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ADDRESS

of

Justice William J. Brennan, Jr.

July 22, 1983

WILLIAM S. RICHARDSON
SCHOOL OF LAW
UNIVERSITY OF HAWAII

Dean Miller, Chief Justice Lum, Justices of the Hawaii Supreme Court, other honored guests, members of the faculty, and students of the Law School.

I am deeply honored to share this important occasion with you. This celebration of the Law School's Tenth Anniversary and the dedication of the law library and classroom/office building attests to Hawaii's determination to make this school a preeminent law school comparable to the best. And I am doubly honored to be afforded this opportunity to extend my most sincere congratulations to my old and dear friend, Chief Justice Richardson, upon the naming of this magnificent law school in his honor.

I first met Chief Justice Richardson when we both participated in the Appellate Judges Seminar at New York University Law School in July 1966, now 17 years ago. We started with something in common, for earlier that year, in April, I had delivered the opinion for the Supreme Court in *Burns v. Richardson*,[1] which had passed on the constitutionality of Hawaii's legislative apportionment plan. I still vividly recall that the Chief Justice had to suspend his participation in the seminar to fly back to Hawaii from New York for an emergency session of his court. He returned to New York within 3 days, however, to take a vigorous role in the seminar proceedings, and all of us marveled at his stamina.

But what I particularly recall is how eloquently he stated his agreement with the then rapidly evolving emphasis of judges upon the primacy of the equality principle in American jurisprudence. His chief concern, of course, was the peo-

[1] Burns v. Richardson, 384 U.S. 73 (1966).

ple of Hawaii, but all of the people, not just some. He urged — and his entire career as Chief Justice attests to his steadfast adherence to the belief — that any defense of a constitutional democracy must begin with the equality principle, for the equality principle is the aspect of our constitution that facilitates important social and economic change; it acts as the springboard for the realignment of unequal political forces toward economic and social equality. The equality principle is what nurtures social mobilization; it can activate a quiescent citizenry and it can recognize new and different forms of social organization. It is this principle that even the most skeptical among us can take pride in and consent to a rule of constitutional jurisprudence.

For consent to a rule of law implies a commitment to a set of shared moral values — a set of values that transcends the individual and that binds us to each other. In our society, it has historically been the courts that have interpreted and made acceptable this rule of law; the judicial pursuit of equality is in my view properly regarded to be the noblest mission of judges; it has been the primary task of judges since the repudiation of laissez faire capitalism as our central constitutional concern. This pursuit of shared moral values and their accurate translation in individual cases is what produced the U. S. Supreme Court decisions in *Brown v. Board of Education*,[2] *Baker v. Carr*,[3] and *Gideon v. Wainwright*.[4]

We have come a long way since Justice Stone of the United States Supreme Court could say of the legal profession that "steadily the best skill and capacity of the profession has been drawn into the exacting and highly specialized service of business and finance" with the consequence that "at its worst it has made the learned profession of an earlier day the obsequious servant of business and tainted it with the morals and manners of the marketplace in its most anti-social manifestations."[5]

For the profession — practitioners and judges alike — have perforce been carried along by the overriding concern of the society over the past several decades with providing freedom and equality of rights and opportunities, in a realistic and not merely formal sense, to all the people of this nation: justice, equal and practical, to the poor, to the members of minority groups, to the criminally accused, to the displaced persons of the technological revolution, to alienated youth, to the urban masses, to the unrepresented consumers — to all, in short, who have not yet really fully partaken of the abundance of American life. But the task of advancing the principle of equality is no task for the short-winded. Who will deny that despite the great progress we have made in recent

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[2] Brown v. Board of Education, 347 U.S. 483 (1954).

[3] Baker v. Carr, 369 U.S. 186 (1962).

[4] Gideon v. Wainwright, 372 U.S. 335 (1963).

[5] Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 7 (1934).

decades toward universal equality, freedom and prosperity, the goal is far from won and ugly inequities continue to mar the national promise? Much surely remains to be done. Even the noteworthy constitutional contribution of the Hawaii Supreme Court under Chief Justice Richardson's leadership is but the start for this state. None of us in the ministry of the law, whether teacher, practitioner or judge, can deny that law still tenaciously clings to the tradition that for so long isolated law from the boiling and difficult currents of life as life is lived. Too many in the law still cling to the old notion that substantive problems of human living should be left for adjustment to the psychologists, sociologists, educators, economists and bankers. Increasingly, however, and fortunately, more of us recognize that law has, as it must, come alive as a living process responsive to changing human needs for, in the words of an American Bar Association report, we have at long last come to recognize that that jurisprudence is best that constitutes "a recognition of human beings, as the most distinctive and most important feature of the universe which confronts our senses, and of the function of law as the historic means of guaranteeing that preeminence. In a scientific age it asks, in effect, what is the nature of man, and what is the nature of the universe with which he is confronted. Why is a human being important; what gives him dignity; what limits his freedom to do whatever he likes; what are his essential needs; whence comes his sense of injustice."[6]

But of late one has the uneasy feeling that courts are slowing down in the pursuit of the equality principle. Because of burgeoning dockets, as Dean Redlich of New York University said to this year's graduating law class last month:

> It seems that the standard fare for leading jurists in both the federal and state system is to bemoan the fact that too many issues are being brought before the courts, that they take too long to try, that discovery is abused, that judges are being asked to decide issues which no other country on earth would consider placing before a court, that the quality of the product has declined as the workload has increased, and that something must be done — either create another court, give us more judges, give the work to some other court, speed up the process, or, better still, take the matter out of the courts into some other system.[7]

And the judges' complaints are echoed in the media; for example, the New York Times recently sounded off that the country suffers from too many laws, too many lawsuits, too many legal entanglements and too many lawyers. But the complainers should pause to ask: Why are so many more people pounding on our courthouse doors?

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[6] ABA Section of International & Comparative Law. Report of Committee on New Trends (Rooney, Chairman), August 10, 1964.

[7] Address by Dean Norman Redlich, NYU School of Law, Convocation Exercises, May 26, 1983.

The answer is of course that "[l]awsuits don't emerge from a vacuum. It seems very clear to me that it is impossible meaningfully to discuss the litigation crisis without considering at the same time the twin revolutions in science and technology and in social expectations."[8] For these have come together to create radical upheaval in American values and to generate vast new legislative and social conflict. And where do Americans turn for resolution of their differences? Why, of course, as always they turn to the courts. We have been a legalistic society from the beginning, and to go to court is an ingrained habit in our society. We place a premium on the value of dissent not, as in other countries, upon the value of consensus. From our beginnings, governmental action that in other societies is exclusively the purview of administrators or legislators is, in America, subject also to judicial scrutiny. The diversity of our people, combined with their ingrained sense of justice and moral duty, has caused this society to frame urgent social, economic and political questions in legal terms — to place great problems of social order in the hands of lawyers for their definition, and in the hands of judges for their ultimate resolution. The almost incredible intricacy and pervasiveness of the webbing of statutes, regulations and common-law rules in this country which surrounds every contemporary social endeavor of consequence give lawyers and judges a peculiar advantage as well as responsibility in coming to grips with our social problems. They alone — or so it sometimes seems — are charged by this society to penetrate directly and incisively to the core of a problem through the cloud of statutes, rules, regulations and rulings which today invariably obscure it to the lay eye. The society for this reason has come to believe that the lawyer and judge in America are uniquely situated to play a creative role in American social progress. Indeed, I would make bold to suggest that the responses of Chief Justice Richardson and his colleagues during his tenure on the bench for over sixteen years to the challenges of what was plainly a new era of crisis and of promise in the life of Hawaii often proved decisive in determining the outcome of the social experiments on which this state was embarked. We must remember too the great change in the identity of the consumers of justice, not only in Hawaii but in every one of the 50 states. As Senior Judge Bazelon of the D. C. Court of Appeals recently noted:

> For years the American justice system operated exclusively for those who were wealthy enough to afford it; even today, the difference in the quality of representation received by those who are rich and those who are poor is shocking. Criminal defense of the indigent is hopelessly inadequate more often than not. Public interest organizations and legal services corporations held some promise for providing access to the courts for the poor in civil cases, but funding cutbacks are

[8] Address by David L. Bazelon, Senior Circuit Judge, 1983 Commencement, School of Law, University of Washington, June 11, 1983.

> threatening even the small gains that have been made in this area.
>
> Nevertheless, some of the poor, the disadvantaged, the disenfranchised are taking their causes to court. The number of civil rights suits filed annually in the federal courts, excluding suits by prisoners, has grown more than fifty-fold since 1961. For nearly two hundred years of this nation's history, few Blacks, Hispanics, or Asian-Americans, to name only a few of the victims of oppression, would have thought of taking their claims to court; they knew they would receive no hearing there. But today, the expectations of the disadvantaged, as well as the sensitivity of our society to their plight, have been heightened. Discrimination and second-class treatment will no longer be patiently endured, quietly tolerated. The victims of racism, sexism, and poverty, the aged, the physically and mentally disabled are demanding that they be heard, and they are increasingly turning to the courts to demand redress of fundamental injustice. And the present increase in litigation from this quarter of our society is only the tip of the iceberg. As President Bok of Harvard pointed out, "beneath the visible mass of litigation lies a vast accumulation of festering quarrels and potential suits that never come to court because of fear, ignorance, and the inhibiting cost of legal services." If adequate funding for legal aid for the poor were provided, "it could easily touch off a huge burst of litigation" that would dwarf the present "explosion."
>
> If the so-called "litigation crisis" is due in any significant part to the increase in social expectations of the disadvantaged and to society's growing sensitivity to such issues, and I believe it is, then in my opinion the increase in litigation is a healthy one. Judicial economy must not be purchased at the price of justice. Addressing the underlying problems that are at the heart of this crisis will be costly, but it is the only long-run solution.[•]

Of course, courts must adopt procedures that promote efficiency in the handling of swollen dockets. Chief Justice Richardson was acutely aware throughout his tenure that promotion of efficient and effective overall operation of the courts was a primary duty of judges, and he did something about it. He labored to that end not only at home but nationally; he served three terms as President of the National Center for State Courts, the organization that is making great strides toward that goal. But the Chief Justice knew too that this effort must not be at the price of legitimate claims and expectations.

For as Dean Redlich trenchantly observed,

> For reasons which the critics do not seem to understand, the people still want to take their case to court — those inefficient, lawyer-dominated, judge-ruled, discovery-plagued, slow-moving, unpredictable courts. I think that the American people, to the great credit of our profession, turn to the courts because it is just

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[•] *Id.*

> about the only agency of government that they can still trust. Judges and juries may be inefficient, they may sometimes be stupid, and even wrong, but instinctively the American people feel that there is one thing that judges and juries are not. They are not bought. With all of the problems in the system, it still involves a process where a claim can be asserted, a defense raised, and judges and juries will make an honest attempt to resolve the dispute on the merits.
>
> And as we look critically at the justice system, we should not fall into the habit of judging it purely in procedural or mechanical terms. During the days of Earl Warren, we did not seem to evaluate the justice system solely in terms of the numbers of dispositions, the average length of the criminal trial, the number of days it takes to select a jury, or the length of the backlog. It is, of course, true that justice delayed is justice lost. But it is also true that injustice in a hurry is still injustice.
>
> The justice system ought to have a substantive agenda as well as a procedural agenda. I do not here carry a brief either for a liberal or a conservative position. I am simply suggesting that leaders of the bench and bar, while they address issues of judicial administration, have a correlative duty to address some of the great substantive issues that face the courts — problems of the environment, of the structure of our political system in an age of soaring costs, of the need to preserve religious freedom and separation of church and state, of the role of the courts in dealing with the problems of aliens, race, sex, personal autonomy, the prison system, the aged, inequalities of opportunity, access to legal services, concentrations of economic power opportunity, and the protection of privacy and inventiveness in an electronic age. These, and many others, head the agenda of the justice system — not the workload of the Supreme Court.[10]

Yes, equal justice under law, an intensely moral concept, is the very cornerstone of our American concept of justice, and will remain so as long as courts function in its service. Chief Justice Richardson's distinguished career exemplified this truism. His court's record during his tenure is cogent proof that, in the words of my late colleague, Justice Hugo L. Black:

> Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. . . . No higher duty, no more solemn responsibility, rests upon a court than that of translating into living law and maintaining this constitutional shield planned and inscribed for the benefit of every human being subject to our Constitution — of whatever race, creed or persuasion.[11]

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[10] Redlich, *supra* note 7.

[11] Chamber v. Florida, 309 U.S. 157, 241 (1940).

This law school and this state have greatly honored Chief Justice Richardson in naming the school in his honor. But the school and the state are also greatly honored that they have so long commanded his distinguished service.

The Richardson Court: Ho'Oponopono*

by Carol Santoki Dodd**

> The man who is Chief Justice must balance the rules of the past to conform with the state of society today. He must bring the old rules in line with modern times. He must remember that those rules were made under a different structure.
>
> He must live in the past—but not only in the past. He must adopt the fundamental principles of the past and bring them into focus with the present.
>
> And in Hawaii, the present—like the past—is a time of migration.[1]
>
> —William Shaw Richardson
> February 26, 1966

William Shaw Richardson served as Chief Justice of the Hawaii State Supreme Court from 1966-1982. During those sixteen years, his court reflected the activist tenor of the times as well as the liberal bent of the U.S. Supreme Court. However, in some instances, the Richardson-led court moved beyond mere reflection and engaged in extraordinary judicial activism. The causes and effects of this activism serve as the focal point for this article, derived from a larger work entitled THE RICHARDSON YEARS: 1966-1982.

INTRODUCTION

Chief Justice Richardson was born in Honolulu on December 22, 1919, to

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* *Ho'oponopono* means to put to rights, correct or rectify. *See* Pukui and Elbert, *Hawaiian Dictionary* (1979). The writer wishes to acknowledge with appreciation the editorial assistance given by Matthew S. Goodbody, Brian Nakamura and Jane L. Silverman as well as research assistance for footnotes rendered by the Law Review staff.

** B.A., Pomona College, Calif., 1958; M.Ed., College of William and Mary, Virginia, 1960; Studies in Indian art and history, University of Calcutta, India, 1961; Ed. D., University of Hawaii, 1980. Mrs. Dodd has been privately commissioned to complete a biography entitled THE RICHARDSON YEARS: 1966-1982 from which this work was derived.

[1] Honolulu Advertiser, Feb. 26, 1966, at A-1, col. 6.

Wilfred Kelelani Kanekoa Alapai Richardson and Amy Lan Kyau Wung Richardson. His lineage is typical of the islands in that it was a blend of races—Hawaiian, Chinese, English. What was not so typical was his family's long proclivity toward law and leadership. Progenitor Alapai-nui, chief of the Big Island during the 1700s, was keeper of the war god Kuka-ilimoku, a charge of high honor. The Chief Justice's great grandfather, English Captain John Richardson, was judge of the Second Circuit Court on Maui in 1848. He also served in the House of Representatives, the House of Nobles, and the Royal Privy Council. Captain Richardson's son, Colonel John Richardson, whose title derived from his appointment as Knight Commander to King Kalakaua, in large part repeated his father's career. He later became Queen Liliuokalani's legal representative in Washington, D.C.[2]

Formal education was a priority for the Richardsons over the years. In spite of straitened family finances, Wilfred and Amy Richardson insisted that their three sons and three daughters be well-schooled. Bill Richardson, their third child and first son, would attend Roosevelt High School, the University of Hawaii, and—upon the recommendation of family friend and chemistry professor Lenora Bilger—the University of Cincinnati's School of Law, where he earned a J.D. in 1943 and an honorary LL.D. in 1967.[3] In 1943, the future Chief Justice began his legal career in the Army's Judge Advocate General Corps where he served until 1946.

Even in his younger days, Bill Richardson's feelings about Hawaii's power structure were fairly well defined. His intent to change that structure to a more equitable one became a persistent theme in his life, as did his intent somehow to reverse the flow of history and to better the lot of the Hawaiian.

Political involvement was a Richardson family tradition. That involvement had taken an unexpectedly lively turn from 1900, when a faction of the native Home Rule Party splintered off to begin the Democratic Party in the islands. Col. Richardson remained a royalist all of his life, but his wife, Mary Ann Kaulaikalauela Shaw Richardson, became an active Democrat on Maui at a time when it was neither popular nor especially wise to be one. She instilled in her son Wilfred, father of the future Chief Justice, a devotion to the Democratic and Hawaiian causes, which she viewed as intertwined. Wilfred was the only one of his siblings to become a Democrat. The others, like many Hawaiians, found it more sensible to align themselves with the then all-powerful Republican Party. Under the tutelage of family and friends, young Bill Richardson was convinced that the tide which had shifted the balance of power away from Hawaiians needed to be stemmed and, like his father and paternal

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[2] Amy Ching Richardson (1921-1975), wife of the Chief Justice, spent years researching and compiling the Richardson family genealogy.

[3] The University of Hawaii Chemistry Building is named for Dr. Bilger.

grandmother, he chose the Democratic Party as his vehicle of political expression.

For twenty years from the mid-1940s, Bill Richardson joined with other leaders including John A. Burns (Hawaii's Governor, 1962-1975) to strengthen the Democratic Party and, through the Party, to work toward Statehood and a community marked by equity for all its citizens. Richardson was chairman of the Central Committee of the Democratic Party of Hawaii from 1956-1962, and he served as Chief Clerk of the Territorial Senate during its 1955 and 1957 sessions. He was elected in 1962 to the State's Lieutenant Governorship where he remained until March, 1966, when he was named Chief Justice of the Hawaii State Supreme Court.

In many ways, Bill Richardson as Chief Justice was the archetypical Hawaiian lawyer, judge and community leader. An unusual confluence of factors thrust him into this position: the socio-political history of the islands, his family's ethnic backgrounds and traditions of public service, his own educational attainments, and a personal willingness to take a public and activist stance when necessary. As Chief Justice, Richardson almost perfectly reflected some of the inner conflicts and ambitions of the indigenous and immigrant non-white peoples of the islands. His duty as Chief Justice was to uphold, preserve and build upon Anglo-American precepts of law. His deeper mission, though, involved a re-examination of Western precepts as set against those of the Hawaiian culture, the culture within which he felt most rooted. That mission, almost instinctual in nature, also involved a recognition of and return to ancient island customs and practices wherever feasible.

The various peoples of Hawaii carry within them their own special heritage. Although fabled as a melting pot of races, evidence of racial division resounds throughout island history. Individual and communal problems caused by clash of cultures surfaced and persisted in many forms over many years.[4]

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[4] For example, Lot Kamehameha—King Kamehameha V—is said to have retreated into the Hawaiian past when the "civilized" rituals of his rule tired and confused him. Abandoning court dress and custom, he then would withdraw to his house at the seashore, eating, drinking, dancing, generally leading a life which was once the good life in ancient Hawaii, but which, under the set of Calvinist mores introduced by the white man, now bordered on debauchery. I. BIRD, SIX MONTHS IN THE SANDWICH ISLANDS 274 (1964). It was as though he rewarded himself for proper Christian and Western behavior; at those times, he gave in to the other, more ancient culture tugging at his soul.

Later, public figures no less influential than King Kalakaua, the last male monarch of the kingdom, and Queen Liliuokalani, the sister who succeeded him, periodically objected to incursions of foreigners and of American missionaries on their culture. Whatever their own foibles (and even Liliuokalani could not decide whether her brother David was wastrel or saint), an enduring message they transmitted to their subjects was one of anger at being dispossessed, an anger which seemed alternately to strengthen their people and embitter them into ineffectiveness.

Strong antagonisms based upon race and ethnicity existed long before the time of these last

The tensions between native and non-native cultures grew more complex with influx of various immigrant groups to the islands during the latter half of the nineteenth century. These immigrant waves gave vitality to what might have become a vapid, insular society. They also affirmed old laws of societal behavior: newcomers are at the mercy of the established order until they gain economic and political power; and the established order will do everything it can, legal or illegal, to keep the newest arrivals at the lowest point of the power structure.

In Hawaii, these laws underwent some permutation, giving subtle dimensions to the normal complexities of ethnic politics. In few other places did immigrants of so many different races arrive in such a short span of time to make their home in such a small geographic area. Furthermore, they arrived to find erosion of the indigenous group's authority. They also found dominant overlay of American-European cultures upon Hawaiian life.

Eventually, the island community became polarized into the all-powerful white (or *haole*) elitists and the powerless non-white, numerically greater, indigenous and immigrant masses. Within each of the two groups were gradations of influence. The continuum between the two groups was sparsely populated by the ambivalent, usually Hawaiians who, at one moment, might cast their lot with *haole* rulers and, at another moment, might conclude that only by joining forces with other non-whites could they regain any real power.[5] Whatever their political affiliations, many native Hawaiians shared a desire to preserve their cultural identity and to keep the foreigners out.[6]

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monarchs. Numerous instances of anti-*haole* feelings are recorded: the uprising on Maui (*see* Privy Council Minutes, July 14 and August 15, 1848, Vol. 4, 425-426, 430-446, Archives of Hawaii); the anti-American feelings held by earlier monarchs Alexander Liholiho and his brother Lot Kamehameha (*see* THE JOURNAL OF PRINCE ALEXANDER LIHOLIHO: THE VOYAGES MADE TO THE UNITED STATES, ENGLAND AND FRANCE IN 1849-1850 (J. ADLER ED. 1967)); the crystallization of anti-foreign and anti-American sentiment during the 1874 elections, feelings which led to the rallying cry, "Hawaii for Hawaiians."

[5] Nowhere, perhaps, was the Hawaiian political ambivalence more visibly illustrated than in the family of Prince Kuhio and David Kawananakoa, sons of old island royalty. Kuhio, after spending a year in prison for taking part in the unsuccessful counterrevolution to restore Queen Liliuokalani to her throne, became a member of the Republican Party. His brother, David Kawananakoa, broke away from the native Home Rule Party in 1900 to organize the Democratic Party of Hawaii.

In 1900, David Kawananakoa was Democratic candidate for the post of delegate to Congress, running unsuccessfully against Republican Col. Samuel Parker and the ultimately victorious Home Rule Candidate, Robert Wilcox. Two years later, Prince Kuhio would win election as Hawaii's Republican delegate to Congress and remain in that post until his death twenty years later. The family, though politically divided, remained united in protests against the powerful strangers in their midst, in their attempts to regain some of what they and their people had lost.

[6] Coupled with unsophisticated campaign practices of an earlier time, this desire sometimes found serio-comic expression. Consider the native politician in an early territorial campaign who

One of the earliest recorded protests against the threat of foreigners occurred in 1845, when natives of Kailua on the Big Island presented a petition to their king, Kamehameha III, and their legislature. The natives, prescient in their concerns, implored the chiefs not to sell lands to white men or other foreigners: "The selling of lands to outsiders is not a wise course, the lands being a source of benefit to the Government, the throne and the Hawaiian people."[7]

Further, the natives asked that foreigners be denied full citizenship in the kingdom and allowed to act in a governmental advisory post for only three to four years. Otherwise, the natives said, ". . . they will predominate over the chiefs, the throne, the Government, the people and the country, after . . . the chiefs are dead. Then the country will be taken away by the foreigners."[8]

The sweep of history would push this petition aside for more than a century.

Then Chief Justice Richardson and the Hawaii Supreme Court—delving into island history, would reach across the years to address some of the underlying concerns contained in that petition. In part, the justices on the Richardson court were engaged in a search for and return to Hawaii's unique legal and historic heritage. They did so, apparently disregarding a century of established law in significant instances, attempting to rely upon and apply native concepts, practices and precedents.

THE COURT YEARS

When Richardson stepped on to the Hawaii Supreme Court bench in 1966, the major personal and political themes of his life were clearly developed, awaiting only a more conducive court milieu—and the right cases—for further expression. He would have to work with the other members of the court to accomplish his mission.

The retirement in May, 1967, of Justices Charles Cassidy and Rhoda Lewis, Republican appointees, and Democrat Cable Wirtz, ended what was viewed as an essentially moderate court.[9] A little ironically, Jack Mizuha, the Republican

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pointedly commented on the fact that his opponent was white. He stood at the polls on election day, shouting in Hawaiian at the top of his voice, "Look at the skin and (don't) vote for him." In the short run of events, the native politician was not all that ineffective, for he won that particular election. LITTLER, THE GOVERNANCE OF HAWAII 90 (1929).

[7] Kailua, June 12, 1845, Petition to Kamehameha III and the Legislature, Foreign Officer and Executive, 1845, Archives of Hawaii. The Penal Code and Laws of 1850 first gave foreigners the right to acquire fee title to land. R. KUYKENDALL, THE HAWAIIAN KINGDOM 1778-1854, 297 (1938).

[8] Kailua's Petition, *supra* note 7.

[9] Just prior to the retirement of the three justices, a reporter assigned to the courts asked several attorneys to describe the legal-philosophic leanings of the departing jurists. Attorney Harriet Bouslog's reply was immediate: "Definitely conservative." Her judgment was confirmed by

appointee whose term expired in June of 1968, was considered a very progressive justice, even after addition of new justices of Democratic and ostensibly more liberal ideology.

Soon after the mid-1967 retirement of the three justices and the appointment of their replacements, the court's collective personality would change. Even those persons who felt it the bench's prerogative to venture into the role of public policy-maker would express uneasiness at the court's extremely activist approach to law. In addition, because of the ethnic make-up of the bench, many observers were discomfited by what seemed to be a racial or "local" bias in its decisions.[10]

In May of 1967, Masaji Marumoto, Kazuhisa Abe, and Bernard H. Levinson stepped into vacancies created by the retiring justices. Marumoto and Levinson balanced each other in an interesting way. Both graduates of Harvard Law School, they appeared to share a careful, scholarly, ratiocinative approach to law. Marumoto was the only Republican appointed by Governor Burns to the supreme court.[11] Levinson was a Democrat whose affections lay with groups such as the American Civil Liberties Union. Although Marumoto and Levinson often disagreed vehemently with each other in the privacy of the supreme court conference room, they sometimes found themselves together as fellow dissenters to the supreme court majority.[12]

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lawyers of very different political persuasions. Defining her use of "conservative," Bouslog said that the court had been one which, in her opinion, had tended too often to take too legalistic a view of the law. Honolulu Star-Bulletin, May 5, 1967, at B-1, col. 7.

[10] Two prominent Honolulu attorneys expressed different views on this "local" bias. J. Russell Cades, a senior partner in the firm of Cades, Schutte, Fleming & Wright, stated that, "I think it's fit to say: the true and sensitive Hawaiian, the sensitive Japanese, and the sensitive Chinese that I know, abhor this racial approach to decision in the law as much as I do." Wallace S. Fujiyama saw the court's decisions in a much different light. "This is a 'real people' court. These justices know the problems of the real world; they know how real people feel. They know especially how local people feel." Honolulu Advertiser, February 20, 1980, at A-1, col. 1.

[11] Marumoto's lifelong allegiance to the Republican Party was unusual for someone of his age, race and rural background. (His father, a Japanese immigrant, first worked for the Paauhau sugar plantation. Later, after a short trip back to Japan, he operated a general merchandise store in Honolulu, then in Kona.) His Republicanism came from an indebtedness he felt toward key Party members as he started his legal career. They included Governor Samuel W. King, Delegate Joseph P. Farrington and Farrington's wife Betty (who became Hawaii's Delegate to Congress after her husband's death). In spite of his Republican loyalties, Marumoto maintained a closeness to Democratic leader Burns, a closeness built upon mutual esteem which grew over the years; they had met intially through their work with island Japanese during the war years. Interview with Masaji Marumoto in Honolulu, Hawaii (May 21, 1982).

[12] Levinson was chagrined whenever he, who prided himself on being a liberal, was linked with Marumoto, a recognized conservative. Once, when an Advertiser article described the supreme court as generally liberal with a "tinge of conservatism in the views of Justices Marumoto and Levinson in special types of cases," Levinson was very upset. Interview with Masaji Marumoto in Honolulu, Hawaii (May 21, 1982).

Kazuhisa Abe filled the last supreme court vacancy in 1967. Like Marumoto, he had been raised in a rural community on the Big Island. But he was a Democrat and had served for many years in the State Senate, the last few of them as Senate president. Like Levinson, he held liberal views. Unlike Levinson, however, his public expression of these views was often explosive. Outspoken, he had occasional difficulty in communication bred partly of impatience and partly of very strong feelings.

In July, 1969, Bert Kobayashi, Governor Burns' first Attorney General and a man with a reputation as a tough, forthright negotiator, was named to fill the vacancy created by Justice Mizuha's retirement in June, 1968.

The state supreme court, for the first time, consisted entirely of members appointed by John Burns. The Governor, as he appointed judges and justices, reportedly told some of them not to feel bound by Territorial precedents if, in their judgment, those precedents were wrong.[13]

To suggest that the prior body of Anglo-American law is not sacrosanct comes close to heresy in some legal circles. To act upon that suggestion is even more damnable. However, the Richardson court did just that.

Through a series of decisions stretching from the late 1960s through the next decade, Hawaii's supreme court would show a willingness to question the existing body of Anglo-American case law. In rendering its decisions in these cases, the court recognized the validity of both native Hawaiian and Anglo-American tenets of jurisprudence. At points of unresolvable conflict and contradiction between the two cultures, the court would draw upon precepts and traditions of the Hawaiian culture.[14]

Harsh critics of these decisions charged the Richardson court with tyranny and heresy. The court, they said, assumed lawmaking and public policy-making authority which was assigned to other government bodies. Other critics of these court decisions raised their concerns in gentler fashion.

A *Star-Bulletin* editorial, for example, acknowledged that many people understood and sympathized with the underlying reasons for these decisions.[15] But, the editorial continued:

> The danger in such a course . . . is that the whole foundation of law in the state,

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[13] Interview with Chief Judge of the Intermediate Court of Appeals James S. Burns, son of former Governor John A. Burns, in Honolulu, Hawaii (May 26, 1982 and February 14, 1984).

[14] The very first section of the HAWAII REV. STAT., § 1-1, provided some of the legal support for the court's deviations from Anglo-American law. The statute declared common law for the islands to be English common law as interpreted and defined through English and American decisions. However, the statute continued, exceptions could occur when that common law differed from Hawaiian use and Hawaiian judicial precedent. This statute in part provided basis for the court's controversial decisions, giving it authority—some said license—for its actions.

[15] Honolulu Star-Bulletin, February 14, 1974, at A-22, col. 1.

> as developed and interpreted through most of this century, can now be said to be undermined and uncertain. No man can be sure that a contract means much in these circumstances.[16]

In a decision issued in mid-1968, *Palama v. Sheehan*,[17] Richardson gave the first indication that he considered ancient Hawaiian practices valid precedent for modern legal decisions. Demonstrating his rich knowledge of Hawaii's past, the Chief Justice wrote a unanimous decision upholding a Kauai circuit court decision which based modern rights upon the ancient rights to use of the land.[18] Through the *Palama* case, the Richardson court indicated its willingness to transpose a customary Hawaiian right into a present-day context.

The centuries-old Hawaiian right of land usage underwent some adjustment and codification after Kamehameha III's 1848 Great Mahele.[19] The Mahele distributed the land of the islands among the king, the *ali'i* (chiefs) and the commoners, thus ending the semi-feudal ownership of the land. It was followed by the Kuleana Act of 1850[20] which enabled native Hawaiians to apply to the Land Commission for the grant of a fee simple *kuleana*, a small, usually arable parcel of land.[21] Certain rights specifically accrued to the owner of a *kuleana*, for that parcel was often part of an *ahupua'a*, a body of larger land stretching from sea to mountain.[22]

In a modern case which had its roots in Hawaiian land usage, the Philip K. Palamas filed a suit to get clear title to a large tract of land known as Nomilo

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[16] *Id.*, at cols. 1 and 2.

[17] Palama v. Sheehan, 50 Hawaii 298, 440 P.2d 95 (1968).

[18] *Id.* at 300-303, 440 P.2d at 97-99.

[19] The idea of private ownership of land had no place in early Hawaiian society. The *alii nui* or ruling chiefs controlled the land, much as trustees. E. S. HANDY & E. G. HANDY, NATIVE PLANTERS IN OLD HAWAII 58-63 (1972). The legal foundation for a system of private ownership of real property was established in 1845 with adoption of the "Law Creating the Board of Commissioners to Quiet Land Titles." R. KUYKENDALL, *supra* note 7, at 278-79. The Land Commission established principals for the tripartite division of land between the King, the *alii* (chiefs), and the commoners which set in motion the Great Mahele of 1848. *Id.* at 280.

[20] Since many commoners or "native tenants" were unaware of their land-holding position following the Great Mahele, a statute called the "Enactment of Further Principals" or Kuleana Act of 1850 was adopted to clarify their rights and provide for their claims. 2 REV. LAWS OF HAWAII 2141 (1925).

[21] A *kuleana* was a small tract of land held by the commoners for their own use. Included with the *kuleana* were gathering rights (firewood, house timber, aho cord, thatch, ti leaf) and rights to adjacent running or spring waters. Levy, *Native Hawaiian Land Rights*, 63 CAL. L. REV. 848, 849 (1975); 2 Rev. Laws of Hawaii 2142 (1925).

[22] "[T]he basic landholding unit was the *ahupuaa*, which ranged in size from 100 to 100,000 acres and usually had natural boundaries. The ideal *ahupuaa* was an economically self-sufficient, pie-shaped unit which ran from mountain tops down ridges to the sea. Most *ahupuaa* were in turn divided into ili." *Id.* Subordinate chiefs controlled this hierarchy of land division with the commoner and his small *kuleana* at the bottom. *Id.*

Pond, in Kalaheo, on the island of Kauai. The Palamas' land covered some sixty acres and included an eighteen-acre fishing pond. John J. Sheehan, along with a few other persons, owned four *kuleanas*. Three of their *kuleanas* fell directly outside the seaward boundary of the Palama property, and one fell within the boundary. In filing an answer to the Palama suit, Sheehan asserted his claim to fishing rights in the pond and right-of-way through the Palama property. He based his claim upon ancient Hawaiian rights.

Kauai's circuit court ruled that Sheehan did *not* have the right to fish in the pond but was entitled to reasonable right-of-way privileges through the Palamas' land for exit and entry to his own property.

On appeal, the Palamas argued that Sheehan had not proved existence of an ancient right-of-way through the acreage in dispute. Furthermore, they contended, the judge had not specified "right-of-way" in definite enough terms: if he granted right-of-way on the basis of old Hawaiian practice, then he should not permit use of modern motor vehicles through the Palama land, and the entry and exit path should be wide enough only for persons on foot or on horseback.

The Palamas' argument was one not brooked by the Chief Justice. Upholding the decision of the lower court, Richardson pointed out that in old Hawaii, whenever a *kuleana* fell within an *ahupua'a*, the rights of the native owner of the *kuleana* were specifically reserved, "*Koe no kuleana o Kanaka.*"[23] To support his statement, Richardson cited *kuleana* land owner rights included in an August 6, 1850, act of the Hawaiian Kingdom.

The *Palama* decision, based upon old Hawaiian laws and practices, preserved the integrity of native customs and history without undermining the bulwark of later Western laws.[24] It thus was accepted by the public with little comment. The decision did not hint at future similarly based decisions of the Richardson court which would lead to bursts of indignation in some segments of the island community.

These later decisions dealt with issues involving ownership of land and water. The Richardson court consistently would favor state and public ownership of property over ownership by private interests. These decisions met with great consternation by legal conservatives and traditionalists, who viewed them as shocking, almost capricious, disjunctions of the law. Richardson, however, saw these decisions as a continuation of Hawaii's unique heritage. In ancient times, land and water had been held in stewardship by the King himself through each

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[23] *Palama*, 50 Hawaii at 300, 440 P.2d at 97.

[24] In confirming the lower court's decision, the high court relied in part upon a traditional doctrine of easement by necessity, a fundamental Western rule of property which in this case buttressed the native Hawaiian right. The court in fact specifically cited Kalaukoa v. Keawe, 9 Hawaii 191 (1893) and Henry v. Ahlo, 9 Hawaii 490 (1894) for the notion of easement by necessity.

landowner or *konohiki* for the good of the people. The present day state was now fulfilling this role of trustee.

Two of Hawaii's precious resources, fresh water and the shoreline, served as focal points for the Richardson court's judicial activism. Before statehood, these resources were considered to be private commodities, subject to the exclusive use and control of landowners who either owned property upon which they were located or property adjacent to them.[25]

Water and shoreline decisions of the Richardson court upset earlier notions of ownership.[26] In making its decisions, the court relied heavily upon three factors: its view of King Kamehameha III's intent at the time of the Mahele; known ancient Hawaiian customs and practices; and "*kamaaina*" testimony with regard to those customs and practices. Underlying the seminal water and beach decisions was a single theme: that, in translating the indigenous system into a Western system, inadequate consideration had been given to the long-held rights of a native people who had relied upon their king to protect their interests and well-being.

The Water Rights Case

The vehicle for the court's reassertion of the public's claim to water would come to be known as the "*McBryde* case."[27] In 1959 on the island of Kauai, the McBryde Sugar Company brought suit against its neighbor plantation, Gay and Robinson, to determine their relative rights to waters of the Hanapepe

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[25] Students of island history, particularly those with a revisionist bent, are fond of pointing out that pre-statehood notions of ownership favored planters and that small bands of men were the real arbiters of the then sugar-based island economy.

[26] Peck v. Bailey, 8 Hawaii 658, 661 (1867) (taro lands conveyed by the King or awarded by the Land Commission carried with them the appurtenant right to sufficient water for taro growing); Lonoaea v. Wailuku Sugar Co., 9 Hawaii 651 (1895) (decision recognized prescriptive rights to water); Hawaiian Commercial and Sugar Co. v. Wailuku Sugar Co., 15 Hawaii 675, 691 (1904) (discontinuation of irrigation to land with appurtenant water rights is not an abandonment of the water right); Carter v. Territory, 24 Hawaii 47 (1917) (riparian water rights doctrine applied in Hawaii); Territory v. Gay, 31 Hawaii 376, 396-97 (1930) (riparian water rights applied to normal surplus waters recognizing private ownership); City Mill Co. v. Honolulu Sewer and Water Commission, 30 Hawaii 912 (1929) (recognized correlative or proportionate share rights to water from artesian well).

Case law establishing shoreline property interests included, Haalelea v. Montgomery, 2 Hawaii 62 (1858) (recognized private title to oceanside lands extending down to the low watermark); Territory v. Liliuokalani, 14 Hawaii 88 (1902) (conveyance of tide lands to low watermark was legal); Brown v. Spreckels, 14 Hawaii 399 (1902), 18 Hawaii 91 (1906), *aff'd* 212 U.S. 208 (1909) (conveyance described as including sea beach in front of property down to the low water mark).

[27] McBryde Sugar Co. v. Robinson, 54 Hawaii 174, 504 P.2d 1330 (1973).

River and the Koula and Manuahi Streams which fed it. Other parties to the suit subsequently included the State of Hawaii, Olokele Plantation (an adjacent plantation) and small landowners in the Hanapepe Valley.

Three different types of water rights were asserted. The first of these were appurtenant rights, those which attached to lands on the basis of the amount of water used at the time those lands were converted into private ownership.[28] The second were prescriptive rights gained through actual use of given amounts of water against the rights of others during a statutorially required period of time.[29] The third were rights to surplus water, the rest of the river waters. Earlier judicial decisions had established water as a private commodity that could be used without restriction, subject to no higher authority than the private rights of its owners.[30]

Presentation of the various claims in the lower court consumed a decade. Finally, in a 1969 decision, the Kauai court quantified the appurtenant rights of each party, awarded McBryde certain prescriptive rights, and granted surplus water rights to Robinson as the owner, or *konohiki*, of the property upon which the Hanapepe river waters originated.[31] Robinson, McBryde and the State then appealed to the supreme court on various grounds.

In December of 1973, the Hawaii Supreme Court partially overturned the judgment of the Kauai circuit court and announced a dramatically new doctrine of water rights.[32] Largely ignoring Hawaiian case law since the turn of the century, the Richardson court went back to the time of the monarchy in an attempt to determine the intent of native kings with respect to water rights.[33] The court came to a clear conclusion: grants of water rights to landowners by kings had been limited to actual need, and other water had been reserved for public use.[34] The court then declared that Hawaii's waters no longer were a privately owned commodity: although recognizing private appurtenant rights, it reserved the basic ownership of all waters to the State, prohibited the transfer of appurtenant rights, and abolished the concepts of prescriptive rights and of surplus water.[35]

Justice Abe wrote the majority decision, relying heavily upon interpretation

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[28] *Id.* at 188, 504 P.2d at 1339.

[29] *Id.* at 198, 504 P.2d at 1344-45.

[30] *See, e.g.*, Carter v. Territory, 24 Hawaii 47 (1917); Haw. Com. & Sugar Co. v. Wailuku Sugar Co., 15 Hawaii 675 (1904); Peck v. Bailey, 8 Hawaii 658 (1867).

[31] 54 Hawaii at 176-77, 504 P.2d at 133-34.

[32] McBryde Sugar Co. v. Robinson, 54 Hawaii 174, 504 P.2d 1330 (1973).

[33] *Id.*, at 182-87, 504 P.2d at 1336-39.

[34] *Id.*, at 186-87, 504 P.2d at 1338-39.

[35] McBryde Sugar Co. v. Robinson, 54 Hawaii 174, 504 P.2d 1330 (1973), *rehearing*, 55 Hawaii 260, 517 P.2d 26 (1973), *cert. denied*, 417 U.S. 976, sub. nom., Robinson v. Hawaii; enforcement enjoined 441 F. Supp. 559 (D. Hawaii 1977).

of 1846 and 1850 laws of the kingdom.[36] Justice Marumoto was the sole dissenter.[37] The assertion of the majority opinion was clear: in treating water as a private commodity, public interests had been sacrificed for the benefit of a handful of large property owners. The Richardson court, in *McBryde*, sought to redress this situation by denying commercial ownership of water and recognizing the State as ultimate arbiter for distribution of water.

The ruling was totally unexpected by the attorneys for the major plantations involved in the suit. They, and others with a traditional view of the law, were incensed.[38]

They protested that the court's decision centered on an issue which was not even in dispute. Parties to the original suit, they said, *never* believed that public ownership of water was at issue; rather, the concern of the plantations was further definition and quantification of their respective rights to and ownership of the water.

Some attorneys expressed the feeling that the Richardson court always had intended, one way or another, to deal with the issue of public rights to and ownership of water whether or not that issue actually came before the court.[39]

The most severe critics of the *McBryde* decision asked a hard question: Did a state supreme court have the right and power to take what had been deemed private property by legal precedent and now pronounce the property as the State's? A rehearing confirmed the original decision[40] and an appeal to the U.S. Supreme Court was turned down.[41]

Undaunted, and united in their belief that the Richardson court wrongfully had usurped property, McBryde joined with Robinson, Olokele, and Hanapepe Valley farmers to challenge the decision in the U.S. district court.[42] The basis of their challenge was the allegation that the *McBryde* decision constituted a taking of private property without just compensation and was therefore a constitutional violation subject to federal court jurisdiction.[43]

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[36] Implementing the Mahele, the Land Commission Act created the Board of Land Commission. In 1846 the Commission adopted principles by which to quiet title to land. The Commission either granted or rejected an individual's claim to land but the principles provided that the Commission had authority to convey certain of the king's rights in land. 54 Hawaii at 185-86, 504 P.2d at 1338-39.

[37] Marumoto was later joined by Levinson after a rehearing. McBryde v. Robinson, 55 Hawaii 260, 262, 517 P.2d 26, 26 (1973).

[38] Honolulu Advertiser, May 14, 1982, at A-19, col. 4.

[39] *Id.*

[40] McBryde v. Robinson, 55 Hawaii 260, 517 P.2d 26 (1973).

[41] McBryde v. Hawaii, 417 U.S. 962 (1974)(Appeal dismissed for lack of jurisdiction. Appeal then treated as petition for writ of certiorari.) *Cert. denied*, sub. nom Robinson v. Hawaii, 417 U.S. 976 (1974).

[42] Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Hawaii 1977).

[43] In *McBryde v. Robinson*, the plaintiffs claimed that the Hawaii Supreme Court had deprived

In 1977, District Court Judge Martin Pence issued an injunction against the enforcement of the Richardson court's decision, in effect reversing it.[44] Pence minced no words: the Hawaii Supreme Court had erred in its radical departure from prior decisions and in its usurpation of property without fair payment.[45] Discussing the case even years after his decision, Pence's comments were strong and direct, typifying not only a personal characteristic but also the high feelings which continue to stamp discussion about the *McBryde* case. The supreme court's ruling was "strictly a 'public policy' decision with no prior underlying 'legal' justification," Pence said. It was "one of the grossest examples of unfettered judicial construction used to achieve the result desired—regardless of its effect upon the parties, or the state of the prior law on the subject."[46]

In more temperate language, Justices Marumoto and Levinson had made much the same points in their dissenting opinions.[47] Marumoto additionally pointed out the decision's negative impact upon those for whom irrigation systems formed an economic backbone.[48]

The State of Hawaii took Pence's "reversal" to the U.S. Ninth Circuit Court of Appeals.[49] In May, 1981, the Ninth Circuit asked the supreme court to answer six "certified questions" in order to clarify the meaning and effect of the court's 1973 decision and its relationship to prior Hawaii decisions.[50] In De-

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them of their property or water rights without either procedural due process (the court raised the public ownership question *sua sponte*, thereby depriving plaintiffs of an opportunity to defend their interests) or substantive due process (plaintiffs' water rights were taken without just compensation). *Id.* at 580-85.

[44] *Id.* at 586.

[45] *Id.* at 585.

[46] Honolulu Advertiser, Feb. 20, 1980, at 1, col. 3 cont'd at 6, col. 1.

[47] McBryde Sugar Co. v. Robinson, 55 Hawaii 260 (1973) (Marumoto and Levinson, JJ., dissenting).

[48] 54 Hawaii at 208, 504 P.2d at 1349.

[49] The Chief Justice, displeased that *McBryde* had moved into the federal court system, felt impelled to state his position through a brief filed as "friend of the court." In his brief and in conversations about the matter, Richardson pointed out that the federal district court would in effect become the appellate court of the State of Hawaii if review by the federal court was permitted. Also, since there are no time limits on the bringing of challenges to the state court decisions in the federal district courts, the judicial system of the State would be deprived of its most important quality, the ability to resolve any controversy before it with conclusiveness. Brief of Amicus Curiae William S. Richardson, Chief Justice of the Hawaii Supreme Court and Chief Administrator of the Judiciary, State of Hawaii, filed in the U.S. Court of Appeals for the Ninth Circuit.

[50] The questions certified for reply were:

(1) May any Hawaii state official execute on the judgment entered in *McBryde Sugar Co. v. Robinson* to enjoin Robinson, McBryde, Olokele, or the Small Owners from diverting water from the Hanapepe or Koula watersheds?

(2) May the State of Hawaii claim collateral estoppel or bar any merger effect from *McBryde Sugar Co. v. Robinson* if the state brings an action either to quiet title to the water of the

cember, 1982, after briefing and oral argument by all parties, the court issued answers to the questions in a lengthy opinion authored by Richardson.[51] In August, 1983, following Richardson's retirement from the bench, the remaining members of the court denied a motion to reconsider the opinion, and the answers were then formally transmitted to the Ninth Circuit.[52]

Throughout reactive developments stemming from the supreme court's reversal of the 1959 decision of the Kauai court, Richardson remained quietly confident. He refused to disqualify himself from the case. He was certain that his court's *McBryde* decision was justified. In private conversations with his friends, Richardson expressed feelings of hurt and disappointment at Pence's injunction and statements to the press. It seemed to the Chief Justice that Pence's written and spoken language was injudicious and inappropriate, aimed personally at Richardson himself rather than at the issues in the case.[53]

The Chief Justice had reached his position only after extensive research and lengthy discussions with other justices, particularly with Marumoto; for a long time, he had not been certain at all what his decision would be. Once his decision was made, however, he was confident that it was correct. Richardson's confidence extended to decisions in the area of land ownership as well.

The Shoreline Boundary Cases

Over the period of a decade, several cases confirmed the Richardson court's intent to base some of its decisions upon Hawaiian, rather than Anglo-American, law and practice. The Hawaii Supreme Court extended the *McBryde* principle of public ownership to beachfront land through decisions in the 1968 *Ashford*,[54] the 1973 *Sotomura*,[55] the 1977 *Sanborn*[56] and *Zimring* cases.[57]

Hanapepe or to enjoin the diversion of water from the Hanapepe?

(3) Do the rulings in *McBryde*, with respect to water ownership and water diversion, have binding precedential effect on the Hawaii state courts?

(4) Does Territory v. Gay, 31 Hawaii 376 (1930) (Gay II), *aff'd* 52 F.2d 356 (9th Cir.), *cert. denied*, 284 U.S. 677 (1931), preclude the State of Hawaii from bringing an action against Robinson, Olokele, McBryde, or the Small Owners to enjoin them from diverting water from the Koula or Hanapepe watersheds?

(5) Does *McBryde* preclude any or all of the appellees from bringing an action in state court alleging that their property was taken without compensation in violation of the Fifth Amendment to the United States Constitution?

(6) Until *McBryde* was decided, had the issue of who owned surplus water been a settled question in Hawaii law?

Robinson v. Ariyoshi, 65 Hawaii 641, 647, 658 P.2d 287, 294 (1982).

[51] *Id.*

[52] *Id.*

[53] Interview with William S. Richardson, Honolulu, Hawaii (Feb. 14, 1984).

[54] In re Ashford, 50 Hawaii 314, 440 P.2d 76 (1968).

The *Ashford* case, the first of what would be called the Shoreline Boundary Cases,[58] involved property on the island of Molokai. The high court's *Ashford* decision was important in that it revealed the basic approach and philosophy of the Richardson court toward ownership of beachfront property. The decision also revealed how much credence the court would place upon the testimony of *kama'aina* witnesses, persons whose knowledge of and connection with the land were supposedly so deep that they could attest expertly to pre-1892 native custom.[59]

The Clinton Ashfords had petitioned the land court in 1963 to register title to property granted by royal patents in 1866. The original patents described the seaward boundary as "*ma ke kai*", translated to "along the sea."[60] The U.S. Coast and Geodetic Survey provided tidal information supporting the Ashfords' contention that this boundary lay at the mean high water line.[61] The land court ruled in favor of the Ashfords.

The State of Hawaii contested the land court decision, basing its case on what it termed "reputation evidence" presented by "*kama'aina* witnesses." The State claimed that the term "*ma ke kai*" did not refer to the mean high water mark; it referred instead to the high water mark at the debris or vegetation line.[62]

The justices, particularly Richardson and Marumoto, engaged in lengthy, earnest conversations about the pending decision, which Richardson felt was a most important one.[63] The crux of the matter, as far as Richardson was concerned, lay in the king's intent when he gifted others with shoreline property. Richardson felt that no Hawaiian king would deny his subjects access to beach frontage for any number of public uses: for sorting *limu* or seaweed, for beaching canoes, for swimming and other recreational activities.

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[58] County of Hawaii v. Sotomura, 55 Hawaii 176, 517 P.2d 57 (1973); *cert. denied*, 419 U.S. 872 (1973).

[59] In re Sanborn, 57 Hawaii 585, 562 P.2d 771 (1977).

[60] State v. Zimring, 58 Hawaii 106, 566 P.2d 725 (1977).

[58] *Ashford*, *Sotomura*, and *Sanborn* formed the trio of cases commonly called the Shoreline Boundary Cases.

[59] Research had shown that in the islands long ago, certain people had been taught the names of boundaries of land divisions. These people, repositories of special knowledge, had been allowed to testify as "kama'aina witnesses." The Richardson Court, accepting the validity and credibility of this practice, saw no reason to discontinue the presentation of such testimony. *Ashford*, 50 Hawaii at 316, 440 P.2d at 77-78.

[60] 50 Hawaii at 314, 440 P.2d at 77.

[61] *Id.*, at 314-15, 440 P.2d at 77.

[62] *Id.* at 316, 440 P.2d at 78 (based on the testimony of kama'aina witness).

[63] In later years, asked to list the most far-reaching decisions which emanated from the Supreme Court during his years as Chief Justice, Richardson unhesitatingly placed *Ashford* at the top of his list.

Marumoto agreed that the king's intent was important, but more important was the fact that native rulers, in time, had accepted Western standards and influence. One of the consequences of such acceptance, Marumoto firmly believed, was strict adherence to Western scientific measurements and Western legal concepts as developed through case and common law.

After serious deliberation among the justices, the Chief Justice wrote the majority opinion. He upheld the state's position and rejected years of common law in declaring that the upper reaches of the waves, usually indicated by the debris or vegetation line, formed the new shoreline boundary between private and public lands.[64]

Richardson asserted that King Kamehameha V certainly had no knowledge of standards applied by the U.S. Coast and Geodetic Survey, formally established in the islands only in 1929. Thus, interpretation of the King's intent must depend upon "reputation evidence", and this evidence must prevail over any evidence produced by standards of a later time.[65]

Justice Marumoto dissented, as he would in the other Shoreline Boundary cases. This time he felt so strongly that his written opinion extended for forty-two pages.[66] Usually polite and circumspect even in disagreement, Marumoto's language of dissent revealed the passion of his feelings.[67]

In his written opinion, Marumoto claimed that the State's position was based on "spurious historical assumptions" and that there was no reason "for Hawaii to deviate from the mainstream of American decisions."[68] The Hawaii Supreme Court's decision, he said, was a practice which the U.S. Supreme Court had rejected for use by the federal government;[69] the state court's decision encouraged "a practice primitive in concept and haphazard in application and result."[70]

The majority opinion in *Ashford* soon was followed by similar opinions. The *Sotomura* and *Sanborn* decisions consistently affirmed the *Ashford* principle of shoreline ownership although the basic facts in each case differed.

Joseph Y. Sotomura owned land in the Black Sand area of the Big Island. Hawaii County, wanting to improve its beach park, claimed that the shoreline

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[64] *See supra* note 26.

[65] 50 Hawaii at 315-17, 440 P.2d at 77-78 (Marumoto, J. dissenting).

[66] The length of the opinion was the subject of good-natured jibes from Governor Burns whenever he saw Marumoto over the years to come. Marumoto's explanation for its length was that his opinion might hold meaning for similarly oriented judges in the future. Interview with Masaji Marumoto, in Honolulu, Hawaii (May 21, 1982).

[67] "Because the decision has the potential future impact described above, I will state my position in greater detail than is normal in dissents to decisions which do not have such impact." 50 Hawaii at 318, 440 P.2d at 79 (Marumoto, J., dissenting).

[68] *Id.* at 321, 440 P.2d at 81.

[69] *Id.*

[70] *Id.*

portion of one of Sotomura's lots was public land. Sotomura produced a land title registration which showed that the original boundary had been washed away by erosion and was now under water. He asserted that the shoreline portion of his property was *not* public property.[71]

The trial court held that because of erosion which had occurred, a new boundary line had to be drawn. Based on the *Ashford* decision, the court then simply drew a new line at the vegetation line.[72]

Sotomura appealed his case to the Hawaii Supreme Court, which affirmed the circuit court's decision. The supreme court was open in its assumption of a policy-making role: "Public policy as interpreted by this court, favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible."[73]

The supreme court made a number of important statements in its *Sotomura* decision. First, it said that while erosion may alter the size of oceanfront property, it does not alter the placement of the seaward boundary according to the standard set forth by *Ashford*.[74] Secondly, it declared that when high tides are evidenced both by a debris line and a vegetation line, the vegetation line is presumptively the property's shoreline boundary.[75]

The *Sotomura* case was the subject of a separate action in federal district court.[76] The Sotomuras alleged that the Hawaii Supreme Court's determination of a new seaward boundary constituted a taking of private property in violation of the U.S. Constitution.[77] The federal district court agreed and enjoined enforcement of the decision.[78] Misunderstanding and bureaucratic bungling prevented the State of Hawaii from filing a timely notice of appeal; it therefore could not carry out its intent to take the case to the Ninth Circuit Court of Appeals.

However, the supreme court was able to reassert its position a few years after its *Sotomura* decision in the *Sanborn* case.[79] Like the Sotomuras, heirs to the estate of Walter F. Sanborn held a land court decree which placed a boundary of their property seaward of the vegetation line. The Sanborn heirs, joint owners of Hanalei Bay property on Kauai, wished to subdivide their lot; application of

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[71] County of Hawaii v. Sotomura, 55 Hawaii 176, 178, 517 P.2d 57, 59 (1973).

[72] *Id.* at 180, 517 P.2d at 60.

[73] *Id.* at 182, 517 P.2d at 61-62.

[74] *Id.* at 181, 517 P.2d at 61.

[75] *Id.* at 182, 517 P.2d at 62.

[76] Sotomura v. County of Hawaii, 402 F. Supp. 95 (D. Hawaii 1975) (denial of motion to dismiss); 78-1 Hawaii Legal Rptr. at 78-407 (final decision issued October 16, 1978) (Plaintiff's injunction granted).

[77] Sotomura v. County of Hawaii, 402 F. Supp. 95, 97 n.1 (1975).

[78] Sotomura v. County of Hawaii, 78-1 Hawaii Legal Rptr. 78-407, 78-426 (1978).

[79] In re Sanborn, 57 Hawaii 585, 562 P.2d 771 (1977).

the supreme court's *Ashford* principle would reduce the size of their lot to the point where they could not subdivide it under Kauai ordinances.

Legal traditionalists pessimistically pointed out that if the Sanborn heirs thought that their 1951 land court title provided sufficient legal proof of acreage perimeters, they were mistaken. After all, this supreme court had interpreted a royal patent with self-assurance and had ignored long-practiced U.S. Coast and Geodetic principles.[80] It had also established a new boundary line in the face of shoreline erosion[81] and had ridden out accusations of "uninhibited judicial legislation" by articulate and powerful critics, among them J. Russell Cades, the attorney for McBryde in the *McBryde* water rights case and a partner in an old, large, and prestigious law firm.[82] Expectably, the Hawaii Supreme Court ruled that the land court had erred in its *Sanborn* decree.[83]

The 1977 *Zimring* case provided a final foil against which the ramifications of Hawaii's shoreline boundary cases could be examined further. The Puna lava flow of 1955 had changed the boundaries of Big Island property owned by Herbert C. Shipman, destroying the existing oceanfront boundary and adding 7.9 acres of lava in the process. Five years later, the Maurice Zimrings bought and proceeded to improve the entire property, including the newly formed lava addition. In 1968, in its attempt to claim that portion of the property formed by the lava flow, the State filed a suit against the Zimrings in circuit court.

In some ways, the case incorporated key elements of two of the Shoreline Boundary Cases. In *Sotomura*, private property had been decreased by erosion; in the *Zimring* case, it had been increased by lava deposit. In *Ashford*, the State had presented testimony from two *kama'aina* witnesses; in the *Zimring* case, the defendants—perhaps noting the supreme court's deference to such testimony—produced a witness to testify on their behalf. Land surveyor William Kamau, born in 1892 and professing to have expert knowledge of ancient Hawaiian land practices, testified that new land formed by lava flows belonged to the abutting land owner.[84]

The circuit judge ruled in favor of the Zimrings, basing his decisions upon the historical evidence presented by Kamau and also upon the "matter of basic and fundamental fairness" to the Zimrings.[85] The State's appeal to the supreme court resulted in reversal of the lower court's ruling.

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[80] *See supra* note 30 and accompanying text.

[81] *See supra* note 72.

[82] Cades, *Judicial Legislation in the Supreme Court of Hawaii: a Brief Introduction to the 'Knowne Uncertaintie' of the Law*, 7 HAWAII B. J. 58 (1970).

[83] 57 Hawaii at 598, 562 P.2d at 779.

[84] State v. Zimring, 58 Hawaii 106, 109, 566 P.2d 725, 729 (1977).

[85] *Id.* at 129, 566 P.2d at 739. Judge Betty M. Vitousek, temporarily filling a vacancy, wrote a dissenting opinion, raising the question of violation of due process inherent in the taking of private property.

Chief Justice Richardson, in writing the majority decision, refuted Kamau's testimony by pointing to the scarcity of lava flows—only two between 1846 and 1892—which altered privately owned oceanfront land.[86] Custom could hardly result from such a limited occurrence of eruptions, he implied.

Richardson restated a major pre-Mahele principle, one adopted by his court in most of its majority decisions on land and water cases: *ahupua'as*, intended to be self-sufficient land divisions, really were held in trust for all people by the landowner *konohiki*, with all lands ultimately being held in trust by the king as overall *konohiki*. This principle remained no matter how the land was distributed. Extending this principle to the present time, the modern *konohiki*, the State, became trustee of land and water for all island peoples.[87]

Furthermore, Richardson did not view the lava addition as common law "accretion," although the press and public continued to use that term in its discussion of the case. In the years after the decision, Richardson staunchly would defend the *Zimring* decision, saying that, of course, it defied the law developed over the years in accretion cases. He insisted that land changes due to volcanic eruption were *not* caused by "accretion," the slow build-up of land deposit. They were caused by common law "avulsion," the sudden cataclysmic changes brought about by floods, avalanches, and similar natural events.[88]

The *Sanborn* and *Zimring* decisions had been rendered by a supreme court whose composition was changed a little by the addition of new justices. In early 1974, Thomas S. Ogata and Benjamin Menor, both former State senators and then circuit judges, filled vacancies created by the retirement of Justices Marumoto and Abe. While neither had been part of the inner, original core of the earliest Democratic fighters, their backgrounds were akin to many other Burns appointees: their outlook was shaped by their immigrant heritage and their primary identification with non-Western cultures; also, their climb to success was achieved first, through education and then, through politics.[89]

In mid-1975, H. Baird Kidwell filled the vacancy created by Justice Levinson's retirement. Kidwell was Republican and Stanford Law School-educated. As a conservative and a mainlander who had married into a *haole, kama'aina* family, his communication with other court members did not flow easily, instinctively, from the same wellspring of experience. In any event, although the *Sanborn* case was heard after his appointment to the bench, he disqualified him-

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[86] *Id.* at 116, 566 P.2d at 732.

[87] *Id.* at 121, 566 P.2d at 735.

[88] *Id.* at 119-120, 566 P.2d at 734.

[89] Menor's experience was somewhat different in that his birthplace was not Hawaii. Born in the Philippines, he was the first person of Filipino ancestry to be appointed to the Supreme Court. Ogata received his legal training at the University of Michigan, Menor at Boston University. In 1980, the Hawaii Supreme Court was probably the only high court in the nation without a full-blooded Caucasian.

self from the case.[90]

Besides the controversial land and water decisions which emanated from the Richardson court, other decisions illustrated the court's liberal bent.[91] Some of these reinterpreted the statute of limitation in a much more liberal way. For instance, in one case, the supreme court said that the medical malpractice statute did not begin to run until the victim was aware of her difficulty.[92] The supreme court decisions also tended to be protective of defendants' rights, continuing the national trends of the 1960s which expanded the rights of persons accused of a crime.[93] The right of citizens to bring suit also was broadened,[94] and the court decided that taxpayers could challenge the propriety of a legislative appropriation;[95] another decision established the right of citizens to challenge land use decisions.[96] In the area of workers' compensation, the Richardson court held that there was a presumption of compensability for a heart attack occurring on the job, even where medical experts confirmed the likelihood that the attack could have happened at home rather than at the job site.[97]

As the controversy over his court's judicial activism continued, especially after the land and water decisions, Bill Richardson would say with a smile, in private conversations: "If I had my way, the public would have even greater access to water and shoreline property. Hawaiian kings, I'm sure, intended to give their subjects more public seashore lands than we now allot. No one but a fool would leave his canoe at the vegetation line and let the waves wash it out to sea! The kings *really* must have intended to extend public property to that area on the beach where canoes could be left without danger of being washed away." With a broader smile, Richardson would then say: "But there's no point in drawing *blood* from my critics!"

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[90] Circuit Judge Hiroshi Kato acted as substitute justice in his absence.

[91] *See* County of Kauai v. Pacific Standard Life Insurance Co., 65 Hawaii 318, 653 P.2d 766 (1982), *appeal dismissed* 103 S.Ct. 1762 (1983) (want of substantial federal question). In this case, popularly known as the Nukolii decision, the court upheld the principle of referendum as applied to land use decisions, even in the face of a serious question of the developer's vested rights. The Chief Justice wrote that the referendum is "an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest." (Citation omitted). 65 Hawaii at ___, 653 P.2d at 775.

[92] Yoshizaki v. Hilo Hospital, 50 Hawaii 1, 427 P.2d 845 (1967), *rev'd.* 50 Hawaii 150, 433 P.2d 220 (1967).

[93] *See, e.g.*, Carvalho v. Olim, 55 Hawaii 336, 519 P.2d 892 (1974) (defendant must fully understand the consequences of his waiver of constitutional rights and such waiver must be voluntary); State v. Almeida, 54 Hawaii 443, 509 P.2d 549 (1973) (defendant's sixth amendment right to speedy trial protected); State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1971) (fifth amendment privilege against self-incrimination protected).

[94] Life of the Land, Inc. v. Land Use Comm'n, 61 Hawaii 3, 594 P.2d 1079 (1979).

[95] Schwab v. Ariyoshi, 58 Hawaii 25, 555 P.2d 1329 (1977).

[96] Life of the Land, Inc. v. Land Use Commission, 61 Hawaii 3, 594 P.2d 1079 (1979).

[97] Akamine v. Hawaiian Packing & Crating Co., 53 Hawaii 406, 495 P.2d 1164 (1972).

HO'OPONOPONO

Not a born orator, the Chief Justice was never more eloquent than when speaking to Hawaiians about their future based upon their past. Early in 1974, Richardson had spoken at a large gathering of the Hawaiian Civic Clubs. His speech was surprisingly frank for one whose public demeanor was usually marked by restraint.

Richardson talked about the foreign system of laws and government which had been imposed upon "our own people." "*Haole* law", he said, had made crimes of what the Hawaiians considered "proper or trivial." "*Haole* law" had caused land to be taken away "illegally" from natives. Richardson went on to say that it was time for Hawaiians to work within the system to change the ills of the past.[98] Richardson's message was that modern day Hawaiians must and could work within the *haole* system to alter their condition.

Nearly everyone in his audience understood this meaning. Outside his immediate audience, in the wider community, there were those who felt an uneasiness at the latent militancy and potential divisiveness inherent in his words. A few worried persons knew the power of words to shape reality, and they feared the possible effects of Richardson's speech on some of his listeners.

Some students of history view events as discrete, unconnected occurrences often perverse in their defiance of cause and effect. Others believe, in spite of life's occasional absurdities, that history is generally marked by logical, causative progression from one event to another. Those who fall into this second category could claim that the decisions on water rights and on access to and ownership of lands were predetermined by island history and by the individual histories of the men who sat on the Richardson court.

To be sure, such a claim begs many questions. What is the proper exercise of judicial authority? Where is the golden mean between judicial activism and adherence to the prior body of law? How far can the courts go in substituting the personal will of judges for the impersonal will of legal precedent? A further tantalizing question is this: exactly how "impersonal" is the will of legal precedent?

In handing down its controversial decisions on land and water rights, the Richardson court seemed to use as its test the same test used by the Warren Court.[99] In deciding these cases, Hawaii's jurists did not ask primarily, "What

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[98] Speech delivered to Hawaiian Civic Club, February 7, 1974. *See* Honolulu Star-Bulletin, February 14, 1974, at A-22, col. 3.

[99] Earl Warren and Bill Richardson felt an affinity toward each other, Warren making it a point to call Richardson and spend time together whenever he was in Honolulu. The men would drive around the island, ending up at the Richardson beach home at Laie. When Warren was in town at the time of Bebe Richardson's high school graduation, the Richardsons made arrangements for him to attend commencement exercises. The Punahou president stated: "Tickets are at

is the legal precedent? What is the law?" They asked instead, "What is fair?"

"Fairness", like many other human qualities, depends upon several variables for its definition. One variable—voiced by attorney Wally Fujiyama, vocal champion of the "local" as opposed to the "outsiders' " point of view is this: "It depends whose ox is being gored."[100]

In the eyes of the island justices who supported the majority position in these cases, it *was* "fair" to give the public access to land and water. Their opinions were justified, they may have felt, by an island history which often had denied the common man much of what once was his to use.

In private, Richardson's description of the Great Mahele was much more candid than his public utterances: the white man had sold Kamehameha III a "bill of goods" through the Mahele. Some of Richardson's belief contained seeds of romanticism, an appealing vision of the noble savage. He was convinced that *haole* civilization had deprived the native Hawaiian of much of his own civilization.

Surely, an entire culture could not be restored to a people through judicial fiat, but Richardson believed that if no one else would do it, it was his judicial duty to at least return some island property to its "rightful" owners.

One might say that through these decisions, the Richardson court merely attempted to correct imbalances created by island history and by earlier island courts, courts which appeared to have a bias toward the ruling hegemony and commercial interests with a great deal at stake in protecting private rather than public ownership of land and water resources.

Whatever the final decisions from the federal courts, there will be no final answers. Ultimately, questions about the "proper" exercise of judicial authority turn into a statement which recognizes the human condition as described by Oliver Wendell Holmes: "The life of the law has not been logic; it has been experience. The felt necessities of that time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious . . . have had a good deal more to do than the syllogism in determining the rules by which men should be governed."[101]

The controversial decisions of the Richardson court seem to support Holmes' inference that even lawyers and judges, those most prudent and rational of creatures, do not escape the pull of passions, intuitions, and what they perceive to be the "felt necessities of the time."

Since the unspoken rule of confidentiality covers conference room discussions held by members of the state supreme court, Richardson's real role in the formulation of his court's controversial decisions will remain unknown. His general

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a premium, but how can one deny a seat to the Chief Justice of the United States?!"

[100] Honolulu Advertiser, Feb. 20, 1980, at A-6, col. 5.

[101] O. W. HOLMES, THE COMMON LAW 1 (1923 ed.).

comments about the decisions indicate that he did not take a leadership role in the early stages of deliberation. His uncertainties, as well as his personal habit, led him instead to question, listen, research and converse with his supreme court brethren about the issues in each case. He spent especially long hours talking with dissenter Marumoto: "If anyone with as fine a legal mind as Maru believed as strongly as he did in *his* position, then it behooved me to be very sure that I had grounds for my position."[102] Once the court's decisions were made, however, Richardson as Chief Justice and member of the court majority became spokesman and unwavering defender of those decisions.

Thus, while the Chief Justice's specific role in the decision-making process cannot be known, what is clear is that decisions issued by his court during his sixteen-year tenure changed the complexion of island justice.

Like courts throughout the nation, Hawaii's judiciary began to follow liberal trends of the 1960s which expanded rights of the accused and which generally broadened access of citizens to their courts.

More importantly, although considered "legally" unjustifiable by conservatives, the controversial decisions of the Richardson-led court altered Hawaii law so that it became more reflective of the islands' uncommon cultural heritage.

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[102] Interviews with William S. Richardson, in Honolulu, Hawaii (1981-1984).

The Honolulu Development Plans: An Analysis of Land Use Implications for Oahu

by *Charles C. Goodin**

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I. INTRODUCTION

The new Honolulu development plans are a bold effort to provide an implementation mechanism for the Honolulu general plan. The task is monumental. Oahu is the most populous and developed island of the State of Hawaii,[1] a state with the most complex and heavily regulated land use systems in the United States.[2] The development plans will control or influence every aspect of development on Oahu and their success or failure will be closely watched by land use experts throughout the country. Indeed, Honolulu's city council and

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[1] There are four county governments in the state: Hawaii County consists entirely of the island of Hawaii; Maui County consists of the islands of Maui, Molokai, Lanai and Kahoolawe; Kauai County consists of the islands of Kauai and Niihau; and the City and County of Honolulu consists entirely of the island of Oahu. Although the City and County of Honolulu is the smallest county geographically, it contains 80% of the state's population, over 57% of the state's urban designated land and an even larger percentage of the actually developed urban land. P. VITOUSEK, J. REILLY & R. REDISKE, PRINCIPLES & PRACTICES OF HAWAIIAN REAL ESTATE (9th ed. 1982).

[2] "Hawaii—the gem of the Pacific, whose people revered the land above all—a scant 100 years from an agrarian feudal society where the use of land was so inextricably joined with government, religion, commerce and trade—is now the most planned and regulated [state] of all." D. Callies, Land Use Control In Hawaii: A Survey I-1 (Jan. 1981) (unpublished manuscript available in William S. Richardson School of Law Library). It has also been stated that:

> At no other place in the United States is the land management imperative as demanding as it is in the Hawaiian islands. A series of volcanic cones rising from the depths of the ocean floor, the islands cradle a growing population and a rising tourism industry that presses heavily on its limited land resources. These pressures have prompted the enactment of an extensive state and local land use control system that may make Hawaii the most land-regulated domain in the entire world.

Mandelker & Kolis, *Whither Hawaii? Land Use Management in An Island State*, 1 U. HAWAII L. REV. 48 (1979).

administration have repeatedly emphasized that the adoption of the revised general plan and new development plans are among the city's greatest accomplishments.[3] This survey will explore the legal ramifications of development plan implementation on land use in Honolulu. The basic provisions of the plans, land use and social issues addressed, implementation procedures and amendment processes will be examined. The purpose of this survey is to familiarize the reader with the development plans and to identify their legal impact on land use issues.

The development plans have become the primary focus of legal attention in the land use area. The general plan states objectives for Honolulu in such a broad and policy oriented manner that it is practically above legal attack.[4] In the 1973 revision of the city charter, most of the earlier general plan's land use considerations, especially those in the implementation area, were transferred to the development plans.[5] Additionally, the general plan was reduced from an ordinance to an advisory policy document,[6] while the development plans were elevated to binding ordinances.[7] The development plans also contain considerably more detail than the general plan and are the likely target of any litigation attacking planning in Honolulu.

Eight development plans were adopted by the City and County of Honolulu during 1982 and 1983.[8] They divide the island of Oahu into eight geographic

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[3] *See infra* notes 15 and 81. *See also Mayor: One Election at a Time*, The Honolulu Advertiser, February 28, 1984, at A-1.

[4] "The general plan shall set forth the city's broad policies for the long range development of the city." REVISED CHARTER OF THE CITY AND COUNTY OF HONOLULU, HAWAII § 5-408 (1973 & Supp. 1979) [hereinafter cited as REVISED CHARTER].

[5] *See infra* text accompanying notes 61-94.

[6] "The council shall adopt the general plan or revision thereto by resolution. . . ." REVISED CHARTER, *supra* note 4, § 5-412.1.

[7] "The council shall adopt . . . development plans or amendments thereto by ordinance." *Id.*

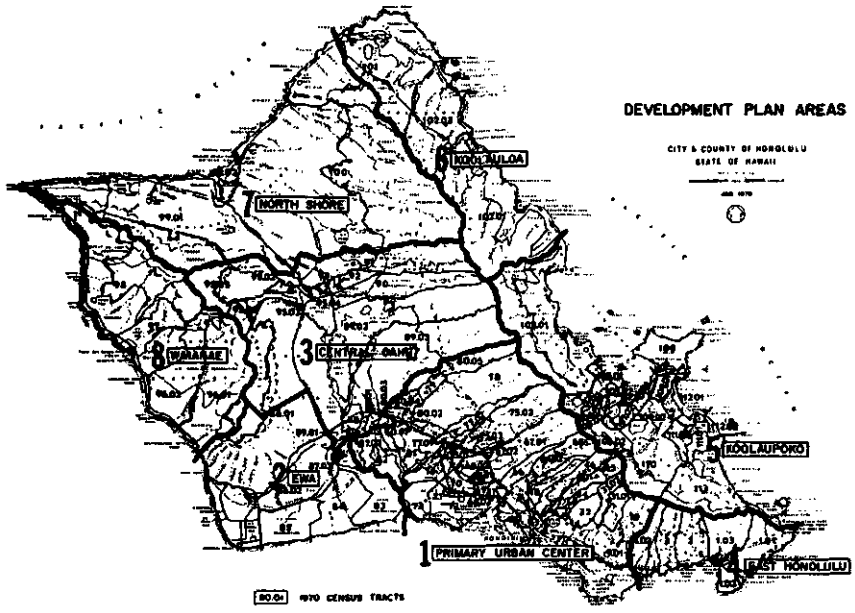
[8] The development plans for the Primary Urban Center and Ewa, were adopted in 1981 and subsequently amended on June 8, 1983. The remaining six development plans for East Honolulu, Central Oahu, Koolaupoko, Koolauloa, North Shore and Waianae were adopted on May 10, 1983, and as of the writing of this survey, have yet to be amended. The following are the current ordinance and bill numbers for the development plans.

areas:[9]

	Area	Ordinance No.	Bill No.
1.	Primary Urban Center	83-25	9 (1983)
2.	East Honolulu	83-6	79 (1982)
3.	Central Oahu	83-7	80 (1982)
4.	Ewa	83-26	10 (1983)
5.	Koolaupoko	83-8	81 (1982)
6.	Koolauloa	83-9	82 (1982)
7.	North Shore	83-10	83 (1982)
8.	Waianae	83-11	84 (1982)

[9] Section 14 of the special provisions of the development plans describes the area covered by each plan:

1. Primary Urban Center: "includes the communities from Waialae-Kahala to Pearl City."
2. East Honolulu: "includes the area from Aina Koa Ridge to Makapuu Point."
3. Central Oahu: "consists of the . . . plateau between the Waianae and the Koolau mountain ranges. The area includes the towns of Waipahu and Wahiawa, and the residential communities of Crestview, Waipio, Mililani, Waipio Acres, and Melemanu Woodlands. Adjacent to Wahiawa are the Schofield Barracks and Wheeler Air Force Base military reservations."
4. Ewa: "encompasses the coral plain which stretches from the Central Oahu district boundary at Waipahu and Pearl Harbor, around the southwestern corner of the island, to Nanakuli."
5. Koolaupoko: "spans the windward coastal and valley areas of Oahu from Makapuu Point to Kaoio Point at the northern end of Kaneohe Bay, and is bounded by the Koolau mountain range and the sea. It includes the agricultural communities of Kahaluu, Waiahole-Waikane, Kualoa, and Waimanalo and the suburban communities of Kaneohe and Kailua."
6. Koolauloa: "comprises the northern half of Oahu's windward coast and is bounded on the north by the ridgeline of the northerly end of the Koolau mountain range and on the south by the ridgeline extending Makai between Kualoa Point and Kaaawa Stream. . . . Residential communities bordering Kamehameha Highway include Kaaawa, Punaluu, Hauula, Laie, and Kahuku."
7. North Shore: "extends from Waialee Gulch near Kawela Bay to Kaena Point."
8. Waianae: "covers the arid coastal fringe from the Ewa-Waianae boundary, north of the Kahe Power Plant, to Kaena Point, and is enclosed by the Leeward slopes of the Waianae mountain range. . . . [It has] four principal communities: Nanakuli, Maili, Waianae, and Makaha."



They have assumed the crucial intermediate role between the Honolulu general plan and ultimate planning components, such as zoning and subdivision ordinances. They also coordinate land use decisions with the city's budgetary review process.[10]

The implementation of the development plans will be problematic. First, any new implementation mechanism has legal effects which may upset those more favorably treated by the previous system or those who are required to assume more burdensome administrative duties. Second, the council and planning department are not in complete agreement as to the specific required content and desired function of the plans. As such, interpretation of aspects of the plans may vary with the government entity consulted.

Finally, the development plans accomplish their task through two layers of provisions. At one level, the development plans lay down legally neutral planning components. This level is comprised of identification sections and statements of design principles which are the "what" of the planning system. At another level, the development plans present the "how and when" of the system

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[10] *See infra* text accompanying notes 298-307.

through implementation sections covering control of government operations, application to zoning, sequencing of public facilities, social impact and amendment procedures and controls. This latter category presents greater potential for legal scrutiny.

The content of the development plans is determined primarily by the Revised Charter. The mandatory contents specified by Section 5-409 of the charter are thoroughly covered by the plans. These relate primarily to physical components of planning. An important focus of the general plan, however, is consideration of non-physical planning objectives.[11] The development plans implement the overall development objectives and policies of the general plan. This important focus of the general plan should be equally emphasized in the development plans. Non-physical planning components, however, are permissive and are not required to be included in the development plans by the charter.[12]

The Department of General Planning, which drafted the development plans, takes the position that the charter literally determines the content of the development plans. Accordingly, mandatory contents are included in the development plans. The city council, on the other hand, more loosely interprets the charter with a social orientation and requires that the plans address social issues. Although non-physical planning components were reluctantly included, recent proposals made by the planning department call for their removal.[13]

The department believes that the development plans should gradually evolve to fulfill the ambitious function assigned them by the general plan and other planning documents. The growth mechanism is the annual review process[14] which combines input from the city council, chief planning officer, the public and others. As the development plans are amended, it is envisioned that physical planning components of the plans will be solidified and non-physical planning objectives will be more fully addressed. The city council has a different perspective and would like the plans to incorporate social issues immediately.[15]

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[11] *See infra* text accompanying notes 64-65, and 320-46.

[12] *See infra* text accompanying notes 68-70.

[13] *See infra* text accompanying notes 334-335.

[14] *See infra* text accompanying notes 214-27.

[15] It is incorrect to speak of *a* city council per se. With each election, the council changes. In 1983 five new members entered office including the current chairperson of the Planning and Zoning Committee. The previous council was in office for the adoption of the Primary Urban Center and Ewa development plans but the remaining six plans were adopted by the new council. All studies cited in this article which comment upon the views of the city council refer to the old council. Additionally, early actions on the development plans by the various city agencies were guided by a different mayor. It is difficult to predict the actions that the new council will take but it appears that their orientation is to simplify and expedite the land use system. It is desired to make the plans much more policy oriented. Interview with Councilmember Leigh-Wai Doo, Chairperson, Planning and Zoning Committee, in Honolulu (April 7, 1984) [hereinafter cited as Interview with the City Council].

Currently the city council and the planning department are at a critical juncture. The seed of a massive social program is built into the development plans and studies have been conducted to prepare an operational system for adoption. It appears that this program could be incorporated into the development plans or the entire matter could be relegated to the administrative level. The impact of adoption of the social program on the planning process is potentially staggering and could substantially increase the social analysis required of private development.

Social concerns are the storm clouds on the horizon, but on the day to day level, the development plans are also proving to be burdensome to the private sector. The plans were born into an already burgeoning, confusing, and hyper-regulation oriented system. An analogy would be throwing an octopus into a barrel of squid, and trying to untangle the writhing mass! Zoning, subdivision, sequencing of public improvements, budgetary concerns, growth planning—all mesh with the development plans. Before examining the content and impact of the plans, however, a cursory review of the overall planning context in which they function is in order.[16]

II. STATEWIDE PLANNING CONTEXT

Hawaii has both state and county planning systems. Act 187, which became law in 1961, established the State Land Use Law.[17] The law created the Land Use Commission and divided all land in Hawaii into four zones: urban, rural, agricultural and conservation.[18] This system "structurally at least, consists of local zoning writ large."[19] Only in urban districts are the counties given power to exercise full land use controls.[20] In agricultural and rural districts, the counties must share control with the state and in conservation districts, the state exercises complete power.[21]

Mere classification of land as urban by the state does not entitle a landowner

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[16] The overall system has been heavily analyzed. *See, e.g.*, F. BOSSELMAN & D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROLS (1981); D. MANDELKER, ENVIRONMENTAL AND LAND CONTROL LEGISLATION (1976); Callies, *Land Use: Herein of Vested Rights, Plans, and the Relationship of Planning and Controls*, 2 U. HAWAII L. REV. 167 (1979); Lowry & McElroy, *State Land Use Control; Some Lessons from Experience*, 1 STATE PLAN. ISSUES 15 (1976); Mandelker & Kolis, *supra* note 2; Selinger, Van Dyke, Amano, Takenaka & Young, *Selected Constitutional Issues Related to Growth Management in Hawaii*, 5 HASTINGS CONST. L.Q. 639 (1978) [hereinafter cited as *Constitutional Issues*]; D. Callies, *supra* note 2.

[17] HAWAII REV. STAT. § 205 (1976 & Supp. 1983).

[18] *Id.* § 205-2.

[19] D. Callies, *supra* note 2, at II-4.

[20] HAWAII REV. STAT. § 205-2 (Supp. 1983).

[21] *Id.*

to urban use.[22] The counties are free to zone state designated urban land as they see fit. The state designation merely sets the most intensive use allowable.[23]

In addition to the State Land Use Law, the state and county governments in Hawaii exert control through a proliferation of plans to which all land use decisions and governmental actions must conform. Both the state and the counties have general and implementing land use laws which must be integrated.

The state general plan is law in Hawaii[24] and basically serves two functions. First, it provides the overall theme, goals, objectives, policies, and priority directions which serve as broad guidelines for land use in the state.[25] Second, it establishes a statewide planning system to implement these factors and coordinate all major state and county land use activities.[26]

The state plan will be implemented through functional plans[27] and coordination will be achieved through a policy council.[28] The functional plans, yet to be adopted by the concurrent resolution of the legislature,[29] will cover the areas of agriculture, conservation lands, education, energy, higher education, health, historic preservation, housing, recreation, tourism, transportation, and water resource development.[30] They will define and implement the overall policies of the state plan.[31] Moreover, once adopted, they will be used as guidelines for conforming the county general plans and development plans to the state plan by amendment.[32]

The policy council will consist of various state agency heads, the county planning directors and members of the general public.[33] Its role is to provide a

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[22] D. Callies, *supra* note 2, at II-4, II-5.

[23] The state urban classification does not, however, carry with it a *right* to urban use. It is the county which issues the requisite building permit for development, one of the requirements for which not only *state* urban district classification, but also appropriate *county* zoning. Counties can—and do—classify land into relatively low-intensity use—such as *local* agricultural districts—regardless of the classification placed on land by the state. All the state urban classification signifies is that a county *may* now classify the same land so as to permit development under its zoning code.

Id. at II-5.

[24] "Hawaii is unique among the fifty states in having converted its state general plan into a statute, Act 100." Callies, *Land Use Controls: An Eclectic Summary for 1980-1981*, 13 URB. LAW. 723, 735 (1981). *See* Memorandum from Sandra Maile to Councilmember Leigh-Wai Doo (December 2, 1983) (discussing comprehensive plans and the consistency requirement).

[25] HAWAII REV. STAT. §§ 226-3 to 226-28 and §§ 226-101 to 226-105 (Supp. 1983).

[26] *Id.* §§ 226-51 to 226-63.

[27] *Id.* §§ 226-52, 226-57.

[28] *Id.* §§ 226-53, 226-54.

[29] *Id.* § 226-57(a).

[30] *Id.* § 226-52(a)(3).

[31] *Id.* §§ 226-52(a)(3), 226-58(a).

[32] *Id.* § 226-52(a)(4).

[33] *Id.* § 226-54.

forum for discussion of conflicts between state and county plans[34] and to advise the legislature on ways of resolving such conflicts.[35]

The Honolulu general plan is essentially a county version of the state plan. Unlike the state plan, however, which is a statute, the general plan was adopted by council resolution and has only advisory status.[36] The general plan sets forth "the city's broad policies for the long range development of the city."[37] It states objectives and policies in the areas of population, economic activity, the natural environment, housing, transportation and utilities, physical development and urban design, public safety, health and education, culture and recreation, government operations and fiscal management.[38] The general plan's broad objectives and policies are implemented through the "relatively detailed schemes" of the development plans.[39] In this respect, the development plans are analogous to the state functional plans.

In a nutshell, the Hawaii land use planning scheme involves four plans: the state plan and state functional plans; the county general plans and county development plans. The state plan is at the apex of the scheme, defining broad statewide concerns, which are translated into more detailed statements by the

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[34] *Id.* § 226-54(1).

[35] *Id.* § 226-54(3).

[36] The Revised Charter provides:

> The council shall adopt the general plan or revisions thereto by resolution. . . . Resolutions adopting or revising the general plan shall be laid over for at least two weeks after introduction. Such resolutions shall be advertised once in a daily newspaper of general circulation at least ten days before adoption by the council. Upon adoption, every such resolution shall be presented to the mayor, and he may approve or disapprove it pursuant to applicable provisions governing the approval or disapproval of bills.

REVISED CHARTER, *supra* note 4, § 5-412.1. Additionally, according to the Revised Charter, all legislative acts of the council must be by ordinance. *Id.* § 3-201. Therefore, adoption and amendment of the general plan is purportedly a nonlegislative act. As stated by the charter commission, the general plan's "standing as a resolution, rather than an ordinance means that it is not a law, but a guide or policy statement." Charter Commission, City and County of Honolulu, Final Report of the Charter Commission 24 (1971-1972) (unpublished report available in Municipal Reference Library, City and County of Honolulu) [hereinafter cited as Final Report of the Charter Commission].

[37] REVISED CHARTER, *supra* note 4, § 5-408. The section states in full:

> The general plan shall set forth the city's broad policies for the long range development of the city. It shall contain statements of the general social, economic, environmental and design objectives to be achieved for the general welfare and prosperity of the people of the city through government action, city, State or federal. The statements shall include, but not be limited to, policy and development objectives to be achieved with respect to the distribution of social benefits, the most desirable uses of land within the city, the overall circulation pattern and the most desirable population densities within the several areas of the city.

[38] GENERAL PLAN: CITY AND COUNTY OF HONOLULU (Res. No. 238, Jan. 18, 1977).

[39] REVISED CHARTER, *supra* note 4, § 5-409.

state functional plans. Functional plans are the nexus between the state plan and county plans. Derived from the Honolulu general plan are the development plans, which as ordinances, control all county activities. From the perspective of the state plan, the scheme is hierarchical with the state plan at the top.

The above characterization, however, fails to take into consideration the complex interrelationship between the state and counties and the jealousy with which each covets its regulatory powers.[40] The state functional plans directly link the state plan to the county general plans. But a serious question exists as to the precedence between the state functional plans and county general plans.

The state plan provides not only that the functional plans will be used as guidelines for amendment of the county general plans, but that the "[c]ounty general plans and development plans shall be used as a basis in the formulation of state functional plans."[41] As stated by one authority, "[t]he county and functional planning processes are to be coordinated with the end product, based one upon another, in the implementation of the state plan."[42]

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[40] The relationship between the counties and the state agencies is less than perfect. The counties have substantially improved their planning program within the 10 years the Land Use Law has been in effect, and some county officials feel that the law now needs substantial revision. They argue that although the Land Use Law may have had the beneficial effect of slowing development while the counties caught up on their planning, the counties' planning is now more sophisticated than the state's and the counties' views should now be given more weight. Honolulu Planning Director Robert Way argues that the counties' decisions must be based on sound planning because the Hawaii Supreme Court has imposed uniquely restrictive standards on rezonings by the counties, requiring that each rezoning be based on a comprehensive planning decision.

BOSSELMAN & CALLIES, *supra* note 16, at 33 (1971) (footnotes omitted).

[41] HAWAII REV. STAT. § 226-52(a)(3) (Supp. 1983).

[42] Callies, *supra* note 24, at 736. As further stated by one consultant:

> [T]he state Functional Plans and the County General Plans represent a third level of policies to implement the State Plan. The State Plan document places these two types of plans on the same level. Neither is subordinate or superior to the other.
>
> . . . .
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> The relationship is intended to be one of coordination between these two plans. In the area of land use management, this relationship has raised the question of whether the County General Plans are to represent the basic land use plan for the State and are to serve as the basis for functional plan development. The counties have advocated such a perspective. The State, however, is also involved in land use management functions and there are land use issues which are clearly of concern and interest to the state. While it is appropriate for County General Plans to serve as a point of departure for State Functional Plans, other factors must be considered. The functional plans should integrate into their planning process State concerns in land use management where present. If none exists in a particular functional area, then it would be appropriate to allow the County General Plan to serve as the principal land use guide for functional planning.

Daly & Associates, Inc., State Land Use Management Study 73-74 (Oct. 1981) (unpublished report available in Municipal Reference Library, City and County of Honolulu).

The ambiguity of this system invites conflict. In the first place, there is no guarantee that the functional plans will be formulated consistently with the county general plans.[43] The state plan attempts to resolve this situation as follows:

> Functional plans and any amendments thereto shall be adopted by the legislature by concurrent resolution and shall upon adoption, *provide direction* to state and county agencies, provided that *in the event of a conflict between the proposed functional plan and general plan of a county, every effort shall be made to determine which of the matters in conflict has the greater merit and recommend modifications* by the appropriate state *or* county agency to the proposed functional plan or county general plan.[44]

Moreover, it is likely that the substance of the functional plans, once adopted, will differ from the county general plans. In only one instance does the state plan provide for such conflict outside of the amendatory process: "The legislature, upon a finding of overriding statewide concern, may determine in any given instance that the site for a specific project may be other than that designated on the county general plan. . . ."[45] In all other situations, where the county general plans are inconsistent with the state plan, it is arguable that the state plan compels amendment of the nonconforming aspects of the county plans.[46] The counties could defend against such an action using at least three arguments: 1) that the functional plans do not unambiguously apply to the county plans to the extent of requiring amendment for nonconformance therewith;[47] 2) that the counties have home-rule powers over their planning systems;[48] and 3) that the method of adopting the functional plans by concurrent

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[43] According to the state plan "[c]ounty general plans and development plans shall be used as *a basis* in the formulation of the state functional plans," HAWAII REV. STAT. § 226-52(a)(3) (emphasis added) and "[t]he formulation and amendment of a state functional plan shall conform to the state plan and use as *a basis* the county general plans" HAWAII REV. STAT. § 226-57(a) (emphasis added). While the state plan provides that county plans will be used as a basis for the formulation of the state functional plans, it does not require that the state functional plans be consistent with the county plans. Inconsistencies could arise if the county plans were (1) inconsistent with the state plan or (2) inconsistent with each other.

[44] HAWAII REV. STAT. § 226-57(a) (Supp. 1983) (emphasis added).

[45] *Id.* § 226-59(b).

[46] *See* D. Callies, *supra* note 2, at II-44.

[47] Ambiguity as to the precedence between the state functional plans and the county plans has led the state attorney general to issue an opinion that "[t]here are no specific provisions requiring conformance of county general and development plans with state functional plans." Letter from Deputy Attorney General Annette Chock to Senator Richard S.H. Wong at 7 (Nov. 7, 1980). *See* D. Callies, *supra* note 2, at II-43.

[48] The City and County of Honolulu is a home rule local government under the Constitution of the State of Hawaii. Art. VIII, § 2 of the Hawaii constitution provides that:

resolution is ineffective against the county plans.[49] On the other hand, the state has a strong argument that action under its plans is a justified exercise of its regulatory power and that the functional plans are "binding . . . as interpretations and extensions of the goals, objectives, policies and policy directions to which the counties are by law required to conform as set forth in the State Plan."[50]

The very nature of the precedence problem may defy resolution. The issue, however, will not arise until the functional plans are adopted. The basic premise that the county plans must "define, implement and be in conformance with the

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> Each political subdivision shall have the power to frame and adopt a charter for its own self-government within such limits and under such procedures as may be provided by general law. Such procedures however, shall not require the approval of a charter by a legislative body.
>
> Charter provisions with respect to a political subdivision's executive, legislative and administrative structure and organization shall be superior to statutory provisions, subject to the authority of the legislature to enact general laws allocating and reallocating powers and functions.

As a home rule local government, the City and County of Honolulu may argue that it has independent land use control powers. The state however, can respond that it is empowered to impose restrictions on the counties under general law, as provided in art. VIII, § 1 of the Hawaii constitution:

> The legislature shall create counties, and may create other political subdivisions within the state, and provide for the government thereof. Each political subdivision shall have and exercise such powers as shall be conferred under general laws.

Moreover, the state can assert that the counties' superiority over the legislature relates only to their "executive, legislative and administrative *structure and organization*", rather than land use laws per se. Here again, the state and counties can engage in circular arguments regarding state regulation of the counties under "general laws" and county self-regulation under home rule.

The dangers which concern counties has been expressed thus:

> Among the most controversial parts of the consistency debate are those that arise from concern about the impact of a consistency reform on the process of planning. Opponents of the planning law change argue that consistency requirements threaten home rule. They create another opportunity for state and federal interference with decisions that are optimally made at the local level. . . .
>
> If plans must have a consistent relationship . . . local controls will be jeopardized. Local values will be sacrificed and data not easily observable to state or federal planners will be lost. Communication difficulties inherent in intergovernmental relations will increase with increased state government directives.

J. DIMENTO, THE CONSISTENCY DOCTRINE AND THE LIMITS OF PLANNING 59 (1980). *See generally*, 1 R. ANDERSON, AMERICAN LAW OF ZONING §§ 2.14-2.18 (2d ed. 1976); D. MANDELKER, LAND USE LAW § 4.28 (1982).

[49] The argument is basically that the usual practice for legislators is to enact laws as statutes but the state constitution has raised this custom to a legal requirement. Thus, non-statutorily enacted functional plans would violate this constitutional requirement. "On the face of it, the legislature seems to be flying in the face of the constitution in providing for the passage of the functional plans by concurrent resolution only." D. Callies, *supra* note 2, at II-46.

[50] *Id.* at II-41.

overall theme, goals, objectives, policies, and priority directions"[51] of the state plan is also relatively unchallenged. At a minimum, the functional plans will serve as guidelines by which to gauge county conformance to the state plan. Whether this means that they will be merely suggestive and easily dispensed with or ultimately determinative, will inevitably be a matter for negotiation between the state and counties.

III. BACKGROUND, PURPOSE, FORM & CONTENT OF THE DEVELOPMENT PLANS

A. Background

The term "development plan" is not truly a new concept in Honolulu's land use law. Under the 1959 city charter, development plans were defined as "a relatively detailed scheme for the placement or use of specific facilities within a defined area so as to insure the most beneficial use of such area in conjunction with the use of surrounding areas."[52] This rather vague definition led to formulation of development plans as detailed maps which showed the placement of actual facilities and fixed the site of future facilities.[53] The old development plans were criticized as failing "to effectively serve a real planning function."[54] Problems seemed to stem from uncertainty as to the intended function of the plans and the absence of an organized process to prepare them.[55]

The concept of the current development plans emerged as part of the 1973 charter revision. Prior to the revision, the content of the present development plans were required to be contained in the general plan.[56] The charter commis-

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[51] HAWAII REV. STAT. § 226-52(a)(4).

[52] CHARTER OF THE CITY AND COUNTY OF HONOLULU § 5-510 (1959).

[53] Dep't of Gen. Plan., City and County of Honolulu, DESIGN OF DEVELOPMENT PLANS 4 (1975) (hereinafter cited as DESIGN OF DEVELOPMENT PLANS).

[54] *Id.* at 2.

[55] *Id.* at 2-4.

[56] The general plan shall set forth the council's policy for the long-range, comprehensive physical development of the city. The general plan shall include a map of the city and shall contain a statement of development objectives, standards and principles with respect to the most desirable use of land within the city for residential, recreational, agricultural, commercial, industrial and other purposes; the most desirable density of population in the several parts of the city; a system of public thoroughfares, highways, streets and other public open spaces; the general location, relocation and improvement of public buildings; the general location and extent of public utilities and terminals, whether publicly or privately owned, for water, sewers, light, power, transit and other purposes; the extent and location of public housing projects; adequate drainage facilities and control; and such other matters as may, in the council's judgment, be beneficial to the city. The plan shall be based upon studies of physical, social, economic and governmental conditions and trends and shall be designed to assure the coordinated development of the city and to promote the general welfare and prosperity of its people.

sion basically transferred the bulk of the physical detail of the old general plan to the new development plans, leaving the general plan as a set of policies and objectives. This was part of a process which separated "the long range planning functions from those which implement those plans" and established the theme of comprehensive planning.[57] In its final report, the charter commission gave three reasons for the change: 1) to show that policy planning for the city should no longer be limited to physical planning alone; 2) to show that planning is to be considered "an ongoing process in which the general plan is not a single best picture or golden flash of the city at some future point in time but rather a set of policies and objectives for its development;" and 3) to avoid the amendment burdens imposed by the Hawaii Supreme Court decision.[58] At the earliest phase of the formulation of the development plans, a researcher characterized the development plans under the Revised Charter as "a new and unknown component of the planning system."[59]

Today, the development plans are in place. Yet references are still made to the intent of the charter commission in an attempt to substantiate broadening or curtailing the coverage of the development plans on certain issues. This is in large part a reflection of the conflicting planning philosophies held by those parties which shaped those plans and now seek to modify them.

B. The Purpose of the Plans

Although several legal sources describe the required content and function of the development plans, determining the scope of coverage has sparked recurring conflicts between participants in the planning system. In particular, there are differing views concerning the incorporation of non-physical planning issues in the development plans. These differences reflect not only conflicting interpretations of the Revised Charter but also reflect fundamentally contrasting planning philosophies.

The state plan gives a broad definition of the development plans. It states that county general and development plans are to "address the unique problems

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CHARTER OF THE CITY AND COUNTY OF HONOLULU § 5-509 (1959).

[57] Final Report of the Charter Commission, *supra* note 36, at 23.

[58] *Id. See infra* text accompanying notes 258-70 for a discussion of *Dalton v. City and County of Honolulu*, the case referred to by the charter commission.

[59] DESIGN OF DEVELOPMENT PLANS, *supra* note 53, at 22. The charter commission indicated that:

> In this reorientation, the Commission realizes that it is committing the city to a difficult undertaking, for there was a dearth of models to guide the Commission's own decisions, and although it was evident from all literature and other cities' experiences that the need for the [social] component is great, most efforts are still experimental.

Final Report of the Charter Commission, *supra* note 36, at 23.

and needs of each county and regions within each county"[60] and must be in accordance with the state plan itself. The actual function, design and contents of the development plans are derived from article V, chapter 4 of the Revised Charter.[61] Section 5-407 states that the purposes of preparing the general plan and development plans are to: "[R]ecognize and state the major problems and opportunities concerning the needs and development of the city and the social, economic and environmental effects of such development and set forth the desired sequence, patterns and characteristics of future development."[62]

Development plans individually are defined as "relatively detailed schemes for implementing and accomplishing the *development objectives and policies* of the general plan within the several parts of the city."[63] This innocuous looking

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[60] HAWAII REV. STAT. § 226-52(a)(4) (Supp. 1983).

[61] REVISED CHARTER, *supra* note 4, art. V, ch. 4.

[62] *Id.* § 5-407.

[63] *Id.* § 5-409 (emphasis added).

In addition to determining the content of the development plans, charter section 5-409 sets the general of detail of the development plans as well. The Department of General Planning embraces a literal interpretation of the charter requirements. One research group conducted interviews with a department spokesman and found that:

> The department adheres to the charter definition of what should be contained in the ADP [area development plan] map and text. A spokesman notes that the Charter asked for "a relatively detailed scheme" and that the DGP [Department of General Planning] has interpreted this to mean that the plans would contain more detail than the General Plan but would not go into exhaustive specifics.

E. Matsukawa, E. Yamamoto, G. Inabe, N. Nikaido & C. Stalcup, Area Development Plan Implementation—Role of the Agency Functional Plans 13 (1979) (unpublished report available in Municipal Reference Library, City and County of Honolulu) [hereinafter cited as Area Development Plan Implementation].

The charter commission also set limits on the detail to be contained in the development plans. It warned that:

> Neither the general plan nor development plans are to become zoning or engineering plans either in theory or in practice wherein they are merely reflective of current uses. *They are policy tools* and are to be used, in conjunction with the programs and budgets of the city, to accomplish the objectives of the city and as guides for the decisions made in the private sector.

Final Report of the Charter Commission, *supra* note 36, at 25 (emphasis added). Despite this warning, one of the controversies surrounding the development plans is their level of detail. A full discussion of this controversy is outside the scope of this survey, and is essentially a planning concern. Briefly, the development plans are not only complicated in terms of procedures and analyses, they are also extremely detailed. The land use maps, which are a part of the plans, are very specific. They are so specific, in fact, that they regulate individual parcels of land. This not only complicates the development plan amendment process but also has a stifling effect on administration of zoning. It is sometimes said that zoning, after adoption of the development plans, has become little more than an infrastructure review. Thus, it appears that the charter commission's warning that the plans do not become zoning oriented has not been heeded.

The general plan closely follows the charter definition of the development plan. It describes the

phrase has been at the center of a debate to expand coverage of the development plans to social issues.

Literally, the phrase "development objectives and policies" could connotate a land use orientation. However, land use issues can never be completely divorced from non-physical planning issues. Early drafts of the development plans were silent as to social issues. Critics argued that the plans must directly address such areas.[64] The Final Report of the Charter Commission in fact states that "[i]t is the intention of the Charter Commission that the term 'development objective' be construed liberally and in light of the Commission's emphasis on the purposes of planning and the need for comprehensive planning, rather than be limited to its land use or physical connotation."[65] This language, however, was used by the commission in reference to its reasons for transferring physical details to the development plans, thus leaving the general plan as a policy oriented document. Arguably, the above quoted language refers to the role of social issues in the general plan rather than the development plans. Indeed, the section of the Revised Charter which defines the purpose of the general plan also uses the term "development objectives" and *requires* that the general plan state policy and development objectives.[66]

Despite numerous variations on the charter commission's social orientation language, the Revised Charter directly *requires* only that physical development issues be addressed by the development plans. Section 5-409 of the Revised Charter provides that:

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development plans as "relatively detailed guidelines for the physical development of the Island" and "intermediate means of implementing the objectives of the General Plan. . . ." General Plan, *supra* note 38, at 10. Thus, the Hawaii Supreme Court has observed that "[a] development plan is within the framework of and implements the general plan." Hall v. City and County of Honolulu, 56 Hawaii 121, 125, 530 P.2d 737, 741 (1975) (quoting charter § 5-510 (1969)).

One of the eleven subject areas of the general plan specifically pertains to "physical development and urban design." However, it would not be fair to say that the remaining areas are not within the planning process. The general plan itself states that:

> The eleven subject areas provide the framework for the City's expression of public policy concerning the needs of the public and the functions of government. *The objectives and policies reflect the comprehensive planning process of the City and County* which addresses all aspects of the health, safety, and welfare of the people of Oahu.

General Plan, *supra* note 38, at 4 (emphasis added).

[64] F. Bosselman & B. Blaesser, Potential Land Use Litigation Issues Arising out of the Implementation Phase of the Development Plans (June 23, 1980) (unpublished report available in Municipal Reference Library, City and County of Honolulu) [hereinafter cited as Bosselman Report].

[65] Final Report of the Charter Commission, *supra* note 36, at 24.

[66] The Revised Charter requires that the general plan shall include "policy and development objectives to be achieved with respect to the distribution of social benefits,. . . ." REVISED CHARTER, *supra* note 4, § 5-408 (1973 & Supp. 1979).

> A development plan *shall* include a map of the area of the city to which it is applicable; *shall* contain statements of standards and principles with respect to land uses within the area for residential, recreational, agricultural, commercial, industrial, institutional, open spaces and other purposes and statements of urban design principles and controls; and *shall* identify areas, sites and structures of historical, archeological, architectural or scenic significance, a system of public thoroughfares, highways and streets, and the location, relocation and improvements of public buildings, public or private facilities for utilities, terminals and drainage. It *shall* state the desirable sequence for development and other purposes as may be important and consistent with the orderly implementation of the general plan.[67]

Absent from these mandatory contents are non-physical planning issues. Indeed, the Revised Charter itself relegates non-physical planning issues to permissive status:

> Development plans *may* contain statements identifying the present conditions and major problems relating to development, physical deterioration and the location of land uses and the social, economic and environmental effects thereof; *may* show the projected nature and rate of change in present conditions for the reasonably foreseeable future based on a projection of current trends; and *may* forecast the probable social, economic and environmental consequences of such changes.[68]

What the development plans are to contain is a controversial subject. There should be a distinction between that which is *required* and that which is *desired.* Unfortunately, as will be seen in the following sections, this distinction was blurred in the formulation and adoption of the present development plans.

1. *Immediate Versus Eventual Coverage of the Permissive Contents*

The city council and planning department engaged in something of a war over the permissive paragraph of Revised Charter section 5-409. The city council wanted the development plans to be adopted in a form which immediately addressed the permissive contents. Conversely, the planning department took the position that such factors could best be addressed after the development plans were in place.

To clarify the reason for use of the word "may" in the above quoted paragraph, the charter commission stated: "[s]ince it is specified that development plans may identify and state present conditions and major problems relating to development, it is intended that such statements will, in fact, increase as exper-

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[67] *Id.* § 5-409 (emphasis added).

[68] *Id.* (emphasis added).

tise and familiarity with such perspectives become more widely shared."[69] This indicates that permissive contents are not required immediately, but that coverage thereof may develop over time.

In this respect, the Department of General Planning has commented that:

> The Charter Commission in using the word "may" in the second paragraph of Section 5-409 recognized that certain studies and relationships would need to be deferred or minimally carried out until more basic technical work had been done. By writing a special paragraph to stress the items that were *not* mandated, the Commission differentiated between what "shall" be included and what may be included in the DP [development plans].[70]

Accordingly, in early drafts of the development plans, permissive factors were not covered. This caused an uproar with the city council and its consultants. They believed consideration of social issues by the development plans upon adoption to be not only important, but required by the intent of the charter commission.[71]

In 1980, Fred Bosselman, a recognized land-use expert, presented a report to the city council entitled "Potential Land Use Litigation Issues Arising Out of the Implementation Phase of the Development Plans" (Bosselman Report)[72]

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[69] Final Report of the Charter Commission, *supra* note 36, at 25.

[70] Dep't of Gen. Plan., City and County of Honolulu, Review of Fred Bosselman's June 23, 1980 Report "Potential Land Use Litigation Issues Arising Out of the Implementation Phase of the Development Plans," 4-5 (1980) (unpublished report available in Municipal Reference Library, City and County of Honolulu) [hereinafter cited as Review of the Bosselman Report].

[71] *See* Bosselman Report, *supra* note 64, at 37-40. It should be noted that although it is accurate to say that the city council espoused this belief, the real force behind the scenes was Fred Bosselman. He was hired as a consultant to the city council on the development plans and had very strong views about their legally required and intended function. He is a leading expert in the area and the city council largely concurred with his recommendations. What basically happened during the drafting phase of the development plans was that the planning department's drafts were presented to the city council in 1980. Bosselman critiqued the drafts, as did the corporation counsel. In response to these critiques, the planning department submitted revised development plan drafts. In 1981, however, Bosselman presented his own proposed draft of the development plans, which incorporated much of the planning department's revised draft, plus several of his own changes. The social sections of the development plans were drafted by Bosselman, as were large portions of many other sections. The current development plans have changed only in minor respects from Bosselman's draft. Thus, while the planning department is assigned responsibility to draft development plans for the city council, much of the drafting was performed by Bosselman. For a brief discussion of the process, see Memorandum from the Dep't of the Corporation Counsel to the City Council, City and County of Honolulu M 82-70 (Sept. 17, 1982) (amendments to the development plans which may be considered independently of the annual review process). The author of this memorandum, Steven Lim, has provided helpful information to further the research of this survey.

[72] Bosselman Report, *supra* note 64.

which emphasized the importance of social issues in the development plans. In particular, the report declared that the failure to address social issues would pose a potentially serious legal problem.[73]

The planning department reacted very negatively to the Bosselman Report[74] and basically dismissed it as lacking foundation.[75] The department noted the distinction between the mandatory and permissive language of section 5-409 and argued that only the mandatory contents were required in the early phases of the development plans.[76] Moreover, the department argued that Bosselman's basic assumptions about the role of the initial development plans in the overall planning process were incorrect.[77]

The department obviously interprets the charter commission's statements to mean that the development plans were not intended to fulfill the full range of their potential functions immediately upon adoption. Rather, the development plans were intended to be part of a problem solving process and to evolve over time through the annual review procedure. The first step of the process would be to satisfy the charter content requirements. The subsequent continuous process would be to review and amend the plans so that they would also satisfy the function requirements.

This conflict is characteristic of the tension that exists between the planning department and the city council. Dispute persists not only as to particular provisions but over the basic planning philosophy underlying the development plans. The city council largely approved of the Bosselman Report and most of its suggestions are incorporated in the current development plans. For example, three social impact sections are currently included as well as an amendment procedure section. The Department of General Planning vigorously opposed in-

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[73] The report stated that "[i]f there was one factor that the Charter Commission emphasized in its report it was that the new charter would not be limited to physical planning." *Id.* at 37.

[74] Review of the Bosselman Report, *supra* note 70.

[75] The Department of General Planning, at various places in its review, referred to the Bosselman Report as "totally lacking in foundation and justification," "purely conjectural," *id.* at 47, and resorting to "shallow accusations," *id.* at 13.

[76] *See supra* text accompanying note 67.

[77] The Bosselman Report's interpretation of the Charter is that the whole planning process is to be completed with adoption of the first DPs [development plans]. The DGP [Department of General Planning] interpretation is that the Charter Commission envisioned "the planning process as a continuous problem solving activity of which the General Plan is but one transitional part.

It must be noted that in describing the process, the commission "has adopted the systems argument." This particular approach is a relatively new process and "most efforts are still experimental" and in order to implement it requires the development of each component part moving from the general to the particular or from policy to implementation planning. To be precise, we have taken the General Plan's objectives and policies and moved toward the next increment of the systems approach, i.e., the DPs.

Review of the Bosselman Report, *supra* note 70, at 3-4 (footnotes omitted).

clusion of all those sections. The result of this conflict in these two areas are that the social impact sections, though present in the development plans, are basically inert and the amendment procedures provided by the development plans are largely supplemented by duplicative administrative procedures. Perhaps the greatest philosophical dispute however, relates not to the particular content or timing of the coverage of the development plans but to the basic planning scheme itself.

2. *The Case of the Disappearing Functional Plans*

One of the intriguing aspects of the process which led to adoption of the development plans is the disappearance of agency functional plans. Such plans, although much heralded, have failed to materialize. The Department of General Planning espoused a fundamentally different view of the planning process than we now see in Honolulu. This view consisted of a four-step planning process comprised of: the general plan, eight development plans, six functional plans, and the budget process.[78] The department defined functional plans as "precisely how, when and where we plan to implement the schemes of the development plan"[79] and further described the plans as follows:

> Functional planning contains two forms of plans:
> a. a broad design plan which is the long-range plan for the functional area.
> b. a plan which is concerned with intermediate-range planning and programming of resources.
> These plans, which are not required by the Charter, are intermediate rather than final products of the system. They are the only set of major plans which are not formally adopted. They are essential since they provide the technical basis for the development plan and bridge the technical gap between the development plan and the General Plan.[80]

After formulating the development plans which would establish the land use patterns for the island, the planning department wanted the agencies to take the plans and determine the proper infrastructure in the functional planning

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[78] Dep't of Gen. Plan., City and County of Honolulu, Diagram—The Four-Step Planning Process (April 1980) (unpublished handout, available from the Department of General Planning and also appended to the Bosselman Report, *supra* note 64).

[79] *Id.* "The term, functional planning, refers to planning which occurs in a functional area, such as transportation, recreation, and water supply." DESIGN OF DEVELOPMENT PLANS, *supra* note 53, at 18. Functional plans "provide the technical basis for the development plans." *Id.*

[80] Dep't of Gen. Plan., City and County of Honolulu, Design of Development Plans—Summary 1 (undated) (unpublished report available in Municipal Reference Library, City and County of Honolulu).

phase.[81] While agency functional plans are not a charter requirement, the department interprets the establishment of functional plans as an inherent duty assigned to agencies under the charter.[82]

The importance of the disappearing functional plans is that the department and the city council were and perhaps still are at odds over what should be contained in the development plans. The department basically wanted technical information to be in the functional plans, which as informally adopted plans, would not be subject to the procedural constraints of ordinances or resolutions, especially in the amendment process.[83] The council, on the other hand, envisioned a charter based three-step planning process (general plan, development plans and the budget process) with much of the material in the proposed functional plans absorbed into the development plans.

These opposing views collided with the oft-cited Bosselman Report. Bosselman directly attacked the entire premise of functional plans. He found that such plans were in violation of the Revised Charter, would reduce citizen participation in the planning process, and would usurp the functions allocated to the budget and planning departments.[84] The Department of General Planning vehemently contested Bosselman's conclusions, fearful perhaps that it was about to lose a pillar of its planning system.[85]

At this juncture, the corporation counsel gave an opinion that indeed, functional planning, as envisioned by the department, was outside of the charter and likely to usurp the central role assigned to the development plans.[86] A major problem noted was that functional plans were to be promulgated by agencies under their rule making power which did not require submittal to the city council. Such a process, it was argued, would not be in accord with the policy orientation of planning.[87] Policy, it was observed, was the city council's primary area of concern. The corporation counsel finally indicated that functional plans would be acceptable only if they were formulated after adoption of the development plans and were either attached to or incorporated by reference

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[81] Interview with Gene Connell, Branch Chief, Community Planning Branch, Department of General Planning and Keith Kurahashi, Area Planner, Department of General Planning in Honolulu (March 21, 1984) [hereinafter cited as Interview with the Department of General Planning].

[82] "According to DGP [Department of General Planning], although functional plans are not specifically mandated by the charter, there is a clear mandate for each agency to perform certain duties. The department interprets one of these duties to be the preparation of a functional plan." Area Development Plan Implementation, *supra* note 63, at 14.

[83] Interview with the Department of General Planning, *supra* note 81.

[84] Bosselman Report, *supra* note 64, at 48-49.

[85] Review of the Bosselman Report, *supra* note 70.

[86] Memorandum from Dep't of the Corporation Counsel to the Planning Commission, City and County of Honolulu M 80-48 at 3-6 (Sept. 30, 1980) (discussed development plans and the Bosselman Report).

[87] *Id.* at 6.

into the development plans.[88]

The result of the above controversy was that agency functional plans, as a separate planning process, failed to materialize. Accordingly, most of the technical information which was to be provided for in functional plans, became a part of the development plans. Currently, the bulk of this information can be found in the public facility maps, identification of public facility sections and sequencing section of the development plans. The former functional planning provisions, however, are incorporated in the development plans in a piecemeal fashion. The department's vision of a comprehensive functional planning system is therefore not reflected in the development plans.[89]

In summary, major philosophical disputes arose in the formulation of the development plans. Conflicts arose concerning what was to be contained in the plans, when the plans were to address non-physical planning issues and whether the plans were to be supplemented by agency functional plans. The planning department seemed to have lost in all these contested areas. Thus, rather than a pure systems approach to planning, the current development plans reflect something of a systems-end product combination.[90] The development plans contain considerably more procedural detail than desired by the department, and have addressed issues which the department would have preferred to defer until later in the planning process.[91]

The development plans represent not only the result of a legal and planning process, but a political process as well. Since so much of the written commentaries on the development plans are based upon interviews with various agencies and the city council, or consultants' reports, it should be kept in mind that each body may have an interpretation of the plans suited more to their objectives than a neutral reading of the law.

If it is difficult to legally analyze a planning based system, it is doubly difficult for lay persons to understand, let alone apply, a planning based system cast in legal form. Planning and legal theories merge in the development plans. While planners and attorneys may be comfortable with their own professional means of expression and basic assumptions, the public is generally untrained in and overwhelmed by these issues.[92]

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[88] *Id.*

[89] Interview with the Department of General Planning, *supra* note 81.

[90] *Id.*

[91] *Id.*

[92] One research group on the social aspect of the development plans found that:

> [T]he publics' [sic] awareness of the Development Plan Program was very low. Also, much of the information which is available to the people who are aware of the Development Plan tends to be meaningless. The planning concepts are expressed in the language of the planners and architects. An East Honolulu resident told us . . .
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> "They do their best to make you feel like a dummy when you ask any questions at

Moreover, the actual meaning of development plan provisions often lies far beyond the language or term of art used in the text. Thus, even if a person understands the language of a provision, the intent may yet elude him.[93] Different agencies and political bodies have individually oriented notions of what the development plans represent and "[d]epending on the reader and his purposes a variety of different and conflicting interpretations can be made."[94]

C. *Form and Content*

The development plans consist of three parts: common provisions applicable to all eight geographic areas; special provisions for each area; and a land use map and a public facilities map for each area.[95] Each development plan contains the common provisions text. The common provisions comprise a twenty-six page document which applies to the entire county. The aspects of the development plans which are of primary legal interest (i.e. implementation mechanisms) are found almost exclusively in the common provisions.

The special provisions provide specific land use details. They describe the area covered by the particular development plan and its characteristics, and pro-

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their meetings. That's what they are trained to do. And their stuff is written in a language only they can understand."

Fund Pacific Associates, Task 2 Report—Preliminary Social Impact Management System 26 (Feb. 25, 1980) (unpublished report available in Municipal Reference Library, City and County of Honolulu).

In all fairness, the author of this survey found the Department of General Planning most willing to explain the development plans. Nevertheless, the task of understanding the development plans which faces a lay person is formidable. In the first place, trying to gather materials on the plans is very difficult. Most available literature can be found in the Municipal Reference Library or can be obtained from the Department of General Planning. Once literature is obtained however, it becomes apparent that there was no overall organization in the formulation of the plans. The plans evolved piece by piece, with contributions from many sources. Finally, it seems, as in early religions, that the real flavor of the development plans is found in the "oral tradition"—stories recounted by various members of the city government.

[93] "The problem in interpreting the Development Plans lies in determining the true intent behind the various statements. Unfortunately, what is written cannot always be literally translated and, where it appears that it can, there exists a risk for misinterpretation." Wanket, Smith & Hosoda, Land Use Management Consultants, Development Plan Impact on Zoning 25 (1981) (unpublished report available in Municipal Reference Library, City and County of Honolulu). This report also found that "[t]he statements incorporated into the Development Plan cannot be singularly interpreted but must, instead, require a close dialogue between the Department of General Planning and the various agencies expected to implement the various proposals. *Id.* at 27.

[94] *Id.* at 11.

[95] *See* Honolulu, Hawaii, Ordinance No. 83-25 (June 8, 1983), the development plan for the primary urban center.

vide area specific details for design considerations and development priorities.[96] For example, specific height controls are provided by the special provisions while general height controls are established by the common provisions. The land use map and public facilities maps depict the boundaries, land use patterns, and locations of various facilities and systems within a development plan area.[97] The maps are an excellent way to readily visualize the current and planned uses of land and supporting public facilities. Since the major aspects of the development plans are contained in the common provisions, the remainder of this article will focus on them.

In the current annual review process, the chief planning officer has proposed several amendments to the common provisions of the development plans,[98] one of which is designed to bring the common provisions of several development plans into uniformity.[99] The development plans for the Primary Urban Center and Ewa area were the first plans to be adopted and were subsequently amended on June 8, 1983.[100] The plans for the remaining areas, also known as the "outer six" plans, were adopted on May 10, 1983.[101] The two groups of common provisions are not identical and many of the proposed amendments are designed to create a standard set of provisions. It should be noted, though, that the differences between the provisions are relatively minor and do not affect application of the plans.

Once uniformity is realized, the chief planning officer has proposed to delete the common provisions from the body of the eight development plans.[102] The common provisions would then be unified and adopted as a separate ordinance applicable to all eight development plan areas.[103] The reasons for this proposed change highlight some of the problems inherent in the existing system:

> The most important [reason] is that a Common Provisions ordinance would provide *a place* in the Development Plans *for islandwide issues*. It makes possible the inclusion in the Development Plans of the essential comprehensive planning ingredient which may be out of place or neglected when issues are addressed only area by area.
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> The Common Provisions ordinance would provide a *readily identifiable place for principles and standards that are applicable to all Development Plan areas*. This

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[96] *Id.* § 14-16.

[97] *See infra* note 120.

[98] *See* Dep't of Gen. Plan., City and County of Honolulu, Proposed Amendments to the Development Plan Common Provisions 1983-84 (handout available from the Department of General Planning) [hereinafter cited as Proposed Amendments].

[99] *Id.*

[100] *See supra* note 8.

[101] Proposed Amendments, *supra* note 98, at 1.

[102] *See* Proposed Amendments, *supra* note 98.

[103] *Id.* at 12-13.

> minimizes the potential for conflicting principles and standards among Development Plan areas. A Common Provisions ordinance would also help reduce the confusion and unnecessary duplication of redundant statements repeated eight times, once for each Development Plan area.[104]

While action on the standardization and unification proposals is pending, it seems likely that the basic intent of the proposals will eventually be adopted and implemented.[105] For purposes of this survey, the common provisions of the Primary Urban Center development plan as amended on June 8, 1983 will be referred to in the text and footnotes unless otherwise indicated.[106] This is appropriate given that the Primary Urban Center is the most populated part of the state and the area with the greatest development.[107]

Before commencing a detailed analysis, it should be noted that the common provisions of the development plans cover a wide range of issues, many of which relate to details of general planning (e.g. maximum heights and densities), as opposed to implementation (e.g. interface of the development plans with zoning, amendment procedures and sequencing priorities). The implementation aspects of the development plans are naturally of paramount importance to the legal community. In depth consideration of those aspects of the development plans which relate to planning per se, however, is outside the scope of a legal analysis. Such planning factors will be briefly reviewed for descriptive purposes rather than to evaluate their planning propriety or desirability.[108]

Within the general planning area, there are two main types of common provisions. The first provides statements of design principles while the second concerns identification of various land uses and public facility placements.

Section 3 of the common provisions establishes twelve land use categories: residential; low-density apartment; medium-density apartment; high-density apartment; commercial; industrial; resort; agricultural; public and quasi-public; parks and recreation; preservation; and military.[109] The next two sections estab-

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[104] *Id.* (emphasis added).

[105] The city council appears to be willing to accept the proposal, and should act favorably on it this year. A unified set of common provisions would provide an opportunity for the city council to act upon its desire to make the development plans more policy oriented. Interview with the City Council, *supra* note 15.

[106] Honolulu, Hawaii, Ordinance No. 83-25 (June 8, 1983).

[107] *Id.* § 14.

[108] In this respect, a statement made by the corporation counsel is noteworthy:

> It would be presumptuous for us to comment upon either Mr. Bosselman's or the DGP [Department of General Planning] approach to good planning. We will therefore refrain from rendering value judgments as to whether the proposed DPs [development plans] represent "good planning" or "bad planning."

Memorandum, *supra* note 86, at 2.

[109] Honolulu, Hawaii, Ordinance No. 83-25 § 3. (June 8, 1983). Many of the land use areas

lish design principles and controls. Section 4 pertains to urban design principles and controls which "outline the desired three dimensional implications of the land use pattern depicted on the land use map to be implemented through public and private actions."[110] The urban design principles and controls "shall be applied by all City agencies in the performance of their powers, duties and functions as related to both public and private developments."[111] Urban design principles and controls are established for public views, open space, vehicular and pedestrian routes, general height controls, energy efficiency in development, existing built-up, single-family residential areas, and mixed use areas.[112]

Section 5 sets forth general principles and controls for the establishment of parks, recreation and preservation systems.[113] Such systems "shall consist of existing and future community-based parks and recreation sites, existing and future state and county-based parks and recreation sites, and preservation areas."[114] The parks and recreation subsection distinguishes between state and county versus community-based parks and recreation sites. In the state and county area, provisions are made for preservation/forest areas, significant natural or historical parks and sites, state and county regional parks, beach/shoreline parks, beach/shoreline rights-of-ways, zoos and botanical gardens, and golf courses.

The community-based system appears most relevant to developers. It requires that suburban and new development areas include at least two acres of land per thousand residents for open space and recreation purposes. The same two acres per thousand persons is required in built-up areas "with inadequate recreational opportunities and insufficient suitable sites for future recreational development."[115] However, in such areas, the recreational or open space land may be "made available within a reasonable distance of the immediate service area."[116]

Sections 3, 4 and 5 of the common provisions are statement oriented. The next three common provisions are concerned with identification of various land use factors in the development plans.

The city charter provides that the development plans shall identify areas, sites and structures of (1) historical, archeological, architectural or scenic significance; (2) a system of public thoroughfares, highways and streets; and (3) the location, relocation and improvement of public buildings, public or private facilities for

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may be further defined or limited by the special provisions of the individual development plans.

[110] Honolulu, Hawaii, Ordinance No. 83-25 § 4. (June 8, 1983).

[111] *Id.*

[112] *Id.*

[113] *Id.* § 5.

[114] *Id.*

[115] *Id.*

[116] *Id.*

utilities, terminals and drainage.[117] The development plans comply with this mandate through sections 6, 7 and 8 of the common provisions.

Section 6 identifies the principal areas, sites and structures of historical, archelogical or architectural significance by reference to the National and Hawaii Registers of Historic Places.[118] Additionally, the development plans allow other areas to be so identified by the county. To further implement the general plan, the development plan provides that:

> The continued use, enhancement or preservation of such areas, sites and structures shall be incorporated or promoted in any applicable action by the City. Such actions shall be permitted in all areas designated for any use on the land use map. Adjacent development shall complement registered properties with appropriate building facades, setbacks, scale, heights and compatible uses.[119]

The next two sections identify public transportation systems, buildings and facilities, in conjunction with the development plan land use maps and public facilities and public facilities maps.[120] As will be discussed in the next section, the Revised Charter requires that "[n]o public improvement or project . . . shall be initiated or adopted unless it conforms to and implements the development plan for that area."[121] It has been speculated that the two public improvement identification sections of the development plans may be related to

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[117] REVISED CHARTER, *supra* note 4, § 5-409.

[118] Honolulu, Hawaii, Ordinance No. 83-25 § 6. (June 8, 1983).

[119] *Id.*

[120] *Id.* §§ 7-8. The maps serve many functions, uppermost of which are defining the boundaries and land use patterns of each development plan area and identifying public facilities and systems. The maps are described by § 17 of the development plans as follows:

> The land use map defines the boundary of the [relevant development plan area]. . . . It depicts a land use pattern that is consistent with the objectives and policies of the general plan and is used as a basis for public facility planning. It shows the existing and planned locations of [many land uses]. . . .
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> . . . .
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> The . . . development plan public facilities map, together with the land use map, identifies a system of public thoroughfares, highways and streets, and the location, relocation and improvement of public buildings, public or private facilities for utilities, terminals and drainage. . . . The map is intended to provide notice of the approximate site and corridor locations of future public facilities. . . .
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> . . . .
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> The map distinguishes between facilities planned for commencement of land acquisition and/or construction within the next six years, and facilities planned for commencement of land acquisition and or construction beyond the next six years.

The development plans also provide that: "[I]n case of any conflict between the text of this development plan and either of the maps attached hereto the provisions of the text shall control. Honolulu, Hawaii, Ordinance No. 83-25 § 2.8 (June 8, 1983).

[121] REVISED CHARTER, *supra* note 4, § 5-412.1.

this charter requirement. Under this theory, identification is a means of conclusively demonstrating that a public improvement "conforms to and implements" the appropriate plan, because identification has made it a part of the plan.[122]

A system of public thoroughfares, highways and streets is identified by section 7.[123] The section provides for the existing system to be shown on the development plan land use map and for planned improvements to the system to be shown on the public facilities map. Flexibility is incorporated in the section to avoid interpretation of the positioning of the systems on the maps as exact locations.[124]

The location, relocation and improvement of public buildings, public or private facilities for utilities, terminals and drainage are identified by section 8.[125] As in the previous section, existing facilities are shown on the development plan land use map while planned new facilities and improvements to existing facilities are shown on the public facilities map. Again, flexibility is provided as to the exact positioning of the facilities.

The section states numerous principles and policies. It provides that public facilities should, where appropriate, generally be screened from incompatible uses by buffer areas or landscaping.[126] Moreover, public buildings which generate substantial traffic should be centrally located and all public buildings must strive for energy efficiency. Energy efficiency is also given priority in the location of public or private facilities for utilities. Terminals, which include airports and harbors, are also identified by the section. The main consideration about airports is accident potential and noise hazards—a new airport cannot be placed where it would create these and new development cannot occur where these are already present.[127]

There was considerable controversy during the drafting of the development plans as to whether it was necessary to identify future public facilities. This primarily concerned earlier versions of sections 7 and 8. Both the Bosselman Report and the corporation counsel argued that the Revised Charter required the development plans to include the proposed future locations of major public transportation systems and public utilities.[128] The Department of General Planning strenuously objected to this contention, finding that the Revised Charter made no mention of future public utilities.[129] It argued that:

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[122] DESIGN OF DEVELOPMENT PLANS, *supra* note 53, at 37-39.

[123] Honolulu, Hawaii, Ordinance No. 83-25 § 7 (June 8, 1983).

[124] *Id.*

[125] *Id.* at § 8.

[126] *Id.*

[127] *Id.*

[128] Bosselman Report, *supra* note 64; Memorandum, *supra* note 86, at 3.

[129] Review of the Bosselman Report, *supra* note 70, at 10.

> Near future needs of facilities have been shown extensively on the Development Plans and conform to the requirements of the City Charter accordingly. Annual reviews of the DPs will keep abreast with projected public facility requirements as detailed planning by the respective agencies charged with a planning by the Charter are carried out.[130]

The current development plans identify new planned facilities and improvements to public facilities on the public facilities map. Thus, any charter requirement appears to be fully satisfied. It should be noted, however, that planned improvements to minor streets and planned new facilities of a minor nature are *not* shown on the public facilities map.[131] To avoid uncertainty in this respect, the proposed amendments to the development plans add a definition for major and minor streets and elaborate on the nature of planned major facilities.[132]

The general planning sections of the development plans control land use to the extent that they define and identify components of the land use systems, but for the most part are legally neutral. The implementation and application mechanisms for the plans, however, provide for the crucial every day operation and application of the development plans.

IV. IMPLEMENTATION SECTIONS OF THE DEVELOPMENT PLANS

The implementation aspects of the development plans invite the greatest legal scrutiny. They describe how the development plans are to be applied to the existing Honolulu land use system, most of which has become subordinate to the plans. As such, developers must not only look to the development plans to determine the permitted use of a particular piece of land (general planning) but also to determine the amendment procedures necessary to change the permitted use, what growth is planned for the area via the sequencing element and what social analysis must precede a change. While general planning considerations are typically straightforward, many of the implementation aspects of the development plans involve a geometric progression of complexities (the octopus analogy revisited).

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[130] *Id.* at 11-12.

[131] Honolulu, Hawaii, Ordinance No. 83-25 §§ 7, 8 (June 8, 1983).

[132] Proposed Amendments, *supra* note 98. The proposed § 1.11 defines a major street as "a freeway, expressway, arterial, or collector street, whether publicly or privately owned, which is primarily intended to serve through traffic or the circulation of traffic between different communities and/or portions of a community. In the case of arterial and collectors street, access to abutting properties may also be permitted." A minor street is defined by the proposed § 1.12 as "a street other than a major street which is primarily intended to provide access to abutting property and serve local traffic to and from these properties."

A. Control of City Functions

Section 2 of the common provisions covers the areas of control of city functions, zoning, interim development controls, amendment controls and development plan conformance guidelines. The Revised Charter provides that "[n]o public improvement or project, or subdivision or zoning ordinance shall be initiated or adopted unless it conforms to and implements the development plan for that area."[133] Section 2.1 of the development plans duplicates this language and adds that a *finding* of conformance must accompany such initiation or adoption.[134]

According to the chief planning officer, the language of section 2.1 "is intended to be administered literally."[135] The chief planning officer has given the example that "subdivisions which conform to the existing zoning but are in conflict with the Development Plan are to be denied."[136] Thus, the development plans place great limits on the power of the city to initiate or adopt public improvements and subdivision or zoning ordinances.

An important exception to the application of section 2.1 applies to federal aid projects. Pursuant to Revised Charter section 5-412(3):

> In case of a conflict between any federal aid project and the general plan or the development plans, the council, after public hearings, may set aside the general plan or development plans to the extent that such conflict prevents the obtaining or the granting of federal aid on any such project or the prosecution of work thereunder.[137]

The development plans also provide for this exception upon a finding of exemption under the Revised Charter.[138]

Early last year, the corporation counsel issued an opinion as to the application of this provision to a proposed bus facility within the Campbell Industrial Park.[139] The City and County of Honolulu was attempting to obtain federal funding for the bus facility through the use of Urban Mass Transportation Administration section 3 funds. Receipt of the funds depended upon prompt action. Under the development plan, however, the project would be required to be a part of the annual review process. This process could take up to fifteen

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[133] REVISED CHARTER, *supra* note 4, § 5-412(3).

[134] Honolulu, Hawaii, Ordinance No. 83-25 § 2.1 (June 8, 1983).

[135] Wanket, Smith & Hosoda, *supra* note 93, at 12.

[136] *Id.*

[137] REVISED CHARTER, *supra* note 4, § 5-412(3).

[138] Honolulu, Hawaii, Ordinance No. 83-25 § 2.1 (June 8, 1983).

[139] Memorandum from Dep't of the Corporation Counsel to the City Council, City and County of Honolulu M 83-3 (Jan. 11, 1983) (Campbell Industrial Park Heavy Maintenance Bus Facility).

months and the receipt of funds was deemed to be jeopardized. The corporation counsel, while cautioning that the "opinion should not be stretched to defeat the purpose and policies behind the development plan process,"[140] stated that the requirements could be dispensed with "if the receipt of federal aid for a public project will be jeopardized by strict adherence to the development plan requirements."[141]

While the Revised Charter appears to limit direct control of the development plans to traditional land use areas (initiation or adoption of public improvements and subdivision or zoning ordinances), the development plans themselves provide that "[t]he performance of prescribed powers, duties and functions by *all* City agencies shall conform to and implement the policies and provisions of this development plan."[142] This language extends the control of the development plans to all city functions, including those outside traditional land use areas.

In summary, the development plans affect all city functions (e.g., planning, zoning, utilities, transportation). Performance of such functions must conform to and implement the appropriate development plan or plans. Additionally, in the land use area, a finding of conformance must precede city action.

The development plans assign city agencies the considerable responsibility of evaluating their actions in terms of conformance to and implementation of the plans. To guide agencies, section 2.6 of the development plans provides several factors to be taken into consideration in determining whether a contemplated action is consistent with the development plans.[143] This provision notably ties the determination of plan conformance to zoning, social impact and sequencing, which are other important implementation aspects of the development plans. Thus, the development plans impose a weighty responsibility on county agencies to initially be aware of development plan criteria and thereafter to apply the criteria in all agency decisions and actions. The requirement of a finding of conformance prior to agency action imposes research and reporting duties. Often, these duties may be shifted to the private parties who request agency

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[140] *Id.*

[141] *Id.*

[142] Honolulu, Hawaii, Ordinance § 2.1 (June 8, 1983) (emphasis added). One report states: "[a]s a tool that 'represents a relatively detailed scheme for implementing and accomplishing the development objectives and policies of the General Plan,' the Development Plans will have an impact on the administrative functions of most city departments." Wanket, Smith & Hosoda, *supra* note 93, at 76.

[143] Honolulu, Hawaii, Ordinance No. 83-25 § 2.6 (June 8, 1983). The factors include: 1) consistency with the development plan land use maps and applicable zoning ordinances; 2) consistency with the development plans' general height controls; 3) consistency with Population Objective C of the general plan; 4) consideration of social impact as required by section 10 of the development plans; development, and the planned sequencing of public facilities pursuant to section 9 of the development plans.

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B. Impact on Zoning

Although language in the Charter Commission's report and the general plan warn that the development plans should not be confused with zoning ordinances,[144] the line between planning and zoning is not always apparent. Useful guidelines distinguishing the two are provided by only a few courts.[145] For example, the Supreme Court of Kentucky explained that planning generally refers to the systematic development of an area while zoning relates primarily to use regulation.[146] The Supreme Court of Oregon has found planning and zoning to be intimately related—the comprehensive plan provides policy determinations and guiding principles while zoning provides the detailed means to effect the plan.[147]

In Hawaii, the general plan embodies broad policy determinations and guiding principles while the development plans and zoning ordinance together provide the detailed means of giving effect to those principles. The difference seems to be a matter of degree. The development plans are "relatively detailed" while zoning ordinances are highly detailed. The zoning ordinances, however, are subservient to the development plans and are required by the city charter to "contain the necessary provisions to carry out the purpose of the general plan and development plans."[148] At the same time, the zoning ordinances are central to

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[144] Final Report of the Charter Commission, *supra* note 36, at 24; General Plan, *supra* note 38, at 11.

[145] *See* 1 R. ANDERSON, *supra* note 48, § 1.03.

[146] *See* Seligman v. Belknap, 288 Ky. 133, 135, 155 S.W.2d 735, 736 (1941), where the court stated:

> 'Planning' and 'Zoning' are closely related, for, in a general way, planning embraces zoning and zoning may not entirely exclude planning. However, they do not cover identical fields of municipal endeavor for the protection of the common interest and the promotion of general welfare. Broadly speaking, 'planning' connotes the systematic development of an area with particular reference to the location, character and extent of streets, squares, parks and the kindred mapping and charting. 'Zoning' relates to the regulation of the *use* of property—to structural and architectural designs of buildings; also the character of use to which the property or the buildings within classified or designated districts may be put.

[147] *See* Fasano v. Board of County Comm'rs, 264 Or. 574, 582, 507 P.2d 23, 27 (1973), where the court observed that:

> Although we are aware of the analytical distinction between zoning and planning, it is clear that under our statutes the plan adopted by the planning commission and the zoning ordinances enacted by the county governing body are closely related; both are intended to be parts of a single integrated procedure for land use control. The plan embodies policy determinations and guiding principles; the zoning ordinances provide the detailed means of giving effect to those principles.

[148] REVISED CHARTER, *supra* note 4, § 6-906.

the realization of the objectives and policies of the development plans.

In essence, the general plan provides direction and the development plans broadly implement the plan. The zoning ordinances provide the fine details necessary to actually implement the development plans. The zoning ordinances and the development plans must maintain conformance with the next higher planning tool, the development plans and the general plan respectively.

1. Conflicts Between the Development Plans and Zoning

The development plans were adopted with the Comprehensive Zoning Code, the zoning ordinance, already in effect. The Code was adopted in 1969 and was based upon the provisions of the general plan in effect prior to the 1973 charter revision. As such, the Code and the recently adopted development plans are not coordinated planning components. Initial conflicts between the development plans and the zoning ordinances are to be expected and, in a major study, were predicted to be considerable.[149] The general rule is that there must be consistency between the development plans and applicable zoning.[150] The development plans provide for this initial conflict by giving the zoning ordinances precedence until they are amended.[151]

Conformity, however, is not required to be absolute. Where the development plans are more restrictive, a mechanism for bringing the zoning into conformance is provided, along with interim development control measures.[152] Since no mention is made of the general situation in which the development plans are less restrictive than the zoning ordinance, it must be assumed that more restrictive zoning could continue in effect indefinitely. In other words, the development plans permit, through omission, more restrictive zoning than specified by the provisions of the development plans. In fact, in one instance, the development plans specifically permit more restrictive zoning.[153]

The Department of General Planning acknowledges that there is no formal development plan mechanism for easing zoning ordinances which are more restrictive than the applicable development plan.[154] While there are instances where the Department of Land Utilization has taken the initiative in amending

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[149] Wanket, Smith & Hosoda, *supra* note 93, at 71.

[150] D. Callies, *supra* note 2, at III-19.

[151] Honolulu, Hawaii, Ordinance No. 83-25 § 2.2 (June 8, 1983), which states:

> Notwithstanding the land use designations and provisions of this development plan, existing zoning ordinances applicable to this development plan area shall continue to regulate the use of land within demarcated zones and set detailed standards for height, bulk, size and location of buildings.

[152] *See infra* notes 158-61.

[153] Honolulu, Hawaii, Ordinance No. 83-25 § 4.4 (June 8, 1983).

[154] Interview with the Department of General Planning, *supra* note 81.

such zoning ordinances to conform with the development plans, the Department's general policy is to await requests for zoning changes by affected property owners.[155] Thus, the burden is effectively shifted to the public to initiate zoning changes where the development plans are less restrictive than the zoning.

Where the development plans are more restrictive than the zoning, the Department of Land Utilization and the planning commission must respectively present a conforming zoning ordinance and recommendations within set deadlines.[156] Within 135 days from the date of adoption or amendment of a development plan, the city council should receive recommendations from the planning commission as to ordinances necessary to amend the zoning ordinances.[157] There is no time limit, however, provided for city council action. Until the city council adopts appropriate zoning ordinance amendments, the existing zoning would control. Thus, the existing zoning ordinances could effectively preempt the development plans.

To provide for this situation, and in recognition of the time that will be necessary to formulate and adopt conforming zoning ordinances, the development plans provide that the Department of Land Utilization must prepare and submit to the city council, appropriate interim development controls to regulate development until the zoning is brought in conformance with the development plans. This provision also applies "where public facilities are inadequate to service the types of land uses permitted under the applicable zoning ordinances."[158] In these cases, adopted interim development controls would apply "until adequate service levels can be achieved."[159]

A possible way for a developer to obtain concessions from a county government is to provide a public facility infrastructure at his own expense. It is arguable that a developer could insist that interim development controls must be eased if he follows such a course of action. If the controls were imposed because of the inadequacy of public facilities to service *permitted* uses, the interim development controls must be eased.[160] If the controls were imposed because the development plans are more restrictive than zoning, the outcome is

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[155] *Id.*

[156] Honolulu, Hawaii, Ordinance No. 83-25 § 2.2 (June 8, 1983).

[157] *Id.* The section states that:

> [W]here the land use map designations or provisions of this development plan are more restrictive than applicable zoning ordinances, the Department of Land Utilization shall within 90 days of the date of approval or amendment of this development plan prepare and submit to the Planning Commission such ordinances as are necessary to bring the applicable zoning ordinances into conformance with this development plan. The Planning Commission shall forward its recommendations to the Council within 45 days.

[158] *Id.* at § 2.3.

[159] *Id.*

[160] The development plans specifically state that "interim development controls . . . regulate development . . . until adequate service levels can be achieved." *Id.*

less certain.

Where the development plans are more restrictive than zoning, there may be a planning reason beyond the mere lack of an appropriate infrastructure. For example, it may not be part of the city's long term plan for growth to occur in a particular area until some time in the future. In this situation, provision of private utilities would not warrant easing of the interim development controls. Thus, the outcome of the issue may largely depend upon the reason why the development plans are more restrictive than zoning. A discussion of public facilities and the sequencing process follows in Part D., *infra*.

Interim development controls have been adopted for all eight development plan areas.[161] They are basically identical ordinances, which were adopted "[t]o protect the public interest and welfare and to prevent a race of diligence . . . during the interim period while the rezoning is being considered, ..."[162] The ordinances regulate the processing of all zoning permits and applications and require that land use actions conform to the applicable development plans.[163]

As noted earlier, the development plans set firm deadlines for submission to the city council of conforming zoning ordinances and interim development controls. But the council itself is given no time mandate. Less restrictive zoning will

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[161] *Cf.*, Honolulu, Hawaii, Ordinance No. 83-21 (May 26, 1983), the interim development control for the North Shore development plan area. As stated by the Hawaii Supreme Court:

> [T]he program of interim development control of land development by the enactment and operation of IDC ordinances was a program well established, widely used, and universally accepted in the City and County of Honolulu.

Life of the Land v. City Council of Honolulu, 61 Hawaii 390, 422, 606 P.2d 866, 886 (1980). Interim development controls have been used in Honolulu since the early 1970s when controls were enacted for Waikiki. Wanket, Smith & Hosoda, *supra* note 93, at 71. The interim development controls under the development plans, however, differ from these earlier types of controls:

> Previously, interim development controls were established for purposes of reducing the potential for development, through substantial reductions in building heights, in areas undergoing planning studies. The use regulations, however, were not affected. Under the Development Plans, interim development controls take on a new dimension and appear to extend to all facets of the zoning code which conflicts with the standards and principles of the Plan including use regulations.

Id.

[162] Honolulu, Hawaii, Ordinance No. 83-21 § I.D. (May 26, 1983). As stated by one land use authority:

> IDC's represent a form of interim zoning which has the effect of "freezing" otherwise-permitted development in the area so mapped (it is thus very nearly a form of overlay zoning) for a period roughly corresponding to the planning and reclassification of land into another zone. Its principal purpose is to prevent a "race of diligence" by property owners and developers to commence development in accordance with a presently-existing zone classification—presumably less onerous—which the *new* classification would prevent.

D. Callies, *supra* note 2, at III-49, III-50.

[163] D. Callies, *supra* note 2, at III-49, III-50.

preempt the development plans during this interim. This concern led the drafters of the development plans to initially require mandatory passage of interim development controls where the provisions of the development plans were more restrictive than the applicable zoning ordinances. The 1980 version of the Primary Urban Center Development Plan stated that: "[a]ll zoning shall be in conformance with the Development Plan within a reasonable period."[164] Under the current development plans, the city council is only required to *consider* zoning amendments and adoption of interim development controls. Thus, the preemption issue still exists.

Despite the statutory silence on the subject, there is authority that existing zoning must conform with the adopted plans within some reasonable time.[165] A major decision in this area is *Baker v. City of Milwaukie*.[166] In *Baker*, the Oregon Supreme Court considered the required consistency between a comprehensive plan and zoning. The case involved allegations that the City of Milwaukie had adopted a comprehensive plan but had not taken steps to amend its zoning ordinances to conform to the plan for more than three years. In the meantime, the city granted building permits under the existing zoning which permitted more intensive development than allowed by the plan. In particular, permits were issued for the construction of a 102 unit complex which would result in a density less than the maximum allowed by the zoning ordinances but considerably more than allowed by the comprehensive plan. The city argued that it had no obligation to conform its zoning to the comprehensive plan. The court rejected this position and held that the "plan" must be given preference over conflicting prior zoning.[167]

Baker involved zoning which allowed more intensive use than that prescribed by the comprehensive plan, i.e.: a higher living density. However, it is arguable that the case applies to both more or less restrictive zoning, for the court also held that "[u]pon passage of a comprehensive plan a city assumes a responsibility to effectuate that plan and conform prior conflicting zoning ordinances to it."[168] Thus, a real question is whether *Baker* applies to both zoning situations

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[164] Dep't of Gen. Plan., City and County of Honolulu, 1980 Development Plan Draft for the Primary Urban Center § 1-104 (1980) (available in Municipal Reference Library, City and County of Honolulu).

[165] *See* D. Callies, *supra* note 2, at I-20 which states:

> [S]ome commentators have suggested that all *existing* zoning must also accord with the new development plans, once adopted. This was the position taken by the Supreme Court of Oregon in 1975 when it interpreted legislation requiring that zoning be in accordance with a comprehensive plan of a much more general nature than here in Hawaii. (citations omitted).

[166] Baker v. Milwaukie, 271 Or. 500, 533 P.2d 772 (1975).

[167] *Id.* at 506, 533 P.2d at 776, (*quoting* Fasano v. Board of County Comm'rs, 264 Or. 574, 582, 507 P.2d 23, 27 (1973)).

[168] *Id.* at 514, 533 P.2d at 779.

or to more permissive zoning alone. It is apparent that one challenging zoning which is more restrictive than a comprehensive plan could argue that *Baker* is applicable. In dicta, however, the court qualified the applicability of its decision to other situations by noting that there are situations in which more restrictive zoning may be appropriate.[169]

In several subsequent cases, litigants have argued that land use decisions must be based upon the comprehensive plan rather than existing zoning where the zoning was more restrictive than the plan.[170] The courts have resisted this interpretation of *Baker*.

In *Marracci v. Scappose*,[171] the court stated that *Baker* "does not stand for the proposition that every land-use determination must at all times literally comply with the applicable comprehensive plan."[172] The court construed *Baker* to apply only to zoning ordinances which permit development more intensive than allowed by the comprehensive plan.[173] Following upon this line of reasoning, the court stated:

> [A] comprehensive plan only establishes a long-range maximum limit on the possible intensity of land use; a plan does not simultaneously establish an immediate minimum limit on the possible intensity of land use. The present use of land may, by zoning ordinance, continue to be more limited than the future use contemplated by the comprehensive plan.[174]

The *Marracci* court seems to hold that a city can maintain existing zoning ordinances which are more restrictive than a comprehensive plan, apparently without conditions. In other words, there should be no grounds for invalidating more restrictive zoning ordinances on the basis of a less restrictive comprehensive plan. Therefore, arguably, a city could maintain more restrictive zoning for legitimate growth control purposes.

An interesting variation of this issue was presented in *Pohrman v. Klamath*

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[169] The court stated that:

> This opinion deals only with the question of the effect of the enactment of a comprehensive plan on conflicting zoning ordinances. Of course, where the plan adopts general parameters of long term growth with a provision that the intensity of use or the density of living units shall not exceed a certain amount, a more restrictive zoning ordinance may be in accord with that plan.

Baker v. Milwaukie, 271 Or. 500, 510 n. 10, 533 P.2d 772, 777 n.10 (1975). This quotation supports the position taken by the development plans. The plans adopt general parameters of long term growth that limit use intensity and living density in certain areas.

[170] *See* Marracci v. Scappose, 26 Or. App. 131, 552 P.2d 552 (1976).

[171] *Id.*

[172] *Id.* at ____, 552 P.2d at 553.

[173] *Id.*

[174] *Id.*

County Commissioners.[175] There, a comprehensive plan and zoning ordinance were adopted in 1972. Both provided that a certain parcel of land was designated for agricultural and forestry use. The landowner requested a change of the land designation to allow for development of a recreational subdivision. Subsequently, the comprehensive plan designation was changed to permit such development. However, the zoning authority refused the request.[176]

The landowner cited *Baker* for the proposition that zoning must follow the comprehensive plan. The court first distinguished *Baker* as pertaining only to more permissive zoning. It next quoted dicta in *Baker* regarding the propriety of more restrictive zoning and stated that it understood *Baker* "to mean that there is no obligation imposed upon local governments to *immediately* make more restrictive zoning ordinances consistent with less restrictive comprehensive plans."[177] As emphasized in this quotation, the *Pohrman* court held that an *immediate* change was not required. It is arguable from this language, however, that a change may be required at some time in the future. The timing of required changes to the zoning ordinances is an important issue but is not provided for by the Honolulu development plans.

In *Baker*, the court addressed the conformance issue without discussing *when* conformance was actually required.[178] *Marracci* went further than *Baker* and specifically held that the timing issue is completely a matter for legislative judgment, subject only to review for patent arbitrariness.[179]

Thus, it appears justified for Honolulu's zoning ordinances to be more restrictive than its development plans. The development plans certainly satisfy the dicta of *Baker* which allows more restrictive zoning if the comprehensive plan espouses a long term program to reduce intensity and density. Such an interpretation would also be consistent with *Marracci* and *Pohrman*. Moreover, the city council does not appear to have a time constraint on bringing the zoning ordi-

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[175] Pohrman v. Klamath County Comm'rs, 25 Or. App. 613, 550 P.2d 1236 (1976).

[176] *Id.* at ____, 550 P.2d at 1239 (emphasis added).

[177] *Id.*

[178] Baker v. Milwaukie, 271 Or. 500, 533 P.2d 772 (1975).

[179] The court stated that:

> The applicable comprehensive plan contains no timetable or other guidance on the question of when more restrictive zoning ordinances will evolve toward conformity with more permissive provisions of the plan. In such a situation, we hold the determination of when to conform more restrictive zoning ordinances with the plan is a legislative judgment to be made by a local governing body, and only subject to limited judicial review for patent arbitrariness. In adopting a comprehensive plan, a governing body necessarily makes a great number of legislative and policy judgments about what the *future* use of land might and should be. It is just as much a legislative judgment when the local governing body is called upon to decide whether "the future has arrived" and it is therefore applicable to conform zoning with planning.

Marracci v. Scappose, 26 Or. App. 131, ____, 552 P.2d 552, 553 (1976).

nance into conformance. The timing of conformance is a legislative matter and courts applying *Marracci* would defer to legislative judgment.

In the situation where a comprehensive plan provides for a certain use of land at some point in the future—can the landowner or developer prompt an early or immediate consistent zoning designation of the land? In *Clinkscales v. City of Lake Oswego*,[180] the Oregon Appellate Court found that the timing of the rezoning is a discretionary matter.[181] Thus, the affected landowner in the case did not obtain an early multifamily residential designation and was required to await the action of the municipality.

Zoning which permits more intensive use of land than the comprehensive plan, however, must be brought into conformance. No known case, however, has provided a timetable for such conformance. The development plans provide for interim development controls which, if adopted *and* maintained, could effectively prevent more permissive zoning from usurping the plans themselves. Currently eight interim development controls are in effect and should preclude preemption of the development plans until appropriate conformance amendments are made.

2. *Prospective Impact on Zoning*

The development plans require that any newly amended or adopted zoning ordinance must conform to and implement the development plans.[182] The language of the development plans is derived from section 5-412.3 of the Revised Charter, which provides in relevant part that "[n]o . . . zoning ordinance shall be initiated or adopted unless it conforms to and implements the development plan for that area."[183]

The Hawaii Supreme Court interpreted almost identical language in *Dalton v. City and County of Honolulu*.[184] The court first observed that "zoning, considered as a self-contained activity rather than a means to a broader end, may tyrannize individual property owners."[185] Accordingly, the court emphasized the need to ensure that zoning conforms to and implements the controlling plan.[186] The court reviewed the legislative history of the charter provision and

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[180] Clinkscales v. City of Lake Oswego, 47 Or. App. 1117, 615 P.2d 1164 (1980). *See* D. MANDELKER, *supra* note 48 § 3.18 (1982).

[181] Clinkscales v. City of Lake Oswego, 47 Or. App. 1117, ____, 615 P.2d 1164, 1167 (1980). *See also* Dade County v. Inversiones Rafamar, S.A., 360 So.2d 1130 (Fla. App. 1978).

[182] Honolulu, Hawaii, Ordinance No. 83-25 § 2.1 (June 8, 1983).

[183] REVISED CHARTER, *supra* note 4, § 5-412.3.

[184] 51 Hawaii 400, 462 P.2d 199 (1969).

[185] *Id.* at 413, 462 P.2d at 207 (*quoting* Haar, *In Accordance With A Comprehensive Plan*, 68 HARV. L. REV. 1154, 1158 (1955)).

[186] *Id.* at 413, 462 P.2d at 207.

found that while the charter commission had considered giving the council an unlimited power, they ultimately developed a specific prohibition against non-conforming zoning ordinances.[187] Subsequent courts have not had an opportunity to apply this mandate to the development plans but it seems reasonable to assume that they would.[188] Therefore, amendments to the zoning ordinances made after adoption of the development plans must be consistent with such plans.

Finally, whenever zoning is changed, non-conforming uses arise. The development plans do not address this issue. Since the plans, however, have only a prospective impact on zoning, the provisions of the Comprehensive Zoning Code would apply to non-conforming uses caused by adoption or revision of the development plans. Earlier drafts of the development plans did include a provision for non-conforming uses, a primary feature of which was indefinite continuance of "compatible" uses.[189]

The Department of General Planning's intent in drafting this provision was to separately address non-conforming uses that existed prior to and were created by the adoption of the development plans. With respect to previously existing non-conforming uses, the intent was to have the Comprehensive Zoning Code provisions control. Greater flexibility was envisioned for non-conforming uses caused by adoption of the development plans. The provision "was designed to allow most of the non-conformities (including structures) to continue and even redevelop."[190]

The early non-conforming use provision was a significant departure from the rules of the Comprehensive Zoning Code. For example, while the early provision allowed reestablishment of uses which were totally destroyed, the Code currently allows restoration only in cases involving no more than fifty percent destruction.[191] The early non-conforming uses provision of the development plans is not incorporated in the current plans. Thus, the Comprehensive Zoning Code exclusively controls non-conforming uses and applies the same rules whether the non-conforming uses existed prior to or were caused by adoption of

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[187] *Id.* at 415, 462 P.2d at 208.

[188] *See generally* D. Callies, *supra* note 2, at III.

[189] The old non-conforming uses section provided that:

> The CZC shall provide for the continuance of uses which become non-conforming by the implementation of this Development Plan, provided such uses are reasonably compatible with the surrounding Development Plan uses or until such non-conforming uses are abandoned. Such reasonably compatible uses, if destroyed by any cause, may be reestablished provided that use will not be of any greater intensity and density than the previous use. The CZC shall also provide for the eventual removal of any non-conforming uses which are not reasonably compatible with the surrounding Development Plan uses.

Wanket, Smith & Hosoda, *supra* note 93, at 26.

[190] *Id.*

[191] Honolulu, Hawaii, Comprehensive Zoning Code § 21-107(d)(2) (1969).

the development plans.

3. *Summary*

The development plans have significant effects on zoning. This is an area, however, characterized by public misconceptions. Perhaps the most common misconception is that once adopted, the development plans automatically supercede and take precedence over inconsistent zoning. This is clearly not true—the development plans provide that the existing zoning remains in effect until the city council amends it or adopts interim development controls. It is up to the city council to bring the zoning into conformance and there is no mandate that the city council take any action other than "consideration" of various recommendations.

The second misconception is that the existing zoning must eventually conform with the development plans. The city council has directions for consideration of zoning amendments and adoption of interim development controls where zoning is more permissive than the development plans. If the zoning, on the other hand, is more restrictive than the development plan, no general directions are given. In such a case, it is up to the public to seek relief through amendment of the zoning ordinance. Case law in this area, requires more permissive zoning to be amended at some undetermined time but generally allows more restrictive zoning to remain in effect.

Finally, while the city council is not required to act to bring the existing zoning in conformance with the development plan, if the city council does act, it *must* act in conformance with the plans. The city council can negate the impact of the development plans by inaction but becomes bound by the development plans if it acts in any way to amend the zoning ordinances.

Zoning and planning are so closely related that a land use change must often involve zoning and comprehensive plan amendments. Zoning amendments must conform to the development plans. The extensive amendment process provided for the development plans is discussed in the next section.

C. *Amendment Procedures and Controls*

The major theme running through the Honolulu land use laws is consistency. Tremendous emphasis was placed upon ensuring that the development plans would be formulated and adopted in a form consistent with the general plan and charter requirements. The development plans, however, must be given the flexibility to change and evolve over time. The amendment procedures for the development plans were formulated to effectuate both goals. The amendment process has a great potential for litigation, not only because of the importance of

amendment decisions, but also because of the competing judicial standards applicable in the review of disputes.

As noted in the last section, city zoning ordinances must eventually be amended to achieve conformance with the development plans. Moreover, all new zoning actions must immediately conform to the plans. Due to this intimate relationship between the plans and zoning, developers and landowners must now seek amendments to applicable development plan provisions prior to requesting needed zoning changes. As expected, a sizeable volume of development plan amendment applications have been received.[192]

The Revised Charter, the development plans themselves and rules promulgated by the planning department provide extensive procedures for amending the development plans. One of the striking features of the amendment procedures is the time frame of the process. It can take up to eighteen months for a proposal to be approved by the city council.[193] Amendment applications and proposals must go through the annual review process unless they meet one of the exceptions that allow for independent consideration.

Although burdensome, the eighteen month annual review process under the development plans may be an improvement over the previous system. The planning department has noted that in the past, when it was necessary to amend the Detailed Land Use Maps (DLUM), the process took on the average, about three to four years.[194] Many smaller amendments, however, were processed in only a few months and applications were received and individually processed throughout the year. The obvious benefit of the new system is that it allows the council to consider a large number of amendment requests at one time, in order to assess their impact on a wider scale.

Quite apart from the issue of the burden imposed by the amendment process is the concern that unbridled amendment, spurred by private interests, could defeat the comprehensive nature of the development plans. Accordingly, the Revised Charter, the development plans and Hawaii case law have established controls on the power of the city council to adopt amendments. These procedural safeguards are the *ultimate* controls on the amendment process.

1. Amendment Procedures

Detailed amendment procedures are provided by the development plans themselves and also by rules and regulations promulgated by the Department of

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[192] Interview with the Department of General Planning, *supra* note 81.

[193] *See* Dep't Gen'l Planning City and County of Honolulu, The Development Plan Amendment Process (Annual Review) (a handout available from the Department of General Planning).

[194] Interview with the Department of General Planning, *supra* note 81.

General Planning.[195] The amendment procedures were not included in the development plans until 1981, when the plans were in their second draft. The reasons for inclusion of the amendment procedures in the development plan text were to avoid total reliance on the planning department's rules and regulations and "to resolve the problem that the Council has previously experienced with the Chief Planning Officer's refusal to process requested amendments."[196] Amendment procedures are not required to be included in the development plans by the Revised Charter. Therefore, it is likely that the true reason for inclusion of such procedures in the plans was to address the council's concerns regarding the chief planning officer's failure to process amendment applications.

The planning department objected to the inclusion of amendment procedures principally because of the procedural burden imposed when amendment of the procedures themselves became necessary.[197] Inclusion of the procedures probably is more a reflection of the tenuous relationship between the city council and planning department than a response to a legal requirement. The development plans would not have been legally defective even if the amendment procedures were omitted.

a. The Overall Amendment Process

Proposals for amendments to the development plans may be made either by the city council,[198] through the chief planning officer,[199] or by the chief planning officer.[200] Individuals may, and public agencies must request amendments through the chief planning officer.[201] Additionally, individuals may request the

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[195] Honolulu, Hawaii, Ordinance No. 83-25 § 13 (June 8, 1983); Dep't of Gen. Planning Honolulu, Hawaii, RULES OF THE DEPARTMENT OF GENERAL PLANNING FOR PROCESSING AMENDMENTS TO THE DEVELOPMENT PLANS OF THE CITY AND COUNTY OF HONOLULU (Feb. 26, 1982) [hereinafter cited as RULES]. The rules were promulgated pursuant to § 5-403 of the Revised Charter.

[196] Bosselman, Summary of Principal Revisions Proposed for Draft No. 2 of Development Plan Bills (Sept. 8, 1981) (City Council Miscellaneous Communications No. 1195, unpublished report available in Municipal Reference Library, City and County of Honolulu).

[197] Interview with the Department of General Planning, *supra* note 81.

[198] RULES, *supra* note 195 § 8.6.

[199] *Id.* § 8.3, 8.4.

[200] *Id.* § 8.5.

[201] *Id.* § 7, which provides:

> Any person may formally request the Chief Planning Officer to process a proposal to amend the Development Plans.
>
> The City Council may propose any revision of or amendment to the Development Plans pursuant to Section 5-412.2 of the City Charter.
>
> All public agencies seeking an amendment to the Development Plans relating to their area of responsibilities shall submit a request to the Chief Planning Officer in accordance

city council to make proposals.

The chief planning officer and the planning department are at the center of the amendment process. The chief planning officer first decides whether to accept an amendment application by considering the basis of its adequacy and appropriateness. The amendment request must: (1) identify a specific public issue, need, or problem which should be addressed by the development plans but is either not addressed or inappropriately addressed in the existing plans; or (2) clarify the wording of existing statements in the development plans which need clarification; or (3) be timely in terms of the immediacy of the identified issue, problem, or need.[202]

Next, the chief planning officer decides whether to take further action by proposing the amendment to the city council through the planning commission. The rules provide the factors the chief planning officer will utilize in his decision whether to propose a requested amendment:

> All applications for amendments shall be reviewed from the perspective of (a) contribution to the general welfare and prosperity of the people of Oahu, (b) whether or not a public issue, need or problem presently exists to serve as a basis for the proposed amendment, (c) consistency with the General Plan, and (d) conformance to these Rules.
>
> . . . .
>
> Applications for amendments which do not meet these requirements, or which are solely based upon benefit to individuals or specific interests, shall not be proposed by the Chief Planning Officer.[203]

The chief planning officer has a great responsibility to the public in processing amendment proposal applications. He generally operates, however, under the rules prepared by his own department. One of the reasons for inclusion of amendment procedures in the development plans was to provide a mechanism for ensuring that the chief planning officer's actions alone do not preclude an applicant from obtaining attention on an amendment request.[204]

If the chief planning officer does not propose a requested amendment, the applicant can either reapply with the chief planning officer or request action through the city council. The development plans require the chief planning officer to report to the city council on all amendment applications which he has

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with these Rules.

[202] *Id.* § 8.2.

[203] *Id.* § 8.1. The rules also provide that:

> If the Chief Planning Officer does not accept an Application for processing, a written evaluation and basis for disapproval shall be mailed to the applicant within 45 days after receipt of the Application.

Id. § 8.4 d.

[204] Bosselman, *supra* note 196.

accepted for processing but subsequently believes are not suitable for proposal.[205] The report must state the reasons for such a belief and it must be submitted to the council by December 1st.[206] The city council can propose such an amendment by resolution, despite the chief planning officer's belief as to its lack of suitability.[207] An amendment, proposed in this way before December 31st, will become a part of the annual review for that fiscal year beginning July 1st. Otherwise, the proposal will be set aside until the next annual review.[208]

Additionally, the chief planning officer must file copies of all amendment applications received but elected not to be processed.[209] The city council may initiate amendments by July 1st to become part of the annual review process.[210] Thus, a person who has submitted an amendment application which has been rejected by the chief planning officer has at least three months to persuade the city council to make such a request on his behalf.[211] The corporation counsel, in commenting on the role of the chief planning officer in the amendment proposal process, has noted that his judgment is to be exercised independent of council sentiments.[212]

Although the chief planning officer decides whether he will or will not accept an amendment application or propose an amendment, there are procedural safeguards to protect an applicant. The practical effects of the chief planning officer's rejection of an application or failure to propose the amendment after the application has been accepted is uncertain. The city council can propose the amendment itself by July 1st for rejected applications or by December 31st for

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[205] Honolulu, Hawaii, Ordinance No. 83-25 § 13.3.a.(4)b. (June 8, 1983).

[206] *Id.*

[207] *Id.* § 13.3.a.(6).

[208] *Id.*

[209] *Id.* § 13.3.a.(1).

[210] *Id.* § 13.3.a.(2).

[211] The applicant would have from April 1, as per § 13.3.a.(1), to July 1, as per § 13.3.a.(2) to make such a request.

[212] Memorandum from Dep't of the Corporation Counsel to the City Council, City and County of Honolulu M 81-22, (April 28, 1981) (processing of detailed land use map amendments), which states:

> Both Charters [1959 and 1973] make special provision for Council initiation of amendments to planning documents, describing the method pursuant to which such amendments may be processed; but unless the Council sees fit to so initiate, it seems clear that the Director's decision as to whether a particular amendment should be proposed is to be made independently of any express Council sentiments concerning the appropriateness of the amendment in question or of amendments generally, and is subject only to constraints imposed by the Charter or by the Director's own rules. . . .
>
> [W]e cannot agree that either the 1959 or the 1973 Charter obliges the Chief Planning Officer to propose amendments to planning documents when in his opinion the amendment requested will not contribute to the general welfare or is not based on an existing public issue, need or problem.

amendments deemed not suitable for proposal by the chief planning officer. Moreover, an applicant can presumably reapply to the chief planning officer. However, negative action by the chief planning officer could affect an application adversely. In this respect, there is no separately mandated review process in the development plans for consideration of such actions. The city council route seems to be the only alternative in cases where the chief planning officer refuses to accept an application or propose an amendment.

This entire area is permeated with due process issues because the process itself directly affects property interests. The amendment procedures provide for the city council to have an opportunity to circumvent negative actions by the chief planning officer and planning department. The actions of the city council are legislative and courts would most probably grant a deferential review of their decision.[213] One opposing city council actions would therefore face a great burden of persuasion. The administrative acts of the chief planning officer and planning department, on the other hand, are generally non-legislative and accordingly subject to a more stringent "clearly erroneous" standard of review. As will be shown in section 2, *infra*, however, the chief planning officer and planning department have been deemed by the Hawaii Supreme Court to act in a quasi-legislative capacity when making certain amendment decisions. Thus, in such instances, their decisions are reviewed by the more lenient standard.

b. Independent Consideration and Annual Review

There are two procedures an amendment initiated by the chief planning officer or the city council may undergo, depending upon the nature of the requested amendment. The majority of amendments go through the annual review process.[214] The remaining amendment actions are entitled to independent consideration, a process potentially much quicker than the annual review process.

Time is one of the most expensive aspects of real estate development. Where a development plan amendment is required before development can proceed, there is naturally a desire to expedite the amendment process. Under the annual review process, it may take up to 18 months to receive approval of an amendment request.[215] On the other hand, a proposal entitled to independent consid-

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[213] D. MANDELKER, *supra* note 48, at 64.

[214] Honolulu, Hawaii, Ordinance No. 83-25 § 13.1 (June 8, 1983), which provides:
Amendments to this development plan shall be considered by the Council as part of the annual review procedure established by the Department of General Planning, pursuant to Section 5-403 of the charter, unless they satisfy the requirements for independent consideration.

[215] *See infra* note 226.

eration can get to the city council for action in as few as six months.[216]

Section 13.2 of the development plans provides the prerequisites for independent consideration.[217] Three categories of amendments are covered by the provision: first, amendments to the text and/or land use map which affect the nature or intensity of planned uses; second, text amendments which involve changing procedures or clarifying language; finally, amendments which are designed to expedite governmental matters.[218] For the public sector, the first category is the real focus of attention.

In order for an amendment which affects the nature or intensity of planned uses to be considered independently of the annual review process it must satisfy two levels of requirements. First, the amendment must not establish a need for additional capital improvement expenditures, must be in conformance with the general plan, and must affect land entirely within the State Land Use Urban District.[219] Also, there must be currently available adequate utilities and support services to serve the proposed development, without detracting from uses already designated on the development plan.[220]

If all four of these requirements are met, an amendment must additionally satisfy a second level of requirements. The amendment must fall into at least one of three amendment characterizations. The amendment must provide for four or fewer units and there can be no cumulative impact of multiple applications, involve an expansion of less than 10,000 square feet on a commercial or industrial use designated site, or correct technical mistakes in the development plans which do not involve basic methodology.[221]

The planning department's amendment rules require the submittal of a letter of intent to initiate an amendment request with the chief planning officer.[222]

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[216] *See* Honolulu, Hawaii, Ordinance No. 83-25 §§ 13.3.b., 13.3.c. (June 8, 1983) which set a maximum time period for processing an amendment at 180 days.

[217] *Id.* § 13.2.

[218] *Id.* This provision pertains to amendments which (a) change the "funds appropriated" or "proposed funding (2-6 years)" designation of a project on the public facilities map where funds have been appropriated or withdrawn, or (b) designate as existing public facilities on the land use map those projects for which land has been acquired or construction has been completed.

[219] *See* Memorandum from Dep't of the Corporation Counsel to Chief Planning Officer, City and County of Honolulu M 84-12, at 3 (April 10, 1984) (processing of minor amendments to development plans where properties are not located entirely within the state land use urban district), which states:

> The requirement that the minor amendments be limited to properties entirely within the State Land Use Urban District was intended to act as a safeguard against rapid urban development in nonurban areas such as State Agricultural and Conservation Districts without an opportunity for prior review and comment by the public, City agencies, the City Council and the Mayor.

[220] Honolulu, Hawaii, Ordinance No. 83-25 § 13.2.a. (June 8, 1983).

[221] *Id.*

[222] RULES, *supra* note 195, § 8.3 a.

The letter of intent is reviewed to determine whether the proposal would be minor or major. Only minor amendments are entitled to independent consideration.[223] Major amendments must be a part of the annual review process. Where an amendment proposal is entitled to independent consideration, the development plans basically require that within 120 days of receipt or proposal, the chief planning officer must submit a report with his recommendations to the planning commission for its consideration and action.[224] Such a proposal may be processed at any time of the year. The corporation counsel has observed that the rationale for independent consideration is to avoid the necessity of conducting an extensive review of proposed amendments which would have a negligible impact on land use planning for a particular parcel or insufficient regional impact to merit consideration in conjunction with the annual review process.[225]

Any amendment proposal not entitled to independent consideration, must be included in the annual review process.[226] The annual review process is essen-

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[223] *Id.* § 8.4 b.

[224] Honolulu, Hawaii, Ordinance No. 83-25 § 13.3.c. (June 8, 1983). *See* RULES, *supra* note 195, § 8.4B.

[225] Memorandum from Dep't of the Corporation Counsel to the City Council, City and County of Honolulu M 82-70 (Sept. 17, 1982) (amendments to the development plans which may be considered independently of the annual review process). The corporation counsel also indicated that:

> The intent of creating a "fast track" for minor amendments to the DPs was a recognition of the fact that certain DP amendments are of such minor scope and regional impact that the Chief Planning Officer need not process those amendments in conjunction with the other amendments in the Annual Review.

Memorandum from Dep't of the Corporation Counsel to the Chief Planning Officer, City and County of Honolulu M 84-12, at 3 (Apr. 10, 1984) (processing of minor amendments to development plans where properties are not located entirely within the state land use urban district).

[226] Honolulu, Hawaii, Ordinance No. 83-25 § 13.a. In a handout, the Department of General Planning outlines the development plan annual review amendment process as follows:

> 1. Letters of Intent to amend the Development Plan are submitted to the department by December 1.
> 2. If the Letters of Intent are accepted, applications are submitted by February 15.
> 3. These applications are reviewed and, if appropriate, are placed in an Agency and Public Review Package along with changes initiated by the Chief Planning Officer (CPO) and City Council.
> 4. The Agency and Public Review Packages are sent in mid-July to the affected agencies and neighborhood boards (or Lead Community Organization) for review and comment.
> 5. Based on these reviews, the CPO submits his recommendations to the Executive Planning Committee for review.
> 6. Final recommendations are then submitted to the Planning Commission by December 15. The Commission then holds a public hearing and makes its recommendations on the amendment proposals to the City Council by March 1.
> 7. The City Council then holds its own public hearings and adopts the amendments as proposed or with changes that have been initiated and reviewed.
>
> This process takes about 18 months for receipt of Letters of Intent to adoption by the City

tially a timetable for certain actions and is a product of section 13.3 of the development plans and the planning department's rules. Whether a requested amendment qualifies for independent consideration or undergoes the annual review process, the eventual result is the same. After a proposal leaves the chief planning officer, it goes to the planning commission which holds a public hearing and transmits its findings to the city council for action.[227] The same studies and hearings are required, and thus, both processes should provide the same procedural safeguards. Moreover, the same requirements for submittal of paperwork and research apply to both processes.

Amendment procedures are likely to be the most applied and challenged aspects of the development plans, especially by developers, who may need a plan amendment in order to obtain a zoning change. Applicants will seek the fastest process available, and opponents of a project will challenge findings by the chief planning officer that an application is not entitled to independent consideration. The development plans and the planning department's amendment rules provide extensive amendment procedures which should resolve most but not all conflicts over the classification of amendment requests. Where the amendment process produces litigation, the determinative factor may be the standard of review the court applies to the situation.

2. *Judicial Review of the Amendment Process*

As discussed earlier, the chief planning officer and the Department of General Planning are assigned extremely important roles in the development plan amendment process. Decisions are made at several procedural levels which could adversely affect an amendment applicant. These include: the rejection of letters of intent and amendment applications; the characterization of an amendment as major, which will prevent independent consideration of the request; and the failure to propose an amendment which has survived the earlier processes. Where an unfavorable action is taken, the applicant may desire judicial review. The availability and nature of judicial relief, however, will depend largely upon the characterization of the chief planning officer's or planning department's action as either legislative or quasi-judicial.

The overwhelming majority rule is that the amendment of zoning and planning laws is a legislative function.[228] Legislative actions are reviewed under the

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Council.

Dep't Gen'l Plan., City and County of Honolulu, The Development Plan Amendment Process (Annual Review).

[227] Honolulu, Hawaii, Ordinance No. 83-25 § 13.3.c. (June 8, 1983).

[228] 1 R. ANDERSON, *supra* note 48, §§ 3.14-3.16. *See* Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130, (1972).

most deferential of judicial standards. In order to be invalidated, an action must be found to be arbitrary and capricious.[229] This standard is reflective of the judiciary's general deference to legislative judgment.[230]

There is a growing trend, however, to broaden the characterization of actions as quasi-judicial, especially where the action involves the application, as opposed to the creation of rules. In the amendment process, the chief planning officer and the planning department are guided by established rules and apply these to the particular fact pattern of an amendment request. Thus, when the planning department characterizes an amendment as "major," its action would appear to be rule applying rather than rule making, and should be deemed quasi-judicial and the rules governing the review process for administrative decisions would apply.

a. Applicability of HAPA

A finding that the chief planning officer's or planning department's actions are legislative would do more than to trigger the imposition of the most deferential standard of review. It would also take their actions outside the scope of the Hawaii Administrative Procedure Act (HAPA).[231] This law provides procedures by which administrative decisions can be appealed to the courts. For example, if HAPA applies, administrative remedies must be exhausted before a court action can be brought. Further, the clearly erroneous standard of review is applied to administrative decisions of fact.[232]

The Hawaii Supreme Court has explained the application of this standard as follows:

> [A]dministrative decisions are measured against the clearly erroneous test, *viz.*, "whether the appellate court is left with a firm and definite conviction that a mistake has been made." . . . [T]his standard gives an appellate court greater leeway in exercising its functions and that although there is evidence to support

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[229] *See* Willott v. Beachwood, 197 N.E.2d 201, 204 (Ohio 1964), where the court observed:

> The legislative, not the judicial, authority is charged with the duty of determining the wisdom of zoning regulations, and the judicial judgment is not to be substituted for the legislative judgment in any case in which the issue or matter is fairly debatable.

[230] *See* 1 R. ANDERSON, *supra* note 48, 3.14. *See also* Bishop v. Town of Houghton, 69 Wash. 2d 786, 794, 420 P.2d 368, 373 (1966), where the court stated:

> We have frequently defined arbitrary and capricious administrative action as being willful and unreasoning action, without consideration and in disregard of facts or circumstances, and have pointed out that, where there is room for two opinions, action is not arbitrary and capricious when exercised honestly and upon due consideration, even though it may be otherwise felt that a different conclusion might be reached.

[231] HAWAII REV. STAT. ch. 91. (Supp. 1983).

[232] *Id.* § 91-14.

> an agency finding, if the court is left with a firm and definite conviction that a mistake has been made, the court will, under the clearly erroneous rule, reject the tribunal's findings.[233]

Thus, under the clearly erroneous test, the focus of the court's attention is whether a mistake has been made. If the court believes strongly that such is the case, the administrative decision can be overturned. This is in contrast to the arbitrary and capricious standard where the court will defer to legislative judgment unless there is no rational basis for the decisions.[234]

The planning department's development plan amendment rules were established pursuant to HAPA, which applies to administrative procedures. By definition, it does not apply to actions of agencies in the legislative and judicial branches.[235] This does not appear to pose a problem because the chief planning officer and planning department operate under the executive branch. However, the Hawaii Supreme Court has characterized their actions in the amendment process as essentially legislative and thus outside the scope of HAPA.

In *Kailua Community Council v. City and County of Honolulu*,[236] the Hawaii Supreme Court considered general plan amendment procedures in light of HAPA. It declared that HAPA *may* be applicable to actions of the chief planning officer which are *determinative* of public or private rights.[237] In the amendment process, however, the chief planning officer's actions were not found to be determinative, but rather purely advisory. Determinative actions, the court concluded, could only be made by the city council: "whether amendments or revisions are to be made is within the absolute discretion of the city council in the exercise of its legislative function. Its actions on the proposals are the only acts declarative of and affecting the interests of the public."[238]

As noted earlier, the development plan amendment procedures provide for the planning department to report to the city council on applications it rejects or fails to process within a time sufficient for the council to itself make the amend-

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[233] In re Hawaii Elec. Light Co., 60 Hawaii 625, 629, 594 P.2d 612, 616-17 (1979).

[234] *See supra* note 229; *see generally* 4 R. ANDERSON, *supra* note 48, §§ 25.05-25.06.

[235] HAWAII REV. STAT. § 91-1(1).

[236] Kailua Community Council v. City and County of Honolulu, 60 Hawaii 428, 591 P.2d 602 (1979). An authority has stated that "[a]lthough the actions of the chief planning officer occurred in 1970, and HAPA has since been amended, the court's analysis would apply to the current statute." Callies, *supra* note 16, at 191 n.135 (1979).

[237] Kailua Community Council v. City and County of Honolulu, 60 Hawaii 428, 431, 591 P.2d 602, 604 (1979). The court cited the following cases in support of this statement: Aguiar v. Hawaii Housing Authority, 55 Hawaii 478, 522 P.2d 1255 (1974); E. Diamond Head Ass'n v. Zoning Bd., 52 Hawaii 518, 479 P.2d 796 (1971). *But see* Doe v. Chang, 58 Hawaii 94, 564 P.2d 1271 (1977); Holdman v. Olim, 59 Hawaii 346, 581 P.2d 1164 (1978).

[238] Kailua Community Council v. City and County of Honolulu, 60 Hawaii 428, 432, 591 P.2d 602, 605 (1979).

ment proposal. In a footnote in *Kailua Community Council*, the court focused on this safeguard to minimize the importance of the role of the chief planning officer and the planning department: "members of the public desiring a change in the general plan and development plans are assured of access to the legislative process. . . . [T]he chief planning officer does not have final veto power over any application."[239]

Thus, the court found that the chief planning officer's actions are not determinative of public or private rights because any action he takes is subject to the ultimate control of the city council. But HAPA applies to all administrative actions and it is arguable that the chief planning officer's and planning department's actions should be covered since they function within the executive branch of the city government. The court defeated this argument by finding that in the amendment process, the chief planning officer and planning department perform "a role for the city council closely analogous to that of a legislative committee."[240] As such, they serve in a dual capacity. In the administration of city planning they act principally as an executive agency but in the amendment process they act quasi-legislatively.

Ultimately, the court relegated the chief planning officer's and planning department's role in the amendment process to advisory and concluded that as such, they are not subject to HAPA. This conclusion was deemed necessary because: "[t]o hold otherwise would, by indirection, extend the application of the HAPA to the actions of the city council which by its terms the Act has excluded from its operation."[241]

Presumably, this case would apply to actions taken by the chief planning officer and the planning department in the development plan amendment process because of the city council's role as the ultimate decision maker. The application of the decision, however, is questionable in at least two respects.

First, it is inaccurate to say that the city council solely determines whether amendments are to be made to the development plans. The Revised Charter specifically provides for the mayor to be presented with adopted amendments for his approval or disapproval.[242] If the mayor disapproves, the city council can only pass the amendment by a two-thirds majority.[243] Since this could alter the

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[239] *Id.* at 432, 591 P.2d at 605 n.3.

[240] *Id.* at 432, 591 P.2d 605. The city council also believes that the CPO and DGP act in an advisory capacity in the amendment process. Basically, it is believed that they perform an initial screening of applications and do tedious technical work for the city council. It is, however, the city council which is empowered to make amendment proposals for the public. Interview with the City Council, *supra* note 15.

[241] Kailua Community Council v. City and County of Honolulu, 60 Hawaii 428, 433, 591 P.2d 602, 606 (1979).

[242] REVISED CHARTER, *supra* note 4, § 5-412.1.

[243] *Id.*

ability of a divided council to pass the amendment, the mayor's action could be classified as adjudicating the rights of parties.[244] This strengthens the argument that the chief planning officer and planning department, who function under the mayor, act administratively.

Second, the *Kailua* case dealt with amendment rules which were not promulgated pursuant to HAPA. The current amendment rules reflect and were promulgated in light of HAPA. The court found that the HAPA status of the rules was not determinative but it is arguable that rules promulgated pursuant to HAPA should be covered thereby.[245]

Further, perhaps the substance, rather than the form, of the decisions made by the chief planning officer and planning department should be examined. Although the city council makes the ultimate decision whether an amendment proposal is approved, rejection of an application by the planning department must significantly affect the chances of its final approval. Also, rejection of an application definitely will cause time delays. HAPA would provide the necessary safeguards to prevent the chief planning officer and planning department from abusing their decision making powers.

Today, no one is really sure whether HAPA will apply to the chief planning officer and the planning department in the development plan amendment process. The corporation counsel is taking a wait and see attitude. Whether HAPA applies will depend upon the characterization of the action as legislative or quasi-judicial. The legislative/quasi-judicial distinction is undergoing considerable judicial development.

b. Judicial Expansion of the Quasi-Judicial Characterization

In *Fasano v. Washington County Commission*,[246] the Oregon Supreme Court took long strides toward recharacterizing land use amendment actions as quasi-judicial rather than legislative. The court pronounced the following test to deter-

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[244] For example, if the original amendment was passed by a 5-4 vote of the nine member council, disapproval by the mayor would require the amendment to pass by at least a 6-3 vote, which may be unattainable. The importance of the mayor in the amendment process was highlighted by the charter commission which stated that the general plan "is to be adopted or amended by resolution and the mayor is empowered to approve or *reject* it." Final Report of the Charter Commission, *supra* note 36, at 24 (emphasis added).

[245] Kailua Community Council v. City and County of Honolulu, 60 Hawaii 428, 433, 591 P.2d 602, 606 (1979).

[246] Fasano v. Board of Comm'rs, 264 Or. 574, 507 P.2d 23 (1973). For a thorough discussion of the impact of *Fasano* on judicial review of land use actions, *see* Parker & Schwab, *Forecast: Cloudy But Clearing—Land Use Remedies in Oregon*, 15 WILLIAMETTE L. REV. 245 (1979). For an analysis of pre-*Fasano* law, *see* Sullivan, *From Kroner to Fasano: An Analysis of Judicial Review of Land Use Regulation in Oregon*, 10 WILLIAMETTE L.J. 358 (1974).

mine the character of an action:

> Basically, this test involves the determination of whether action produces a general rule or policy which is applicable to an open class of individuals, interest [sic], or situations, or whether it entails the application of a general rule or policy to specific individuals, interests, or situations. If the former determination is satisfied, there is a legislative action; if the latter determination is satisfied, the action is judicial.[247]

Finding that the action involved in the case was judicial, the court did not limit itself to the arbitrary and capricious standard.[248]

Subsequently, the Oregon Supreme Court further defined the test for determining whether a land-use decision is quasi-judicial or legislative. In *South of Sunnyside Neighborhood League v. Board of Commissioners of Clackamas County*,[249] the court stated: "[a] number of factors such as the size of the area affected in relation to the area in the planning unit, the number of landowners affected, and the kinds of standards governing the decisionmakers may be relevant."[250] Applying these standards, small amendment requests made pursuant to established rules should be deemed quasi-judicial rather than legislative and the appropriate standard of review would be "clearly erroneous" rather than "arbitrary and capricious."

In this respect, the Hawaii Supreme Court *has* characterized the process by which the Land Use Commission (a state agency) makes boundary amendments as quasi-judicial and subject to HAPA. In *Town v. Land Use Commission*,[251] the court stated that:

> We are of the opinion that the adoption of district boundaries classifying lands into conservation, agricultural, rural or urban districts, or the amendment to said district boundaries is not rule making process. . . . It logically follows that the process for boundary amendment is not a rule making or quasi-legislative, but is adjudicative of legal rights or property interests in that it calls for the interpretation of facts applied to rules that have already been promulgated by the legislature.[252]

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[247] Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23, 27 (1973) (quoting Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130, 137 (1972)).

[248] *Id.*

[249] South of Sunnyside Neighborhood League v. Board of Comm'rs of Clackamas County, 280 Or. 3, 569 P.2d 1063 (1977).

[250] *Id.* at 11 n. 5, 569 P.2d at 1071 n.5.

[251] Town v. Land Use Commission, 55 Hawaii 538, 524 P.2d 84 (1974).

[252] *Id.* at 546-48, 524 P.2d 90-91.

In the development plan amendment process, the chief planning officer and planning department also interpret facts applied to rules which have already been promulgated, the development plan ordinances and departmental amendment rules. Accordingly, their actions are arguably adjudicative of public interests. This is especially true in the characterization of an amendment as major or minor which is not directly controlled by the city council.

Nevertheless, until overturned or modified, *Kailua* stands as valid law in the area of development plan amendments. However, the persuasiveness of the *Fasano* line of cases for a quasi-judicial characterization of such amendment procedures should increase over time. Without a doubt, disgruntled amendment applicants will argue for a quasi-judicial characterization in an attempt to obtain the stricter "clearly erroneous" standard of review. Given the realities of the amendment process, such a characterization appears appropriate. It should be noted, however, that Honolulu is a relatively small, closely knit town in which developers and city administrators function less by procedure and more on a personal level. It is unlikely that a developer would mount a strong challenge to the amendment process and risk possible negative influence on his project and future dealings. Such challenges would certainly hasten a refined land use system but could be practically disadvantageous.

3. *Controls on the Power to Amend*

The need for amendment controls stems from concern that the city council could, by uncontrolled amendment, defeat the very purpose of the development plans.[253] In other words, short-sighted amendments could undermine a far-sighted plan. The city council makes the final decision on whether development plan amendments will be adopted. The development plans generally provide that the city council cannot adopt a text amendment to the development plan unless such amendment is consistent with the policies and objectives of the general plan.[254]

Additionally, certain types of amendments are required by section 2.4 to also conform to the development plan itself:

> No amendment to this development plan for the *purpose of changing the land use classification of any specific property or the nature of any designated public facility improvement* shall be adopted unless the Council finds that such amendment will be consistent with the policies and provisions of this development plan and the objectives and policies of the general plan.[255]

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[253] *See* discussion of Dalton v. City and County of Honolulu, *infra* at notes 258-264.

[254] Honolulu, Hawaii, Ordinance No. 83-25 § 2.5 (June 8, 1983).

[255] *Id.* § 2.4 (emphasis added).

Under these provisions, an amendment for the purpose of changing the land use classification of any specific property or the nature of any designated public facility improvement must be consistent with both the general and development plans.[256] These situations are very specific and call for the strictest controls.

A development plan amendment designed to change the land use classification of any specific property is most likely to induce less than pure planning considerations.[257] For example, a property owner with land on which only an apartment complex can be built might strenuously lobby for an amendment which would allow high-density residential activities on his particular lot. Similarly, a politician could forcefully encourage a change in the nature of a public facility improvement in his district. Accordingly, in these situations, the city council is required to find conformance with both the general and development plans prior to adopting an amendment.

The landmark plan amendment case in Hawaii is *Dalton v. City and County of Honolulu*.[258] The new general plan and development plans were specifically rewritten, in part, to overcome the restrictions imposed by this decision.[259] In *Dalton*, the Hawaii Supreme Court considered the propriety of amendments made to the old general plan, which retained the land use detail now found in the development plans. In August 1966, the city council approved ordinances which amended the general plan and general plan detailed land use map increasing the density allowed on Castle Estate land in Kailua. Shortly thereafter, the council approved ordinances rezoning the land in accordance with the increased density of the general plan and detailed land use map.[260] The underlying motive for this two step process was charter section 5-512(2) (currently section 5-412(3)) which required zoning to be in accordance with the general plan.[261]

The petitioner argued that the zoning ordinance amendments were invalid because they were based on improper general plan amendments. General plan amendments, it was contended, must be based upon requisite planning studies and be in conformance with the long-range and comprehensive nature of the

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[256] *Id.*

[257] Prior to the adoption of the development plans, one writer noted political favoritism as a possible reason for a strict standard of review for amendments to the general plan. Chatburn, *Comprehensive Planning: Only as Certain as Your Survival*, 8 HAWAII B.J. 15, 20 (1971). The writer also quoted an unreported Hawaiian case which stated that: "[a] general plan not only makes for better planning, it also makes for less likelihood of influence on planning from favoritism, personal influence, bribery, or other forms of corruption." *Id.* (quoting Bowen v. City and County of Honolulu, No. 10274, 621-30 (1963)).

[258] Dalton v. City and County of Honolulu, 51 Hawaii 400, 462 P.2d 199 (1969). *See* Chatburn, *supra* note 257, at 20; Callies, *supra* note 16; Mandelker & Kolis, *supra* note 2.

[259] *See supra* note 57.

[260] Dalton v. City and County of Honolulu, 51 Hawaii 400, 401, 462 P.2d 199, 201 (1969).

[261] *Id.* at 412, 462 P.2d at 201.

general plan. The court agreed with these contentions and found the amendments to be invalid.[362]

The court first reviewed the applicable procedures for amending the general plan. To effectuate the spirit and intent of the law the court concluded that:

> [T]he planning commission and the planning director are required to follow a course of conduct consistent with the safeguards that were required in the initial adoption of the general plan. This interpretation will not only meet the spirit of the law but fulfill the true intent of the laws covering the general plan.
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> . . . .
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> To allow amendment of the general plan without any of the safeguards which were required in the adoption of the general plan would subvert and destroy the progress which was achieved by the adoption of the charter's sections on planning, and by their effectuation in the 1964 general plan.[363]

Thus, *Dalton* requires that the safeguards applicable to adoption of the general plan be observed in the amendment process as well. One of the most important safeguards is the detailed, comprehensive study requirement.

Major changes have occurred, however, since *Dalton* was decided. First, the general plan is adopted by resolution and is no longer an ordinance.[364] Second, to ease the restrictions imposed by *Dalton*, the city charter revision in 1973 redefined the nature of the general plan.[365] The applicable general plan at the time *Dalton* was decided stated that:

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[362] *Id.* at 417, 462 P.2d at 209.

[363] *Id.* at 415-416, 462 P.2d at 208-209. The court also stated that: "[w]e hold that the safeguards specified by the charter as applicable to the adoption of the general plan must be followed in altering the general plan." *Id.* at 416, 462 P.2d at 209.

[364] *See* Callies, *supra* note 16, at 187, which states:

> The charter now calls for a general plan that is a broad statement of textual policies for long range development which is adopted and amended by resolution, rather than a comprehensive mapping of planned land uses that is adopted by ordinance. As noted above, the requirement for consistency between planning and zoning has shifted to the local development plans. The development plans (DPs) are required to be more detailed and shorter range textual statements of principles and standards for implementing the general plan. (Footnotes omitted).

[365] *Id.* The author states:

> In changing the nature of the general plan, the charter commission ostensibly intended to relieve the city of only the cumbersome procedural burdens imposed by *Dalton*. The absence of a requirement that the general plan be comprehensive and founded on detailed studies (which was arguably the court's lever in *Dalton* for requiring that amendments also be based on detailed studies) from the revised charter's definition of the general plan and the DPs is more troublesome. The charter commission said it intended to move away from physical, end-state planning to a *process* which included *social* planning as well. (Footnotes omitted).

> The general plan shall set forth the council's policy for the long-range comprehensive physical development of the city. . . . The plan shall be based upon studies of physical, social, economic and governmental conditions and trends and shall be designed to assure the coordinated development of the city and to promote the general welfare and prosperity of its people.[266]

In the current charter, the only comparable description of the general plan is that it "shall set forth the city's broad policies for the long range development of the city."[267] Third, the development plans have been adopted and now are the most important focus of amendment.[268] In the 1973 revision, most of the details of the earlier charter provision stating the function of the general plan were transferred to the development plans.[269] The current question is to what extent the amendment rules of *Dalton* will apply to the development plans.

At least one authority has written that the detailed, comprehensive study requirement is still "the necessary support for plans to which the future land use changes must comply even though it is true that these former general plan requirements were not transferred to the DP [development plan] requirements in the revised charter."[270] It seems safe to say that, minimally, *Dalton* stated a simple, straightforward premise—if the formation and adoption of a plan are required to be far-sighted and based upon extensive studies, then such should also be true of amendments to the plan. The rule is therefore, "as in preparation, so in amendment."

Section 5-411 of the Revised Charter provides the following requirements for preparation of the development plans:

> 1. The chief planning officer shall prepare the general plan and development plans. In preparing such plans, the chief planning officer *shall* consult with the executive planning committee and *shall* have continuing liaison with all agencies of the executive branch. The chief planning officer, with the approval of the mayor, *may* assign any relevant study to any agency. Any agency may undertake the study of any matters relating to such plans which are within the scope of its duties. The chief planning officer *shall* evaluate all such studies and other reports and information, in light of the policies, programs and priorities of the mayor.
>
> 2. The people of the city living in an area likely to be affected by a development plan under preparation by the chief planning officer *shall* be given reasonable opportunity to present facts and arguments relative to the matters under study.

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[266] CHARTER OF THE CITY AND COUNTY OF HONOLULU § 5-509 (1959).

[267] REVISED CHARTER, *supra* note 4, § 5-408.

[268] Since zoning is now required to conform to the development plans, development plan amendments will frequently precede zoning amendments.

[269] *See supra* notes 56-59.

[270] Callies, *supra* note 16 at 187 (footnote omitted).

3. In preparing such plans, the chief planning officer *shall* consult with persons responsible for development activities of other governmental and private organizations operating within the city.[271]

Several aspects of this provision are striking in light of *Dalton*. First, while the planning studies in *Dalton* were mandatory, the studies referred to in the current city charter are all permissive. The chief planning officer and affected agencies *may* undertake studies, but are not required to do so by the language of the charter.[272] Moreover, while the chief planning officer is required to evaluate the studies once made, obviously he cannot evaluate studies which have not been made. Second, the people in areas affected by a plan must be given an opportunity to present their views but only as to matters under study.[273] Therefore, if no studies are made, it is arguable that public input is not necessary. Finally, the provision only requires the chief planning officer to *interact* with other bodies or agencies.[274] Thus, studies are not required and the charter focuses on coordination.

Under the *Dalton* rule, it is arguable that the city would have only to meet these coordination requirements, with studies being optional. This argument is in fact preempted by the development plans themselves and the planning department's amendment rules which provide numerous procedural safeguards for the amendment process. However, the easing of the studies requirement is interesting in light of the 1973 charter commission's express desire to circumvent the procedural burdens imposed by *Dalton*.

a. Procedural Safeguards in the Amendment Process: Required Studies and Hearings and Responsible Agencies

The development plans describe the procedural safeguards for the amendment review and preparation process. The Department of General Planning is required to review all proposed amendments in reference to the general plan objectives and policies.[275] It must also report to the city council, through the

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[271] REVISED CHARTER, *supra* note 4, § 5-411 (emphasis added).

[272] *Id.*

[273] *Id.*

[274] *Id.*

[275] Honolulu, Hawaii, Ordinance No. 83-25 § 2.4 (June 8, 1983), which is in relevant part, functionally identical to § 2.5. The section provides:

> In processing any proposed amendment to this development plan, the Department of General Planning shall review the objectives and policies of the general plan and all the policies and provisions hereof, and shall report through the Planning Commission to the Council its comments regarding the consistency of the proposed amendment with this development plan. Any questions of interpretation regarding the consistency of the proposed amendment with the policies and provisions of this development plan and the objectives and

planning commission, concerning the consistency of the proposed amendment with the applicable development plan.[276] The planning commission is required to hold public hearings and submit its findings and recommendations to the city council.[277]

In *Hall v. City and County of Honolulu*,[278] the Hawaii Supreme Court provided some insight into the nature of the studies required for a development plan amendment. After highlighting that development plans are within the framework of and must implement the general plan, the court distinguished the studies required for the two.[279] This differentiation suggests that less extensive studies and hearings are required for a development plan amendment than for a general plan amendment.

The court also gave a clue as to what is involved in a general plan amendment study. It observed "that a time period of seven to nine months . . . was required for the preparation of a comprehensive and long-range study for the proper consideration of an amendment to the general plan of the subject area."[280] Regrettably, *Hall* states little more than, that for amendment purposes, the development plan studies are not required to be as comprehensive and long-ranged as those for the general plan. As stated by one writer: "all we know for sure is that the presumably short-range studies of the type found in *Hall* will not suffice for both general plan and DP-DLUM [development plan-detailed land use map] amendments."[281]

While the depth and detail required of a study for amendment of the development plans is still unclear, the Hawaii Supreme Court has discussed who is empowered or required to conduct studies and hearings and the relative precedences between these members of the city government. In *Akahane v.*

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policies of the general plan shall be resolved by the Council.

[276] *Id.* § 13.3.c, which states:

The Planning Commission, upon receipt of a proposal from the Chief Planning Officer or the Council for an amendment or amendments to this development plan, shall within 30 days hold a public hearing on the proposed amendment(s) and shall within 30 days after the close of the public hearing transmit its findings and recommendations thereon, through the Mayor, to the Council for its consideration and action. Such findings and recommendations on an annual review shall be transmitted in time to be received by the City Council by March 1 of the fiscal year covered by that annual review.

[277] *Id.*

[278] 56 Hawaii 121, 530 P.2d 737 (1975).

[279] *Id.* at 127, 530 P.2d at 741 where the court stated:

The trial court further erred by equating studies on the public hearings of proposals for a development plan and/or detailed land use map with the necessary, comprehensive and long-range studies of and public hearings on proposals for an amendment of the General Plan covering the subject area.

[280] *Id.*

[281] Callies, *supra* note 16, at 189 (1979).

Fasi,[282] the city council sought to enter into a contract with a private consultant for the formulation of a development plan for the Kakaako area. The corporation counsel refused to approve the contract and the Honolulu city council sued both the corporation counsel and the mayor. The court noted that the city charter permits both the chief planning officer and the city council to propose plan amendments. The question was who is permitted to arrange for consultant studies. In resolving this conflict, the court found that the executive branch (Department of General Planning) has the primary responsibility to conduct or arrange for the required studies for amendments to the development plans.[283] Where this responsibility is not met, however, the city council can arrange for the required studies.[284] In situations where the executive branch has submitted plans to the city council for its approval or review, the council is also empowered to arrange for the necessary studies.[285]

While *Akahane* holds that the city council is empowered to conduct studies for the development plans and general plan, such power does not vest until the executive agencies have failed to assume their responsibility, which is primary. The key fact in the case was that the city council never requested that the executive branch make the desired studies. Thus, the city council's power to act had not vested and it could not enter into a contract with a consultant for preparation of a development plan.[286]

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[282] 58 Hawaii 74, 565 P.2d 552 (1977).

[283] *Id.* at 83-84, 565 P.2d at 558-559 (footnotes omitted), where the court stated:

> [I]t is our opinion that under the charter such in-depth studies must be the initial responsibility of the city departments established for that purpose. Article V of the Charter reserves and enumerates the power of general planning and its incidental functions in various executive departments and agencies. It is the executive branch which is fully staffed and departmentalized to expeditiously proceed with this reserved power. However, we do not construe this reservation of power to mean "exclusively reserved." . . . . [I]t is evident that the executive branch is vested with the primary, and not necessarily exclusive, duty and responsibility for municipal planning.

[284] *Id.* at 85, 558 P.2d at 559, where the court observes:

> Where however, after a proper request by the city council is made, the executive branch is uncooperative or has failed within a reasonable period, to assume and proceed with their responsibility, we are of the opinion that the city council can and must assume the reserved, but not exclusive, powers of the executive branch in the issue herein as an incidental exercise of their power to amend or revise an existing general plan or development plan.

[285] *Id.* at 85-86, 565 P.2d at 559, where the court observes:

> Moreover, where the executive branch has submitted to the city council proposed general or development plans and amendments thereto, the city council is necessarily empowered and authorized to employ consultants with the necessary expertise to review, evaluate, consolidate, and to advise the council on these various proposals. . . .
>
> The city council's power to act upon or participate in such important and far-reaching activities cannot be denied for lack of initiative or response from the executive branch.

[286] *Id.* at 86, 565 P.2d at 559-560.

In summation, the development plan amendment procedures and controls provide a mechanism for the public to seek changes to the plans and safeguards that the city will not improperly adopt amendments which erode the long-range nature of the plans. Moreover, the annual review is perceived by the Department of General Planning as part of the process by which the development plans will evolve into the broad function ascribed to them by the Revised Charter. The process additionally provides for considerable attention to the social impact of development, which will be discussed in a following section.

The arbitrary and capricious standard of review appears to be applicable to most amendment decisions made by both the city council and the chief planning officer. Therefore, the city council's and chief planning officer's actions in the amendment process have a strong presumption of validity and a disgruntled applicant may have difficulty obtaining a favorable court decision.

D. Sequencing of Public Facilities

Section 9 of the development plans provides the city's mechanism for the sequencing of public facilities.[287] Proposed projects are prioritized according to the development plans' sequencing guidelines. The priorities thus derived are incorporated into and are a very important part of the city's capital improvements and budgetary review process. The sequencing of public facilities has a natural effect on private development and raises numerous legal issues relating to growth management.

The Revised Charter mandates inclusion of sequencing guidelines in the development plans in two separate provisions. Section 5-407 states that one of the reasons for preparing the general plan and development plans is to "set forth the desired sequence, patterns and characteristics of future development."[288] Section 5-409 provides that the development plans "shall state the desired sequence for development."[289] This repetitiveness has led commentators to conclude that the charter commission emphasized the importance of sequencing in the Honolulu plans.[290]

1. Control of Private Development

One of the early questions raised was whether the sequencing requirements were to apply to public developments alone or to private development as well. The language of the Revised Charter is not specific as to the type of develop-

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[287] Honolulu, Hawaii, Ordinance No. 83-25 § 9 (June 8, 1983).

[288] REVISED CHARTER, *supra* note 4, § 5-407.

[289] *Id.* § 5-409.

[290] Bosselman Report, *supra* note 64, at 49.

ment intended to be covered. This problem was identified in the Bosselman Report as one of the aspects of the development plans posing potentially serious legal issues.[291] The report noted the indefiniteness of the Revised Charter language and also criticized the brevity of the development plan drafts in existence at the time of the report, given the emphasis placed on sequencing by the charter. Most importantly, the report found that the development plan sequencing requirements may not be applicable to private development.[292]

The Department of General Planning attacked the Bosselman Report's contention that private development may not have been intended to be covered by the sequencing policies of the development plans. It stated that: "[s]equencing equated to public facilities alone would cause havoc to governmental agencies charged with providing for the public health, safety and welfare. . . . *[A] reading of the Charter equating development to public facilities is patently without foundation.*"[293] The corporation counsel also commented upon the situation and observed that while the sequencing section does not directly apply to private development, control thereof is a natural consequence of public facility sequencing: *"[i]t is axiomatic that the location of a major infrastructure, whether undertaken by the City or required of a private developer, will direct the course of private development."*[294]

This indirect approach is also followed by the current development plans. Section 9 declares that "[i]t is a purpose of the development plans to provide a means of establishing the desired sequence for constructing public facilities consistent with general plan sequencing objectives and policies, and *in a manner that will also provide guidance for private development decisions.*"[295] The implication of this statement is that developers ought to coordinate their projects with the scheduled sequence for construction of public facilities.

The position that the sequencing of public facilities inevitably controls private development is amplified by another provision of the development plans. Section 2.6.e provides that a factor in determining whether any action relating to a proposed development is consistent with the development plans is whether the proposed development is consistent with the city's plans for locating and constructing relevant public facilities.[296] This provision is applicable to *any* responsible agency considering a proposed development.

Could a developer circumvent the sequencing element by providing his own facilities? The answer to this question may depend upon whether he already has the desired land use designation or is seeking a land use change. Where the

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[291] *Id.*

[292] *Id.* at 49-54.

[293] Review of the Bosselman Report, *supra* note 70, at 23 (emphasis added).

[294] Memorandum, *supra* note 86, at 6 (emphasis added).

[295] Honolulu, Hawaii, Ordinance No. 83-25 § 9.1 (June 8, 1983) (emphasis added).

[296] *Id.* § 2.6.e.

current land use designation would permit the proposed development, but necessary facilities are not scheduled, it appears that provision of utilities by the developer could indeed circumvent the sequencing requirement. Generally, public facilities precede land use designation and if they are not present, they are implicitly anticipated. Where the developer already has the appropriate land use designation, the sequencing element appears to relate more to timing, and thus is easily dispensed with. A developer should not have to wait several years for a facility when the city has already designated the land for the desired use.[297]

On the other hand, where the developer is seeking a change in land use designation to allow a more intensive use of his property, the sequencing element appears to be a greater barrier. In this case, construction of a facility by the developer could disrupt the planned growth pattern for the area, which is regulated, in large part, by the sequencing of public facilities.

2. *Sequencing Priorities and Their Use in the Budgetary Review Process*

The development plans' sequencing policies directly affect the city's budgetary review process and influence the funds that will be available for public facility construction. Section 9 states the sequencing priorities to be applied in the evaluation of proposals to construct public facilities:

> Priority shall be given proposals that will encourage development in areas designated for growth or correct deficiencies in public facilities in accordance with the following policies:
>
> a. Growth Facilitation. Priority shall be given in the programming of capital improvements to those public facilities that
>
> (1) are consistent with the needs that will be generated by development planned in accordance with the land use designations in this development plan;
>
> (2) are consistent with the general plan pattern of population distribution for this development plan area;
>
> (3) are planned for construction in a priority area for development or redevelopment;
>
> (4) will not encourage growth in urban fringe and rural areas;
>
> (5) will not create a demand for unavailable or unplanned regional support services.
>
> b. Deficiency Correction. Priority shall also be given in the programming of capital improvements to those public facility projects that
>
> (1) will improve or replace existing public facilities in unsound condition;
>
> (2) will correct public facility needs identified in this development plan

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[297] Interview with the Department of General Planning, *supra* note 81.

area;
(3) will not duplicate other available public or private facilities;
(4) will correct recognized but previously unmet facility needs;
(5) will benefit low and moderate income residents.[298]

The section also establishes a procedure for evaluation of public facility proposals. By July 15 of each year, the Department of General Planning is to prepare "a report setting forth sequencing guidelines for line departments to use in preparing their public facility proposals."[299] Once the various city departments submit their proposals, the planning department evaluates them using the above sequencing policies of the development plans and the departmental sequencing guidelines, and assigns a rank or priority for each proposal. Ranks and priorities are proposed both for projects within individual development plan areas and also for all eight areas as a whole.

The sequencing ranks and priorities thus derived become an important part of the city's budgetary review process. The chief planning officer is required by the Revised Charter to review the capital program and budget for conformance to the general plan and development plans.[300] Such review includes consideration of conformance with the sequencing element. Similarly, the Executive Planning Committee reviews facility proposals for conformance with the general plan and development plans, including the sequencing element. The committee makes recommendations to the mayor in coordination with the chief budget officer's preparation of the capital program and budget.[301] Finally, the city council reviews the capital budget proposed by the mayor for conformance with the sequencing element of the development plans.[302] The plans provide that the city council may, "upon findings of fact relating to sequencing and other relevant criteria, add new items to, or delete or amend any item or items in the proposed capital budget."[303]

In the 1982-83 Development Plan Annual Review, the Department of General Planning found that one of the most important functions of the sequencing element was coordination of the public facility planning process:

> The sequencing process bases the rationale for projects to the City's adopted and

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[298] Honolulu, Hawaii, Ordinance No. 83-25 § 9.2.a (June 8, 1983).

[299] *Id. See* Dep't of Gen. Plan., City and County of Honolulu, Report of the 1982-83 Development Plan Annual Review Sequencing of Public Facilities at 3-4 App. D (July 1983) (unpublished report available in Municipal Reference Library, City and County of Honolulu) [hereinafter cited as Sequencing of Public Facilities].

[300] REVISED CHARTER, *supra* note 4, § 5-403(c).

[301] Honolulu, Hawaii, Ordinance No. 83-25 § 9.1 (June 8, 1983). *See* REVISED CHARTER, *supra* note 4, § 5-404.

[302] Honolulu, Hawaii, Ordinance No. 83-25 § 9.3.b (June 8, 1983).

[303] *Id.*

> proposed Development Plans. Previously, public facility planning was an uncoordinated process with each line agency using its own interpretations of City policy to set project priorities. . . . There was no systematic relationship between CIP projects and comprehensive planning nor any consistent way of evaluating the relationship between City projects and City policy. The sequencing process begins to bring plan consistency to bear on the entire program of major public facilities rather than merely project by project. . . . Perhaps most importantly, the basis for priority is available for discussion and comparison with other projects.[304]

Additional benefits included the promotion of early citizen input into a public facility planning process[305] and improvement in project timing.[306]

There were many practical problems with the earlier unorganized approach to public facility planning.[307] For example, budgets were allocated to areas irrespective of real needs. Thus, one area could obtain a new park while another area might go without a needed sewer system. By prioritizing projects, funds can be applied on a more rational basis in relation to actual overall needs. Simultaneously however, the prioritization process, which is reflective of a planned growth strategy, raises serious issues as to the legal implications of growth management.

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[304] Sequencing of Public Facilities, *supra* note 299, at 31.

[305] *Id.*, where the report states:

> The sequencing procedure promotes early citizen input into the public facility planning process. Neighborhood Board comments are solicited and the priority they assign to a project is included in the sequencing evaluation. Extra emphasis is given if the Neighborhood Board area already has a lot of LULU's (locally undesirable land uses). Priority scores assigned by the Neighborhood Boards were doubled or tripled depending on the number of LULU's in their area. . . . This gives neighborhoods an incentive for accepting LULU's and also provides the boards a real "piece of the action" in determining priorities among public facility deficiencies in their communities.

The 1982-83 sequencing guidelines promulgated by the Department of General Planning are appended in Section B.3 of the report.

[306] *Id.* The report stated:

> Another value of the sequencing is its impact on project timing. There are two aspects to this benefit. First, as projects are evaluated the projects that have a greater overall score emerge. Then, if the project had been timed for future years it could later be brought into the 2-6 year category. The sequencing results can provide agencies with a stronger rationale for processing project timing in the CIP [Capital Improvements Program and Budget Report of the City and County of Honolulu] by tying it to the General Plans and Development Plans. The second benefit related to timing is in the integration between projects of different agencies. We can begin to flag and better coordinate public facility construction in the same area.

Id.

[307] Interview with the Department of General Planning, *supra* note 81.

3. *Growth Control*

With the sequencing of public facilities, the development plans come face to face with the legal concerns inherent in growth control. The sequencing element determines when, where and to what extent public facilities will be provided. A consequence of this determination is control over private development—without adequate facilities, there can be no development. Since growth control limits development and decreases the value of property which cannot be fully utilized, legal attacks in this area are to be expected.

While it is outside the scope of this article to fully explore the implications of growth control, some broad observations can be made. When development is linked with provision of facilities, the main issues are whether there has been an unconstitutional infringement on the right to travel,[308] whether there is a duty to serve the affected area,[309] and whether there has been a compensable taking of property.[310]

The right to travel issue was discussed by Bosselman. After observing the difficulty of prevailing on a right to travel challenge to local growth control regulations, Bosselman observed that:

> [T]here are certain aspects of the draft development plans which might make them more susceptible to challenge on this ground than most local enactments. Specifically, in view of the fact that Honolulu contains the great majority of the state's job opportunities, it could be argued more forcefully that limitation on its growth are equivalent to limiting the growth of the entire state. Moreover, the Department's methodology is based on state forecasts that were prepared by a state administration that has made no secret of its desire to keep immigration under control.[311]

The sequencing element ties growth control with the capital improvement program. This is similar to an aspect of the method used by the widely ana-

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[308] *See* Bosselman Report, *supra* note 64, at 6, App. A, for a discussion of constitutional issues relating to the right to travel.

[309] *See* Note, *Control of the Timing and Location of Government Utility Extensions*, 26 STAN. L. REV. 945 (1974). It has been observed that:

> The exercise of municipal discretion to refuse service to prospective users of public utility systems raises an equal protection problem. The municipality must have a justifiable reason for the service refusal. Courts usually uphold refusals by municipal utilities to extend services within their boundaries when the refusal is based on utility-related reasons, such as inadequate financial resources or inadequate capacity.

D. MANDELKER, *supra* note 48, at 292.

[310] D. MANDELKER, *supra* note 48, at 293. *See* Bosselman, *Growth Management and Constitutional Rights, Part II: The States Search for a Growth Policy*, 11 URB. L. ANN. 321 (1976).

[311] Bosselman Report, *supra* note 64, at 6, App. A; *Constitutional Issues, supra* note 16; Note, *Municipal Growth Limitations and the Right to Migration*, 52 S. CAL. L. REV. 1239 (1979).

lyzed growth management plan instituted in Ramapo, New York.[312]

Under the Ramapo system, the comprehensive zoning ordinance conditioned the development of residential units upon obtaining a special permit which in turn was conditioned upon the accumulation of a certain number of development points.[313] Development points were based upon the availability of sewer, drainage, improved public parks or recreation facilities, improved roads and firehouse services. An important procedural aspect of the plan was that a developer could either await provision of services or build them himself.[314] A capital improvement program was also adopted with an eighteen year schedule of construction. Within that eighteen year period, sufficient facilities would be constructed to allow all land owners to satisfy the development point requirement.[315] Thus, the Ramapo system was actually an interim growth control measure because the complete development of the entire municipality was assured within an eighteen year period.

This system was challenged on several grounds but was upheld by the New York Court of Appeals in *Golden v. Planning Bd. of Ramapo*.[316] In doing so, however, the court expressed considerable concerns:

> There is, then, something inherently suspect in a scheme which, apart from its professed purposes, effects a restriction upon the free mobility of a people until some time in the future when projected facilities are available to meet increased demands. Although zoning must include schemes designed to allow municipalities to more effectively contend with the increased demands of evolving and growing communities, under its guise, townships have been wont to try their hand at an array of exclusionary devices in the hope of avoiding the very burden which growth must inevitably bring.[317]

The *Ramapo* decision upheld a specific growth management program which utilized the timing of public facilities. This is not, however, a carte blanche for broad application of such practices. There were several aspects of the Ramapo

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[312] For detailed descriptions of the Ramapo system, *see* Bosselman, *Can the Town of Ramapo Pass a Law to Bind the Whole World?*, 1 FLA. ST. U. L. REV. 234 (1973); Kellner, *Judicial Responses to Comprehensively Planned No-Growth Provisions: Ramapo, Petaluma and Beyond*, 4 ENVTL. AFF. 759 (1975); Note, *A Zoning Program for Phased Growth: Ramapo Township's Time Controls on Residential Development*, 47 N.Y.U. L. REV. 723 (1972); Note, *So You Want to Move to the Suburbs: Policy Formulation and the Constitutionality of Municipal Growth-Restricting Plans*, 3 HASTINGS CONST. L.Q. 803, 834-38 (1976). *See also* D. MANDELKER, *supra* note 48, at 286-88.

[313] *See* D. MANDELKER, *supra* note 48, at 286-88.

[314] *Id.*

[315] *Id.*

[316] *See* Golden v. Planning Board of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972), *appeal dismissed*, 409 U.S. 1003 (1972).

[317] *Id.* 285 N.E.2d at 300, 334 N.Y.S.2d at 145-150.

system which influenced the court's decision:

> The extensive planning that preceded the adoption of the growth management ordinance was an important factor in the court's opinion, as were the remedial measures made available to developers. The court could uphold the growth management ordinance as an interim measure because all of the municipality was committed to development. The *Ramapo* decision does not support growth management programs in communities not wishing to make this commitment.[318]

As such, *Ramapo* alone does not support the validity of the sequencing element of the development plans. Given the breadth of legal issues present in growth control, it should be expected that this aspect of the development plans will receive judicial attention in the future. As further stated by Bosselman: "if such a challenge reached the merits of the issue, it would provoke great interest throughout the country and would produce publicity that might be counterproductive for the land use planning objectives of the state and the City and County of Honolulu."[319]

E. Social Impact of Development

As discussed earlier, the charter commission placed considerable emphasis on coverage of social issues by the general plan and arguably by the development plans. The charter commission stated that its intent in reforming the general plan and development plans was "to make it evident and imperative that all city officials address themselves to the overriding social problems which confront the people of Honolulu."[320] Despite this frequently stated intent, the Revised Charter does not make consideration of social issues by the development plans mandatory. Advocating a literal interpretation of the Revised Charter and the view that the development plans were part of a process which was to evolve over time, the Department of General Planning argued strongly against inclusion of specific socially oriented sections in the development plans.

The primary, or at least most vocal, proponent of inclusion of the social sections in the initial development plans was Fred Bosselman. His view was accepted by the city council. The Bosselman Report attacked the early development plan drafts as focusing too heavily on land use planning alone and not adequately addressing issues of social concern.[321] The report traced the charter commission's socially oriented language and argued that since the intent of the commission was so pronounced, social issues were required to occupy an impor-

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[318] D. MANDELKER, *supra* note 48, at 288.

[319] Bosselman Report, *supra* note 64, at 8, App. A.

[320] Final Report of the Charter Commission, *supra* note 36, at 24.

[321] Bosselman Report, *supra* note 64, at 37-40.

tant role in the development plans as well.

The report was critiqued by the Department of General Planning and the corporation counsel. Not surprisingly, the department entirely rejected Bosselman's contentions.[322] The corporation counsel largely concurred, finding that the Revised Charter made coverage of social issues permissive rather than mandatory.[323] It added however, that "[i]t cannot be disputed that more social benefit planning specifically enunciated within the DPs [development plans], would make the DPs less vulnerable to litigation challenging the lack thereof."[324]

Although neither the Department of General Planning nor the corporation counsel found inclusion to be mandatory in the initial development plans, the city council pressed forward with its commitment to coverage of social issues. Ultimately, the second and later drafts of the development plans contained social impact sections. To date, the city council has spent several hundred thousand dollars on studies for the social sections of the development plans.[325] The Department of General Planning believes that expenditure of such a large sum makes it difficult for the city council to retreat from its position on social coverage.[326]

There are currently three sections in the development plans dealing with social issues. Section 10 of the development plans specifies factors in the areas of demographics, economics, housing, public services and the physical environment to be considered as they pertain to the objectives relating to the distribution of social benefits.[327]

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[322] Review of the Bosselman Report, *supra* note 70, at 1-8.

[323] Memorandum, *supra* note 86, at 9.

[324] *Id.*

[325] Interview with the City Council, *supra* note 15; Interview with the Department of General Planning, *supra* note 81. It should be noted that the three social impact sections of the development plans were drafted largely by Fred Bosselman. If ever fully implemented, they would likely create the most extensive social impact system found anywhere. As such, a tremendous experiment appears to have been conceived by Bosselman—to see how far a planning system could go with detailed social analysis.

[326] Interview with the Department of General Planning, *supra* note 81. Of course, the current city council consists of five new members (out of a total of nine). The social studies were ordered by the previous council and new members may feel less reluctant to part with a program they had little to do with.

[327] Honolulu, Hawaii, Ordinance No. 83-25 § 10 (June 8, 1983). The section provides the following factors to be considered:

a. Demographic: Whether the development will:
   (1) Increase or decrease the residential population.
   (2) Increase or decrease the visitor population.
   (3) Change the character or culture of the neighborhood.
b. Economic: Whether the development will affect:
   (1) The rate and pattern of economic growth and development.

Section 11 of the development plans requires the establishment of a social impact management system to give residents of an area who will be affected by a proposed development an opportunity for involvement in the evaluation process.[328] This system is planned to be applicable to the following actions:

> a. A development plan amendment for the purpose of changing the land use classification of a specific property;
> b. A change in zoning for the purpose of changing the zone classification of specific property;
> c. A plan review use pursuant to Section 21-2.90 of the Comprehensive Zoning Code;
> d. A public improvement or project to be included for the first time in the Capital Improvement Program.[329]

To date, a social impact management system has not been adopted, although extensive and expensive studies have been made.[330] The Department of General Planning estimates that implementation of a social impact management system would cost over $1 million per year, and may be unnecessary in view of the alternative methods available.[331]

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(2) The diversity of employment.
(3) The availability of jobs.
(4) The employment wage rate.
(5) The principal economic activities on Oahu.

c. Housing: Whether the development will affect:
(1) The availability of housing.
(2) The quality of housing.
(3) Speculation in land and housing.
(4) Property values of existing homes.

d. Public Services: Whether the development will affect:
(1) Medical facilities.
(2) Educational facilities.
(3) Recreational facilities.
(4) Transportation facilities.
(5) Police and fire protection.
(6) Public utilities facilities.

e. Physical; Environmental: Whether the development will affect:
(1) The natural environment.
(2) Existing natural monuments, landmarks and scenic views.
(3) Open space.
(4) The aesthetic quality of the area.

[328] *Id.* § 11.

[329] *Id.*

[330] Interview with the City Council, *supra* note 15; Interview with Department of General Planning, *supra* note 81.

[331] Interview with the Department of General Planning, *supra* note 81.

Lastly, section 12 of the development plans calls for a certification of compliance with the social factors identified in section 10, to accompany applications for any of the section 11 actions.[332] Upon the inclusion of this section in the second draft of the development plans, it was commented that "the certificate is intended to signify the satisfactory completion of the SIMS [social impact management system] review process rather than the achievement of any particular outcome."[333]

The social impact sections continue to trouble the chief planning officer and he has proposed the total elimination of sections 10 and 12 from the development plans.[334] It is proposed to shift most of the social impact considerations to administrative regulations, much like the current amendment procedures:

> The purpose of these amendments is to delete unnecessary detail from the Development Plans, which are policy documents, and allow for the substantive details of an impact notification process to be worked out through specific administrative procedures. Both substantive requirements and procedures can be incorporated in departmental rules and regulations.[335]

The planning department argues that the problem with the social impact sections is the detail they add to the development plans. Such detail would not only be expensive to implement but largely necessary. Specifically, the department identifies steps in the annual review process which already provide for consideration of social issues.

As discussed earlier, the annual review process is shaped both by the development plans and the Department of General Planning's amendment rules. The social coverage provisions are largely found in these rules. Rule 8.3.a requires that an applicant for a development plan amendment "notify adjacent property owners and affected neighborhood board(s) and community association(s) by forwarding a copy of the Letter of Intent to them."[336] The letter of intent is used to initiate a request for an amendment and is submitted to the chief planning officer.[337] Comments from the community are received by the department by February 15th during each annual review and are considered in the process of accepting or rejecting amendment applications.[338] Community comments are again received by September 15th during each annual review prior to

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[332] Honolulu, Hawaii, Ordinance No. 83-25 § 11 (June 8, 1983).

[333] Bosselman, *supra* note 196, at 4.

[334] Proposed Amendments, *supra* note 98, at 7.

[335] *Id.*

[336] RULES, *supra* note 195, § 8.3.a.

[337] *Id.*

[338] Dept. of Gen'l. Plan., City and County of Honolulu, Development Plan—Annual Review Process (Flow Chart) (a handout available from the Department of General Planning).

the decision to propose or reject amendment requests.[339] These comments are received from neighborhood boards, Areawide Planning Forums and the Statewide Planning Forum.[340] Additionally, the Revised Charter requires that the planning commission and the city council each hold public hearings on proposed development plan amendments.[341] Thus it is argued, that there are numerous phases of the amendment process which adequately address social concerns.

Central to this social evaluation process, is the role of the neighborhood boards. The proposed social impact management system would shift responsibility to a neighborhood head or representative who would be compensated for his efforts.[342] According to the Department of General Planning, neighborhood

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[339] *Id.*

[340] *See* Dept. of Gen'l Plan., City and County of Honolulu, Citizen Participation Program of the Department of General Planning (May 1981) (a handout available from the Department of General Planning). The handout describes the roles of neighborhood boards, Areawide Planning Forums (APF) and the Islandwide Planning Forum (IPW). Neighborhood boards are the basic unit for citizen participation in the planning process. The two larger forums are both made up of neighborhood board representatives. The Areawide Planning Forums are comprised of neighborhood boards *within* each development plan area. The Islandwide Planning Forum consists of the chairman of each neighborhood board and is a forum for coordinating islandwide planning issues among the neighborhood boards. The three tiered system has great potential. It is not, however, a formally adopted system under the development plans. Therefore, use of the system by the planning department appears discretionary.

[341] REVISED CHARTER, *supra* note 4, § 5-413.

[342] *See* Fund Pacific Associates, Task 2 Report: Preliminary Social Impact Management System 24 (1980), which describes the role of the neighborhood representative as follows:

> The principal function of the Neighborhood Rep would be to make face-to-face contact with the scores of informal networks and groups within a prescribed territory when an action is pending. Typically, members of organized groups communicate reasonably well—they read papers, they are on mailing lists, and often they know their way around in government. However, it is the informal groups—the networks—wherein the bulk of the work must take place. There are the uninvolved people who have trouble gaining access to and dealing with the appropriate government agencies. Providing assistance to them on government related matters will tend to solve issues before the issues have an opportunity to become disruptive.

Principal functions of the Neighborhood Rep would be as follows:

- Establish contact with the networks.
- Inform networks and groups in Neighborhood Units about proposed projects that have an effect on them.
- Help people gain access to the appropriate parts of government for resolution of day-to-day issues.
- Monitor and expedite on-going issues that need resolution.
- Work with all parties as they move step-by-step through the guideline procedures.

Regrettably, the entire Fund Pacific Associates study has basically been discarded. A newer study has been conducted by SMS Research, and may suffer a similar fate if a way is not found to decrease the costs involved with implementing a full-scale social system.

board members have asked "why pay someone to do what we already do for free?"[343]

Interestingly, the department notes that its consideration of social issues as a part of the annual review process has increased considerably now that the initial wave of development plan amendment applications and proposals have been processed.[344] In each successive annual review, the number of amendment applications and proposals has decreased markedly.[345] Thus, with more time and available manpower, the department is able to pursue greater depth of social coverage through the annual review process.

Finally, there may be an underlying belief in the city council that the Revised Charter provision for social coverage, permissive though it may be, requires separate coverage. The problem of a social section buried within the annual review process may be that it lacks a tangible identity as such.

It is difficult to predict the disposition of the chief planning officer's current proposals to basically "gut" the social impact management system. From a neutral standpoint, it is obvious that the development plans do not need two separate systems. If the three social impact sections become operative, the part of the annual review process which currently addresses social concerns should be curtailed. On the other hand, if the two sections are deleted, the annual review coverage of the area should be identified, clarified and perhaps expanded.[346]

V. CONCLUSION

The role and performance of the development plans has emerged as one of the "hottest" land use, political and social issues in Honolulu. The development plans permeate the operations of the city and directly influence every aspect of land use on Oahu. They give substance to the amorphous goals and policies of the city. But there is a larger system of which the development plans and general plan is but a part. Land use in Hawaii is a statewide matter and county issues can not realistically be severed from the big picture.

Honolulu's planning system has not evolved in a coordinated manner. The zoning code preceded the new general plan, which in turn preceded the new development plans. Part of the difficulty facing the development plans is bridging the gap that exists between these divergent parts of the planning sys-

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[343] Interview with the Department of General Planning, *supra* note 81.

[344] *Id.*

[345] *Id.*

[346] The city council appears willing to acquiesce to the proposal to delete the troublesome social sections from the development plans. Such acquiescence, however, would presume that a new section could simultaneously be adopted which addresses social concerns in some manner. A new section which formalized the existing system appears acceptable. Interview with the City Council, *supra* note 15.

tem—the general and the specific.

In the general plan, provision of objectives and policies concerning social issues is an easy matter. Social issues are best cast in the general rather than the specific. But in the development plans, applying a structure and creating a working mechanism for consideration of social issues is an administrative nightmare. The proper role of social issues in the development plans continues to generate considerable conflict and debate.

In more structured areas however, the development plans seem to function well, perhaps too well. Interfacing the development plans with zoning for example, appears on its face to be a smooth process. The interim development controls are in place and are regulating land use activities until the zoning ordinances are amended to conform to the development plans. There is no question that zoning is subordinate to the development plans. The issue, however, regarding when zoning must be in conformance with the development plans is yet unanswered.

Physical design aspects of the development plans such as statement and identification sections have been implemented without apparent hardship. There is concern, however, that these aspects of the development plans are too detailed. The concerns in these areas pose planning and administrative problems rather than serious legal issues.[347]

The development plan amendment process as well, seems legally secure but plagued by administrative problems. The annual review provides a mechanism for considering most amendments in a coordinated manner so that collective land use impacts can be evaluated. The burden imposed by the system is its primary drawback. Reforms aimed at streamlining the process are sorely needed. In the amendment process, the Hawaii Supreme Court has created a presumption that the chief planning officer and the Department of General Planning act in a quasi-legislative manner. As such, their actions are afforded the presumption of validity associated with legislative actions. Recent developments in the characterization of amendment actions, however, indicate a trend toward a broadening of the quasi-judicial concept. No case has yet addressed

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[347] The new city council appears dedicated to simplifying and expediting the development plans and the entire land use system. The goal for the future is development plans which are *more* policy oriented and easier to apply. Land use seems plagued by extremes—land use experts who thrive on complexity; developers who earn their livelihood by trying to maximize the allowable use of land; politicians who must ultimately account to the public; and the public itself, which largely cannot begin to comprehend the full scope of the land use system.

Honolulu's land use system is complex, perhaps rightfully so. Where else in the world is there such a dynamic combination of intense development and untouched land, modern lifestyles and traditional ways, verdant mountains and glistening sea, need for development and limitation of basic resources, as on Oahu? But a planning system that is so complex that it escapes the average landowner is of questionable value. Honolulu does not need two sets of zoning ordinances—it needs a viable plan for the next twenty years.

the new characterization arguments in regard to the development plans.

Finally, through sequencing, the development plans attempt to limit the timing and pattern of growth in the city. This aspect of the plans has proven to increase the efficiency of the city's facility planning process but is subject to considerable judicial scrutiny. The growth control aspect of the plans will perhaps be the area requiring the greatest legal attention in the future as Honolulu begins to exhaust its land, water and transportation resources.

To date, no major court decision has been rendered addressing the broad issues presented in this survey as applied to the development plans. A major lawsuit, however, was recently filed in the United States District Court against the City and County of Honolulu challenging numerous aspects of the development plans and the city's overall land use system. The outcome of this suit will invariably have an impact on this area of the law.[348]

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[348] Lewers & Cooke, Inc. v. City and County of Honolulu, No. 84-0346 (D. Hawaii filed Apr. 12, 1984). Lewers & Cooke, Inc., the plaintiff, is the owner of approximately 150 acres of undeveloped land in Waihee Valley. When the corporation acquired the property, it was zoned for residential purposes and its designation was primarily residential on the General Plan Detailed Land Use Map. At all relevant times, the land also had a State Land Use District designation of "urban."

The land is located in the Koolaupoko development plan area. The Koolaupoko development plan, adopted in 1983, reduced the permissible use of the land from residential to agriculture. About one month later, an interim development control was adopted and in 1984 the property was down-zoned to agriculture (AG-1).

Since 1972, Lewers & Cooke, Inc. was in the process of seeking necessary approvals for developing the land. The long and drawn out approval process was not completed prior to the adoption of the development plans. The plaintiff alleges that the city's arbitrary and capricious course of conduct adversely affects their rights.

Specifically, the plaintiff alleges that the defendant violated the taking clause of the fifth amendment and the equal protection clause and due process clause of the fourteenth amendment. Further, the defendant is alleged to have deprived the plaintiff of its constitutional rights under the color of law pursuant to 42 U.S.C. § 1983.

The plaintiff is seeking damages, the restoration of the residential designation of the land and the invalidation of the applicable development plan, interim development control, zoning amendment and subdivision rules. This case is of importance because of its potential impact on land use issues.

The Case of *Korematsu v. United States*: Could it be Justified Today?

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PREFACE

The bombing of Pearl Harbor on December 7, 1941 abruptly thrust the United States into World War II. The fear of further attacks inflamed the anti-Japanese sentiments already existent among West Coast communities where many Asian immigrants had settled.[1] Looked upon with suspicion, the Japa-

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[1] By congressional enactment, the Commission on Wartime Relocation and Internment of Civilians [hereinafter cited as CWRIC] was formed in 1980. CWRIC Act, Pub. L. No. 96-317, 94 Stat. 964 (1980) (codified as amended at 50 U.S.C. app. § 1981 (1976 & Supp. V 1981)). The report issued by the Commission after a two-year investigation presented, among other things, a capsule of the "long and ugly history of West Coast anti-Japanese agitation and legislation." CWRIC, PERSONAL JUSTICE DENIED 4 (1982) [hereinafter cited as CWRIC REPORT].

> Antipathy and hostility toward the ethnic Japanese was a major factor of the public life of the West Coast states for more than forty years before Pearl Harbor. Under pressure from California, immigration from Japan had been severely restricted in 1908 and entirely prohibited in 1924. Japanese immigrants were barred from American citizenship, although their children born here were citizens by birth. California and the other western states prohibited Japanese immigrants from owning land. In part the hostility was economic, emerging in various white American groups who began to feel competition, particularly in agriculture, the principal occupation of the immigrants. The anti-Japanese agitation also fed on racial stereotypes and fears: the "yellow peril" of an unknown Asian culture achieving substantial influence on the Pacific Coast or of a Japanese population alleged to be growing far faster than the white population. This agitation and hostility persisted, even though the ethnic Japanese never exceeded three percent of the population of California, the state of greatest concentration.
>
> The ethnic Japanese, small in number and with no political voice—the citizen generation was just reaching voting age in 1940—had become a convenient target for political demagogues, and over the years all the major parties indulged in anti-Japanese rhetoric and programs. Political bullying was supported by organized interest groups who adopted anti-Japanese agitation as a consistent part of their program: The Native Sons and Daughters of the Golden West, the Joint Immigration Committee, the American Legion, the California State Federation of Labor and the California State Grange.
>
> This agitation attacked a number of ethnic Japanese cultural traits or patterns which were woven into a bogus theory that the ethnic Japanese could not or would not assimilate or become "American." Dual citizenship, Shinto, Japanese language schools, and the education of many ethnic Japanese children in Japan were all used as evidence. But as a matter of fact, Japan's laws on dual citizenship went no further than those of many European countries in claiming the allegiance of the children of its nationals born abroad. Only a small number of ethnic Japanese subscribed to Shinto, which in some forms included veneration of the Emperor. The language schools were not unlike those of other first-generation immigrants, and the return of some children to Japan for education was as

nese, both American citizens and resident aliens alike, were perceived as potential saboteurs and spies who would aid the enemy in another invasion. The government concluded that areas vulnerable to attack by Japanese forces required protection from such subversive threats. President Roosevelt, with the approval of Congress, authorized the military to take measures necessary to defuse this menace.[2] What was deemed "necessary" was the wholesale removal or exclusion of Japanese Americans and aliens from areas considered by the military to be of strategic value.[3] Once removed, the evacuees were shunted to internment camps, where many remained for over two years.[4]

Although most of the internees were residents of the West Coast, about 1,900 of them were also relocated from Hawaii.[5] Among them was George Hoshida. Prior to the attack on Pearl Harbor, Hoshida thought of himself as an ordinary family man. He cherished his wife and three daughters, and was grateful that he could provide them with a home in a pleasant neighborhood in Hilo, Hawaii. He earned a living as a salesman for the Hilo Electric Light Company. As a pastime and as a means of keeping physically fit, he practiced and taught judo, and served as president of an association of judo clubs. He also conducted Sunday school classes at the local Buddhist temple and was an officer of a church-affiliated organization, the United Young Buddhist Association of Hawaii. Although Hoshida continued to observe certain Japanese customs, he nevertheless considered himself a permanent member of the Hawaiian community. He felt fortunate to be among people who were able to retain an identity with their ethnic origins, while living together harmoniously.[6]

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much a reaction to hostile discrimination and an uncertain future as it was a commitment to the mores, much less the political doctrines, of Japan. Nevertheless, in 1942 these popular misconceptions infected the views of a great many West Coast people who viewed the ethnic Japanese as alien and unassimilated.

Id. at 4-5. *See also id.* at 27-46 (presenting in detail the socio-economic atmosphere in California preceding World War II); M. FUKUDA, LEGAL PROBLEMS OF JAPANESE-AMERICANS (1980); F. CHUMAN, THE BAMBOO PEOPLE: THE LAW AND JAPANESE-AMERICANS (1976).

[2] *See infra* text at part I, sec. A.

[3] *Id.*

[4] CWRIC REPORT, *supra* note 1, at 12-15.

[5] *Id.* at 277.

[6] The CWRIC considered cultural harmony to be one of the significant factors in the difference between the fate of the Japanese in Hawaii from those on the West Coast during World War II:

> Hawaii was more ethnically mixed and racially tolerant than the West Coast. Race relations in Hawaii before the war were not infected with the virulent antagonism of 75 years of anti-Asian agitation. While anti-Asian feeling existed in the territory, it did not represent the longtime views of well-organized groups as it did on the West Coast and, without statehood, xenophobia had no effective voice in the Congress.

Id. at 16.

Other factors cited by the Commission were the greater number of ethnic Japanese in Hawaii,

In the aftermath of the Pearl Harbor bombing, Hoshida's self-perception was drastically altered. Those personal traits he once considered unremarkable now set him apart from the rest of the community. His association with the Buddhist church, his judo practice, his respect for Japanese ways, and his alienage suddenly brought loyalty to his adopted country into question. Afraid of courting suspicion, he refrained from conversing in his native language in public; he burned many Japanese books and articles he had collected and disposed of Japanese dolls given to his daughters in observance of Girl's Day, a holiday of the old country.

These attempts to allay mistrust proved to be futile. Hoshida was taken into custody on February 6, 1942 by his own brother-in-law, a detective on the local police force. With other detainees,[7] he was confined under guard at the Kilauea Military Camp, a facility used in peacetime as a vacation resort by armed forces personnel. Uncertain about his future, he worried about his family's ability to cope without him. He learned by letter that his wife was pregnant with their fourth child. In addition, she could no longer rely on his help to care for their eldest daughter Taeko who had been left blind, mute, and partially paralyzed as a result of an automobile accident.

About a month after his seizure, Hoshida faced a panel of military officers and civilians charged with reviewing the loyalty of the detainees. The judgment rendered by the panel would determine Hoshida's fate during the course of the war. He later recounted his thoughts about the confrontation:

> Why didn't I keep my mouth shut? If only I had kept quiet when the examiners told me that judo was pro-Japanese training! Why did I have to argue that judo in itself is not pro-Japanese or pro-any nationality? Why didn't I just nod and say, "Yes, sir, yes, sir?"[8]

Not allowed to notify his family of his departure or to bid them farewell, Hoshida was sent to an internment camp in Lordsburg, New Mexico. In retrospect, "he believed he 'may have gotten out clear' if he had patiently listened to the lecture a panel member gave him instead of disagreeing."[9]

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the imposition of martial law in Hawaii, which gave the military more effective control over daily affairs, and the difference in the racial attitudes of the military commander of each area. *Id.* at 16-17; *see also id.* at 261-82 (describing in greater detail the Hawaii situation and contrasting it with the West Coast experience).

[7] In an unpublished autogiography, Hoshida noted that those places under initial custody at the military camp were referred to as *detainees*. Those detainees who were subsequently sent to centers on the Mainland after loyalty hearings were classified as *internees*. G. Hoshida, Life of a Japanese Immigrant Boy in Hawaii & America: (The First Half) From Birth Thru WWII 1907-1945 at 256 & 274 (Dec. 14, 1983) (unpublished manuscript).

[8] P. SAIKI, GANBARE! AN EXAMPLE OF JAPANESE SPIRIT 92 (1982).

[9] E. JOESTING, HAWAII: AN UNCOMMON HISTORY 316 (1972).

Hoshida was virtually a prisoner-of-war in his own country.[10] The internment camp was surrounded by double barbed wire fences and constantly under armed military guard. The ordeal of confinement proved to be intolerable for some. One internee from Hawaii was shot and killed while attempting to escape over the compound's barrier.[11]

In the meantime, the family Hoshida had left behind in Hawaii was also undergoing hardship. His wife Tamae could not work because of her advancing pregnancy. She had to accept welfare benefits to relieve financial burdens despite help from family members. Unable to cope after a nervous collapse, Mrs. Hoshida was forced to institutionalize her severely handicapped daughter.

Eventually, Hoshida's family was also interned. Two months after the birth of their fourth daughter, Mrs. Hoshida left with the children for a relocation camp in Jerome, Arkansas. Before leaving Hawaii, she hastily sold their home. Hoshida wrote in a journal he had kept during his internment, "It seems so unreal that the house we've struggled to acquire should no longer be called our home. It feels as though a bond which has been binding us to Hawaii has snapped. Perhaps we may never return there again."[12]

The anxieties of relocation were lessened for Mrs. Hoshida by the promise of being with her husband once again. But the family would not be reunited for another year as petitions for Hoshida's release made their way through the administrative morass. While still apart, Mrs. Hoshida no longer had the support of the close friends and relatives she had left behind in Hawaii. A few months after their reunion, the family was informed of the death of the eldest girl Taeko. Later, they would learn that she had drowned while left unattended in a bathtub.

The family returned to Hilo in 1945. With no money and no livelihood, Hoshida at the age of thirty-seven, had to rebuild a life for himself and his family:

> He filed claims against the government for the property he had lost, but in the end he was awarded $500, a small part of what he had lost. George Hoshida and the others who had been condemned to live out the war behind barbed wire lost

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[10] Hoshida's autobiography includes excerpts from a diary of his internment years. His October 28, 1942 entry notes the arrival at the internment camp of about fifty Japanese prisoners-of-war:

> The majority of the POWs were captured adrift in a life boat after the Battle of Midway where the Japanese [navy] suffered a great loss. They were the engine crew of [the] aircraft carrier *Hiryu* sunk at Midway. . . . The group included five officers. . . . Five others were captured in the [Aleutians] and were members of a sub which was sunk. One was taken from a lookout boat near Ogasawara [Island] off Japan.

G. Hoshida, *supra* note 7, at 350.

[11] *Id.* at 320.

[12] *Id.* at 378 (relating journal entry of Jan. 23, 1943).

not only their possessions but also valuable years from their lives.[13]

George Hoshida is my father. I know this gentle man would never have aided the Japanese military—they were his enemy, too. But, because he fit the government's profile of a potential saboteur, he was sent away. He expressed his bewilderment about the experience in an autobiography he is currently writing:

> Although it was war, it seemed so unbelievable that we who had been honest, law-abiding residents of this land, should be seized and thrown into such humiliating situations for the reason that we were the nationals of the enemy country. We had looked upon this country as our home but to be treated as an enemy alien and dangerous to the security of this country and be segregated and confined behind barbed wire under guard, was a rude awakening. It was a great shock to realize that this land which we had considered as home for life was after all not our true home. We would have gladly relinquished our affiliation to the land of our birth and become citizens of this country of adoption but discriminating naturalization laws [had] denied us that privilege.[14]

My own memories of the internment are vague. I was only two years old when my family was ordered to leave Hawaii. Hearing and reading about the experience only increased my own bewilderment: How could such events have taken place at all? This paper was the vehicle I used to understand what happened and to reassure myself that the injustice could not be repeated today. The political, social and legal forces that operated to justify the exclusion and internment of the Japanese Americans are clearer to me now. However, they leave me far less certain that another misunderstood minority might not be similarly mistreated again.

INTRODUCTION

Nearly four decades ago while the country was still embroiled in World War II, the United States Supreme Court decided the case of *Korematsu v. United States*.[15] The highest court of the land upheld the conviction of one Fred Toyosaburo Korematsu, a Japanese American, for failure to vacate a zone de-

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[13] E. JOESTING, *supra* note 9, at 319. Today, George Hoshida does not seek additional monetary reparations. Despite what happened, he feels a debt to the country that offered him a home and a way of life. Interview with Ray Lovell, newscaster for Channel 2, Honolulu, Hawaii (July 1981). *But cf.* CWRIC, PERSONAL JUSTICE DENIED PART 2: RECOMMENDATIONS 9 (1983) (recommending, among other things, that Congress establish a fund "to provide a one-time per capita compensatory payment of $20,000 to each of the approximately 60,000 surviving persons excluded from their places of residence pursuant to Executive Order No. 9066").

[14] G. Hoshida, *supra* note 7, at 306.

[15] 323 U.S. 214 (1944).

cleared off-limits by the military to all those of his ancestry.[16] After the bombing of Pearl Harbor, the ethnic Japanese on the West Coast and in Hawaii were feared to be potential saboteurs and spies who would willingly aid the enemy in another invasion. As a result, their presence was forbidden in those strategic areas believed to be under threat of attack by Japan's armed forces. Because the government believed that the exigencies of the time justified the wholesale restraint of a single ethnic group, the United States Supreme Court upheld the action as a constitutional exercise of the war power.[17]

Today, Fred Korematsu is free of the stigma of the conviction levied against him over forty years ago. In November 1983, United States District Judge Marilyn Patel vacated the 1942 judgment, accepting Korematsu's assertion that the Supreme Court ruling had been attained with evidence falsified by the government.[18] Although the present Justice Department supported the petition to set aside the conviction,[19] the 1944 *Korematsu* decision remains as precedent for justifying restrictive government actions against an ethnic minority on the basis of military necessity.[20]

Does the evolution of caselaw ensure that the Court will not sanction governmental decisions based on "race prejudice, war hysteria and a failure of political leadership?"[21] To attempt an answer, this comment first presents the facts and legal reasoning of the actual decision. The Court's analysis is then examined vis-a-vis the direction certain areas of constitutional law have taken since that landmark case, specifically:

1. Constitutional authorization for exclusion and internment and the permissible interplay between Congress and the Executive in the exercise of the war power;

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[16] *Id.* at 215-16.

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

[18] Honolulu Star-Bulletin, Nov. 11, 1983, at A-5, col. 1.

[19] Honolulu Star-Bulletin, Oct. 4, 1983, at A-6, col. 5.

[20] Professor Gerald Gunther of Stanford University is troubled by this: "The unsettling aspects of *Korematsu* are not removed by the fact that 40 years later someone can say that it shouldn't have happened." *Bad Landmark: Righting A Racial Wrong*, TIME, Nov. 21, 1983, at 51 (quoting Professor Gunther). *See also* Justice Jackson's dissent in *Korematsu*:

> But once a judicial opinion rationalizes such [a military] order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.

Korematsu, 323 U.S. at 246 (Jackson, J., dissenting).

[21] In its report to the United States Congress, the CWRIC concluded that "[t]he broad historical causes which shaped these decisions [to detain, to end detention, and to end exclusion of the ethnic Japanese] were race prejudice, war hysteria and a failure of political leadership." CWRIC REPORT, *supra* note 1, at 18.

2. Current equal protection law and the deference the Court might accord to military judgment in its decisions today; and
3. Justiciability of the *Korematsu* question.

The paper also identifies some nonlegal factors that may have entered into the judicial decisionmaking of the 1944 Supreme Court bench, and explores the extent to which such variables could be controlled today.

Refinements to the equal protection doctrine may demand that the Court exercise the strictest scrutiny where official actions aimed at a single ethnic group result in serious deprivations of freedom. Certainly, the revelations of history provide guideposts to direct governmental conduct today.[22] Nonetheless, judicial decisions are not calculated from the mechanical insertion of variables into legal formulae. Enough latitude exists in the application of rules and doctrines to permit the influence of nonjudicial factors to enter into the Court's decisions. Its review is also limited by the facts laid before it; it cannot act on evidence withheld from its scrutiny. Thus, historical and legal developments do not serve as guarantees that a case such as *Korematsu* would be decided differently today.

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[22] *See generally* CWRIC REPORT, *supra* note 1, and P. IRONS, JUSTICE AT WAR (1983) (an exposition of the events leading to the three Japanese American World War II Supreme Court decisions—Hirabayashi v. United States, 320 U.S. 81 (1943), Korematsu v. United States, 323 U.S. 214 (1944), and *Ex parte* Endo, 323 U.S. 283 (1944)).

Specifically, the CWRIC Report presented personal assessments by some of those involved in the events:

Henry L. Stimson, then Secretary of War: "While believing in the context of the time that evacuation was a legitimate exercise of the war powers, [he] recognized that 'to loyal citizens this forced evacuation was a personal injustice.' " CWRIC REPORT, *supra* note 1, at 18.

Francis Biddle, then United States Attorney General: "In his autobiography, [he] reiterated his beliefs at the time: 'the program was ill-advised, unnecessary and unnecessarily cruel.' " *Id.*

Justice William O. Douglas, who had joined the majority opinion in *Korematsu*: "[He] found that the evacuation case 'was ever on my conscience.' " *Id.*

Milton Eisenhower, then director of the War Relocation Authority, the civilian agency created by President Roosevelt to oversee the relocation of civilians: "[He] described the evacuation to the relocation camps as 'an inhuman mistake.' " *Id.*

Chief Justice Earl Warren, who, as Attorney General of California, had promoted the evacuation: " 'I have since deeply regretted the removal order and my own testimony advocating it, because it was not in keeping with our American concept of freedom and the rights of citizens.' " *Id.*

Justice Tom C. Clark, then liaison between the Justice Department and the Western Defense Command: " 'Looking back on it today [the evacuation] was, of course, a mistake.' " *Id.*

But cf. John J. McCloy, then Assistant Secretary of War: "The historic reality is that the wartime Japanese government made the evacuation necessary. . . . The consensus of prudent, responsible officials, without rebuttal from any quarter, was that an attack was possible, accompanied by sabotage by the ethnic Japanese heavily concentrated around vulnerable West Coast defense installations." McCloy, *Payment to Internees Opposed*, Honolulu Star-Bulletin, May 6, 1983, at A-21, col. 1.

I. THE *Korematsu* DECISION

A. *The Factual Setting*[23]

On the day after the December 7, 1941 bombing of Pearl Harbor, the United States Congress declared war on Japan.[24] Early measures to protect the national security were instituted under the Alien Enemy Act.[25] By authority of presidential proclamations, the United States Attorney General seized and detained mainly those enemy aliens previously identified as dangerous to the national security by civilian and military intelligence services.[26] As a result, ini-

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[23] Much of the facts and circumstances that were before the Court in *Korematsu* are culled from Hirabayashi v. United States, 320 U.S. 81 (1943). The basis for looking to the earlier decision to reconstruct the record is the reliance by the Court in *Korematsu* on the facts and principles expressed in *Hirabayashi*.

> The Hirabayashi conviction and this one [Korematsu] thus rest on the same 1942 Congressional Act and the same basic executive and military orders, all of which orders were aimed at the twin dangers of espionage and sabotage.
>
> . . . .
>
> In the light of the principles we announced in the *Hirabayashi* case, we are unable to conclude that it was beyond the war powers of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did.

Korematsu, 323 U.S. at 217-18.

In addition, another source is utilized for supplemental background material. Lieutenant General John L. DeWitt, United States Army, who was Military Commander of the Western Defense Command (which included the area that Korematsu had been directed to leave) submitted a report on the evacuation to the United States Army Chief of Staff. Headquarters Western Defense Command and Fourth Army, Final Report [on the] Evacuation of Japanese from the West Coast 1942 (June 5, 1943) [hereinafter cited as Final Report]. The Court in *Korematsu* had the Final Report before it, citing it in a number of instances. *See, e.g.*, *Korematsu*, 323 U.S. at 219 n.2, 236-38 nn.1, 3, & 4-10. The document provides historical information and sociological embellishments presented in this section and in other parts of this paper.

[24] Pub. L. No. 328, 55 Stat. 795 (1941) (codified as 50 U.S.C. app. § 1 note (1976)).

[25] 50 U.S.C. § 21 (1976). Still in force today, the Act provides for the restraint, regulation and removal of alien enemies. Specifically, the statute states, in part:

> Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, and the President makes public proclamation of the event, all natives, citizens, denizens or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies.

Id.

[26] Final Report, *supra* note 23, at 3. Under the Alien Enemy Act, the President immediately issued proclamations declaring all nationals of the countries with which the United States was at war to be enemy aliens. *Id.* The Attorney General, through the Department of Justice, was directed to implement the provisions of the proclamations. He was given the authority to (1) promulgate administrative procedures, (2) declare zones from which enemy aliens were to be

tially about 2,300 enemy aliens were apprehended: 1,291 Japanese (367 in Hawaii and 924 on the mainland), 857 Germans, and 147 Italians.[27] However, no American citizen of Japanese ancestry was involved in this early stage.[28] At this time, the Attorney General did not exercise any other discretionary options. He did not designate off-limit areas, nor did he require the collection of contraband.[29]

Lieutenant General John L. DeWitt, Commander of the Fourth Army on the West Coast (and later the leader of the Western Defense Command), was "convinced that the military security of the coast required [more assertive] measures."[30] At his urging, representatives of the Justice and War Departments met and eventually agreed to coordinate efforts to exclude enemy aliens from zones surrounding vital installations and to enforce the prohibition against contraband.[31] The joint undertaking, however, led to disagreements between the parties. The Attorney General refused to adopt General DeWitt's recommendation to expand the off-limit areas by including regions not contiguous to important defense installations.[32] The Justice Department official did not wish to proceed without "convincing evidence of the military necessity."[33]

In a February 14, 1942 memorandum to the Secretary of War, General DeWitt presented his own assessment of the military necessity for expanding the exclusion areas and for including Japanese American citizens in the program.[34]

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excluded, (3) collect from such persons articles described as contraband, and (4) intern such enemy aliens believed to be dangerous to the national security. *Id.*

[27] CWRIC REPORT, *supra* note 1, at 55.

[28] Final Report, *supra* note 23, at 3, 6.

[29] *Id.* at 3.

[30] *Id.* In a memorandum to Assistant Attorney General James Rowe, Jr., General DeWitt expressed his misgivings:

> The developments which have resulted in the current conferences between the Attorney General's representative, and General DeWitt and his staff, have been occasioned by the almost complete absence of action on the part of the Department of Justice over a period of nearly four weeks since promulgation of the [executive] proclamations, toward implementing [necessary measures].
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> . . . .
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> . . . [I]t is considered desirable to request advice as to the extent to which the Department of Justice is prepared to assume and to discharge the responsibility of taking whatever steps are necessary for the prevention of sabotage, espionage, and other fifth column activities from enemy alien [quarters].

Memorandum from General DeWitt to Assistant Attorney General James Rowe, Jr., (Jan. 5, 1942), *reprinted in* Final Report, *supra* note 23, at 19, 22 (app. to ch. II).

[31] Final Report, *supra* note 23, at 4.

[32] *Id.* at 7.

[33] *Id.*

[34] Memorandum from General DeWitt to Secretary of War Henry L. Stimson (Feb. 14, 1942), *reprinted in* Final Report, *supra* note 23, at 25, 33-38.

His proposal was the impetus for Executive Order No. 9066, issued on February 19, 1942.[35] The presidential directive declared that "[t]he successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises and national-defense utilities."[36] Accordingly, the order authorized the Secretary of War and his designated military commanders, when they deem it necessary or desirable, "to prescribe military areas . . . from which any or all persons may be excluded. . . . The designation of military areas . . . shall supersede designations of prohibited and restricted areas by the Attorney General . . . and shall supersede the responsibility and authority of the Attorney General . . . in respect of such . . . areas."[37] The day after the order was issued, the Secretary of War named General DeWitt as Military Commander of the Western Defense Command.[38] This appointment was pivotal in expanding the scope of the West Coast defense program beyond that envisioned by the Attorney General.[39]

To implement his earlier proposal, General DeWitt issued a series of proclamations and orders. The first directives, released in early March 1942, established certain military areas within the Western Defense Command.[40] These designations were necessary, according to the official statements, because the Pacific Coast was "particularly subject to attack, to attempted invasion by the armed forces of nations with which the United States [was] at war, and . . . [was] subject to espionage and acts of sabotage."[41] The proclamations also warned that exclusion measures might be taken against "such persons or classes of persons as the situation may require" by subsequent announcements.[42]

Additionally, on March 18, 1942, the President issued the executive order which established the War Relocation Authority, the civilian agency charged with supervision of the evacuees after departure from assembly centers.[43] Although the order did not expressly call for relocation camps, the newly created unit was given wide discretion in deciding the fate of the Japanese who were forced to leave their homes.[44]

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[35] 7 Fed. Reg. 1407 (1942); Final Report, *supra* note 23, at 25.

[36] Exec. Order No. 9066, 7 Fed. Reg. 1407 (1942).

[37] *Id.*

[38] The Western Defense Command Area comprised the West Coast states and Idaho, Montana, Nevada, Utah, and Arizona as well. Final Report, *supra* note 23, at 16 (figure 1).

[39] P. IRONS, *supra* note 22, at 24. For a detailed account of the clash between the Justice Department and the War Department before the issuance of Executive Order No. 9066, see *id.* at 25-47 (chapter 2: "An American Citizen Is an American Citizen").

[40] Pub. Proclamation No. 1, 7 Fed. Reg. 2320 (1942) (issued on Mar. 2, 1942); Pub. Proclamation No. 2, 7 Fed. Reg. 2405 (1942) (issued on Mar. 16, 1942).

[41] Pub. Proclamation No. 1, 7 Fed. Reg. 2320 (1942).

[42] *Id.*

[43] Exec. Order No. 9102, 7 Fed. Reg. 2165 (1942).

[44] CWRIC REPORT, *supra* note 1, at 107.

Within a month thereafter, General DeWitt imposed a curfew and began to issue exclusion orders for certain areas within his command.[45] These applied to all persons of Japanese ancestry. Another order from the commander prohibited departure from military areas until further instructions were issued.[46] The purpose of this restriction was to "insure the orderly evacuation and resettlement of Japanese voluntarily migrating from Military Area No. 1."[47] Five months after the bombing of Pearl Harbor, in May 1942, General DeWitt issued the civilian exclusion order which Korematsu eventually defied.[48] It required all persons of Japanese ancestry, both aliens and citizens alike, to evacuate a prescribed portion of Military Area No. 1 and to report within five days to assembly centers.[49] Indefinite detention of persons reporting to these centers was decreed in another order by the General, promulgated eleven days before Korematsu was charged.[50]

Those who failed to leave as directed were subject to criminal prosecution.[51] A conviction was punishable by a fine of $5,000, or up to one year of imprisonment, or both.[52] These sanctions were provided by an act of Congress passed before General DeWitt began issuing the curfew and exclusion orders.[53] However, from the legislative history, it is evident that Congress was aware of the

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[45] *Korematsu*, 323 U.S. at 228.

[46] *Id.*

[47] Pub. Proclamation No. 4, 7 Fed. Reg. 2601 (1942). Korematsu's home was located in Military Area No. 1, which comprised the coastal region of California, Oregon and Washington, as well as southern Arizona. *Hirabayashi*, 320 U.S. at 87.

[48] Civilian Exclusion Order No. 34, 7 Fed. Reg. 3967 (1942) (issued on May 3, 1942; reporting to center required by May 8, 1942); *Korematsu*, 323 U.S. at 216, 229.

[49] *Korematsu*, 323 U.S. at 229; *see supra* note 48.

[50] Civilian Restrictive Order No. 1, 8 Fed. Reg. 982 (1943); *Korematsu*, 323 U.S. at 221.

[51] *Korematsu*, 323 U.S. at 229.

[52] Restrictions in Military Areas and Zones Act, Pub. L. No. 503, ch. 191, 56 Stat. 173 (1942) (codified as amended at 18 U.S.C. § 1383 (1976) (repealed 1976)). The statute, at enactment, read:

> To provide a penalty for violation of restrictions or orders with respect to persons entering, remaining in, leaving, or committing any act in military areas or zones.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of misdemeanor and upon conviction shall be liable to a fine of [sic] not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense.

[53] *Id.*

Military Commander's plans.[54] It enacted the statute "to provide the means for the enforcement of orders issued under Executive Order No. 9066."[55]

Thus, at the time of his arrest, Korematsu was under compulsion of a military order forbidding him from leaving the area except as authorized. Other orders required that he evacuate the military area in which he resided and report to an assembly center where he could be indefinitely detained. Failure to comply subjected him to criminal penalties under an act of Congress. Yet, Korematsu's personal make-up did not distinguish him from any other American citizen:

> The record in Korematsu's case showed by stipulation and uncontroverted evidence that he had violated the Exclusion Order applicable to San Leandro, which was the place of his residence. It further showed without contradiction that Korematsu had been born in California; that he had never departed from the continental limits of the United States nor renounced his American citizenship nor did he have any form of allegiance to any country other than the United States; that he was willing to render any service requested of him in the war against Japan and had no sympathy for Japan in the war; that he was a registered voter and was in various respects assimilated into the American community; and that he had remained in his place of residence in violation of the Exclusion Order because of friendly relations with the residents of the locality, particularly with a girl not of Japanese ancestry, and because he considered himself an American.[56]

Korematsu's conviction was thereafter upheld by the United States Supreme Court.

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[54] *Hirabayashi*, 320 U.S. at 89-91. The decision related some legislative historical background:

> The Chairman of the Senate Military Affairs Committee explained on the floor of the Senate that the purpose of the proposed legislation was to provide means of enforcement of curfew orders and other military orders made pursuant to Executive Order No. 9066. He read General DeWitt's Public Proclamation No. 1, and statements from newspaper reports that "evacuation of the first Japanese aliens and American-born Japanese" was about to begin.

Id. at 90.

[55] *Id.* at 89.

[56] Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions*, 45 COLUM. L. REV. 175, 182 (1945) (extracting information from Brief for the United States at 4-5, Korematsu v. United States, 323 U.S. 214 (1944)). The author, Nanette Dembitz, was a member of the legal staff of the Justice Department during preparations for presentation of the *Korematsu* and *Endo* cases to the Supreme Court. P. IRONS, *supra* note 22, at 119.

B. *The Decision*

Justice Hugo Black delivered the opinion of the Court. He was joined in the majority opinion by Chief Justice Stone and by Justices Reed, Douglas, and Rutledge. Justice Frankfurter concurred in a separate opinion.[57] Justices Roberts, Murphy and Jackson each voiced their dissent in individual opinions.[58]

1. *The Majority Opinion*

Justice Black recognized that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect."[59] He articulated the oft-cited standard of review that applies even today in equal protection cases addressing racial issues—"the most rigid scrutiny" and the requirement of "[p]ressing public necessity."[60] Reaffirming the principles proclaimed in *Hirabayashi v. United States*,[61] the Court held the exclusion of "a single racial

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[57] *Korematsu*, 323 U.S. at 224 (Frankfurter, J., concurring).

[58] *Id.* at 225 (Roberts, J., dissenting); *id.* at 233 (Murphy, J., dissenting); *id.* at 242 (Jackson, J., dissenting).

[59] *Korematsu*, 323 U.S. at 216.

[60] *Id. See, e.g.*, Fullilove v. Klutzwick, 448 U.S. 448, 507 (1980) (Powell, J., concurring); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966); McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Narenji v. Civiletti, 617 F.2d 745, 754 (1979).

[61] 320 U.S. at 81 (1943). The *Korematsu* decision did not reiterate those principles. From a reading of the *Hirabayashi* decision, they appear to be:

1. *Congress may delegate legislative powers by ratification of measures already promulgated by the executive branch.* Legislative history suggested that Congress, aware of the military plans for the West Coast pursuant to Executive Order No. 9066, had effectively ratified orders such as the curfew restriction by enacting the statute under which Korematsu and Hirabayashi were charged. *Id.* at 90-91. In addition, the Court did not hesitate to look to the military orders themselves to find the standards and policies that must be articulated by Congress when delegating its legislative powers. *Id.* at 103-04.

2. *Congress and the President through joint action possess the constitutional power to impose the curfew restriction as an emergency war measure.* "The war power of the national government is 'the power to wage war successfully.' " *Id.* at 93 (quoting Hughes, *War Powers under the Constitution*, 42 A.B.A. Rep. 232, 238 (1917)). Since the constitutionally granted power must be wielded by Congress and the President within the context of warfare, the Court reasoned that the grant necessarily included "wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it." *Id.* Accordingly, the judicial branch should not review the advisability of wartime measures employed by its coequal branches nor substitute its judgment for theirs. *Id.* The Court in *Hirabayashi* then held that the curfew was a justifiable governmental restriction in light of (1) the military situation in the Pacific following the Pearl Harbor attack; (2) the military judgment that the West Coast, vulnerable to attack by the Japanese, must be safeguarded against espionage and sabotage; and (3) the reasonableness of imposing the curfew on a few citizens, the

group" to be within the war power of Congress and of the President.[62] The "pressing public necessity" rested on the military judgment that immediate segregation of the disloyal—potential spies and saboteurs who threatened West Coast security—from the loyal was not possible.[63] And, in turn, reliance on the military to decide the best course of action was held to be proper, in light of congressional authorization.[64]

The Court limited its review to the constitutionality of the exclusion order. Refusing to regard the exclusion and subsequent detention as "one and inseparable,"[65] Justice Black found "no reason why violations of these orders, insofar as they were promulgated pursuant to congressional enactment, should not be treated as separate offenses."[66] He surmised that Congress would have provided distinct sanctions for violation of each order, if it had chosen to legislate the separate directives into one act.[67] Since Korematsu had been convicted of violating only the exclusion order, the Associate Justice saw no need to address any other issues.[68] He presumed there would be "time enough" later, when the assembly or detention orders were enforced against Korematsu, for the Japanese American to raise constitutional issues relevant to these military restrictions.[69]

2. *The Concurrence*

Justice Frankfurter agreed with the majority that the Court's decision in

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ethnic Japanese, rather than on the entire West Coast populace.

3. ***Facts and circumstances indicating that an ethnic group poses a danger to others provide a rational basis for the implementation of public safety measures by the government in the face of threatened invasion and warfare.*** The Court held that there was no denial of equal protection in imposing the curfew only upon those of Japanese ancestry. *Id.* at 100-02. The "facts and circumstances" relied on by the Court include: (1) the effectiveness of espionage in the surprise attack on Pearl Harbor; (2) the concentration of persons of Japanese ancestry along the West Coast; (3) the failure of the ethnic Japanese to assimilate into the American culture; (4) the attachment to Japan as evidenced by the continued practice of Japanese customs; (5) the military judgment that segregation of the disloyal from the loyal could not be done with the swiftness demanded by the crisis of threatened attack and by the possibility of espionage and sabotage; and (6) the greater source of danger posed by those residents having ethnic affiliations with the enemy attackers.

Id. at 96-102.

[62] *Korematsu*, 323 U.S. at 217-18.

[63] *Id.* at 218-19.

[64] *Id.* at 223.

[65] *Id.* at 221.

[66] *Id.* at 222.

[67] *Id.*

[68] *Id.*

[69] *Id.*

Hirabayashi sustained the exclusion order at issue in *Korematsu*.[70] Additionally, the Justice appeared to hold a more expansive view of the war power and of the scope of its legitimate exercise. As his premise, he recited former Chief Justice Hughes' charge that "the war power of the Government is 'the power to wage war successfully,' "[71] Frankfurter firmly fixed this power within the bounds of the Constitution. He concluded that military actions, though possibly illegal measures in time of peace, "must be judged wholly in the context of war."[72] The constitutional test he would apply was that the "military order . . . not transcend the *means appropriate for conducting war.*"[73]

His standard reflected a degree of deference to the military that the majority opinion apparently was not willing to entertain. Justice Black's constitutional gauge required "apprehension by the proper military authorities of the gravest imminent danger to the public safety" and "a definite and close relationship to the prevention of espionage and sabotage."[74]

The latitude that Justice Frankfurter would accord the legislative and executive branches in the waging of war necessarily limited the judicial role. "To find that the Constitution does not forbid the military measures now complained of does not carry with it approval of that which Congress and the Executive did. *That is their business, not ours.*"[75]

3. *Justice Roberts' Dissent*

Justice Roberts' dissent from the majority opinion was based on an elemental difference, the issue before the Court. The governmental intrusion he considered under judicial review was not "keeping people off the streets at night, . . . nor . . . temporary exclusion of a citizen from an area for his own safety or that of the community, nor . . . offering him an opportunity to go temporarily out of an area where his presence might cause danger to himself or to his fellows."[76] Rather, he framed the issue as a "case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States."[77] So stated, the issue invites the Justice's conclusion that "[c]onstitutional rights have been

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[70] *Id.* at 224. (Frankfurter, J., dissenting).

[71] *Id.* (citing *Hirabayashi*, 320 U.S. at 93, quoting Hughes, *War Powers Under the Constitution*, 42 A.B.A. Rep. 232, 238 (1917)).

[72] *Id.* at 224.

[73] *Id.* at 225 (emphasis added).

[74] *Id.* at 218.

[75] *Id.* at 225 (emphasis added).

[76] *Id.* at 225-26 (Roberts, J., dissenting).

[77] *Id.* at 226.

violated."[78]

Justice Roberts' position was that "exclusion was but a part of an overall plan for forceable detention."[79] As support, he recited a chronology of the executive and military orders to illustrate progressive governmental restraint that operated to narrow the options available to Korematsu and other ethnic Japanese evacuees.[80] He described Korematsu's situation, prior to his arrest, as a dilemma: the Californian could not remain in his home or leave the area voluntarily without inviting criminal arrest; yet, to avoid punishment he had to submit to military custody at an assembly center.[81]

Justice Roberts could not accept the majority's holding that the principles announced by the Court in *Hirabayashi* applied here—"that exclusion from a given area of danger, while somewhat more sweeping than a curfew regulation, is of the same nature—a temporary expedient made necessary by a sudden emergency."[82] He characterized this as "a substitution of an hypothetical case for the case actually before the court,"[83] and questioned the use of an "artificial situation" instead of "the actualities of the case."[84] He found it untenable that Korematsu would have to submit to detention to escape violation of, in his mind, an unconstitutional statute and to delay until then the benefit of legal remedy by way of a writ of habeas corpus.[85]

4. *Justice Murphy's Dissent*

Justice Murphy vehemently dissented, refusing to uphold "this legalization of racism."[86] His opinion is the only one of the five delivered that delved extensively into General DeWitt's *Final Report*.[87] The dissenter parsed the document to support his contention that the military necessity upon which evacuation rested "resolve[d] itself into a few intimations that certain individuals actively aided the enemy, from which it is inferred that the entire group of Japanese Americans could not be trusted to be or remain loyal to the United States."[88]

Justice Murphy would accord the military a wide scope of discretion in pro-

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[78] *Id.*
[79] *Id.* at 232.
[80] *Id.* at 226-30.
[81] *Id.* at 230 & 232.
[82] *Id.* at 231; *see also supra* note 61.
[83] *Korematsu*, 323 U.S. at 231 (Roberts, J., dissenting).
[84] *Id.* at 232.
[85] *Id.* at 233.
[86] *Id.* at 242 (Murphy, J., dissenting).
[87] Final Report, *supra* note 23.
[88] *Korematsu*, 323 U.S. at 240 (Murphy, J., dissenting).

tecting the national security.[89] However, in the absence of martial law, he could not find the necessary imminent and immediate public danger to support the evacuation.[90] The assumption that all persons of Japanese ancestry are potential saboteurs or spies he found unsupported by the *Final Report*.[91] He characterized its findings as based on "questionable racial and sociological grounds not ordinarily within the realm of expert military judgment, supplemented by certain semi-military conclusions drawn from an unwarranted use of circumstantial evidence."[92]

Moreover, the Justice could not agree that a sense of urgency existed to justify dispensing with individual loyalty hearings. He noted, instead, a sense of "[l]eisure and deliberation" in the lapsing of eleven months between the Pearl Harbor attack and removal of the last of the evacuees.[93] He found no adequate proof that government intelligence services alone could not control the espionage and sabotage threat, a fear that failed to materialize after Pearl Harbor.[94] The situation, he surmised, would have permitted the holding of loyalty hearings for the "mere 112,000 persons involved, "as in Britain, for approximately 74,000 German and Austrian aliens."[95]

5. *Justice Jackson's Dissent*

Justice Jackson appeared to have doubted the justiciability of military judgments because of the Court's inability to assess adequately the necessity and reasonable basis for wartime decisions.[96] Once confronted with the issue, however, the Justice saw a grave danger in according constitutionality to government action directed against individuals by virtue of their membership in "a race from which there is no way to resign."[97] He warned of the durability of the Court's imprimatur upon racially discriminatory measures; its precedential value could be utilized to justify racial discrimination in future crises.[98] Further, he cautioned against reliance upon a judiciary, inexpert in military matters, to restrain military power.[99] In essence, he advised a nation to choose its generals carefully.

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[89] *Id.* at 233-34.
[90] *Id.* at 235.
[91] *Id.* at 235-41.
[92] *Id.* at 236-37.
[93] *Id.* at 241.
[94] *Id.*
[95] *Id.* at 241-42 & n.16.
[96] *Id.* at 244-45 (Jackson, J., dissenting).
[97] *Id.* at 243.
[98] *Id.* at 246.
[99] *Id.* at 248.

C. *Summary of the Issues*

As outlined above, the five opinions in *Korematsu* confronted several issues in varying degrees. In addition, the majority opinion incorporated the reasoning in the *Hirabayashi* decision by its reliance on the principles announced in the earlier case.[100] From both decisions, the following issues have been identified for discussion in this comment:

1. Whether the military authority exercised over civilians during wartime was within the constitutional boundaries of the war power of Congress, the President, and the military.
   a. What is the nature of the war power?
   b. What military measures should be subjected to judicial review?
   c. Were the military actions taken under proper authority?
2. Whether the restriction of only those of Japanese ancestry was racially discriminatory in violation of the fifth amendment.[101]
   a. Did the ethnic classification have "a definite and close relationship" to the prevention of espionage and sabotage?
   b. Was there a "pressing public necessity" for the classification?
3. Whether the orders merited judicial deference or, more fundamentally, were not justiciable.

II. THE WAR POWER: CONSTITUTIONAL LIMITS OF EXERCISE

The first issue is whether the military control of civilians of Japanese ancestry during World War II was exercised within the constitutional boundaries of the war power of Congress, the President, and the military. The discussion here focuses on the nature and scope of the military actions taken and the source of authority for the measures instituted by General DeWitt. The equal protection issue raised by the operation of the military orders upon one ethnic group is addressed in Part III.[102]

Writing for the majority in *Korematsu*, Justice Black concluded that it was not "beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did."[103] The task presented is to determine whether that same conclusion can be supported

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[100] *See supra* note 61.

[101] U.S. CONST. amend. V.

[102] The discussion here in part II is limited to whether the Constitution provides for the exercise of the war power through such measures as the exclusion orders. Whether such actions were in fact necessary for the successful conduct of the war is examined in a later section. *See infra* text at part III. The equal protection issue focuses on the asserted military necessity as a compelling governmental interest and on the least restrictive alternative required to protect that interest.

[103] *Korematsu*, 323 U.S. at 217-18.

today. The inquiry proceeds in the following manner: First, as an introduction, the source of the war power and its recent definitions are reviewed. Next, the question of which military measures should be the object of judicial scrutiny is addressed; specifically, is the scope of the *Korematsu* case properly limited to the exclusion measure, or should it include review of the detention and relocation orders? The inquiry then explores the constitutionally rooted mechanisms for apportioning the war power among Congress, the President, and the military.

A. *Nature of the War Power*

The legitimate exercise of the war power does not lend itself to mechanical verification. The difficulty rests, partly, with the lack of specificity in the definition of its boundaries and its proper locus.

1. *Constitutional Definition*

The United States Constitution contains a number of clauses pertinent to the conduct of war, none of which clearly commits this power to either Congress or the President.[104] The lawmaking body is delegated the power "[t]o declare

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[104] Professor tenBroek compiled a list of those constitutional provisions related to the exercise of war:

> The Congress shall have power to lay and collect taxes, duties, imposts and excises, to . . . provide for the common defense and general welfare of the United States. [U.S. CONST. art. I, § 8, cl. 1].
>
> To borrow money on the credit of the United States [*Id.* at art. I, § 8, cl. 2];
>
> . . . . .
>
> To declare war [*Id.* at art. I, § 8, cl. 11]; To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years [*Id.* at art. I, § 8, cl. 12];
>
> To provide and maintain a navy [*Id.* at art. I, § 8, cl. 13];
>
> To make rules for the government and regulation of the land and naval forces [*Id.* at art. I, § 8, cl. 14];
>
> To provide for calling forth the militia to execute the laws of the Union, suppress insurrection and repel invasions [*Id.* at art. I, § 8, cl. 15];
>
> To provide for organizing, arming and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress [*Id.* at art. I, § 8, cl. 16];
>
> . . . To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof [*Id.* at art. I, § 8, cl. 18];
>
> . . . The executive power shall be vested in a President of the United States of America [*Id.* at art. II, § 1, cl. 1]; . . . The President shall be commander in chief of the army and the navy of the United States, and of the militia of the several states, when called into

war"[105] and "[t]o provide for calling forth the militia to execute the laws of the Union, suppress insurrection and repel invasions."[106] The President, on the other hand, is the "Commander in Chief of the Army and Navy of the United States . . . when called into actual service of the United States."[107] The provisions of the Constitution clearly avoid assigning the war power exclusively to one branch of government. As a result, the scope of authority resting in each branch is not clearly defined. The Constitution itself contains no apparent guidelines to determine the appropriate application of the war power by either branch of government.

Historically, this void has resulted in political and judicial definitions and redefinitions of the constitutionally acceptable exercise of the war power—both in terms of which branch is empowered to act and in terms of the proper scope of its authority.[108] This continual translation has its genesis in the birth of the Constitution. Unbridled military power under the King of England was one of the evils the Founding Fathers sought to eradicate when the Constitution was written. Through the separation of powers to create a system of checks and balances and by the declaration of a bill of rights, they intended the subordination of the military to civilian control.[109]

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actual service of the United States [*Id.* at art. II, § 2, cl. 1].

TenBroek, *Wartime Powers of the Military Over Citizen Civilians Within the Country*, 41 CALIF. L. REV. 167, 168-69 n. 5 (1953).

[105] U.S. CONST. art I, § 8, cl. 11.

[106] *Id.* at art. I, § 8, cl. 15.

[107] *Id.* at art. II, § 2, cl. 1.

[108] For historial background, *see* SENATE COMM. ON FOREIGN RELATIONS, NATIONAL COMMITMENTS, S. REP. NO. 797, 90th Cong., 1st Sess. (1967).

[109] In a speech given at the New York University Law Center, Chief Justice Earl Warren reviewed the constitutional history:

> I think it desirable to consider for a moment the principle of separation and subordination of the military establishment, for it is this principle that contributes in a vital way to a resolution of the problems engendered by the existence of a military establishment in a free society.
>
> It is significant that in our own hemisphere only our neighbor, Canada, and we ourselves have avoided rule by the military throughout our national existences. This is not merely happenstance. A tradition has been bred into us that the perpetuation of free government depends upon the continued supremacy of the civilian representatives of the people. To maintain this supremacy has always been a preoccupation of all three branches of our government. . . .
>
> . . . [T]he people of the colonies had long been subjected to the intemperance of military power. Among the grievous wrongs of which they complained in the Declaration of Independence were that the King had subordinated the civil power to the military . . . . Our War of the Revolution was, in good measure, fought as a protest against standing armies . . . .
>
> . . . Distrust of a standing army was expressed by many [of the Founding Fathers when they drafted the Constitution] . . . .

2. *Political Definition*

Politically, the war power has migrated toward the executive branch.

> The principal cause of the constitutional imbalance has been the circumstances of American involvement and responsibility in a violent and unstable world. . . .
> . . . Prior to 1940, foreign crises were infrequent and therefore put no lasting strain on our institutions. Since 1940 crisis has been chronic and, coming as something new in our experience, has given rise to a tendency toward anxious expediency in our response to it. The natural expedient—natural because of the real or seeming need for speed—has been the executive action . . . .[110]

The War Powers Resolution, passed in 1973, manifested Congress' concern over this shift and represented an attempt to reintroduce a means for checks and balances.[111] The principal concern appeared to be presidential commitment

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> Their apprehensions found expression in the diffusion of the war powers granted the Government by the Constitution . . . .
>
> Despite these safeguards, the people were still troubled by the recollection of the conditions that prompted the charge of the Declaration of Independence that the King had "effected to render the military independent and superior to the civil power." . . . Although there is undoubtedly room for argument based on the frequently conflicting sources of history, it is not unreasonable to believe that our Founders' determination to guarantee the preeminence of civil over military power was an important element that prompted adoption of the Constitutional Amendments we call the Bill of Rights.

Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 183-85 (1962).

[110] SENATE COMM. ON FOREIGN RELATIONS, *supra* note 108, at 422. *But cf.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 630 (1952) (Douglas, J., concurring) ("We . . . cannot decide this case by determining which branch of government can deal most expeditiously with the present crisis [the threat of a nationwide strike of steelworkers in the face of Korean War supply needs]. The answer must depend on the allocation of powers under the Constitution.").

[111] War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as 50 U.S.C. §§ 1541-48 (1976)). The purpose and policy statement reads:

> It is the purpose of this chapter to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of the United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

The legislative history further describes Congress' position:

> The interpretation and application of [the] constitutional grants [of the war power] have varied widely throughout our Nation's history. Testimony received during hearings . . . confirmed the view of many Members of Congress . . . that the constitutional "balance" of authority over warmaking has swung heavily to the President in modern times. To restore the balance provided for and mandated in the Constitution, Congress must now reassert its own prerogatives and responsibilities.
>
> In shaping legislation to that purpose, the intention was not to reflect criticism on activities of Presidents, past or present, or to take punitive action. Rather, the focus of concern

of troops without congressional approval or adequate consultation with Congress.[112] The joint resolution articulated Congress' elaboration of the President's and the lawmaking body's constitutional war powers.[113] The legislative body recognized that, as Commander in Chief, the President may engage the armed forces in hostilities "only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States."[114] The resolution requires the Chief Executive "in every possible instance" to consult Congress before and during the commitment of troops to hostilities or to imminent confrontation with hostile forces.[115] He must also report to the Congress on such deployments in the absence of a declaration of war.[116]

The President is required to terminate the use of armed forces within sixty days after the submission of a report, unless Congress (1) has declared war, (2) has enacted specific authorization for such troop commitment, (3) has extended the sixty-day period, or (4) is unable to convene as a result of armed attack upon the nation.[117] Where there is no declaration of war or specific statutory authorization, Congress may, by concurrent resolution, direct the removal of military forces by the President.[118]

> was the appropriate scope and substance of congressional and [p]residential authority in the exercise of the power of war in order that the Congress might fulfill its responsibilities under the Constitution while permitting the President to exercise his responsibilities.

H.R. COMM. ON FOREIGN AFFAIRS, WAR POWERS RESOLUTION OF 1973, H.R. REP. NO. 287, 93d Cong., 1st Sess., *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 2346, 2349 [hereinafter cited as WAR POWERS RES. LEGISLATIVE HISTORY].

[112] *Id.* at 2349.

[113] "[T]he resolution is merely intended to elaborate upon the application of the warmaking powers of the Congress and the President mentioned in the Constitution. [It] does not attempt any itemized definition of the war powers." *Id.* at 2350.

> A *joint resolution* is [a] resolution adopted by both houses of [C]ongress or when such a resolution has been approved by the [P]resident or passed with his approval it has the effect of law.
>
> The distinction between a joint resolution and a concurrent resolution of [C]ongress, is that the former requires the approval of the [P]resident while the latter does not.

BLACK'S LAW DICTIONARY 1178 (rev. 5th ed. 1979).

The War Powers Resolution was passed on November 7, 1973, by Congress, overriding President Nixon's veto. Pub. L. No. 93-148, 87 Stat. 555, 557 (1973).

[114] War Powers Resolution, 50 U.S.C. §§ 1541-58, § 1541(c) (1976).

[115] *Id.* at § 1542.

[116] *Id.* at § 1543.

[117] *Id.* at § 1544(b).

[118] *Id.* at § 1544(c). The use of a concurrent resolution, which does not require executive approval, was intended as a vehicle for legislative veto of presidential troop commitments that met with congressional disapproval. WAR POWERS RES. LEGISLATIVE HISTORY, *supra* note 111, at 2357-58. Its constitutionality was questioned by certain members of Congress. *Id.* at 2358-63. A recent Supreme Court decision, Immigration & Naturalization Serv. v. Chadha, 103 S. Ct. 2764

The resolution's effectiveness remains to be tested both politically and judicially. However, recent presidential troop deployments to Lebanon and to Grenada without prior congressional approval suggest the resolution has not met the lawmaking body's expectations.[119]

3. *Judicial Definition*

The Supreme Court has varied in its perception of the range within which legitimate exercise of the war power falls.[120] Generally, the Court has accorded, with some consistency, much deference to the President and to Congress in matters involving national security vis-a-vis foreign affairs.[121] In contrast, where the assertion of military authority has involved individual rights, the judicial attitude has fluctuated.[122]

The Court's deferential attitude toward broad national security issues reflects

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(1983), underscores that uncertainty. The Court in *Chadha* struck down as unconstitutional the congressional veto of Attorney General decisions allowing particular deportable aliens to remain in the United States. *Id.* at 2780-88. The veto power of the House of Representatives was held to be contrary to the separation of powers doctrine. Writing for the majority, Chief Justice Burger characterized the veto as legislative action, which therefore required passage by both houses and presentation to the President for his approval. *Id.* The veto capability reserved by the War Powers Resolution may meet similar judicial challenge. However, a concurrent resolution *does* require passage by both houses, but does not submit to presidential review. Additionally, at issue will be the nature of the veto—that is, whether it is legislative in character.

[119] Congress attempted to use the War Powers Resolution to rein in the powers of the President. When President Reagan deployed troops to Lebanon, the lawmaking body adopted a resolution authorizing the United States Marines to remain in that country as part of a multi-national peace-keeping force through March 1985. The Wash. Post, Sept. 24, 1983, at A1, col. 5. Although the President agreed on the 18-month period of Marine presence in Lebanon, he did *not* agree that his deployment decision required congressional authorization or approval. *Id.* at A22, col. 1. *See also id.*, Sept. 25, 1983, at A1, col. 4; *Strengthening the American Hand*, *id.*, Sept. 26, 1983, at A12, col. 1; *id.*, Sept. 28, 1983, at A1, col. 1.

The Grenada invasion by the United States Marines on October 26, 1983, produced similar reactions from both political branches of government. *Id.*, Oct. 28, 1983, at A1, col. 5 & at A3, col. 3. It was anticipated that the 60-day cutoff for unilateral presidential troop deployment under the War Powers Resolution would not be tested because the United States armed forces were expected to depart before that deadline. *Id.* at A3, col. 3.

[120] *See supra* text accompanying note 71 and *infra* text accompanying note 234.

[121] *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654 (1981) (judicial deference to presidential action freezing Iranian assets in the United States as bargaining chips in negotiations for release of American hostages captured by Iranians); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (judicial deference to presidential prohibition of arms sales to certain foreign countries under broad delegation of congressional authority).

[122] *See, e.g.*, United States v. Robel, 389 U.S. 258 (1967) (membership in Communist party not sufficient to deny citizen employment at defense plant); Duncan v. Kahanamoku, 327 U.S. 304 (1946) (civilians improperly tried by military tribunal); cases cited *infra* note 360.

judicial wariness in addressing political questions.[123] "Conventional wisdom suggests that in a democracy the judiciary should refrain from deciding 'political questions.' Such issues as initiating, conducting, and terminating war and hostilities require policy decisions that are political rather than legal in character."[124] It has even characterized the war power as:

> [one of the] powers of external sovereignty [that do] not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.[125]

Where the war power has collided with individual rights, the Court has intervened. However, the judicial results have varied enough to leave uncertain the constitutional boundaries of the war power in relation to personal liberties.[126] Former Chief Justice Warren has postulated that the variations may be due to whether decisions are rendered during times of war or peace:

> War is . . . a pathological condition for our Nation. Military judgments sometimes breed action that, in more stable times, would be regarded as abhorrent. Judges cannot detach themselves from such judgments, although by hindsight, from the vantage point of more tranquil times, they might conclude that some actions advanced in the name of national survival had in fact overridden the strictures of due process.[127]

Thus, as Chief Justice Warren's analysis suggests, the constitutionality of government measures affecting individuals and taken in the name of the war power appears to depend less on theoretical limits in the minds of jurists than on the "winds of war." In *Korematsu*, the federal actions at issue are just such measures. The next section looks at the case to determine exactly *which* military orders should be subject to judicial review.

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[123] *See, e.g.*, Baker v. Carr, 369 U.S. 186, 210-11 (1962) (addressing justiciability of political questions). *See generally* Keynes, *Democracy, Judicial Review, and the War Power*, 8 OHIO N.U.L. REV. 69 (1981) (discussing judiciary's role in review of exercise of war power by the President and Congress).

[124] Keynes, *supra* note 123, at 69.

[125] *Curtiss-Wright Export Corp.*, 299 U.S. at 318.

[126] *See generally* Warren, *supra* note 109, for an exposition of Bill of Rights cases involving the exercise of military authority.

[127] *Id.* at 191-92. *See infra* note 149 for contrasting cases.

B. *War Power Exercise Under Review*

What military measures were at issue in the *Korematsu* case? An answer is prerequisite to determining the larger question—whether Korematsu's conviction was unjustified because the military restraints imposed upon him were outside the constitutional limits of the war power. Obviously, a less restrictive measure is more easily placed within constitutional boundaries than a more intrusive one. Thus, a court's delineation of the object of scrutiny may very well presage the judicial outcome.[128]

The majority opinion in *Korematsu* limited review to the exclusion order and held that it represented a constitutional exercise of the war power.[129] Its reasoning rested on (1) an assumption that Congress would have treated the violation of each order as separate offenses if it had chosen to pass such legislation; (2) the fact that Korematsu had been convicted solely of defying the exclusion order; and (3) he would have time enough to seek legal relief when he was subjected to detention.[130]

Strong arguments were raised in the dissent by Justice Roberts for the review of exclusion, detention and relocation as a "single and indivisible" military plan.[131] His factual appraisal led the Justice to conclude that Korematsu was under the compulsion of all the orders. The Japanese American could not remain at home without courting arrest; to leave as ordered meant inevitable relocation and detention. In Justice Roberts' estimation, limiting judicial review to the exclusion was "a substitution of an [sic] hypothetical case for the case actually before the court."[132]

Judicial resolution of the scope of review in this case must focus on congressional intent in the enactment of the statute under which Korematsu was charged.[133] On its face, the act is devoid of any reference to relocation and detention. It provides unambiguously for the restriction of entry into and exit from military areas, but makes no mention of the authority to relocate or to

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[128] *See supra* text accompanying notes 76-78 (discussing Justice Roberts' framing of issue in his dissent, contrasting with the question addressed by the majority opinion). *See also* P. IRONS, *supra* note 22, at 325-27 (explaining Justice Black's difficulties, while drafting the majority opinion, over treatment of the orders for exclusion and for detention as separable issues).

[129] 323 U.S. at 221-24. *See also supra* text accompanying notes 65-69.

[130] 323 U.S. at 222.

[131] *Id.* at 226 (Roberts, J., dissenting). *See also supra* text accompanying notes 79-85; *Korematsu*, 323 U.S. at 243 (Jackson, J., dissenting) ("[The orders] were so drawn that the only way Korematsu could avoid violation was to give himself up to the military authority. This meant submission to custody, examination, and the transportation out of the territory, to be followed by indeterminate confinement in detention camps."); *infra* note 216.

[132] 323 U.S. at 231 (Roberts, J., dissenting).

[133] 18 U.S.C. § 1383 (repealed 1976). *See supra* note 52 for text of statute.

detain individuals.[134] Thus, from the statutory language alone, it is not evident whether Congress intended a comprehensive plan of removal and detention—or separate and independent measures, each of which was not necessarily applicable to all evacuees.

The Court in *Hirabayashi* was very likely aware of the danger of reading too much from the sparse language of the statute alone. In order to sustain constitutional delegation of legislative power, the decision readily found that the congressional legislation, Executive Order No. 9066 and General DeWitt's orders "were not to be read in isolation from each other. They were parts of a single program and must be judged as such."[135] The measures were aggregated in order to meet the requirements for constitutional delegation of legislative power—that the legislation contain a standard to which the military orders must conform and that it require findings of necessity for the orders.[136] The Court looked to Executive Order No. 9066 for the requisite standard—the need to protect military facilities from espionage and sabotage—and to the military orders themselves for the findings required to support their promulgation.[137] By combining the orders and legislation into "a single program," the Court in *Hirabayashi* was free to look to all to find the prerequisites for constitutional delegation of legislative powers.

The facts of the case in *Korematsu* support an analogous use of the approach taken by the Court in *Hirabayashi*. The statute under which Korematsu was charged was enacted *after* issuance of Executive Order No. 9066, with knowledge of General DeWitt's plans, and for the purpose of providing sanctions for the violation of the military orders,[138] all of which suggest incorporation of these measures by the legislation. To return to the question—was the legislative intent to provide for a comprehensive and unified program of exclusion, relocation, and detention—or for discrete measures for independent application? Since the statute itself is silent, the implementing orders are examined to determine the nature of the legislative authority delegated.

At the time of arrest, Korematsu was subject to General DeWitt's orders to leave Military Area No. 1, where his home was located—but to leave only as authorized.[139] The "authorized" departure was by way of assembly centers, where evacuees faced indefinite detention before removal to relocation centers.[140] The degree of compulsion under which Korematsu acted is certainly diluted if viewed as solely the command to evacuate the area. If exclusion were

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[134] *Id.*

[135] 320 U.S. at 103.

[136] *Id.* at 102-03.

[137] *Id.* at 103.

[138] *See supra* notes 51-55 and accompanying text.

[139] *See supra* notes 46-49 and accompanying text.

[140] *Id. See also supra* text accompanying notes 43-44.

the only order Korematsu was expected to obey, although intrusive enough, he would be free to choose his course of action once outside the prohibited area. But that was not the case.

Korematsu was to leave the area to go where the government had directed he should go. Exclusion was but the first step in the military's program to restrict the Japanese Americans and aliens on the West Coast. The government did not intend to do one—to exclude—without the other—to relocate and to detain. Thus, rationally and realistically, exclusion, relocation and detention are inseparable. And *all* require examination by the reviewing court to determine whether the military authority exercised over Korematsu was within constitutionally acceptable limits of the war power.

C. *Mechanisms for Exercise of War Power*

What was the source of authority for the military actions taken by General DeWitt and was that authority assumed or delegated constitutionally? Restricting review to the exclusion orders, without consideration of detention or relocation, the *Korematsu* Court was "unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area."[141] Justice Black's summary conclusion relied on principles expounded in *Hirabayashi* (left unarticulated in *Korematsu*)[142] and on ready acceptance of congressional and military judgment of the need for exclusion.[143] He could not discard as groundless the belief of "the war-making branches of government" that quick action was necessary to deal with the disloyal, "a menace to the national defense" who could not be readily segregated from the loyal.[144]

To assess Justice Black's appraisal, the inquiry in this section looks first to the conditions under which the military may possess its own authority to exert controls over civilians. Specifically, the question is, did the West Coast situation at the time of General DeWitt's command warrant martial rule? Second, in the absence of any inchoate military power arising from the prevailing circumstances, presidential authority and the vehicle for its delegation are examined as the enabling source. Third, congressional authorization and delegation of legislative power are considered.

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[141] 323 U.S. at 217-18, 221-23.

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

[143] *Id.* at 218.

[144] *Id.*

1. *Military Power Over Civilians During Wartime*

What are the conditions under which inchoate military power develops to authorize military control of civilians during wartime?[145] The declaration of martial law, or the conditions that would necessitate its invocation, provides one basis for the wielding of such authority *sua sponte* over civilians.[146]

In *Duncan v. Kahanamoku*,[147] a case arising out of the imposition of martial law in Hawaii during World War II, the Supreme Court could find no precise meaning of martial law either within the Constitution or in any congressional enactment.[148] Writing the plurality opinion,[149] Justice Black[150] reviewed the development of the nation's political institutions and found a consistent theme—fear and opposition to subordination of civilian governance to military

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[145] *Cf. Duncan*, 327 U.S. at 313-14 & nn.6-10 (enumerating different conditions which lend themselves to military authority—e.g., military jurisdiction over its own personnel or over prisoners of war).

[146] Former Chief Justice Stone expressed one view of the conditions giving rise to martial law:

> [M]artial law is the exercise of the power which resides in the executive branch of the government to preserve order and to insure the public safety in times of emergency, when other branches of the government are unable to function, or their functioning would itself threaten the public safety.

Id. at 335 (Stone, C.J., concurring) (citing Luther v. Borden, 48 U.S. (7 How.) 1, 45 (1849)).

[147] 327 U.S. 304 (1946).

[148] *Id.* at 315. After the Japanese attack on Pearl Harbor, the Governor of Hawaii placed the Territory (now the state of Hawaii) under martial law pursuant to the Hawaii Organic Act, 48 U.S.C. § 532 (1946) (omitted as obsolete 1959). *Id.* at 307. Two civilians, White and Duncan, were arrested by military police while martial rule was still in force. *Id.* at 309-10. Both were convicted by the military tribunals whose jurisdiction they subsequently challenged. *Id.* at 311. Legislative history of the enabling act was deficient in aiding the Court to determine whether the scope of martial law intended by the statute was to include supplanting of courts by military tribunals.

[149] Justice Jackson did not participate in the case. Chief Justice Stone and Justice Murphy each concurred in separate opinions. Justice Burton, with Justice Frankfurter, dissented.

[150] Note that Justice Black authored both the *Duncan* and *Korematsu* opinions. His expansive view of permissive war power exercise in *Korematsu* [*see supra* text accompanying notes 141-44] was not evident in *Duncan*. In the latter case the Justice saw in our nation's history a reflection of the nearly universal abhorrence to complete military dominance over civilian government. As a result, he interpreted the scope of permissible rule narrowly in *Duncan*. *See also* CWRIC REPORT, *supra* note 1, at 280-82 (comparing Justice Black's decision in the two cases). *But cf. id.* at 282 n.92 (citing Fairman, *The Supreme Court on Military Jurisdiction: Martial Rule in Hawaii and the Yamashita Case*, 59 HARV. L. REV. 833 (1946), which reconciled *Duncan* and *Korematsu*); *Duncan*, 327 U.S. at 314 n.9 (where Justice Black appeared to distinguish the two cases: "Nor is this [*Duncan*,] a case where violators of military orders are to be tried by regular courts. *Cf.* Hirabayashi v. United States, 320 U.S. 81.").

As former Chief Justice Warren posited, such differing judicial postures may be due to the context in which decisions are made. *See supra* text accompanying notes 126-27. *Korematsu* was decided when the country was still engaged in World War II; *Duncan* was a post-war decision.

authority.[151] The Court held that the act under which martial law had been declared in Hawaii did not contemplate authorization of military rule so broad as to supplant civilian courts with military tribunals.[152] The decision in *Duncan* rested on the interpretation of statutory intent. It did not need to reach constitutional issues since its reading of legislative purpose was sufficient to decide the case.

In its reasoning, the Court cited *Ex parte Milligan*, a case that did involve constitutional issues raised by the exercise of martial law.[153] This landmark case provides a framework for assessing the constitutionality of military control over civilians.[154] In *Milligan*, a civilian was convicted by a Civil War Military Commission in Indiana. The Supreme Court held that the commission had no jurisdiction to do so, when Indiana had not been invaded or engaged in rebellion and the arrestee was neither a member of the armed forces nor a prisoner of war. The Court reasoned that "[m]artial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war."[155]

The Court in *Milligan* delineated the conditions under which martial law may properly be imposed:

> If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then*, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power.[156]

The imposition of martial law was not at issue in *Korematsu*. However, it is worth noting that the criteria of valid military control are the *Milligan* factors,

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[151] 327 U.S. at 319-24.

[152] *Id.* at 324.

[153] 71 U.S. (4 Wall.) 2 (1866), *cited with approval in Duncan*, 327 U.S. at 322, 324. In his concurrence, Justice Murphy applied the constitutional tests developed in *Milligan* and found the trials at issue in *Duncan* "were forbidden by the Bill of Rights." *Duncan*, 327 U.S. at 325, 326 (Murphy, J., concurring).

[154] "Decided in 1866 and arising out of an episode of the Civil War, [*Ex parte Milligan*] has stood as a landmark in our constitutional history on the nature and extent of the war-time power of the military over civilians within the country." tenBroek, *supra* note 104, at 171. The approach utilized in this section relies on TenBroek's treatment of *Ex parte Milligan* in the cited article.

[155] 71 U.S. (4 Wall.) at 127.

[156] *Id.* (emphasis included).

and not the incantation of the words, "martial law," however officially pronounced.[157] The *Milligan* factors are: (1) the occurrence of foreign invasion or civil war; (2) the impossibility of administering criminal law through the civil courts; (3) the presence of the "theatre of active military operations, where war really prevails"; and (4) overthrown civil authority, leaving none but military power.[158]

Applying the factors to the *Korematsu* case, the inescapable conclusion is that the West Coast situation did not warrant the exercise of military control over civilians, or that the declaration of martial law (which would have been the source of authorization for *sua sponte* military control) would not have been justified. Indeed, a foreign invasion had occurred in an area under the aegis of the United States. On December 11, 1941, Army Chief of Staff General George C. Marshall did declare the Pacific Coast to be a "theatre of operations."[159] But it was not the site "where war really prevails."[160] During the period that General DeWitt was in command of the Western Defense area, all civil agencies, including the courts, were open. The conditions then present did not make it "impossible to administer criminal justice according to law."[161] The situation on the West Coast was not so critical as to justify military control over civilians,[162] and, in fact, mimicked the consequences of indiscriminate

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[157] Although the *Duncan* case involved incidents occurring under officially declared martial law, the court appeared to reject the label of "martial law" as self-justifying or self-defining. *Duncan*, 327 U.S. at 314-24. It thus avoided validating the circular reasoning that: when civil courts are not able to function because of critical wartime conditions, martial law is warranted; therefore, when martial law has been invoked, civil courts ought to be closed and supplanted by military tribunals.

[158] 71 U.S. (4 Wall.) at 127.

[159] F. CHUMAN, *supra* note 1, at 155.

[160] *But cf. Duncan*, 327 U.S. at 344 n.3 (Burton, J., dissenting) (quoting, from the *Duncan* record, testimony of Lieutenant General Robert C. Richardson, Jr., United States Army, then Commanding General of the Central Pacific Area). A very broad interpretation of the "theatre of operations" was suggested. It would be the area needed for defensive or offensive operations, including administrative agencies which are necessary for the conduct of these operations.

[161] *Milligan*, 71 U.S. (4 Wall.) at 127. In fact, Korematsu himself had been tried and convicted in a federal district court in San Francisco. P. IRONS, *supra* note 22, at 151-54.

[162] *See* CWRIC REPORT, *supra* note 1, at 261-62. The report described the conditions in Hawaii where martial law had been imposed. No wholesale evacuation of persons of Japanese ancestry occurred; yet, the area included the Pearl Harbor bombing site and was certainly closer to the active theatre of war in the Pacific. *See also* F. CHUMAN, *supra* note 1, at 154-55. In his legal history of the Japanese Americans, attorney Frank Chuman described the role of then Army Provost Marshall General Allen W. Gullion, that service's highest ranking law enforcement officer, in the decision to evacuate the Japanese. In December 1941, after an unsuccessful attempt to have the enemy alien program transferred from the Department of Justice to the War Department, he recommended to General DeWitt that all Japanese, American citizens and aliens alike, be taken into custody. *Id.* at 155. The Provost Marshall told General DeWitt that such action had been urged by a representative of the Los Angeles Chamber of Commerce. *Id.* at 155 and ch.

martial rule that *Milligan* found untenable:

> [W]hen war exists, foreign or domestic, and the country is subdivided into military departments for more convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the Laws, and punish persons, as he thinks right and proper, without fixed or certain rules.[163]

In *Korematsu*, Justice Black alluded to "conditions of modern warfare [under which] our shores are threatened by hostile forces . . ."[164] and described the West Coast as a "war area."[165] The bombing of Pearl Harbor may have subjected the West Coast to the threat of attack. The prevailing military judgment was that the threat was exacerbated by possible espionage and sabotage by persons of Japanese ancestry living in the area. However, to expand the *Milligan* "theatre of war" concept to include such conditions would effectively remove any protection the doctrine would provide against unrestrained military control over civilians during wartime. Modern concepts of war could turn the entire United States into a "theatre," as Justice Black would suggest, on the basis of threatened invasion, even when civil authority was not rendered powerless by hostilities. In his later opinion in *Duncan*, Justice Black provided his own counterpoint:

> Our system of government clearly is the antithesis of total military rule and the founders of this country are not likely to have contemplated complete military dominance within the limits of a Territory made part of this country and not recently taken from an enemy. They were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws.[166]

2. *Executive Power*

If General DeWitt lacked any independent power to exercise control over

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9, n.25. Yet, in his previous capacity as Judge Advocate General, the Army's highest ranking legal officer, General Gullion's official opinion had been that the "military . . . does not have jurisdiction to participate in the arrest and temporary holding of civilians who are citizens of the United States" outside of any combat zone where civilian courts were still open. *Id.* at 154-55 & ch. 9, n.24 (quoting General Gullion). Ironically, at that time in December 1941, General DeWitt was doubtful of the wisdom of General Gullion's wholesale internment idea and thought that the disloyal could be ferreted out. *Id.* at 155 & ch. 9, n.26.

[163] 71 U.S. (4 Wall.) at 124-25.

[164] 323 U.S. at 220.

[165] *Id.* at 218.

[166] 327 U.S. at 322.

civilians, did he derive authority from the powers of the President? On February 19, 1942, President Roosevelt issued Executive Order No. 9066 authorizing the Secretary of War or his designate "to prescribe military areas" and to exclude "any or all persons" as deemed necessary.[167] A month later, by Executive Order No. 9102,[168] the President established the War Relocation Authority and entrusted it with the removal and relocation of persons excluded under military orders emanating from Executive Order No. 9066. Such presidential statements may have the force and effect of public law when based on constitutional powers or on congressional authorization.[169] There is no statute that specifically defines the term "executive order." Essentially, it is a presidential device used to direct the actions of administrative officials and agencies.[170]

Did the President have the requisite constitutional or congressional authorization to promulgate Executive Orders No. 9066 and 9102? The inquiry will depend in part on whether the Court were to construe the presidential orders alone or as part of a joint congressional-executive plan. If the orders are viewed as independent executive actions, they would require constitutional or statutory bases to be valid.[171] In this case, the declaration of war by Congress arguably could be sufficient authorization. Alternative justification could be sought under the President's constitutional power as Commander in Chief. On the other hand, if specific legislation can be identified, the requisite congressional approval or participation would be less difficult to substantiate. In *Korematsu*, although Congress did pass Public Law No. 503,[172] a statute permitting restrictions in military areas under the authority of executive order, the enactment *followed* the issuance of Executive Order No. 9066. The tardy legislative measure could be characterized as ratification by Congress after the fact.[173]

If assumed to be unilateral actions by the President, do the orders pass judicial muster under his constitutional role as "Commander in Chief of the Army

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[167] 7 Fed. Reg. 1407 (1942).

[168] 7 Fed. Reg. 2165 (1942).

[169] Jenkins v. Collard, 145 U.S. 546 (1891) (presidential pardon, a constitutional prerogative of the Executive [U.S. CONST. art. II, § 2, cl. 1] made by way of proclamation had force of public law). It should be noted that "[t]he difference between Executive orders and proclamations is more one of form than of substance since in each instance the effective action sought or directed by the document is an exercise of the Executive power under article II of the Constitution and must be based on authority derived from the Constitution or statute." HOUSE COMM. ON GOVERNMENTAL OPERATIONS, 85th Cong., 1st Sess., EXECUTIVE ORDERS AND PROCLAMATIONS: A STUDY OF A USE OF PRESIDENTIAL POWERS 1 (Comm. Print 1957) (footnote omitted).

[170] HOUSE COMM. ON GOVERNMENTAL OPERATIONS, *supra* note 169, at 1.

[171] *Youngstown Sheet & Tube Co.*, 343 U.S. at 585 ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.").

[172] Codified as amended at 18 U.S.C. § 1383 (1976) (repealed 1976).

[173] *See infra* notes 185-90 and accompanying text.

and Navy of the United States?"[174] Immediately after congressional declaration of war, security measures decreed by the President were directed only against suspected enemy aliens.[175] These early presidential proclamations were issued under the authority of the Alien Enemy Act.[176] However, Executive Order No. 9066, not specifically limited in application to enemy aliens, was promulgated "by virtue of the authority vested in [the Chief Executive] as President of the United States, and *Commander in Chief of the Army and Navy*."[177] Executive Order No. 9102, establishing the War Relocation Authority, followed and purportedly did no more than "implement the program authorized by Executive Order No. 9066."[178]

Upon declaration of war by Congress, the legitimacy of the President's conduct would turn on whether it was executive in character (and thereby within his own constitutional powers) or whether it could be action committed in the "zone of twilight in which he and Congress may have concurrent authority or in which its distribution is uncertain."[179] Clearly "executive" actions would be those implementing constitutional or congressional policy.[180] The President encroaches upon the lawmaking function when he "does not direct that a congressional policy be executed in a manner prescribed by Congress—[he is legislating when he] directs that a presidential policy be executed in a manner prescribed by the President."[181]

There very likely would be judicial reluctance to sanction the decisions to exclude and to detain persons of Japanese ancestry as unilateral executive measures. In *Youngstown Sheet & Tube Co.*, the Court appeared to suggest that the exercise of the President's war power as Commander in Chief would not go beyond the broad powers exercised in "day-to-day fighting in a theater of war."[182] The decision recognized that the concept "theater of war" was an expanding one, but held that seizure of private property to prevent production stoppage could not meet constitutional strictures even when taken under the war power of the Commander in Chief.[183] Moreover, in light of the War Pow-

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[174] U.S. CONST. art. II, § 2, cl. 1.

[175] *See supra* note 26 and accompanying text.

[176] 50 U.S.C. § 21 (1976). *See also supra* notes 25-26 and accompanying text.

[177] Exec. Order No. 9066, 7 Fed. Reg. 1407 (1942) (emphasis added).

[178] *Ex parte* Endo, 323 U.S. 283, 298-301 (1944) (construing Executive Order No. 9102 as based on Executive Order No. 9066 which, in turn, rested for authority on Public Law No. 503, the Act providing penalties for violation of the military orders).

[179] *Youngstown Sheet & Tube Co.*, 343 U.S. at 635-37 (Jackson, J., concurring); *see also id.* at 587-89 (plurality opinion).

[180] *Id.* at 585, 587 (plurality opinion).

[181] *Id.* at 588.

[182] *Id.* at 587.

[183] *Id. See also* letter from Black, J., to Stone, C.J., (Jan. 18, 1946) (responding to criticism of a draft of his *Duncan* opinion) *quoted in* CWRIC REPORT, *supra* note 1, at 282:

ers Resolution, the Court may hesitate to sanction unilateral presidential action if congressional approval is not evident—either because the political nature of the question would caution against justiciability or because specific congressional direction required by the resolution is missing.[184]

However, the Court very likely would not consider the executive actions independent of the legislative authorization of Public Law 503.[185] To do so would indicate a narrow adherence to form.[186] Congress, fully aware of the intent of Executive Order No. 9066, ratified it after the fact. Thus, the inquiry turns to whether such ratification would be recognized as valid. In the *Prize Cases*[187] the Court upheld the seizure of ships transporting goods to Confederate areas in defiance of a presidential blockade instituted before any congressional declaration of war. It noted that Congress had passed subsequent legislation "approving, legalizing, and making valid all the acts, proclamations, and orders of the President . . . as if they had been *issued and done under the previous express authority* and direction of the Congress of the United States."[188] The Court concluded that "it is plain that if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, . . . this ratification has operated to perfectly cure the defect."[189]

I think the Executive is without Constitutional powers to suspend all legislative enactments in loyal, uninvaded states, to substitute executive edicts for those laws, and to provide for their enforcement by agents chosen by and through tribunals set up by the Executive . . . . In other words, the Constitution, as I understand it, so far as civilians in legal uninvaded territory is concerned, empowers the Executive to "execute" a general code of civil laws, not executive edicts.

[184] *See supra* notes 110-19 and accompanying text.

[185] Codified as amended at 18 U.S.C. § 1383 (1976) (repealed 1976).

[186] Legislative history before the Court in *Korematsu* indicated that the congressional act was imposed "to provide the means of enforcement of curfew orders and other military orders made pursuant to Executive Order No. 9066." *Hirabayashi*, 320 U.S. at 90; *see also supra* notes 51-55 and accompanying text.

[187] 67 U.S. (2 Black) 635 (1863); *see also* Haig v. Agee, 453 U.S. 280, 292-300 (1981) (nonstatutory administrative practices taken under original enactment considered adopted by Congress when, in amending statute, there was no evidence of legislative intent to repudiate such practices).

[188] 67 U.S. (2 Black) at 670 (*quoting* Act of Aug. 6, 1861, ch. 63, § 3) (emphasis added).

[189] *Id.* at 671; *see also* Mason Co. v. Tax Comm'n of Wash., 302 U.S. 186, 208 (1937) ("The federal intent in this instance is clearly shown. It is shown not merely by the action of administrative officials, but by the deliberate and ratifying action of Congress, which gives the force of law to the prior official action even if unauthorized when taken."); Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297, 301-02 (1937) ("It is well settled that Congress may, by enactment not otherwise inappropriate, 'ratify . . . acts which it might have authorized,' and given the force of law to official action unauthorized when taken [citation omitted] . . . . The mere fact that the validation is retroactive in its operation is not enough, in the circumstances of this case, to render it ineffective."); Isbrandtsen-Moller Co. v. United States, 300 U.S. 139, 146-48 (1937) ("Whatever doubt may be entertained as to the intent of Congress [that the President

In *Korematsu* Congress did not expressly ratify the executive order in the body of the statute.[190] However, the President was acting in the aftermath of an official declaration of war. Moreover, the Court had information before it indicating that the legislation was enacted in response to a War Department request and that Congress was told of General DeWitt's initial plans.[191] Accordingly, the enactment could be construed to confer after the fact ratification upon the executive order.

3. *Congressional Delegation of Power*

If the exclusion, relocation, and internment orders required ratification by Congress, the legislative authorization must have been constitutionally delegated. A congressional statement of policies and standards is required for presidential exercise of the delegated power.[192] "The degree to which Congress must specify its policies and standards in order that the administrative authority granted may not be an unconstitutional delegation of its own legislative power is not capable of precise definition."[193] Certainly, "the Constitution [must] be scrupulously obeyed."[194] Nevertheless, where the war power is concerned, the Court has shown its customary deference in finding constitutional delegation even when congressional directions have been vaguely stated and leave much to

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was authorized to transfer specific functions between agencies of the executive branch], . . . Congress appears to have recognized the validity of the transfer and ratified the President's action by [appropriation acts earmarking related salaries to the agency assigned the transferred functions].").

[190] *See supra* note 52 for the text of the Act.

[191] *See supra* notes 23, 51-55, 186 and accompanying text. General DeWitt's Final Report reveals that:

> Immediately upon the promulgation of Executive Order No. 9066, the War Department, with the approval of the President, requested the Congress to enact legislation to provide sanctions for the enforcement of directives issued under the authority of the Executive Order. A draft of proposed legislation for this purpose was transmitted [to Congress]
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> While the legislation was under consideration, the Secretary of War . . . transmitted another letter to the Congress . . . urging immediate enactment, [which stated in part:] "General DeWitt is strongly of the opinion that the bill, when enacted, should be broad enough to enable the Secretary of War or the appropriate military commander to enforce curfews and other restrictions within the military areas and zones."

Final Report, *supra* note 23, at 29-30.

[192] *See, e.g.*, Greene v. McElroy, 360 U.S. 474, 507 (1959); Kent v. Dulles, 357 U.S. 116, 129 (1958); Lichter v. United States, 334 U.S. 742, 779 (1948); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 530 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935).

[193] *Lichter*, 334 U.S. at 779.

[194] *Id.*

presidential discretion.[195]

> *A constitutional power implies a power of delegation of authority under it sufficient to effect its purpose.* This power is especially significant in connection with constitutional war powers under which the exercise of broad discretion as to methods to be employed may be essential to an effective use of its war powers by Congress.[196]

The requisite congressional guidance to the President is not evident on the face of the statute[197] identified as the ratification instrument in *Korematsu*. It merely stated as its purpose, "[t]o provide a penalty for violation of restrictions or orders with respect to persons entering, remaining, leaving, or committing any act in military areas or zones."[198] This deficiency may not be fatal, in light of decisions in which the Court has looked to the presidential action itself to find the necessary legislative intent and direction where the war power, national security, or foreign affairs were involved.[199]

This stance could be further supported by the Court's recognition that the actions in question, if not specifically taken "pursuant to an express or implied authorization of Congress,"[200] were at least within "a zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain."[201] In this zone of shared power, the constitutional question would not turn so much on the specificity of statements of congressional policies and standards. Rather, "any actual test of power is likely to depend on the imperatives of the events and contemporary imponderables rather than on abstract theories of law."[202]

Moreover, the power to wage war has been viewed by the Court as one of the federal government's inherent powers of sovereignty.[203] As such, the political branches of government do not need to look to the Constitution for delineations of such authority.[204] "As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not

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[195] *See, e.g., Lichter*, 334 U.S. at 783-86; *cf. Curtiss-Wright Corp.*, 299 U.S. at 322-29 (listing several legislative and judicial decisions confirming the need for broad delegation of legislative powers under which the President defines the appropriate parameters for action).

[196] *Lichter*, 334 U.S. at 778-79 (emphasis included).

[197] 18 U.S.C. § 1383 (1976) (repealed 1976). *See supra* note 52 for text of statute.

[198] *Id.*

[199] *See supra* note 195.

[200] *Youngstown Sheet & Tube Co.*, 343 U.S. at 635 (Jackson, J., concurring).

[201] *Id.* at 637; *see also supra* notes 102-27 and accompanying text.

[202] *Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring).

[203] *Curtiss-Wright Corp.*, 299 U.S. at 318.

[204] *Id.*

completely sovereign."[205] The effectiveness of federal actions in this area often requires prompt response based on an assessment of conditions best known to the President alone.[206] Congress has thus frequently granted the Chief Executive wide discretion in national security affairs.[207] Especially where the two political branches act in concert, a judgment of "the imperatives of the events" by either entity could be sufficient to provide "the test of power." Accordingly, as in *Hirabayashi*, the executive order could very well serve as the source of the standard by which adherence to congressional policy is measured.[208] In Executive Order No. 9066, the President declared that "[t]he successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises and national-defense utilities."[209]

Against the standard of the need to protect national defense resources against espionage and sabotage, could exclusion, relocation and internment have been measures contemplated by the Congress in its delegation of authority? The Court has certainly recognized that the grant of legislative power cannot anticipate all myriad situations which the executive branch is better structured to meet.[210] "Undoubtedly, legislation must often be adapted to complex conditions involving a host of details with which the national Legislature cannot deal directly."[211] As intrusive as exclusion and relocation appear to be, they are less troubling than internment as measures that could be necessary and proper[212] to protect designated military zones from espionage and sabotage. The prohibition of entry into and the removal of individuals from vital areas to safeguard against those twin dangers appear to be within the realm of necessary and proper military options.

However, if these measures are but initial phases of a comprehensive plan of internment, they take on a more questionable cast. Internment, as carried out in World War II, was a constriction of virtually all freedom of choice in movement—at least until plans for the leave program and Nisei combat teams were formulated in the fall of 1942.[213] The judicial device of severability could per-

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[205] *Id.*

[206] *Id.* at 320. *See also supra* note 110 and accompanying text.

[207] *Curtiss-Wright Corp.*, 299 U.S. at 321-22.

[208] 320 U.S. at 103-05; *see also supra* note 54.

[209] 7 Fed. Reg. 1407 (1942).

[210] *See, e.g.*, Carlson v. Landon, 342 U.S. 524, 542 (1952); *Lichter*, 334 U.S. at 384-86; *Panama Ref. Co.*, 293 U.S. at 421.

[211] *Panama Ref. Co.*, 293 U.S. at 421.

[212] *Lichter*, 334 U.S. at 781 (legislative power includes all that is necessary and proper for executing that power).

[213] CWRIC REPORT, *supra* note 1, at 185-212. *Nisei* is a Japanese word denoting the "[s]econd generation[,] [p]articularly a person born in the United States of Japanese parents." BLACK'S LAW DICTIONARY, *supra* note 113, at 944.

mit the Court to find exclusion acceptable, while ruling out internment as within the powers delegated, "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not."[214] This exercise of "concurrent authority," however, relied on the President, and ultimately his military commanders, for definition.[215] Thus, the earlier military orders calling for exclusion and removal were, as discussed previously, part and parcel of a unified program leading inevitably to the internment of evacuees.[216]

The broad authority conferred by Congress upon the President to protect wartime facilities gave him much discretion in defining the scope of the plan necessary to meet that objective. The defense measures taken by General DeWitt, under the authority of Executive Order No. 9066, were designed to move potential saboteurs and spies out of designated military areas and to detain them in internment camps. Exclusion and relocation may arguably be within the scope of actions contemplated by Congress as necessary for the protection of vital resources. The constitutionality of the delegation thus hinges on the internment measure and on whether this restriction of the ethnic Japanese fell within the authorized legislative power. Was such a drastic restriction upon the evacuees' movements necessary, when measured against the standard of protection of military facilities from subversion? The Court in *Ex parte Endo*[217] established the purpose of the prolonged detention to be the protection of the *evacuees* from hostilities perceived to be present in the communities expected to receive the displaced West Coast ethnic Japanese.[218] Justice Douglas could find no support in the statute or executive orders for such a ground for internment.[219] The entire, unified plan of evacuation and internment therefore fails as

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[214] Buckley v. Valeo, 424 U.S. 1, 108-09 (*quoting* Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932)).

[215] *See supra* text accompanying notes 200-09.

[216] In his autobiography, Justice William Douglas expressed regret over his position in the *Korematsu* decision. He had written a draft of a concurring opinion in which he agreed to the constitutionality of evacuation, but not to evacuation through internment. He was persuaded by Justices Black and Frankfurter to withdraw his opinion, both jurists arguing that the issue of detention was not before the Court. Justice Douglas reflected: "Technically, . . . the question of detention was not presented to us. Yet evacuation via detention camps was before us, and I have always regretted that I bowed to my elders and withdrew my opinion." W. DOUGLAS, THE COURT YEARS: 1939-1975 at 279-80 (1980), *quoted in* CWRIC REPORT, *supra* note 1, at 239 n.112. *See also supra* notes 128-40 and accompanying text.

[217] 323 U.S. 283 (1944).

[218] *Id.* at 301.

[219] *Id.* at 302-04. Unlike the decisions in *Hirabayashi* and *Korematsu*, in *Endo* a citizen's loyalty was important in determining whether the governmental action was appropriate to protect against espionage and sabotage. *Id.* at 302. But the Court was not implying that "detention in connection with no phase of the evacuation program would be lawful. The fact that the Act and the orders are silent on detention does not mean that any power to detain is lacking." *Id.* at 301.

a constitutionally delegated measure.

If the issue of internment were to be addressed squarely by the Court today, there might be even less latitude in finding constitutional delegation of authority to do so. The 1971 repeal of the Emergency Detention of Suspected Security Risks Act (passed in 1950 and thus not before the *Korematsu* Court for consideration) provides legislative history requiring specific congressional authorization for internment.[220] Until its repeal, the enactment permitted the detention of suspected security risks if the President proclaimed a "state of 'Internal Security Emergency' " and "[i]n the event of any one of the following: (1) [i]nvasion of the territory of the United States or its possessions, (2) [d]eclaration of war by Congress, or (3) [i]nsurrection within the United States in aid of a foreign enemy."[221] Its repeal was demanded because the statute was perceived as a means by which internment camps could again be used. "[G]roups of Japanese-American citizens regard[ed] the legislation as permitting a recurrence of the roundups which resulted in the detention of Americans of Japanese ancestry in 1941 and subsequently during World War II."[222]

When it repealed this act, Congress also amended another statute to provide that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[223] Its purpose was twofold: to remove legislation that contained "concentration camp implications" and to "assure that no detention camps can be established without at least the acquiescence of Congress."[224]

Congress was not satisfied with repeal alone as a means to restrict presidential conduct:

> Repeal alone might leave citizens subject to arbitrary executive action, with no clear demarcation of the limits of executive authority. It has been suggested that repeal alone would leave us where we were prior to 1950. The Committee believes that imprisonment or other detention of citizens should be limited to situations in which a statutory authorization, an Act of Congress, exists.[225]

The legislative history of the repeal and amendment suggests that internment is not necessarily foreclosed. As stated in the passage quoted above, it is emphatic in requiring a congressional command for instituting such measures.

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[220] The statute was 50 U.S.C. §§ 811-26 (1970) (repealed 1971). For the legislative history of its repeal see H.R. REP. NO. 116, 92nd Cong., 1st Sess., *reprinted in* 1971 U.S. CODE CONG. & AD. NEWS 1435 [hereinafter cited as H.R. REP. NO. 116].

[221] 50 U.S.C. §§ 811-26 (1970) (repealed 1971).

[222] H.R. REP. NO. 116, *supra* note 220, at 1436.

[223] 18 U.S.C. § 4001(a) (1976).

[224] H.R. REP. NO. 116, *supra* note 220, at 1438.

[225] *Id.*

Thus, "[s]hould drastic measures be called for at some future time, it is inconceivable that this already dated statute [subject of the repeal] would fill the needs of the moment. Almost certainly, *new and different legislation would be called for, tailored to current needs.*"[226]

No doubt, the 1942 statute under which President Roosevelt acted[227] would be found constitutionally deficient on its face for delegation purposes today. However, if internment were instituted under current laws, the authorizing statute would in all likelihood be drafted more carefully in light of legislative history. The irony is that, by requiring specificity in legislating the command for internment, the amended statute and its history ensures that today the delegation issue would be more apt to withstand constitutional attack.

III. EQUAL PROTECTION V. MILITARY NECESSITY

> It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are *immediately suspect*. That is to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the *most rigid scrutiny*. Pressing public necessity may sometime justify the existence of such restrictions; racial antagonism never can.[228]

This seminal passage articulates the tests by which courts today judge the constitutionality of racially classifying governmental actions.[229] Yet the decision from which it sprang has been the target of criticism for not heeding its own command to subject suspect legal restrictions to strict scrutiny.[230] The excerpt is, of course, from *Korematsu v. United States*.[231]

Presently, strict, or rigid, scrutiny is the acknowledged standard of review courts use to assess restrictions upon fundamental rights or upon suspect classifications.[232] Accordingly, in *Korematsu* the military orders singling out the ethnic

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[226] *Id.* (emphasis added).

[227] 18 U.S.C. § 1383 (1976) (repealed 1976).

[228] *Korematsu*, 323 U.S. at 216.

[229] *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 192 (1964); cases cited *supra* note 60.

[230] *See, e.g.*, P. IRONS, *supra* note 22, at 337-38; CWRIC REPORT, *supra* note 1, at 236; TenBroek, *supra* note 104, at 182-83.

[231] 323 U.S. 214 (1944) (majority opinion).

[232] For fundamental rights cases, *see, e.g.*, Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (woman's decision to terminate pregnancy protected by right to privacy); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel interstate impaired by one-year residency requirement for welfare qualification; no compelling state interest thereby served); William v. Rhodes, 393 U.S. 23 (1968) (right to vote and to associate impaired by burdensome election requirements for new political parties; no compelling state interest served by burden).

For cases involving race or ethnicity as suspect category, *see, e.g.*, University of Cal. Regents v.

Japanese would be "immediately suspect."[233] By its own directive, the Court should have subjected the exclusion order, if not also the order for internment, to the most rigorous review. In a more recent decision, it has held that "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. '[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.' "[234]

The Court in *Korematsu* recognized that "exclusion from the area in which one's home is located is a *far greater* deprivation than constant confinement to the home from 8 p.m. to 6 a.m. [the curfew measure approved by the court in *Hirabayashi*]."[235] Its conclusion was that "exclusion from a threatened area, *no less than curfew*, has a definite and close relationship to the prevention of espionage and sabotage."[236] The Court relied, as it did in *Hirabayashi*, on the military and congressional judgment that the order was necessary. Thus, the Court apparently rested the justification for the "far greater deprivation" on the rationale for the less intrusive curfew.[237] And that, essentially, was the extent of the "most rigid scrutiny" it undertook.

In this section, the *Korematsu* case is examined, using recent case law on official actions that involve racial classifications. Additionally, decisions revealing the weight given by the Court to military justifications for official actions are

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Bakke, 438 U.S. 265 (1978); *McLaughlin*, 379 U.S. 184 (1964); Hernandez v. Texas, 347 U.S. 375 (1954); Oyama v. California, 332 U.S. 633 (1948).

[233] Whether a racial, national origin, or ethnic category is the subject of discrimination, the Supreme Court has treated all such classifications as "suspect" for equal protection purposes. *See, e.g., Bakke*, 438 U.S. at 290-91 ("Racial and ethnic classification . . . are subject to stringent examination without regard to [notion that a group must be a 'discrete and insular minority' requiring extraordinary protection from the majoritarian political process]."); *Hernandez*, 347 U.S. at 478 (1954) (reasoning that while race defines easily identifiable groups requiring special protection under the laws, "community prejudices are not static, and from time to time other differences from the community norm may define other groups [such as defendant's Mexican sector] which need the same protection"); *Oyama*, 332 U.S. at 647 (1948) (applying same standards of review as in racial discrimination cases to hold that "the rights of a citizen may not be subordinated merely because of his father's country of origin"); *Hirabayashi*, 320 U.S. at 100 (Court treating synonymously race and ancestry: "Distinctions between citizens solely because of their ancestry are by their nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classifications or discrimination based on race alone has often been held to be a denial of equal protection."); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) ("No reason for [ordinance requiring laundries to be operated in brick or stone buildings] is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality [Chinese] to which the petitioners belong.").

[234] United States v. Robel, 389 U.S. 258, 263-64 (1967) (*quoting* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934)).

[235] 323 U.S. at 218 (emphasis added).

[236] *Id.* (emphasis added).

[237] *Id.*

reviewed. The positions of the Court in these two areas are juxtaposed to determine whether the *Korematsu* situation might produce a different result today.

A. *Racial Discrimination*

An equal protection challenge involving a suspect classification may be brought against the federal government through the due process clause of the fifth amendment.[238] Generally, two approaches have emerged. First, if the racial classification is manifest on the face of the official measure, those seeking redress must show that no other purpose is served except antagonistic racial discrimination.[239] If a public interest is proffered by the government as justification for the classification, it must be a compelling one and the means employed must be narrowly tailored toward that end.[240] Secondly, if the measure is facially neutral, a demonstration that a "clear pattern unexplainable on grounds other than race emerges from the . . . action"[241] will serve to invalidate the official act. Otherwise, a showing of an intent to discriminate must be made, either by direct or circumstantial evidence. This may include, but is not necessarily satisfied by, facts or statistics supporting any racially disproportionate impact.[242]

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[238] *See, e.g., Fullilove*, 448 U.S. at 480; Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

[239] *See, e.g., McLaughlin*, 379 U.S. at 198 (Stewart, J., concurring) (reasoning that state statute conditioning imposition of criminal punishment on the color of an individual's skin is *per se* invidious discrimination); Strauder v. West Virginia, 100 U.S. 303, 308 (1880) (holding that statute denying blacks right to serve on juries "is practically a brand upon them, . . . an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.").

[240] *See, e.g.*, Swain v. Alabama, 380 U.S. 202 (1965) (prosecutor's use of peremptory challenges to remove all six black jurors not unconstitutional; essential nature of peremptory challenge system noted by Court). Cases upholding racially discriminatory action because of a compelling governmental interest are extremely rare.

> Since *Korematsu* the Court has had few occasions to consider the possibility . . . that racial discrimination against minorities might be constitutionally permissible in some circumstances because of some overriding justification.
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> . . . .
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> . . . *Swain v. Alabama* . . . seems to be the only case since *Korematsu* in which the Court has written an opinion upholding deliberate official racial discrimination directed against a minority group.

N. Dorsen, P. Bender, B. Neuborne, S. Law, 2 Emerson, Haber and Dorsen's Political and Civil Rights in the United States 67, 68 (4th ed. 1979).

[241] Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (*citing* Gomillion v. Lightfoot, 364 U.S. 339 (1960); Lane v. Wilson, 307 U.S. 268 (1939); Guinn v. United States, 238 U.S. 347 (1915); Yick Wo v. Hopkins, 118 U.S. 356 (1886)).

[242] *See, e.g., Village of Arlington Heights*, 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

In *Korematsu* the particular governmental measure that should have been the focus of judicial review is not clear. In previous sections, the argument was presented that the executive and military orders, as well as the authorizing legislation, should be viewed as a comprehensive and unified plan to remove and to intern those of Japanese ancestry.[243] If this argument were accepted, the equal protection analysis should follow the first approach delineated above since General DeWitt's orders, on their face, evidence a suspect racial classification. On the other hand, if each official action is considered separately, the general's orders may arguably be simply evidence of the discriminatory impact of a facially neutral enactment. In this case, the second approach would be the appropriate equal protection analysis. Under either analysis, the orders should be viewed as being unconstitutional.

1. *Manifest Racial Classification*

The authorizing legislation[244] and Executive Order No. 9066,[245] on their face, did not direct restrictions against any particular "suspect classification." General DeWitt's orders, though, contained language clearly specifying all persons of Japanese ancestry in a military area be evacuated and detained at assembly centers.[246] The Court had before it the officer's *Final Report* which narrated the steps leading up to the congressional enactment.[247] The suggested legislative awareness implied adoption of the general's plan by the act's passage.[248] If all the measures did comprise a comprehensive and unified plan, a reviewing court could find the entire package facially discriminatory, based on the provisions of the military orders.

A showing that a suspect category appeared on the face of the legislation may not be sufficient indication of "an invidious racial discrimination forbidden by the Constitution."[249] Many government decisions require recognition of a particular racial or ethnic group, but do not fail constitutionally. In *University of Cal. Regents v. Bakke*,[250] for example, the Court considered the admissions program of a California medical school which had allocated a fixed number of positions for racial minorities. Although the program was struck down, the Court recognized that "a substantial state interest" could validate racial classifi-

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[243] *See supra* part II, §§ B and C.

[244] Pub. L. No. 503, ch. 191, 56 Stat. 173 (1942) (codified as amended at 18 U.S.C. § 1383 (1976) (repealed 1976)). *See supra* note 52 for text of statute.

[245] 7 Fed. Reg. 1407 (1942).

[246] *See supra* text accompanying notes 45-50.

[247] Final Report, *supra* note 23, at 25-31; *see also supra* notes 51-55 and accompanying text.

[248] *See supra* text accompanying notes 185-91.

[249] Washington v. Davis, 426 U.S. 229, 242 (1976).

[250] 438 U.S. 265 (1978).

cation.[351] Other decisions have upheld the use of racial criteria in a remedial context to correct prior *de jure* school segregation[352] and to ensure that minority businesses receive subcontracts comprising a fixed percent of federal funds granted to public works projects.[353] In these cases, the racial classification was not indicative of antagonism toward a minority.

Similarly, in *Korematsu*, could there have been a reason, other than racial prejudice, for singling out only those of Japanese ancestry for exclusion and internment?[354] The evacuation of designated military zones was prompted by the military judgment that persons associated by ethnic affinity to wartime enemies were security threats. At its earliest stages, the government's evacuation plan included German and Italian aliens, as well as all persons of Japanese ancestry.[355] Later, when by memorandum, the Secretary of War named General DeWitt head of the Western Defense Command, the Secretary expressed his desire that those of Italian descent should not be part of the exclusion scheme. He considered them less dangerous, and, at the same time, a burden on military resources because of their number.[356] No reason was given in the *Final Report* for the later omission of German persons from the exclusion program.

The German enemy armed forces produced far greater actual damage on the East Coast than the Japanese military did on the western shores. American ships were lost to German attacks along the Atlantic coast, as well as on the high seas.[357] "This devastating warfare often came alarmingly close to shore. Sinkings could be watched from Florida resorts and, on June 15, 1942, two American ships were torpedoed in full view of bathers and picknickers [sic] at Virginia Beach."[358] Yet no mass evacuation or detention of German aliens or German Americans occurred. Only those German individuals deemed dangerous by the Justice Department were interned.[359]

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[351] *Id.* at 294-95.

[352] *See, e.g.*, Milliken v. Bradley, 433 U.S. 267 (1977) (remedial educational programs to restore discrimination victims to educational positions, they would otherwise have attained); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1972) (racial criteria used in assigning students and teachers to remedy prior *de jure* school segregation).

[353] Fullilove v. Klutznick, 448 U.S. 448 (1980).

[354] In this section, the legislative basis for the classification would have been one that justified selecting only the ethnic Japanese, and not any other. The "compelling governmental interest" as justification for racial discrimination is discussed in section B.

[355] Memorandum from Assistant Secretary of War John J. McCloy to General DeWitt (Feb. 20, 1942), *reprinted in* Final Report, *supra* note 23, at 27-29.

[356] Letter from Secretary of War Henry L. Stimson to General DeWitt (Feb. 20, 1942), *reprinted in* Final Report, *supra* note 23, at 25-26.

[357] CWRIC REPORT, *supra* note 1, at 283; *see infra* note 288.

[358] *Id.*

[359] *Id.* at 284.

> Was there a coherent policy behind treating the German aliens and German Americans on the East Coast differently from the Japanese on the West Coast? If one accepted the Western Defense Command's view that ethnic groups remain loyal to their ancestral nation, and further argued that mass measures were necessary only against Japanese Americans either because the loyal could not be distinguished from the disloyal within Asian groups or because urgency did not permit individual review, one would expect a careful official review of all German Americans in order to detain the disloyal. The government made no such review . . . . The divergent treatment of ethnic Japanese and Germans does not make a logical pattern; one must look elsewhere to understand these events.[260]

In its report, the Commission on Wartime Relocation and Internment of Civilians suggests two factors for the less harsh treatment of the ethnic Germans. First, by sheer numbers, those of German descent would have posed a monumental logistics problem to exclude and, an even greater one, to intern.[261] In 1940 there were 1,237,000 of them living in the United States, "the largest foreign-born ethnic group except for the Italians."[262] Secondly, their numbers also endowed them with political influence, especially in those areas of the country where they represented substantial voting blocs.[263]

Added to these considerations were certain negative factors against the ethnic Japanese on the West Coast. Much pressure for internment was exerted upon cabinet members by California politicians, probably stemming from the atmosphere of pre-war antagonism against the Asians in that area.[264] In addition, the successful farming enterprises of the ethnic Japanese were considered threatening by other produce growers, who collectively became advocates for removal of their competitors.[265]

The obvious dangers to which the East Coast was exposed could hardly justify differential treatment between those of Japanese and German descent, assuming that the reasoning for detention of the ethnic Japanese was valid. Without more, the restrictions aimed solely at nonwhite enemy aliens and similar American citizens would be unconstitutional, in light of the Court's holding in *McLaughlin v. Florida*.[266] That decision involved a Florida statute which, in

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[260] *Id.* at 288-89.

[261] *Id.* at 289.

[262] *Id.*

[263] *Id.*

[264] P. IRONS, *supra* note 22, at 38-40. For example, California Congressman Leland M. Ford called for placement of all ethnic Japanese in "inland concentration camps," rationalizing that a Japanese American could prove that " 'he is patriotic and is working for us' " by agreeing to be interned. *Id.* at 38 (*quoting* from M. GRODZINS, AMERICANS BETRAYED 65 (1947)). *See also* CWRIC REPORT, *supra* note 1, at 4, 67-86.

[265] P. IRONS, *supra* note 22, at 39-40; CWRIC REPORT, *supra* note 1, at 69.

[266] 379 U.S. 184 (1964).

effect, barred only interracial couples from living together if unmarried. Its purpose was "to prevent . . . breaches of basic concepts of sexual decency."[267] The Court held it to be unconstitutional because of its discriminatory restriction of only interracial couples who are sexually promiscuous.

> That a general evil will be partially corrected may at times, and without more, serve to justify the limited application of a criminal law; but legislative discretion to employ the piecemeal approach stops short of permitting a State to narrow statutory coverage to focus on a racial group.[268]

Enactments offering only partial solutions to problems have been approved by the Court in other cases not involving suspect classifications.[269] In *Korematsu*, those ethnically related to countries at war with the United States were considered military security risks. Yet the harshest measures were directed only against the nonwhite group. If the official action was intended to prevent sabotage and espionage, its discriminatory application solely upon the ethnic Japanese, who comprised only a part of the pool of potential enemy saboteurs, would be a constitutionally unacceptable partial solution to the national security problem.

2. *Facially Neutral Legislation*

If the legislation, the statute and the executive order in the *Korematsu* case were examined and found to be facially neutral, could a "clear pattern" of racial discrimination in its application be found that could not be explained? Otherwise, could direct and circumstantial evidence be presented to demonstrate violation of equal protection rights?

In the first instance, the Court would be looking for an obvious scheme of racial discrimination emerging from execution of the legislative directive. The unexplainable and patent character of the racially discriminatory application of authority would render the legislation unconstitutional. Two classic cases provide illustrations of this pattern—*Yick Wo v. Hopkins*[270] and *Gomillion v. Lightfoot*.[271] In the first case, an ordinance of the city of San Francisco forbade the conduct of laundry businesses in buildings other than those of brick or stone. This effectively barred the Chinese from such enterprises in the area,

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[267] *Id.* at 193.

[268] *Id.* at 194.

[269] *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 896 (1981) (step-by-step environmental protection measure valid); Dandridge v. Williams, 397 U.S. 471 (1970) (limited welfare grants regardless of family size valid under the equal protection clause as step-by-step program to combat poverty).

[270] 118 U.S. 356 (1886).

[271] 364 U.S. 339 (1960).

since nearly all of their laundries were operated in wooden structures. On the other hand, exceptions to the ordinance were granted to all *non-Chinese* petitioners. The Court held that "[n]o reason for [this pattern] is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the [Chinese] . . . which, in the eye of the law, is not justified."[272]

In *Gomillion*, an Alabama redistricting statute changed the shape of the city of Tuskegee "from a square to an uncouth twenty-eight-sided figure."[273] The result excluded almost all black voters from the city limits, while no white voters were affected. The Court viewed the gerrymandering as "tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town."[274]

Was there a "clear pattern" of discriminatory application of restrictions levied to protect sensitive military areas in *Korematsu*? The purpose of the legislation, imputed from the executive order, was to guard against the dangers of espionage and sabotage in those military areas vulnerable to attack by enemy forces.[275] In *Hirabayashi*, the principles of which were relied upon in the *Korematsu* decision, the Court posited that "[t]he fact alone that attack on our shores was threatened by Japan rather than another enemy power set these citizens [of Japanese descent] apart from others who have no particular association with Japan."[276] That reasoning, in light of the purpose of the statute, and the greater incidence of German enemy activity along the East Coast,[277] would clearly call for restriction of aliens and citizens of German origin. If a danger to the nation's safety was perceived from those who had ethnic ties with enemy countries, no reason was advanced for limiting exclusion and internment to only the nonwhite group. The emerging picture of an unexplained and "clear pattern" of racial discrimination is accented by the congressional testimony given by the military officer who issued the West Coast orders: "It makes no difference whether he is an American citizen, he is still a Japanese. American citizenship does not necessarily determine loyalty . . . . But we must worry about the Japanese all the time until he is wiped off the map."[278]

If the Court is not persuaded that invidious discrimination was clearly demonstrated from the law's execution, direct and circumstantial evidence could

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[272] 118 U.S. at 374.

[273] 364 U.S. at 340.

[274] *Id.* at 341.

[275] *See supra* text accompanying notes 36-41 and 197-209.

[276] 320 U.S. at 101.

[277] *See supra* text accompanying notes 257-59.

[278] *Hearing Before the House Naval Affairs Subcommittee to Investigate Congested Areas*, 78th Cong., 1st Sess. 739-40 (1943) (statement of General DeWitt), *quoted in Korematsu*, 323 U.S. at 236 n.2 (Murphy, J., dissenting).

be used to show a racial intent. Some of the criteria developed by the Court to prove intent are: (1) disproportionate impact on a minority;[279] (2) the historical background of the government decision, including any series of actions instituted for invidious purposes, the specific events leading up to the decision, or any departure from routine or traditional procedure;[280] and (3) lack of any neutral justification for the government's conduct.[281] *Washington v. Davis* articulates the approach to be employed: "[A]n invidious discriminatory purpose may often be inferred from the *totality of the relevant facts*, including the fact . . . that the law bears more heavily on one race than another."[282]

A disproportionate impact on one ethnic group, the Japanese, is readily discernible in this case. According to the *Washington* framework, however, this showing alone would not suffice to prove intent. "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only under the weightiest considerations."[283] However, in *Korematsu*, disproportionate impact was *not* the "sole touchstone." Procedural departures and the absence of neutral justifications for the official actions also provide support for the conclusion that the restrictive measures imposed upon the ethnic Japanese were fomented by invidious racial discrimination.

Turning, then, to the historical background of the government's decisions, does it reveal such irregularities as to implicate "invidious purpose"? The difficulty is in determining the routine or traditional lines along which national defense decisions should be made.[284] In *Korematsu* a procedural departure of sorts was the ratification of presidential action after the fact. The accepted sequence of events is the delegation of authority by Congress, *after* which the president acts under the conferred power. However, this kind of deviation has occurred in the past, with the subsequent approval of the Supreme Court.[285] The turbulent nature of war may require that legislative authorization be forthcoming only after field decisions have been made—as occurred in this case.

There was, however, another inconsistency in the course of the government's decision making process that the Court could have questioned. While the threat

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[279] *See, e.g., Village of Arlington Heights*, 429 U.S. at 266; Washington v. Davis, 426 U.S. 229, 242 (1976).

[280] *See, e.g., Village of Arlington Heights*, 429 U.S. at 267.

[281] *See, e.g.*, Washington v. Davis, 426 U.S. at 242.

[282] *Id.* (emphasis added).

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

[284] This difficulty suggests one of the reasons for the judicial deference accorded federal action during wartime. Note that the examination here focuses on the procedural aspect of the decision, not the substance of it.

[285] *See supra* notes 185-91 and accompanying text.

of enemy attack was greater initially than at the time of Korematsu's arrest, the scope of defensive measures taken by the President and his subordinates was limited to enemy aliens—Japanese, Germans, and Italians alike—who had been identified as potentially dangerous by intelligence agencies before the Pearl Harbor bombing.[286] Yet as the probability of attack upon the West Coast by Japan diminished[287] and American casualties inflicted by the Germans rose in the Atlantic,[288] restrictions upon the Japanese element widened to include all aliens and citizens as well. Concomitantly, detention of Italians ceased and actions against the German sector remained selective and limited.[289] This disparity was never explained in terms of military necessity.[290]

Another factor in the determination of discriminatory intent is the absence of any neutral justification for the official action. General DeWitt highlighted the military activities affecting the West Coast area in his *Final Report*: clashes with Japan's armed forces in the Pacific theatre and reports of enemy attacks on coastal points, with evidence, according to the general, of shore-to-sea communication of information to the enemy.[291] These, perhaps, could be characterized as "neutral justifications" for the exclusion. But they lose their patina of legitimacy when the East Coast situation failed to generate similar defense concerns.

Once removal of potential saboteurs from the threatened area had been effected, however, these military conditions did not justify indefinite detention or internment. By Executive Order No. 9066, the Secretary of War was empowered "to provide for residents of any such [military] area who are excluded

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[286] *See supra* notes 24-29 and accompanying text.

[287] *But cf.* memorandum from General DeWitt to Secretary of War Stimson, *supra* note 34, *reprinted in* Final Report, *supra* note 23, at 34 ("The very fact that no sabotage has taken place to date [Feb. 14, 1942] is a disturbing and confirming indication that such action will be taken.").

[288] Before the issuance of the exclusion order in March 1942, 93 American vessels were sunk in the Atlantic, a loss of nearly 200,000 tons. In March, 28 ships, totaling over 150,000 tons, were lost along the East Coast. Additionally, 15 more, comprising over 90,000 tons, went down in the Gulf of Mexico and the Caribbean Sea. CWRIC REPORT, *supra* note 1, at 283.

[289] *See supra* text accompanying notes 257-63.

[290] No basis for the noninclusion of the ethnic Germans in the exclusion and detention orders is given by General DeWitt in his Final Report, *supra* note 23. *See also Korematsu*, 323 U.S. at 240 (Murphy, J., dissenting) (pointing out the disparity).

[291] Final Report, *supra* note 23, at 18-19. *But cf.* CWRIC REPORT, *supra* note 1, at 7 ("But the reports of shore-to-ship signaling were investigated by the Federal Communications Commission, the agency with relevant expertise, and no identifiable cases of such signaling were substantiated."). There was indication of General DeWitt's awareness that reports of the alleged radio signalings were false. P. IRONS, *supra* note 22, at 285. In fact, two deputies on the United States Attorney General's staff, John Burling and John Ennis, had inserted a footnote in an early version of the government's *Korematsu* brief, informing the Court that military necessity could not rest on such tenuous grounds. *Id.* at 286. Before the brief was finalized, the language of that crucial footnote was watered down, removing the clear message to the Court that General DeWitt's judgment was not premised on substantiated fact. *Id.* at 292.

therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary . . . or the [designated] Military Commander."[292] Initially, it was envisioned that evacuation of Japanese American citizens was to be followed by "voluntary internment," with those persons declining such custody to "be excluded from all military areas, and left to their own resources."[293] The plan to provide "shelter" for evacuees from which they could voluntarily leave was displaced by required detention at assembly centers and eventual internment at relocation camps.

Although the involuntary custody of evacuees was accomplished under the delegated authority of both the executive order and legislation, General DeWitt conceded that it was not done to protect against espionage and sabotage. Rather, as he stated in his *Final Report*:

> Essentially, military necessity required only that the Japanese population be removed from the coastal area and dispersed in the interior, where the danger of action in concert during any attempted enemy raids along the coast, or in advance thereof as preparation for a full scale attack, would be eliminated. That the evacuation program necessarily and ultimately developed into one of complete Federal supervision, was due primarily to the fact that the interior states would not accept an uncontrolled Japanese migration.[294]

Confinement of an ethnic minority cannot pass constitutional tests when employed simply to avoid the adverse reactions of communities that would have had to accept evacuees. If a benevolent motive was present, such as protection of the evacuees by placement in internment camps, it produced a result contrary to the dictates of our criminal justice system. That institution envisions that the offender is incarcerated, not the victim. It is ludicrous to suggest that it is legitimate to segregate and to imprison a minority group in anticipation of probable racial clashes. The Court could hardly return now to the doctrine of "separate but equal."[295] Moreover, the conditions awaiting the evacuees at the camps could *not* have been characterized as "equal" to those not under restraint.[296]

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[292] Exec. Order No. 9066, 7 Fed. Reg. 1407 (1942).

[293] Memorandum from General DeWitt to Secretary of War Stimson, *supra* note 34, *reprinted in* Final Report, *supra* note 23, at 36-37. This document served as the basis for Exec. Order No. 9066, which was issued on Feb. 19, 1942.

[294] Final Report, *supra* note 23, at 43-44. *See also Ex parte* Endo, 323 U.S. at 301-04 (reasoning that community hostility against the ethnic Japanese evacuees could not be used to justify detention, which was prompted by the need to protect against espionage and sabotage).

[295] Plessy v. Ferguson, 163 U.S. 537 (1896).

[296] *See* CWRIC REPORT, *supra* note 1, at 158-84 (describing the harsh conditions under which the internees lived). Although my personal memories of camp life are vague, the stories related to me by my mother, Tamae Hoshida, conjured images of hard times. One, especially, has

In total, the evidence supports an inference of discriminatory intent. Only one minority group was decidedly burdened by the government's actions. The decision making process involved some questionable steps, although the wartime atmosphere may have affected the procedure. The "neutral justifications" fail when the entire program instituted against persons of Japanese ancestry is taken into account. The Court would have a strong basis for finding an intent to discriminate at this point, and for shifting the evidentiary burden to the government.

B. Military Necessity

Confronted with an assertion that its actions were racially discriminatory, the government has at least two avenues of defense: (1) the rebuttal of the racial discrimination contention, or (2) a showing that a compelling governmental interest was at stake and that it had been advanced by a narrowly tailored, least intrusive alternative. In *Korematsu*, the Court relied on military justification to address both approaches.

1. *Rebuttal to Racial Discrimination Contention*

The racial discrimination contention was rebutted in *Korematsu* by the same "military imperative" created by the impossibility of immediate segregation of the disloyal that justified the curfew order in *Hirabayashi*.[297] According to the later decision, the refusal by approximately 5,000 Japanese American internees to swear allegiance to the United States and to renounce any ties to the Japanese emperor was further confirmation of disloyalty.[298] The Court in *Hirabayashi* acknowledged that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection."[299] But, the Court countered, "in dealing with the perils of war, Congress and the Executive are [not] wholly precluded from taking into

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stayed with me—a tiny woman, not five feet tall, trudging along a highway with bucket in hand, searching for bits of coal that might have fallen from passing trucks to use to warm her family.

[297] *Korematsu*, 323 U.S. at 218-19.

[298] *Id.* at 219. *But cf.* CWRIC REPORT, *supra* note 1, at 191-97 (describing the confusion with which the internees confronted the loyalty questionnaire presented to them—whether asserting loyalty to the United States and renouncing Japanese nationality left Japanese aliens "without a country" or would be interpreted as a pledge by the Japanese Americans to volunteer for the military; offering testimony from those who answered in the negative as a protest against their summary internment).

[299] 320 U.S. at 100.

account those facts and circumstances which are relevant to measures for our national defense and for the successful prosecution of the war, and which may in fact *place citizens of one ancestry* in a *different category from others.*"[300] The Court's conclusion was that these "facts and circumstances" indicated "that a group of one national extraction may menace [public] safety [in time of war and threatened invasion] more than others."[301]

The "facts and circumstances" the Court delineated were essentially sociological in nature and based on questionable authority.[302] Most of the "data" were derived from a congressional hearing and a House of Representatives report.[303] Yet the Court approved of their use by the political branches of government in wartime decisionmaking. "These are only some of the many considerations which those charged with responsibility for the national defense could take into account in determining the nature and extent of the danger of espionage and sabotage, in the event of invasion or air raid attack."[304]

These kinds of data were indeed taken into account by General DeWitt, and probably formed the primary basis for his military orders.[305] Aside from his concern about the contraband seized and the supposed shore-to-ship signaling by saboteurs,[306] the commander's conclusion that all persons of Japanese ancestry posed threats of espionage and sabotage was based on his collection of sociological information on the Japanese in America. His data, also of questionable validity and reliability, were essentially the same as that reviewed by the Supreme Court in *Hirabayashi*.[307] His reasoning followed this tack:

1. The Japanese alien in the United States maintains close allegiance to his mother country and has failed to assimilate into the American mainstream because of nonacceptance by other Americans and because of strong bonds of tradition and custom. The group conducts pro-Japanese activities through Japanese organizations, religious practices, and native language newspapers.[308]
2. Because of nonassimilation, the Japanese born in America identify with the aliens among them and their traditions. Indoctrination is accom-

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[300] *Id.* (emphasis added).

[301] *Id.* at 101.

[302] *Id.* at 96-98. *See also supra* note 61.

[303] *Id.* at 97 nn.5 and 6, 98 n.9.

[304] *Id.* at 99.

[305] Most of chapter II, "Need for Military Control and for Evacuation," in General DeWitt's Final Report deals extensively with his version of a sociological profile of the ethnic Japanese. No authoritative citations are offered. Final Report, *supra* note 23, at 7-19. *See also supra* note 291.

[306] Final Report, *supra* note 23, at 8. *But cf.* CWRIC REPORT, *supra* note 1, at 62, 88 (Justice Department reports minimizing significance of material gathered in contraband round-up); *supra* note 291.

[307] *Compare Hirabayashi*, 320 U.S. at 96-98 *with* Final Report, *supra* note 23, at 7-19.

[308] Final Report, *supra* note 23, at 9-12.

plished through Japanese language schools and by the practice of sending American-born children to Japan for their education.[309]

3. The Japanese have located themselves along strategic military points on the West Coast.[310]
4. There are some disloyal persons of Japanese ancestry on the West Coast who pose a threat of espionage and sabotage.[311]
5. Because of their strong cultural identification, loyal Japanese Americans cannot be distinguished from the disloyal.[312]

From this logic, the general concluded that all persons of Japanese ancestry must be excluded from specified military areas and detained at assembly centers.

If the sociological features of a group ethnically related to an enemy nation were of military significance, why were similar analyses not performed of the Italian and German population? Using General DeWitt's criteria of disloyalty, Morton Grodzins[313] developed a profile of the Italians in the United States. His result, astonishing in its similarity to the portrayal of the Japanese, was presented in his 1949 book *Americans Betrayed*:

> Because of their concentration in the fishing industry, Italians if anything were located in more strategic coastal locations than the Japanese. This was especially true of the San Francisco Bay area and adjoining counties.
>
> The Italians had their full quota of language schools and their own churches. They and their children made numerous trips to their home country. The Italian consuls were active and important members of the community, and Fascist propaganda was reflected in a vernacular press which supported Mussolini's domestic and foreign policies. If naturalization were any indication of acculturation, then the single fact that more than half the foreign-born Italians had not become citizens of the United States demonstrated a low degree of Americanization. Educational achievement rates of children of Italian ancestry were lower, and their delinquency rates were higher, in comparison with those of Japanese ancestry. Italians in California had contributed funds to the Italian relief agencies following the conquests of Ethiopia and Albania.[314]

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[309] *Id.* at 12-14.

[310] *Id.* at 9.

[311] *Id.* at 18.

[312] *Id.* at 9.

[313] Morton Grodzins is professor of political science at the University of Chicago, former dean of the Division of the Social Sciences, and a former member of the Evacuation and Resettlement Study of the University of California. He has participated in the Pugwash Conferences on Science and World Affairs and is the co-author of GOVERNMENT AND HOUSING IN METROPOLITAN AREAS and the author of THE LOYAL AND THE DISLOYAL and AMERICANS BETRAYED.

[314] M. GRODZINS, AMERICANS BETRAYED 172-73 (1949), *quoted in* CWRIC REPORT, *supra* note 1, at 90.

Nearly identical phenomena generated antipathy toward persons of German descent in America during World War I.[315] Although by 1942 the German sector had undergone a deliberate and almost defensive assimilation, remnants of cultural ties to the country of origin were still present in 1942.[316] If sociological data are indeed valid indices of disloyalty, the attacks by German enemy forces along the East Coast certainly warranted a study of ethnic Germans in the United States.

The "proof" of disloyalty among the Japanese group thus loses its force as justification for the military orders. At the same time, the suspicion that a racially motivated reason for the exclusion and internment is reinforced.

2. *Compelling Government Interest: Military Necessity*

If the government is unable to dispel the cast of racial discrimination, can its actions be justified by a "compelling governmental interest"? Further, were the means taken to advance that interest narrowly tailored to their purpose and the least intrusive alternative at hand?[317]

The Court in *Korematsu* upheld the constitutionality of the restrictive actions taken against a single ethnic group because there existed "[n]othing short of apprehension by the proper military authorities of the gravest danger to the public safety."[318] The Court accepted the judgment of the military and Congress that, because prompt identification of the disloyal among the ethnic Japanese was not possible, the exclusion of the entire group from vital areas was a military necessity. In *Hirabayashi*, the curfew case, the Court detailed the military conditions confronting the President and Congress in early 1942. The Pearl Harbor attack and the many incursions by Japanese enemy forces in the Pacific theatre created a critical situation along the West Coast.[319] Thus, the military judgment was that the presence of the disloyal, sympathetic to the nation's enemies, presented a threat of espionage and sabotage to defense installations in the area.[320] And the Court in *Korematsu* concluded that "exclusion . . ., no less than curfew, has a definite and close relationship"[321] to the prevention of fruition of that twin threat.

The military assessment of disloyalty, and the willingness to attribute to the entire ethnic group the subversiveness of a few of its members, raises at least

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[315] CWRIC REPORT, *supra* note 1, at 289-92.

[316] *Id.* at 291-92.

[317] *See supra* note 240 and accompanying text.

[318] 323 U.S. at 218.

[319] *Hirabayashi*, 320 U.S. at 93-96.

[320] *Id.* at 95-96.

[321] 323 U.S. at 218.

two points that are troubling: (1) that a military officer's sociological analysis could be accepted as the basis for such a military judgment, and (2) that, in accord with that judgment, an entire ethnic group may be labelled as "disloyal," foregoing a less restrictive and narrower means to remove potential subversives from critical areas.

First, the wholesale exclusion measures ultimately rested on the acceptance of General DeWitt's conclusion that all Japanese, whether American citizen or alien, could be disloyal.[322] His judgment was not military in foundation. A civilian sharing his attitude could have made the same conclusion, but his at least would not have been clothed with the color of military authority. The inclusion of all persons of Japanese ancestry, aliens, those with dual citizenship, and Americans alike—within the group to be restricted was overinclusive and not justified by the officer's reasoning. He viewed the loyalty of both aliens and citizens as questionable only because of their ethnic similarity.[323]

The general's "guilt by association" line of argument could meet judicial disapproval today in light of *United States v. Robel*.[324] In that case, Robel's membership in the Communist Party was seen as a possible threat to the national security. As a result, under authority of a statute, the federal government barred him from working in defense facilities. The Court held such governmental prohibitions unacceptable when appellee's guilt is established "by association alone, without any need to establish that an individual's association poses a threat feared by the Government in proscribing it."[325] Korematsu's loyalty was not in dispute.[326] If alienage is to be equated with disloyalty, Korematsu's "guilt" as a possible saboteur or spy was established only by his common ancestral link to Japanese aliens. Since Robel's membership in the Communist party was presumably a voluntary act, and one that he could rescind, the reasoning in *Robel* is even more persuasive than in Korematsu's case.

> [G]uilt is personal and not inheritable. . . . But here is an attempt to make an otherwise innocent act, being present in the state whereof he is a citizen, near the place where he was born, and where all his life he has lived, a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign.[327]

However, the significance of *Robel* may have been eroded to some extent by

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[322] *See supra* notes 291 and 306.

[323] *See supra* notes 305-12 and accompanying text.

[324] 389 U.S. 258 (1967).

[325] *Id.* at 265 (footnote omitted).

[326] *Korematsu*, 323 U.S. at 216.

[327] *Id.* at 243 (Jackson, J., dissenting).

Haig v. Agee.[328] That case appeared to have expanded the discretionary powers of the executive branch to restrict the rights of an individual when national security or foreign policy is involved, even without clear and specific delegation of authority by Congress. In that case the Court upheld, as constitutionally delegated legislative power, the Secretary of State's discretionary revocation of an American citizen's passport where "there is a substantial likelihood of 'serious damage' to national security or foreign policy as a result of a passport holder's activities in foreign countries."[329] The Court validated the delegation, despite the absence of specific statutory authorization for revocation. The congressional approval was inferred from Congress' silence over or at least acquiescence to a long standing administrative assertion of the power to revoke passports.[330] Yet the finding of a "long standing" practice relied on no more than a handful of revocations[331] over the life of the Passport Act of 1926.[332] The Court defended the paucity of the evidence by asserting that "[t]he exercise of a power emerges only in relation to a factual situation, and the continued validity of the power is not diluted simply because there is no need to use it."[333] As to the charge by the defendant of discriminatory enforcement, the Court dismissed this claim in a footnote, according to the government entitlement "to concentrate its scarce legal resources on cases involving the most serious damage to national security and foreign policy."[334]

The claim by Agee that his first amendment rights of free speech[335] had been abridged had "no foundation" according to the Court.[336] The reasoning by the Court was that the revocation of Agee's passport " 'is an inhibition of *action*' [his campaign to expose intelligence operations abroad] rather than of speech. Agee is as free to criticize the United States Government as he was when he held a passport."[337] However, in light of the wide latitude shown by

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[328] 453 U.S. 280 (1981). The defendant Agee, a former Central Intelligence Agency (CIA) employee, had openly criticized the agency and had undertaken a campaign to expose CIA agents abroad. He began these activities in 1974, but was not notified of his passport revocation until a month after the November 4, 1979 seizure of the American embassy in Iran. *Id.* at 286 and n.8. But the holding in *Agee* approving of the Secretary's discretionary revocation of passports does not rely on the declaration of war or national emergency. *Id.* at 288-89 n.14.

[329] *Id.* at 309.

[330] *Id.* at 291-301.

[331] *Id.* at 301-03 (majority opinion); *id.* at 317 and n.7, 318 (Brennan, J., dissenting).

[332] 22 U.S.C. § 211a (1976 & Supp. III, 1979).

[333] *Agee*, 453 U.S. at 302.

[334] *Id.* at 309 n.61.

[335] U.S. CONST. amend. I.

[336] *Agee*, 453 U.S. at 308-09.

[337] *Id.* at 309 (*quoting* Zemel v. Rusk, 381 U.S. 1, 16-17 (1965) (emphasis added by the Court in *Agee*)). The Court in *Agee* also pointed out that the defendant had violated an express term of his employment contract not to disclose CIA matters without prior clearance, but this fact

the Court in its deference both to the executive branch's determination of danger to the national security, without explicit congressional authorization, and to that branch's discretion in allocating its "scarce legal resources," it is conceivable that mere criticism, without more, could be the basis for passport revocation if, in the Secretary of State's estimation, a "substantial likelihood" of damage to the national security exists.

The Court in *Korematsu* and *Hirabayashi* accepted the link of ethnicity to a high probability of subversive behavior. Could *Agee* permit that to happen again? The reach of that decision could be limited to passport revocation cases and to government actions not involving racial overtones. However persuasively that limitation is argued, the Court's own reaction in a wartime or crisis milieu would seem to be the important gauge. In *Agee*, the Court was approving of the Chief Executive's broad exercise of discretion without reliance on a declaration of national emergency.[338] Would the judicial deference to presidential discretion be heightened and broadened under more stressful conditions?[339]

A strong possibility exists that judicial weight will be placed on questionable sociological arguments presented under the guise of military expertise, given the pressures and uncertainties of wartime. The second equally troubling aspect of reliance on the military judgment in *Korematsu* was the government's failure to use less restrictive means of removing potential spies and saboteurs from the military areas. According to General DeWitt, the bypassing of any loyalty

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did not appear to control the Court's position on Agee's first amendment claim. *Id.* at 284 and nn.4-5. *But cf. id.* at 320 n.10 (Brennan, J., dissenting) (analogizing the majority's assertion that Agee is free to criticize the government despite passport revocation, to the freedom of a prisoner to do the same while serving a 40-year sentence for criticizing the government's food stamp policy).

[338] *See supra* note 328.

[339] How, for example, would the Court decide if confronted with Narenji v. Civiletti, 617 F.2d 745 (D.C. Cir. 1979). In that case, decided during the Iranian crisis, the Circuit Court of the District of Columbia held that the Immigration and Nationality Act (INA), 8 U.S.C. § 1103(a), grants the Attorney General broad enough authority to issue regulations which draw distinctions on the basis of nationality "[s]o long as the distinctions are not wholly irrational." *Narenji*, 617 F.2d at 747. The regulation in question, 8 C.F.R. § 214.5 (1979), provided that all nonimmigrant alien post-secondary school students who are Iranian natives or citizens must meet certain reporting requirements with a local Immigration and Naturalization Service Office. Failure to comply subjected the foreign student to deportation proceedings. The Circuit Court found a reasonable relationship between the Attorney General's action and his duties under the INA. *Narenji*, 617 F.2d at 747. The court had been informed that the regulation was issued as a "fundamental element of the President's effort to resolve the Iranian crisis, the seizure of the American embassy in Iran, and to maintain the safety of the American hostages in Tehran.' " *Id.* (*quoting* an affidavit from the Attorney General). *See also* Note, *Constitutional Limits on the Power to Exclude Aliens*, 82 COLUM. L. REV. 957 (1982) *and* Note, *Aliens—Constitutionality of Discrimination Based on National Origin*—Narenji v. Civiletti, 21 HARV. INT'L L.J. 467 (1980).

screening was necessitated by the exigency of time.[340] Yet the record before the Court showed that the government had conducted itself with "[l]eisure and deliberation," taking nearly eleven months to complete evacuation of the designated areas.[341]

Moreover, the situation in Hawaii and the limited measures taken by the Attorney General immediately after the bombing of Pearl Harbor (before the War Department took over) suggest that other less intrusive alternatives to the DeWitt scheme were available. Following the Attorney General's lead, only enemy aliens could have been summarily removed, with suspected citizens undergoing scrutiny by a panel, as in Hawaii and in England.[342] In the alternative, once all were removed from the area, disloyal evacuees could be weeded out; indefinite custody was not necessary.[343]

To show that the orders were necessary, the commander's sociological appraisal of the Japanese would not be sufficient. Similar ethnic factors present in Hawaii did not trigger large-scale evacuation, detention and internment of the Japanese Americans there. From a military standpoint, it would appear that Hawaii was in a much more strategic position. It was the site of the original attack by the Japanese military. It was in closer vicinity to the Pacific theatre of war. Martial law had been declared. The United States armed forces were stationed in Hawaii, making it an inviting target to the enemy. Despite the Islands' vulnerability, of the 158,000 persons of Japanese ancestry living there at that time, less than 2,000 were interned.[344]

No explanation for the disparate treatment between the ethnic Japanese in Hawaii and those on the West Coast was offered in *Korematsu*. The Commission on Wartime Relocation and Internment of Civilians concluded that four factors contributed to the difference, none of which was of much military significance: (1) the greater ethnic mixture and cultural harmony present in Hawaii; (2) the larger number of ethnic Japanese in Hawaii; (3) the imposition of mar-

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[340] Final Report, *supra* note 23, at 18-19.

[341] It is asserted merely that the loyalties of this group "were unknown and time was of the essence." Yet nearly four months elapsed after Pearl Harbor before the first exclusion order was issued; nearly eight months went by until the last order was issued; and the last of these "subversive" persons was not actually removed until almost eleven months had elapsed. Leisure and deliberation seem to have been more of the essence than speed. And the fact that conditions were not such as to warrant a declaration of martial law adds strength to the belief that the factors of time and military necessity were not as urgent as they have been represented to be.

Korematsu, 323 U.S. at 241 (Murphy, J., dissenting).

[342] *See supra* notes 25-29 and accompanying text. *See also Korematsu*, 323 U.S. at 241-42 and n.16 (Murphy, J., dissenting) (proposing loyalty hearings and describing those conducted by the British government).

[343] *See supra* text accompanying notes 292-93.

[344] CWRIC REPORT, *supra* note 1, at 261.

tial law in Hawaii, giving the military greater responsiveness to deal with emergencies; and (4) the difference in racial outlook of the commanders of each area.[345]

The presence of ethnic Japanese in larger numbers in Hawaii was viewed as an economic plus, for they were represented throughout the governmental work force and among the various professions.[346] In contrast, many among the West Coast Japanese population were successful farmers and posed competitive threats to other agricultural enterprises.[347] The economic difference, the greater degree of racial tolerance in Hawaii and the lack of congressional representation from the Territory produced no major movement to exclude the ethnic Japanese from the Islands, unlike the entreaties by California politicians and agricultural organizations.[348]

General Delos Emmons, United States Army, was General DeWitt's equivalent in Hawaii. Just as the social and political environments within the two commands differed, the attitudes of the two officers toward the ethnic Japanese contrasted. General Emmons chose to see the individual Asian as loyal to the United States unless shown otherwise by supporting evidence.[349] Where pressures for mass evacuation were exerted, he defused them with the practical arguments of economic disruption and logistical problems of transportation.[350] His own staff rejected the Western Command's assessment of the difficulty of loyalty screening.[351] Later, in September 1943, when General Emmons replaced DeWitt as head of the Western Command, he sought to reduce the size of the designated military area and to end exclusion of persons who were not shown to be disloyal or dangerous.[352]

The difference in treatment between the ethnic Japanese and those of German and Italian descents is also indicative of the unnecessarily broad sweep of General DeWitt's orders. At the start of the war, only enemy aliens were under suspicion—whether white or nonwhite.[353] Later, the West Coast Japanese group was the only one in which American citizens, as well as aliens, were considered potentially subversive. Throughout World War II, only those among the German and Italian groups deemed to be potentially dangerous were interned.[354]

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[345] *Id.* at 261-62.

[346] *Id.* at 263.

[347] *See supra* note 1 and note 265 and accompanying text.

[348] CWRIC REPORT, *supra* note 1, at 67-72, 261.

[349] *Id.* at 262.

[350] *Id.*

[351] *Id.* and n.3.

[352] *Id.* at 262.

[353] *See supra* text accompanying notes 24-29.

[354] CWRIC REPORT, *supra* note 1, at 284-85. *See also supra* notes 257-65 and accompanying

Perhaps, if the Court in *Korematsu* had heeded its own admonition that racially directed government restrictions require "the most rigid scrutiny," the nonmilitary character of the justification for exclusion and internment would have become apparent. Justice Murphy apparently scrutinized General DeWitt's report, and found it unacceptable. Although Justices Roberts and Jackson also voiced their dissent, the majority of the Court was persuaded to defer to the military judgment that the presence of the ethnic Japanese along the West Coast was a threat to the national security. It was wartime, our shores were threatened, and there was a need to wage war, and to wage it successfully, no matter what the cost to the constitutional freedoms of one small group of citizens.

IV. JUSTICIABILITY

In a dissenting opinion in *Korematsu*, Justice Jackson expressed doubts about the Court's intervention in matters involving military judgment.

> In the very nature of things, *military decisions are not susceptible of intelligent judicial appraisal.* They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. Information in support of an order could not be disclosed to courts without danger that it would reach the enemy. Neither can courts act on communications made in confidence. *Hence courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint.*[355]

Despite his hesitancy about challenging the validity of military declarations, Justice Jackson feared to a greater degree the lasting and durable nature of judicial opinions that sanction unconstitutional military orders.[356] He saw the majority opinion in *Korematsu* as an example of the need for judicial caution.[357] Here, the Court relied on the principles expounded in *Hirabayashi* to validate exclusion and detention. But, according to Justice Jackson's reading of *Hirabayashi*, that decision was intended to be a limited one, a validation of "discrimination on the basis of ancestry for mild and temporary deprivation of liberty [the curfew]."[358] In *Korematsu*, he saw the legitimizing effect of *Hirabayashi* being expanded to include more restrictive military measures and pondered "[h]ow far the principle of this case would be extended before plausible reasons

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text.

[355] 323 U.S. at 245 (Jackson, J., dissenting) (emphasis added).

[356] *Id.* at 246.

[357] *Id.* at 246-47.

[358] *Id.* at 247.

would play out."[359]

Justice Jackson's dissent embodies the tension that flows between the legitimate exercise of the war power and the protection of individual rights. To some extent, other decisions of the Court reflect that tension by their often polar recitations. For example, in *Haig v. Agee*, the Court acknowledged the "volatile nature of problems confronting the Executive in foreign policy and national defense."[360] It further characterized these areas as "rarely proper subjects for judicial intervention."[361] On the other hand, the Court in *United States v. Robel*[362] declared that "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. '[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.' "[363]

Where the judiciary has accorded great deference in military and national security affairs to the political branches of government, it has recognized the broad constitutional powers each possesses,[364] and its own lack of competence, in those areas.[365] "Such issues as initiating, conducting, and terminating war and hostilities require policy decisions that are political rather than legal in character."[366] This political character, or question, raises the issue of justiciability in cases involving the exercise of the war power. Writing for the majority in *Baker v. Carr*,[367] Justice Brennan reviewed several "political question" decisions and concluded that "it is the relationship between the judiciary and the coordinate branches of the Federal Government which gives rise to the 'political question.' . . . The nonjusticiability of [such a] question is primarily a function of the separation of powers."[368]

In his survey of cases, Justice Brennan sought to determine "the contours of

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[359] *Id.*

[360] 453 U.S. 280, 291 (1981) (*citing* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)). For other cases reflecting judicial deference to military matters, *see, e.g.*, Brown v. Glines, 444 U.S. 348 (1980) (excluding speech likely to interfere with military effectiveness from defense installation); Middendorf v. Henry, 425 U.S. 25 (1976) (need for counsel in summary court martial overriden by military demand for discipline); Greer v. Spock, 424 U.S. 828 (1976) (no generalized constitutional right to make political speeches and distribute leaflets on military base).

[361] 453 U.S. at 292.

[362] 389 U.S. 258 (1967).

[363] *Id.* at 263-64 (*quoting* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934)). For other cases, *see, e.g.*, Duncan v. Kahanamoku, 327 U.S. 304 (1946); *Ex parte* Endo, 323 U.S. 283 (1944).

[364] *See supra* note 360.

[365] *See infra* notes 373-76 and accompanying text.

[366] Keynes, *supra* note 123, at 69.

[367] 369 U.S. 186 (1962).

[368] *Id.* at 210.

the 'political question' doctine."[369] He abstracted several political question formulations:

1. [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or
2. [A] lack of judicially discoverable and manageable standards for resolving it; or
3. [T]he impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or
4. [T]he impossibility of a Court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or
5. [A]n unusual need for unquestioning adherence to a political decision already made; or
6. [T]he potentiality of embarrassment from multifarious pronouncements by various departments on one question.[370]

Justice Brennan concluded that one of these formulations must be inherent in the issue presented before the Court would dismiss it for nonjusticiability.

Determining justiciability by applying the formulations requires certain precautions. Particularly concerning the war power, Justice Brennan pointed out that although the Court would defer to political decisions concerning the duration of hostilities:

> [D]eference rests on reason, not habit. The question in a particular case may not seriously implicate considerations of finality [as in the determination of when or whether a war has ended]. Further, clearly definable criteria for decision may be available. In such a case the political question barrier falls away: "[A] Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. . . . [It can] inquire whether the exigency still existed upon which the continued operation of the law depended."[371]

Does *Korematsu* present a political question that precludes judicial review? The *Baker* criterion that may raise the issue is the possible "lack of judicially discoverable and manageable standards" for resolving the controversies in the case.[372] In *Korematsu*, governmental restrictions were directed against members

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[369] *Id.*

[370] *Id.* at 217.

[371] *Id.* at 213-14 (*quoting* Chastleton Corp. v. Sinclair, 264 U.S. 543, 547-48 (1923)).

[372] The other conditions may be present in lesser degrees in *Korematsu*, but would not be "inextricable from the case at bar." *Baker*, 369 U.S. at 217. As discussed earlier, *supra* text accompanying notes 93-98, the Constitution does not explicitly circumscribe the scope of the war power to be exercised by the "coordinate political departments." In addition, although the issues in *Korematsu* may require the Court to confront the validity of certain military judgments, no

of one ethnic group. The need for such actions rested on the military judgment that vulnerable national defense areas required protection against the threat of espionage and sabotage posed by disloyal persons of Japanese ancestry. Removal of all who were of that ethnic background, whether loyal or disloyal, was deemed a military necessity. The exigencies of time and the fear of invasion, according to military assessment, did not permit identification and removal of only the disloyal.

The Court may choose not to substitute its judgment for that of the military in weighing the need for evacuation and detention, because it lacks the knowledge to develop "judicially discoverable and manageable standards." The shortfall in knowledge may result from either the Court's own limited expertise in military matters or from the relative inaccessibility of information necessary for the setting of appropriate evaluation criteria.

The Court often rests its lack of competence on the nature of the military itself. In *Parker v. Levy*,[373] a claim of infringement of the right of free speech was rebuffed with the reasoning that "[w]hile the members of the military are not excluded from the protection granted by the [f]irst [a]mendment, the different character of the military community and of the military mission requires a different application of those protections."[374] The Court reemphasized its perception of the special character of the military in *Rostker v. Goldberg*:[375]

> [I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive branches.[376]

Although these decisions reflect deference to the military decisions affecting its own personnel, in a wartime context, the Court may be even more reluctant

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policy determination is necessary for its review. Further, if the Court should strike down the exclusion and detention actions of the executive branch, its ruling may "embarrass" the individuals responsible for the political and military decisions, but would not necessarily undermine the nation's credibility vis-a-vis other countries; it is understandable that decisions made in the urgency of wartime may not survive later judicial scrutiny. An adverse ruling would also not be a show of disrespect, especially if it is based on firm constitutional grounds.

[373] 417 U.S. 733 (1974) (officer claiming first and fifth amendment rights infringement, where overly broad and vague provisions of Uniform Code of Military Justice forbade public statements urging blacks not to go to Vietnam).

[374] *Id.* at 758.

[375] 453 U.S. 57 (1981) (holding that draft registration of males and not females does not violate fifth amendment rights).

[376] *Rostker*, 453 U.S. at 65-66 (*quoting* Gilligan v. Morgan, 41 U.S. 1, 10 (1973)) (emphasis included). *See also Agee*, 453 U.S. at 291-92.

to impose its judgment on the soundness of military decisions made to defend against espionage and sabotage. Even the test that Justice Frankfurter appeared to suggest in his concurring opinion in *Korematsu*, that a military order be a "means appropriate for conducting war,"[377] would raise difficulties for the Court. It assumes what the Court, in the first place, is disclaiming—a knowledge of the military mission and its requirements.

However, it is unlikely that the Court would reject as nonjusticiable a case such as *Korematsu*. Where the protection of the rights of individuals are involved, the Court has not hesitated to subject cases to review.[378] Moreover, when an equal protection question exists and involves a suspect class, the Court is equipped with judicially developed standards to guide its strict scrutiny of the case.[379] If a suspect class is singled out and subjected to governmental restraint, the official body must demonstrate that a compelling interest justifies *all* of its actions.[380] This requirement serves to ensure that the alternative it has selected to protect that interest is the least restrictive one and is narrowly tailored to that end. If the Court chooses to defer to military judgment, its scrutiny at a minimum should focus on whether defensive action was indeed prompted by military necessity, and not by any covert invidious motives, and "whether the exigency still existed upon which the continued operation of the law depended."[381]

An effective review depends, of course, on the presentation to the Court of adequate information by the parties involved. The nature of military decisions during wartime necessarily involves confidential information, the secrecy of which must be protected against divulgence to enemy forces. The Court, in *United States v. Nixon*, has recognized the President's need to guard "military, diplomatic, or sensitive national security secrets," despite requiring disclosure of his confidential communications applicable to a criminal prosecution.[382] Whether justified or not, the government may shield information from the Court's review by claim of national security.[383] Additionally, the individual challenging the government's actions may find information important to his arguments beyond his reach because of the same claim of national security.[384]

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[377] 323 U.S. at 225 (Frankfurter, J., dissenting).

[378] *See, e.g.*, Reid v. Covert, 354 U.S. 1 (1957); *Ex parte* Endo, 323 U.S. 283 (1944); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

[379] *See supra* note 232-33 and accompanying text.

[380] *See supra* note 240 and accompanying text.

[381] Keynes, *supra* note 123, at 93 (*quoting* Chastleton Corp. v. Sinclair, 264 U.S. 543, 547-48 (1923)).

[382] United States v. Nixon, 418 U.S. 683, 703, 706 (1974).

[383] In *Korematsu*, critical information had been removed from the government's brief. *See supra* note 291.

[384] *See, e.g.*, Weinberger v. Catholic Action of Hawaii, 454 U.S. 139 (1981) (exempting the

However, when military control is exercised over civilians, the Court has a positive duty to attempt judicial review to protect the personal rights guaranteed by the Constitution. "The self-restraint and constitutional sensitiveness of the generals cannot be relied upon as adequate sources of protection. Because of its organization, mode of selection and function, the military is less likely thus to confine itself than are other agencies of government [that are] subject to judicial surveillance."[385]

Even more critical, an individual in Korematsu's predicament may find himself without any meaningful forum, should the Court fail to review his case. When Congress and the President engage jointly in the exercise of the war power, as in *Korematsu*, the political avenues of redress are effectively closed to an individual whose constitutional rights have been abridged. His last resort is foreclosed if the Court removes itself from review of his cause.

V. Conclusion

What assurances do we have that the strength of history and of legal development will prevent another *Korematsu*? Constitutional case law since the 1944 decision provides strong precedent for reversing the decision made almost forty years ago. The United States Supreme Court could find at the outset that the delegation of power, either from Congress to the President or from the President to the military, was not within constitutional boundaries of specificity. If the validity of the delegation is accepted, it is unlikely that the Court would foreclose judicial review by asserting the political question doctrine. The magnitude of the racial discrimination issue should prompt scrutiny of the case.

The Court also has equal protection bases for invalidating potential evacuation and internment programs. Such measures today would have to meet the strict scrutiny test. There would have to be a compelling governmental interest and the method of implementation would have to be the least intrusive means possible. In *Korematsu*, the federal measures, General DeWitt's orders, were racially discriminatory on their face. The compelling governmental interest of protecting vital defense facilities against the disloyal ethnic Japanese would probably fail as a counterargument. The nonmilitary factors upon which a supposedly military judgment of urgency was made were based substantially on unverified sociological information about the Japanese. Certainly, the selective treatment of German and Italian aliens suggests that the wholesale internment of the Japanese, both aliens and American citizens alike, was an unnecessarily broad and intrusive alternative.

United States Navy from public disclosure of an environmental impact statement which contains classified material dealing with national security).

[385] TenBroek, *supra* note 93, at 207. *See also supra* note 109 and accompanying text.

What of the impact of variables that do not ostensibly enter into the judicial equation? Theoretically, the legal system is structured to provide constitutional safeguards. But the principal actors within that arena are fallible human beings. Although their roles are usually guided by the highest of ideals, they are often the target of forces that seem at times beyond their control or detection. In *Korematsu*, the pressures of wartime, of politicial interests and of racial prejudice may have combined to influence the conduct of usually better-thinking persons.

Professor Arthur Miller has asserted that the role of the courts as guardians of civil liberties may be eroded by the political forces that influence judicial decisons.[386] If this is true, Justice Jackson's words are worth heeding:

> If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.[387]

To ignore his warning is to risk hearing the echo of Korematsu's plaintive words when he was shown, nearly four decades later, the evidence withheld by the government that would have supported his case: "They did me a great wrong."[388]

Sandra Takahata

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[386] [T]he Supreme Court—courts generally—have never been the staunch bastions for protection of American rights and liberties that many consider them to be.

The lesson is clear and unmistakable: civil rights and liberties receive judicial protection when the interests of the state, speaking through government, are not considered jeopardized—as determined by those in public office.

. . . .

. . . [G]overnment in the United States, both in war and in peace, has always been relative to circumstances—and the Supreme Court is usually a willing ally of those who wield effective political power in the nation.

Miller, *Courts Haven't Always Been Guardians of Rights*, The Sunday Star-Bulletin & Advertiser, Mar. 13, 1983, at I-3, col. 1.

[387] *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting).

[388] P. IRONS, *supra* note 22, at 367.

Resolving a Conflict — Ohana[1] Zoning & Private Covenants

I. INTRODUCTION

A zoning ordinance is a legislative determination that a particular structure or activity in a particular area will have the most beneficial effect on the community as a whole.[2] By permitting single-family residences on this block and multi-family housing on that block, each municipality will presumably grow into a healthy, safe, and attractive community.[3] However, the same block that is zoned for multi-family housing may simultaneously be burdened by private

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[1] "Ohana" is the Hawaiian term for the expanded and all-inclusive family. The fundamental unit of the ancient Hawaiian social organization was the community of *ohana*, or relatives by blood, marriage and adoption, some living inland and some near the sea but concentrated geographically in and tied by ancestry, birth, and sentiment to a particular locality which was termed the *aina* (land). HANDY & PUKUI, OHANA, THE DISPERSED COMMUNITY OF KANAKA 3 (1935). Within the ohana, the functional unit is the household. Therefore, when asking the number of families in a given locality, one asks how many households, *not* how many ohanas. *Id.* at 5. Inasmuch as HAWAII REV. STAT. § 46-4(c) was designed in part to maintain the extended family lifestyle, it is popularly referred to as "ohana" zoning.

[2] For a description of traditional zoning ordinances, see Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), wherein the United States Supreme Court first upheld the constitutionality of zoning. In *Euclid*, the Court noted:

> [T]he village . . . is politically a separate municipality, with power of its own and authority to govern itself as it sees fit, within the limits of the organic law of its creation and the state and federal constitutions. Its governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitely fixed lines.

Euclid, 272 U.S. at 389.

[3] The Colorado Supreme Court has noted that "[t]o achieve the purpose of creating places free from congestion and overpopulation, as well as to promote family values, the legislat[ure] may restrict the use of property in a defined geographic area to single family dwellings." Rademan v. City and County of Denver, 186 Colo. 250, 256 P.2d 1325, 1327 (1974). *But see* B. SIEGAN, LAND USE WITHOUT ZONING (1972) for a discussion on the failure of zoning to make the most efficient use of land.

covenants wherein each landowner[4] has promised to build no more than one single-family residential dwelling on a lot.[5] The result is a conflict between the landowners' constitutionally protected property and contract rights[6] and the municipality's right to regulate land use for the benefit of the entire community.[7]

This conflict is not hypothetical. More and more communities are enacting zoning ordinances to provide a greater supply of affordable housing.[8] Yet, the

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[4] For the purposes of this comment, the terms "landowner," "property owner," and "homeowner" are synonymous. With respect to Hawaii, many homeowners do not own their land in fee but instead lease the land underlying their home from the holder of the fee simple interest. *See infra* notes 34-41 and accompanying text. Consequently, there are two parties with distinct property interests in one parcel—the fee owner and the leaseholder. In this context, the terms "landowner," "property owner," and "homeowner" refer to the leaseholder, who is the actual owner of the structures built upon the parcel.

[5] Such restrictions are typically included in deeds or leasehold agreements. *See, e.g.*, Smith v. Hines, 429 So.2d 1016 (Ala. 1983) ("[n]o building shall be erected . . . other than one detached single family dwelling of not less than 1,100 square feet . . ."); Feely v. Birenbaum, 554 S.W.2d 432 (Mo. App. 1977) (use of any residential structure "by more than one family" prohibited); Houk v. Ross, 34 Ohio St. 2d 77, 91, 296 N.E.2d 266, 275 (1973) (multiple-family could be built because deed restriction ambiguously provided that "no more than one residence shall be built upon any said tract"); Kent v. Smith, 410 S.W.2d 833 (Tex. Civ. App. 1967) (lot use restricted to residential purposes explicitly excluded duplexes). In Hawaii Kai, a more exclusive residential community in East Honolulu, the 8,964 lots zoned for ohana use are subject to a lease restriction limiting construction on a single-family lot to one residential dwelling.

Homeowners associations also utilize these restrictive covenants to maintain the character of the neighborhood. *See, e.g.*, Jayno Heights Landowners Ass'n v. Preston, 85 Mich. App. 443, 271 N.W.2d 268 (1978) (landowners association successfully enforced covenant restricting use of property to single-family dwelling occupied by single-family unit to prevent use as adult foster care facility). *See also* Wiley v. Schorr, 594 S.W.2d 484 (Tex. Civ. App. 1979), *reh'g denied* (unpublished) (1980) (owners of property may by agreement, apart from conveyance, create binding restrictions on use of their property). For a general discussion of restrictive covenants, see 5 N. WILLIAMS, AMERICAN LAND PLANNING LAW 241-53 (1975).

[6] U.S. CONST. art. I, § 10, cl. 1 provides that "[n]o State shall . . . pass any . . . law impairing the obligation of contracts . . ." The fifth and fourteenth amendments also provide that neither the federal nor state governments shall deprive any person of his property without due process of law. *See* U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 2. *See also* Lynch v. United States, 292 U.S. 571 (1934) (contracts are property and the rights of individuals arising from them are protected by the fifth amendment); United Properties, Inc. v. Walsmith, 312 N.W.2d 66 (Iowa App. 1981) (restrictive covenants are promises respecting land use which create both proprietary interests and contractual rights); Rofe v. Robinson, 415 Mich. 345, 329 N.W.2d 704 (Mich. 1982) (deed restrictions are property rights and a zoning change did not invalidate the single-family residential restriction).

[7] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[8] Sanders & Mosena, *Changing Development Standards for Affordable Housing*, PLANNING ADVISORY SERVICE REP. NO. 371 (1983) contains a study of how various communities are making development standards less restrictive in order to create a greater supply of affordable housing. Of the 171 communities surveyed, 127 had changed their density standards. Of these, 62% relaxed

supply of housing created is often provided at the expense of the traditional single-family neighborhood. For example, in 1981, the State of Hawaii amended its land use legislation to require that each county enact an ordinance to permit the construction of two dwelling units on appropriate single-family residential lots.[9] This legislation was in response to the "spiraling costs of housing, the limited availability of land for housing, and the failure of wages to keep pace with inflation."[10] The ordinances enacted by the county, popularly referred to as "ohana"[11] zoning, are designed to create more housing in existing neighborhoods by allowing a homeowner to construct an additional dwelling unit on his single-family residential lot.[12]

Such legislation is not unique to Hawaii. California legislation enables cities and counties to grant special use or conditional use permits for construction of a secondary dwelling unit on land zoned for single-family residential use.[13] Likewise, communities in New York, Connecticut, Oregon, and Virginia permit the addition of a second dwelling on a single-family residential lot, provided certain criteria are met.[14] Although the language of these statutes and ordinances may differ, their purpose is ultimately the same: to provide "an immediate and relatively inexpensive means of increasing the supply of affordable housing"[15] in an era where affordable housing is increasingly inaccessible.[16]

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their density standards. In addition to changes in density standards, many communities also relaxed their setback, frontage, and parking requirements. *Id.* at 3.

Another vehicle typically used is inclusionary zoning whereby developers of residential neighborhoods are required to provide a specified percentage of low and moderate income housing. *See* Klevin, *Inclusionary Ordinances - Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing*, 21 U.C.L.A. L. REV. 1432 (1974). Communities that have enacted inclusionary housing measures include FAIRFAX COUNTY, VA., CODE ch. 30 (1971); LOS ANGELES, CAL., MUNICIPAL CODE §§ 12.03, 12.39 & 13.04 (1974); and MONTGOMERY COUNTY, MD., CODE ch. 25A (1973). The City and County of Honolulu is also considering various inclusionary zoning provisions.

[9] HAWAII REV. STAT. § 46-4(c) (Supp. 1982).

[10] 1980 Hawaii Sess. Laws 229.

[11] *See supra* note 1. Similar statutes in the continental United States refer to the secondary unit as accessory apartments, single-family conversions, or mother-in-law apartments. *See* Hare, *Accessory Apartments Using Surplus Space in Single-Family Houses*, PLANNING ADVISORY SERVICE REP. NO. 365 at 1 (1981).

[12] Anderson, *Preface to* CITY AND COUNTY OF HONOLULU, DLU, OHANA HOUSING: A GUIDE TO ADDING A SECOND UNIT ON YOUR LOT at i (Nov. 1982).

[13] CAL. GOV'T. CODE § 65852.2 (West 1983).

[14] *See, e.g.*, WESTPORT, CONN., ORDINANCES 32-1 (conversion of dwelling for elderly person permitted); Babylon, N.Y., Local Law No. 9 of 1979 (Nov. 20, 1979) (two-family dwelling must be owner-occupied); PORTLAND, OR., § 33.22.235 Type 7 (1981); FAIRFAX COUNTY, VA., CODE ch. 112, art. 9-703 (1983).

[15] Conf. Com. Rep. No. 41, 11th legislature, lst Sess. *reprinted* in 1981 Hawaii Senate Journal 923.

[16] As noted by Samuel R. Pierce, Jr., former Secretary of Housing and Urban Development:

The creation of more housing in the single-family neighborhood inevitably results in increased density and increased traffic.[17] As with all zoning ordinances that may adversely affect surrounding property values, the landowner may object to the changed classification. However, it is well established that a property owner does not have a vested property right in a particular zoning classification.[18] Therefore, the only remedy for a property owner who wishes to protect his investment in the face of an ohana type zoning ordinance may lie in the enforcement of private deed restrictions limiting the use of property to a single-family residential dwelling.

At common law, the conflict between zoning ordinances and private covenants has been resolved by enforcing the more restrictive measure.[19] Therefore,

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> The housing problem can be summed up in three words: affordability, availability, and adequacy. Of these, the key issue today is affordability. That's the main issue we're working on. For too many Americans, the dream of owning one's home has become a dream deferred.

Address by Samuel R. Pierce, Jr., American Bar Association's Section of Real Property Fall Meeting (Oct. 16, 1981), *reprinted* in 10 PROB. AND PROP. 3, 3 (Fall 1981).

Single-family lot prices increased during the 1970's by 600 to 800% while the consumer price index rose approximately 100%. Hoben, *National Location Trends and Local Land Use Controls*, 5 URB. L. & POL'Y 149, 156 (1982) (citing data compiled by the Federal Housing Administration).

[17] For example, prior to the enactment of Honolulu's ohana ordinance, C.Z.C. 21-5-2(8) (1982), the residents of one of Honolulu's more exclusive residential areas strongly objected to being included in an ohana district, citing the traffic and noise which accompany ohana units as seriously affecting their lifestyle and property value. Windward Sun Press, Feb. 3, 1982, at B2, col. 1. *See also* Brown v. East Lansing Zoning Board of Appeals, 311 N.W.2d 828, 834 (Mich. App. 1981) (non-adjoining landowners had standing to appeal zoning variance because they had sufficiently alleged special damages resulting from construction of duplexes housing students, including increased traffic, increased population and change in neighborhood character).

[18] Hadacheck v. Sebastian, 239 U.S. 394 (1915); Haas v. City & County of San Francisco, 605 F.2d 1117 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1979), *reh'g denied*, 446 U.S. 929 (1979) (no vested interest in zoning classification even though rezoning decreased value of property from $2,000,000 to $100,000); Cloutier v. Town of Epping, 547 F.Supp. 1232, 1241 (1982), *aff'd*, 714 F.2d 1184 (1st Cir. 1983) (property owner has no vested right to complete project unless he has engaged in substantial construction in good faith reliance on pre-existing ordinance); Wincamp Partnership v. Anne Arundel County, 458 F.Supp. 1009 (D. Md. 1978) (developers had no vested interest in zoning status of property and therefore could not challenge county's decision not to expand sewage facilities); Robinson v. Los Angeles, 146 Cal. App. 2d 810, 304 P.2d 814 (1956); Denning v. County of Maui, 52 Hawaii 653, 485 P.2d 1048 (1971); Norbeck Village Joint Venture v. Montgomery County Council, 254 Md. 59, 254 A.2d 700 (1969); Lamb v. Monroe, 358 Mich. 136, 99 N.W.2d 566 (1959); Eggebeen v. Sonnenburg, 239 Wis. 213, 1 N.W.2d 84 (1941).

[19] Lidke v. Martin, 31 Colo. App. 40, 500 P.2d 1184 (1972) (single-family restriction enforced even though zoning ordinance permitted apartment buildings); Dolan v. Brown, 338 Ill. 412, 170 N.E. 425 (1930) (residential covenant takes precedence over commercial zoning). *See also* Burgess v. Magurian, 214 Iowa 694, 243 N.W. 356 (1932); City of Richlawn v. McMakin,

a private deed restriction limiting construction to a single dwelling would override a zoning ordinance permitting more than one dwelling. However, the application of the "more restrictive measure" principle may impart an excessively harsh result in view of today's housing market. Whether considering rental housing or home ownership, housing costs have escalated and wages have not kept pace. [20] Even where both husband and wife are employed full-time, "the dream of owning one's own home has become a dream deferred."[21] This is particularly true, for example, in Hawaii where, in 1981, the median purchase price of a single-family house was $108,122, in contrast to the national median of $72,000.[22] In fact, of 277 Standard Metropolitan Statistical Areas, Honolulu ranked 277 with respect to the cost of owning a single-family residence.[23]

The changed structure of the typical family unit is another factor contributing to the lack of affordable housing. An increased divorce rate, combined with a declining number of births, has resulted in a smaller family unit.[24] The sprawling homes that once accommodated the families of the 1950's and

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313 Ky. 265, 230 S.W.2d 902 (1950), *appeal dismissed*, 340 U.S. 945 (1951); Vorenberg v. Bunnell, 257 Mass. 399, 153 N.E. 884 (1926); Ludgate v. Somerville, 121 Ore. 643, 256 P. 1043 (1927); Szilvasy v. Saviers, 70 Ohio App. 34, 44 N.E.2d 732 (1942).

[20] In Honolulu, the Consumer Price Index for home ownership increased from a base of 100% in 1967 to 167.5% in 1978 and 253.3% in 1982. STATE OF HAWAII DEPARTMENT OF PLANNING AND ECONOMIC DEVELOPMENT [hereinafter DPED], THE STATE OF HAWAII DATA BOOK 364 (1983) [hereinafter cited as 1983 DATA BOOK]. From 1970 to 1982, per capita personal income increased from $4,674 to $11,602. U.S. Dept. of Commerce, Bureau of Economic Analysis, printouts dated April 1982 and April 1983, *reprinted in* DPED, HAWAII STATISTICAL REPORTS NO. 160, Table 18 (1983).

In California, the average price of a home was $72,745 in 1978 while the median income was only $16,500. CAL. HOUSING TASK FORCE, MAJOR HOUSING LEGISLATION OF 1979 - RECOMMENDTIONS TO THE GOVERNOR & LEGISLATURE 2 (Feb. 1979), *cited in* Comment, *California's Housing Element Guidelines & the Housing Crisis*, 10 GOLDEN GATE L. REV. 729, 729 (1980). A rule of thumb is that a family cannot afford a home that sells for more than three times its annual income. Therefore, a family with a median income of $16,500 cannot afford a home costing more than $49,500. *Id.*

[21] Address by Samuel R. Pierce, Jr., former Secretary of Housing and Urban Development, American Bar Association's section on Real Estate Fall Meeting (Oct. 16, 1981), *reprinted in* 10 PROB. & PROP. 3, 3 (Fall 1981).

[22] 1983 DATA BOOK, *supra* note 20, at 575. In 1976, the average cost of a single-family residence exceeded the national average by 38.3% for new houses and 126.6% for used homes. DPED, THE STATE OF HAWAII DATA BOOK 506 (1981)[hereinafter cited as 1981 DATA BOOK].

[23] 1983 DATA BOOK, *supra* note 20, at 288.

[24] In Hawaii, the number of divorces per 1,000 residents increased from 3.3 in 1970 to 4.3 in 1982. 1983 DATA BOOK, *supra* note 20 at 93. The birth rate has dropped from 20.5 births per 1,000 residents in 1970 to 17.3 births per 1,000 in 1982. *Id.* at 67-68. The number of one-person households on Oahu increased from 20,900 in 1970 to 29,600 in 1976. 1981 DATA BOOK, *supra* note 22, at 492.

1960's fail to meet the needs of today's families.[25] Ohana type legislation encourages the modification of these homes to meet those needs by providing housing for two families instead of one. This also encourages several generations of a family to live together, resulting in the promotion of an extended family lifestyle.[26]

It is not yet clear whether private deed restrictions may be used by property owners as shields against the needs of the surrounding community. If private covenants prevail in every instance, the legislative planning process is rendered nugatory. On the other hand, the property owner's contractual and property rights are constitutionally protected.[27] It is the purpose of this comment to address the relationship between private covenants and public zoning laws, the circumstances in which the zoning ordinance will supersede the covenant, and the arguments available both to those who wish to maintain the single-family residential character of their neighborhood and to those seeking affordable housing. Inasmuch as the ohana zoning law serves as the springboard for this analysis, the first section describes the circumstances underlying Hawaii's current housing situation as well as the ohana zoning process.

II. HAWAII'S OHANA ZONING LAW

A. *General Background*

The development dilemmas faced by communities across the nation are amplified by the perimeters of an island state such as Hawaii. While a major city in the continental United States can rely on its suburbs to provide living space for its growing population, and the suburbs in turn rely on more rural municipalities, Hawaii has a limited amount of land available upon which to support its population.[28]

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[25] There are 18.3 million American homeowners with five rooms or more who have households of two persons or less. Hare, *supra* note 11, at 1-2. In Hawaii, the average household size declined from 3.87 in 1960 to 3.15 in 1980. 1983 DATA BOOK, *supra* note 20, at 49. If this decline continues, there will be a corresponding increase in the demand for new housing units. DALY & ASSOCIATES, HOUSING FOR HAWAII'S PEOPLE III-6 (1977) (report prepared for State of Hawaii, Hawaii Housing Authority, and Department of Planning and Economic Development).

According to the 1980 census, 44% of the state's households are comprised of one or two individuals. U.S. Bureau of the Census (1980), *cited in Death of the Family?*, NEWSWEEK, Jan. 17, 1983, at 26.

[26] The preservation of the extended family is an articulated goal of ohana zoning. 1981 Hawaii Sess. Laws 229. *See infra* notes 252-61 and accompanying text.

[27] *See supra* note 6 and accompanying text.

[28] The total area of the state of Hawaii is 4,112,000 acres. 1983 DATA BOOK, *supra* note 20, at 185. Pursuant to HAWAII REV. STAT. § 205-2 (1976), the State Land Use Commission classifies the land in the state into one of four districts: urban, rural, agricultural, and conservation. The

Two factors compound this scarcity of residential land. First, only 4% of Hawaii's lands are currently classified for urban use, the vast majority being included in conservation and agricultural districts.[29] Forty-eight percent of Hawaii's lands are reserved by the state in conservation districts.[30] This land can be reclassified to urban use only if a clear preponderance of the evidence indicates that it is "reasonably necessary to accommodate growth and development and will cause no significant adverse effects upon agricultural, natural, environmental, recreational, scenic, historic, or other resources of the area."[31] Since much of the conservation land consists of mountain slopes and ridges that are arguably undevelopable, these physical limitations also decrease the amount of land available for residential use. Moreover, another 48% of Hawaii's lands are designated agricultural lands.[32] This large percentage may be disproportionate to the diminishing role of agriculture in Hawaii's economy, but thus far the land remains so classified and is not available for residential use.[33]

The second factor contributing to the scarcity of affordable residential land is the high concentration of land owned by the government and large private landowners. The federal and state governments and the largest 72 landowners own approximately 95% of all land area within the state.[34] Indeed, 22 private landowners own 72.5% (249,501 acres) of Oahu's 373,000 acres.[35] As a result, many homeowners in Hawaii do not own their land in fee.[36] Rather, they lease

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state retains complete control over land located within conservation districts and partial control over agricultural lands. HAWAII REV. STAT. § 205-5(a) and (b) (1976). The county prepares and administers the general plans governing the rural and urban areas. HAWAII REV. STAT. § 205-5(a) (1976). These general plans must conform with the state's master plan. HAWAII REV. STAT. § 226-52(4). As of January 1983, approximately 3,900,000 acres of the state's total acreage were classified as conservation or agricultural lands. Only 156,413 acres are designated urban areas while the remaining 9,223 acres are rural districts. 1983 DATA BOOK, *supra* note 20, at 191.

[29] *Id.*

[30] *Id.*

[31] HAWAII REV. STAT. § 205-16.1 (1976). *But see*, Pearl Ridge Estates Community Association v. Lear Siegler, Inc., 65 Hawaii 133, 648 P.2d 702 (1982).

[32] 1983 DATA BOOK, *supra* note 20, at 191.

[33] It is unlikely that any significant amount of agricultural land will be released soon for urban use in view of recent legislation that created the Land Evaluation and Site Assessment Commission whose duty it is to identify important agricultural lands for protection. Guy, *Lawmakers Act to Safeguard Agricultural Lands*, Honolulu Advertiser, Apr. 25, 1983, at § A, at 3, col. 1. The designation of conservation and agricultural lands also serves as a means of preventing urban sprawl.

[34] 1975 Hawaii Sess. Laws 184, *reprinted in* Midkiff v. Tom, 471 F.Supp. 871, 879 n. 21 (D. Hawaii 1979), *rev'd* 702 F.2d 788 (9th Cir. 1983), *rev'd*, 104 S. Ct. 2321 (1984).

[35] 1981 DATA BOOK, *supra* note 22, at 166. *See also*, 1975 Hawaii Sess. Laws 184.

[36] Of the 353,000 owner-occupied units in the state, over 35,000 are situated on leased land. 1983 DATA BOOK, *supra* note 20, at 555.

To remedy this problem, the state legislature enacted the Hawaii Land Reform Act in 1975, which authorized the state to condemn leasehold land so that leaseholders could purchase fee

the land underlying their home from one of the major landowners. This scarcity of fee simple land results in its inflated value.[37] Since the value of leased land is based on comparable prices for similarly situated fee land,[38] the price of leasehold land also increases.[39] This inflated price results in higher purchase prices and higher rents.[40] Moreover, the greatest concentration of residential leasehold land is in those urban areas where the need for affordable housing is also great.[41]

Hawaii's ohana zoning law is just one example of the progressive land use legislation for which the state is known.[42] The problem it addresses is especially

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simple title to their residential lots. In upholding the constitutionality of the Act, the United States Supreme Court noted:

> The people of Hawaii have attempted, much as the settlers of the original 13 colonies did, to reduce the perceived social and economic evils of a land oligopoly traceable to their monarchs. The land oligopoly has, according to the Hawaii Legislature, created artificial deterrents to the normal functioning of the State's residential land market and forced thousands of individual homeowners to lease, rather than buy, the land underneath their homes. Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers.

104 S.Ct. 2321, 2330 (1984) (footnote omitted).

[37] 1975 Hawaii Sess. Laws 186. In passing this legislation, the Hawaii Land Reform Act, the legislature found that:

> Due to such shortage of fee simple residential land and such artificial inflation of residential land values, the people of the state have been deprived of a choice to own or take a lease of the land on which their homes are situated and have been required instead to accept long-term leases of such land which contain terms and conditions that are financially disadvantageous, that restrict their freedom to fully enjoy such land and that are weighted heavily in favor of the few landowners of such land . . . .

For complete text of legislative findings, see Midkiff v. Tom, 471 F.Supp. 871, 876 n. 21 (D. Hawaii 1979), *rev'd*, 702 F.2d 788 (9th Cir. 1983), *rev'd*, 52 U.S.L.W. 4673 (1984): *See also*, Kemper, *The Antitrust Laws and Land: An Answer to Hawaii's Housing Crisis?*, 8 HAWAII B. J. 5, 8 (1971).

[38] Kemper, *supra* note 37, at 8.

[39] *Id.*

[40] *Id.*

[41] 1975 Hawaii Sess. Laws 184, *reprinted in* Midkiff v. Tom, 471 F.Supp. 871, 879 n. 21 (D. Hawaii 1979), *rev'd*, 702 F.2d 788 (9th Cir. 1983), *rev'd*, 104 S.Ct. 2321 (1984). As an example of the influence large private landowners have on Hawaii's land use, the Bernice Pauahi Bishop Estate owns over 8,000 urban lots on Oahu. These lots are subject to private lease restrictions limiting construction to one single-family dwelling, even though two are permitted by law.

[42] *See, e.g.*, HAWAII REV. STAT. § 205 (1976) (system of statewide land use controls initially enacted in 1961); HAWAII REV. STAT. § 516 (1976) (Hawaii Land Reform Act which attempts to redistribute residential fee simple land, recently held constitutional by the United States Supreme court in Midkiff v. Tom, 471 F.Supp. 871 (D. Hawaii 1979), *rev'd* 702 F.2d 788 (9th Cir. 1983), *rev'd* 104 S.Ct. 2321 (1984). *See also*, F. BOSSELMAN & D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL 5 (1971); Nunns, *Hawaii Pioneers with a New Zoning Law*, 17 J. SOIL & WATER CONSERVATION 104-106 (1962).

critical to an island state—how to house an increasing population on an obviously limited amount of land. The following sections outline the ohana zoning procedure and consider its impact in relation to private deed restrictions.

B. *The Ohana Zoning Process*

Under Hawaii's State Land Use Law,[43] the Land Use Commission divides all land in the state into one of four districts: conservation, agricultural, urban, and rural.[44] While the state retains complete control over land located within conservation districts,[45] and partial control over agricultural land,[46] each county[47] prepares and administers the general plan and development plans that guide the progress of its urban and rural areas.[48] The general plans and development plans prepared by each county must conform with the objectives and policies articulated in the Hawaii State Plan.[49]

In 1981, the Hawaii State Legislature enacted legislation that required each county to establish an ohana permit procedure:

> Neither this section nor any other law, county ordinance, or rule shall prohibit the construction of two single-family dwelling units on any lot where a residential dwelling unit is permitted; provided:
>
> 1. All applicable county requirements, not inconsistent with the intent of this subsection, are met, including building height, setback, maximum lot coverage, parking, and floor area requirements; and
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> 2. The county determines that public facilities are adequate to service the additional dwelling units permitted by this subsection.
>
> . . . .
>
> Each county shall establish a review and permit procedure necessary for the purposes of this subsection.[50]

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[43] HAWAII REV. STAT. § 205 (1976).

[44] HAWAII REV. STAT. § 205-2 (1976). *See supra* note 26.

[45] HAWAII REV. STAT. § 205-5(a) (1976).

[46] HAWAII REV. STAT. § 205-5(b) (1976). The state classifies the land to be included in agricultural districts and specifies the uses permitted thereon. The county applies its zoning regulations which must be consistent with the state's permitted uses.

[47] HAWAII REV. STAT. § 46-4 (1976) enables the counties to enact zoning ordinances. The state of Hawaii is comprised of four counties: the county of Kauai (the islands of Niihau, Lehua, Kaula and Kauai); the county of Maui (the islands of Maui, Lanai, and Molokai); the county of Hawaii (the island of Hawaii); and the City and County of Honolulu (the island of Oahu).

[48] HAWAII REV. STAT. § 46-4 (1976).

[49] HAWAII REV. STAT. § 226-52(4) (Supp. 1982). For a discussion of the relationship between Hawaii's State Plan and county general plans and development plans, see Callies, *Land Use: Herein of Vested Rights, Plans, and the Relationship of Planning and Controls*, 2 U. HAWAII L. REV. 167, 192-96 (1979).

[50] HAWAII REV. STAT. § 46-4(c) (Supp. 1982).

In accordance with this statute, the City and County of Honolulu amended its Comprehensive Zoning Code to permit the construction of ohana units.[51] This zoning ordinance requires that the applicant obtain the approval of four public agencies before applying for a building permit.[52] First, the Building Department ascertains whether the potential ohana lot is located in an eligible residential zone.[53] The Honolulu Fire Department then confirms that the lot has direct access to a street with a minimum paved roadway width of 16 feet, as required by the ordinance.[54] The Department of Public Works and Board of Water Supply determine the adequacy of sewer capacity and availability of water, respectively.[55]

Within 90 days of receiving these preliminary approvals, the applicant must submit final construction plans for a building permit.[56] At this point, the Building Department ensures that the additional unit complies with all applicable county requirements. The construction of an ohana unit is permitted only on an appropriately zoned lot which meets the county's bulk and area requirements.[57] For example, the Comprehensive Zoning Code for the City and County of Honolulu requires that the maximum lot coverage of all buildings not exceed 50% of the lot.[58] The minimum front yard setback for most single-family lots is ten feet,[59] whereas side and rear yard setbacks must be at least five feet.[60] Thus, if the construction of an ohana unit were to result in 51% lot coverage or infringe upon the required setbacks, no permit could be issued.[61]

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[51] Honolulu, Hawaii, Ordinance No. 82-44 (1982). Ohana zoning ordinances have also been enacted by the county of Hawaii, HAWAII COUNTY, HAWAII CODE ch. 8, art. 20 (1982); the county of Kauai, KAUAI COUNTY, HAWAII, REV. CODE OF ORDINANCES § 8-3.3 (1982); and the county of Maui, MAUI COUNTY, HAWAII, CODE ch. 19, art. 2 (1982).

[52] HONOLULU, HAWAII, C.Z.C. § 21-5.2(F)(4) (1982).

[53] However, many of the areas classified as eligible when the ohana ordinance was first implemented have since been closed due to lack of wastewater management facilities. As of November 25, 1983, the neighborhoods of Lanikai, Ahuimanu, Pohakupu, Kukanono, and Maunawili were no longer open to ohana units. Dept. of Land Utilization, City and County of Honolulu, Ohana Housing Log (week ending Nov. 25, 1983). *See also* Garties, *Ohana Zoning Sluggish, but Promising*, Honolulu Star-Bulletin & Advertiser, Dec. 11, 1983, at A-3, col. 1.

[54] HONOLULU, HAWAII, C.Z.C. § 21-5.2(f)(3)(D) (1982).

[55] HONOLULU, HAWAII, C.Z.C. § 21-5.2(f)(3)(B),(C) (1982).

[56] HONOLULU, HAWAII, C.Z.C. § 21-5.2(f)(4) (1982).

[57] HAWAII REV. STAT. § 46-4(c) (Supp. 1982) permits construction of an ohana unit, provided:

> All applicable county requirements, not inconsistent with the intent of this subsection, are met, including building height, setback, maximum lot coverage, parking, and floor area requirements . . . .

[58] HONOLULU, HAWAII, C.Z.C. § 21-502(e) (1969).

[59] HONOLULU, HAWAII, C.Z.C. § 21-533(c) (1969).

[60] HONOLULU, HAWAII, C.Z.C. § 21-533(d) (1969).

[61] A variance might be obtained in some circumstances.

C. *The Potential Supply of Housing Provided by Ohana Zoning*

When enacting the ohana zoning statute, the legislature specifically recognized that "the spiraling costs of housing, the limited availability of land for housing, and the failure of wages to keep pace with inflation, contribute to the inability of many families to purchase their own homes . . . ."[62] The legislature noted further that the rising costs of housing compelled children to remain living with their parents even after reaching adulthood.[63] The purpose of the statute, therefore, was two-fold: (1) to "assist families to purchase affordable living quarters"[64] and (2) to "encourage the preservation of the extended family."[65]

Although the session laws specifically refer to providing greater opportunities for home ownership, the conference committee report does not. Instead, the report indicates that the goal of ohana zoning is to provide "affordable housing."[66] Despite this ambiguity, it appears that ohana zoning is intended to benefit two different groups of individuals—those seeking to buy a home and those seeking reasonably priced rental units.

While it is readily apparent that the construction of ohana units would supplement the rental market, the effect of the statute on purchase prices is less obvious. That is not to suggest that the statute cannot meet its goals. On the contrary, ohana zoning allows families to pool their resources to either purchase an ohana lot or maintain their home despite rising expenses. For the price of one lot, two households are housed.[67] Even where families do not choose to pool resources, leasing the ohana unit provides a means by which the homeowner can defray his expenses. The price of the home may not be lower on its face, but the rental value of the unit compensates for the difference.[68]

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[62] 1980 Hawaii Sess. Laws 229.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] Conf. Com. Rep. No. 41, 11th Legislature, 1st Sess., *reprinted in* 1981 Hawaii Senate Journal 923, states:

> Your Committee finds that allowing the development of an additional dwelling unit on those lots would allow optimal utilization of scarce land, provide an immediate and relatively inexpensive means of increasing the supply of affordable housing . . .

[67] *Id.*

[68] Honolulu's median rental price in 1980 was $276.00 per month. 1983 DATA BOOK, *supra* note 20, at 499 (1982). Prior to the implementation of Honolulu's ohana zoning program, the Building Department estimated that the average cost of a newly constructed ohana unit was $51,000. Interview with Julie Higa, Planner, Department of Land Utilization, in Honolulu (Dec. 19, 1983). Assuming the homeowner borrowed the entire amount at 13.5% interest, he or she must charge at least $482.00 in monthly rent to recoup the investment in a ten year period. The Building Department has since conducted a survey of those issued ohana permits. According to this survey (which had a 51% return), the average construction cost is $34,200. *Id.* Again, as-

One anticipated problem is that the initial properties upon which ohana units are built may be enhanced in value and, therefore, more expensive.[69] Such a result would clearly contravene the purpose of the statute. However, if the supply of homes with ohana units were to increase substantially and the number of single-family residences were to decrease, the ohana lots would ultimately be more affordable than those with a single dwelling.[70] Thus far, there is no indication that this will occur. Indeed, during the first year of Honolulu's ohana zoning program, only 353 ohana unit permits were issued and, of these, 220 permits merely legalized previously existing units.[71] As a result, only 133 new housing units were added in 1983.[72]

In view of the limited scope of the ohana zoning concept, it clearly cannot serve as the sole means to remedy the shortage of affordable housing. Nor does it purport to.[73] It is only one of the vehicles that may be used to more fully utilize already developed land. Nonetheless, ohana zoning can help ease Oahu's housing shortage. If sufficient infrastructure were in place, almost 84,000 dwelling units could be added to Oahu's housing supply.[74] When the ordinance was first passed, planners projected that infrastructure in eligible zones could support 36,000 ohana units.[75] However, because of inadequate facilities, ohana zoning is available to far fewer neighborhoods than originally anticipated.[76] Futhermore, it is unlikely that an ohana unit will be built on every eligible lot. Therefore, the number of housing units ultimately constructed will almost certainly be substantially less than the number projected.[77]

If property owners are permitted to enforce restrictive covenants that limit construction to a single residential dwelling, this potential shrinks still further. For example, there are at present almost 9,000 lots located in ohana zones limited by covenant to one single-family detached dwelling.[78] If the covenants are

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suming that the home improvement loan has a 13.5% interest rate, the homeowner could charge about $324.00 monthly rent and recoup the investment in ten years.

[69] *See* Hare, *supra* note 11, at 5.

[70] *But see infra* note 71-77 and accompanying text.

[71] Garties, *Ohana Zoning Sluggish, but Promising*, Honolulu Star-Bulletin & Advertiser, Dec. 11, 1983, at A-3, col. 1.

[72] *Id.*

[73] Honolulu Mayor Eileen Anderson noted that ohana zoning was never intended as a final solution to Oahu's housing shortgage. *Id.*

[74] Department of General Planning, City and County of Honolulu (Computer Record: Ohana Zoning Housing Supply (All Oahu)) (Dec. 1979).

[75] *Id.*

[76] *See supra* note 52. *See also*, Garties, *supra* note 71.

[77] According to one commentator, the "percentage of single-family units converted [after an accessory apartment ordinance is enacted] is not likely to be high." Hare, *supra* note 11, at 4 (citing experiences of Portland, Oregon; Babylon, New York; and Weston, Connecticut).

[78] DEPARTMENT OF GENERAL PLANNING, CITY AND COUNTY OF HONOLULU, LAND SUPPLY RE-

enforced, the number of potential ohana units decreases from 36,000 to 25,000.[79] The loss of 9,000 potential units may appear insignificant in relation to the 257,000 total housing units located on Oahu.[80] However, Oahu houses approximately 80% of the state's population on only 9% of the state's total land area.[81] When combined with the possibility that other property owners in ohana zones may also subsequently restrict the use of their property to single-family dwellings, and that new developments (which are more likely to have ohana-supporting infrastructure) may be expected to do likewise, this number takes on greater significance.

In spite of the prevalence of private restrictions on Hawaii's residential properties, both the state statute and Honolulu ordinance are silent concerning the enforcement of a conflicting covenant.[82] A challenge to the validity of private deed restrictions limiting construction to a single-family dwelling will most likely arise in the context of either: (1) a homeowner who wishes to build an ohana unit on his restricted property,[83] or (2) a property owner who seeks to prevent his neighbor from constructing such a unit.[84] The next section focuses on the relationship between zoning laws and private covenants and the circum-

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VIEW 7 (Apr. 1982).

[79] This figure is based on the assumption that all potential lots would opt to construct ohana units. In fact, this is highly unlikely. As noted by Bishop Estate's Special Project Director, Paul Cathcart, "most of the calls . . . on the issue were from homeowners who didn't want ohana units in their neighborhoods . . ." Garties, *supra* note 71. Therefore, the 9,000 figure simply serves as an example.

[80] DPED, HAWAII STATISTICAL REPORTS No. 160, Table 31 (1983).

[81] 1983 DATA BOOK, *supra* note 20, at 117.

[82] In fact, it is stated on the Department of Land Utilization's Public Facilities Pre-check Form that "[c]ompliance with private covenants or lease restrictions prohibiting two dwelling units on a lot is applicant's responsibility." The Ohana Zoning Public Facilities Map also specifies that "[s]ome property may not be eligible due to the presence of private lease covenants or deeds prohibiting a second dwelling on a lot and is within the responsibility of the property owner to determine." *See* Appendix 2, *Public Facilities Map*.

In contrast to Honolulu's ordinance, the county of Hawaii ordinance specifically states that "[i]t is not the intent of this Ordinance to supersede private deed restrictions . . . ." HAWAII COUNTY, HAWAII, CODE, ch. 8, art. 20 § 1 (1982). The Kauai ordinance provides that "[n]othing contained in this section shall affect private covenants or deed restrictions. . . ." KAUAI COUNTY, HAWAII, REV. CODE OF ORDINANCES § 8-3.3(6) (1982). Although Maui County's Code is silent on the subject of private covenants, its public facilities form declares that the ohana dwelling ordinance is not intended to supersede private deed restrictions.

[83] For the purposes of this comment, the fee owner will be considered the same as a neighboring property owner or homeowners association.

[84] It should be understood that under the long term leasehold system prevalent in Hawaii, it often will be the fee owner who wants to prevent construction of an ohana unit. For example, Bishop Estate "feels an obligation to all its leaseholders to keep their neighborhoods in single-family use, since that was the agreement at the time they signed up." Garties, *supra* note 71 (quoting Paul Cathcart, Bishop Estate Special Projects Director).

stances in which the courts will deny their enforcement.

III. Private Covenants and Public Zoning Laws

A. *General Principles*

By prohibiting specific uses that may negatively affect the character of a specific neighborhood and cause lower property values, the restrictive covenant contained in a lease or deed is an effective device for the property owner to protect his or her investment.[85] Developers typically include a series of restrictions when conveying lots to initial purchasers[86] and neighborhood homeowners associations often agree to restrict certain types of property use as well.[87] For example, each of the thirty lots in the Kaneohe Heights subdivision was made subject to a one and one-half story height restriction when conveyed in 1956.[88] The purpose of this covenant was to protect the view and privacy of Kaneohe Heights homeowners.[89] In 1978, a Kaneohe Heights homeowner contended that the covenant should no longer be enforced because construction of a thirteen-story building partially obstructed the view that the covenant intended to preserve.[90] In upholding the challenged restriction, the Hawaii Supreme Court noted that the partial obstruction made the remaining view even more valuable, thus increasing rather than diminishing the value of the restrictive height covenant.[91]

Although private covenants have been characterized as "private zoning,"[92] the goals of individual landowners often differ significantly from those of local governments. When entering into restrictive agreements, landowners are pri-

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[85] As the Michigan Supreme Court noted in Cooper v. Kovan, 349 Mich. 520, 530-31, 84 N.W.2d 859, 864 (1957) (*quoted in* Rofe v. Robinson, 415 Mich. 345, 350, 329 N.W.2d 704, 707 (1982)):

> Homeowners seek, by purchasing in areas restricted to residential building, freedom from noise and traffic which are characteristic of business . . . [I]t is clear in our mind that residential restrictions generally constitute a property right of distinct worth.

See also London v. Handicapped Facilities Board of St. Charles County, 637 S.W.2d 262 (Mo. App. 1982); 5 N. Williams, American Land Planning Law § 154.01 (1975).

[86] *See* cases cited *supra* note 5. *See also* J.T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc., 302 N.C. 64, 274 S.E.2d 174 (1981).

[87] *See* cases cited *supra* note 5. *See also* Heritage Heights Homeowners' Ass'n v. Esser, 115 Ariz. 330, 565 P.2d 207 (1977); Kell v. Bella Vista Village Property Owners' Ass'n, 258 Ark. 757, 528 S.W.2d 651 (1975).

[88] Sandstrom v. Larsen, 59 Hawaii 491, 583 P.2d 971 (1978).

[89] *Id.* at 496, 583 P.2d at 976.

[90] *Id.* at 498, 583 P.2d at 977.

[91] *Id.*

[92] Comment, *An Evaluation of the Applicability of Zoning Principles to the Law of Private Land Use Restrictions*, 21 U.C.L.A. L. Rev. 1655, 1664 (1974) (hereinafter cited as *Evaluation*).

marily concerned with protecting their property investment.[93] In contrast, zoning ordinances are enacted pursuant to the state's police power, which can only be exercised to protect the health, safety, and welfare of its citizens.[94] Therefore, local governments must not only consider an ordinance's potential effect on individual property values, but must also take into account its social and economic impact on the community as a whole.[95] Private landowners are under no such obligations when placing restrictions on their properties.[96] Of course, restraints on property are not encouraged; thus, covenants are strictly construed against the grantor.[97] Nevertheless, a properly drawn reasonable covenant will be enforced.

The existence of single-family restrictive covenants on lots otherwise eligible for ohana zoning illustrates these competing interests. The purpose of the ohana zoning statute is to "provide an immediate and relatively inexpensive means of increasing the supply of affordable housing, and encourage the maintenance of the extended family lifestyle . . . ."[98] On the other hand, the primary purpose

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[93] County Comm'rs of Anne Arundel County v. Ward, 46 A.2d 684 (Md. 1946) (restrictive covenants, though appropriate in deeds between private parties, may be wholly inappropriate in zoning regulations); Benton v. Bush, 644 S.W.2d 690 (Tenn. App. 1982) (restrictions protect the beauty of the neighborhood as well as property values). *See also Evaluation*, *supra* note 91, at 1665.

[94] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Nectow v. City of Cambridge, 277 U.S. 183 (1928); City of Little Rock v. Andres, 237 Ark. 658, 375 S.W.2d 370 (1964); Turner v. Del Nort, 24 Cal. App. 3d 311, 101 Cal. Rptr. 93 (1972) (county flood plain ordinance was reasonable exercise of police power); Staninger v. Jacksonville Expressway Authority, 182 So.2d 483 (Fla. 1966); State v. Diamond Motors, Inc., 50 Hawaii 33, 429 P.2d 825 (1967) (city ordinance limiting size of billboards necessary to accomplish aesthetic objective, and thus, was proper use of police power); Board of Zoning Appeals v. Schulte, 241 Ind. 339, 172 N.E.2d 39 (1961) (church and school facilities could not be excluded from residential zone on mere basis that property values would depreciate); Bob Jones University v. City of Greenville, 243 S.C. 351, 133 S.E.2d 843 (1963) *appeal dismissed*, 378 U.S. 581 (1963) (rezoning of residential area to permit retail use held to be proper use of police power).

[95] *Evaluation*, *supra* note 92, at 1664. As one commentator has noted, "[t]he zoning restrictions imposed upon a property owner's land are the measure of his obligations to the community; the private covenant is merely an indication of the measure of his obligation to a private party . . . ." 4 A. RATHKOPF, THE LAW OF ZONING AND PLANNING § 74-1 (4th ed. 1975).

[96] *But see infra* text accompanying notes 234-44.

[97] University Hills, Inc. v. Patton, 427 F.2d 1094, 1099 (6th Cir. 1970) (applying Ohio law); Laguna Royale Owners Ass'n v. Darger, 119 Cal. App. 3d 670, 174 Cal. Rptr. 138 (1981); Alliegro v. Homeowners of Edgewood Hills, Inc., 35 Del. Ch. 543, 547, 122 A.2d 910, 912 (1956); Chang v. Magbee, 45 Hawaii 454, 370 P.2d 479 (1962); Maher v. Park Homes, Inc., 258 Iowa 1291, 142 N.W.2d 430 (1966); City of Livonia v. Dep't of Social Services, 123 Mich. App. 1, 333 N.W.2d 151 (1983); Kiley v. Hall, 96 Ohio St. 374, 117 N.E. 359 (1917). *See also* Maui County v. Puamana Mgmt. Corp., 2 Hawaii App. 352, 631 P.2d 1215 (1981) (zoning laws also strictly construed because they place restraints on property).

[98] CONF. COM. REP. NO. 41, 11th legislature, 1st Sess. *reprinted in* 1981 Senate Journal 923.

of a private deed restriction limiting construction on a lot to a single residential dwelling is to maintain the character of the neighborhood—its spacious yards and quiet streets—and in turn enhance the value of the property.[99] While protecting the character of the neighborhood and preserving property values are also legitimate goals of zoning,[100] the ohana zoning statute expresses a legislative judgment that the construction of two dwelling units on single-family residential lots benefits the entire community. Therefore, agreements limiting construction to a single residential dwelling per lot in the face of an ohana zoning statute benefit some at the expense of the community.

Although the goals underlying private deed restrictions and public zoning laws may differ, their effect is the same; both place restrictions on property. However, while courts are becoming more sensitive to the exclusionary effects of certain types of zoning ordinances,[101] courts rarely interfere with private restrictions.[102] The right to contract is constitutionally protected, including the right

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[99] In Benton v. Bush, 644 S.W.2d 690 (Tenn. App. 1982), the court upheld a covenant limiting construction to a single-family dwelling, noting that:

> Restrictions to protect the beauty of the neighborhood, value of property, and uniformity are covenants running with the land . . .
>
> . . . .
>
> [I]t was the intent of the developer to assure each lot owner a large amount of privacy . . . [I]t was [also] the developer's intention that only a limited number of homes would ever be built in Harrison Point Subdivision.

Id. at 692. However, one commentator notes that an ohana type ordinance is unlikely to make property values decline, stating:

> First, if a house has the potential of bringing in rental income, it is worth more. Second, in the high rental market that prevails today . . . market conditions will enable homeowners with accessory apartments to select tenants with care.

Hare, *supra* note 11, at 5.

[100] The court in City of Little Rock v. Andres, 237 Ark. 658, 660, 375 S.W.2d 370, 371 (1964), noted that the proper purpose of zoning was "to conserve the value of property and encourage the most appropriate use of land." *See also Evaluation, supra* note 91, at 1664.

[101] *See, e.g.*, DuPage County v. Halkier, 1 Ill. 2d 491, 115 N.E.2d 635 (1953) (two and one-half acre lot "estate" zone struck down because no substantial relation to health, safety, and welfare); Home Builders League of So. Jersey, Inc. v. Township of Berlin, 81 N.J. 127, 405 A.2d 381 (1979) (court rejected ordinance requiring minimum floor area of 1200-1600 sq. ft.); Urban League of Greater New Brunswick v. Mayor & Council of Carteret, 142 N.J. Super. 11, 359 A.2d 526 (1976) (zoning excluding low and moderate income housing struck down); Berenson v. Town of New Castle, 38 N.Y.2d 102, 378 N.Y.S.2d 672 (1975) (in enacting a zoning ordinance excluding multi-family residential housing there must be a balancing of local desire to maintain status quo and the greater public interest that regional needs must be met); Nat'l Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1966) (four acre minimum lot size found unconstitutional).

[102] For example, in Ludgate v. Somerville, 121 Or. 643, 649, 256 P. 1043, 1045 (1927), the Oregon Supreme Court stated:

> Plaintiff purchased her lot in reliance upon the covenants in her deed and had the right to expect that every other lot owner in Laurelhurst would comply therewith . . . . Such is a

of a homeowner to place even greater restrictions on his or her property than the law requires.[103] Therefore, when a conflict arises between a zoning ordinance and a private covenant, the most restrictive lawful provision will be enforced.[104] For example, a covenant restricting the use of property to single-family residential use will not be superseded by a zoning ordinance permitting commercial development.[105] Conversely, if the covenant restricted property to commercial use, it would not be enforced in the face of a zoning ordinance allowing single-family residential use.[106] Under these general principles, the ohana zoning ordinance—being the more permissive measure—could not be applied so as to extinguish covenants prohibiting the construction of additional dwelling units. However, since there are other circumstances in which a covenant will not be enforced, the inquiry does not end here.

B. Circumstances in which a Covenant Will Not Be Enforced

A covenant that infringes upon a fundamental right or is otherwise contrary to public policy is not judicially enforceable.[107] Here, the landmark case is *Shelley v. Kraemer*,[108] where the United States Supreme Court characterized the legal enforcement of a covenant contrary to public policy as state action prohibited by the fourteenth amendment. The issue in *Shelley* arose in the context of a covenant limiting the sale of property to caucasians. The Court initially noted that this restriction violated the equal protection rights of petitioners and, therefore, would be invalid if imposed by state statute or local ordinance. The Court held that the fourteenth amendment was not rendered ineffective "simply because the particular pattern of discrimination, which the state has enforced, was defined initially by the terms of a private agreement."[109] In refusing to enforce

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property right of which she cannot be divested by legislation of the character in question.

[103] *See* constitutional provisions and cases cited *supra*, note 6. *See also* 4 A. RATHKOPF, *supra* note 95.

[104] *See* cases cited *supra* note 19. *But see* Fanning v. Grosfent, 58 A.D.2d 366, 397 N.Y.S.2d 421 (1977) (municipal ordinance requiring four foot fence surrounding swimming pools superseded three foot restriction imposed by restrictive covenant).

[105] *See*, e.g., Allen v. Axford, 285 Ala. 251, 231 So.2d 122 (1969); Decker v. Hendricks, 97 Ariz. 36, 396 P.2d 609 (1964); Lidke v. Martin, 31 Colo. App. 40, 500 P.2d 1184 (1972); City of Richlawn v. McMakin, 313 Ky. 265, 230 S.W.2d 902 (1950), *appeal dismissed*, 340 U.S. 945 (1951); G.M.L. Land Corp. v. Foley, 20 App. Div. 2d 645, 246 N.Y.S.2d 338, *aff'd*, 14 N.Y.2d 823, 200 N.E.2d 455 (1964); State v. Yates, 175 Ohio St. 566, 197 N.E.2d 201 (1964); Ludgate v. Somerville, 121 Or. 643, 256 P. 1043 (1927).

[106] *See, e.g.*, Willet & Crane, Inc. v. Palos Verdes Estates, 96 Cal. App. 2d, 216 P.2d 85 (1950); City of Gatesville v. Powell, 500 S.W.2d 581 (Tex. App. 1973).

[107] Shelley v. Kraemer, 334 U.S. 1 (1947).

[108] *Id.*

[109] *Id.* at 20.

the covenant, the Court noted that the covenants were not illegal, as no provision in the constitution prevented either the creation of restrictive agreements or voluntary adherence by the contracting parties.[110] Consequently, the constitutional issue arises only if the property owner seeks judicial enforcement.

In view of the Court's holding in *Shelley*, the most far-reaching approach would be for it to designate housing as a fundamental right which cannot be abridged by state action. As a result, judicial enforcement of private restrictions interfering with this right would violate the fourteenth amendment. Although creating a new fundamental right would have the broadest impact, for this very reason the Court will probably avoid doing so. Nonetheless, even if the Court were unwilling to so designate housing under the federal constitution, the Hawaii Supreme Court could recognize a right to housing under the Hawaii Constitution.[111] The constitutional arguments available to the courts are discussed in Section IV of this comment. Section V then focuses on three alternative means by which the courts may deny enforcement of covenants that conflict with state housing policies:

(1) The covenant can be analyzed as a contract that must yield to the public's need for affordable housing;

(2) Zoning principles may be applied to private agreements, thus requiring the landowner to consider the needs of the community; or

(3) Enforcement of the covenant may be viewed as an impermissible infringement upon choices concerning family relationships.

Whatever means is chosen, there are two hurdles to clear in the ohana zoning-restrictive covenant conflict. First, the court must find that the covenant is in contravention of a fundamental right, public policy or family relationships. Only then can the Court consider the second hurdle—whether the judicial enforcement of the covenant violates the fourteenth amendment.

Interpreted broadly, as in *Shelley v. Kraemer*, the Court may deny enforcement of covenants that do what zoning ordinances cannot, since enforcement of both involves state action.[112] However, the Court's holding in *Shelley* has not been interpreted to require that property owners consider the public's health, safety, and welfare when entering into restrictive agreements.[113] Nor has the

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[110] *Id.* at 13; Barrows v. Jackson, 346 U.S. 249 (1953).

[111] Mills v. Rogers, 457 U.S. 291, 300 (1982); Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980); Cooper v. California, 386 U.S. 58, 62 (1967), *reh'g denied*, 386 U.S. 988 (1967); State v. Kaluna, 55 Hawaii 361, 369, 520 P.2d 51, 58 (1974).

[112] 5 N. WILLIAMS, *supra* note 5, at 253.

[113] Commentators have noted that the state action doctrine of *Shelley* should be confined to rare cases since each time a private agreement is invalidated on constitutional grounds, numerous rights are being abridged. *Evaluation*, *supra* note 91, at 1677; Black, *Forward: State Action, Equal Protection and California's Proposition 14*, 81 HARV. L. REV. 69, 100 (1967). *See also*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (private club's refusal to serve guest because

Court applied its *Shelley* analysis in circumstances where racial discrimination was not at issue.[114] To a large extent, this lack of expansion can be attributed to the Court's traditional sensitivity to issues concerning equal protection on the basis of race.[115] Nonetheless, the critical shortage of affordable housing may be the volatile issue that merits similar judicial action.

IV. HOUSING AS A FUNDAMENTAL RIGHT

To attain the status of a fundamental right, the interest must find explicit or implicit mandate in the federal constitution.[116] While state legislation tradition-

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he was black did not violate 14th amendment, even though the club was licensed by the state); Church of Christ v. Metropolitan Board of Zoning, 175 Ind. App. 346, 371 N.E.2d 1331 (1978) (the way to legally exclude churches from residential areas without violating first amendment is by private covenant).

[114] *E.g.*, Evans v. Abney, 396 U.S. 435 (1970) (trust creating park for the exclusive use of white people terminated because it violated constitutional rights); Lombard v. Louisiana, 373 U.S. 267 (1963) (conviction of three black students who refused to leave a restaurant reserved for caucasians violated the equal protection clause); Burton v. Wilmington Park Authority, 365 U.S. 715 (1961) (restaurant owner operating in state-owned building violated 14th amendment when refused to provide service on basis of race). *But see*, Justice Douglas' dissent to the denial of certiorari in Watson v. Kenlick Coal Co., Inc., 498 F.2d 1183 (6th Cir. 1974), *cert. denied*, 422 U.S. 1012 (1975). The petitioners in *Watson* were landowners whose predecessors had deeded away all rights to the minerals underlying their land. The landowners retained only surface rights. The state of Kentucky regulated the strip mining while the Kentucky judicial system consistently enforced and expanded strip mining rights, even when the strip mining process destroyed the surface. Justice Douglas viewed this as a perfect case to characterize judicial enforcement as state action, but the case was not considered by the Court. *Id.* at 1017. Other federal cases taking a narrow view of the *Shelley v. Kraemer* doctrine include Girard v. 94th St. & Fifth Ave. Corp., 530 F.2d 66 (2d Cir. 1976), *cert. denied*, 425 U.S. 974 (1976); U.S. Jaycees v. Philadelphia Jaycees, 639 F.2d 134 (3rd Cir. 1981); Hardy v. J.C. Gissendaner, 508 F.2d 1207 (5th Cir. 1975); MacDonald v. Shawnee Country Club, Inc., 438 F.2d 632 (6th Cir. 1971); Adams v. So. California First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973), *cert. denied* 516 U.S. 1006 (1974).

[115] *E.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (Title VII of Civil Rights Act of 1964 precluded employer from requiring high school diplomas since the effect was to disadvantage black job applicants); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), *reh'g denied*, 403 U.S. 912 (1971) (affirmative duty placed on urban school system to desegregate schools even if it required busing); Hunter v. Erickson, 393 U.S. 385 (1969) (ordinance requiring voter approval of all low-income housing decisions struck down as being violative of equal protection).

[116] Harris v. McRae, 448 U.S. 297 (1980), *reh'g denied*, 448 U.S. 917 (1980) (no constitutional right to financial resources to obtain abortion); San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973), *reh'g denied*, 411 U.S. 959 (1974) (right to education not constitutionally guaranteed); Lindsey v. Normet, 405 U.S. 56 (1972) (housing is not a fundamental right). In his dissent to Craig v. Boren, 429 U.S. 190 (1976), *reh'g denied*, 419 U.S. 1124 (1976), where the Court struck down a statute imposing standards according to gender, Chief Justice Burger stated:

ally enjoys a presumption of validity,[117] all state action that infringes upon a fundamental right is subject to the strict scrutiny standard of review.[118] Therefore, the government shoulders the burden of proving that the action imposed is necessary to protect a compelling and substantial government interest. Moreover, where a private agreement infringes on a fundamental right and court enforcement is characterized as state action, the agreement will not be enforced.[119]

A. *The Right to Housing Defined*

At the outset, it is important to clarify what precisely is meant by the right to housing. There is a vast difference between the right to own a house and the right to be housed. To guarantee the right to home ownership would not only have serious financial ramifications, but also would require major changes in the political and economic organization of the country.

It is more likely that the Court would consider the right to be housed. At a minimum, this potential right can be characterized as a right to shelter. This right could be expanded to include the right to adequate shelter, the right to affordable shelter, or the right to a particular shelter.[120] The latter two—affordability and location—are of particular importance if the issue is raised in the context of ohana zoning. That is, from the standpoint of a person seeking to rent or buy a residence in a particular neighborhood, the implementation of ohana zoning would arguably bring housing in the desired neighbor-

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> On the merits, we have only recently recognized that our duty is not "to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 33 (1973). Thus even interests of such importance in our society as public education and housing do not qualify as fundamental rights for equal protection purposes because they have no textually independent constitutional status.

Id. at 216-17.

[117] In Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915), the Court noted that the state's police power was "one of the most essential powers of government,—one that is the least limitable." *See also* cases cited *supra* note 94.

[118] Schad v. Mount Ephraim, 452 U.S. 61, 68 (1981); Harris v. McRae, 448 U.S. 297 (1980), *reh'g denied*, 448 U.S. 917 (1980); Rosario v. Rockefeller, 410 U.S. 752, 762 (1973), *reh'g denied*, 411 U.S. 959 (1973); Roe v. Wade, 410 U.S. 113, 155 (1973), *reh'g denied*, 410 U.S. 959 (1973); Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, (1969). *See also*, State v. Maxwell, 62 Hawaii 556, 617 P.2d 816 (1980).

[119] U.S. CONST. amend. XIV.

[120] *See* Michelman, *The Advent of a Right to Housing: A Current Appraisal*, 5 HARV. C.R.-C.L. L. REV. 207 (1970) in which the author coins the phrase "right to be housed" and discusses its numerous interpretations.

hoods within his or her means. Consequently, it might be argued that a private covenant in contravention of ohana zoning results in the loss of a right to affordable housing in the neighborhood of one's choice. From a different perspective, a right to affordable housing in a particular neighborhood might be applied to deny enforcement of a restrictive covenant in a situation where an occupant is forced by rising costs to abandon a long-time residence.[121] Yet, if the property owner were able to build an ohana unit so as to provide additional income, this situation could possibly be avoided while at the same time increasing the supply of rental housing.[122] For the purpose of this discussion, the right to housing encompasses all three elements: adequate, reasonably-priced housing in a particular location, as this seems to be consonant with the purpose of the statute.

B. *Federal Law*

1. *Present Status of Housing*

With its first zoning decision, *Village of Euclid v. Ambler Realty Co.*,[123] the United States Supreme Court recognized that a community has a legitimate interest in maintaining separate districts for single-family detached dwellings and apartment buildings.[124] Since then, the Court has repeatedly demonstrated its deference to local planning boards and state legislatures in the realm of land use management even when access to affordable housing is obstructed.[125] For example, in *James v. Valtierra*,[126] the Court upheld a California constitutional provision that required referendum approval of all low-rent public housing projects. Petitioners were citizens of localities where the local housing authority

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[121] This is particularly true where the homeowner is on a fixed income, as is the case for most retired persons. According to a report prepared for the state of Hawaii, the number of persons over the age of 65 will have doubled between 1970 and 1985. DALY & ASSOCIATES' HOUSING FOR HAWAII'S PEOPLE III-8 (1977). Thus, there will be a greater need for smaller, affordable housing units. *Id.* At the same time, younger couples who would gladly purchase the type of single-family home in which they grew up cannot afford to. *See supra* notes 20-25 and accompanying text.

[122] It should be noted that a dispute over ohana housing may not be the type of case in which one would expect the Court to recognize housing as a fundamental right. However, the Court will often decide broad issues in narrow contexts when it wishes to resolve an issue of first impression. *See, e.g.*, Immigration and Naturalization Service v. Chadha, U.S. , 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983).

[123] 272 U.S. 365 (1926).

[124] Indeed, the Court characterized apartment buildings as parasites taking advantage of the open spaces and pleasing surroundings created by the residential district. *Id.* at 394.

[125] *See supra* note 115.

[126] 402 U.S. 137 (1971).

could not apply for federal funding because low-cost housing proposals had been defeated by referendum. Although low-income individuals could no longer obtain affordable housing in these communities, the Court dismissed the equal protection argument on the basis that the referendum applied to all low-rent projects, not just those occupied by a racial minority.[127] The Court did not acknowledge that a substantial proportion of those applying for low-income housing were, indeed, members of a minority race nor was the issue of housing as a fundamental right raised.[128] Instead, the Court extolled the virtues of the referendum process as a means of ensuring that "all the people of a community . . . have a voice in a decision which may lead to large expenditures of local government funds for increased public services . . . ."[129]

The status of housing as a fundamental right was at issue one year later in *Lindsey v. Normet*.[130] The issue arose in the context of Oregon's forcible entry and wrongful detainer statute which authorized landlords to evict tenants within ten days of non-payment of rent. Petitioners were tenants whose dwellings had been declared unfit for habitation and were attempting to use non-payment of rent as leverage against their landlords, who refused to make the necessary repairs. They challenged the early eviction procedure on equal protection and due process grounds. Although the Court recognized the "importance of decent, safe, and sanitary housing,"[131] it held that housing was not a fundamental right subject to constitutional protection. In addition to noting that the constitution did not mandate the right to housing, the Court emphasized the lack of federal substantive law on landlord-tenant relations and the legislative function of defining the perimeters of these relationships.[132] Absent the landlord-tenant encumbrance, the Court might have reached a different result.[133] Nonetheless, the Court has not retreated from its position in *Lindsey* nor has it shown a disposition to do so.

In *Village of Belle Terre v. Boraas*,[134] the Court upheld a zoning ordinance that limited the number of unrelated individuals who could share a house to two, even though this would prevent three elderly pensioners from rooming

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[127] *Id.* at 138.

[128] It has been noted that the Court's decision in *James v. Valtierra* indicates the Court's refusal to consider the realities of the nation's housing problems. Comment, *Exclusionary Zoning and a Reluctant Supreme Court*, 13 WAKE FOREST L. REV. 107 (1977).

[129] James v. Valtierra, 402 U.S. at 143 (1971).

[130] 405 U.S. 56 (1972).

[131] *Id.* at 74.

[132] *Id.* at 68, 74.

[133] Mandelker, *Differential Enforcement of Housing Codes - The Constitutional Dimensions*, 55 U. DET. J. URB. L. 517, 568 (1978); D. MANDELKER, C. DAYE, O. HETZEL, J. KOSHNER, H. MCGEE & R. WASHBURN, HOUSING AND COMMUNITY DEVELOPMENT 47 (1981) [hereinafter cited as MANDELKER & WASHBURN].

[134] 416 U.S. 1 (1974).

together.[135] The Court also reaffirmed its faith in the referendum process in *Eastlake v. Forest City Enterprises*,[136] wherein 55% voter approval was required for all proposed land use changes. The developer in *Eastlake* had already obtained city council approval to build a multi-family apartment building on his light industrial-zoned parcel, but before he received "parking and yard" approval, the referendum requirement went into effect. His requested change was defeated when put to the voters. Finally, in *Arlington Heights v. Metropolitan Housing Development Corp.*,[137] the Court upheld a decision not to rezone a single-family lot to a multiple-family classification. The rezoning would have allowed the construction of low and moderate income housing on land specifically donated for that purpose. However, the Court required those challenging the denied rezoning to prove that the planning commission had intended to discriminate on the basis of race.[138] Even the Court's traditional sensitivity toward racial issues did not prevent it from placing this heavy burden on those seeking housing.

The Supreme Court case law plainly favors the residential landowner. In *Lindsey*, the Court rejected housing as a fundamental right on the basis that there was not an explicit constitutional mandate.[139] However, many view the constitution as a flexible document intended to adapt to a changing nation.[140] At this point, the nation is confronting a shortage of adequate and affordable housing.[141] State legislatures and city councils are actively pursuing means of providing a greater supply of housing, the ohana zoning statute being one ex-

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[135] *Id.* at 19 (Marshall, J., dissenting). *But see*, Moore v. City of East Cleveland, 431 U.S. 494 (1977) where the Court struck down an ordinance defining family as only a few categories of individuals.

[136] 426 U.S. 668 (1976).

[137] 429 U.S. 252 (1977).

[138] *Id.* at 265.

[139] 405 U.S. 56, 74 (1972).

[140] San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 102-103 (1973) (Marshall, J., dissenting); McCullough v. Maryland, 17 U.S. (4 Wheat.) 415 (1819).

[141] *See supra* text accompanying notes 20-25. *See also*, Laguna Royale Owners Ass'n v. Darger, 119 Cal. App.3d 670, 682, 174 Cal. Rptr. 136, 143 (1981), where the Court stated:

> Ownership and use of condominiums is an increasingly significant form of "home ownership" which has evolved in recent years to meet the desire of our people to own their own dwelling place, in the face of heavy concentrations of population in urban areas, the limited availability of housing, and, thus, the impossibly inflated cost of individual homes in such areas.

In Bryan v. Salmon Corp., 554 S.W.2d 912 (Ky. App. 1977), a Kentucky appellate court noted the need for more affordable housing and held that the current housing shortage created a compelling need to rezone land located in an agricultural district to a residential classification. For further elaboration on the lack of affordable housing, see 1 P. ROHAN, ZONING AND LAND USE CONTROLS, 3-59 (1983); 4 A. RATHKOPF, *supra* note 94, at 34; and Hoben, *supra* note 16, at 151-56.

ample.[142] In the face of private restrictions, however, these measures may prove inadequate. The status of housing as a protected right should be reconsidered in this light.

2. *A Reassessment of Housing as a Fundamental Right Under the Federal Constitution*

Although the Court in *Lindsey* summarily dismissed housing as a fundamental right, other interests have gained this status despite the absence of a constitutional mandate. For example, the Court could not ascribe the source of the right to travel interstate to a particular constitutional provision, yet held it to "occupy a position fundamental to the concept of our Federal Union."[143] Likewise, the Court so recognized the right to vote,[144] the right to procreate,[145] and the right to privacy[146] without reference to a specific constitutional mandate.

However, the majority of the current Court has retreated from the expansive approach that yielded the right to travel. The inquiry is now limited to whether the alleged right is explicitly or implicitly guaranteed by the constitution.[147] Thus, for the reasons cited in *Lindsey*, the Court also held that the right to an education was not constitutionally guaranteed.[148] In his dissent, Mr. Justice Marshall noted that an explicit mandate is not the only means of elevating interests to fundamental right status, but rather the task should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution.[149] The *Shapiro* decision demonstrates this analysis: only by exercising their right to travel can citizens exercise their rights of association, religion, and franchise.

Although there are specific references to housing in the federal constitu-

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[142] *See supra* notes 8-14 and accompanying text. New York State recently enacted new legislation enabling localities to require clustering in residential subdivisions (Ch. 412 of Laws of 1982, enacted June 12).

[143] Shapiro v. Thompson, 394 U.S. 618 (1969).

[144] Dunn v. Blumstein, 405 U.S. 330 (1972).

[145] Skinner v. Oklahoma, 316 U.S. 535 (1942).

[146] Roe v. Wade, 410 U.S. 113 , *reh'g denied*,410 U.S. 959 (1973).

[147] San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973), *reh'g denied*, 411 U.S. 959 (1974). *See also* Chief Justice Burger's dissent in Craig v. Boren, *supra* note 115, at 217 where he declares that fundamental rights must have "textually independent constitutional status." *Cf.* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 579 (1980) (Burger, C.J.) (although constitution nowhere spells out right of the public to attend trials, this does not preclude recognition of important rights not enumerated).

[148] San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[149] *Id.* at 102-103. *See also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 579 (1980).

tion,[150] the right to housing is not explicitly mandated. Thus, if the Court continues to require an express constitutional mandate when designating fundamental rights, the right to housing must fail.

The foregoing conclusion, however, ignores the potential application of the ninth amendment, which provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[151] This amendment served as the basis of Justice Goldberg's concurrence in *Griswold v. Connecticut*,[152] where the Court recognized the right to privacy in a marital relationship. Justice Goldberg noted that "judges . . . must look to the traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental."[153] Thus, the ninth amendment may give the Court sufficient leeway to rank housing as a fundamental right.[154]

When this "collective conscience" is probed, is housing so firmly rooted as to be considered fundamental? Once obtained, housing is, at the very least, a property right.[155] A house also provides protection from the environment, privacy from the outside world, and, depending on its location, a variety of social and professional opportunities.[156] The neighborhood in which we live has a

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[150] The third amendment provides that "[N]o soldier shall, in time of peace be quartered in any *house* . . . ." U.S. CONST. amend. III (emphasis added). "The right of the people to be secure in their persons, *houses*, papers and effects against unreasonable searches and seizures . . ." is guaranteed by the fourth amendment. U.S. CONST. amend. IV (emphasis added). The 14th amendment states: "Nor shall any State deprive any person of life, liberty, or *property* without due process of law." U.S. CONST. amend. XIV (emphasis added). While these amendments presume that people are housed and these homes are subject to special protection, their purpose is to ensure privacy and judicial process rather than access to housing.

[151] U.S. CONST. amend. IX.

[152] 381 U.S. 479 (1965).

[153] *Id.* at 493.

[154] The Court recently cited the ninth amendment to support its recognition of the public's right to attend trials. Richmond Newpapers, Inc. v. Virginia, 448 U.S. 555 (1980). The Court noted the concern of those drafting the constitution that the enumeration of specific rights might preclude the protection of equally important, yet unarticulated rights. The ninth amendment placated this concern. *Id.* at 579, n. 15.

[155] For example, once an individual has been given access to public housing or rent subsidies, these benefits cannot be taken away or increased without providing due process of law. United States v. White, 429 F.Supp. 1245 (D. Miss. 1977) (ownership as well as right to occupy government subsidized housing is a property interest protected by the fifth amendment); Caton v. Barry, 500 F.Supp. 45 (D.D.C. 1980)("Residents of a family shelter could not be deprived of some minimal form of shelter without procedural due process."); Aguiar v. Hawaii Housing Authority, 55 Hawaii 478, 522 P.2d 1255 (1974).

[156] In Griswold v. Connecticut, 381 U.S. 479 (1965), Justice Goldberg noted that "the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life." *Id.* at 495 (quoting Poe v. Ullman, 367 U.S. 497, 551-52 (1961)(Harlan, J., dissenting)). It has also been noted that:

significant impact on our development as human beings. As children, the school we go to is governed by the location of our home. As parents, the property taxes we directly or indirectly pay, not only are determined in large part by the neighborhood in which we live, but also support the schools that educate our children.[157] In addition, our circle of friends is generally comprised of those who live near us. In *Hills v. Gautreaux*,[158] the Court implicitly acknowledged that the consequences inherent in housing are as important as the shelter itself. The Court therein reviewed the validity of an order requiring HUD to provide low income public housing outside the city limits of Chicago.[159] In holding that this regional remedy was appropriate, the Court noted that the purpose of low-rent housing was not only to avoid racial segregation but also to "expand the opportunities of minority group members to locate outside areas of minority concentration."[160]

A deprivation of adequate housing can also be construed as an abuse of one's right to life and liberty. Without shelter, one's chance of survival is obviously diminished. In *Shapiro v. Thompson*, the Court struck down a one year residency requirement for welfare recipients in part because it infringed on the "very means to subsist—food, shelter, and other necessities of life . . . ."[161] The lack of rental housing in Washington, D.C. during World War I compelled Mr. Justice Holmes to describe housing as a "necessary of life," and consequently, to uphold a statute permitting tenants to occupy rented premises despite the expiration of their lease.[162] Moreover, the concept of liberty has been broadly

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> [H]ousing is, if not a preferred or even fundamental "right," one of the most basic necessities, not just because it means a roof over the head of an American individual . . . , but because it carries with it a burden of consequences that deeply involve our daily lives as American citizens, as voters, as students, as learners, as job seekers . . . .

Citizens Comm. for Faraday Wood v. Lindsay, 507 F.2d 1065, 1074 (2d Cir. 1974) (Oakes, J., dissenting); *cert. denied*, 421 U.S. 948 (1975). *See also* W.F. SMITH, HOUSING: THE SOCIAL AND ECONOMIC ELEMENTS 3-14, 23-31 (1970); *reprinted in* D. MANDELKER AND R. MONTGOMERY, HOUSING IN AMERICA: PROBLEMS AND PERSPECTIVES 5 (1973); ABA'S SPECIAL COMMITTEE ON HUD LAW, EXECUTIVE SUMMARY: HOUSING JUSTICE IN THE UNITED STATES (1981); Comment, *The Right to Housing*, 6 BLACK L.T. 247 (1977).

[157] In Hawaii, however, schools are part of a state-wide system and thus are funded by the state. Since property taxes are paid to the county, they are not used to support the schools.

[158] 425 U.S. 284 (1976).

[159] The order was in response to HUD's violation of the fifth amendment and the 1964 Civil Rights Act by knowingly funding the Chicago Housing Authority's discriminatory public housing program. Gautreaux v. Chicago Housing Authority, 265 F.Supp. 582 (N.D. Ill. 1967).

[160] Hills v. Gautreaux, 425 U.S. at 302.

[161] 394 U.S. at 618. *See also* Housing Act of 1937, 42 U.S.C. § 1401 (1970); Housing Act of 1949, 42 U.S.C. § 1441 (1970).

[162] Block v. Hirsh, 256 U.S. 135, 156 (1921). *See also* DePaul v. Kaufman, 441 Pa. 386, 272 A.2d 500 (1971), where the Pennsylvania Supreme Court upheld rent withholding legislation created to equalize the bargaining positions of tenants and landlords of less than habitable

interpreted to include not only "freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to *establish a home* and bring up children . . . ."[163] The thirteenth amendment has also been interpreted to include "the freedom to buy whatever a white man can buy, the right to live wherever a white man can live."[164] The relationship between housing and the exercise of fundamental rights is also implicit in the policy behind fair and equal housing. However, the Court has not yet recognized this connection in a context other than discrimination on the basis of race.

While the Court may review "tradition and the conscience of the people" to ascertain whether housing is a fundamental right, this route is fraught with pitfalls. The most troublesome ramification is the perennial question—where to draw the line? If housing is ranked fundamental because of its importance as gleaned from the people's conscience, aren't there other interests that also deserve such status? Food? Water? Transportation? The proverbial floodgates will be opened.

If the Court were to acknowledge the right to housing, a multitude of other issues would arise: Is housing to be defined as shelter or is it to be of a certain quality? In a particular location? Are we entitled to complete ownership or will rentals suffice? At what price?

State legislatures and Congress are better suited to answer these types of questions than the judiciary.[165] Therefore, while it may be within the Court's power to guarantee a right to housing on the basis that access to shelter is implied in the federal constitution, it is unlikely to do so. It is particularly doubtful that the Court would first acknowledge this right in the ohana zoning context in view of the property owner's countervailing rights.[166] However, the Court may continue its trend of classifying those necessities not explicitly guar-

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dwelling units. In so holding, the court stated that providing an adequate supply of safe and decent housing served the general welfare of the community and therefore, the statute was a legitimate exercise of the state's police power.

[163] Meyer v. Nebraska, 262 U.S. 390, 399 (1923)(emphasis added).

[164] Jones v. Mayer, 392 U.S. 409, 443 (1968).

[165] In holding that the constitution did not guarantee the right to a certain quality of housing, the Court of Appeals for the Second Circuit recognized that: "[C]ourts are not equipped to choose housing sites, approve plans, sell bonds and oversee construction projects." Citizens Comm. for Faraday Wood v. Lindsay, 507 F.2d 1065, 1073 n.14 (2d Cir. 1974); *cert. denied*, 421 U.S. 948 (1975). *See also* Dorrough v. Estelle, 497 F.2d 1007, 1011 (5th Cir. 1974); Mandelker, *supra* note 133, at 570.

[166] According to Charles Siemon, an attorney with the Chicago firm of Ross and Hardiess the issue of housing as a fundamental right will probably be considered in the context of exclusionary zoning or ordinances prohibiting mobile home development. Mr. Siemon also noted that it "will not be long before housing is considered a fundamental right." *Zoning Appeals Seen Increasingly Decided on First Amendment Issues*, 11 LAND USE PLANNING REPORT 80 (March 1983).

anteed in the constitution as "extraordinary interests" subject to an intermediate level of review.[167]

3. *Housing as an Extraordinary Interest*

Traditionally, the Court has applied one of two levels of scrutiny when examining state legislation.[168] As a general rule, the statute is presumed to be constitutional unless the state had no rational basis for enacting the law or the law does not meet its intended goal.[169] However, where a fundamental right or "suspect" class is involved, the Court strictly scrutinizes the legislation to ensure that it is "precisely tailored to serve a compelling governmental interest."[170] Although the Court has not expressly abandoned this rigid two-tier approach, a third level of scrutiny has emerged to protect those interests, which, although not fundamental, are so vital that they require heightened scrutiny.[171]

This intermediate scrutiny standard demands that state action interfering with an "extraordinary interest" both serve an *important* governmental interest and be *substantially* related to that interest.[172] Although the intermediate level of scrutiny has not been unanimously embraced by the Court,[173] it appears that heightened scrutiny has been applied to legislation inhibiting access to food stamps,[174] to a college education,[175] and to federal employment.[176]

The Court recently examined the right to public education using this inter-

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[167] Plyler v. Doe, 457 U.S. 202 (1982); Heffron v. Int'l Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981); Central Hudson Gas v. Public Service Comm'n, 447 U.S. 557 (1980); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); Craig v. Boren, 429 U.S. 190 (1976); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971).

[168] Craig v. Boren, 429 U.S. 190, 210-11 (1976).

[169] McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915).

[170] Plyler v. Doe, 457 U.S. 202, 217 (1982).

[171] L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1082 (1978). *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1979) (gender-based classification subject to intermediate level scrutiny); Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (legislation preventing aliens access to federal employment struck down because it did not substantially relate to government interest); U.S. Dept. of Agriculture v. Murphy, 413 U.S. 508 (1973) (statute denying food stamps to those claimed a year previously as dependents on another's tax return subject to heightened scrutiny); Vlandis v. Kline, 412 U.S. 441 (1973) (legislation interfering with access to higher education violated due process and equal protection clauses).

[172] Craig v. Boren, 429 U.S. 190, 197 (1979).

[173] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 220 (1979) (Rehnquist, J., dissenting); U.S. Dept. of Agriculture v. Murphy, 413 U.S. 508, 523 (1973) (Rehnquist, J., dissenting with whom Burger, C.J., and Powell, J., joined).

[174] U.S. Dept. of Agriculture v. Murphy, 413 U.S. 508 (1973).

[175] Vlandis v. Kline, 412 U.S. 441 (1973).

[176] Hampton v. Mow Sun Wong, 426 U.S. 88 (1976).

mediate scrutiny approach.[177] In *Plyler v. Doe*,[178] the Court struck down a Texas statute that permitted local school districts to deny enrollment to children not "legally admitted" into the United States.[179] If the school district did allow such children to enroll, it would not receive state funds for the "illegal" child.[180] This statute thus had the effect of generally denying an education to foreign-born children of illegal aliens.

Although noting that education is not a fundamental right, the Court distinguished education from a mere government "benefit."[181] It noted the pivotal role education plays in an individual's life and the eventual impact its denial would have on society as a whole. It acknowledged that the denial of education not only damages an individual's opportunity to contribute to society, but relegates him to permanent second-class social status as well.[182] Although the State of Texas argued that the statute was necessary to preserve its educational resources for its lawful residents, the Court held that this goal was hardly substantial enough to justify the denial of education.[183]

The arguments that the Court applied when elevating education to an extraordinary interest entitled to heightened scrutiny appear to have equal force with respect to housing. Like education, the denial of adequate and affordable housing influences an individual's development as a member of society.[184] In the context of ohana zoning, the denial of an additional unit may also deprive one the opportunity to pursue an extended family lifestyle.[185] In view of the number of states enacting legislation aimed at providing a greater supply of affordable housing,[186] and the extensive reference to the "housing crises" in current periodicals,[187] the Court could conceivably recognize the provision of

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[177] 457 U.S. 202 (1982).

[178] *Id.*

[179] *Id.* at 205.

[180] *Id.*

[181] *Id.* at 221.

[182] *Id.* at 223.

[183] *Id.* at 227.

[184] *See supra* text accompanying notes 154-62. However, in his concurrence to Plyler v. Doe, Mr. Justice Blackmun distinguished housing and education, stating:

> Other benefits provided by the state, such as housing and public assistance, are of course important; to an individual in immediate need, they may be more desirable than the right to be educated. But classifications involving the complete denial of education are in a sense unique . . . and strike to the very heart of equal protection . . . .

Plyler, 457 U.S. 202, 234 (1982) (Blackmun, J., concurring).

[185] One function of ohana zoning is to "encourage the maintenance of the extended family lifestyle we value in Hawaii." CONF. COM. REP. NO. 41, 1981 Senate Journal 923.

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

[187] *See, e.g.*, Bozung, *A Positive Response to Growth Control Plans: The Orange County Inclusionary Housing Program*, 9 PEPPERDINE L. REV. 819 (1982); Devito, *Fantasia on Familiar Housing Themes*, 5 URB. L. & POL'Y 333 (1982); Rodeman, *Proposals and Possibilities: The 1981 Legisla-*

housing as an extraordinary interest.

However, whether the designation of housing as an extraordinary interest would be sufficient to overcome private deed restrictions is not clear. First, the Court would have to find that its enforcement of the deed restrictions constitutes state action. If the Court were willing to evaluate the covenants as it would state legislation that interferes with housing, the property owners may then be required to prove that their private restrictions also furthered a substantial state goal.[188] It is not clear from the intermediate scrutiny case law whether they must also prove that no less intrusive alternatives exist, as is required under the strict scrutiny test.[189] Nonetheless, when juxtaposed against the guaranteed right to contract and right to property, the mere interest in housing, albeit an "extraordinary interest," would most likely fall short.

Since heightened scrutiny will not hoist zoning over private contracts, housing must be considered a fundamental right for ohana-type ordinances to prevail over restrictive covenants. However, in view of the present Court's "explicit or implicit constitutional guarantee" requirement and the unpredictable consequences of creating a new fundamental right, it will not take this step. The more favorable tribunals for those seeking housing may be the state courts. A state supreme court is not barred from declaring the right to housing as fundamental even though the United States Supreme Court has refused to do so.[190] The next section addresses the status of housing under the Hawaii Constitution and the role of the state judiciary.

C. The Right to Housing Under the Hawaii Constitution

In contrast to the federal constitution, the Hawaii Constitution makes specific references to the provision of housing. Article I, section 2 guarantees the citizens of Hawaii the right to acquire and possess property.[191] The state also has the

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tive Response to Housing Needs in Oregon, 18 WILLAMETTE L.J. 75 (1982); Sharplin, *The Housing Crisis: Relating the Cure to the Illness*, 16 FED. HOME LOAN BANK BOARD J. 12 (1983).

[188] State action that interferes with an extraordinary interest must further a substantial state goal. *See supra* note 171.

[189] U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980); Vance v. Bradley, 440 U.S. 93 (1979); Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

[190] Cooper v. California, 386 U.S. 58 (1967), *reh'g denied*, 386 U.S. 988 (1967); *cf.* State v. Kaluna, 55 Hawaii 361, 520 P.2d 51 (1974).

[191] HAWAII CONST. art. I, § 2. The article I, § 2 guarantee of the right to acquire and possess property was explained in Standing Committee Report No. 20 of the Hawaii Constitutional Convention of 1950 (hereinafter "1950 Con Con"), which states:

> The inalienable rights the committee believes should include "the right of acquiring and possessing property" since that not only helps to increase the individual's happiness, but tends to make a more stable state which is the best assurance of keeping the citizens free

power to provide for "housing, slum clearance and the development or rehabilitation of substandard areas."[192] In addition, public lands are to be used for the development of farm and home ownership on as widespread a basis as possible.[193] Article IX, section 6 perhaps evidences the clearest mandate, requiring

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from "political oppression."

A similar provision was cited by the New Jersey Supreme Court to require a municipality to consider the regional needs of the state when enacting zoning ordinances. Burlington Cty. NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

[192] HAWAII CONST. art. IX, § 5, entitled "Housing, Slum Clearance, Development and Rehabilitation," was originally proposed by the 1950 Con Con. According to Standing Committee Report No. 16 of that convention:

> The purpose of this section is to give recognition to the fact that the slums of all crowded areas of the world are the source of much illness, crime and juvenile delinquency, all three of which we consider a disease of the political body . . . .
>
> There are those in each community who, for some reason or other, are unable to earn the rent for quarters available at current rates. These people tend, therefore, to live in more and more crowded conditions and in more and more dilapidated houses. For the protection of the majority of the people as well as those unable to provide adequate housing, it is necessary for the state to help in the building of such needed quarters. It is, therefore, imperative to allow for the development of legislation to eliminate the environment that breeds emotional and physical disease.

[193] HAWAII CONST. art. XI, § 10, entitled "Farm and Home Ownership," was explained in terms of its importance to the "public good." Standing Committee Report No. 78 states:

> The Committee unanimously agreed that for the public good, fee simple homes and farms should be made available on as widespread basis as possible. . . . The concensus of opinion was that the present limitation of the size of household lots was entirely too great in general at three acres, and in the main, should be much smaller. . . . The thought of the Committee is that the more families are placed as independent land owners on the public domain, the more stable the economy of the State will be.

The 1968 Con Con retained all of these provisions. However, the 1978 Con Con proposed to delete the "farm and home ownership" provision. This proposal was held in Kahalekai v. Doi, 60 Hawaii 324, 590 P.2d 543 (1979) to have been invalidly ratified by voters because the proposed deletion was not shown in voter information materials which purported to show all proposed changes.

The legislative history indicates that this proposed deletion was not based on opposition to home ownership, but rather because it was felt that the wording could be interpreted to support the building of housing on agricultural lands. Standing Committee Report No. 77 of the 1978 Con Con explains:

> Your Committee deleted the provision in Section 5 of Article X dealing with the use of public lands for farm and home ownership. It was generally understood, based on a letter opinion by the attorney general, that the phrase . . . meant both farm or home ownership. This inconsistency of this interpretation, with a renewed emphasis on preserving valuable and important agricultural lands, and the recommendation of the chairman of the board of agriculture convinced your Committee to delete the provision on farm and home ownership.

Standing Committee Report No. 36 of the 1978 Con Con saw a need "to protect the overlap

the state to "plan and manage the growth of the population to protect and preserve the public health and welfare." The above provisions are expressed in terms of granting the state power, as opposed to imposing a duty on the state. Clearly, however, the framers of the Hawaii Constitution recognized the significance of home ownership and intended the state to exercise considerable authority in providing adequate housing for its citizens.

It is well-established that a state may afford its citizens greater rights under its constitution than those provided under the federal constitution.[194] The Colorado Supreme Court, in *The Colorado Anti-Discrimination Commission v. Case*,[195] held that "the right to acquire one of the necessities of life, a home for himself and those dependent upon him" [196] was an unenumerated inalienable right of man. The court based its decision on the inherent freedoms contained in the Declaration of Independence[197] as well as the ninth amendment of the federal constitution.[198] Although this decision predates *Lindsey*, state courts could incorporate its analysis to designate housing as a fundamental right of all individuals, regardless of race.

The New Jersey Supreme Court epitomizes the active judiciary in the area of housing in its *Mount Laurel* decisions.[199] In *Mount Laurel I*,[200] the court considered whether a municipality could validly limit the types of available housing by a system of land use regulations. The court relied on the due process and

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that now exists between Article VIII [the former public health and welfare section] and Article X [the former resource conservation article]," and this perceived overlap could indicate that the delegates felt that the housing issue was adequately addressed in the public health and welfare section.

Additionally, the 1978 Con Con added the population control provision (Article IX, § 6) to the public health and welfare article. When read together with the agricultural lands section, there is an apparent scheme to confine housing to current urban areas, with population growth planned and managed in those areas "to protect and preserve the public health and welfare."

It is significant that no further attempt has been made to delete the farm and home ownership provision, and the intent expressed by the Con Con delegates in 1950 in adopting it is thus still a valid insight into state policy.

[194] *See supra* note 176.

[195] 151 Colo. 235, 380 P.2d 34 (1962).

[196] *Id.* at 41.

[197] The Declaration of Independence para. 2 (U.S. 1776) states:

> We hold these Truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.

[198] U.S. CONST. amend. IX states: "The enumeration in this constitution of certain rights shall not be construed to deny, impair or disparage others retained by the people."

[199] So. Burlington Cty. NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975) (*Mount Laurel I*); So. Burlington Cty. NAACP v. Township of Mount Laurel, 456 A.2d 890 (1983) (*Mount Laurel II*).

[200] 67 N.J. 151, 336 A.2d 713 (1975), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

equal protection clauses contained in the New Jersey Constitution in holding that municipalities must consider the general welfare of the region by providing their "fair share" of the regional housing needs.[201] The court recently clarified its position in *Mount Laurel II*.[202] This extensive decision reads like a legislative enactment as was recognized by the court itself.[203] In addressing the role of the judiciary, the court noted:

> We act first and foremost because the Constitution of our State requires protection of the interests involved and because the Legislature has not protected them . . . . Enforcement of constitutional rights cannot await a supporting political consensus. So while we have always preferred legislative to judicial action in this field, we shall continue to do our best to uphold the constitutional obligation that underlies the *Mount Laurel* doctrine.[204]

The *Mount Laurel* decisions stand for the proposition that because certain rights are so fundamental, the judiciary must act boldly to ensure their protection. Although the Hawaii State Legislature acted to protect the interests of those seeking affordable housing by enacting the ohana zoning statute, it has been silent as to whether restrictive covenants should be permitted to supersede the ordinance. Thus, the decision may be thrust upon the courts. The designation of housing as a fundamental right under the Hawaii Constitution presents one avenue available to the courts.

Like the United States Supreme Court, however, Hawaii courts may be reluctant to guarantee the right to housing because the designation of housing as a fundamental right would give rise to a multitude of intractable issues.[205] Nonetheless, other means exist by which a court may prohibit the enforcement of restrictive covenants which contravene the goals of the ohana zoning statute, without reaching the fundamental rights issue. The remainder of this comment addresses these alternative approaches.

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[201] 336 A.2d at 727.

[202] 456 A.2d 390.

[203] In addition to assigning three judges to manage all *Mount Laurel* litigation, the Court further defined the meaning of "fair share," discussed affirmative devices available to the municipality in providing its share of housing, and designated the State Development Guide Plans as the means of ascertaining a community's fair share.

[204] 456 A.2d at 417.

[205] *See supra* note 165 and accompanying text.

V. Alternative Approaches

A. *The Covenant as Contract*

In addition to being a property right, the restrictive covenant is essentially a contract between property owners.[206] Therefore, rather than expand the scope of fundamental rights, a court may analyze the conflict between restrictive covenants and zoning ordinances by balancing the landowner's contract rights against public policy. The next section examines this tension between the landowner's freedom to contract and the public's interest in efficient community development.

1. *Contract Rights and Public Policy*

The federal constitution guarantees the right to enter into and enforce contracts.[207] Moreover, restrictions of a contractual nature are considered valuable property rights with which courts rarely interfere.[208] However, a contract in contravention of public policy will not be enforced by the court.[209] Such a refusal to enforce contract rights does not violate article I, section 10 of the constitution because this provision guards only against impairment by legislative en-

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[206] Beall v. Hardie, 177 Kan. 353, 356, 279 P.2d 276, 278 (1955) (the term "covenant" included in a will evidenced that will was contractual); In re Michener's Appeal, 382 Pa. 401, 403-04, 115 A.2d 367, 369 (1955) (planning board erred when considering deed restrictions in application for variance because contracts have no place whatsoever in zoning); Olcott v. Southworth, 115 Vt. 421, 424, 63 A.2d 189,191 (1949) (covenant is a contract between two or more persons). *See also* D. Cheshire, The Modern Law of Real Property 512 (9th ed. 1962).

[207] *See supra* note 6 and accompanying text.

[208] Union Camp Corp. v. Continental Cas. Co., 452 F. Supp. 565 (D. Ga. 1978) (exercise of freedom to contract not to be lightly interfered with); France v. Liberty Mutual Ins. Co., 380 So.2d 1155 (Fla. Ct. App. 1980) (court should be extremely cautious when called upon to declare contract contrary to public policy); Freehling v. Development Management Group, Inc., 75 Ill. App. 3d 243, 393 N.E.2d 646 (1979) (mere breach of covenant sufficient to obtain injunction, plaintiff need not prove injury); Beaver Lake Assn. v. Beaver Lake Corp., 200 Neb. 685, 264 N.W.2d 871 (1978) (by-law provision giving developer authority to appoint board of directors not void per se).

[209] *See, e.g.*, Hudson County Water Co. v. McCarter, 209 U.S. 353 (1907), where the Court stated:

> All rights tend to declare themselves absolute to limit their logical extreme. Yet all in fact are limited by the neighborhood of principles or policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.

209 U.S. at 355. *See also* Hurd v. Hodge, 334 U.S. 24 (1947); Webster v. Star Distributing Co., 241 Ga. 270, 272, 244 S.E.2d 826, 827 (1978); Freehling v. Development Group, Inc., 75 Ill. App. 3d 243, 246, 393 N.E.2d 646, 648 (1979).

actments, not judicial decisions.[210]

Public policy, though seemingly vague, originates from such concrete sources as the constitution, laws, and judicial decisions of a state as well as principles of common law.[211] At what point the public's interest becomes sufficiently strong to abrogate the exercise of contract rights is the more difficult question.

In *Hudson County Water Co. v. McCarter*,[212] riparian lot owners who contracted to sell water out of state asserted their property rights in the face of state legislation that prohibited the transport of stream water across state boundaries. The Court acknowledged the riparian owners' asserted rights, but held that the necessity of water to life itself and the pressure that population growth was placing on this scarce resource outweighed these rights. In addition to ensuring that the legislation was a valid exercise of the state's police power, the Court also examined the circumstances giving rise to the statute.[213]

A New York appellate court recently employed a similar analysis to hold that a restrictive covenant must yield to the need to establish community residences for mentally disabled persons. In *Crane Neck Association, Inc. v. NYC/Long Island County Services Group*,[214] a homeowners association filed a declaratory judgment to prevent the establishment of community residences in its neighborhood. To support its position, the association cited a restrictive covenant limit-

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[210] Barrows v. Jackson, 346 U.S. 249 (1953).

[211] Twin City Pipe Line Co. v. Harding Glass, 283 U.S. 353 (1931) (although Arkansas' constitution prohibited monopolies, requirement contract was not a monopoly and therefore did not violate public policy); Harris v. Harris, 424 F.2d 806, 811 (D.C. Cir. 1970) (divorce statute and *in forma pauperis* act evidenced public policy that rich and poor should have equal right to divorce); People v. Walker, 665 P.2d 154 (Colo. Ct. App. 1983) (statute permitted court to refund bail bond; therefore surety's contract with nonrefundable premium was void); Porubiansky v. Emory University, 156 Ga. App. 602, 275 S.E.2d 163 (1980), *aff'd*, 248 Ga. 391, 282 S.E.2d 903 (1981) (in view of dentist's statutory duty to use reasonable care, contract providing otherwise is contrary to public policy); McClure Engineering Associates, Inc. v. Reuben H. Donnelly Corp., 69 Ill. 183, 447 N.E.2d 400 (1983) (contract limiting publisher's liability to amount paid for services upheld where there was no legislation on point); Vasquez v. Glassboro Service Assn., Inc., 83 N.J. 86, 415 A.2d 1156 (1980) (failure of employment contract to provide migrant farmworker with reasonable opportunity to find shelter violated public policy as evidenced in legislation protecting farmworkers' rights).

[212] 209 U.S. 353 (1907).

[213] At page 356 of its decision, the Court noted that:

> [F]ew public interests are more obvious, indisputable, and independent of particular theory than the interest of the public of a state to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a state, and grows more pressing as population grows.

Cf. Harris v. Pease, 135 Conn. 535, 66 A.2d 590 (1949), where the Connecticut Supreme Court stated that a covenant is unenforceable if it contravenes a constitutional or statutory provision.

[214] No. 1346E (N.Y. App. Div. 2d Dept. March 7, 1983).

ing homes to single-family residential dwellings. However, the State of New York had enacted legislation declaring that a community residence comprised a single family unit for the purposes of local zoning ordinances.[215] The court noted that even if this statutory definition of family applied only to local ordinances, the restrictive covenant could not be enforced as a matter of public policy. The court examined the state and federal efforts to provide treatment and programs for disabled persons and, at the same time, to foster an environment of independence and freedom. These efforts gave rise to a policy "broad enough to overcome not only challenges to group residences which are based upon local zoning ordinances, but also those based upon private restrictive covenants."[216]

Even in the absence of legislation, courts have struck down burdensome restrictions. For example, in *Colonial Trust Co. v. Brown*,[217] property devised in a will was subject to two restrictions that threatened the proper growth and development of a city. First, the will forbade leases exceeding a one year period. Second, a three-story height limitation was placed on the property. The court recognized that such restrictions on property located in the city center would seriously affect the downtown area as a whole.[218] Accordingly, the court refused to enforce these restrictions.

More recently, the New Jersey Supreme Court declined to enforce an employment contract provision allowing a farm labor service to summarily dispossess a farmworker of his living quarters after terminating his employment. Instead, the court in *Vasquez v. Glassboro Service Assn., Inc.*,[219] held that the failure to provide a migrant farmworker with a reasonable opportunity to find shelter before dispossession violated the public policy of the state. In addition to examining the considerable legislation[220] and case law[221] designed to protect the rights of farmworkers, the court emphasized the unequal bargaining positions of the parties.[222] If the farmworker wanted to work in America, he took the

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[215] N.Y. MENTAL HYG. LAW § 41.34 (McKinney Supp. 1983).

[216] No. 1346E, *supra* note 213. Other decisions permitting community residences for the disabled in single-family residential neighborhoods with restrictive covenants include City of Livonia v. Dept. of Social Services, 123 Mich. App. 1, 333 N.W.2d 151, 161 (1983); Beverly Island Assn. v. Zinger, 113 Mich. App. 322, 317 N.W.2d 611 (1982); J.T. Hobby & Son, Inc. v. Family Homes of Wake County, 274 S.E.2d 174 (N.C. Ct. App. 1981); Crawley v. Knapp, 94 Wis. 2d 421, 288 N.W.2d 815 (1980). *But see* Shaver v. Hunter, 626 S.W.2d 574 (Tex. Ct. App. 1981), *cert. denied*, 459 U.S. 1016 (1982).

[217] 105 Conn. 261, 135 A. 555 (1926).

[218] *Id.* at 564.

[219] 83 N.J. 86, 415 A.2d 1156 (1980).

[220] *Id.* at 1163.

[221] *Id.* at 1163-64 (citing State v. Shack, 58 N.J. 297, 277 A.2d 369 (1971) and Five Migrant Farmworkers v. Hoffman, 136 N.J. Super. 242, 345 A.2d 378 (Law. Div. 1975)).

[222] 83 N.J. 86, 415 A.2d 1156, 1164 (1980).

contract as dictated by the labor service. The farmworker depended on the labor service for employment, food, transportation, and housing. He would not be reimbursed for travel expenses from Puerto Rico until he had fulfilled the terms of the contract. In addition, the contract was written in English, not the worker's native language.

In *Vasquez*, the court analogized the relationship between the labor service and farmworker to that of a landlord-tenant during a housing shortage,[223] or that of a consumer who must accept standardized form contracts to purchase necessities.[224] The parties to these contracts do not negotiate their terms. As a result, the courts are likely to examine such contracts more closely than negotiated agreements to ensure the contract is neither contrary to public policy nor unconscionable.

The Hawaii Supreme Court has recognized that the liberty to contract is not absolute. It is subject to the exercise of the state's police power.[225] Furthermore, in *Collins v. Goetsch*,[226] the court stated that the free and unrestricted use of property is favored only to the extent of applicable state land-use and county zoning regulations. Carried to its logical extreme, the zoning regulation, if characterized as an expression of public policy, could abrogate contrary covenants in every instance. Contract rights in property would, in effect, be a nullity. The better reasoned approach, therefore, is to require not only a legislative act, but additional evidence to accentuate the import of the public's interest. Legislation permitting accessory dwellings, such as the ohana zoning ordinance, is generally just one of the many steps taken to provide additional housing. Therefore, the strength of the public policy with respect to housing emanates not only from the ordinance, but from related legislation and court decisions as well.

2. *The Strength of Hawaii's Housing Policy*

If Hawaii's interest in assuring adequate housing is sufficiently compelling, covenants that contravene this interest will be void as a matter of law.[227] A review of Hawaii's legislation and case law reveals the strength of the state's public policy with respect to housing.

The Hawaii State Legislature has actively pursued the goal of affordable housing. The Hawaii State Planning Act addresses the state's long-range housing objective of providing "greater opportunities for Hawaii's people to secure

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[223] *Id.* at 1164.

[224] *Id.* at 1165.

[225] The court upheld the taxation of an emigrant agent, noting that the exercise of the police power may result occasionally in pecuniary injury. *In re* Craig, 20 Hawaii 483 (1911).

[226] 59 Hawaii 481, 583 P.2d 353 (1978).

[227] Hurd v. Hodge, 334 U.S. 24 (1948).

reasonably priced, safe, sanitary, livable homes . . . ."[228] In addition, each county has the authority to develop, construct, and provide "urgently needed housing for persons of low and moderate income."[229] The Hawaii Housing Authority was established to carry out this goal.[230] The legislature recently instituted a rental assistance program whereby owners of rental property may receive rental supplements in exchange for reducing the cost of rent for low and moderate income persons.[231] Other legislation addresses the necessity of providing adequate affordable housing for the elderly.[232] In addition, covenants restricting public lands to residential use are legislatively limited to a ten year period.[233]

Perhaps the most eloquent tribute to the role of housing in Hawaii is included in the legislative findings and purposes accompanying the 1975 Hawaii Land Reform Act:

> The home is the basic source of shelter and security of society, the center of our society which provides the basis for the development of our future citizens. Deprivation . . . results in frustrations and unrest in our community that is harmful to the overall fiber of our society.[234]

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[228] HAWAII REV. STAT. § 226-19 (1976).

[229] HAWAII REV. STAT. § 46-15.1 (Supp. 1982).

[230] HAWAII REV. STAT. § 356-301 (Supp. 1983).

[231] HAWAII REV. STAT. § 356-1 (1976).

> The legislature finds and declares that the health and general welfare of the State require that the people of this State have safe and sanitary rental housing accomodations available at affordable rents; that a grave shortage in the number of such accommodations exists; that it is essential that owners of rental housing accommodations be provided with appropriate additional means to assist in reducing the cost of rental housing accomodations to the people of the State; that it is the purpose of this part to assist such owners in maintaining the rentals at levels affordable by families and individuals of low and moderate income by providing such owners with rental assistance payments which, with rentals received by tenants of low and moderate income, will provide such owners with limited but acceptable rates of return on their investments in rental housing accommodations; and that assisting such owners by entering into contracts with them which provide for rental assistance payments is a valid public purpose and in the public interest.

[232] "A recent survey indicated that an estimated 15 percent of the elderly are in need of better, less expensive housing." HAWAII REV. STAT. § 359-51 (1976).

[233] HAWAII REV. STAT. § 171-93(3) (1976).

[234] 1975 Hawaii Sess. Laws 185. Although neither from a legislative nor a judicial source, a recent newspaper editorial also reflects the importance of affordable housing to Hawaii's future:

> Home ownership is not a birthright. But it's an important stabilizing force in our society, a link between the generations that solidifies and strengthens our roots. The growth of the islands, intellectually, culturally and economically is all part of the home ownership question because we could face an exodus of residents if affordable housing is not available.

Honolulu Advertiser and Star Bulletin, Jan. 23, 1983 at E-2, col. 1.

The United States Supreme Court recently upheld the constitutionality of the Land Reform Act, which authorizes the state to condemn leasehold land in order to allow lessees to acquire fee simple title to their residential lots.[235] In its decision, the Court expanded considerably the meaning of the "public use" clause of the fifth amendment, emphasizing the narrow role of the courts and the expansive role of the legislatures in determining what constitutes a public use. According to the Court, "it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundataion.[236] In view of the deference given legislatures with regard to public use, the courts may be equally deferential to a legislature's determination that public policy outweighs certain private contract rights.

Case law addressing the provision of adequate housing is less abundant. In contrast to the New Jersey Supreme Court, which consistently addresses housing issues,[237] the Hawaii Supreme Court has only considered housing in the

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[235] Midkiff v. Tom, 471 F.Supp. 871 (D. Hawaii 1979), *rev'd*, 702 F.2d 788 (9th Cir. 1983), *rev'd*, 104 S.Ct. 2321 (1984). The Court of Appeals for the Ninth Circuit had found the Land Reform Act to be unconstitutional on the grounds that the taking of private fee simple property and re-sale to private persons did not constitute a sufficient public purpose under the fifth amendment. The fifth amendment requires that governments exercising their right of eminent domain must not only provide just compensation to the dispossessed landowner, but must also condemn the property for public use. U.S. CONST. amend. V. However, this limitation only applies where the government affirmatively exercises its right of eminent domain rather than when it acts pursuant to the police power. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, (1926); Berman v. Parker, 348 U.S. 26, 33 (1954). Where a government merely enacts a zoning ordinance, the ordinance is subject to the traditional police power limitations—the ordinance must further the public's health, safety, and welfare. If the ordinance does not advance legitimate state interest or if its application to a particular parcel denies the owner economically viable use of his land, a court may find that an unconstitutional taking has occurred. *See* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). It is not yet clear whether a citizen must be compensated for a police power taking or whether injunctive relief is sufficient. *See* San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1981) (Court did not reach issue due to technical grounds; however, the Brennan dissent considers this subject at length). It should be noted further that a contract contrary to public policy can be voided without raising the taking issue. Hudson County Water Co. v. McCarter, 209 U.S. 353 (1907).

[236] 104 S.Ct. 2321, 2330 (1984).

1980 Hawaii Sess. Laws 229 emphasizes the purpose of ohana zoning legislation to facilitate home ownership:

> The legislature recognizes that the spiraling costs of housing, the limited availability of land for housing, and the failure of wages to keep pace with inflation, contribute to the inability of many families to purchase their own homes . . . . The purpose of this Act is to assist families to purchase affordable individual living quarters . . . .

[237] *See, e.g.*, So. Burlington Cty. NAACP v. Township of Mt. Laurel, 92 N.J. 158, 456 A.2d 390 (1983); So. Burlington Cty. NAACP v. Township of Mt. Laurel 67 N.J. 151, 336 A.2d 713 (1975), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975); Marini v. Ireland, 56 N.J. 130, 265 A.2d 526 (1970); Kuzmiak v. Brookchester, 33 N.J. Super. 575, 111 A.2d 425 (1955).

due process context. In *Aguiar v. Hawaii Housing Authority*,[238] the plaintiff challenged the increase of rent in government subsidized housing without prior notice. In its decision, the Hawaii Supreme Court noted that a sudden rent increase may result in "substantial deprivation—the inability to pay the increased rentals or to find satisfactory housing."[239] Due to these circumstances, the court held that the statutory benefit of low-cost housing was a property interest that could not be denied without affording procedural due process.[240]

Since public policy is such a nebulous concept, it is difficult to assess whether this legislation and case law represent a sufficiently strong interest to invalidate a restrictive covenant. The fact that the legislature, though undeniably cognizant of the number of Hawaii lots encumbered by covenants,[241] did not address this conflict in either the ohana zoning statute or the committee reports may buttress the property owner's case. That is, if access to affordable housing were so critical, the legislature would have explicitly provided for the priority of the ohana zoning law. Moreover, the Honolulu county agency whose function it is to administer the program posits that "[c]ompliance with private covenants or lease restrictions prohibiting two dwelling units on a lot is [the] applicant's responsibility."[242] However, if the legislature or city council had statutorily provided that the ohana ordinances would be controlling, this action might constitute state interference with contract rights in violation of both the federal and Hawaii constitutions.[243] Therefore, that the statute and ordinance are silent with

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[238] 55 Hawaii 478, 522 P.2d 1255 (1974).

[239] *Id.* at 496, 522 P.2d at 1297, *quoting* Thompson v. Washington, 497 F.2d 626 (D.C. Cir. 1973).

[240] *See also* Swann v. Gastonia Housing Authority, 502 F. Supp. 362 (D. N.C. 1980) *aff'd in part, rev'd in part*, 675 F.2d 1342 (4th Cir. 1982); Metcalf v. Trainer, 472 F. Supp. 576 (D. Ill. 1979); Harrison v. Housing Authority of College Park, 445 F. Supp. 356 (D. Ga. 1978), *aff'd*, 592 F.2d 281 (5th Cir. 1979), *reh'g denied*, 594 F.2d 863 (1979); United States v. White, 429 F. Supp. 1245 (D. Miss. 1977); Gramercy Spire Tenants' Assn. v. Harris, 490 F. Supp. 1219 (S.D.N.Y. 1980); United States v. Dixwell Housing Development Corp., 71 F.R.D. 558 (D. Conn. 1976).

[241] *See supra* note 78.

[242] DEPT. OF LAND UTILIZATION, PUBLIC FACILITIES PRE-CHECK FORM, *reprinted in* DEPT. OF LAND UTILIZATION, OHANA ZONING A GUIDE TO ADDING A SECOND UNIT TO YOUR LOT 9 (1982). Moreover, the United States Supreme Court recognizes that "an administrative agency's consistent, longstanding interpretation of [a] statute under which it operates is entitled to considerable weight." International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Daniel, 439 U.S. 551, 566 n.20 (1979). *See also* U.S. v. National Assn. of Securities Dealers, 422 U.S. 694, 719 (1975); Saxbe v. Bustos, 419 U.S. 65, 74 (1974); Udall v. Tallman, 380 U.S. 1, 16 (1965).

[243] "No State shall enter into any . . . Law impairing the obligation of contracts." U.S. CONST. art. I, § 10, cl. 1. *See, e.g.*, E & E Hauling, Inc. v. Forest Preserve Dist. of DuPage County, 613 F.2d 675 (5th Cir. 1980); White Motor Corp. v. Malone, 599 F.2d 283 (8th Cir. 1979), *aff'd*, 444 U.S. 911 (1980); Holladay v. City of Coral Gables, 382 So.2d 92 (Fla. App.

respect to private deed restrictions remains inconclusive.

The bargaining positions of the large private landowners and those seeking to purchase homes poses another factor that the Hawaii courts may consider. Although the imbalance is not as pronounced as that of the labor service-migrant farmworker relationship in *Vasquez*,[244] the potential lessee possesses less bargaining power than the lessor. As the legislature noted when enacting the Hawaii Land Reform Act,[245] "the people of the State have been . . . required instead to accept long-term leases . . . which contain terms and conditions that are financially disadvantageous, that restrict their freedom to fully enjoy such land and that are weighted heavily in favor of the few landowners . . . ."[246] It cannot be predicted whether this unequal bargaining position would tip the policy argument in favor of those wishing to build ohana units.

In addition to denying enforcement of those covenants that interfere with an important public policy, the court can require that the limitations placed on the enactment of zoning ordinances be applied to agreements between landowners. The application of these principles is discussed in the following section.

B. Application of Zoning Principles to Private Restrictions

As previously discussed, the private deed restrictions in *Shelley v. Kraemer*[247] were subject to the standard of review ordinarily imposed only on actions taken by the state. Although the United States Supreme Court has not applied the fourteenth amendment to require private landowners to consider the health, safety, and welfare of the municipality when entering into restrictive agreements, some state courts have imposed this duty so that covenants that are not rationally related to the general welfare of the public will not be enforced by the state judiciary.[248]

An Ohio appellate court was the first to interpret *Shelley* to require that private restrictions meet constitutional zoning law standards.[249] At issue in *West*

1980). *Cf.* Northwestern National Life Ins. Co. v. Tahoe Regional Planning Agency, 632 F.2d 104 (9th Cir. 1980), where the Court of Appeals for the Ninth Circuit noted that land use ordinances did not impair contractual obligations but merely affected property that served as basis for agreement.

[244] *See supra* text accompanying notes 204-209.

[245] HAWAII REV. STAT. § 516 (1976).

[246] 1975 Hawaii Sess. Laws 186, *reprinted in* Midkiff v. Tom, 471 F. Supp. 871, 876 n.21 (D. Hawaii 1979), *rev'd*, 702 F.2d 788 (9th Cir. 1983), *rev'd*, 104 S.Ct. 2321 (1984).

[247] 334 U.S. 1 (1948).

[248] Riley v. Stove, 22 Ariz. App. 223, 526 P.2d 747 (1974); Conrad v. Dunn, 92 Cal. App. 3d 236, 154 Cal. Rptr. 726 (1979); West Hill Baptist Church v. Abbate, 24 Ohio Misc. 66, 261 N.E.2d 196 (1969).

[249] *Evaluation*, *supra* note 91, at 1673.

Hill Baptist Church v. Abbate[250] was whether a church could be built on property restricted by covenant to residential and agricultural use only. The court held that since the restriction bore no rational relationship to the public's health, safety, and welfare, enforcement of the covenant would violate the due process clause of the fourteenth amendment.[251]

A California appellate court considered the constitutionality of a covenant restricting the use of an outside citizen's band radio antenna in *Conrad v. Dunn*.[252] After first noting that the covenant may interfere with the first amendment right to free speech, the court stated that it was "proper to consider the validity of a zoning ordinance having the same effect."[253] Only after the court determined that there were reasonable aesthetic, economic and safety purposes underlying the restriction was the covenant upheld.

Likewise, an Arizona appellate court has analyzed restrictive covenants in the same fashion as it does zoning ordinances. In *Riley v. Stove*,[254] the covenant agreements prohibited individuals under the age of twenty-one from residing in a mobile home park. The court distinguished a New Jersey case,[255] which had invalidated a similar ordinance as violating the equal protection clause on the basis that there was no evidence of a shortage of housing or a desperate need for housing for families with children. Since the restriction fulfilled a legitimate need for older home buyers, it was upheld, but if there had been an overwhelming public need for housing, it is possible that the court would have held otherwise.

These decisions illustrate a means by which the courts can ensure that private agreements do not jeopardize the goals of a community's development plan. The underlying assumption is that the zoning ordinance is in furtherance of the public's health, safety, and welfare, and thus, is a valid exercise of the state's police power.[256] Therefore, a covenant that contravenes a valid ordinance cannot also be upheld as meeting the needs of the general public. If this analysis were applied to the covenants that conflict with Hawaii's ohana zoning statute, the private restrictions would not be enforceable.

The majority of jurisdictions have not imposed this expansive view of social

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[250] 24 Ohio Misc. 66, 261 N.E.2d 196 (1969).

[251] The Court's decision was based on two other grounds as well. First, the fact that two other churches had been constructed indicated that a choice between religions had been made resulting in a violation of the 14th amendment. Second, the restriction also denied the freedom of worship and, therefore, violated the due process clause.

[252] 92 Cal.App. 3d 236, 154 Cal. Rptr. 726 (1979).

[253] *Id.* at 728.

[254] 22 Ariz. App. 223, 526 P.2d 747 (1974).

[255] Molino v. Mayor and Council of Glassboro, 116 N.J. Super. 193, 281 A.2d 401 (1971).

[256] Of course, this premise may be challenged by property owners.

responsibility on private landowners.[257] At the same time, courts are closely scrutinizing zoning ordinances that promote one segment's health, safety, and welfare at the expense of another.[258] While large lot zoning and minimum cost restrictions designed to maintain the "character of the neighborhood" easily passed judicial inspection previously,[259] the trend has been to reject such exclusionary devices.[260] Behind this trend is the recognition that spacious yards in one area inevitably result in overcrowded conditions in another. Thus, some courts have imposed a duty on municipalities to accommodate their "fair share" of affordable housing.[261]

The fair share doctrine has thus far been limited to situations where one municipality has such exclusionary zoning laws that lower-income individuals are forced to seek housing in neighboring communities.[262] The burden to provide low-income housing is therefore placed on the neighboring municipality while the excluding municipality enjoys higher property values. To prevent this inequity, courts have required each municipality to provide affordable housing for low and moderate income individuals.[263]

The fair share doctrine is difficult to apply in the context of ohana zoning.

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[257] It appears that only appellate courts in Arizona, California, and Ohio have done so. However, a greater number of legislatures have imposed a duty of social responsibility on developers by enacting inclusionary zoning laws. *See supra* note 8.

[258] *See, e.g.*, Bryan v. Salmon Corp., 554 S.W.2d 912 (Ky. Ct. App. 1977) (compelling need to rezone agricultural land to residential zone in view of existing housing shortage); Taxpayers Ass'n of Weymouth Township v. Weymouth Township, 71 N.J. 249, 364 A.2d 1016 (1976), *cert. denied* 430 U.S. 977 (1977) (any governmental action which significantly impinges on right to decent housing subject to close judicial scrutiny); Camp Hill Dev. Co. v. Zoning Board of Adjustment, 13 Pa Commw. 579, 319 A.2d 197 (1974) (townhouses are legitimate means of providing decent housing and should not be discouraged).

[259] As the United States Supreme Court noted in Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974):

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs.

[260] *See, e.g.*, DuPage County v. Halkier, 1 Ill. 2d 491, 115 N.E.2d 635 (1953) (two and one-half acre "estate" zone had no substantial relation to public's health, safety, and welfare); Home Builders League of So. Jersey, Inc. v. Township of Berlin, 81 N.J. 127, 405 A.2d 381 (1979) (1,200-1,600 square foot requirement presumed enacted for improper purpose); Urban League of Greater New Brunswick v. Mayor of Carteret, 142 N.J. Super. 11, 359 A.2d 526 (1976) (ordinance excluding low and moderate income housing struck down); National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1966) (four acre minimum lot requirement held unconstitutional).

[261] *See, e.g.*, So. Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975); Berenson v. Town of New Castle, 38 N.Y.2d 102, 378 N.Y.S.2d 672, 341 N.E.2d 236 (1975). *See also* Brower, *Courts Move Toward Redefinition of General Welfare*, Land Use L. & Zoning Digest 5 (1979).

[262] *See* cases cited *supra* note 248.

[263] *Id.*

Under the circumstances, the City and County of Honolulu is the municipality and it has provided ohana zoning in as many areas as deemed appropriate.[264] Therefore, it is not the municipality that has not provided its "fair share." It is the landowners and homeowners associations who seek to preserve their property interests by excluding ohana units. Therefore, the court would find it necessary to impose the fair share obligation on individuals, not a local government. Although the constitutional guarantee that the state shall not interfere with the freedom to contract does not apply to the judiciary,[265] the imposition of a fair share obligation on individual landowners is a serious restraint on property and contract rights. For that reason, courts may be reluctant to force this expansive view of social responsibility on private property owners.

C. Accommodating the Extended Family

The purpose of the ohana zoning statute is not limited to providing a greater supply of housing but is also intended to encourage the extended family lifestyle, whereby more than two generations comprise a household.[266] This family relationship is a constitutionally protected fundamental interest;[267] thus, courts may deny enforcement of covenants that interfere with extended family living arrangements. Since the court would not be faced with declaring a new fundamental right, this application of *Shelley* may be more acceptable. In any event, the family perspective provides the court with a means of refusing to enforce the private restriction.

In *Moore v. City of East Cleveland*,[268] the United States Supreme Court struck down an ordinance that so narrowly defined the family unit that a grandmother was not allowed to have her two grandsons live with her. Rather than accord the ordinance the usual deference, the Court stated that the purposes of the statute, to prevent overcrowding, traffic congestion, and undue financial burden on the city's school system, must be carefully examined whenever the private realm of the family is concerned and held that the nuclear family was an arbitrary boundary, a point upon which Mr. Justice Brennan elaborated in his concurrence:

> In today's America, the "nuclear family" is the pattern so often found in much of white suburbia. The Constitution cannot be interpreted . . . to tolerate the imposition by government upon the rest of us white suburbia's preferences in pat-

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[264] *See supra* text accompanying notes 62-80.

[265] Barrows v. Jackson, 346 U.S. 249 (1953).

[266] 1981 Hawaii Sess. Laws 229.

[267] Moore v. City of East Cleveland, 431 U.S. 494(1977); Griswold v. Connecticut, 381 U.S. 479 (1965).

[268] 431 U.S. 494 (1977).

> terns in family life. The extended family . . . remains not merely still a pervasive living pattern—virtually a means of survival—for large numbers of the poor and deprived minorities of our society. For them, compelled pooling of scant resources requires compelled sharing of a household.[269]

While the ohana zoning concept accommodates families containing more than two generations, covenants that limit construction to a single-family dwelling unit essentially limit the choice of living arrangements to the nuclear family. As one commentator has noted, the construction of a separate kitchen and bath provides that extra element of privacy which is necessary to maintain successful extended family living in America.[270] Since the covenants preclude the construction of these amenities, the extended family lifestyle is discouraged. The Court may refuse to enforce a covenant that interferes with private family life in this manner.

In contrast to the ordinance in *Moore*, the Honolulu Comprehensive Zoning Code defines "family" to include all persons related by blood, adoption, or marriage.[271] The definition does not limit the number of family members permitted in a detached single-family dwelling, although it does specify that no more than five unrelated individuals may live together as a "family."[272] In Hawaii, moreover, where the extended family is still prevalent,[273] it is not unusual for parents, adult children and grandchildren to share one roof.

The ohana zoning statute indicates the legislature's intent to encourage this extended family lifestyle:

> The legislature also recognizes the resulting trend of children living in their parents' homes even after reaching adulthood and after marriage. This trend has positive and negative aspects. The situation is negative when it is forced upon persons because there is a scarcity of affordable homes. The trend can be positive, however, because it helps preserve the unity of the extended family. The purpose of this Act is to assist families to purchase affordable individual living quarters and, at the same time, to encourage the preservation of the extended family.[274]

In contrast to many ohana type ordinances, however, neither the statute nor

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[269] *Id.* at 507.

[270] Crawford, *Whither, the Single-Family Zoning District*, 5 ZONING & PLAN L. REP. 41 (1982).

[271] HONOLULU, HAWAII, C.Z.C. § 21-110 (1969).

[272] *Id.*

[273] In the 294,000 households in Hawaii, over 11,000 parents live with their grown children. Likewise, over 11,000 brothers or sisters share housing with their sibling's family. The households also house another 50,000 assorted relatives (i.e. aunts, uncles, cousins). 1983 DATA BOOK, *supra* note 20, at 51.

[274] 1981 Hawaii Sess. Laws 229.

the ordinance require that the ohana unit be occupied by family members.[275] It is undeniably more difficult to make the interference with family argument in the face of such an absence. Therefore, unless the statute or ordinance is amended to include a family-occupied restriction, this argument lacks force.

VI. CONCLUSION

The conflict between ohana-type zoning and private deed restrictions poses both practical and doctrinal problems for courts faced with a challenge to such restrictions. That there is a nationwide housing shortage cannot be questioned. Nor can it be questioned that Congress, state legislatures, and local governments have actively supported the idea of "a decent home and a suitable living environment for every American family."[276] But this problem has, for various reasons, remained just that—a mere promise— with the ambitious goals of housing legislation not even close to being realized.[277]

In large part, this is because the ideal of providing affordable housing for all does not exist in a world free of conflicting interests. Whether housing legislation entails an inclusionary zoning scheme[278] or an ohana-type zoning device, the economic value of surrounding property will be affected,[279] arguably adversely, as well as the personal values of surrounding property owners. A particularly deeply-held value that is affected, of course, is individual freedom to enter into contracts and to use one's property.[280]

Legislators could attack this problem directly by specifically providing that private covenants not be enforceable if they conflict with statutes designed to expand the supply of housing. Yet, for political reasons or through mere oversight, legislators may fail to include such provisions, as indeed they did when enacting Honolulu's ohana zoning ordinance. In such a case, the legislation alone will not achieve its goals so long as restrictive covenants can be used as a shield against the housing policies the legislation represents.

Faced with this situation, a court may conclude that the need to prevent individuals from contravening housing policies outweighs the need to protect

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[275] *Cf.* FAIRFAX COUNTY, VA., CODE ch. 112 § 2-502 (5) (1976), which requires certification of family-occupancy at risk of a $1,000 fine for each day in violation. Moreover, neither the statute nor the ordinance require that one of the two units be owner-occupied. *Cf.* Babylon, N.Y., Local Law No. 9 of 1979 (Nov. 20, 1979); Westport, Conn. Ordinance 32-1. *See also* Hare, *supra* note 11, at 13.

[276] Housing Act of 1949, 42 U.S.C. § 1441 (1970). This goal was reaffirmed in the National Neighborhood Policy Act of 1974, 42 U.S.C. § 1441a (1976).

[277] MANDELKER & WASHBURN, *supra* note 133, at 33.

[278] *See supra* note 8.

[279] *But see* Hare, *supra* note 11, at 5.

[280] *See supra* note 6 and accompanying text.

the rights of property owners. A court wishing to take such a course has a variety of tools at its disposal. It could recognize housing as a fundamental right under either the federal constitution or a state constitution. Or, it could find that the fourteenth amendment or a state equivalent requires that private landowners consider public health, safety and welfare when entering into restrictive covenants.

It appears unlikely that the current United States Supreme Court would expand the scope of constitutionally-protected fundamental rights to include a right to housing, nor is it probable that the present Court would impose a duty to consider the public interest upon private landowners who wish to use restrictive covenants to control development. Either holding would work a revolution in the way property is held, used, and controlled, with unpredictable economic, political, and social ramifications; it is highly doubtful that the Court would make such drastic inroads into the rights of property owners.

It is more probable that the Court will, if it wishes to invalidate restrictive covenants that conflict with ohana-type zoning statutes, take the more limited view that the covenant is either a contract that must yield to public policy on the specific facts of the case or, possibly, is unenforceable as an agreement that interferes with family relationships. These approaches would prevent private deed restrictions from interfering with legislative attempts to increase the supply of housing without venturing into the briar patch of creating a fundamental right to housing or imposing on property owners the burden of justifying restrictive covenants in terms of public welfare.

State courts are, of course, not necessarily bound to follow the lead of federal courts in these matters if adequate independent state law grounds exist for holding otherwise and if such holdings do themselves contravene the federal constitution. Yet, they are constrained by the same political, economic, and social forces that act upon the Court and may thus be similarly unwilling to make too drastic a departure from the status quo. This suggests that state courts, too, will invalidate private deed restrictions (if they do at all) on narrow grounds that will avoid the unforseeable effects of decreeing housing a fundamental right or imposing justification requirements on landowners.

To the extent that such court action is necessary to achieve the results envisioned for housing legislation, it represents a legislative failure to either recognize or address the issues such legislation creates when it conflicts with the widespread use of private deed restrictions to prevent the very situation the legislation seeks to encourage. Thus, the courts may be forced to decide whether such a failure represents a deliberate choice, in which case the court should uphold the restrictive covenants, or whether it is merely the result of carelessness or inadvertence, in which case the covenants should be invalidated.

It should not be necessary for the courts to make this decision. Legislation can provide both more housing and protection for the character of a neighbor-

hood; for example, by requiring that additional housing units be constructed in such a way as to maintain the appearance of a single family residence.[281] This would seem a far better solution than consigning the affordable housing versus restrictive covenants conflict to the uncertain fate that awaits it in the courts.

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[281] For example, the conversion of a garage into an ohana unit would not detract from the appearance of a spacious residential neighborhood. Likewise, the addition of an extra kitchen and bath to a four bedroom home creates two separate living quarters without substantial alteration.

Post Majority Educational Support: Is There an Equal Protection Violation?

I. INTRODUCTION

In family law, there is a presumption that natural parents who remain married to each other will act in the best interest of their children, but that upon divorce and custody determination, this perspective of responsibility will change.[1] Given this underlying presumption, statutory intervention by the state is routine in the ordering of the parties' lives subsequent to divorce.[2] Absent divorce, however, the state maintains a non-interventionist posture[3] unless there are exigent circumstances; i.e. child/spouse abuse or neglect.[4]

This presumption is reflected in the contrast between support statutes such as Hawaii Revised Statutes (hereinafter "H.R.S.") §§ 577-7 and 580-47.[5] Under H.R.S. § 577-7, a parent or guardian has "control over the conduct and education of his minor children" and must provide for their education needs only "to

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[1] "Whenever a father has custody of his child, the law presumes that he will decide in the child's best interests. But when he no longer has custody, the law will no longer presume that parents will do what they would ordinarily do by instinct." Esteb v. Esteb, 224 P. 264, 267 (Wash. Sup. Ct. 1926). *See also,* Kujawinski v. Kujawinski, 71 Ill. 2d 592, 376 N.E.2d 1382 (1978); Maitzen v. Maitzen, 24 Ill. App. 2d 32, 163 N.E.2d 840 (1960); Jackman v. Short, 165 Or. 626, 109 P.2d 860 (1941); Childers v. Childers, 89 Wash. 2d 592, 575 P.2d 201 (1978); Annot., 133 A.L.R. 902 (1941).

[2] Similar statutory intervention is routine in paternity actions as well. Pursuant to a judgment confirming the existence of a parent/child relationship, a court is authorized to consider the need and capacity of a child for higher education when determining the amount of child support to be paid. HAWAII REV. STAT. § 584-15(e) (1976 & Supp. 1983).

However, a court does not have statutory authority to consider a child's financial needs for higher education pursuant to a separation decree. HAWAII REV. STAT. § 580-74 (1976 & Supp. 1983).

[3] Courts are generally reluctant to interfere with ongoing marriages. *E.g.,* McQuire v. McQuire, 157 Neb. 226, 59 N.W.2d 336 (1953). Also, while statutes commonly authorize maintenance awards subsequent to divorce (*i.e.,* HAWAII REV. STAT. § 580-47) (1976 & Supp. 1983), they make no allowance for an order when families remain intact.

[4] *See* HAWAII REV. STAT. § 571-11 and HAWAII REV. STAT. Chapters 586 (Domestic Abuse Protective Orders) and 587 (Child Protective Act) (1976 & Supp. 1983).

[5] HAWAII REV. STAT. §§ 580-47, 577-7 (1976 & Supp. 1983).

the best of his ability."[6] The statute does not impose a legal obligation to send adult children to school.[7]

In contrast, H.R.S. § 580-47 specifically empowers a court to compel the parties to a divorce to provide for the post-secondary education of their *adult* children.[8] The statute effectively gives greater protection to children of divorced parents. In addition to support throughout their minority, these adult children are accorded a potential right of support by their parents for additional education. Children whose parents remain married do not have the same statutory entitlement. While H.R.S. § 580-47 empowers a court to require additional child support of divorced parents merely because of a change in marital status and custody, no similar statute authorizes the imposition of such a burden on parents who remain married and retain custody of their children.

This disparate statutory treatment of parents and children raises the issue of a potential equal protection violation.[9] Do statutes that empower the court to compel divorced parents to provide for the post-secondary education of their adult children, pursuant to a child support decree, violate constitutional equal protection guarantees?

This question poses a timely and important issue for a number of reasons. As the cost of education rises, the requirement of support grows in significance.[10] Also, the growing number of divorces today means that a greater percentage of

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[6] § 577-7 Parents' control and duties. (a) Parents or, in case they are both deceased, guardians, legally appointed, shall have control over the conduct and education of their minor children. They shall have the right at all times, to recover the physical custody of their children by habeas corpus. *All parents and guardians shall provide, to the best of their abilities, for the discipline, support and education of their children.*

(b) To the extent that the minor child has a beneficial interest in the income or principal of any trust which is applied for such purposes, parents or guardians shall not be required to pay the costs of registration, tuition, books, room and board, and other expenses incurred in connection with the attendance of a minor child at any private grammar, secondary, industrial arts or trade school, or at any college or university, whether or not the college or university is a private institution or is maintained by a state or any subdivision thereof. *The power of the family court under sections 580-47 and 580-74 to compel the parties to a divorce or separation to provide for the education of a minor or an adult child shall not be limited by any provision of this subsection.* (Emphasis added.)

[7] Eighteen is currently the age of majority. HAWAII REV. STAT. § 577-1 (1976 & Supp. 1983).

[8] § 580-47 Support orders; division of property. (a) Upon granting a divorce, the court may make such further orders as shall appear just and equitable . . . *Provision may be made for the support, maintenance and education of an adult or minor child and for the support, maintenance and education of an incompetent adult child whether or not the application is made before or after the child has attained the age of majority.* (Emphasis added.)

[9] U.S. CONST. amend. XIV, § 1.

[10] Average charges for a four-year university, including tuition, room and board, in 1981 for a full-time resident degree-credit undergraduate student: public, $2,755, private $6,735. STATISTICAL ABSTRACT OF THE UNITED STATES 1981, 102d Ed., BUREAU OF THE CENSUS at 162.

the population is potentially affected.[11] Finally, given that parties to a divorce must submit themselves to the court,[12] is it unfair to require more of them solely on that ground?

While courts generally conclude that post-majority support statutes are rationally related to a legitimate state objective, the decisions do not fully address the issue.[13] Like statutes which classify children on the basis of legitimacy/illegitimacy, post-majority statutes seem unfair to both children and parents. While the state may have a valid interest in children, the "children" affected by post-majority support statutes are legally adults. And while states may have legitimate objectives in ordering post-majority support, there seems to be less than bona fide rationality between those objectives and the means the state has chosen. Furthermore, even if the minimum rationality test is met, there is a question as to whether it is the appropriate standard of judicial review, given the nature of the rights at issue.

This comment will examine the classes of parents and children created by a post-majority support statute in Part II and possible justifications for them in Part III.[14] Part IV illustrates the application of these justifications in recent case law. Part V discusses the applicable equal protection analysis and recommends an amendment to H.R.S. § 577-7 or alternatively H.R.S. § 580-47 to provide true equal protection. Part VI concludes that while H.R.S. § 580-47 currently withstands an equal protection challenge, there are lingering questions given the rights involved, especially in light of the right of privacy provision in the Hawaii constitution.[15]

II. CLASSIFICATION CREATED BY POST-MAJORITY SUPPORT STATUTES

A. *Classes of Children - The Analogy to Illegitimacy*

The disparate statutory treatment of children whose parents maintain custody

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[11] "Each year over one million American marriages end in divorce, disrupting the lives of more than three million men, women, and children. In California alone, the Superior Courts process over 130,000 divorce cases a year, and there is no indication that the divorce rate will decline. In fact, more than 40% of American marriages contracted in the 1980's are expected to end in divorce, and by the 1990's only 56% of the children in the United States will spend their entire childhood with both natural parents." Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1183 (1981) (footnotes omitted).

[12] HAWAII REV. STAT. § 580-1 (1976 & Supp. 1983).

[13] *See e.g.*, Kujawinski v. Kujawinski, 71 Ill. 2d 592, 376 N.E.2d 1382 (1978); Childers v. Childers, 89 Wash. 2d 592, 575 P.2d 201 (1978).

[14] This paper will not deal with the adult child deemed incompetent as the state's interest here could well be different.

[15] HAWAII CONST. art. I, § 6.

and those who do not gives rise to the question of an equal protection violation. This statutory classification of children in reference to their parents is analogous to statutory disparities regarding the legal rights of illegitimate children.[16]

In both instances, the law creates two classes of children by denying legal rights to one class solely because of action taken by their parents. In cases where statutes have distinguished between the legitimate versus illegitimate status of children in determining the basis for enforcing a right, courts have scrutinized the state's objective and the rationality of the relationship between the law and its stated purpose.[17] The courts' reasoning in these cases poses a persuasive argument against the different protection given children of married parents as opposed to children whose parents are divorced.

In *Levy v. Louisiana*,[18] the challenged statute prohibited illegitimate children from bringing a wrongful death action for a parent's death.[19] The Court held that the legislative classification violated equal protection as it was not rationally related to a valid state objective.[20] A wrongful death statute is intended to allow a decedent's dependents to bring a tort claim and be compensated for their loss. The legitimate/illegitimate classification was not rationally related to the statute's intent because a wrongful death action is predicated on family or biological relationships. "These children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would."[21]

Weber v. Aetna Casualty & Surety Co.[22] is similar to *Levy*, in that a statute denied recovery to "unacknowledged" illegitimate children who brought a workers' compensation action for the death of their father.[23] The Court held

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[16] *See, e.g.*, Trimble v. Gordon, 430 U.S. 763 (1977); Jimenez v. Weinberger, 417 U.S. 628 (1974); Gomes v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Levy v. Louisiana, 391 U.S. 68 (1968).

[17] *E.g.*, Trimble v. Gordon, 430 U.S. 762 (1977); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Levy v. Louisiana, 391 U.S. 68 (1968).

[18] Levy v. Louisiana, 391 U.S. 68 (1968). On the same day the Court decided *Levy*, Glona v. American Guarantee & Liability Insurance Co., 391 U.S. 73 (1968) was also decided. The Court in *Glona* struck down a law which prohibited a mother from bringing a wrongful death claim for her illegitimate son.

[19] *Id.* at 69-70.

[20] *Id.* at 72.

[21] *Id.*

[22] Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972).

[23] The Louisiana statutes distinguished between illegitimate children who have been acknowledged by their fathers and illegitimate children who have not (LA. CIV. CODE, art. 202 (1967)). According to the Louisiana statute, acknowledgment consisted of a notarized, witnessed declaration by either or both of the parents, provided they were capable of contracting marriage at the time of conception. Alternatively, if the parents married each other, then acknowledgment may be made. Acknowledged illegitimate children and legitimate children were entitled to recover

that an "unacknowledged illegitimate" classification bears no significant relationship to the purposes of workers' compensation recovery.[24] Where the statute's purpose is to compensate dependents for the loss of support, the legitimate/illegitimate distinction is not rationally related to the achievement of that purpose.[25]

In *Trimble v. Gordon*,[26] an illegitimate, though adjudicated legal, daughter[27] was prohibited from receiving a portion of her father's estate under state intestacy laws.[28] The Court struck down the statute as too broad.[29] The statute included illegitimate children for whom inheritance rights are recognizable without a disruption of an orderly property settlement.[30] As such, it was held to be unconstitutional.[31]

Applying an equal protection analysis to illegitimacy cases, the Court reasoned that while only *minimum* rationality is required for economic and social legislation, "statutory classifications [which] approach sensitive and fundamental personal rights" require stricter scrutiny.[32] The Court in illegitimacy cases has

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worker's compensation on a statutorily equal basis. Unacknowledged illegitimate children however, were only allowed recovery if all other dependents had not already exhausted the maximum amount of benefits. *Weber*, 406 U.S. at 166-68, nn. 2-3.

[24] *Id.* at 175.

[25] *Id.* at 169.

[26] Trimble v. Gordon, 430 U.S. 762 (1977).

[27] There was a paternity hearing in which the court found Mr. Gordon to be plaintiff's legal father. Subsequent to the paternity determination, Mr. Gordon acknowledged and supported his daughter. *Id.* at 764.

[28] ILL. REV. STAT. c. 3, § 12 (1973) was recodified but not materially changed January 1, 1976 as ILL. REV. STAT. c. 3, § 2-2 (1976). The Court's opinion refers to section 12, however. *Id.* at 763, n. 1.

[29] *Id.* at 772-73. *Contra* Labine v. Vincent, 401 U.S. 532 (1971), in which the Court upheld a statute prohibiting illegitimates from taking under intestate succession. The Court held that states had broad discretion regarding the accurate and efficient disposition of property.

[30] The state in *Trimble* argued that to allow illegitimate children to take under laws of intestate succession would preclude orderly property disposition due to evidentiary problems and false claims. The earlier paternity hearing in this case resolved any possible evidentiary problems but the statute still barred the child from an intestate inheritance.

[31] *Trimble*, 430 U.S. at 771.

[32] *Id.* at 767. However, see Mathews v. Lucas where the Supreme Court rejected the applicability of strict scrutiny in illegitimacy cases, but reaffirmed that more than hypothetical rationality is required. Mathews v. Lucas, 427 U.S. 495, 515 (1976). (Court sustained provisions in the Social Security Act which required illegitimate but not legitimate children to prove dependency on the decedent. Court reasoned that there was no sweeping discrimination against illegitimate children. Rather, the Act allowed for illegitimate children to collect benefits on an alternate basis).

Depending on the nature of the classification, the Supreme Court will use one of three standards of review in deciding whether or not a statute is constitutional. Under the first type (low level equal protection analysis), a statute will be upheld if it is *conceivably* related to a legitimate state interest. *E.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Railway Express

not readily accepted the states' justifications for the statutes, nor has it been willing to hypothesize possibly valid reasons.[33] "Hard questions cannot be avoided by a hypothetical reshuffling of the facts."[34] The state's often asserted justifications of general moral welfare, deterrence of illegitimacy, and the potential of fraudulent claims have not persuaded the Court.[35]

The shift in the Court's analysis of the consideration of alternatives is also significant. In *Labine v. Vincent*,[36] an earlier case, the Court found the illegitimate child's intestate succession claim flawed because the parent had alternatives which would have enabled the child to receive property.[37] However, in the *Trimble* decision, the Court held that to review the decedent's alternatives would simply beg the question.[38] Had the decedent used any of the alternatives, the issue of possible discrimination against illegitimates in an intestacy context would still have come up.[39] Instead, the Court carefully examined the state's possible alternatives and held that the statute could have been more carefully drawn.[40]

These cases (*Levy, Weber, Trimble*) arose from claims based on state compensation schemes.[41] Therefore, arguably, a state-created status justification[42] is no

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Agency v. New York, 336 U.S. 106 (1949). Under the second standard of review, the Court will not defer to any possible relationship between a classification and a state objective, but will require instead that the state show a compelling interest which justifies interference with a personal liberty. *E.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969); Griswold v. Connecticut, 381 U.S. 479 (1965).

There is also a third, intermediate standard of review which the Court has applied to classifications based on gender or illegitimacy. *E.g.*, Craig v. Boren, 429 U.S. 190 (1976).

[33] *Cf.* Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

[34] *Trimble*, 430 U.S. 762, 774 (1977).

[35] As to the state's justification of protection of general moral welfare, the Supreme Court held that denial of recovery to the claimants "bears only the most attenuated relationship to the asserted goal." *Id.* at 768. In answer to the state's deterrence objective, the Court held that there was no evidence that precluding recovery by illegitimate children would result in deterring adult behavior. *Weber*, 406 U.S. at 173. And even assuming there was deterrence value, deterrence alone would not justify discrimination. Regarding the state's objective of the prevention of fraudulent claims, the Court held that fraudulent claims are really an evidentiary problem. In either case (where there is an illegitimate or legitimate claimant) the genuineness of the claim would have to be decided. *Weber*, 406 U.S. at 175.

[36] Labine v. Vincent, 401 U.S. 532 (1971).

[37] *Id.* at 539.

[38] *Trimble*, 430 U.S. at 774.

[39] *Id.*

[40] *Id.* at 772-73.

[41] In *Levy* and *Glona*, the parties' claim was brought in a wrongful death action. In *Weber*, the claim was for worker's compensation benefits. Both *Labine* and *Trimble* concerned the right of illegitimate children to inherit property under state intestacy laws. Basically, the causes of action in these cases stemmed from state-created schemes to allow compensation for loss suffered by dependents.

longer acceptable.[43] Rather, the cases would seem to more clearly support a two-fold inquiry: "What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?"[44]

It is also noteworthy that in *Trimble* a step-by-step remedy justification[45] asserted by the state did not persuade the Court.[46] While the Court acknowledged that the statute may have been intended to mitigate the effects of the common law, which barred illegitimates from inheriting, the law's distinction between inheriting from mothers but not fathers was more fully explained by other, unacceptable, reasons.[47]

There is also considerable dicta in illegitimacy cases which speaks to the harshness of statutes which classify children by the actions of their parents:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as unjust—way of deterring the parent. (footnote omitted)[48]

It is thus reasonable to conclude that children cannot be treated differently by the law when the difference is solely the result of a societal value judgment of their parents' actions. For largely the same reasons that classification by legiti-

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[43] As a possible justification for state intervention, it has been suggested that a state-created status may be state controlled. *See infra* text accompanying notes 63-64.

[44] Through intestacy laws, states are empowered to create what is in effect a status which the law recognizes, i.e., the status of heir. However, this justification did not uphold the intestacy statute in *Trimble*. And while not involving a state-created status, the claims for compensation in *Levy, Glona,* and *Weber* arose in the context of a state-created scheme to allow families compensation for the decedent's loss. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Glona v. American Guarantee & Liability Ins. Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968).

[45] *Weber,* 406 U.S. at 173.

[46] The state probate act allowed an illegitimate child to take under intestate succession only from their mothers, not from their fathers. The state's step-by-step argument then, was that the statute at issue was an effort to relieve the harshness of the common law which prevented illegitimate children from taking under intestate succession at all. *See, e.g.,* Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

[47] *Trimble,* 430 U.S. at 76.

[48] " . . . we find in sec. 12 a primary purpose to provide a system of intestate succession more just to illegitimate children than the prior law, a purpose tempered by a secondary interest in protecting spurious claims of paternity." *Id.*

[49] *Weber,* 406 U.S. at 175.

macy/illegitimacy is offensive,[49] the classification at issue seems unfair: it is unjust either to award benefit or possibly to penalize children for the married/divorced status of their parents. Children of intact families, however, do not bear the brunt of society's disapproval of the conduct of their parents, nor could it be said that they suffer from any other social stigma.[50]

From the perspective of children of intact families, the value of an analogy with illegitimacy cases is that the Court demands equal protection justification of a classification based on highly personal decisions. Given these cases, the Court seems unwilling to accept a low-level rationality standard when there is a potential threat to civil or fundamental rights.[51]

If a court were to apply a similar level of review to post-majority support statutes, the justifications proffered by the states would not be readily accepted. For example, the state's commitment to the value of education is one of its justifications for the classes of children created by a post-majority support statute.[52] Arguably, however, there is no rational relationship between this objective and a classification of *children* resulting from their *parents'* marital status.[53] A classification of children *rationally* related to such a state objective would necessarily focus on the value of post-secondary education to them. To sustain a rational relationship here, a court would have to find that children of married parents have less need of higher education; otherwise, one would expect there to be a similar support statute for children of intact families. If a statute requiring educational support of adult children reflects a social policy valuing higher education, then the statute should apply regardless of the marital status of the

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[49] It is unjust to penalize innocent children for the action of their parents. *Id.* at 175-76.

[50] In the case of child support statutes, the children who are arguably denied equal protection are those who in illegitimacy cases bear the socially-favored status.

[51] Lalli v. Lalli, 439 U.S. 259 (1978) (statute prohibiting illegitimate son from inheriting from his father who died intestate upheld) and Parham v. Hughes, 441 U.S. 347 (1979) (statute prohibiting father from collecting under a wrongful death statute for death of his illegitimate son upheld) may be seen as an apparent retreat by the U.S. Supreme Court from demanding equal protection review of statutes classifying on a legitimate/illegitimate basis. But these cases are not really a departure. Because both cases concerned fathers, the state's concerns regarding fraudulent paternity claims were credible. Also these statutes were justifiable in that mothers and fathers are not similarly situated where there is a question of biological relationship.

In addition to illegitimacy cases, *see, e.g.,* Eisenstadt v. Baird, 405 U.S. 438 (1972) (Court struck down statute which prohibited distribution of contraceptives to unmarried people); Griswold v. Connecticut, 381 U.S. 479 (1965) (statute which limited the use of contraceptives by married people invalidated).

[52] Decisions in recent cases on the issue of the constitutionality of post-majority support statutes include dicta of the Court's perception that such statutes reflect society's commitment to the value of education, in addition to providing support for post-secondary education. *See infra* text accompanying note 89.

[53] *See, e.g.,* Hale v. Hale, 132 P.2d 67 (Cal. Dist. Ct. App. 1942); Jackman v. Short, 165 Or. 626, 109 P.2d 860 (1941); Childers v. Childers, 89 Wash. 2d 592, 575 P.2d 201 (1978).

parents.

If, rather than reflecting social values, the statute is a legislative effort to mitigate the detrimental effects of a divorce on children, then a question arises as to the rationality of this mitigation effort.[54] To find a relationship between such a means and such an objective requires the disturbing conclusion that the harmful effects of parental divorce can be significantly alleviated by a few years of higher education. In essence, the legislature has decided that the disruption of a family can be compensated for by giving a child additional educational opportunities.

Alternatively, it could be argued that the opportunity for a post-secondary education results from an implicit family contract which is given legal effect by the statute.[55] This may explain the state's intervention on the behalf of the children of divorced parents, but it does not explain the state's failure to enforce a similar implied expectation interest for children of intact families.

B. Classes of Parents

In addition to two classes of children, H.R.S. § 580-47 effectively creates two classes of parents. Under the statutes the classes of parents have decidedly different rights and responsibilities.[56] Parents who remain married retain a protected right to decide their children's educational upbringing,[57] and, as set forth in H.R.S. § 577-7, are not legally responsible for their post-majority support. However, subsequent to a divorce, non-custodial parents are denied the right to make free decisions about post-secondary education for their children and may be required to support them, even though they are legally deemed adults.[58]

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[54] Subsequent to a custody decision, the state would probably not interfere with the custodial parent and child, absent abuse or neglect. So it seems the state's purpose of mitigation of harm was intended to be effectuated solely by the non-custodial parent. Query whether the sole income-producing parent also given custody would be ordered to provide post-majority support.

[55] Possibly, HAWAII REV. STAT. § 580-47 (1976 & Supp. 1983) is the statutory representation of an implied contract. In a family where the parents are financially able and the child expresses an interest in post-secondary education, the child arguably has a reasonable expectation of support from his parents. In ordering support under § 580-47, a court would be effectively enforcing this reasonable expectation interest.

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

[57] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

[58] An interesting question arises in a situation where Amish parents divorce despite religious strictures and higher education clearly is contrary to the parents' wishes. Would a court hold that mitigation of harm requires a support order for college? The court might decide the state's interest is insufficient to override a first amendment right of freedom of religion.

III. Possible Justifications For State Intervention in Families[59]

Family life by its nature would seem to warrant privacy. There is, therefore, an initial question as to why the state is involved at all. At common law, the justification for the state's authority to intervene in family matters was found in the state's police power and the doctrine of *parens patriae*.[60] Against the privacy interests of the family "stands the interest of society to protect the welfare of children, and the state's assertion of authority to that end."[61] The interest of the state is "no mere corporate concern of official authority. It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens."[62]

Another proffered justification for the state's intervention in family matters is the state's interest in all cases where it creates a status.[63] That is, where the state creates a status which has no legal existence aside from that which the state through its statutes recognizes, the state may place burdens and duties as well as confer privileges and protections on it. Thus, to the extent that parties are willing to partake of protections afforded their marital status, they also consent to the state's involvement should the status be terminated.[64] Similar reasoning may be seen in other benefits conferred by the state; i.e., the statutory creation of a corporation upon which the state confers rights as well as responsibilities, or statutes regarding intestate succession and the state's prerogative to choose which relationship it will recognize for the disposition of property.[65]

Assuming, arguendo, the state's justifications for intervention in families delineated above are asserted in good faith and setting aside possible case law and

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[59] The justifications enumerated here are of a general nature, not exclusively possible reasons for states' involvement in families in post-majority support statutes.

[60] The state's interest under the police power is to prevent people from harming others, whereas *parens patriae* allows the state to intervene to protect the welfare of those deemed incompetent to protect their own interests. Note, *The Constitution and the Family*, 93 Harv. L. Rev. 1156, 1198 (1980) (hereinafter cited as *The Constitution and the Family*). However, this doctrinal distinction is not significant for the purposes of this Comment. *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11 (1905) (state may compel vaccination through its police power); De Manneville v. De Manneville, 32 Eng. Rep. 762 (Ch. 1804) (husband prohibited from taking his infant child out of the realm); Eyre v. Shaftsbury, 24 Eng. Rep. 659 (Ch. 1722) (the Crown of England is the supreme guardian of all infants).

[61] Prince v. Massachusetts, 321 U.S. 158, 165 (1944).

[62] *Id.*

[63] *See supra* note 3.

[64] *See, e.g.*, elective share statutes that preclude the disinheritance of spouses. Hawaii Rev. Stat. §§ 560:2-201, -301 (1976 & Supp. 1983).

[65] Uniform Probate Code, Hawaii Rev. Stat. Ch. 560 art. II (1978). Arguably, intestacy laws merely reflect a state's choices regarding which relationship it will deem of sufficient intimacy to warrant property inheritance absent a will rather than creating a status *per se*.

doctrinal limitations,[66] there is a real question as to the "rationality" of the relationship between a post-majority support statute and the asserted state purposes of mitigation of harm to children post-divorce and effectuating society's commitment to the value of higher education.[67]

In a controversial commentary, *Beyond the Best Interests of the Child* (hereinafter "*Beyond the Best Interests*"),[68] it is argued that the law is an inadequate tool to order the vagaries of interpersonal relationships.[69]

> While the law may claim to establish relationships, it can in fact do little more than give them recognition and provide an opportunity for them to develop. The law, so far as specific individual relationships are concerned, is a relatively crude instrument. It may be able to destroy human relationships; but it does not have the power to compel them to develop.[70]

The book criticizes the legal system for trying to do to personal relationships what relationships by their nature defy: to lend themselves to orderliness, predictability and control. Thus it is only possible to look at the present and find who may likely be a child's psychological parent and to conclude from research that periods of separation and uncertainty are emotionally detrimental to a child.[71] Beyond these perceptions, the book asserts that there is no substantive basis for the law's assumptions and predictions.[72]

The thesis of *Beyond the Best Interests* challenges the validity of the presumption regarding custodial/non-custodial parents which underlies H.R.S. § 580-47 and the case law on this issue. If *Beyond the Best Interests* is correct in concluding that guessing at the future is futile and that the influence of environment on child development is a mystery, legal presumptions regarding non-custodial parents, their child-rearing decisions, and the effect upon the children are un-

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[66] *See infra* text accompanying notes 124-44.

[67] These were the justifications offered by the state and accepted by the Court in two recent cases. *See infra* text accompanying notes 97-107.

[68] J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 49 (2d ed. 1979) (hereinafter cited as BEYOND THE BEST INTERESTS).

[69] *Id.* at 49.

[70] *Id.* at 49-50.

[71] In an effort to qualify their predictive ability the authors state that the person best suited to the role of a psychological parent is the person who presently has a primary relationship with a child. Also, the younger the child, the longer the period of uncertainty (of being without a stable family) and the more detrimental to a child. No one, however, can predict how the development of a child and his family will be reflected in a child's personality. *Id.* at 50.

[72] BEYOND THE BEST INTERESTS does not advocate a policy of no state intervention in families. Rather, the authors recommend a more modest posture for the law of seeking the least detrimental alternative based on short-term predictions, as opposed to trying to guess the future. *Id.* at 51-52.

founded and pretentious.[73] Furthermore, the law's trust in custodial parents to make fair decisions about a child's post-secondary education, is seemingly the result of nothing more than wishful thinking.[74] Arguably then, legislatures have no actual *rational* basis for presuming that marital status is dispositive of the interest and support parents will afford their child.

Not only may the underlying custodial/non-custodial presumption be unfounded, but the harm to be remedied may be illusory as well. The *Beyond the Best Interests* argument suggests that there is no certainty that divorce will result in harm to children. Furthermore, even if divorce and a custody determination may result in psychological harm to a child in one instance, such an occurrence does not forecast harm in every case.

Even if post-divorce harm to children was predictable, following the *Beyond the Best Interests* analysis, such harm would not be mitigated by educational support. That is, the availability of a psychological parent and continuity are what is critical to child development,[75] not the availability of higher education. Based on their research, the authors maintain that if divorce disturbs children, it is due to the disruption of what is familiar and stable in their lives.[76] Post-majority support, then, is not at all congruent with the ends sought as it is not necessarily related to maintaining a stable environment.

Furthermore, based on the disruption thesis of *Beyond the Best Interests*, if support orders are not obeyed (as they often are not), then the state's effort at mitigation of harm could possibly be more damaging than beneficial.[77] For the

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[73] *Id.* at 49-50.

[74] *See infra* text accompanying notes 95-96. A minimum rationality standard will sustain even legislative wishful thinking because all the standard requires is some plausible relationship.

[75] BEYOND THE BEST INTERESTS, *supra* note 68, at 51. A psychological parent is an adult with whom a child has an affectionate bond.

> Whether any adult becomes the psychological parent of a child is based thus on day-to-day interaction, companionship, and shared experiences. The role can be fulfilled either by a biological parent or by any other caring adult—but never by an absent, inactive adult, whatever his biological or legal relationship to the child may be.

Id. at 19. *See also supra* note 71.

[76] *Id.* at 37.

[77] The state might argue that statistics which show the high number of single parents who receive welfare assistance justify statutory requirements for financial support. Of the families who received welfare assistance in 1978, 84.9 percent qualified on the basis that one parent was absent from the home. POCKET DATA BOOK USA 1979, U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS 215. *See also* Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 U.C.L.A. L. REV. 1180, 1255 (1981). Because a high number of welfare recipients are post-divorce families, the state could conceivably conclude that court orders are necessary to insure that parents will not ignore their financial responsibilities. This argument is not persuasive, however, in light of statistics on non-compliance with court-ordered decrees. *See* Weitzman, *supra*, at 1256. Subsequent to court orders, many fathers pay support irregularly and are in arrears. Between one-quarter and one-third do not pay

state to lead parties to expect what it has reason to believe it cannot deliver (that a court order requiring post-majority support will actually result in support for a post-secondary education) would seemingly result in the abrupt change the book cautions against.[78]

This is not to argue that post-majority support should not be sought, but given the limited predictability of the future and unanswered questions about child development, the state's presumption of preserving expectations is speculative. What might be good now, will not necessarily be so later. "Thus, the law will not act in the child's interest but merely add to the uncertainties if it tries to do the impossible — guess the future and impose on the custodian conditions of the child's care."[79]

Alternatively, if the state's purpose in H.R.S. § 580-47 is to reflect a social commitment to the value of higher education, then the state should require all parents to provide equal levels of educational opportunity. The fact that a parent no longer has custody of his child does not logically lead to the conclusion that he should therefore be required to provide whatever society generally believes to be of value where no such requirement is imposed on parents generally. Logically, states should require all parents, regardless of custody, to support their adult children's higher education and accord to all children the legal protection to effectuate such a right.

Based on *Beyond the Best Interests*, the state's selective interest in certain children seems to be without a real basis. The disparate treatment of parents affected by post-majority support statutes also lacks actual support. This arguably groundless, uneven treatment is both confusing and unsatisfying. But minimum rationality does not require more than legislative speculation. If minimum rationality is the standard of review, therefore, a post-majority support statute will not be struck down. However, given the nature of the rights infringed upon, minimum rationality seems to be an inappropriate standard to apply.

IV. STATE OF THE LAW ON POST-MAJORITY SUPPORT FOR EDUCATION

Recent case law is divided on the question of whether a divorced parent may be required to support an adult child's post-secondary education.[80] In those

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at all. Therefore, even where a court orders what it is statutorily empowered to do, the law cannot effectuate what is contrary to the parties' intent.

[78] "In the long run, the child's chances will be better if the law is less pretentious and ambitious in its aim, that is, if it confines itself to the avoidance of harm and acts in accord with a few, even if modest, generally applicable short-term predictions." BEYOND THE BEST INTERESTS, *supra* note 68, at 52.

[79] *Id.* at 51-52.

[80] Post-majority support for education can be required. *See, e.g.*, Kujawinski v. Kujawinski, 71 Ill. 2d 592, 376 N.E.2d 1382 (1978); Maitzen v. Maitzen, 24 Ill. App. 2d 32, 163 N.E.2d 840

cases where an equal protection challenge to post-majority support has been brought, the minimum rationality standard has been applied to uphold the statute.[81] There is even case law holding that a parent may be required to continue support after a child's graduation from college.[82] A review of recent case law, particularly where an equal protection challenge has been unsuccessful, illustrates the interests of the individual, the justifications proffered by the state and the low level of scrutiny accorded by the courts.

Cases holding that there is no requirement of post-majority support subsequent to a divorce have been decided primarily on the basis of the common law doctrine of necessaries.[83] At common law, parents were held to a duty of support only until their children reached the age of majority.[84] Therefore, the courts reasoned, absent an agreement to the contrary, there is no parental obligation for post-majority support. The courts readily acknowledged that a moral obligation might well exist on the part of the parents, but not one that is legally enforceable.[85]

Cases requiring parental support of an adult child have been decided largely on a particular configuration of facts and circumstances.[86] The three factors courts have looked to in these cases are: 1) whether the parent being required to support the child can financially afford the expense, 2) whether the child will benefit from a college education, and 3) whether, but for the divorce, it was the

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(1960); Childers v. Childers, 89 Wash. 2d 592, 575 P.2d 201 (1978).

Obligation to support terminates at age of majority. *See, e.g.,* Genoe v. Genoe, 373 So.2d 940 (Fla. Dist. Ct. App. 1979); Haag v. Haag, 240 Ind. 291, 163 N.E.2d 243 (1959); Halstead v. Halstead, 239 N.Y.S. 422 (N.Y. App. Div. 1930); Grishaver v. Grishaver, 225 N.Y.S.2d 924 (N.Y. Sup. Ct. 1961).

[81] *E.g.,* Kujawinski v. Kujawinski, 71 Ill. 2d 592, 376 N.E.2d 1382 (1978); Winkler v. Winkler, 207 N.Y.S.2d 218 (N.Y. Sup. Ct. 1960); Jackman v. Short, 165 Or. 626, 109 P.2d 860 (1941); Childers v. Childers, 89 Wash. 2d 592, 575 P.2d 201 (1978).

[82] Mooty v. Mooty, 179 So. 155 (Fla. Sup. Ct. 1938) (woman out of college has desires for surroundings which will put her on an equal footing with others; therefore there should be no change in amount of support until she can become self-supporting).

[83] The doctrine of necessaries requires that parents provide what is necessary for their child's existence as determined by the child's social position, customs, and the parents' financial capability as well as other factors. 42 AM. JUR. 2d *Infants* §§ 67-68 (1976).

See, e.g., Genoe v. Genoe, 373 So.2d 940 (Fla. Dist. Ct. App. 1979); Haag v. Haag, 240 Ind. 291, 163 N.E.2d 243 (1959); Young v. Young, 413 S.W.2d 887 (Ky. 1967); Halstead v. Halstead, 239 N.Y.S. 422 (N.Y. App. Div. 1930); Wagner v. Wagner, 273 N.Y.S.2d (N.Y. Sup. Ct. 1966); Grishaver v. Grishaver, 225 N.Y.S.2d 924 (N.Y. Sup. Ct. 1961).

[84] *See, e.g.,* Mills v. Wyman, 20 Mass. (3 Pick.) 207 (1825).

[85] *See, e.g.,* Haag v. Haag, 240 Ind. 291, 163 N.E.2d 243 (1959); Young v. Young, 413 S.W.2d 887 (Ky. 1967); Wagner v. Wagner, 273 N.Y.S.2d (N.Y. Sup. Ct. 1966).

[86] *See, e.g.,* Hale v. Hale, 132 P.2d 67 (Cal. Dist. Ct. App. 1942); Winkler v. Winkler, 207 N.Y.S.2d 940 (N.Y. Sup. Ct. 1960); Kronenberg v. Kronenberg, 203 N.Y.S.2d 218 (N.Y. Sup. Ct. 1960).

implicit or explicit expectation of the parties that the child would go to college.[87] Where courts do not feel bound by a literal interpretation of the doctrine of necessaries and find all three factors in the affirmative, support has invariably been required.[88] Occasionally, courts have bolstered this facts-and-circumstances analysis with policy arguments concerning the importance of a college education and the state's commitment to the education of its residents as evidenced by the number of public institutions available.[89]

Not many cases, however, have been argued on the issue of whether a post-majority support requirement violated the equal protection clause.[90] Conceivably, an equal protection violation argument could be brought for both the parent ordered to provide support and the adult children of intact families whose parents refuse financial support for their higher education.[91] A violation of parents' equal protection rights was asserted in two cases,[92] but there was no mention of a possible violation of children's rights.[93]

The equal protection argument has not been successful thus far in striking

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[87] *See, e.g.,* Kujawinski v. Kujawinski, 71 Ill. 2d 592, 376 N.E.2d 1382 (1978); Winkler v. Winkler, 207 N.Y.S.2d 940 (N.Y. Sup. Ct. 1960); Kronenberg v. Kronenberg, 203 N.Y.S.2d 218 (N.Y. Sup. Ct. 1960); Jackman v. Short, 165 Or. 626, 109 P.2d 860 (1941); Childers v. Childers, 89 Wash. 2d 592, 575 P.2d 201 (1978).

[88] *Id.*

[89] *See, e.g.,* Hale v. Hale, 132 P.2d 67 (Cal. Dist. Ct. App. 1942); Maitzen v. Maitzen, 24 Ill. App. 2d 32, 163 N.E.2d 840 (1960); Jackman v. Short, 165 Or. 626, 109 P.2d 860 (1941); Annot., 133 A.L.R. 902 (1941).

[90] It is only recently that the Constitution was thought to have any impact on family law doctrine. "The recognition of the Constitutional stature of these family rights is most often traced to Meyer v. Nebraska, and Pierce v. Society of Sisters." Note, *The Constitution and the Family,* 93 HARV. L. REV. 1156, 1160 (1980).

Equal protection challenges to divorce laws in general do not provide a helpful analogy to the issue of the requirement of post-majority support because the challenged statutes did not classify children as well as parents. The most prominent cases in the area of equal protection challenges to divorce laws are Boddie v. Connecticut, 401 U.S. 371 (1971) (filing fee for a divorce action was held to be an unconstitutional violation of the equal protection clause); Sosna v. Iowa, 419 U.S. 393 (1975) (state residency requirement for filing a divorce complaint upheld); Orr v. Orr, 440 U.S. 268 (1979) (statute requiring alimony only of the ex-husband struck down as a violation of equal protection).

[91] A possible explanation for the lack of litigation by adult children of intact families may be that the age of majority was lowered only recently. In Hawaii, the age of majority was lowered from 20 to 18 in a 1972 amendment to HAWAII REV. STAT. § 577-1, 1972 Hawaii Sess. Laws, Act 2 § 1.

[92] Kujawinski v. Kujawinski, 71 Ill. 2d 592, 376 N.E.2d 1382 (1978); Childers v. Childers, 89 Wash. 2d 592, 575 P.2d 201 (1978).

[93] The absence of an equal protection violation claim by the children in these cases is understandable however. Because their parents were divorcing, the children in both *Childers* and *Kujawinski* were statutorily given the right to post-majority support and would not have had reason to bring such a claim.

down the requirement of post-majority support.[94] Due to the absence of a suspect class or a fundamental right,[95] the courts have held that a statutory classification of this nature must meet only a rational relationship standard.[96]

In *Kujawinski v. Kujawinski*,[97] an ex-husband sought a declaratory judgment claiming that the Illinois Marriage and Dissolution Act[98] was unconstitutional because it invidiously discriminated against divorced parents on the basis of their status.[99] The court upheld the constitutionality of the statute, finding that "the legislature may differentiate between persons similarly situated as long as the classification bears a reasonable relationship to a legitimate legislative purpose."[100] The court found that the purpose of the statute was to mitigate against the potential harm to spouses and children caused by a divorce.[101] Noting that divorce by its nature has a major personal and economic effect on the parties involved, the court stated that non-custodial parents cannot be relied upon to voluntarily support their children because they often lose concern for

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[94] Childers v. Childers, 89 Wash. 2d 592, 575 P.2d 201 (1978); Kujawinski v. Kujawinski, 71 Ill. 2d 563, 376 N.E.2d 1382 (1978).

[95] For discussion regarding suspect class and fundamental rights, *see infra* text accompanying notes 140-74.

[96] Under a rational relationship standard of review, the Court will ask only whether it is conceivable that the classification bears a rational relationship to an end of government which is not prohibited by the Constitution. "So long as it is arguable that the other branch of government had such a basis for creating the classification the Court will not invalidate the law." J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW at 524 (1978) (hereinafter cited as NOWAK). *See also* U.S. Railroad Retirement Bd. v. Fritz, 449 U.S. 166 (1980); Daniel v. Family Security Life Insurance Co., 336 U.S. 220 (1949); Railway Express Agency v. New York, 336 U.S. 106 (1949); Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

Although the court in *Childers* held, "We have no trouble asserting that a rational relationship exists between the legislative scheme before us and the *compelling* state interest in seeing that children are properly provided for within the boundaries of the needs of the children and what parents can afford," the court was really using a rational relationship test. Despite the mislabeling of the nature of the state's interest, the court clearly speculates on state objectives of the well-being of society and children without requiring more. [Emphasis added.] *Childers*, 89 Wash. 2d at 600, 575 P.2d at 209.

[97] Kujawinski v. Kujawinski, 71 Ill. 2d 563, 376 N.E.2d 1382 (1978).

[98] The relevant portion of the Illinois statute provides: "The Court also may make such provision for the education and maintenance of the child or children; whether of minor or majority age, out of the property of either or both of its parents as equity may require, whether application is made therefor before or after such child has, or children have, attained majority age." ILL. REV. STAT. 1977, ch. 40, § 513. *Id.* at 1389. The statute also list other factors for the court to consider, and is similar to HAWAII REV. STAT. § 580-47 (1976 & Supp. 1983).

[99] *Id.* at 1388.

[100] *Id.* at 1389. Although the age of majority in 1978 in Illinois was 18, the court's reasoning did not address the distinction between a mitigation of harm to children as opposed to adults. To this extent then, it would seem the court in *Kujawinski* did not fully consider that the "children" affected were legally adults under ILL. ANN. STAT. ch. 110-112, § 11-1 (Smith-Hurd 1978).

[101] *Kujawinski*, 71 Ill. 2d at 600-601, 376 N.E.2d at 1389-90.

their children's welfare and/or harbor an animosity toward the custodial parent which is reflected in a reluctance to provide any type of financial support.[102]

In *Childers v. Childers*,[103] an ex-husband appealed a divorce decree requiring him to support the college education of his three sons as a violation of equal protection.[104] The court of appeals reversed the trial court, holding that there was no reasonable ground for distinguishing between married and divorced parents.[105] Relying on the custodial/non-custodial parent presumption,[106] the state supreme court reversed the court of appeals, holding (as in *Kujawinski*) that equal protection only requires a rational relationship between a statute and a legitimate state interest.[107] The court in *Childers* found the state interest to be the minimizing of the disadvantages created by a divorce and recognized a rational relationship between this interest and a post-majority support requirement.[108]

Under a minimum rationality test, the Supreme Court has held the equal protection clause requires only that there be some conceivable purpose to which the statute may be related.[109] Implicit in a rational basis test is the notion that the nature of the classification under review is such that it is up to the legislature to decide what means are chosen to effectuate the state's objective.[110] In its deference to the legislature, the court will not even inquire as to whether the stated purpose is the actual one[111] or require that the statute be the best means available to effectuate the state's purpose.[112] In essence, under a minimum rational relationship test, the court will only overturn the questioned statute if it is completely irrational.[113] Under this standard, it is almost a foregone conclu-

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[102] *Id.*

[103] Childers v. Childers, 89 Wash. 2d 592, 575 P.2d 201 (1978).

[104] The 1973 Dissolution of Marriage Act, WASH. REV. CODE § 26.09 (1974), provides: "The Court may order either or both parents owing a duty of support to any child of the marriage dependent upon either or both spouses to pay an amount reasonable or necessary for his support." WASH. REV. CODE. § 26.09.100. *Id.* at 204.

[105] *Id.* at 203.

[106] *See supra* text accompanying notes 1-4. Custodial parents are presumed to act in the best interests of their children while non-custodial parents are presumed not to.

[107] *Childers*, 89 Wash. 2d at 600, 575 P.2d at 209.

[108] *Id.* at 599, 575 P.2d at 208.

[109] *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 896 (1981); U.S. Railroad Retirement Bd. v. Fritz, 449 U.S. 166 (1980); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Railway Express Agency v. New York, 336 U.S. 106 (1949); Nagle v. Bd. of Education, 63 Hawaii 389, 629 P.2d 109 (1981).

[110] *See* cases cited *supra* note 109.

[111] *E.g.*, U.S. Railroad Retirement Bd. v. Fritz, 449 U.S. 166 (1980); Nagle v. Bd. of Education, 63 Hawaii 389, 629 P.2d 109 (1981).

[112] *E.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981).

[113] *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981); U.S. Retirement Bd. v. Fritz, 449 U.S. 166 (1980); Williamson v. Lee Optical Co., 348 U.S. 483 (1955);

sion that a post-majority support statute will be upheld.[114]

Had the *Childers* and *Kujawinski* courts required that the statutes meet an *actual* rational relationship test,[115] the statutes might have been struck down. In *Kujawinski* and *Childers*, the courts held that the mitigation of harm or disadvantages to children is a legitimate state interest.[116] In both cases, however, the courts did not explain why the state has any legitimate interest in *adult* children.[117] Absent a tort or criminal action, it is curious that the state should have any particularized interest in adult children and their parents at all. In effect, it could be said that *Childers* and *Kujawinski* merely beg the question. To hold that the state has an interest in mitigation of harm to children may be a valid *parens patriae* interest,[118] but the "children" potentially affected by a post-majority support order are *adults*. The decisions, however, do not fully confront this issue, and are thus unsatisfying.

Furthermore, the courts in *Childers* and *Kujawinski* effectively concluded that the harm which may result from a divorce can be significantly alleviated by simply providing support for higher education.[119] Arguably, though, if harm results from a divorce, it is caused by the inherent upheaval and anxiety due to uncertainty.[120] If so, it would seem the damage may be mitigated, if at all, by a continuing relationship with the child's psychological parent, not necessarily by increased financial support.[121] As such, the state has only a limited ability to effectuate a remedy.[122]

Despite the willingness of the courts in *Kujawinski* and *Childers* to conclude that there is a rational relationship between a divorced/non-divorced classification and a valid state purpose, there are lingering questions. Is the state's pur-

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Railway Express Agency v. New York, 336 U.S. 106 (1949); Nagle v. Bd. of Education, 63 Hawaii 390, 629 P.2d 109 (1981).

[114] Although not covered in this Comment, there would seem to be a question as to whether the mere rationality test constitutes any standard of review at all.

[115] *See, e.g.*, Shibuya v. Architects Hawaii Ltd., 65 Hawaii 26, 647 P.2d 276 (1982); Hasegawa v. Maui Pineapple Co., 52 Hawaii 327, 475 P.2d 679 (1970). *See also supra* notes 66-79 and accompanying text.

[116] *Childers*, 89 Wash. 2d at 599, 575 P.2d at 208; *Kujawinski*, 71 Ill. 2d at 563, 376 N.E.2d at 1390.

[117] In *Childers*, the court merely states that the legislature has decided that support should no longer depend on minority. *Childers*, 89 Wash. 2d at 595, 575 P.2d at 204.

[118] *See supra* text accompanying notes 60-62.

[119] *Childers*, 89 Wash. 2d at 599, 575 P.2d at 28; *Kujawinski*, 71 Ill. 2d at 571, 376 N.E.2d at 1390.

[120] BEYOND THE BEST INTERESTS OF THE CHILD, *supra* note 68 at 6-7.

[121] *Id.* at 17-20. *See supra* note 71 and accompanying text.

[122] If extended financial support had been justified by the state as a step toward a remedy, then post-majority support statutes should be upheld. *Cf.* Minnesota v. Cloverleaf Creamery Co., 449 U.S. 456 (1981). However, *Childers* and *Kujawinski* do not refer to the post-majority statutes as an imperfect step towards a complete remedy.

pose of mitigation of harm to *adult* children valid? Assuming a valid purpose, is there really a rational relationship? If minimum rationality is met, is that sufficient given the potentially large financial burden of a post-majority support requirement and the highly personal nature of family life?

A. Limits on State Intervention

Whether the state's interest in divorce has been justified by the *parens patriae* doctrine, or alternatively under a state-created theory (where a status is statutorily-created, the state may place burdens as well as privileges on it),[123] there are limitations. Not only is it questionable whether *parens patriae* should apply to a divorce situation at all, but case law provides boundaries for state intervention.

1. Case Law Limitations on State Intervention in Parental Rights

Case law places limitations on the extent to which the state may statutorily interfere with children's upbringing.[124] These limits seemingly preclude the state from ordering post-majority support for children of intact families.[125] Therefore, arguably, these limits should also proscribe state intervention in families where parents divorce.

Cases which impose constitutional limits on state intervention as *parens patriae*, uphold the doctrine as valid generally but question whether the state can always be depended on to look out for the parties' interests in particular circumstances.[126] The state may do much in order to improve the quality of its citizens' well being, but the individual has certain fundamental rights[127] which

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[123] *See supra* text accompanying notes 63-65.

[124] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

[125] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (state cannot compel formal education beyond the eighth grade where it interfered with a family's religious practice); *In re* Gault, 387 U.S. 1 (1967) (state's interest as *parens partriae* not sufficient to overcome the procedural due process rights of a minor); Pierce v. Society of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925) (state could not require a public school education for all children between the ages 8 and 16); Meyer v. Nebraska, 262 U.S. 390 (1923) (state could not prohibit the teaching of the German language).

[126] *E.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923).

[127] "Rights the [Supreme] Court has recognized as fundamental and deserving of significant judicial protection are most of the guarantees of the Bill of Rights, the right to fairness in the criminal process, the right to privacy (including some freedom of choice in matters of marriage, sexual relations and child bearing), the right to travel, the right to vote, the freedom of association and some aspects of fairness in the adjudication of individual claims against the government (procedural due process rights)." NOWAK, *supra* note 96, at 409 (footnotes omitted). *See also,*

must be respected.[128] The *Meyer* court found that historically there has been philosophical justification for state intervention,[129] but that the modern view finds the imposition of the state on the parental right to decide about one's children violative of the Constitution.[130] Therefore, "it hardly will be affirmed that any legislature could impose such restrictions (prohibiting parents from deciding their children's education) upon the people of a state without doing violence to both letter and spirit of the Constitution."[131]

In addition to *Meyer*, both *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*[132] and *Wisconsin v. Yoder*[133] held that parents' rights to decide the educational and religious upbringing of their children cannot be abrogated by the state acting as *parens patriae*. The Supreme Court noted that, absent jeopardy to a child's health or safety, or the potential of a societal burden, *parens patriae* did not empower the state to direct the upbringing of children.[134]

Further, in *Boddie v. Connecticut*,[135] the Court held that there is a limit on state intervention in a state-created status as well.[136] Both marriage and divorce entail a status or change of status regulated by the state. Yet, in *Boddie*, the Court struck down a filing fee for divorce as an unconstitutional state interference with the adjustment of such a status.[137] Regardless of the state's creation of the status of divorce, the state cannot unreasonably withhold access to it.[138] *Boddie*, then, teaches that the state cannot unduly burden either access to or adjustment of a status it may offer.

U.S. v. Carolene Products, 304 U.S. 144, 152-53 n. 4 (1941).

[128] *Meyer*, 262 U.S. at 401. The Court in *Meyer* referred to Plato's notion of public welfare in the ideal state. Plato advocated that under ideal conditions children would not be brought up in individual families, but rather as creations of the state. Accordingly, no basis for state intervention in families would be required. Families, as they are commonly thought of, would not exist. *Meyer*, 262 U.S. at 401-402.

[129] *Id.* at 402.

[130] *Id.* at 401-402. *See also*, Santosky v. Kramer, 455 U.S. 745 (1982) (state may not terminate parental rights without compliance with due process); Wisconsin v. Yoder, 406 U.S. 205 (1972) (state cannot compel education that substantially interferes with parents' decisions regarding the upbringing of children).

[131] *Meyer*, 262 U.S. at 401-402.

[132] Pierce v. Society of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925) (state cannot compel public education for children between 8 and 16 years of age).

[133] Wisconsin v. Yoder, 406 U.S. 205 (1972) (state cannot compel education which substantially interfered with the religious upbringing of children).

[134] *Id.* at 233-34; *Society of Sisters*, 268 U.S. at 534-35.

[135] 401 U.S. 371 (1971).

[136] *Id.* at 383.

[137] *Id.*

[138] *Id.*

2. *The Limits of* Parens Patriae

It has also been argued that there is no doctrinal basis for state intervention in family matters as *parens patriae*. While originally conceived for a very narrow application, the doctrine has been distorted and applied in situations not intended at the outset.[139]

Parens patriae originated to empower the English crown to control and profit from property owned by "idiots and lunatics."[140] In the nineteenth century, American courts extended the doctrine to apply to custody disputes.[141] This authority was limited, however, when the child was mature enough to make his own decisions.[142] Also, application of the doctrine in custody cases was limited to those cases where there was a showing of parental unfitness in promoting the child's welfare.[143]

Today, its application has broadened to cover divorce and custody disputes, to uphold neglect and delinquency statutes and to supplement the state's police power.[144] Clearly, its present application is far beyond its original intended use. This distortion of doctrine is evident in H.R.S. § 580-47. Not only was the doctrine not conceived to apply to post-divorce support decrees, it was originally intended to be invoked where the parties affected were *legally disabled*. The parents and "children" affected by H.R.S. § 580-47 are adults and presumed to be legally competent. As such, state *parens patriae* intervention would appear to be wholly unwarranted.

There are, therefore, limitations on a state's interference with parents' decisions regarding their children's upbringing. Furthermore, while *parens patriae* may be a valid basis for state intervention in situations where the health or welfare of a *minor* child is in jeopardy, it is an inappropriate basis for intervention on the behalf of persons deemed legally competent. The state has no viable interest on the behalf of adults based on justifications of alleviating possible post-divorce harm to a "child."

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[139] At the time of Edward I, *parens patriae* accorded the King a beneficial interest in an idiot's property. The King retained control of the land for the idiot's life. Upon death, the idiot's heirs had to petition for the return of the property. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195, 196 (1978). *Compare* Prince v. Massachusetts, 321 U.S. 158 (1944) (state's *parens patriae* interest in protecting the physical safety of a child was sufficient to uphold statute prohibiting minors from distributing religious materials).

[140] Custer, *supra* note 196.

[141] *The Constitution and the Family*, *supra* note 60, at 1222.

[142] *Id.* at 1223.

[143] *Id.*

[144] *Id.* at 1221-27.

V. An Equal Protection Analysis

Under an equal protection analysis, the degree of scrutiny a court will afford a statute depends on whether a suspect class is discriminated against or the exercise of a fundamental right is infringed.[145]

A. Strict Scrutiny Based on a Suspect Class.

One way of invoking strict scrutiny by the courts is to establish that a suspect class is involved. Under this standard, the court requires that a statute in question must serve a compelling government interest in order to justify limiting an individual liberty or right.[146] There is no doubt that the protection given certain children and the requirement that may be made of certain parents under H.R.S. § 580-47 results in different treatment based on status classifications.[147] Some classifications, such as those based on race, reflect a history of prejudice. They are deemed to be invidiously discriminatory, and as such, are suspect.[148] The classes here, though, are not analogous to those based on race. Neither divorced parents nor children of intact families bear an immutable trait by which they are singled out nor have they suffered a history of discriminatory treatment.[149]

Alternatively, there is evidence to suggest that a strict scrutiny standard has been used to abolish legislation which imposed a special disability "upon groups disfavored by virtue of circumstances beyond their control."[150] Arguably then, adult children, whose parents remain married but choose not to support their post-secondary education, are subject to a disability created by a legislative classification. This disability results solely from their parents' personal choices, a circumstance beyond their control.[151] Consequently, courts should apply a stan-

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[145] Nowak, *supra* note 96, at 384.

[146] *E.g.*, Brown v. Board of Education, 347 U.S. 483 (1954).

[147] *See supra* text accompanying notes 16-58.

[148] *See e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886) (statute struck down where application would unduly burden one race); Brown v. Board of Education, 347 U.S. 483 (1954) (statute permitting racial segregation in public schools struck down as deprivation of equal educational opportunities).

[149] In U.S. v. Carolene Products, 304 U.S. 144 (1938), the Court articulated a standard to be used to determine whether a suspect class exists. In addition to racial classifications, the legal system should be alerted to treat as suspect those groups of people who are "discrete and insular minorities." *Id.* at 152. However, not even under a strained analysis would divorced parents qualify as a "discrete and insular minority" that is unrepresented in the political process. Because the children here are adults, they too could not be considered politically powerless.

[150] Plyler v. Doe, 457 U.S. 202, 216 n. 14 (1982).

[151] *See, e.g., Plyler*, 457 U.S. at 220. The children in *Plyler* were not allowed to attend public schools because of their status as illegal aliens, which in turn resulted solely from their parents'

dard higher than a mere rational relationship.[152] As mentioned earlier, *Kujawinski*[153] and *Childers*,[154] two cases which upheld the constitutionality of post-majority support, confronted the issue in the context of the claims of divorced, non-custodial parents. Given the factual background, the parties could not raise the equal protection question as it concerns children of intact families. The rights potentially infringed are clearly different, therefore, it is unclear as to how successful a challenge by children might be.[155]

B. Strict Scrutiny Based on a Fundamental Right

1. The Parents' Perspective

a. Right to marry/divorce

Absent a suspect class, a court will invoke strict scrutiny only if a statute is found to interfere with the exercise of a fundamental right.[156] For example, where a state required a filing fee to initiate a divorce complaint, the Court struck down the statute, holding that the Constitution requires that all persons have access to the legal system where it is the "exclusive precondition to the adjustment of a fundamental human relationship."[157]

In *Zablocki v. Redhail*,[158] a statute prohibited the non-custodial parent of children to whom he owed a duty of support from remarrying unless he could prove compliance with the order and that the children were not likely to be in need of public assistance.[159] In striking down the statute, the Court held that the right to marry is fundamental.[160] The right to marry was described as basic and essential to the pursuit of happiness.[161] Given that an interest deemed so necessary to the fabric of our society was threatened by the statute, the Court found that the state's objective of protecting the welfare of out-of-custody children was not compelling nor were the means sufficiently tailored to effectuate

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decision to enter this country illegally.

[152] *See infra* text accompanying notes 209-11.

[153] 71 Ill. 2d 563, 376 N.E.2d 1382 (1978).

[154] 89 Wash. 2d 592, 575 P.2d 201 (1978).

[155] Conceivably, the children of intact families who choose not to support their post-secondary education might have difficulty in bringing a successful denial of equal protection challenge. Given the nature of the state objectives, it is likely a court would refer litigants to the legislature to enact an amendment.

[156] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

[157] Boddie v. Connecticut, 401 U.S. 371 (1971).

[158] 434 U.S. 374 (1978).

[159] *Id.* at 383.

[160] *Id.*

[161] *Id.*, (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

only that interest.[162]

Boddie and *Zablocki* support the argument that the right to divorce is constitutionally protected because it is a fundamental right. Fundamental rights have been defined as those which are necessary for the meaningful exercise of other constitutionally-protected rights.[163] Therefore, because the only means of fully exercising the fundamental right to marry is state-prescribed, the right to divorce (i.e., to adjust one's status from married to unmarried) must necessarily also be fundamental.[164] Like the state-imposed financial burdens in *Boddie* and *Zablocki*, post-majority support may be an improper financial burden on the exercise of a fundamental right.

State interference with the exercise of a fundamental right shifts the burden to the state to prove a compelling interest which warrants the limitation of individual rights.[165] In *Childers* and *Kujawinski* the state's justification was to protect out-of-custody children from harm resulting from divorce.[166] This justification is essentially indistinguishable from that rejected in *Zablocki* as insufficient to uphold interference in an individual's right to remarry. Both post-majority support and the child support prior to remarriage requirement in *Zablocki* interfere with a fundamental right to marry and, perhaps, to divorce. While the welfare of out-of-custody children is a valid state interest, the Court did not find it to be compelling in *Zablocki*.

Even if a fundamental right to divorce could not be derived from *Boddie* and *Zablocki*, the cases provide useful analogies. In both, the state required payments before persons could exercise a personal right. In *Boddie*, the Court held this requirement could potentially preclude individuals from ever obtaining a divorce.[167] Further, *Zablocki* contains striking similarities to the requirement of post-majority support. Not only did the state require payments prior to the exercise of a right, but the requirement fell solely on the non-custodial parent.[168] It is arguable then that the requirement of post-majority support by the

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[162] *Id.* at 390.

[163] San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 111-14 (1973) (Marshall, J., dissenting).

[164] HAWAII REV. STAT. § 572-1 (1976 & Supp. 1983) enumerates the requisites of a valid marriage contract. Under subsection (3), the statute specifically prohibits bigamy.

[165] *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

[166] Kujawinski v. Kujawinski, 71 Ill. 2d 592, 17 Ill. Dec. 801, 376 N.E.2d 1382 (1978); Childers v. Childers, 89 Wash. 2d 592, 575 P.2d 201 (1978).

[167] *Boddie*, 401 U.S. at 380.

[168] 434 U.S. at 375. While on its face, HAWAII REV. STAT. § 580-47 does not apply only to non-custodial parents, the application of post-majority support statutes is seemingly targeted at non-custodial parents. *See, e.g.*, Esteb v. Esteb, 244 P. 264 (Wash. Sup. Ct. 1926). "Whenever a father has the custody of a child, the law presumes that he will provide for the child's education in that vocation for which it is best fitted, and which will enable it to meet the conditions of

non-custodial parent unconstitutionally burdens both the right to divorce and the right to remarry, both of which are fundamental.

b. *Right of privacy*

It can be asserted that there is also a fundamental right to privacy in decisions about the education of children.[169] In both *Meyer*[170] and *Society of Sisters*,[171] the Supreme Court established parameters for state intervention in decisions regarding the educational and religious upbringing of children.[172] In *Meyer*, parents hired an instructor to teach German to their children in violation of a statute which prohibited the teaching of modern languages other than English. In striking down the statute, the Court held that the parents had a constitutionally-protected right to hire the teacher.[173] In *Society of Sisters*, a statute required that parents send their minor children, between the ages of eight and sixteen, to a public school.[174] Holding that the state may not force a child to attend a public school, the Court recognized a constitutionally-protected right of parents to decide about the nature of their children's education.[175]

In *Wisconsin v. Yoder*,[176] the Court reaffirmed the constitutional protection of parents' rights to direct their children's upbringing.[177] In *Yoder*, a statute requiring school attendance until age sixteen conflicted with Amish religious beliefs. The Court struck down the statute as it related to the Amish, stating that there is a "fundamental interest of parents, as contrasted with that of the state, to guide the religious future and education of their children."[178]

From these cases then, parents of intact families clearly have a right to pri-

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modern life. But can the courts indulge that presumption where the custody of the child has been taken from the father?" *Id.* at 267.

[169] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965); Pierce v. Society of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

[170] 262 U.S. 390 (1923).

[171] 268 U.S. 510 (1925).

[172] Although *Meyer* was decided on narrow issues of parents' rights to contract and a teacher's right to teach, it has subsequently been cited as holding that there is a right to privacy in decisions parents make for their children. *See* Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); Pierce v. Society of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534 (1925).

[173] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[174] *Society of Sisters*, 268 U.S. at 531.

[175] *Id.* at 534.

[176] 406 U.S. 205 (1972).

[177] *Id.* at 232.

[178] *Id.* While the holding in *Yoder* might seem to be limited to its facts, it has subsequently been cited to support the proposition that the parent/child relationship is constitutionally-protected. H. L. v. Matheson, 450 U.S. 398 (1981); Quilloin v. Walcott, 434 U.S. 246 (1978).

vacy in their decisions about the education of their children. A statute empowering a state court to compel a parent of an intact family to pay support for post-secondary education also would seem to be unconstitutional. Furthermore, regardless of the validity of the state's interest in the elementary and high school education of minor children, the state's interest in the post-secondary education of adults is not similarly supportable. If the state cannot constitutionally require parents of intact families to provide for the education of all adult children, then surely it should not be able to do so only for children of divorced parents. Yet, it seems that divorced non-custodial parents no longer have that same constitutionally-protected right.[179] The different results in these cases lead to the conclusion that once the protective barrier no longer exists, the state can intervene in decisions previously found constitutionally-protected as private.[180]

c. *The application of strict scrutiny*

Where a statute interferes with the exercise of a fundamental right, such interference must withstand strict scrutiny. To withstand such scrutiny, the statute must be proven necessary to promote a compelling state interest and must be achieved through the least instrusive means.[181]

i. Does the state have a "compelling interest"?

As noted above, statutes that require post-majority educational support appear to interfere with the right of parents to choose their children's education. A court will use strict scrutiny when confronted with legislation that distinguishes people "in terms of their ability to exercise a fundamental right."[182] An analogy between *Meyer*[183] and *Society of Sisters*[184] and the constitutionality of post-majority support may seem questionable.[185] However, assuming that it is possible

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[179] Kujawinski v. Kujawinski, 71 Ill. 2d 592, 17 Ill. Dec. 801, 376 N.E.2d 1382 (1978); Maitzen v. Maitzen, 24 Ill. App. 2d 32, 163 N.E.2d 840 (1960); Jackman v. Short, 165 Or. 626, 109 P.2d 860 (1941); Childers v. Childers, 89 Wash. 2d, 575 P.2d 201 (1978); Esteb v. Esteb, 224 P. 264, 267 (Wash. Sup. Ct. 1926).

[180] Protective barrier refers to the parameters of state intervention as delineated by case law. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Pierce v. Society of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

[181] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969); Harper v. Virginia Board of Elections 383 U.S. 663 (1966).

[182] NOWAK, *supra* note 96, at 524.

[183] 262 U.S. 390 (1923).

[184] 263 U.S. 510 (1925).

[185] *Meyer* and *Pierce* are distinguishable in that the children affected were minors as opposed to adults. Also the issues in *Meyer* and *Pierce* dealt with requirements by the state regarding lower

for a court to order college support for a child who is sixteen at the time of the hearing, the significant remaining difference is that the family is no longer intact. The right to decide a child's mode of education (within limits) seems to be a fundamental right.[186] Therefore, following an equal protection analysis, the state would need compelling justification for its interference.[187]

Properly providing for children may be a compelling state interest. However, it is difficult to conclude that the classification here is related to an overriding state objective.[188] Further, this interest does not seem to be even rationally related since a sincere concern over the welfare of children does not logically depend on whether a child has divorced parents.[189]

ii. Is the state's interference direct and substantial?

Assuming that there is a fundamental right to divorce or to privacy within the family, an equal protection analysis must also focus on the nature of the state's interference.[190] Are post-majority support statutes a significant interference with the parents' right to either divorce or remarry or to have privacy in child-rearing decisions?

In *Califano v. Jobst*,[191] the Supreme Court held that absent significant interference, the government may impose certain limitations on the exercise of a fundamental right.[192] *Jobst* involved two recipients of Social Security benefits. Due to limitations promulgated under the Social Security Act, one party's benefits would be terminated if they married. The Court held that the loss of Social Security benefits could be construed as a burden to their decision to marry, but that merely burdening the exercise of a fundamental right was not significant enough to require striking down the provision.[193]

In *Zablocki v. Redhail*,[194] the Court differentiated between a "direct and

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education, not an issue of what the state may permissibly require for post-secondary education.

[186] Pierce v. Society of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

[187] NOWAK, *supra* note 96 at 524.

[188] *See supra* text accompanying notes 66-79.

[189] *See supra* text accompanying notes 158-62. In *Zablocki*, the Court found the state's interest in out-of-custody children insufficient to uphold the statute.

[190] *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978); Califano v. Jobst, 434 U.S. 47 (1977).

[191] 434 U.S. 47 (1977).

[192] *Id.* at 58.

[193] Perhaps factual changes would have made a difference. In *Jobst*, the parties even after finding out about the potential of a loss of benefit, went ahead and married. Given these facts, it was difficult to argue that the state's interference was direct and substantial.

[194] 434 U.S. 374 (1978).

substantial interference" and a mere "burden" as in *Jobst*.[195] The parties were effectually prevented from marrying in *Zablocki* because of the statute's requirement that a non-custodial parent prove compliance with a support order. Even if the requirement of proving compliance did not actually prevent remarriage, the Court viewed the statute as a significant intrusion into the fundamental right to marry.[196]

Jobst and *Zablocki*, then, teach that it is necessary to determine whether post-majority support poses an *undue* burden on the exercise of a fundamental right or only a *mere* burden. Post-majority support seems to more closely resemble the *Jobst* situation. It highlights the possibly determinative factor in *Jobst* that the amount of money involved was relatively small. Because of other federal benefits available, the total difference in income to the Jobsts was only twenty dollars a month.[197] Post-secondary education, however, costs thousands of dollars.[198] These costs would, of course, be multiplied by the number of children in a family. Unlike the small sum involved in *Jobst*, the large amounts of money for post-majority support are more like the support required in *Zablocki* that was held to be unconstitutional.[199]

Furthermore, *Zablocki* and *Boddie* teach that the law should not prescribe the means for people to order their personal lives[200] and then penalize them for doing so.[201] The procedure necessary to change a status should not give the state an opportunity to direct personal lives and, in effect, hang a large price tag on complying with the law. As in *Boddie*, it is unfair to unduly burden access to divorce when the state mandates it as the necessary precondition to the exercise of the fundamental right to marry.[202]

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[195] *Id.* at 387 n. 12.

[196] *Id.*

[197] Califano v. Jobst, 434 U.S. 47, 57 n. 17 (1977).

[198] *E.g.*, University of California at Berkeley, tuition and fees for 1982-3, $1,172 (in-state) and $4,322 (out-of-state), room and board, $3,252; Stanford University, tuition (1982-3) $8,220, room and board, $3,423. *See generally*, C. STRAUGHN & B.L. STRAUGHN, LOVEJOY'S COLLEGE GUIDE (16th ed. 1983).

[199] To use actual deterrence as the test as the court did in *Jobst* seems unfair. Because the law presumes married parents will take care of their children, the issue of child support will never arise until parties divorce. It is unreasonable to expect people unfamiliar with statutory requirements to foresee the possibility of post-majority support.

[200] HAWAII REV. STAT. § 580-2 (1976 & Supp. 1983). To begin a divorce action a complaint must be filed with the court.

[201] Zablocki v. Redhail, 434 U.S. 374 (1978); Boddie v. Connecticut, 401 U.S. 371 (1971).

[202] 401 U.S. 371 (1971) (state may not impose a filing fee to initiate a divorce where there are no alternatives to the judicial process).

2. The children's perspective

Children of intact families could contend that there is a fundamental right to higher education.[203] Unfortunately, case law in this area does not presently support a fundamental right to education argument.[204]

In *San Antonio Independent School District v. Rodriguez*,[205] the Supreme Court addressed the question of a fundamental right to education.[206] The Court concluded there is no fundamental right to education because such a right is neither explicitly nor implicitly found in the Constitution.[207] However, despite its holding, there is considerable dicta referring to the importance of education and prior case law recognizing the significance of education "both to the individual and to our society."[208]

In *Plyler v. Doe*,[209] the Court came very close to holding that there is a fundamental right to education. The Court held that the state could not deny a public education to the children of illegal aliens because of education's enormous impact on the individual and its importance in maintaining society's basic institutions.[210] The long-range effect of denying an education to such individuals, the Court said, would be the creation of a permanent subclass of people who would undoubtedly increase the nation's social welfare problems.[211]

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[203] In a denial of equal protection challenge, children of intact families could conceivably argue that a fundamental right to post-secondary education is implicit in the Constitution. Therefore, the state's unequal protection of the exercise of a fundamental right (by way of a post-majority support statute) could only be sustained if justified by a compelling state interest.

[204] To the extent that fundamental rights are in a continual state of flux, current case law holding no fundamental right to education could be reversed. As social values, expectations and needs for what is considered to be the fundamental ethic of a democratic society change, the case law may be expected to reflect these changes. As an example of this continual transition, *compare* San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973) *with* Plyler v. Doe, 457 U.S. 202 (1982).

[205] 411 U.S. 1 (1973). The case concerned a state scheme of financing public schools based on the amount of property tax paid.

[206] *Id.* at 33-34.

[207] *Id.*

[208] *Id.* at 30-31.

[209] 457 U.S. 202 (1982). Factual differences, among other reasons, kept the Court from having to reverse *Rodriguez*, because all children were receiving some education. In *Plyler*, the state wanted to deny any education to children of illegal aliens unless they were able to pay full tuition. But note reasoning in *Plyler* that sounds so much like fundamental rights analysis. The state presented three major justifications for denial of education: (1) protection of state's resources from influx of immigrants; (2) imposition on state's ability to provide quality education; and (3) unlikelihood that children would remain in state. *Id.* at 228-30. The Court rejected all the justifications and held there was no showing of a substantial state interest, despite the absence of a fundamental right to education. *Id.* at 230.

[210] *Id.* at 221 and 230.

[211] The notion of a permanent subclass in *Plyler* and the idea of a discrete and insular minor-

Rodriguez and *Plyler* suggest that even in cases where a fundamental right is not affected, more than hypothetical rationality will be required. Read narrowly, *Rodriguez* stands for the proposition that a right to elementary education is not fundamental.[212] Even so, the Court in *Plyler* required more of the statute than minimum rationality.[213] Arguably, because the right to education is personal in nature, yet has vast ramifications, state interference is subject to a more demanding review.

Despite seemingly opposite holdings, both *Rodriguez* and *Plyler* seem to turn on the problem of defining a fundamental right.[214] The cases may be reconciled as an illustration of the evolving standard of fundamental rights.[215] As such, the two decisions are not contradictory, but rather a statement of social change. Although only nine years separate the decisions, the competitive need for education in 1982 is far greater than it was in 1973. If this trend continues, education could possibly be deemed a fundamental right in the future.

In *Rodriguez*, the Court held that the equal protection clause does not protect against some inequity in result.[216] A difference in the quality of education the state provided in different neighborhoods was not unconstitutional.[217] However, in *Plyler*, the Court held that complete denial of public education to persons within a jurisdiction does violate equal protection.[218] Therefore, if the lack of similar statutory protection for the children of intact families resulted in their not receiving higher education, perhaps *Plyler* would be held to apply.[219] However, in *Plyler*, the statute completely *barred* the children of illegal aliens from access to an education. Therefore, a post-majority support statute which simply does not provide for post-secondary education for children of intact families may be distinguishable and may not be subject to the same constitutional infirmity.

Justice Marshall's dissent in *Rodriguez* presents another perspective on funda-

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ity in *Carolene Products* are similar. They both refer to a group of people who lack access to the political process.

[212] *Rodriguez*, 411 U.S. at 35.

[213] *Plyler*, 457 U.S. 202, 223-24.

[214] In *Rodriguez*, the majority indicated that to hold education to be a fundamental right would be problematic in that there would no longer be boundaries which define fundamental rights. *Rodriguez*, 411 U.S. at 41-43. In *Plyler*, the Court did not have trouble distinguishing education from other social welfare legislation because of its life-long impact. *Plyler*, 457 U.S. at 222-23.

[215] In the more recent of the two cases, the Court noted, "[i]n sum, education has a fundamental role in maintaining the fabric of our society." *Plyler*, 457 U.S. at 221.

[216] *Rodriguez*, 411 U.S. at 50-51.

[217] *Id.* at 54-55.

[218] *Plyler*, 457 U.S. at 230.

[219] In such a situation, it might be argued the statute effectively denied college education to some children of intact families.

mental rights.[220] Marshall contended that the question of fundamental rights cannot be answered by simply looking implicitly or explicitly at the Constitution.[221] The test should be the extent to which other rights guaranteed by the Constitution are dependent on the right in question.[222] As Marshall reasoned, "[o]nly if we closely protect the related interests from state discrimination do we ultimately ensure the integrity of the constitutional guarantee itself."[223] His test would provide a meaningful compromise between *Rodriguez* and *Plyler*. If adopted by the Court, the outlook for a fundamental right to education would brighten.

Although *Rodriguez* and *Plyler* are helpful in forecasting future Supreme Court decisions on the subject of a fundamental right to education, they do not resolve the issue. The issue in question concerns higher education. Not only does *Rodriguez* hold that the state need not give everyone the same education, and that there is no fundamental right to an education in the first place, but, as in *Plyler*, the question was raised only as to elementary education. Given the present case law, it seems unlikely that the Court will find there is a fundamental right to higher education.

C. *A Less Intrusive Alternative?*

Even if there is not a suspect class or fundamental right directly infringed, the rights which are indirectly burdened are of a highly personal nature. It could be argued that the state should be required to use the least instrusive means to achieve its objective of mitigation of post-divorce harm or of its commitment to the value of higher education.

An amendment to either H.R.S. § 577-7 or § 580-47 could provide a less intrusive alternative. Hawaii Rev. Stat. § 577-7 could, for example, be amended to require that all parents support their children until the age of twenty-three, if the children should choose some form of post-secondary education.[224] This change in a parent's duty of support would allow a child to finish a post-secondary education before the right to support terminated. Given society's interests in education as set forth in *Childers*[225] and *Kujawinski*,[226] this amendment would clearly reflect society's perception of the value of education and its commitment to it. Also, if education as a means of mitigating harm to

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[220] *Rodriguez* (Marshall, J., dissenting), 411 U.S. at 70.

[221] *Id.* at 100.

[222] *Id.* at 102.

[223] *Id.* at 103.

[224] The stipulation that continued support depends on the pursuit of higher education tailors the statute to the state's commitment to the value of higher education.

[225] 89 Wash. 2d 592, 575 P.2d 201 (1978).

[226] 71 Ill. 2d 563, 376 N.E.2d 1382 (1978).

children of divorced parents continues to be a valid state interest (despite some question as to the rationality of this conclusion),[227] then this amendment would effectuate this objective as well.[228]

However, as with the present requirement of post-majority support, a requirement of parental support until age twenty-three should depend on other factors as well. Support for post-secondary education obviously should not be required of a parent who cannot financially uphold such a demand. Also, the child's talents and abilities should be a relevant factor. There would seem to be little to be gained by simply extending the period of adolescent support without a particular objective in mind.

Alternatively, assuming that post-majority support is constitutional, an amendment to H.R.S. § 580-47 would seem to provide a less burdensome, workable alternative for non-custodial parents.[229] For instance, it could be amended to require consideration of additional factors in determining post-majority support.[230]

Among the factors which the court could be required to consider are: (1) whether the non-custodial parent has previously demonstrated a sincere desire for the child to assume a greater self-reliance, and (2) whether the family, prior to the divorce, adhered to social or cultural values which differed from those of the western model.[231] These factors would be examined in addition to those already mentioned by several courts: (1) the parents are financially able to pay, (2) the child would benefit from a post-secondary education, and (3) but for the divorce, the child would have continued in some form of post-secondary education. With these additional factors, an amended statute could make clear that support for an adult child would not be required if a parent sincerely

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[227] *See supra* text accompanying notes 66-79.

[228] While such an amendment to HAWAII REV. STAT. § 577-7 might remedy an equal protection violation, it raises a potential violation of parents' right to privacy problem. An amended statute might be upheld though only if it required that all parents provide support for some form of post-secondary education. *See, e.g., Society of Sisters*, 268 U.S. at 535 (while the state does have a valid interest in children's education, it does not have authority "to standardize its children by forcing them to accept instruction from public teachers only.")

[229] An amendment of HAWAII REV. STAT. § 577-7 is preferable, as it would effectuate a more complete remedy, but an amendment to § 580-47 offers an alternative.

[230] This amendment would not render the post-majority support constitutional. Consideration of additional factors would be a statutory effort to lessen the court's intrusion into parents' decisions about their children's upbringing.

[231] There is also a general sense of unfairness regarding post-majority support in that arguably implicit in such an order is the imposition of a value judgment that whatever is required by the court is necessarily better than what a parent himself may choose for his child, i.e., a four-year college education is necessarily better than other pursuits. *See* Carle v. Carle, 503 P.2d 1050 (Alaska 1972) (custody decision reversed because it was not certain the decision did not result from the judge's cultural bias).

believed that it was not in the child's best interest, either for personal or cultural reasons. Although a divorced parent can now appeal a support decree on these grounds, this proposed less burdensome alternative would differ in that it would naturally follow in the course of events *prior* to the court's decision regarding the support decree.[232]

VI. Withstanding an Equal Protection Challenge

A. *Under the Federal Constitution*

Applying an equal protection analysis using a minimum rationality standard to the issue of child support, a post-majority support statute presently withstands a constitutional attack on the federal level. However, while there is no suspect class or fundamental right to education involved, there are other fundamental rights which are, at least peripherally, affected by the state requirement.[233] Meeting a low level equal protection standard should not be deemed sufficient because there are multiple rights involved. If fundamental rights are those which are so necessary that they are deemed an integral part of a democratic way of life, then a court would be justified in requiring more of the statute than a merely hypothetical rationality, possibly an intermediate standard.[234]

The issue at hand lends itself to an analogy to classifications based on illegitimacy because the classes of children created by the statute hinge on the actions of their parents. The Court, when reviewing such classifications, has invoked a higher test which substantively resembles strict scrutiny.[235] States in such situations have been required to develop less intrusive alternatives.[236]

Similarly, a court faced with an equal protection challenge to a post-majority

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[232] The hearing envisioned here would be similar to the fitness hearing required in Stanley v. Illinois, 405 U.S. 645 (1972). The court in *Stanley* held that prior to a custody determination, an unwed father was entitled to a hearing on his fitness as a parent. The hearings would be similar to those in *Stanley* in that they would be predicated on a presumption of parental fitness in his decisions regarding his children. The hearings would serve as a means of finding facts which would rebut the presumption.

[233] The rights potentially limited would be the right to marry and the right of privacy in family matters. As mentioned earlier in the text, the establishment of the right of children to a higher education may be possible in the future.

[234] The higher standard used by the Court might be the intermediate standard used in classifications which involve sex, as in Craig v. Boren, 429 U.S. 190 (1976).

[235] *See, e.g.*, Trimble v. Gordon, 430 U.S. 762 (1977); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Glona v. American Guarantee Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968).

[236] *See, e.g.*, Trimble v. Gordon, 430 U.S. 762 (1977); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Levy v. Louisiana, 391 U.S. 68 (1968).

support order should use a standard higher than hypothetical rationality. Any merely plausible justification for state intervention should not be sufficient. In illegitimacy cases, as previously noted, courts have rejected the justification that states were attempting to statutorily deter immoral conduct, because there was no evidence to support a determination of actual deterrence.[237]

States have argued mitigation of harm to children of divorced parents as justification for a post-majority support statute.[238] However, under a stringent rationality test, a court should strike down the statute unless there was evidence that proved that divorce actually resulted in harm to children and that ordering post-majority support would lessen that harm.

B. Under The Hawaii Constitution

RIGHT OF PRIVACY

Section 6. The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.[239]

Unlike the U.S. Constitution, the Hawaii Constitution, as amended in 1978, specifically provides a fundamental right of privacy.[240] In addition to a fourth amendment right of privacy from illegal searches and seizures, the Hawaii Constitution provides for the protection of privacy in family decisions. "[T]his privacy concept encompasses the notion that in certain highly personal and intimate matters, the individual should be afforded freedom of choice absent a controlling state interest."[241] The committee report of the 1978 Constitutional Convention analogized the provision in Section 6 to the right found by the Court in the "penumbras" of the Bill of Rights.[242] The report cited *Griswold v. Connecticut*,[243] *Eisenstadt v. Baird*,[244] and *Roe v. Wade*,[245] as illustrative of the

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[237] *E.g.*, Trimble v. Gordon, 430 U.S. 762 (1977).

[238] *See supra* text accompanying notes 97-108.

[239] HAWAII CONST. art. I, § 6.

[240] COMM. OF THE WHOLE REPORT NO. 15, 1 JOURNAL AND DOCUMENTS OF THE CONSTITUTIONAL CONVENTION 1024 (1978).

[241] *Id.*

[242] *Id.*

[243] 381 U.S. 479 (1965) (statute which prohibited the use of contraceptives by married people struck down as a violation of the right of privacy).

[244] 405 U.S. 438 (1972) (statute which prohibited the distribution of contraceptives to unmarried couples struck down as a violation of the right of privacy).

[245] 410 U.S. 113 (1973) (during the first trimester of pregnancy, a woman has a constitutionally-protected right to choose to have an abortion).

kinds of decisions to be protected as private.[246]

Rights which have an explicit textual basis in the federal Constitution are considered fundamental and are subject to strict scrutiny.[247] However, when a state imposes on the exercise of a right without an explicit constitutional basis, there has not been complete agreement by the Court as to the appropriate standard of review to apply.[248] While the Court has in several instances found a protected right to lie within zones created by the Bill of Rights, there is some question as to the constitutional basis of the majority's reasoning.[249]

It is arguable that an equal protection challenge to a post-majority support statute necessarily invokes strict scrutiny on the state level because Section 6 of the Hawaii Constitution provides an explicit right of privacy. The burden would then shift to the state to prove a *compelling* interest and the absence of a no less intrusive alternative which could possibly effectuate the state's objective.[250] As it seems that a post-majority support statute would have difficulty withstanding even a more stringent rationality test,[251] it likewise would probably not be upheld under a compelling interest test.

An equal protection challenge to a post-majority support requirement has not been litigated in Hawaii. It is unclear, therefore, how the specific privacy provision in the state constitution might affect the outcome. On one hand, a state court might adhere to a limited interpretation of the provision and hold that it refers to a right of privacy only in procreative matters, given the nature of the cases cited in the Constitutional Convention's committee report.[252]

Alternatively, the court might find the cases cited as merely illustrative, but not exhaustive, of the nature of the rights to be protected.[253] At the very least, it would seem that this specific provision offers the opportunity for a stronger equal protection challenge and a basis for a court to find that more than hypothetical rationality must support the enactment of the statute.[254]

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[246] COMM. OF THE WHOLE REPORT NO. 15, 1 JOURNAL AND DOCUMENTS OF THE CONSTITUTIONAL CONVENTION 1024 (1978).

[247] NOWAK, *supra* note 96, at 675. For example, whenever a state burdens a fourteenth amendment guarantee, the statute will be subject to strict judicial scrutiny. *E.g.*, Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).

[248] *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

[249] *See, e.g., Roe*, 410 U.S. at 174 (1973) (Rehnquist, J., dissenting); *Griswold*, 381 U.S. at 507 (1965) (Black, J., dissenting).

[250] NOWAK, *supra* note 96, at 524.

[251] *See supra* text accompanying notes 65-78.

[252] COMM. OF THE WHOLE REPORT NO. 15, 1 JOURNAL AND DOCUMENTS OF THE CONSTITUTIONAL CONVENTION 1024 (1978).

[253] For a similar interpretation of a civil rights statute, see *In re* Cox, 3 Cal. 3d 205, 208, 90 Cal. Rptr. 24, 27; 474 P.2d 992, 995 (1970).

[254] *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

VIII. CONCLUSION

It appears basically unfair to require support of adult children by divorced parents and not of those still married. It also seems unfair to offer greater legal protection to children of divorced parents than those of intact families. If the statute is intended to reflect society's commitment to the value of higher education, then the statute is presently too narrow to effectuate this objective. Assuming this intent, statutes should require parental support for the post-secondary education costs of all adult children, regardless of the marital status of their parents. However, if courts continue to subject post-majority support statutes to merely hypothetical rationality, then such a step-by-step remedy will not be invalidated as too narrow to be related to the stated objective.

Despite the fact that no court has yet struck down a post-majority support statute, there is an equitable argument that all parents, regardless of marital status or custody, have a duty to support the post-secondary education of their children. A statute which requires all parents, married and divorced, to provide to the best of their ability for their children until they complete a post-secondary education would more completely support this underlying policy. Such a requirement of all parents would be consistent with society's perception of the value of education and support a fundamental sense of fairness in the treatment of parents and children.

R. Chun

Shibuya v. Architects Hawaii, Ltd.: Did the Court Apply an Intermediate Standard of Review?

I. INTRODUCTION

Intense lobbying by the construction industry[1] prompted many state legislatures in the 1960s to enact statutes protecting the building professions from unlimited liability. These so-called "builders' statutes" limited the period in which a suit for negligent design and construction could be brought, thereby effectively granting immunity from suit after a specified number of years.[2] Substantial litigation subsequently challenged the statutes' constitutionality on the grounds that they granted immunity to a special class of persons and that they barred the adjudication of otherwise valid claims in violation of the constitutional guarantees of equal protection and due process.[3]

On June 29, 1982, the Hawaii Supreme Court, in *Shibuya v. Architects Hawaii, Ltd.*,[4] invalidated Hawaii's builders' statute for the second time.[5] The court, purportedly applying the rational basis test, held the statute "constitutionally infirm."[6] The court deemed unreasonable the statutory grant of immunity from tort liability solely on the basis of affiliation with the construction industry, since the statute denied protection to persons similarly situated to the

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[1] Rogers, *The Constitutionality of Alabama's Statute of Limitations for Construction Litigation: The Legislature Tries Again*, 11 CUM. L. REV. 1, 2 n.5 (1980).

[2] Representative statutes are discussed in Part III.A.1. of this Note.

[3] For a summary of cases challenging such statutes as applied to architects and engineers, see Annot., 93 A.L.R.3d 1242, 1251-64 (1979).

[4] 65 Hawaii 26, 647 P.2d 276 (1982).

[5] *Shibuya* invalidated Act of May 17, 1980, ch. 70, 1980 Hawaii Sess. Laws 94 (current version at HAWAII REV. STAT. § 657-8 (Supp. 1983)). An earlier version of Hawaii's builders' statute, Act of June 4, 1967, ch. 194, 1967 Hawaii Sess. Laws 203, was ruled unconstitutional in Fujioka v. Kam, 55 Hawaii 7, 514 P.2d 568 (1973). *See* Part III.B. of this note for a discussion of *Fujioka*.

[6] 65 Hawaii at 44, 647 P.2d at 288.

benefited class.[7]

Since its enactment in 1967, the statute had been amended four times in response to successful constitutional challenges in Hawaii as well as to developments in other jurisdictions.[8] The court's decision in *Shibuya* has resulted in yet another amendment[9] in the legislature's continuing effort to provide the construction industry with protection that will survive judicial scrutiny.

Shibuya suggests that the Hawaii Supreme Court will subject special interest legislation to a stricter standard of review than the rational basis test traditionally affords when quasi-fundamental rights like access to the courts are involved. This note traces the development of builders' statutes in the nation and in Hawaii and then analyzes the court's use of the rational basis test in *Shibuya*. Finally, it asks whether future equal protection challenges will be reviewed with a stricter intermediate scrutiny or whether this will be reserved for special interest legislation like Hawaii's builders' statute.

II. THE FACTS

On December 8, 1975, plaintiff-appellant Derek Shibuya was seriously injured while working for the Coca-Cola Bottling Company of Honolulu when the forklift that he was operating turned over while passing over a metal grating that had become dislodged. The grating had been installed during the building's construction nine years before the accident.[10]

Shibuya brought suit on December 5, 1977 against four defendants for their combined negligence which allegedly caused his injuries: Architects Hawaii, Ltd., the architects of the bottling plant; Thoht Construction, Inc., the general contractor; Reliance Steel Products Co., the fabricator of the metal grating; and

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[7] *Id.* at 43, 647 P.2d at 288. (quoting *Fujioka*, 55 Hawaii at 12, 514 P.2d at 571; and citing State v. Johnston, 51 Hawaii 195, 456 P.2d 805 (1969), *appeal dismissed*, 397 U.S. 336 (1970) (equal protection applies equally "both in the privileges conferred and in the liabilities imposed")). In *Johnston*, a statute requiring a three-year state residency for an individual to qualify for jury duty withstood an equal protection challenge. Besides citing numerous Supreme Court and other state decisions, *Johnston* relied on State v. Diamond Motors, 50 Hawaii 33, 429 P.2d 825 (1967) for the proposition that the burden of proving a statute unconstitutional falls on the individual asserting the challenge. *Diamond Motors* upheld the constitutionality of a statute regulating the location and size of outdoor signs on the ground that the statute is a valid exercise of state police power to achieve aesthetic purposes.

[8] Act of June 4, 1967, ch. 194, 1967 Hawaii Sess. Laws 203 (original enactment); Act of May 30, 1972, ch. 133, 1972 Hawaii Sess. Laws 464; Act of May 29, 1974, ch. 73, 1974 Hawaii Sess. Laws 129; Act of June 5, 1979, ch. 185, 1979 Hawaii Sess. Laws 368; Act of May 17, 1980, ch. 70, 1980 Hawaii Sess. Laws 94.

[9] Act of May 26, 1983, ch. 120, 1983 Hawaii Sess. Laws 218 (codified at HAWAII REV. STAT. § 657-8 (Supp. 1983)).

[10] *Shibuya*, 65 Hawaii at 28, 647 P.2d at 279.

Clark Equipment Co., the manufacturer of the forklift and the only defendant with no connection to the design or building of the plant.[11]

Thoht Construction filed a third-party complaint against Coca-Cola, the owner of both the building and the forklift, and against Industrial Welding, the subcontractor originally in charge of the metal work. Thoht alleged that Coca-Cola and Industrial Welding were primarily responsible for the plaintiff's injuries. Plaintiff Shibuya thereafter amended his complaint to include Industrial Welding as a defendant.[12]

The defending architects, general contractor, and subcontractor in charge of the metal work sought summary judgments on the ground that Hawaii's builders' statute provided them with immunity from suit.[13] The circuit court granted the defendants' motions for summary judgments, since the alleged injuries had occurred more than six years after the completion of the plant.[14] Application of the statute resulted in dismissal of all the defendants except Clark Equipment, the manufacturer of the forklift.[15] Plaintiff Shibuya and defendant Clark Equipment then obtained an interlocutory appeal to the Hawaii Supreme Court.[16]

On appeal, Shibuya and Clark Equipment argued that the statute was unconstitutional because it arbitrarily excluded from its protection similarly situated persons.[17] The Hawaii Supreme Court agreed, finding no rational basis for

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[11] *Id.*

[12] *Id.* at 28-29, 647 P.2d at 279. Shibuya did not amend his complaint to sue Coca-Cola, the owner of the building, since Hawaii's Worker's Compensation law prohibits an employee from suing an employer. HAWAII REV. STAT. ch. 386 (1976).

[13] Limitation of action for damages based on construction to improve real property. No action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of any condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury, shall be brought against the owner of the real property or any other person having an interest therein or in the improvement or against any registered or duly licensed person performing or furnishing professional or licensed services in the design, planning, supervision, or observation of construction of the improvement to real property more than two years after the cause of action has accrued, but in any event not more than six years after the completion of the improvement except that this provision shall not apply to surveyors for their own errors in boundary surveys. This section shall not apply to actions for damages resulting from the negligent conduct of the owner of the real property or any other person having an interest therein or in the improvement in the repair or maintenance of the improvement.

Act of May 17, 1980, ch. 70, 1980 Hawaii Sess. Laws 94.

[14] 65 Hawaii at 29, 647 P.2d at 279.

[15] *Id.*

[16] *Id.*

[17] This argument appeared in a different form in appellants' opening briefs. They noted that the exclusion of materialmen from the statute, later amended to include them, was arbitrary and unreasonable. The court in its opinion held the exclusion of Clark Equipment to be unreasonable.

distinguishing between the material supplier Reliance and the subcontractor Industrial Welding who had been granted immunity from liability under the statute and the manufacturer Clark Equipment who was left solely liable.[18] The court vacated the summary judgments awarded below and remanded the case for further proceedings consistent with its opinion.[19]

III. The Historical and Analytical Context

A. *Builders' Statutes and Constitutional Challenges: A National Perspective*

Legislatures began enacting statutes to protect the construction industry against unlimited liability in the mid-1960s. They were responding to the courts' increasing rejection of the defense of lack of privity of contract often raised by the construction industry in suits for negligent construction and design.[20] As of 1982, forty-five states and the District of Columbia had enacted builders' statutes.[21] Although they vary widely in scope and specific provisions, most are based on a model act proposed by the construction industry.[22]

1. *Major Characteristics*

Persons Covered by the Statutes. Most statutes are designed to provide protection to all persons directly involved in the construction itself, including the architect, contractor, engineer, inspector or "any other party performing or furnishing the design, planning, supervision, inspection, construction, or observation of construction."[23] Certain jurisdictions have a more limited coverage which includes only certain persons involved in the construction.[24] Some

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Id. at 43, 647 P.2d at 288.

[18] *Id.*

[19] *Id.* at 44, 647 P.2d at 288. The court held the statute violated the equal protection guarantee of art. I, § 5, Hawaii Const. (1979).

[20] Annot., 93 A.L.R.3d 1242, 1246. *See* Inman v. Binghampton Hous. Auth., 3 N.Y.2d 137, 164 N.Y.S.2d 699, 143 N.E.2d 895 (1957).

[21] The five states which had not enacted builders' statutes by 1982 are: Arizona, Iowa, Kansas, Vermont, and West Virginia. New York has a general statute of limitation for professional liability. Illinois repealed its builders' statute (formerly Ill. Ann. Stat. ch. 83, § 24f) by P.A. 76-884 § 1 effective August 20, 1969. For a listing of state statutes, *see* Knapp & Lee, *Application of Special Statutes of Limitations Concerning Design and Construction*, 23 St. Louis U.L.J. 351, 352 n.4 (1979).

[22] *See* Collins, *Limitation of Action Statutes for Architects and Builders: An Examination of Constitutionality*, 29 Fed'n of Ins. Counsl. Q. 41 (1978) and *infra* note 56.

[23] *See, e.g.*, N.H. Rev. Stat. Ann. § 508:4(b) (1968); Wyo. Stat. § 1-3-111 (1977); Colo. Rev. Stat. § 13-80-127 (1973).

[24] *See, e.g.*, Ind. Code Ann. § 34-4-20-2 (Burns Supp. 1978) (protection extends only to

jurisdictions, though, also extend protection to surveyors,[25] materialmen, suppliers or manufacturers,[26] owners of the property or those having an interest therein,[27] or sureties of persons included in the statutes.[28]

Types of Actions Included. Statutes in most jurisdictions apply to actions to recover damages for injury to real or personal property, bodily injury or wrongful death.[29] Similarly, most statutes preserve actions for damages brought in contract or in tort or under other appropriate theories,[30] although some statutes are more restrictive and do not extend protection beyond tort claims.[31] Since most construction litigation involves multiple parties with cross-claims and third party claims, many statutes preserve actions for contribution or indemnification arising out of claims based upon design and construction deficiencies.[32]

Time Limitations for Bringing of Actions. Most jurisdictions limit actions in one of two ways: by means of a "statute of repose" or "immunity statute"[33] that requires that an action be commenced within a specific period following the occurrence of a specific action,[34] typically the substantial completion of the improvement;[35] or through a bifurcated system consisting of a statute of immu-

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architects and engineers); ME. REV. STAT. ANN. § 752-A (Supp. 1977).

[25] *See, e.g.*, MICH. COMP. LAWS ANN. § 600.5839(2) (West 1968); TENN. CODE ANN. § 28-314 (Supp. 1978); S.C. CODE ANN. § 15-3-640 (1977); CAL. CIV. CODE § 337.15 (West) (1982).

[26] *See, e.g.*, R.I. GEN. LAWS § 9-1-29 (Supp. 1977); WIS. STAT. ANN. § 893.155 (West Supp. 1978); MINN. STAT. ANN. § 541.051 (West 1983).

[27] *See, e.g.*, MINN. STAT. ANN. § 541.051 (West 1983). The extension of protection to owners is quite rare. Owners are more often expressly excluded from protection. *See, e.g.*, CAL. CIV. CODE § 337.15(2)(e) (West 1982).

[28] *See, e.g.*, CAL. CIV. CODE § 337.15 (West 1982).

[29] *See* MINN. STAT. ANN. § 541.051 (West 1983).

[30] *Id.* Some statutes merely extend to "all actions to recover damages" without enumerating those actions. *See, e.g.*, TENN. CODE ANN. § 28-314 (Supp. 1978). *See generally* Knapp & Lee, *supra* note 21, at 355.

[31] *See, e.g.*, D.C. CODE ANN. § 12-310(b)(1) (1973); MONT. CODE ANN. § 93-2619 (1977). *See generally* Knapp & Lee, *supra* note 21, at 355.

[32] *See, e.g.*, DEL. CODE ANN. tit. 10 § 8127(b) (1974); N.C. GEN. STAT. § 1-50(5) (1969). *See generally* Knapp & Lee, *supra* note 21, at 357 n.39. Missouri limits the amount of time which an architect, engineer, or contractor can bring an action for contribution or indemnity arising out of claims based upon design and construction deficiencies to one year from the date suit is brought against them. *See* MO. ANN. STAT. § 516.0973 (Vernon Supp. 1977). *See generally* Knapp & Lee, *supra* note 21, at 357.

[33] *See, e.g.*, Klein v. Catalano, 386 Mass. 701, 437 N.E.2d 514 (1982) (statute of repose); Skinner v. Anderson, 38 Ill.2d 455, 231 N.E.2d 588 (1967) (statute of immunity).

[34] *See, e.g.*, FLA. STAT. ANN. § 95.11 (West 1982) (4-year immunity provision); MD. CTS. & JUD. PROC. CODE ANN. § 5-108 (West 1979) (20-year immunity provision).

[35] *See, e.g.*, MINN. STAT. ANN. § 541.051 (West 1983); KY. REV. STAT. § 413.135 (1979). Some statutes provide alternative points of commencement, normally whichever event occurs first. *See, e.g.*, CAL. CIV. CODE § 337.15(2)(g) (West 1982); FLA. STAT. ANN. § 95.11(3)(c) (West

nity and a statute of limitations in which an action must be brought within a certain time, normally one to four years[36] after the cause of action accrues, but in no event beyond the period specified.[37]

Saving Clauses. To avoid a possible conflict with other existing statutes of limitations, an increasing number of states have amended their builders' statutes by adding a saving clause. Where the action accrues within the last year or two prior to the time immunity would normally begin, the clause delays immunity for a time period consistent with the applicable statute of limitations in that jurisdiction.[38]

Conflict of Statutes Provision. In reaction to numerous due process challenges,[39] many states have also amended their statutes to provide that nothing in the statute extends or limits the regular statute of limitations time period of the jurisdiction.[40]

Suspension of Immunity. Although generally implied in most statutes, some jurisdictions have recently added an express provision that "willful misconduct or fraudulent concealment" suspends the statute's grant of immunity.[41]

2. *Constitutional Challenges in Other Jurisdictions*

Of the forty-six jurisdictions that have enacted builders' statutes,[42] thirty-four have litigated their constitutional validity since the first suit was brought in 1967.[43] Twenty-one jurisdictions[44] have upheld such statutes and thirteen have

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1982). In a few jurisdictions, the period commences after the performance or furnishing of the service, a feature which operates to the benefit of architects or subcontractors whose service is completed prior to substantial completion of the overall project. *See, e.g.*, MASS. ANN. LAWS ch. 260 § 2B (Michie/Law. Co-op 1977).

[36] Most jurisdictions with bifurcated statutes have adopted a two-year statute of limitations. *See, e.g.*, MINN. STAT. ANN. § 541.05 (West Supp. 1983); S.C. CODE ANN. § 15-3-650 (Law. Co-op 1979).

[37] *See, e.g.*, COLO. REV. STAT. § 13-80-127 (1973); OR. REV. STAT. § 12.135 (1975). For example, an action must be initiated within four years but in no case two years beyond the point of substantial completion.

[38] *See, e.g.*, MINN. STAT. ANN. § 541.051 (West Supp. 1983):

> Subd. 2. Notwithstanding the provisions of subdivision 1, in the case of an action which accrues during the fourteenth or fifteenth year after the substantial completion of the construction, an action to recover damages may be brought within two years after the date on which the action accrued, but in no event may an action be brought more than 17 years after substantial completion of the construction.

[39] *See, e.g.*, Saylor v. Hall, 497 S.W.2d 218 (Ky. 1973); Overland Constr. Co., Inc. v. Sirmons, 369 So.2d 572 (Fla. 1979).

[40] *See, e.g.*, MINN. STAT. ANN. § 54.051 (West Supp. 1983).

[41] CAL. CIV. CODE § 337.15(2)(f) (West 1982).

[42] *See supra* note 21 and accompanying text.

[43] *Skinner*, 38 Ill.2d 455.

overturned them.[45] Where held unconstitutional, four statutes have been subse-

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[44] *Arkansas*: Carter v. Harrenstein, 248 Ark. 1172, 455 S.W.2d 918 (1970), *appeal dismissed*, 401 U.S. 901 (1970); *California*: Regents of the Univ. of Cal. v. Hartford Accident & Indem. Co., 21 Cal. 3d 624, 581 P.2d 197, 147 Cal. Rptr. 486 (1978); Barnhouse v. City of Pinole, 133 Cal. App. 3d 171, 183 Cal. Rptr. 881 (1982); *District of Columbia*: Pres. & Dir. of Georgetown College v. Madden, 505 F. Supp. 557 (D. Md. 1981); *Georgia*: Mullis v. Southern Co. Services, Inc., 250 Ga. 90, 296 S.E.2d 579 (1982); *Idaho*: Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill, 103 Idaho 19, 644 P.2d 341 (1982); *Louisiana*: Burmaster v. Gravity Drainage Dist. No. 2 of the Parish of St. Charles, 366 So.2d 1381 (La. 1978); Bordlee v. Neyrey Park, Inc., 394 So.2d 822 (La. App. 1981); *Massachusetts*: Klein v. Catalano, 386 Mass. 701, 437 N.E.2d 514 (1982); *Mississippi*: Anderson v. Fred Wagner & Roy Anderson, Jr. Inc., 402 So.2d 320 (Miss. 1981); *Montana*: Reeves v. Ille Elec. Co., 170 Mont. 104, 551 P.2d 647 (1976); *New Jersey*: Rosenberg v. Town of North Bergen, 61 N.J. 90, 293 A.2d 662 (1972); O'Connor v. Altus, 67 N.J. 106, 335 A.2d 545 (1975); *New Mexico*: Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (N.M. Ct. App. 1977), *cert. denied*, 91 N.M. 3, 569 P.2d 413 (1977); *North Carolina*: Lamb v. Wedgewood South Corp., 55 N.C. App. 686, 286 S.E.2d 876 (1982); *Ohio*: Adair v. Koppers Co., Inc., 541 F. Supp. 1120 (D. Ohio 1982); *Oregon*: Josephs v. Burns, 260 Or. 493, 491 P.2d 203 (1971); *Pennsylvania*: Freezer Storage Inc. v. Armstrong Cork Co., 234 Pa. Super. 441, 341 A.2d 184 (1975); *South Dakota*: McMacken v. State, 320 N.W.2d 131 (1982), *but see* Daugaard v. Baltic Coop. Bldg. Assoc., No. 14052, May 2, 1984, S.D. Sup. Ct. (South Dakota statutes that bar actions against persons involved in construction of improvements to real property if brought more than six years after completion of such improvements, and against product manufacturers if brought more than six years after date of product's delivery violate state constitutional provision ensuring open courts for redress of injury); *Tennessee*: Agus v. Future Chattanooga Dev. Corp., 358 F. Supp. 246 (E.D. Tenn. 1973), *cited with approval*, Watts v. Putnam County, 525 S.W.2d 488 (Tenn. 1975); *Texas*: Hill v. Forrest & Cotton, Inc., 555 S.W.2d 145 (Tex. Civ. App. 1977); *Utah*: Good v. Christensen, 527 P.2d 223 (Utah 1974); *Virginia*: Smith v. Allen-Bradley Co., 371 F. Supp. 698 (W.D. Va. 1974); *Washington*: Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co., 81 Wash. 2d 528, 503 P.2d 108 (1972).

[45] *Alabama*: Bagby Elev. & Elec. Co. Inc. v. McBride, 292 Ala. 191, 291 So.2d 306 (1974); Plant v. Reid Inc., 294 Ala. 155, 313 So.2d 518 (1975); *Colorado*: McClanahan v. American Gilsonite Co., 494 F. Supp. 1334 (D. Colo. 1980). *But see* Cudahay Co. v. Ragnar Benson Inc., 514 F. Supp. 1212 (D. Colo. 1981) (upheld); *Florida*: Overland Const. Co., Inc. v. Sirmons, 369 So.2d 572 (Fla. 1979). *But see* Havatampa Corp. v. McElvy, Jennewein, Stefany & Howard, Architects/Planners, Inc., 417 So.2d 703 (Fla. App. 1982) (upheld); *Hawaii*: Fujioka v. Kam, 55 Hawaii 7, 514 P.2d 568 (1973); Shibuya v. Architects Hawaii, Ltd., 65 Hawaii 26, 647 P.2d 276 (1982); *Illinois*: Skinner v. Anderson, 38 Ill. 2d 455, 231 N.E.2d 588 (1967); *Kentucky*: Saylor v. Hall, 497 S.W.2d 218 (Ky. 1973); *Michigan*: Muzar v. Metro Town Houses, Inc. 82 Mich App. 368, 266 N.W.2d 850 (1978) *but see* O'Brien v. Hazelet & Erdal Consulting Engineers, 299 N.W.2d 336, 410 Mich. 1 (1980) (upheld); *Minnesota*: Pacific Indem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 549 (1977) *but see* Calder v. City of Crystal, 318 N.W.2d 838 (Minn. 1982) (upheld); *New Hampshire*: Henderson Clay Products, Inc. v. Edgar Wood & Assoc., Inc., 122 N.H. 800, 451 A.2d 174 (1982); *Oklahoma*: Loyal Order of Moose Lodge, 1785 v. Cavaness, 563 P.2d 143 (Okla. 1977); *South Carolina*: Broome v. Truluck, 270 S.C. 227, 241 S.E.2d 739 (1978); *Wisconsin*: Kallas Millwork Corp. v. Square D. Co., 66 Wis. 2d 382, 225 N.W.2d 454 (1975) *but see* U.S. Fire Ins. Co. v. E.D. Wesley Co., 100 Wis. 2d 59, 301 N.W.2d 271 (Wis. App. 1980) (upheld); *Wyoming*: Phillips v. ABC Builders, Inc., 611

quently upheld in amended versions.[46] The current trend, therefore, appears to uphold builders' statutes, since seventeen out of twenty-one have been validated in state appellate and federal district court decisions rendered between 1980 and 1982.[47]

Challenges to builders' statutes are most commonly premised on alleged violations of the equal protection clause of the fourteenth amendment of the United States Constitution and of the corresponding provision in the particular state constitution. Specifically, the statutes have been attacked on the grounds that the classification of persons protected by the statute is arbitrary and that the classification does not bear a reasonable relationship to the legislative purpose.[48] While one court will find a classification arbitrary and unreasonable, another court may find the same classification reasonable in a similarly worded statute,[49] indicating that the decision turns on the reviewing court's basic attitude toward judicial review of socio-economic legislation.

Challenges have also been premised on violations of due process on the theory that the legislative grant of immunity effectively bars a cause of action before it arises.[50] These challenges have been especially successful in those states which also have state constitutional provisions which prohibit the legislature from abolishing common law rights of action.[51]

The United States Supreme Court has not directly ruled on the constitutionality of such statutes but has tacitly upheld the constitutionality of an Arkansas statute which had been challenged on due process grounds.[52] Similarly, although the Ninth Circuit Court of Appeals has yet to rule on the issue, it has stated that arguments challenging their constitutionality are "neither insubstan-

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P.2d 821 (Wyo. 1980).

[46] Michigan, Florida, Wisconsin, and Minnesota. At least four other states have amended their statutes. However, their constitutionality has yet to be tested. *See* OKLA. STAT. ANN. tit. 12 § 109 (amended 1978); ALA. CODE § 6-5-218 (amended 1977); KY. REV. STAT. § 413.135 (1979); and HAWAII REV. STAT. § 657-8 (amended 1983).

[47] *See Phillips*, 611 P.2d 821, *McClanahan*, 494 F. Supp. 1334, *Henderson*, ___ N.H. ___, 451 A.2d 174, and *Shibuya*, 65 Hawaii 26, 647 P.2d 276.

[48] Truax v. Corrigan, 257 U.S. 312 (1921).

[49] *Compare, e.g., Klein*, 386 Mass. 701, 437 N.E.2d 514, in which the Massachusetts court held that a six-year statute of immunity which extended protection to architects, engineers, and contractors, but excluded suppliers, owners, and materialmen did *not* violate equal protection with *Henderson*, ___ N.H. ___, 451 A.2d 174, in which the New Hampshire court held that a similar six-year statute of immunity favoring architects, engineers, and contractors was unconstitutionally discriminatory because it did not grant the same protection to materialmen and suppliers.

[50] Due process is allegedly violated because a grant of absolute immunity bars a cause of action before it arises. *See, e.g., Skinner*, 38 Ill. 2d 455, 231 N.E.2d 588 (statute held unconstitutional). *But see Carter*, 248 Ark. 1172, 455 S.W.2d 918 (statute upheld).

[51] *See Saylor*, 497 S.W.2d 218; *Phillips*, 611 P.2d 821; and *Overland Const. Co.*, 269 So.2d 572.

[52] *See Carter*, 248 Ark. 1172, 455 S.W.2d 918.

tial nor obscure."[53]

B. *The Evolution of Hawaii's Builders' Statute Through 1980*

In 1967, Hawaii's builders' statute was enacted[54] as a statute of limitations to protect architects, engineers, and contractors from future liability arising out of any deficiency in the design, planning, supervision, observation of construction or construction of an improvement to real property.[55] The legislature expressed concern that unlimited future liability imposed an undue burden on the construction industry, since physical improvements to real estate are subject to deterioration and normal wear and tear.[56] With the passage of time, those defects caused by negligent upkeep become increasingly difficult to distinguish from those caused by negligent design. As a result, it was deemed that the construction industry was unfairly forced to defend itself in liability suits for harm it did not necessarily cause.[57]

In its original form, the statute applied to actions for damages for injury to property, bodily injury, wrongful death and contribution and indemnification due to injury.[58] It differed in several respects from statutes enacted in other jurisdictions. First, it protected only registered or licensed persons, possibly in an attempt to exclude out-of-state professionals. Second, it did not grant immunity until ten years after either performance or the furnishing of services as opposed to after substantial completion. Third, it expressly excluded surveyors from protection for their own errors in boundary surveys.[59] The bifurcated statute also imposed a two-year statute of limitations to take effect after the cause of action accrued, in addition to granting an absolute ten-year immunity.[60] The legisla-

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[53] Jasinski v. Showboat Operating Co., 644 F.2d 1277, at 1281 n.7 (1981) (case remanded to district court to hear constitutional arguments).

[54] Act of June 4, 1967, ch. 194, S.B. 855, 1967 Hawaii Sess. Laws 203.

[55] *Id.*

[56] H.R. Stand. Comm. Rep. No. 790, 4th Hawaii Legislature, 1967 H.J. 781. In its original form, HAWAII REV. STAT. § 657-8 was similar to statutes already adopted in fourteen other jurisdictions as well as to the Model Act drafted by the American Institute of Architects, the National Society of Professional Engineers, and the Associated General Contractors of America, which, through their local chapters, had lobbied for the adoption of the statute in Hawaii. *See* Collins, *supra* note 22, at 46 and n.27.

[57] H.R. Stand. Comm. Rep. No. 790, *supra* note 56.

[58] Act of June 4, 1967, *supra* note 54.

[59] *Id.*

[60] Hawaii's conventional two-year statute of limitations is codified at HAWAII REV. STAT. § 657-7 (1976). The legislature, although noting that nationally 84.3% of claims are brought within four years and 93% are brought within six years, finally adopted the ten-year statute of immunity to provide added protection to the public. H.R. Stand. Comm. Rep. No. 790, *supra* note 56.

ture amended the statute in 1972 by reducing the immunity provision from ten to six years.[61]

The Hawaii Supreme Court reviewed the statute's constitutionality for the first time in *Fujioka v. Kam*.[62] Plaintiff Fujioka brought an action for damages against the owner of a supermarket for injuries she sustained when a portion of a supermarket roof fell on her. The owner of the building joined the engineer and the general contractor as third party defendants. The circuit court granted the contractor's and engineer's motions for summary judgment, since their services had been rendered more than ten years prior to the collapse of the roof and application of the builders' statute relieved them of any liability for contribution or indemnity.[63] The owner was therefore left solely liable. Stating that the statute "calls for arbitrary and capricious discrimination . . . violative of the equal protection guarantee," the Hawaii Supreme Court found that there was no "rational basis for treating an engineer and the contractor differently from the owners under the same circumstances."[64]

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[61] Act of May 30, 1972, ch. 133, 1972 Hawaii Sess. Laws 464.

> Your Committee finds that ample justification for a reduction in the length of limitation has been presented by the General Contractors Association of Hawaii and the Consulting Engineers Council of Hawaii. Specifically noted that:
>
> (1) Records get lost with time so that the basis for defense becomes cloudy.
>
> (2) Witnesses die or move away.
>
> (3) The longer the statutory period, the harder it becomes to distinguish between negligence in design or construction and negligence in maintenance.
>
> (4) In Hawaii, almost 80% of all claims are initiated in the first three years.

The original proposal to reduce the immunity to three years was rejected in favor of the six-year immunity which was consistent with the time permitted to bring personal actions under HAWAII REV. STAT. § 657-1. S. Stand. Comm. Rep. No. 176-22, 6th Hawaii Legislature, 1972 S.J. 815. The amendment was to be given prospective application only: "SECTION 2. This Act does not affect the rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date." Act of May 30, 1972, ch. 133, 1972 Hawaii Sess. Laws at 465.

In Agustin v. Dan Ostrow Construction Co. Inc., 64 Hawaii 80, 636 P.2d 1348 (1981), the Hawaii Supreme Court was called upon to interpret this provision of Act 133. It held that the words "accrued" as used in the two-year statute of limitations and the word "matured" as used in the amendment do not have the same legal effect. Plaintiff homeowner in 1968 acquired matured rights which remained inchoate when Act 133 reduced the limitation period from 10 to six years. Therefore, even though the cause of action did not accrue until 1977, plaintiff was not barred from bringing suit, since the right against the defendant contractor matured prior to the effective date of the amendment. Plaintiff thus had 10 years from the date of the contractor's misfeasance in 1968 to bring suit, which was in fact brought in the ninth year.

[62] 55 Hawaii 7, 514 P.2d 568 (1973).

[63] *Id.* at 8, 514 P.2d at 569.

[64] *Id.* at 12-13, 514 P.2d at 572. Because the statute prevented a plaintiff from recovering from an engineer or contractor, even if he was the sole cause of the injury, while the owners could not obtain reimbursement or contribution for the damages they had to pay, the court found no

In direct response to *Fujioka*, the legislature amended the statute in 1974 and extended immunity to owners of real property as well as to any other persons having an interest in the property or improvement, unless damages were due to the negligent conduct of the owner or part-owner in the repair or maintenance of the improvement.[65] Materialmen and suppliers were specifically excluded from protection under the 1974 version of the statute because they were deemed to constitute a separate class.[66] The circuit court in *Shibuya* applied the 1974 version in awarding summary judgment to the defendants.[67] However, in 1979, during the course of the litigation, the legislature extended protection to materialmen and suppliers in response to decisions in other jurisdictions holding their exclusion to be a violation of equal protection.[68]

The 1979 amendment also sought to cure the statute's other weaknesses as evidenced by successful challenges to similar statutes in other jurisdictions.[69] Prior to 1979, a cause of action which accrued in the fifth or sixth year after the completion of the improvement or construction left an aggrieved person less than the two years otherwise allowed under the standard two-year statute of limitations to bring an action.[70] To cure what would therefore subject the stat-

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rational basis for the different treatment of the engineers and contractors. There was, however, no showing in *Fujioka* that this hypothetical situation existed in fact.

[65] Act of May 29, 1974, ch. 73, 1974 Hawaii Sess. Laws 129. "In order to meet the constitutional requirements as set forth in the *Fujioka* decision this bill extends the statute of limitations to include 'the owner of real property or any other person having an interest therein or in the improvement'." H.R. Stand. Comm. Rep. No. 704-74, 7th Hawaii Legislature, 1974 H.J. 821.

[66] Immunity had not been extended earlier to manufacturers and suppliers of materials because:

> [M]aterials can be physically and scientifically measured and tested before being offered for sale. Their durability and expected performance are usually well documented and backed by specific warrantys [sic] and guaranties. However, a building cannot be tested until after it is completed and with the passage of time. The concepts and services performed are primarily judgmental and change according to technological advances and the refinement of the state of the art. In the case of the owner, designer, contractor, and others involved in the creation of the improvement, proof of "due care" would serve as a defense. However, in the case of materials, which can be measured and tested, strict liability governs and "due care" is not a defense.

H.R. Stand. Comm. Rep. No. 704-74 at 821-22.

[67] 65 Hawaii at 28, 647 P.2d at 279.

[68] Act of June 5, 1979, ch. 73, 1979 Hawaii Sess. Laws 368-369.

[69] H.R. Stand. Comm. Rep. No. 618, 10th Hawaii Legislature, 1979 H.J. 1433. The Legislature was probably influenced by the decisions in *Kallas*, 66 Wis. 2d 382, 225 N.W.2d 454 (1975), *Pacific Indem. Co.*, 260 N.W.2d 549 (1977), and *Broome* 270 S.C. 227, 241 S.E.2d 739, (1978), all of which held that statutes which excluded materialmen and suppliers but included other members of the construction industry violated equal protection.

[70] HAWAII REV. STAT. § 657-7 (1976): "Damage to persons or property. Actions for the recovery of compensation for damage or injury to persons or property shall be instituted within two years after the cause of action accrued, and not after, except as provided in section 657-13

ute to a due process challenge on the basis of an abolition of a common law right, the legislature added a saving clause[71] and a conflict of statutes provision.[72] The amendment was given retroactive application, thereby clarifying a previous ambiguity in legislative intent.[73] In 1980, prompted by a 1978 California Supreme Court decision and a subsequent 1979 amendment to the California statute,[74] the legislature included the sureties of those already included within the protection of Hawaii's statute.[75]

C. Standards of Review Applied to Equal Protection Challenges

1. *United States Supreme Court Standards of Review*

Although the *Shibuya* decision explicitly rests on a violation of the equal protection guarantee of the Hawaii State Constitution,[76] an understanding of

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[which deals with infancy, insanity, and imprisonment]."

[71] SECTION 2. Savings clause. Notwithstanding the provisions of section 1 of this Act, in the case of such an injury to property or the person or such an injury causing wrongful death, which injury occurred during the fifth or sixth year after the date of completion, an action to recover damages for such an injury or wrongful death may be brought within two (2) years after the date on which such injury occurred (irrespective of the date of death) but in no event may such an action be brought more than eight (8) years after the date of completion of the improvement.

Act of June 5, 1979, *supra* note 69 at 369.

[72] "SECTION 3: Except as provided in section 2 above, nothing in this Act shall be construed as extending the period prescribed by the laws of this State for the bringing of any action." *Id.*

[73] H.R. Stand. Comm. Rep. No. 704-74, 7th Hawaii Legislature 1974 H.J. 822:

> It is your Committee's intention that this bill should apply to all actions commenced *after its effective date.* That is, that it should apply to all actions that have accrued since the enaction of the original statute in 1967. For example, if a building is more than 6 years old, the statute of limitations has already run and if the building is three years old, there are 3 years remaining before the statute of limitations would bar an action. [Emphasis in the original]

From the Committee Report, it is not clear whether the legislature intended the 1974 amendment to apply prospectively (as the initial portion of the report would suggest) or retrospectively (as the example would suggest). The Hawaii Supreme Court determined the statute to have prospective application in *Agustin*, 64 Hawaii 80, 636 P.2d 1348.

[74] *Regents of the Univ. of Cal.*, 21 Cal. 3d 624, 581 P.2d 197, 147 Cal. Rptr. 486. The California Supreme Court held that "[e]xclusion of surety from ten year statute of limitations governing certain actions against construction contractors did not deny general contractor's surety equal protection of the laws, as there existed rational basis for legislative distinctions between contractors and sureties. . . ." As a result of the court's decision, the California legislature amended its statute in 1979 to include the sureties of a person covered. CAL. CIV. CODE § 337.15(a) (West 1982).

[75] Act of May 17, 1980, ch. 70, 1980 Hawaii Sess. Laws 94.

[76] HAWAII CONST. art. I, § 5 (1979).

the standards of review developed by the United States Supreme Court for fourteenth amendment equal protection cases helps to analyze the Hawaii Supreme Court's approach in *Shibuya*.[77]

Once denigrated by Justice Holmes as "the last resort of constitutional arguments,"[78] the equal protection guarantee[79] today ranks with due process[80] as an important check on government action.[81] Whether or not a governmental action classifies individuals determines whether a due process or an equal protection analysis applies. If an act impinges upon fundamental rights, the government must show a compelling state interest to justify the act under either clause. When an act relates to socio-economic matters, it need only further a legitimate state purpose in a rational manner to survive either an equal protection or due process challenge. The due process analysis is appropriate where governmental action arbitrarily affects an individual's life, liberty or property interests, while an equal protection analysis applies where the government distributes benefits and burdens by singling out a particular class of individuals. An equal protection analysis concerns legislative line drawing, while a due process analysis deals with the adjudication of individual claims.[82]

In applying a rational basis standard of review to a particular classification, the United States Supreme Court has since 1937 consistently displayed extreme deference to the legislative prerogative.[83] Judicial deference has been justified as

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[77] J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW (1983) (hereinafter cited as J. NOWAK); L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978); Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

[78] Buck v. Bell, 274 U.S. 200, 208 (1927)

[79] The equal protection guarantee is found in the fourteenth amendment of the U.S. CONST., § 1: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

[80] The due process guarantee of the fourteenth amendment is also found in § 1: "nor shall any State deprive any person of life, liberty, or property, without due process of law." The same guarantee is found in the fifth amendment without the restriction of state action: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

[81] J. NOWAK, *supra* note 77 at 586.

[82] *Id.* at 587.

[83] L. TRIBE, *supra* note 77 § 16-2; J. NOWAK, *supra* note 77, at 590-91; Tussman & tenBroek, *supra* note 77, at 365-68. Application of the rational basis test at least since 1937 has virtually assured a finding of constitutionality. West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) expressly overruled Adkins v. Children's Hospital, 261 U.S. 525 (1923) and began the modern era of rational basis analysis for equal protection challenges. U.S. v. Carolene Products Co., 304 U.S. 144 (1938) inaugurated the use of the same analysis for due process challenges.

The only exception to a finding of constitutional validity, Morey v. Doud, 354 U.S. 457 (1957) (holding unconstitutional an Illinois law exempting the American Express Company from its provisions concerning currency exchanges) was overruled by New Orleans v. Dukes, 427 U.S. 297 (1976) (affirming a New Orleans ordinance exempting two specified vendors from its ban on push-cart selling in the French Quarter).

necessary to guard against usurpation of the legislative function as defined by the separation of powers doctrine.[84] On the other hand, the doctrine of checks and balances authorizes the Court to supervise the legislature's acts to insure that constitutional guarantees are not violated. Even here, however, the Court is hopefully guided by judicial self-restraint to avoid the "undemocratic character of judicial lawmaking."[85] The inherent conflict between these two doctrines has created conceptual difficulties for the Court.[86]

The United States Supreme Court has proven most deferential in the area of utilities, tax, and economic regulation cases.[87] The traditional justifications for deference in the socio-economic sphere include the legislature's superior fact-finding abilities compared to the Court's relative remoteness, the complexity of economic regulations, and the uncertainty of expert opinion.[88] As a result, the Court has applied the rational basis test to uphold classifications which were not closely fitted to the purposes of a statute.[89]

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[84] Tussman & tenBroek, *supra* note 77, at 365.

[85] *Id.* at 366.

[86] The United States Supreme Court attempts to meet these difficulties by maintaining that it is not its function, as it reviews legislation, to substitute its views about what is desirable for that of the legislature. It thus bows in the direction of the functional separation theory. But at the same time the Court speaks of judicial self-restraint as the answer to the undemocratic aspects of the check and balance system. Kept apart from each other, the essential incompatability of these two attitudes often escapes notice. For self-restraint is no virtue if the Court has a unique function to perform. If, on the other hand, the self-restraint is justified, the belief in a unique judicial function is untenable. These difficulties plague the Court at every stage in the process of applying the equal protection clause. *Id.*

[87] The leading case in this area is Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911), which articulated four rules of decision in upholding a statute regulating the business of carbonic gas production: (1) since the legislature enjoys wide discretion in decision-making, its acts will be declared unconstitutional only when they are purely arbitrary and without a reasonable basis; (2) a classification will not be held unconstitutional simply because it lacks mathematical precision or because it results in some inequality, as long as it has some reasonable basis; (3) if any conceivable set of facts can justify a classification, those facts will be assumed have existed when the law was enacted; and (4) the challenger of the classification bears the burden of showing that it rests on no reasonable basis. *See also* Kotch v. Board of River Port Pilot Commissioners, 330 U.S. 552 (1947) and Allied Stores v. Bowers, 358 U.S. 522 (1959). Judicial performance under this standard is discussed in L. TRIBE, *supra* note 77, § 16-2 and in Tussman & tenBroek, *supra* note 77 at 368-72.

[88] Tussman & tenBroek, *supra* note 77, at 372-73.

[89] For a discussion of underinclusive classification, see *id.* at 344-53 and L. TRIBE *supra* note 77, § 16-4. The rationale for permitting underinclusive classification is that a legislature should be free to work out pragmatic solutions to a problem "one step at a time". *See, e.g,* Williamson v. Lee Optical, 348 U.S. 483, 489 (1955). Moreover, the Court has been willing to go further and assume a purpose unstated by the legislature in order to rationalize a regulation. *See, e.g.*, Railway Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949). An example of overinclusive classifications being validated is Dandridge v. Williams, 397 U.S. 471 (1970) (upholding a

In the area of human, civil, and individual rights, the Court has developed a second standard of review. Under the "strict scrutiny" test,[90] an act will be upheld only if there is a showing that the government purpose is compelling and that the classification is necessary to promote that compelling interest.[91] Two types of classifications trigger a strict scrutiny review: those which infringe upon a fundamental right[92] and "suspect" classifications.[93] The evil to be avoided is invidious discrimination.[94]

In addition to these two well-established standards of review, within the last twenty years, the United States Supreme Court has also developed an intermediate standard of review[95] for cases involving quasi-fundamental rights or semi-suspect classifications. Although gender-based classifications are the only cases in which the Court has expressly used this standard, it has implicitly been used to invalidate classifications based on illegitimacy and alienage.[96] In addition, recent

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welfare regulation placing an absolute welfare limit of $250 per month per family, regardless of need or size). A combination of an over- and underinclusive classification was validated in Goesaert v. Cleary, 335 U.S. 464 (1948) (sustaining a statute denying all women bartenders' licenses except the wives and daughters of male owners of bars).

[90] L. TRIBE, *supra* note 77, at § 16-6; J. NOWAK, *supra* note 77, 591-92; and Tussman & tenBroek, *supra* note 77, at 373-78.

[91] *Id.*

[92] *See Carolene Products*, 304 U.S. 144 in which Justice Stone noted in dicta that legislation restricting political rights such as voting, speech and assembly might be subjected to stricter judicial scrutiny. Perhaps the Court's most important decision supporting at least one theory by which the *Shibuya* decision might have been made is Boddie v. Connecticut, 401 U.S. 371 (1971), which held unconstitutional a state law conditioning the grant of a divorce decree on the claimant's ability to pay court costs and fees. Access to the judicial process was deemed too fundamental a right upon which to place undue burdens. Although subsequent decisions suggest that the marriage relationship confines *Boddie* to its facts, a fundamental right of access to the courts has been posited as an emerging area of stricter scrutiny. *See* L. TRIBE, *supra* note 77, at § 16-11.

[93] *See* Korematsu v. United States, 323 U.S. 214 (1944) (although upholding a military order excluding Americans of Japanese ancestry from certain areas of the West Coast after Pearl Harbor, originated the phrase "suspect" as applied to ethnic classifications). In addition to race and ethnicity, suspect classifications include those based on alienage. *See* Oyama v. California, 332 U.S. 633 (1948) and Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948).

[94] *See* L. TRIBE, *supra* note 77, at § 16-12 through § 16-17.

[95] This new standard has been termed "intermediate," "sliding scale," or "middle level." *See* L. TRIBE, *supra* note 77, at § 16-30 through § 16-33; and J. NOWAK, *supra* note 77, at 592-599. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) *reh'g denied* 429 U.S. 1124 (1977) (invalidating a statute prohibiting the sale of 3.2% beer to males under 21 and to females under 18); Kirchberg v. Feenstra, 450 U.S. 455 (1981) (striking down a state law giving a husband the unilateral right to dispose of community property without his wife's consent). To be validated under the intermediate test, an act must further an important government interest with means substantially related to the purpose.

[96] *See* Matthews v. Lucas, 427 U.S. 495, 510 (1976) (describing the standard as "not toothless"), Mills v. Habluetzel, 456 U.S. 91, 99 (1982) (classification required to be "substantially

cases involving fundamental rights appear to be using an intermediate rather than a strict scrutiny standard of review.[97] Intermediate scrutiny requires that classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives."[98] Thus the classification must further some important legislative purpose in a closely tailored manner.

Absent a suspect classification or fundamental right, Hawaii's builders' statute should be reviewed under the rational basis test or intermediate scrutiny.[99] In order to invalidate the statute under rational basis, the court must find either an impermissible legislative purpose or a classification not rationally related to achieving the legislative goal. Invalidation under intermediate scrutiny requires the reviewing court to identify a quasi-fundamental right or a semi-suspect classification[100] and to find no important government interest or means not substantially related to an important purpose.

By invalidating the statute in *Shibuya* under the rational basis test, however, the Hawaii Supreme Court clearly departed from the United States Supreme Court's use of the test without articulating an alternative philosophical rationale for this departure.

2. *The Rational Basis Test in Hawaii*

The court in *Shibuya* claimed it was applying a rational basis standard of review.[101] Although not a typical equal protection decision, *Hasegawa v. Maui Pineapple Co.*,[102] provides a clear statement of the two-pronged test that the

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related to a legitimate state interest").

[97] *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374 (1978) (restrictions on marriage); Zobel v. Williams 457 U.S. 55 (1982) (right to travel).

[98] *Craig*, 429 U.S. at 197.

[99] *See* discussion *supra* note 83.

[100] The Court has not adopted these terms. They are useful, however, simply to distinguish between strict and intermediate levels of scrutiny requirements. The terms have been used by commentators. *See* Learner, *Restrictive Medical Malpractice Compensation Schemes: A Constitutional "Quid Pro Quo" Analysis to Safeguard Individual Liberties*, 18 HARV. J. ON LEGIS. 143 (1981). The author argues that intermediate scrutiny is an inadequate tool for dealing with semi-suspect classes or quasi-fundamental rights. He proposes a quid pro quo analysis as a jurisprudentially preferable review technique. The right at issue in medical malpractice and in *Shibuya* is freedom from uncompensated bodily injury.

[101] In Part III of the *Shibuya* opinion, the court acknowledges its sources: "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Shibuya*, 65 Hawaii at 35, 647 P.2d at 283. This standard was articulated in F.S. Royster Guano v. Virginia, 253 U.S. 412, 415 (1920); *Railway Express Agency*, 336 U.S. 106 (1949); and in *Williamson*, 348 U.S. 483. The court also cited and quoted from Schweiker v. Wilson, 450 U.S. 221 (1981) and Rinaldi v. Yeager, 384 U.S. 305 (1966).

[102] 52 Hawaii 327, 475 P.2d 679 (1970). The court invalidated HAWAII REV. STAT. § 388-

court applies under this standard. The party challenging the statute bears the initial burden of showing that the classification bears no reasonable relationship to the purpose of the legislation. The court makes a two-step inquiry to determine whether the burden has been met: first, it determines the legislative purpose of the statute; and second, it examines the means used to achieve the purpose "to determine whether the means bears a reasonable relationship to the purpose."[103]

Hawaii Supreme Court decisions applying the rational basis test have resulted in inconsistent holdings in two ways.[104] First, because socio-economic statutes not involving suspect classifications or fundamental rights have been both validated and invalidated, the test as applied by the Hawaii court offers limited predictive value. Unless the classifications under review were irrational or the purpose was illegitimate, application of the test should have resulted in

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32, which required every employer who employed more than twenty-five individuals to pay employees who served on a jury or public board the normal wages they would have received had they not served. The court held that the statute violated equal protection and constituted a taking of property without just compensation.

[103] *Id.* at 330. The equal protection guarantee extends both to state administrative as well as legislative actions.

[104] The court has as a result taken an inconsistent philosophical stance towards the legislature: where it has validated a statute, it has recognized the value of the democratic process in decision-making; where it has invalidated a statute, it has impliedly affirmed the judicial intrusion into the process without justifying that intrusion in any principled way.

The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 628 (1969) (footnote omitted).

Excluding criminal and tax statutes, recent Hawaii decisions affirming a statute's or regulation's constitutionality by an explication of the rational basis test include Maeda v. Amemiya, 60 Hawaii 662, 594 P.2d 130 (1979) (upholding a statute banning nehu fishing); Holdman v. Olim, 59 Hawaii 346, 581 P.2d 1164 (1978) (upholding Oahu Prison's regulation requiring female visitors to wear bras); State v. Cotton, 55 Hawaii 148, 516 P.2d 715 (1973) (upholding Hawaii's helmet law for motorcyclists); Whitehead v. Whitehead, 53 Hawaii 302, 492 P.2d 939 (1972) (upholding a residency durational requirement to be eligible for divorce). Decisions purporting to apply rational basis to strike down statutes in whole or part include Joshua v. MTL, Inc., 65 Hawaii 623, 656 P.2d 736 (1982); Nelson v. Miwa, 56 Hawaii 601, 546 P.2d 1005 (1976) (striking down a University of Hawaii personnel policy which prohibited the hiring of any professor over the age of sixty-five); *Fujioka*, 55 Hawaii 7; *Hasegawa*, 52 Hawaii 327, 475 P.2d 679. *But see* Nagle v. Board of Education, 63 Hawaii 389, 629 P. 2d 109 (1981) (upholding a statute mandating retirement of public school teachers at age 65); and Daoang v. Department of Education, 63 Hawaii 501, 630 P.2d 629 (1981) (upholding a statute mandating retirement of public employees at age 70). It is especially difficult to understand the court's inconsistent holdings in the three retirement cases of *Nelson*, *Nagle* and *Daong*. The 1984 session of the Legislature resolved the confusion by passing a bill eliminating mandatory retirement laws or rules in both public and private employment. *See* Act of April 30, 1984, ch. 85, 1984 Sess. Laws ___ (amending HAWAII REV. STAT. §§ 78-3, 88-73, 297-15 and 378-3).

the validation of all the statutes in question. Second, the decisions are inconsistent with the functional utility of and the fundamental constitutional principle underlying the test: judicial deference to the legislature's democratic decision-making powers. In *Shibuya*, then, the court addressed for the second time the constitutionality of Hawaii's builders' statute within a somewhat confusing doctrinal context.

IV. Analysis

A. *The Shibuya Opinion*

The court first addressed the issue of whether plaintiff Shibuya or the forklift manufacturer Clark Equipment had standing to raise the constitutional issue of equal protection. The appellees argued that appellants were asserting vicarious constitutional rights not personal to them, since neither of the appellants belonged to the class excluded by the statute.[105]

Instead of focusing on the vicarious rights of materialmen and suppliers which appellants alleged were prejudiced by the statute, the court analyzed the statute's effect on plaintiff Shibuya and defendant Clark Equipment.[106] The court noted that the statute effectively precluded claims against several putative tortfeasors even before a cause of action arose.[107] Should Clark as sole defendant be absolved of fault in the manufacture of the forklift, then Shibuya would be totally divested of any cause of action for his injuries. Similarly, Clark was placed in the unenviable position of being solely liable for Shibuya's injuries

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[105] 65 Hawaii at 33, 647 P.2d at 282. The court acknowledged without further comment in n.9 that the briefs were submitted to the court prior to the enactment of the 1979 amendment bringing suppliers and materialmen within the protection of the statute. The significance of this note may be lost to the reader who may not realize that the basis of the appellees' lack of standing argument was the fact that manufacturers and suppliers were prejudiced because, although similarly situated as owners, architects and contractors, they were deprived of immunity under the statute in violation of the equal protection guarantee. *See* Architect's Answering Brief at 23-25 and Industrial's Answering Brief at 13-16.

[106] Still, we experience no difficulty in arriving at a conclusion that Plaintiff and Clark have standing to question whether they are being denied the "equal protection of the laws." For they are not asserting rights on behalf of others; they have been aggrieved by the summary judgments below. [N. 10: The circuit court's allowance of an interlocutory appeal stands in testimony of this fact.] *In re Guardianship of Ward*, 42 Haw. 60, 65 (1957); *Hawaiian Trust Co. v. Holt*, 24 Haw. 212, 215 (1918).

Shibuya, 65 Hawaii at 34, 647 P.2d at 282. *Ward* and *Holt*, neither case addressing standing or the constitutionality of a legislative decision, represent the proposition that a party aggrieved by a *judicial* decision may seek appellate review of that decision.

[107] Arguably, of course, this was the explicit legislative purpose of the statute and would be an inevitable result of any immunity statute.

and would be denied any opportunity to establish the liability of the other defendants.[108] In view of the perceived burdens imposed by the operation of the statute, the court concluded that the appellants' standing requirement was satisfied.[109]

The court next considered the constitutional challenge to the statute in light of the two-pronged rational basis test. Under the first prong,[110] the court acknowledged that the statute's original purpose was to relieve the construction industry of liability where "the passage of time rendered the defense of suits grounded on allegedly faulty design or construction of buildings difficult."[111] However, subsequent amendments extended protection from negligence actions to all who had any connection with the construction or improvement to real property after a lapse of six or eight years in an "effort to ensure the legality of earlier attempts to legislate a fair limitation statute."[112] As a result, the present statute, in the court's view, bore little or no relation to the statute's original purpose.[113] However, not wishing to "substitute its view of wise or fair legislative policy for that of duly elected representatives of the people,"[114] the court declined to hold that the tenuous relationship between the purpose of the statute as enacted and the statute as amended bore no "fair and substantial relation to the object of the legislation . . . ."[115]

Appellant Clark had argued that the statute violated due process because the immunity provision, if applied retroactively, had the effect of abrogating an otherwise actionable common law right before it ever arose and because the provision constituted a special law or immunity.[116] Balancing the policy under-

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[108] *Shibuya*, Hawaii at 34, 647 P.2d at 282. *See* discussion *infra* note 145 regarding the theoretical nature of the inquiry here.

[109] "Hence, the appellants are entitled to seek a ruling on whether the distinction among tortfeasors drawn by the legislature is inconsistent with the equal protection guaranteed by Article I, § 5 of the State Constitution and the Fourteenth Amendment, and we proceed to their challenge of HRS § 657-8." *Id.*

[110] "An inquiry on whether H.R.S. § 657-8 furthers legitimate state objectives in a rational fashion starts with an identification of the statute's purpose." *Id.* at 35, 647 P.2d at 283.

[111] *Id.* at 40, 647 P.2d at 286.

[112] *Id.*

[113] "But the purpose asserted by the legislature has not been stated, and what appeared as the purpose has been obscured, if not obliterated." *Id.* at 35, 647 P.2d at 283.

[114] *Id.* at 41 (citing *Schweiker*, 450 U.S. at 243).

[115] *Id.* at 35, 647 P.2d at 283 (citing *F.S. Royster Guano*, 253 U.S. 412, 415).

[116] Indirect evidence of the court's empathy with Clark's due process argument advanced in Clark's opening brief at 21-23 may be found in the following language:

> [The statute] grants partial immunity to a large class of potential tortfeasors solely on the basis of their participation in some way in the construction of an improvement to real property. Involvement in the construction, no matter how slight, serves to insulate possible tortfeasors from suits for negligent conduct following the passage of relatively short periods, relative to the improvement's expected durability . . . . We are troubled here, too,

lying statutes of limitations, which requires prompt assertions of claims, against the policy of favoring adjudication of claims on the merits to a party with a valid claim,[117] the court recognized "the inherent injustice in barring a suit before the plaintiff could reasonably have been aware that . . . [he] had a claim."[118] Nevertheless, it held that fairness for the defendant and the prompt assertion of claims are proper legislative concerns and that "legislation must often favor a segment of the society over others."[119] Although acknowledging that the statute conferred a special immunity on the construction industry, the court declined to reach the question of whether or not it constituted a special law.[120]

The court then distinguished the statute from the conventional statute of limitations which begins to run "when plaintiff knew or should have known of defendant's negligence."[121] Instead, the statute was deemed to be a grant of immunity[122] or a statute of repose[123] which does not bar a cause of action but rather prevents a cause of action from ever arising. Since *Fujioka* affirmed the legislature's power to change or entirely abrogate common law rules, the court dismissed the due process challenge.[124]

The court reluctantly conceded that the statute arguably served a legitimate state purpose.[125] Having determined that the statute consisted of "accretions to

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especially by the wider immunity legislated as a consequence of our initial visitation of the statute and by the injustice of barring a suit before the plaintiff "could reasonably have been aware that . . . [he] had a claim."

Id. at 39-40, 40-41, 647 P.2d at 286 (citing Yoshizaki v. Hilo Hospital, 50 Hawaii 150, 154, 433 P.2d 220, 223 (1967)).

[117] *Id.* at 41, 647 P.2d at 286. *Shibuya*, 65 Hawaii at 39, 647 P.2d at 285 (citing *Yoshizaki*, 50 Hawaii at 154, 433 P.2d at 223).

[118] 65 Hawaii at 40-41, 647 P.2d at 286.

[119] *Id.* at 41, 647 P.2d at 286.

[120] It is unclear in Hawaii what is the appropriate standard of review to apply to constitutional challenges based on alleged violations of art. 1, § 21, HAWAII CONST. (*Limitations of Special Privileges*), since no case law exists on the point. Some states have equated the standard with that of equal protection. *See, e.g., Rosenberg*, 61 N.J. 90, 293 A.2d 662. For a discussion of special privileges and equal protection challenges to medical malpractice legislation, *see* Redish, *Legislative Response to Medical Malpractice Insurance Crisis: Consitutional Implications*, 55 TEX. L. REV. 759, 782-84 (1977).

[121] 65 Hawaii at 39, 647 P.2d at 285, *citing Yoshizaki*, 50 Hawaii at 154, 433 P.2d at 223.

[122] *Id.*

[123] *Id.* at 32, 647 P.2d at 281.

[124] 55 Hawaii at 10, 514 P.2d at 570. For an intriguing thesis that the courts today are utilizing an equal protection analysis in lieu of the common law doctrines of treating like cases alike and strict interpretation of statutes in derogation of the common law, see G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 8-15 (1982), especially ch. II, *The Flight to the Constitution and to Equal Protection Clauses.*

[125] "Thus, we hesitate to declare the legislation at issue is constitutionally infirm on grounds [sic] that it does not further legitimate State objectives." 65 Hawaii at 41, 647 P.2d at 286.

what originally was a narrow purpose," the court then applied the second prong of the rational basis test by inquiring "whether this [purpose] advances legitimate goals in a reasonable manner."[126]

In reviewing the propriety of an award of summary judgment by the court below, the court assumed, as it had in *Fujioka*, that plaintiff's injuries were caused by the combined fault of all the defendants.[127] Application of the statute, however, immunized and released all defendants from liability except Clark Equipment. The court then compared Clark's situation to that of the manufacturer Reliance and the subcontractor Industrial to determine if valid distinctions existed between arguably similarly situated parties justifying selective immunity.

Under the original statute, manufacturers such as Reliance were denied immunity from suit because the legislature determined that manufacturers should be strictly liable for marketing defective products.[128] Unlike a building, which can only be tested after completion and the passage of time, manufactured goods can be tested for defects prior to being offered for sale or use.[129] On this basis, both Reliance, as the manufacturer of the steel grating, and Clark, the forklift manufacturer, were deemed similarly situated and would be answerable to the plaintiff on the basis of strict product liability. The subsequent legislative decision to include materialmen and suppliers within the ambit of the statute[130] was deemed "suspect" since there appeared to be little reason for granting immunity to a supplier of materials, but not to Clark, since both manufacturers were under the duty of providing safe products to consumers.[131]

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[126] *Id.* at 38, 647 P.2d at 285.

[127] In reviewing the validity of granting summary judgment below, the Hawaii Supreme Court has enunciated a standard identical to that employed by the trial court: whether there is any genuine issue of material fact and whether the moving party is entitled to summary judgment as a matter of law. *See* HAWAII R. CIV. P. 56; Fernandes v. Tenbruggencate, 65 Hawaii 226, 649 P.2d 1144 (1982); Namauu v. City & County of Honolulu, 62 Hawaii 358, 614 P.2d 943 (1980). The court has also said that inferences to be drawn from the facts must be viewed in the light most favorable to the party opposing the motion. *See* Miller v. First Hawaiian Bank, 61 Hawaii 346, 604 P.2d 39 (1979); Technicolor Inc. v. Traeger, 57 Hawaii 113, 551 P.2d 163 (1976); Fasi v. Burns, 56 Hawaii 615, 546 P.2d 1122 (1976). The effect of assuming that all defendants caused plaintiff's injuries in an equal protection analysis, however, arguably violates the rational basis requirement that a statute should be presumed to be constitutional, especially when the facts do not establish the liability of all possible defendants. *See supra* note 64 and *infra* note 144.

[128] *See supra*, note 65. For an analysis of recent developments in products liability law in Hawaii, see Note, *Rethinking Products Liability: Kaneko v. Hilo Coast Processing*, 6 HAWAII L. REV. ____ (1984).

[129] 65 Hawaii at 42, 647 P.2d at 287 (citing H.R. Stand. Comm. Rep. No. 704-74, 7th Hawaii Legislature, 1974 H.J. at 821-22).

[130] H.R. Stand. Comm. Rep. No. 618, 10th Hawaii Legislature, 1979 H.J. at 1433.

[131] 65 Hawaii at 43, 647 P.2d at 287. The opening briefs in *Shibuya* were filed prior to the enactment of Act of June 5, 1979, ch. 185, 1979 Hawaii Sess. Laws 368, which extended

Industrial's immunity was based on the determination that a licensed subcontractor's services were " 'primarily judgmental and [subject to] change according to technological advances and the refinement of the state of the art.' "[132] The court disagreed with this legislative determination, however, and noted that the subcontractor's services were typically performed according to plans prepared by other professionals involved in the building's construction.[133] In addition, the standard of care imposed on a subcontractor would likely be as stringent as the strict liability standard imposed on both Clark and Reliance.[134] Therefore the grant of immunity to Industrial was also deemed suspect because Clark was similarly situated but not treated equally.[135]

The court then reasoned that the statute conferred unequal treatment on Clark, because just as the passage of time created special problems of proof for the construction professions,[136] similar problems existed for Clark or any other manufacturer. Finding that Clark, Reliance, and Industrial were similarly situated parties and that only Clark was denied protection under the statute, the court concluded that the legislative classification bore no rational relationship to the purpose of the statute.[137] Failure of the second-prong of the rational basis test resulted in the court's invalidation of the statute.[138]

B. A Critique Of The Shibuya Opinion

1. *The Problem*

Shibuya is an important decision for at least three reasons: the Hawaii Supreme Court for the first time articulated a liberal rule of standing in equal protection cases, the court reaffirmed its unwillingness to validate a builders' statute of any kind, and it impliedly endorsed an intermediate level of scrutiny potentially applicable to certain future equal protection cases.

Each of these achievements, however, is obscured by the court's failure to

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retroactive protection to materialmen and suppliers. Upon enactment, Reliance Industries was retroactively brought within the scope of HAWAII REV. STAT. § 657-8.

[132] 65 Hawaii at 42, 647 P.2d at 287, *quoting* H.R. Stand. Comm. Rep. No. 704- 74, 7th Hawaii Legislature, 1974 H.J. at 822.

[133] 65 Hawaii at 42-43, 647 P.2d at 287.

[134] *Id.* at 43, 647 P.2d at 287.

[135] *Id.*, 647 P.2d at 288.

[136] "[R]ecords getting lost, witnesses dying or moving away, negligence in design or construction and negligence in maintenance becoming undistinguishable [sic] with the passage of time, and the bulk of all claims being initiated during the first three years following the construction." *Id.* at 43, 647 P.2d at 287, *citing* H.R. Stand. Comm. Rep. No. 615-72, 6th Hawaii Legislature, 1972 H.J. at 928.

[137] *Id.* at 43, 647 P.2d at 288.

[138] *Id.* at 44, 647 P.2d at 288.

make a complete and explicit statement of its basis for decision. As a result, the holdings concerning the issues of standing and standard of review are clouded, the opinion is internally inconsistent, and the predictability of future equal protection decisions appears to be impaired.

The court's handling of the standing issue illustrates some of these difficulties. Shibuya and Clark based their constitutional attack on the ground that the statute denied equal protection to suppliers and materialmen, not on the ground that their own personal rights had been compromised. Appellees argued in turn that the legislature had specifically amended the statute in 1979 to retroactively include materialmen and suppliers within its protection.[139] Since neither Shibuya nor Clark were suppliers or materialmen, they could not assert the rights of third parties.[140] In response, Shibuya and Clark contended that limitations on a litigant's assertion of *jus tertii* are not constitutionally mandated but rather stem from a salutary rule of judicial self-restraint designed to minimize unwarranted intervention into controversies where the constitutional questions raised are speculative or ill-defined.[141] The court here, they argued, could legitimately exercise its discretion to hear the case.

The court avoided these arguments and instead declared that the appellants had standing because they were "aggrieved by the summary judgments entered below."[142] Rather than acknowledging the fact that there was no Hawaii case law on the issue and that the court was articulating for the first time a liberal rule of standing for equal protection cases, the court supported its holding by citing two cases dealing with an aggrieved litigant's right to appeal a judicial

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[139] Act of June 5, 1979, ch. 185, 1979 Hawaii Sess. Laws 368. The retrospective operation of a statute was made permissible under the court's decision in Roe v. Doe, 59 Hawaii 259, 581 P.2d 310 (1978).

[140] Cases cited for the proposition that a party cannot as a rule raise the constitutional rights of a non-litigant include Warth v. Seldin, 422 U.S. 490, 499 (1975) (necessity for substantial probability of redress for standing to be granted); Broadrick v. Oklahoma, 413 U.S. 601, 608-10 (1972); Sierra Club v. Morton, 405 U.S. 727, 731 (1972); Barrows v. Jackson, 346 U.S. 249, 255 *reh'g denied*, 346 U.S. 841 (1953); New York *ex rel.* Hatch v. Reardon, 204 U.S. 152, 160 (1907); Clark v. Kansas City, 176 U.S. 114, 118 (1900); Wilson v. Stainback, 39 Hawaii 67, 70 (1951); Territory v. Sakanashi, 36 Hawaii 661, 669 (1944); Territory v. McVeagh, 23 Hawaii 176, 178-79 (1916); *In re* Craig, 20 Hawaii 483, 490 (1911), *appeal dismissed*, 234 U.S. 752 (1914); Territory v. Miguel, 18 Hawaii 401 (1907), *appeal dismissed*, 214 U.S. 531 (1909). In *Sakanashi*, a forty-one year old alien did not have standing to challenge the constitutionality of a statute that required peddlers to be licensed but exempted any person who was a citizen of the territory who had reached the age of 70 years, even though he was arguably aggrieved by the statute's exception.

[141] Appellants cited *Craig*, 429 U.S. at 193, for this proposition. The fact that the court implicitly accepted the proposition lends weight to the suspicion that the court also impliedly adopted *Craig*'s intermediate level of scrutiny.

[142] 65 Hawaii at 34, 647 P.2d at 282.

rather than a legislative determination.[143] The court's failure to address the argument that neither Shibuya nor Clark were within the statutory class alleged to have been unfairly treated creates the impression that the court was result-oriented rather than process-oriented.[144]

The court's rational basis analysis, however, is the most troubling part of *Shibuya*. Noticeably underplayed is the traditional language acknowledging deference to legislative decision-making and placing the burden on the challenger of a statute to establish its unconstitutionality.[145] The court first obliquely criticized the stated purpose of the builders' statute but then ultimately accepted the purpose as one properly within the scope of the legislature's function.[146]

Declining to invalidate the statute on the basis of impermissible purpose, the court proceeded to attack the statute on the basis of its discriminatory effect and the legislature's failure to confer benefits and burdens in a manner rationally related to the stated purpose.[147] However, in light of the fact that the statute

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[143] *See* discussion *supra* note 106. The judicial doctrine of standing traditionally requires: (1) injury-in-fact, to meet the constitutionally mandated Article III case or controversy requirement; and (2) the zone-of-interest test which is a matter of judicial discretion. *See* L. TRIBE, *supra* note 77, at §§ 3-22, 3-23, 3-26, 3-27. McGowan v. Maryland, 366 U.S. 420 (1961) illustrates the zone-of-interest requirement. Department store employees prosecuted for violation of a Sunday closing law were held to have no standing to argue that the law violated free exercise of religion because there was no infringement of their religious beliefs by operation of the statute.

[144] It is true that theoretically both appellants might be aggrieved in this situation, but the hypothetical nature of the aggrievement should have been addressed by the court. Shibuya still could sue Clark and therefore was not left totally without a remedy. Clark similarly would have been subject to suit, regardless of the status of the other putative tortfeasors. Moreover, Clark would only have been aggrieved if it were found to be liable, of which there was some question. That the aggrievement was as much theoretical as actual is highlighted by the court's reliance on Sugue v. F. L. Smithe Machine, Co., 56 Hawaii 598, 546 P.2d 527 (1976).

As Professor Miller points out in *Filling the "Empty Chair": Some Thoughts About Sugue*, 15 HAWAII B.J. 69 (1980) (also cited with approval by the court), it is not clear whether *Sugue* stands for the proposition that evidence of the causal negligence of an absent non-party to an action may not be admitted for *any* purpose or that a party defendant may not use the causal fault of absent non-party to reduce his own liability to a plaintiff. As of the date of the *Shibuya* decision, no clarification of this ambiguity had been offered in any Hawaii Supreme Court opinion.

[145] Ironic in this regard is Justice Nakamura's dissent in Joshua v. MTL, Inc., 65 Hawaii 623, 656 P.2d 736 (1983) compared to his majority opinion in *Shibuya*. In arguing that Hawaii's No-Fault law should be upheld, he cited numerous Hawaii cases for the propositions that an act of the legislature should be deemed presumptively constitutional and a challenger has the burden of proving it unconstitutional beyond a reasonable doubt. *See id.* at 635, 656 P.2d at 743. Moreover, he argued that statutes should be construed to preserve their constitutionality and that the court should not decide constitutional questions unless absolutely necessary to its decision. *Id.* at 636, 656 P.2d at 743. *See infra* notes 169 and 170 and accompanying text.

[146] 65 Hawaii at 41, 647 P.2d at 286.

[147] *Id.* at 41-44, 647 P.2d at 286-88.

was designed to protect the construction industry, the court's conclusion that a classification conferring benefits on the industry is not reasonably related to the legislative purpose is difficult to accept. Under the circumstances, the court's initial approval of the legislative purpose almost automatically compels the court to validate the classification as reasonably furthering the purpose of the statute.[148]

The court also chose to avoid the issue of whether the subsequent decision to grant immunity to suppliers or materialmen violated equal protection. The court could have theoretically held that inclusion was inconsistent with the original legislative intent because it bestowed a windfall upon the included class. The court could have reached the same result had it chosen to invalidate the statute as overinclusive. The legislature's decision to grant protection to materialmen was unreasonable because, unlike other building professions, materialmen are able to test the quality of their materials prior to construction.

The decision to invalidate the statute on the basis of underinclusiveness, however, renders the opinion internally inconsistent because a tortfeasor in Clark's position was never intended to be granted protection under the statute. Although the court accepts the statute's purpose as legitimate, it contradicts this acceptance by invalidating a classification that defines the protected class precisely in terms of that purpose.

While it is unfortunate that Clark was liable solely because it was never involved in the construction of the building, the result is an inevitable effect of the legislature's decision that the construction industry should be given special protection[149] by the virtue of its unique services.

The court's decision to invalidate the statute on the basis of underinclusiveness suggests that its actual intent was to nullify the statute on the ground of improper purpose without offending either the legislature or the construction industry. Is *Shibuya*, therefore, indicative of the Hawaii Supreme Court's intention to enact judicial legislation where it wishes to circumvent the legislature while purportedly applying only a minimum rationality?

If so, the rational basis standard of review is rendered meaningless. If the legislature is the proper branch to determine the propriety of granting the construction industry greater immunity from tort liability than other professions, then judicial deference is mandatory. Indeed, Justice Nakamura's dissent in *Joshua v. MTL, Inc.*[150] endorsed the legislature's prerogative even if the statute is "ill-advised, unequal and oppressive."[151] Accordingly, the proper forum to

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[148] *See supra* note 83 and accompanying text.

[149] The court could have legitimately viewed the statute as a constitutionally valid and practical attempt by government to classify those similarly situated in an underinclusive but not unconstitutionally arbitrary manner. *See* L. TRIBE, *supra* note 78, at 997-99.

[150] 65 Hawaii 623, 656 P.2d 736 (1982).

[151] Tussman & tenBroek, *supra* note 77, *cited in Joshua*, 65 Hawaii at 635, 656 P.2d at 743,

rectify socio-economic inequalities is through the democratic political process. Judicial activism may often be appropriate in other areas, but not at the price of unpredictability or of compromising the democratic process.[152]

2. *Proposed Solution*

The opinion's internal inconsistencies, coupled with the court's evident desire to disguise its underlying rationale for decision, burden the task of predicting future equal protection decisions.[153] Taken together, *Fujioka* and *Shibuya* clearly demonstrate the court's eagerness to closely scrutinize immunity statutes, even when the parties themselves fail to raise the issues or only raise them on appeal.[154] The questions then become whether there is a principled way to justify the result in *Shibuya* and whether the court will limit its scrutiny of such statutes in the future.

As many commentators noted in the early years of the Burger Court, a series of equal protection decisions[155] suggested that although the Court was paying lip-service to the rational basis standard, the actual standard applied was an

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quoting Justice McKenna in Heath & Milligan Co. v. Worst, 207 U.S. 338, 354 (1907). The six examples of fine lines drawn by the Supreme Court in decisions made between 1907 and 1940 are given in Tussman & tenBroek, *supra* note 77, at 370-71.

[152] It is possible, of course, that the court has consciously developed a unique equal protection rational basis analysis in order to insulate its decisions from federal appellate review. The practice of declining to review state high court opinions in cases involving both federal and state constitutional law so long as the state decision was based on adequate and independent state grounds might justify Hawaii's novel approach. However, it seems desirable that an alternative test represent a consistent philosophical approach. For a suggestion that the separate and adequate state ground doctrine might be subject to some erosion, *see* Michigan v. Long, ___ U.S. ___, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983) (no state court decision will be secure from federal scrutiny unless there is a "plain statement" disavowing any dependence on federal law).

[153] The decisions in *Joshua*, 65 Hawaii at 623, 656 P.2d at 736 (striking down two provisions of Hawaii's No-Fault statute) and *Nagle*, 63 Hawaii at 389, 629 P.2d at 109 (upholding Hawaii's statute requiring mandatory retirement of public school teachers at age 65), illustrate the difficulty in prediction. For problems in the area of retirement laws, *see supra* note 104.

[154] Besides the accommodation in regard to standing which it made in *Shibuya*, the court in *Fujioka* waived the doctrine that an appellate court generally should reverse the judgment of a trial court only on a theory first presented in the trial court and allowed the issue of the statute's constitutionality to be raised for the first time on appeal, since "the question is of great public import." *Fujioka*, 55 Hawaii at 9, 514 P.2d at 570.

[155] Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Nowak, *Realigning the Standards of Review under the Equal Protection Guarantee — Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071 (1974); Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975); Simson, *A Method for Analyzing Discriminatory Effects Under the Equal Protection Clause*, 29 STAN. L. REV. 663 (1977).

intermediate scrutiny just short of strict.[156] Alternatives to this misapplication of the test have been proposed. Justice Marshall, in fact, has been a long-standing advocate of the use of a balancing test in equal protection cases in order to fully address all the factors of decision.[157]

Professor Simson has developed a useful model to explicate the relevant factors involved in intermediate scrutiny.[158] His balancing test consists of comparing the product representing the discriminatory effect on the individual (the nature of the affected interest times the magnitude of disadvantage) with the product representing the state's justification for the legislation (the nature of the state's interest times the relationship between the means and the end). The individual's interests affected may be fundamental, significant, or insignificant. The disadvantage to the affected interest may be total, significant, or insignificant. The state's interest may be compelling, significant, or unlawful. The relationship between the means and ends may be necessary, significant, possible, insignificant or non-existent.[159]

Application of Professor Simson's model to *Shibuya* results in a clearer picture of the actual basis for the court's decision. Both Shibuya and Clark were

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[156] Although more prevalent in the Burger Court, decisions during the Warren era used the language of the rational basis standard while subjecting government action to a kind of strict scrutiny. *See, e.g.*, Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); Levy v. Louisiana, 391 U.S. 68 (1968). The Burger Court continued the practice. *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971); Weinberger v. Weisenfeld, 420 U.S. 636 (1975). At least some cases have seemingly applied an intermediate standard of review. *See, e.g.*, Jimenez v. Weinberger, 417 U.S. 628 (1974). In the case of sex discrimination, the Court has explicitly adopted an intermediate standard. *See Craig*, 429 U.S. 190.

[157] *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 591-622 (1970) (Marshall, J., dissenting); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318-21 (1976) (Marshall, J., dissenting).

[158] Simson, *supra* note 155, at 678-81.

[159] The model's possible permutations are summarized as follows with "I" and "G" indicating whether the individual or the governmental body prevails in an equal protection challenge:

deemed to have significant interests[160] which were significantly disadvantaged[161] by the application of the builders' statute. Shibuya's interest in preserving his cause of action against all possible tortfeasors was significantly disadvantaged because the statute released all but one from liability. Clark's interest in spreading its potential liability among as many defendants as possible was significantly impaired because Clark was left solely liable. The state's interest in protecting the construction industry, especially in view of the court's misgivings

GOVERNMENTAL JUSTIFICATION / DISCRIMINATORY EFFECT	Unlawful interest	Nonexistent relation	Insignificant interest x Any relation	Significant interest x Insignificant relation	Significant interest x Significant relation	Significant interest x Necessary relation	Compelling interest x Insignificant relation	Compelling interest x Significant relation	Compelling interest x Necessary relation
Insignificant interest x Any disadvantage	I	I	G	G	G	G	G	G	G
Significant interest x Insignificant disadvantage	I	I	G	G	G	G	G	G	G
Significant interest x Significant disadvantage	I	I	I	I	G	G	I	G	G
Significant interest x Total disadvantage	I	I	I	I	I	G	I	G	G
Fundamental interest x Insignificant disadvantage	I	I	G	G	G	G	G	G	G
Fundamental interest x Significant disadvantage	I	I	I	I	I	G	I	G	G
Fundamental interest x Total disadvantage	I	I	I	I	I	I	I	I	G

Id. at 681.

[160] "Significant interests are ones that deserve a special measure of judicial solicitude because they contribute substantially to the enjoyment of fundamental interests or materially embody values more fully represented by fundamental interests." Simson, *supra* note 155, at 678.

[161] "[The state] significantly disadvantages some persons when it allows or offers others an opportunity to enjoy the interest that is materially greater than the one allowed or offerred them . . . ." *Id.* at 679.

about the statute's purpose, was deemed moderately significant.[162] Finally, the court incorrectly determined that the relationship between the statute's means and end was nonexistent.[163] Balancing the interests against each other, the court accorded greater weight to the interests of the individual.

Under Simson's model, the court could have correctly invalidated the statute because the disadvantage to the individual outweighed the state's interest, but not because the means were unrelated to the purpose of the statute. Application of the model reveals all of the factors weighed by the court in reaching its decision and avoids the confusion about the rationality of the classification. Although the court must still make subjective value judgments in reaching a decision under intermediate scrutiny, predictability would be facilitated by an explicit identification and balancing of the underlying values.

3. *The Underlying Values*

In a broader sense, *Shibuya* raises important questions as to future legislative enactments and corresponding judicial review under an equal protection analysis. The Richardson court closely scrutinized socio-economic legislation which arguably represented special interests, especially when significant rights of the individual were perceived to be seriously impaired.[164] The basic reason for the

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[162] "Significant interests are ones important to institutional or popular well-being, and insignificant interests are ones inconsequential to these ends." *Id.* (footnotes omitted).

[163] "[A] minimally rational classification [indicates] an insignificant connection, and an irrational classification a nonexistent connection." *Id.* at 679-80, (footnotes omitted). Here the court fell into a conceptual error by viewing the exclusion of Clark as a legislative means to an end. More correctly, the inclusion of materialmen and suppliers was the means, and the exclusion of Clark was an inescapable *effect* of the legislative purpose. Therefore, the more accurate holding should have been that inclusion of materialmen did not significantly further the goal of insuring that tort liability be based on clearly demonstrable negligence in design or construction. By focusing on Clark in finding an irrational classification, of course, the court avoided, at least explicitly, the standing problem discussed *supra* note 140 and accompanying text.

[164] *Compare Fujioka*, 55 Hawaii at 13, 714 P.2d at 572 ("Here, it is clear that the statute calls for arbitrary and capricious discrimination and must therefore be declared an invidious discrimination violative of the equal protection guaranty.") *and Shibuya*, 65 Hawaii at 41, 647 P.2d at 286 ("The classificatory scheme in HRS § 657-8, as it now stands, operates to cloak putative tortfeasors with partial immunity on the basis of membership in a particular industry or an alliance therewith in some way or form.") *with* Sisson & Kelley, *Statutes of Limitations for the Design and Building Professions — Will They Survive Constitutional Attack?*, 49 INS. COUNS. J. 243, 250 (1983) ("This personal liability is, arguably, fundamentally unfair. When the perpetuality of liability is combined with the designer/builder's inability to protect himself as a result of loss of control, insurance differences, faded memories, lost documents or technological changes, fundamental unfairness is visited upon the designer/builder.") *and* Kornblut, *Statutes of Limitations for Claims Against Architects*, ARCHITECTURAL REC. 63 (February, 1981) ("More and more courts are beginning to recognize the inherent fairness in these statutes of limitations to alleviate

closer scrutiny was undoubtedly what Justice Brennan termed "the equality principle."[165] The court in this view is committed to insure the fullest possible access to the courts to air legitimate claims. The court's proper function is to serve as a final arbiter of legislative actions, especially those that compromise individual rights to benefit special interests.[166]

Joshua v. MTL, Inc.[167] provides additional evidence of the court's desire to zealously protect the rights of the individual. Two provisions of Hawaii's no-fault insurance law[168] as applied to those ineligible for no-fault benefits were held to violate equal protection under minimum rationality scrutiny.[169] How-

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the otherwise never-ending threat of liability hanging over architects and others simply because they were involved with a project many years earlier in their careers.").

[165] "[Richardson's] chief concern . . . was the people of Hawaii, but all of the people, not just some. He urged — and his entire career as Chief Justice attests to his steadfast adherence to the belief — that any defense of a constitutional democracy must begin with the equality principle . . . ." Address, Associate Justice William T. Brennan, Jr., United States Supreme Court, 10th Anniversary Dedication, William S. Richardson School of Law, University of Hawaii, July 22, 1983, 6 U. HAWAII L. REV. 1 at 1-2 (1984). *See also* Dodd, *The Richardson Court: Ho'oponopono*, 6 U. HAWAII L. REV. 7 (1984). Perhaps Holmes' classic formulation best expresses the thought:

> The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which man should be governed.

O.W. HOLMES, THE COMMON LAW 1 (1881). *But see infra* notes 174, 195.

[166] For a persuasive argument in favor of Congress completely abolishing the judicially imposed standing doctrine discussed *supra* note 140 by the enactment of a statute allowing anyone to challenge a government action inconsistent with federal law or the Constitution, see Braverman, *The Standing Doctrine: A Dialogue between the Court and Congress*, 2 CARDOZO L. REV. 31 (1980). The author's justification for such a radical proposal is to achieve equal justice by providing meaningful access to the courts. Apparently the Hawaii Supreme Court agrees with at least the spirit of this argument.

[167] 65 Hawaii 623, 656 P.2d 736 (1983). The court's formulation in *Joshua* of the proposition for which *Fujioka* and *Shibuya* stand is instructive: "A statute of limitations which denies equal protection of the laws is unconstitutional and will not be upheld." *Id.* at 631-32, 656 P.2d at 742. The suggestion here is that the precedential value of both cases will be reserved in the future to the narrow issue of an equal protection challenge to a statute of limitations.

[168] HAWAII REV. STAT. §§ 294-6(a)(2) and 294-36(b) (1976).

[169] Writing for the majority, Justice Padgett applied the two-prong *Hasegawa* rational basis test. *Joshua*, 65 Hawaii at 629, 656 P.2d at 740. The court accepted the legislative purposes of No-Fault: creation of a reparation system, provision of compensation without regard to fault, and limitation of tort liability for automobile accidents. *Id.* However, in invalidating the provisions under minimal rationality, the court again appears to have applied a heightened scrutiny. The court construed the statute so as to apply only to those eligible for no-fault benefits, a construction arguably *creating* a semi-suspect classification. *Id.* at 628, 656 P.2d at 739. In addition, the court implied that it viewed the appellant's poverty as a semi-suspect classification. *Id.* at 630, 656 P.2d at 741. Finally, the majority held that there was no rational relationship between the goal of

ever, because the slim majority of three to two again considered the statute within a confused theoretical framework, the decision is troubling. Indeed, Justice Nakamura's well-reasoned dissent more accurately articulated both a valid process and result under the rational basis test[170] than did the *Shibuya* opinion or the majority opinion in *Joshua*. Arguably the case required intermediate scrutiny for the same reasons as *Shibuya*: to protect the quasi-fundamental right to be free from uncompensated bodily injury. If so, the court's decision would rest on principled, consistent grounds, the articulation of which would be very desirable.

The potential utility of the model may be demonstrated by applying it to the earlier case of *Nagle v. Board of Education*.[171] Although the court's validation of a mandatory retirement statute for teachers correctly applied the rational basis test,[172] the court could have applied intermediate scrutiny in order to explicitly address the competing interests arguably involved.[173] The difficulty here, of course, is that taken together, the retirement cases are arguably inconsistent[174] and therefore difficult to square doctrinally with *Shibuya* and *Joshua*.

No analytical tool will solve all the court's problems in the area of equal protection. The court must make difficult value choices before decisions can be rendered. However, consistency and clarity might well be facilitated by the explicit use of intermediate scrutiny where neither rational basis nor strict scrutiny provides a satisfactory analytical framework for decision-making. The suggested middle-tier analysis would acknowledge the value choices before the court and would reveal the grounds for the decision where special interests or majority

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providing compensation without regard to fault and the classification of those ineligible for benefits. *Id.* at 630-31, 656 P.2d at 741. Here the court downplayed the self-evident legislative purpose of providing compulsory insurance by finding that no express purpose to that effect was written into the statute and by deeming that the existence of criminal sanctions sufficiently addressed the purpose anyway. *Id.* By so doing, the majority's analysis was inconsistent with the traditional application of the rational basis standard which requires the court to conceive of *any possible rational relationship* in order to validate a statute. *See supra* note 87. Justice Nakamura's dissent correctly articulated and applied the rational basis test to find the provisions constitutional. *See infra* note 170.

[170] *See supra* note 145. Since the appellant had neither argued nor demonstrated that his aggrievement was attributable to a statutory classification scheme that disadvantaged him, and because a reasonable construction could have been placed on the provisions to provide a remedy to the appellant without declaring them unconstitutional, Justice Nakamura argued that the provisions should be considered presumptively constitutional.

[171] 63 Hawaii 389, 629 P.2d 109 (1981).

[172] The law required public school teachers to retire at age 65. *See supra* note 104.

[173] That a higher standard of review was appropriate in this case is evidenced by the court's grappling with the issues of whether the age-based classification was suspect requiring strict scrutiny (63 Hawaii at 392-99, 629 P.2d at 111-16) and whether the right to work was fundamental (*id.* at 399-400, 629 P.2d at 116). Both issues were answered in the negative.

[174] *See supra* note 104.

abuse threaten to violate quasi-fundamental or significant rights of the individual. Decisions resting on explicit and principled grounds would, in turn, provide practitioners, the Legislature and the public with much needed predictability and consistency in future decisions.[175]

C. Hawaii's Builders' Statute After Shibuya

The Hawaii State Legislature substantially amended Hawaii's builders' statute[176] in direct response to *Shibuya*.[177] The statute now applies only to actions

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[175] In contrasting the relative merits of two early opinions by Justice Benjamin Cardozo before he was appointed to the United States Supreme Court, Professor Llewellyn makes a similar point with concise elegance:

> [S]o long as a "style" or manner of work in the craft of appellate judging fails to become *conscious and clear* and *therefore* readily consistent in application, so long reckonability of outcome must remain in jeopardy, and wisdom both of rule and decision must rest quite unduly on the chance that peculiar inspiration may descend upon counsel or upon court.

K. LLEWELLYN, *Three Phases of Cardozo*, in THE COMMON LAW TRADITION: DECIDING APPEALS 432 (1960) (emphasis in the original). In the area of constitutional construction, the issue of appellate craftsmanship assumes an even greater importance: "In expounding the Constitution, the Court's rule is to discern 'principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place'. A. Cox, *The Role of the Supreme Court in American Government* 114 (1976)." University of California Regents v. Bakke, 438 U.S. 265, 299 (1978) (Powell, J.)(majority opinion).

Adoption of any particular analytical tool, however, does not provide a panacea. Because they are not grounded in textual constitutional provisions, a court embracing quasi-fundamental rights on the basis of penumbral or implied rights also risks unbridled judicial legislation. Moreover, the difficult problem of deciding precisely what constitutes special interest legislation triggering intermediate scrutiny is not easily resolved by the application of any particular process. What is gained by an adoption of an intermediate scrutiny test, however, is the explicit identification of the value choices made by a court in reaching a decision.

[176] Act of May 26, 1983, ch. 120, 1983 Hawaii Sess. Laws 218.

> SECTION 1. Section 657-8, Hawaii Revised Statutes, is amended to read as follows:
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> § 657-8 *Limitation of action for damages based on construction to improve real property.* No action to recover damages for any injury to property, real or personal, arising out of any deficiency or neglect in the planning, design, suretyship, manufacturing and supplying of materials, construction, supervision and administering of construction, and observation of construction relating to an improvement to real property shall be commenced more than two years after the cause of action accrued, but in any event not more than ten years after the date of completion of the improvement. This section shall not apply to actions for damages against the owner or any other person having an interest in the property or improvement based on their negligent conduct in the repair or maintenance of the improvement or to actions for damages against surveyors for their own errors in boundary surveys. The term "improvement" as used in this section shall have the same meaning as in section 507-41 and the phrase "date of completion" as used in this section shall mean

for damages to real or personal property[178] arising out of negligent or deficient construction. Immunity no longer applies to owners or persons with an interest in the property or to persons performing repairs or alterations to the property.[179] Immunity is not conferred until ten years, instead of six years, after construction.[180] The saving clause and conflict of statutes provisions were also deleted, as well as an express provision including actions for contribution and indemnification within the scope of immunity.

The legislature attempted to design a statute that would pass judicial muster[181] yet still provide the construction industry with some protection against unlimited future liability.[182] The express concern was control of Hawaii's spiraling housing costs by minimizing the potential effect of the construction industry's unlimited liability.[183] In balancing the right to sue in tort for faulty construction against the need to control inflationary pressures, the legislature concluded that "a far greater majority of the general public would profit from the enactment of a statute of limitations than would be hurt by its passage."[184] In effect, the legislature was anticipating the proper balancing test for intermediate scrutiny and advocating a particular result to that test.

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the time when there has been substantial completion of the improvement or the improvement has been abandoned. The filing of an affidavit of publication and notice of completion with the circuit court where the property is situated in compliance with section 507-43(f) shall be prima facie evidence of the date of completion. Inclusion of sureties in this section shall not be construed to prevent, limit, or extend any shorter period of limitation applicable to sureties provided for in any contract or bond or any other statute, nor to extend or add to the liability of any surety beyond that for which the surety agreed to be liable by the contract or bond.

SECTION 2: The amendments made by this Act shall apply to any action or proceeding which is commenced on or after the date of its approval and, to the extent permitted by law, to any action or proceeding which is pending on the date of such approval.

[177] H. Stand. Comm. Rep. No. 825, 12th Hawaii Legislature, 1983 H.J. at 1221.

[178] *Id.* at 1221-22. In limiting the scope to property damage, the legislature appears to have followed California which enacted a similar provision in 1981. CAL. CIV. CODE § 337.15(a)(1)(2) (as amended 1981) (West 1982).

[179] Knapp & Lee *supra* note 21, at 365:

In an attempt to cure the defect found by the [Hawaii] court [in *Fujioka*], the protection of the new legislation (1974 amendment) was extended to property owners. In obvious recognition of the logic which does exclude owners and those in possession from the class of designers and erectors, the [Hawaii] legislature provided that, while owners were included within the statute, an owner would not be protected by the statute if an action for damages against him resulted from his own negligent conduct. Consequently it is debatable whether the revised statute made any substantive change.

[180] H. Stand. Comm. Rep. No. 825, *supra* note 177 at 1222.

[181] *Id.* at 1221.

[182] *Id.*

[183] *Id.* at 1220-21.

[184] *Id.* at 1221.

Hawaii's builders' statute is now but a shadow of its former self. By eliminating actions for personal injuries and wrongful death and increasing the waiting period for immunity from six to ten years, the Hawaii State Legislature granted future plaintiffs a healthy advantage over potential defendants and allocated the major costs of potential liability to the construction industry. A large number of personal injury and wrongful death cases formerly brought under the immunity statute will now be brought under the regular statute of limitations.[185] In addition, since the amendment was given retroactive effect, Shibuya may on remand proceed against all putative tortfeasors independently of the court's decision or of the revised builders' statute, since it is an action for personal injury brought within two years of accrual of the cause of action.

The legislature offered no explanation as to why it eliminated the saving clause or conflict of statutes provisions. As a result, the door may once again be open for a due process challenge.[186] For example, a cause of action for damages for injury to personal property which accrues in the ninth year will afford the injured party less than the two years to bring an action otherwise allowed under the traditional statute of limitations. The chances of a successful due process challenge are far from certain, however, since recent decisions in several other jurisdictions have upheld similar statutes challenged on the same ground.[187]

The statute as amended may also be susceptible to an equal protection challenge like that in *Fujioka*. The status of non-negligent owners is left ambiguous, and whether suits for contribution and indemnity may be brought beyond the ten-year grant of immunity is unclear.[188] If such suits are deemed barred after ten years following the completion of the improvement, then arguably the same due process deficiency which prompted invalidation ten years ago still exists.

It is possible that the legislature has finally remedied the constitutional infirmities of Hawaii's builders' statute. In both *Fujioka* and *Shibuya*, the court implied that some version of the statute might pass constitutional muster.[189]

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[185] HAWAII REV. STAT. §§ 657-7 and 657-7.5 permit an action for personal injury within two years after it accrues. Of the three appeals to the court in this area, two (*Fujioka* and *Shibuya*) were for personal injuries. *Agustin*, 64 Hawaii 80, 636 P.2d 1348, was for damage to property and would therefore be covered under the amended HAWAII REV. STAT. § 657-8 if brought today.

[186] *See supra* notes 50-51 for examples of successful due process challenges.

[187] *See, e.g., Klein*, 386 Mass. 701, 437 N.E.2d 514; *Barnhouse*, 133 Cal. App. 3d 171, 183 Cal. Rptr. 881; *McMacken*, 320 N.W.2d ___.

[188] Act of May 26, 1983, *supra* note 176, eliminated the express provision present since the enactment of HAWAII REV. STAT. § 657-8 which included actions for indemnity or contribution within the statute's grant of immunity. "When the language of the statute is broad, courts have generally ruled that indemnity or contribution claims are covered by the statute." Knapp & Lee, *supra* note 21, at 357.

[189] Professor Tribe's citation of Justice Jackson's concurring opinion in *Railway Express Agency*, 336 U.S. 106 provides evidence of the fact that a successful equal protection challenge is

The fact that jurisdictions disagree on the constitutionality of such statutes under equal protection challenges suggests that the question is still open. Moreover, the United States Supreme Court's decision[190] tacitly upholding Arkansas' builders' statute and its precedential effect favor, at least indirectly, a receptive climate for validating some kind of builders' statute in the future. Perhaps the newly stated purpose of reducing Hawaii's housing costs will convince the court that the public purpose of the statute is significant.[191] Finally, the economic interests of the construction industry insure a continued effort to find a constitutionally acceptable limiting statute.

It is also possible that this latest amendment has so emasculated the statute's utility by removing actions for personal injury and wrongful death from its protection, that a constitutional challenge might not materialize again. On the other hand, the organized support of the construction industry in advocating a cap on property damage actions indirectly suggests that litigation in this area is neither infrequent nor insubstantial. Actions by plaintiffs such as Fujioka and Shibuya would not fall under the newly amended statute in any case.

Finally, should the newly amended statute be subject to a constitutional challenge from another quarter, it is at least arguable, thanks to the amendment's precise language which identifies the unique nature of the building process,[192] that the statute could be legitimately validated under either a rational basis or

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less binding on future legislative action than a successful due process challenge: "Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable. Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject matter at hand." L. TRIBE, *supra* note 77, § 16-1, note 4.

[190] *Carter*, 248 Ark. 1172, 455 S.W.2d 918.

[191] Application of the rational basis standard of review to the amended statute should result in its validation. On the other hand, a higher scrutiny might result in invalidation unless the factual basis for asserting reduced housing costs is convincingly established. Facts to be established would include the percentage of new construction making up the future housing supply and the actual increased costs of unlimited liability (as measured by the added cost of liability insurance) per each new housing unit. It is not clear that this burden could be easily met to justify the purported state interest of lower housing costs as weighed against the right of the individual to maintain a suit against all putative tortfeasors.

[192] Owners accept future responsibility for the condition of the premises at least impliedly when they accept the building or improvements. Materials suppliers make standard goods and thus may be held accountable as any other manufacturer in strict products liability, a fact noted by the court in *Shibuya*. Moreover, an owner's liability generally arises in tort and is limited to persons properly on the land, subject to the rules concerning licensees, undiscovered trespassers and the like. Building professionals' liability, however, can arise under theories of negligence, warranty, strict liability or contract. Also, liability may extend to owners, tenants, and all other persons who come onto the land, whether properly or not. *See generally* Sisson & Kelley, *supra* note 165, at 248-50 ("The requirement for professional licensing is an admission, supported by the courts [*e.g.*, Richmond v. Fla. State Bd. of Arch., 163 So.2d 262 (Fla. 1964)], that design professionals and construction contractors are in a unique position." *Id.* at 249).

an intermediate scrutiny standard of review as not violative of the equal protection guarantees of the fourteenth amendment of the United States Constitution or of art. I, §5 of the Hawaii State Constitution.

V. Conclusion: The Craft of Appellate Review

The Hawaii Supreme Court's decision in *Shibuya* represents not only an achievement, but also a danger and an opportunity. The court protected the individual's free access to the judicial process in the face of special interests seeking to limit that access. In achieving this result, however, the court rendered an opinion flawed by the application of an inconsistent reasoning process that vitiates the decision's moral force.

Two dangers could hamper future constitutional decision-making should the court fail to adopt explicitly an intermediate standard of review.[193] First, the court may unintentionally dilute the higher scrutiny test by using strict scrutiny language in cases where it does not intend to restrict the prerogative of the legislature. These decisions might then be used as precedents threatening the meaning and utility of strict scrutiny analysis, designed to protect minority interests from burdens imposed by special interest classifications endorsed by the majority.

The second danger following from a failure to define a level of heightened scrutiny, clearly exemplified in *Shibuya*, could be an overreaching judicial activism cloaked within a rational basis analysis.[194] In addition to inevitable unpredictability, this failure could create a level of unrestrained judicial interference reminiscent of that of the United States Supreme Court during the now-discredited era of the substantive due process doctrine.[195]

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[193] *See generally* J. Nowak, *supra* note 77 at 595-96.

[194] The debate concerning judicial activism is still very much alive. For an intelligent review of three recent scholarly treatments of the subject, see White, *Judicial Activism and the Identity of the Legal Profession* (Book Review), 67 Judicature 246 (1983) (reviewing R. Berger, Death Penalties: The Supreme Court's Obstacle Course (1982); A. Miller, Toward Increased Activism: The Political Role of the Supreme Court (1982); and M. Perry, The Constitution, the Courts and Human Rights (1982)).

[195] The era spanned from roughly the end of the 19th century to 1937. The classic cases representing the doctrine at its zenith include Lochner v. New York, 198 U.S. 45 (1905), Adair v. United States, 208 U.S. 161 (1908), Coppage v. Kansas, 236 U.S. 1 (1915), and Adkins v. Children's Hospital, 261 U.S. 525 (1923). Although seemingly discredited, the modern doctrine of substantive due process offers a challenger of a builders' statute a fifth amendment theory: operation of the statute results in the taking of a property right (here the right to maintain a cause of action against all putative tortfeasors) without just compensation. *See* Reich, *The New Property*, 73 Yale L.J. 733 (1964) for the seminal exposition of the concept. *See also* Michaelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation Law"*, 80 Harv. L. Rev. 1165 (1967); Sax, *Takings, Private Property and Public Rights*,

This note has suggested that the Hawaii Supreme Court would greatly enhance the clarity and predictability[196] of its constitutional decisions by adopting a middle-tier standard of review to apply to the defined set of legal issues that *Shibuya* raises.[197] Explicit adoption of an intermediate standard of review in cases striking a balance between special interest legislation and an individual's right of access to the court should greatly facilitate appellate craftsmanship by clearly articulating the court's decision-making process.

David C. Farmer

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81 YALE L.J. 149 (1971); Tushnet, *The Newer Property: Suggestions for the Revival of Substantive Due Process*, 1975 S. CT. REV. 261 (1975); and Alexander, *The Concept of Property and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis*, 82 COLUM. L. REV. 1545 (1982).

[196] This Note has attempted to suggest the moral or ethical rather than the scientific sense of the term "predictability". That this is the appropriate sense is reflected in Brennan, *supra* note 165, at 3: "None of us in the ministry of the law . . . can deny . . . that law has, as it must, come alive as a living process responsive to changing human needs . . . ." To the extent changing human needs are "unpredictable," law at its highest level of operation must also be unpredictable. Unpredictability caused by the inconsistent application of analytical tools like the rational basis test is quite another matter.

[197] A closely related issue is that of the constitutionality of medical malpractice statutes. For an excellent overview of the issue in California, as well as a well-reasoned argument in favor of adopting an intermediate standard of review in equal protection analysis of such statutes, see Jenkins & Schweinfurth, *California's Medical Injury Compensation Reform Act: An Equal Protection Challenge*, 52 S. CAL. L. REV. 829 (1979) at 933-971. For arguments against applying an intermediate standard of review, see Learner, *supra* note 100.

Kaiman Realty v. Carmichael: Is Time of the Essence In DROA Contracts?

INTRODUCTION

In *Kaiman Realty v. Carmichael*,[1] the Hawaii Supreme Court considered the extent to which equity may override express contract provisions to grant relief from forfeiture under a land purchase contract.[2] Specifically, the court held that a defaulting buyer may be granted specific performance under such contracts despite a finding that time is of the essence[3] in the contracts. The *Kaiman* holding applies to agreements of sale[4] and the Deposit Receipt, Offer and Ac-

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[1] 65 Hawaii 637, 655 P.2d 872 (1982) (*Kaiman I*), *aff'd on reconsideration*, 66 Hawaii 103, 659 P.2d 63 (1983) (*Kaiman II*).

[2] "Land purchase contract" is a broad term which applies to security devices (*see infra* note 13) such as an agreement of sale (*see infra* note 4), as well as marketing contracts (*see infra* note 14) such as a DROA (*see infra* note 5). Hetland, *The California Land Contract*, 48 CALIF. L. REV. 729 (1960). *See also* Scotella v. Osgood, 4 Hawaii App. 20, 21 n.1, 659 P.2d 73, 74 n.1 (1983) (the term "land purchase contract" encompasses any contract for the purchase of land whether or not improvements are included).

[3] The standard provision in the 1984 DROA form reads:

> TIME IS OF THE ESSENCE: If either Buyer or Seller for reasons beyond his control, cannot perform his obligation to purchase or sell the property by the closing date, then such party by giving escrow written notice, can extend closing for no longer than 30 calendar days to allow performance. Thereafter time is of the essence and the default provisions of paragraph H apply. Any further extension must then be agreed to in writing by both parties. There is no automatic right to extend. This provision relates only to extension of the closing date.

Hawaii Assn. of Realtors Standard Form, Deposit Receipt, Offer and Acceptance (1984) (DROA)).

Paragraph H is the default clause which lists the remedies available to the parties in the event of default. *Id.* One remedy available to the seller upon the buyer's default is retention of the initial deposit and all additional deposits as liquidated damages. *Id.* ¶ H(b). *See infra* notes 8, 22, 25, and 33 for the circumstances under which the trial court in *Kaiman* found that time was of the essence.

[4] The "agreement of sale" document is both a contract and a security device, the purpose of which is to secure the buyer's performance of a promise to purchase property from the seller. During the term of the agreement, the buyer usually has possession and other beneficial rights of ownership (along with its risks and liabilities), while the seller retains legal title to the property

ceptance (DROA) contracts,[5] both of which are extensively used in Hawaii.[6] Since both types of contracts frequently provide that "time is of the essence," the case has a great impact on real estate transactions in Hawaii.

Kaiman consists of two separate opinions written by the Hawaii Supreme Court. The first decision, *Kaiman I*,[7] holds that a "time is of the essence" clause[8] in an agreement of sale will not foreclose equitable relief from forfeiture to a defaulting buyer, where such forfeiture would be harsh and unreasonable.[9]

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until buyer fully performs his obligations under the agreement. It is also known as a "contract for deed," "land contract," or an "installment land contract." J. REILLY, J. GRAD & J. ROLLS, HAWAII CONVEYANCE MANUAL 6-1 (1983) [hereinafter cited as CONVEYANCE MANUAL].

The Hawaii Supreme Court has specifically defined an agreement of sale as "an executory contract which binds the vendor to sell and the vendee to buy the realty which constitutes the subject matter of the transaction." Jenkins v. Wise, 58 Hawaii 590, 596, 574 P.2d 1337, 1340 (1978); State Savings and Loan v. Kauaian Development, 50 Hawaii 540, 445 P.2d 109 (1968).

See generally L. CANNELORA, SUMMARY OF THE HAWAII LAW ON AGREEMENTS OF SALE (1973).

[5] The DROA, *supra* note 3, is the blueprint for the entire real estate transaction in which the buyer and seller come to final agreement. It includes the essential terms of price, method of payment, proration of expenses, closing date, and other important details which must be completed before title can pass.

It serves four principal functions: (1) It is a receipt for the buyer's earnest money deposit. (2) It is the buyer's offer. (3) When accepted by the seller, it becomes the purchase contract. (4) It evidences the buyer's acknowledgement of a receipt of the accepted contract. CONVEYANCE MANUAL, *supra* note 4, at 2-11.

The Hawaii Supreme Court has defined a DROA, stating that "a properly executed DROA binds the buyer to buy and the seller to sell a particular property at a fixed consideration. It is an executory contract for the sale of land . . . ." State v. Pioneer Mill Co., 64 Hawaii 168, 174, 637 P.2d 1131, 1136 (1981).

[6] The DROA is the most frequently used contract of sale or purchase agreement in Hawaii, CONVEYANCE MANUAL, *supra* note 4, at 2-11, while the agreement of sale is the most widely used method of seller financing in Hawaii. *Id.* at 6-1.

In the 1970s, Hawaii experienced rising real estate values with the attendant increase in interest rates and decrease in the availability of mortgage money. These factors contributed to the agreement of sale's popularity as an alternative financing device. It enabled purchasers who would not otherwise qualify for a conventional loan to buy land. Ferrington, *Dealing With the Remorseful Seller: Time Being of the Essence and Buyer's Right to Specific Performance in Hawaii Real Estate Transactions*, 15 HAWAII B.J. 77, 78 (1980).

[7] 65 Hawaii 637, 655 P.2d 872 (1982).

[8] The holding uses the term "time is of the essence clause." 65 Hawaii at 640, 655 P.2d at 874. However, the 1971 DROA form used by the parties in *Kaiman* did not contain such a clause. This is because prior to 1979 the DROA form included no specific language stating that time was of the essence. 1971 DROA, *supra* note 3; Ferrington, *supra* note 6, at 81.

Rather, the trial court made a finding of fact that time was of the essence. The parties' intent as manifested by the agreement as a whole in light of the surrounding facts formed the basis of the finding. Kaiman Realty, Inc. v. Carmichael, 2 Hawaii App. 499, 502-03, 634 P.2d 603, 607, *rev'd and remanded per curiam*, 65 Hawaii 637, 655 P.2d 872 (1982), *aff'd on reconsideration*, 66 Hawaii 103, 659 P.2d 63 (1983).

[9] 65 Hawaii at 640, 655 P.2d at 874.

The second, and more significant opinion, *Kaiman II*,[10] arose upon motion for reconsideration. In this opinion, the court extends the equitable principles governing agreements of sale to the DROA.[11] While *Kaiman I* merely clarifies established principles[12] governing the agreement of sale, which is a security device,[13] *Kaiman II* extends those principles to the DROA, a marketing contract,[14] and creates new real estate law.

This note examines both decisions and particularly focuses on the applicability of equitable principles to an agreement of sale contract as compared with a DROA. While equitable relief from forfeiture under the former is widely accepted,[15] the latter contract is generally governed by traditional contract principles.[16] Thus, as it relates to the DROA, *Kaiman II* departs from the weight of authority nationally.[17] This note concludes by examining the impact of the decision on both buyers and sellers as well as the uncertainties it has created in real estate law.

I. FACTS

Defendants-Appellees in this case were three Canadian residents, Carmichael, Langas and Morrow (the sellers) who owned six condominium units in Maui County.[18] Plaintiff-Appellant was Kaiman Realty, Inc. (the buyer).[19] Using sep-

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[10] 66 Hawaii 103, 659 P.2d 63.

[11] *Id.* at 104, 659 P.2d at 64.

[12] These principles, developed in Jenkins v. Wise, 58 Hawaii 592, 574 P.2d 1337 (1978), require a weighing of equities rather than strict enforcement of forfeiture provisions in agreements of sale. *See infra* notes 71-75 and accompanying text.

[13] The term "security device" refers to any agreement in which the seller retains title primarily as security for payment of the price. Hetland, *supra* note 2, at 729 n.2. The mortgage is an example of a security device. *See* J. REILLY, LANGUAGE OF REAL ESTATE 311-12 (2d ed. 1982).

[14] The term "marketing contract" is used to refer to any contract intended by the parties to be the basic buy-sell agreement. Hetland, *supra* note 2, at 729 n.1. It is a contract in which the buyer agrees to purchase for a certain price, and the seller agrees to convey title, and it binds the parties during the period of time required to close the transaction. J. REILLY, *supra* note 13, at 106. It is also referred to as a deposit receipt, earnest money contract, mutual escrow instructions, Hetland, *supra* note 2, at 729, or contract of sale. J. REILLY, *supra* note 13, at 106.

[15] *See infra* note 123 and accompanying text.

[16] *See infra* note 141 and accompanying text.

[17] *See infra* note 140 and accompanying text.

[18] The three sellers were residents of British Columbia. Langas was a real estate dealer and developer, Carmichael an attorney, and Morrow an accountant. Application to the Supreme Court for Writ of Certiorari at 3, record at 350, *Kaiman*, 2 Hawaii App. 499, 634 P.2d 603.

[19] Buyer in this case is a realty corporation which acted through its principal broker, Edward Neizman. *Id.* Unlike a first time purchaser, a broker is presumably knowledgeable with respect to terms and conditions in real estate transactions and is therefore not a completely unsophisticated party to the transaction. For example, statutory and administrative provisions for licensing brokers

arate, but identical DROA forms for each condominium unit, the buyer offered to purchase the six units for $75,000 each under the following terms: $15,000 in cash and the balance via a one year agreement of sale at $515 per month including interest.[20] The DROAs were dated August 31, 1978[21] and specified October 16, 1978 as the date by which the buyer and the sellers were to perform all obligations.[22] The sellers had required this closing date as a condition of the contracts and the buyer understood this requirement.[23] In addition, the DROAs specified that if the buyer defaulted, the sellers would be allowed to retain all deposits as liquidated damages.[24] More importantly, although the DROAs included no "time is of the essence" clause, the sellers expressly deleted an optional thirty-day extension clause on the original offer.[25]

The sellers did not deliver their final acceptance to the buyer until September 28,[26] thus giving escrow less than three weeks to close the transactions.[27] On that date, escrow received the six DROAs along with the buyer's $6,000 de-

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require brokers to pass a written examination that demonstrates a reasonable knowledge of real estate laws and practices. HAWAII REV. STAT. § 467-8 (Supp. 1983); Rules of the Real Estate Comm'n § 16-99-30 (1982). The licensed broker must also have at least two years of full-time occupation or its equivalent as a real estate salesperson in Hawaii. HAWAII REV. STAT. § 467-9.5(4) (1976 & Supp. 1983); Rules of the Real Estate Comm'n § 16-99-38.

[20] 2 Hawaii App. at 500, 634 P.2d at 605.

[21] *Id.*

[22] Paragraph 5 of the offers stated, "Buyer and Seller shall perform all their obligations set forth herein on or before October 16, 1978." *Id.* at 503, 634 P.2d at 606.

[23] On the basis of the evidence before it the trial court found that the buyer understood this requirement. *Id.* at 603, 634 P.2d at 607.

[24] Paragraph 7 of each contract was a standard printed provision which stated: "It is expressly understood and agreed: First: In the event Buyer fails to pay the balance of the purchase price or complete the purchase as herein provided, Seller may . . . (c) retain the initial deposit, and all additional deposits provided for herein as liquidated damages." *Id.* at 505, 634 P.2d at 608.

[25] The sellers crossed out the following sentences: "Buyer and Seller both agree that this time may be extended for a period of 30 days at the discretion of the Seller's Broker. All documents shall be recorded within a reasonable time thereafter, and upon such recordation the net proceeds shall be disbursed to Seller." *Id.* at 501, 634 P.2d at 606. In its place, the sellers inserted language which specified that interest would run from October 16, 1978 and that the buyer would be responsible for maintenance expenses from October 16, 1978. *Id.*

[26] Both parties admitted this fact. *See* Memorandum in Support of Findings of Fact and Conclusions of Law proposed by Plaintiff at 7, record at 134, *Kaiman*, 2 Hawaii App. 499, 634 P.2d 603; Memorandum in Support of Findings of Fact and Conclusions of Law proposed by Defendant at 5, record at 96, *Kaiman*, 2 Hawaii App. 499, 634 P.2d 603.

[27] In contrast, forty-five days is a normal closing period after the purchase agreement is drawn up. J. REILLY, *supra* note 13, at 79. Where a licensed escrow company handles closing, the company uses this period to perform such duties as paying liens, computing prorations, ordering title evidence and closing documents, obtaining necessary signatures, recording documents and disbursing funds. *Id.* at 167.

posit check[28] and subsequently ordered the agreements of sale to be drafted by an attorney. Escrow received these documents on or before October 13, 1978. However, the buyer failed to sign and return the agreements of sale until October 19. Thus, for several reasons, only some of which were attributable to the buyer, escrow was not ready to close until October 20,[29] four days after the agreed upon closing date.

On October 20, escrow mailed the documents to Langas who held special powers of attorney for the other sellers.[30] Langas failed to respond, and due to the delay in closing, the sellers refused to transfer the properties.[31] Consequently, on December 12, 1978, the buyer sued the sellers for specific performance of the six contracts.[32]

Based on the above facts, the trial court held that time was of the essence and that the buyer failed to perform in a timely fashion.[33] Accordingly, the

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[28] The $6,000 consisted of a $1,000 deposit on each unit. 2 Hawaii App. at 502, 505, 634 P.2d at 606, 608.

[29] The reasons contributing to the delay were:

1) Although the offer was initiated on August 30, 1978, the sellers' final acceptance was not delivered to the buyer until late September. *See supra* note 26. Escrow thus had less than three weeks to close the transaction.
2) Title search ordered by escrow on September 30, 1978 was not completed until October 17, 1978. *Kaiman*, 2 Hawaii App. at 505, 634 P.2d at 606.
3) The buyer apparently could not generate the funds to purchase the units. Defendants' Trial Brief at 9, record at 100, *Kaiman*, 2 Hawaii App. at 505, 634 P.2d at 606. Consequently, for all but one of the six units, the buyer designated owners other than itself. These designated owners failed to sign and deliver to escrow their copies of the agreement of sale and their down payments until October 19. *Kaiman*, 2 Hawaii App. at 505, 634 P.2d at 606.

[30] *Kaiman*, 2 Hawaii App. at 502, 634 P.2d at 606.

[31] *Id.* Although the exact reason for the sellers' refusal to transfer the properties is not known, they were in a position to sell the properties to other purchasers for a higher price than the prices in the contracts with Kaiman Realty. *Id.* at 502, 634 P.2d at 607. Indeed, within two weeks of the October 16, 1978 closing date, the sellers agreed to sell five of the apartments to other purchasers. On April 12, 1979, after the trial court filed its judgment and order expunging *lis pendens*, the sellers deeded away all six apartments. *Id.* at 502 n.4, 634 P.2d at 606 n.4.

The sellers' actions in this situation were not unusual. In times of rising real estate values, sellers often experience what one commentator describes as "seller's remorse." "The seller becomes 'remorseful' at having entered into a contract for the sale of property at a price that was fair at the time the contract was made, but which is lower than the market value at the time of closing." Ferrington, *supra* note 6, at 77.

[32] The sellers counterclaimed for the right to keep the $6,000 deposit as liquidated damages. Both parties made various alternative claims for damages, but eventually agreed to proceed with a non-jury trial solely as to the issue of specific performance. 2 Hawaii App. at 502, 634 P.2d at 607.

[33] *Id.* The key factor making time of the essence seems to be the sellers' action in crossing out the 30-day extension clause. *See supra* note 25 and accompanying text. Another possible consideration may have been the fact that Mr. Carmichael was in poor health and scheduled to undergo

buyer's request for specific performance was denied.[34] The Hawaii Intermediate Court of Appeals affirmed.[35]

Upon the buyer's appeal, the Hawaii Supreme Court in *Kaiman II* reversed. The supreme court held that a "time is of the essence" clause in an *agreement of sale* comprises only one factor among many in a trial court's decision to grant or deny specific performance.[36] The difficulty with *Kaiman I* lay in its addressing an agreement of sale situation, whereas in fact, the buyer had defaulted under a DROA contract. Only upon the sellers' motion for reconsideration in *Kaiman II* did the supreme court acknowledge that the differences between the two types of contracts might be significant in determining whether specific performance should be granted.[37] Nevertheless the court upheld its previous decision and applied the equitable principles governing agreements of sale to both types of contracts.[38]

II. Historical Development of the Law Governing Land Purchase Contracts in Hawaii

Prior to *Kaiman*, the Hawaii Supreme Court decided three major cases[39] dealing with a buyer's right to specific performance under a land purchase contract. Two of these cases, *Bohnenberg v. Zimmerman*[40] and *Lum v. Stevens*,[41] established the traditional rules governing such contracts. *Jenkins v. Wise*,[42] the third case, followed the modern trend of authority and expanded the availability of equitable relief to a defaulting buyer under an agreement of sale by limiting the importance of time is of the essence clauses.[43]

In 1900, the Hawaii Supreme Court in *Bohnenberg* established the equitable principles which continue to govern land purchase contracts in Hawaii today.

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open heart surgery. Answer of Respondents to Application to the Supreme Court for Writ of Certiorari at 2, record at 393, *Kaiman*, 2 Hawaii App. 499, 634 P.2d 603.

[34] However, because the buyer was still willing to perform and the sellers could sell the properties for more than the contracted prices, the trial court also dismissed the sellers' counterclaim and required them to refund the deposit. 2 Hawaii App. at 502, 634 P.2d at 607.

[35] The Intermediate Court of Appeals affirmed the trial court's denial of specific performance. However, it reversed and remanded the trial court's order requiring the sellers to refund cash deposits to the buyer and its dismissal of sellers' counterclaim. *Id.* at 500, 634 P.2d at 605.

[36] *Kaiman I*, 65 Hawaii at 640, 655 P.2d at 874.

[37] *Kaiman II*, 66 Hawaii 103, 659 P.2d 63.

[38] *Id.* at 104, 659 P.2d at 64.

[39] Jenkins v. Wise, 58 Hawaii 592, 574 P.2d 1337 (1978); Lum v. Stevens, 42 Hawaii 286 (1958); Bohnenberg v. Zimmerman, 13 Hawaii 4 (1900).

[40] 13 Hawaii 4 (1900).

[41] 42 Hawaii 286 (1958).

[42] 58 Hawaii 592, 574 P.2d 1337 (1978).

[43] *See infra* note 75 and accompanying text.

The court stated, "in equity, time is not regarded as of the essence of a contract unless an intention to make it so clearly appears."[44] Accordingly, in *Bohnenberg*, the court's primary inquiry focused on whether time was of the essence in such contracts.[45]

In *Bohnenberg* the court concluded that time was not of the essence. The disputed short-term escrow agreement contained no express time is of the essence clause, and the supreme court found no evidence of intent to make time essential.[46] The court found the appropriate rule in such cases to be one that preferred compensation over forfeiture, so long as no injustice would result.[47]

Thus, the *Bohnenberg* rule required a second inquiry of whether the denial of forfeiture would lead to an unjust result. To answer this question, the court considered the parties' conduct, the potential for compensating the seller, and the buyer's tender of performance.[48] In *Bohnenberg*, the delay was not due to bad faith or lack of diligence on the buyer's part, the seller could be compensated for the delay by payment of interest,[49] and the buyer could complete payment within ten days.[50] Accordingly, the court granted specific performance.[51]

Then in 1958, the Hawaii Supreme Court decided *Lum v. Stevens* in which it expanded on the *Bohnenberg* principles. While recognizing that time is not ordinarily of the essence in contracts, the court stated that the parties may make time essential either by express stipulation or by a clear manifestation of their intent that the contract be performed by a specified date.[52] Thus, the intent to

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[44] *Bohnenberg*, 13 Hawaii at 7.

[45] The court explained: "The main question is, whether the time agreed upon for payment of the balance of the purchase price was of the essence of the contract." *Id.* at 5.

[46] *Id.* at 7. The *Bohnenberg* court based its finding that the parties did not intend to make time essential on the following facts: 1) the buyer paid a portion of the purchase price upon execution of the deed, and the parties made no provision as to the disposition of that payment; 2) the agreement provided that the deed should be held in escrow "until the balance of the purchase money . . . is paid"; and 3) the balance of the purchase price should not bear interest up to the date stipulated for closing, but it should thereafter. *Id.*

[47] *Id.*

[48] *Id.* at 6, 7. *See infra* notes 49-50 and accompanying text.

[49] *Id.* at 7.

[50] Seller rejected the buyer's check which had been tendered within the stated time for performance and demanded payment in gold. Buyer could not obtain gold, due to its scarcity in Hilo where the transaction occurred. However, he obtained it ten days later, at which time he tendered full payment with interest. *Id.* at 6.

[51] *Id.* at 8.

[52] *Lum*, 42 Hawaii at 288; Ferrington, *supra* note 6 at 77. The Hawaii case law reflects the modern trend of authority in law as well as equity to determine whether time is of the essence by construing the parties' intent. 17 AM. JUR. 2d *Contracts* § 332 (1964), 77 AM. JUR. 2d. *Vendor and Purchaser* § 71 (1975). *Cf.* Benezet v. Nowell, 42 Hawaii 581 (1958) (In a contract for services, the question of whether time is of the essence is also determined by the intent of the

make time essential, as construed from all the surrounding facts, again became the primary issue.[53]

Based on these principles, the court concluded that time was of the essence. The contract[54] in *Lum* contained no express time is of the essence clause.[55] The court, however, found evidence of intent to make time essential because the seller initially rejected the buyer's offer, and then countered with an offer identical to the buyer's original offer, except for a thirty-day payment requirement.[56]

After finding that time was of the essence, the *Lum* court applied a two-part rule.[57] Where time was of the essence, the "usual rule" denied specific performance to a party failing to perform on time. Nevertheless, the facts could take the case out of the "usual rule."[58] The first part of the *Lum* rule posed an exception to the *Bohnenberg* maxim that equity prefers compensation over forfeiture.[59] The second part of the rule, however, allowed equity to intervene where unusual circumstances justified granting relief from forfeiture.[60] The circumstances that led to a decree of specific peformance in *Bohnenberg* were similarly important in determining whether such a decree would be unjust in *Lum*.[61] Three major factors proved significant to the *Lum* court's determination. Such factors included the conduct of the parties, the amount of forfeiture that would result if specific performance was denied, and tender of performance by the buyer.[62] First, the court focused on the parties' conduct and found neither

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parties.). The traditional rule at law, in the absence of any statute to the contrary, made time essential in land sale contracts even without an express stipulation or clear manifestation of intent. However, even this general rule is subject to modification where a contrary intention appears or where the result would be to enforce a forfeiture. 71 AM. JUR. 2d *Specific Performance* § 63 (1973); 77 AM. JUR. 2d *Vendor and Purchaser* § 72 (1975).

[53] *Lum*, 42 Hawaii at 287.

[54] The parties used a form called "Initial Payment Receipt and Contract" said to be generally used by brokers in Honolulu. *Id.*

[55] *Id.* at 291.

[56] *Id.* at 287.

[57] The court agreed with the following statement in 49 AM. JUR. *Specific Performance* § 42 (1943): "[Where time is of the essence,] the court may refuse to decree specific performance where it appears that the plaintiff failed to perform on his part within the stipulated time, unless there is something in the facts to take the case out of the usual rule." 42 Hawaii at 289.

[58] 42 Hawaii at 288-89. The court considered various rules which might govern where time is essential. It rejected the rule stated in POMEROY'S EQUITY JURISPRUDENCE § 1408 (5th ed. 1941) that where time is essential a delay cannot be excused. "A performance at the time is essential; any default will defeat the right to performance." 42 Hawaii at 288 (quoting POMEROY). The court stated that this rule was too extreme because it allowed no exception, and opted for the rule stated in the text. *Id. See supra* note 57.

[59] 13 Hawaii 7. *See supra* text accompanying note 47.

[60] *See supra* note 57.

[61] *See supra* text accompanying notes 49-51.

[62] 42 Hawaii at 293, 294, 295. *See infra* notes 63-66 and accompanying text. Tomikawa v. Gama, 14 Hawaii 175 (1902) provides another exception to the *Lum* rule. Where time is of the

diligence on the part of the buyer[63] nor "sharp practice and connivance on the part of the seller to place the buyer in default."[64] Second, the court did not deem the buyer's $1000 deposit and expenditures incurred for a survey a substantial forfeiture which required granting specific performance.[65] Third, and perhaps most significant, the court found an insufficient showing of the buyer's readiness and ability to perform his contractual obligations.[66] Thus, the court applied the usual rule and denied specific performance.[67]

In effect, in both *Bohnenberg*, where time was not of the essence, and *Lum*, where time was of the essence, the court relied on similar factors in determining whether to grant relief from forfeiture. However, a finding that time was of the essence created a presumption in favor of forfeiture, whereas a finding that time was not of the essence created a presumption in favor of specific performance.

In this manner, *Bohnenberg* and *Lum* provided the traditional starting point for a party arguing for or against specific performance to a defaulting buyer. The court began by inquiring whether time was of the essence.[68] Since an affirmative finding could be based on an express stipulation to that effect, a time is of the essence clause in a land purchase contract proved very significant for both buyers and sellers.

Bohnenberg and *Lum* were the foundation cases until 1978 when the Hawaii Supreme Court decided the landmark case of *Jenkins v. Wise*.[69] This case in-

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essence, third party action may provide an excuse for buyer's delay. Also, a seller may waive his right to enforce forfeiture upon buyer's default by accepting late payments.

[63] *Lum*, 42 Hawaii at 294. The court chose to accept the seller's version of the disputed facts. *Id.* at 289. Although the buyer arranged a bank mortgage to pay for the bulk of the purchase price and delivered a personal check for the balance to the real estate broker handling the transaction, the supreme court agreed with the trial judge that the buyer failed to "personally make any attempt" to help bring the transaction to a "satisfactory conclusion." *Id.* at 291-93. The court ignored the buyer's testimony that he repeatedly called the broker in, seeking to close the transaction. Furthermore, the court criticized the buyer for preferring to have the broker handle the closing. *Id.* at 293.

[64] *Id.* at 294. The seller's two attempts to collect with the bank were frustrated. The first time, he arrived after the loan department was closed. The second time, the bank lacked the buyer's authorization to pay the seller. Although on both occasions the bank offered to deposit the money in the seller's account if he would leave the signed deed, the seller refused. *Id.* at 292.

[65] *Id.* at 294-95.

[66] *Id.* at 293. Although the buyer gave notice of his ability to perform, the court found it to be an insufficient showing of actual tender.

[67] One commentator criticized the court's conclusions stating: "In reviewing the facts on appeal, the court, contrary to the attitude that it was later to take in *Jenkins*, appeared determined to ignore equity and find grounds for enforcing the forfeiture provision." Cane, *Equity and Forfeitures in Contracts for the Sale of Land*, 4 U. HAWAII L. REV. 61, 75 (1982).

[68] *Lum*, 42 Hawaii at 287-88; *Bohnenberg*, 13 Hawaii 5; Cane, *supra* note 67 at 61; Ferrington, *supra* note 6 at 77.

[69] 58 Hawaii 592, 574 P.2d 1337 (1978). *Kaiman I* quoted extensively from the *Jenkins* opinion. *Jenkins* is a far reaching opinion that covers many issues in the law governing agreements

volved a buyer who defaulted under an agreement of sale after making several payments,[70] and then sought equitable relief from forfeiture upon seller's cancellation of the agreement. The court ruled, "where the vendee's breach has not been due to gross negligence, or to deliberate bad-faith conduct on his part, and the vendor can reasonably and adequately be compensated for his injury, courts in equity will generally grant relief against forfeiture and decree specific performance of the agreement."[71] Unlike *Bohnenberg* and *Lum*, which first required a determination of whether time was of the essence when the contract was made, *Jenkins* proceeded directly to the question of whether injustice would result if specific performance were denied. Thus, *Jenkins* bypassed the first barrier to specific performance and gave buyers an even greater right to specific performance.

The *Jenkins* court stated that the decision to grant or deny specific performance lies within the trial court's discretion, the key factor being whether forfeiture would render a harsh and unreasonable result under the circumstances.[72] In a footnote, the court suggested several relevant factors in determining whether forfeiture would be unjust.[73] Such factors included the amount already paid in relation to the total purchase price; the amount and length of the default; the reasons for the delay; the nature and extent of the improvements, if any, made upon the premises by a buyer in possession; expenditures incurred by the buyer in good faith reliance upon the agreement of sale; the land value as security for the unpaid balance of the purchase price; and the parties' conduct.[74]

The court further stated,

> [T]he fact the parties have stipulated that time is of the essence is but one of the factors to be taken into consideration in determining whether equity will intervene to set aside a forfeiture. Where the forfeiture is disproportionately large and other facts, circumstances and equities cry out for relief, a court in equity may,

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of sale. The opinion defined an agreement of sale. *See supra* note 4. The court also discussed each parties' interests, *id.* at 596, 574 P.2d at 1340-41; the consequences and remedies for breach, *id.* at 597, 574 P.2d at 1341; damages in cases where specific performance is denied, *id.* at 598, 574 P.2d at 1341-42; the standard of appellate review, *id.*, 574 P.2d at 1342; duties of a real estate broker to his client, *id.* at 603-04, 574 P.2d at 1344; and the standard for attorneys' fees, *id.* at 604, 574 P.2d at 1345.

[70] The buyer purchased two parcels of land at $50,000 each. He paid the initial down payment of $6,000 on both parcels, and the first installment of $4,000 on one parcel. *Id.* at 594, 574 P.2d at 1339. Thus, upon default, he stood to lose $16,000 plus $51,000 in accrued equity due to increased land values.

[71] 58 Hawaii at 597, 574 P.2d at 1341.

[72] *Id.* at 597-98, 574 P.2d at 1341.

[73] *Id.* at 598 n.3, 574 P.2d at 1341 n.3.

[74] *Id.*

nevertheless, intervene.[75]

Since the opinion did not specify whether time was of the essence, the scope of the *Jenkins* rule was unclear. On one hand, the statements imply that neither a time is of the essence clause nor any other single factor presents a barrier to granting specific performance. They also indicate the court's willingness to overrule *Lum* to the extent that *Lum* created a presumption in favor of upholding forfeiture upon finding that time was of the essence. Given this language, together with the *Jenkins* rule in favor of specific performance, the key inquiry would shift from whether time was of the essence to whether forfeiture creates an unjust result.[76] On the other hand, without the above dicta, *Jenkins* could be interpreted as simply reaffirming the rule established in *Bohnenberg* for cases where time was not of the essence.[77] Thus, clarification of this matter awaited a future case.

An important question not addressed by *Jenkins* was whether specific performance constituted the preferred remedy regardless of the type of land purchase contract involved. Hawaii caselaw previously made no distinction between different types of land purchase contracts.[78] The general rules in equity for granting specific performance of land purchase contracts relied on a concept that regarded money damages as an inadequate substitute for the uniqueness of a given parcel of land.[79] Thus, in Hawaii courts accorded similar treatment to all contracts that generally related to the sale of land.

However, courts in other jurisdictions have begun to confer greater protection to buyers under long-term installment sales contracts, such as the agreement of sale, than under other land purchase contracts.[80] This trend marks a recognition by courts that the agreement of sale serves essentially as a security device similar

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[75] *Id.* The *Jenkins* court quoted in full from Rothenberg v. Follman, 19 Mich. App. 383, 392, 172 N.W.2d 845, 850 (1969).

[76] *See supra* notes 72-75 and accompanying text.

[77] *See supra* text accompanying note 47. The court in *Jenkins* relied *inter alia* on the *Bohnenberg* maxim that "equity . . . abhors forfeitures and where no injustice would thereby result to the injured party, equity will generally favor compensation rather than forfeiture." *Jenkins*, 58 Hawaii at 597, 574 P.2d at 1341.

[78] Previous cases dealing with contracts for the sale of land failed to distinguish between different types of land sale contracts for purposes of applying equitable principles. For example, *Jenkins*, an agreement of sale case, relied in part on *Bohnenberg*, which involved a short term escrow contract. Likewise, *Lum*, involving a contract similar to a DROA, cited Cheney v. Libbey, 134 U. S. 68 (1890), a case involving an installment land sale contract.

[79] Courts in equity nationally have long decreed specific performance of land contracts on the ground that each parcel of land is unique and money damages are poor substitutes for seller's performance. D. DOBBS, HANDBOOK OF THE LAW OF REMEDIES § 12.2 at 796 (1973).

[80] For discussion of this trend, see *infra* notes 104-23 and accompanying text.

to a mortgage.[81] The *Jenkins* reasoning reflects this recognition. Significant factors bearing upon the court's decision included the equitable interests created in a buyer under an agreement of sale,[82] the prevalence of the agreement of sale as a financing method for the sale of homes,[83] and the injustice that often results if a forfeiture clause is enforced as written.[84] The court particularly noted that enforcement of such clauses "has the effect of divesting the purchaser of his equitable interest in the property, as well as any right he may have to recover any moneys . . . paid on account of the purchase price."[85] Thus, these considerations suggest that *Jenkins* applies to the agreement of sale and not to all land purchase contracts.

Subsequent cases followed the *Jenkins* guidelines and clarified its holding as appropriate fact patterns arose.[86] *Gomez v. Pagaduan*,[87] decided by the Hawaii Intermediate Court of Appeals, presents a case in point. In *Gomez*, the default-

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[81] *See infra* notes 116-20 and accompanying text.

[82] The court stated, "upon the execution and delivery of the agreement of sale, there accrues to the vendee an equitable interest in the land . . . . The purchaser becomes vested with the equitable and beneficial ownership of the property, and unless the agreement provides otherwise, the vendee is entitled to its immediate possession. The legal title is retained by the vender essentially as security for the payment by the vendee of the purchase price." *Jenkins*, 58 Hawaii at 596, 574 P.2d at 1340-41.

[83] The court stated, "[a]n agreement of sale in this jurisdiction has become a common and established device utilized in the sale and purchase of property." *Id.* The court also noted that an agreement of sale often provides the only means by which low income purchasers are able to buy land, since it allows them at least initially to bypass the substantial down payment requirement imposed on lending institutions for conventional loans by state and federal regulations. *Id.* at 596, 574 P.2d at 1340.

[84] *Id.* at 596-97, 574 P.2d at 1341.

[85] *Id.*

[86] Other cases following *Jenkins* dealt with the following issues: 1) the fashioning of relief by the trial courts, Bank of Honolulu v. Anderson, 3 Hawaii App. 545, 654 P.2d 1370 (1982) (trial courts may fashion any relief they deem proper including ordering foreclosure rather than cancellation); 2) the standards of appellate review, Michely v. Anthony, 2 Hawaii App. 193, 628 P.2d 1031 (1981) (the granting of equitable relief will not be set aside unless manifestly against the clear weight of the evidence); 3) equitable treatment of buyers, Dang v. Mtn. View Estates, 1 Hawaii App. 539, 621 P.2d 988 (1981) (purchasers under agreements of sale are not entitled to be treated as if they were mortgagors); 4) seller's ability to convey good title, Shaffer v. Thacker, 3 Hawaii App. 81, 641 P.2d 983 (1983) (sellers must be able to convey good equitable title at the time of closing the agreement of sale); Romig v. deVallance, 2 Hawaii App. 597, 637 P.2d 1147 (1981) (if the seller's ability to convey good title is in doubt, the buyer may demand adequate assurances).

Other cases distinguished *Jenkins*. In Dowsett v. Cashman, 2 Hawaii App. 77, 625 P.2d 1064 (1981), cancellation of the agreement of sale pursuant to a voluntary compromise agreement was upheld. In re Continental Properties, 15 Bankr. 732 (D. Hawaii 1981), held that *Jenkins* does not apply to the option contract.

[87] 1 Hawaii App. 70, 613 P.2d 658 (1980).

ing buyer sought the equitable remedy of restitution[88] rather than specific performance.[89] Following dicta in *Jenkins*,[90] the court held that a seller may keep a buyer's payments only to the extent that the amount is reasonably related to the seller's actual damages.[91] *Gomez* thus shaped the law governing liquidated damages in accordance with *Jenkins* principles.

Although *Jenkins* established certain guidelines on agreements of sale, two key issues remained unsettled. First, dicta in *Jenkins* that discussed the status of time is of the essence clauses[92] had yet to be either repudiated or followed. Second, it was unclear whether the principles established in *Jenkins* to govern agreements of sale[93] applied to other land purchase contracts.

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[88] Restitution is defined as the "act of restoring, the act of making good or giving equivalent for any loss, damage, or injury, and indemnification." BLACK'S LAW DICTIONARY 1180 (5th ed. 1979). A person who has been unjustly enriched at the expense of another is required to make restitution to the other. RESTATEMENT OF RESTITUTION § 1.

Courts in equity tend to grant restitution more readily than specific performance. It is more like an accounting between the parties than an assessment for damages. Stratton v. Tejani, 139 Cal. App. 3d 204, 187 Cal. Rptr. 231, 236 (1982). For a general discussion of a defaulting purchaser's right to restitution under a land sale contract, see D. DOBBS, *supra* note 79.

[89] The buyer in *Gomez* challenged the seller's right, pursuant to the agreement to retain all monies paid as liquidated damages. The agreement of sale provided that in the event of the buyer's default, sellers may elect to cancel the agreement and all payments made by the buyer "shall be retained by the Seller, absolutely, without any other or further notice, and shall be deemed to be liquidated damages and rent for the use and occupation of said premises by the Purchaser and in settlement of any depreciation of the same and not as a penalty . . . ." 1 Hawaii App. at 71-72, 613 P.2d at 660.

[90] In *Jenkins* the court stated: "[E]ven where equity declines to grant relief from the forfeiture . . . it may nevertheless order the return of that portion of the purchase price already paid which it finds constitutes a penalty, rather than liquidated damages, for the breach." 58 Hawaii at 548, 574 P.2d at 1341-42.

[91] The Intermediate Court of Appeals stated:

> Where the purchaser's breach does not involve bad faith conduct, a provision in an agreement stating that in the event of purchaser's default the seller may elect to keep all payments as liquidated damages may be enforced by the seller if there is a reasonable relation between the amount of payments retained and the amount of seller's actual damages.

Gomez, 1 Hawaii App. at 75, 613 P.2d at 662. *See also* Ventura v. Grace, 3 Hawaii App. 371, 650 P.2d 620 (1982); Romig v. deVallance, 2 Hawaii App. 596, 637 P.2d 1147 (1981).

Actual damages include: 1) the excess of the contract price over the fair market value at the termination date of the agreement; 2) the amount of interest due during buyer's equitable ownership; 3) seller's actual or estimated costs of resale; 4) other payments required of the buyer by the contract, but not made; 5) any expenses or damages which the contract entitles seller to claim in case of buyer's breach. 1 Hawaii App. at 76, 613 P.2d at 662.

[92] *See supra* text accompanying note 75.

[93] *See supra* notes 71-75 and accompanying text.

III. ANALYSIS

The *Kaiman* decisions addressed the two major areas of uncertainly following *Jenkins*. First, *Kaiman I* affirmed the *Jenkins* principles which favor granting specific performance even where time is of the essence. Then, in a more controversial decision, the Hawaii Supreme Court in *Kaiman II* extended those principles to DROA contracts. An analysis of both opinions establishes that *Kaiman I* provides a welcome clarification of agreement of sale law, which is well-supported both by reasoning in *Jenkins* and national caselaw. In contrast, the extension of the *Jenkins* holding in *Kaiman II* seems unwarranted, and creates uncertainty in the law relating to DROAs.

A. *Time is of the Essence in Agreements of Sale*: Kaiman I

In *Kaiman I*, the Hawaii Supreme Court addressed only the issue of whether a "time is of the essence" clause in an agreement of sale forecloses equitable relief from forfeiture to a defaulting buyer.[94] Because the supreme court differed with the Intermediate Court of Appeals' interpretation of *Jenkins*, the high court proceeded to clarify the impact of *Jenkins* on "time is of the essence" clauses in agreements of sale.[95] The Intermediate Court of Appeals implied that *Jenkins* merely followed the rules established in *Lum* and *Bohnenberg*.[96] Since the Intermediate Court of Appeals found that time was of the essence, it followed the *Lum* rule which favors denial of specific performance in such cases.[97] The supreme court granted certiorari essentially to reaffirm *Jenkins* and to establish that its principles must apply to all agreements of sale, whether or not time is of the essence.

In resolving this issue, the court relied heavily on language in *Jenkins* relegating a time is of the essence clause to one factor among many in a trial court's decision to set aside a forfeiture.[98] The court concluded by reaffirming *Jenkins*

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[94] 65 Hawaii at 638, 655 P.2d at 873.

[95] The court stated it "granted certiorari essentially for the purpose of clarifying the impact of *Jenkins v. Wise* . . . on 'time of the essence' clauses in agreements of sale." *Id.*

[96] The Intermediate Court of Appeals stated: "In *Jenkins*, the Hawaii Supreme Court did not specify whether time was or was not of the essence. Possibly it was not, and in such case, *Bohnenberg* would be apposite. If time was of the essence, then, unlike this case, its facts required that it be taken out of the usual rule." *Kaiman*, 2 Hawaii App. at 504-05, 634 P.2d at 608.

[97] The *Lum* court ruled that where time is of the essence specific performance will be denied a defaulting buyer unless there is something in the facts to take the case out of the usual rule. 42 Hawaii 286. Similarly, in *Kaiman*, the Intermediate Court of Appeals agreed with the trial court's finding that time was of the essence, but found nothing to take the case out of the usual rule, and therefore denied specific performance. 2 Hawaii App. at 504-05, 634 P.2d at 607-08.

[98] *Kaiman I*, 65 Hawaii at 639, 655 P.2d at 873 (quoting *Jenkins*, 58 Hawaii at 598 n.3, 574 P.2d at 1341 n.3).

and holding, "a 'time is of the essence' clause in an agreement of sale will not foreclose equitable relief where absent gross negligence or bad faith conduct of the vendee, forfeiture would be harsh and unreasonable."[99]

The *Kaiman I* holding requires a trial court in agreement of sale cases to consider the equitable effect of a forfeiture on the parties,[100] rather than whether time is of the essence. To the extent that *Kaiman* sets a new standard for granting specific performance where time is of the essence, it effectively overrules *Lum*.[101] While a time is of the essence clause did not preclude specific performance under *Lum*, such a clause placed the burden on the defaulting buyer to show why forfeiture would be particularly harsh.[102] Under *Kaiman*, on the other hand, a time is of the essence clause presents no such initial obstacle to a defaulting buyer. Rather, the burden seems to shift to the seller to show why a forfeiture would not be harsh and unreasonable.

In terms of its application to agreements of sale, *Kaiman* is well supported by reasoning in *Jenkins* which recognizes the harshness that often results from strict enforcement of forfeiture provisions.[103] The holding also stands consistent with the recent national trend of granting equitable relief from forfeiture, despite the presence of a "time is of the essence" clause.[104] This trend is essentially a recognition of the agreement of sale as a security device, which has resulted in con-

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[99] 65 Hawaii at 640, 655 P.2d at 874. In *Kaiman I*, the court quoted from Rothenberg v. Follman, 19 Mich. App. at 394, 172 N.W.2d at 851:

> Whether time is truly of the essence, and the extent to which that should influence the judge in deciding whether to relieve against a particular forfeiture, depends upon the nature of the subject matter, the purpose and object of the contract and all other relevant facts and circumstances, not upon the skill of the draftsman.

65 Hawaii at 640, 655 P.2d at 874.

[100] *Id.* Circumstances to be taken into consideration in determining whether a forfeiture would be unjust were established in *Jenkins*. *See supra* text accompanying note 74.

[101] Noting that *Lum* recognized situations in which, notwithstanding a contract provision making time essential, the equities would require the court to grant specific performance, the court in *Kaiman I* stated "[n]evertheless, to the extent that a conflict may be deemed to exist, the principles underlying *Jenkins* shall prevail." 65 Hawaii at 640 n.1, 655 P.2d at 874 n.1.

[102] 42 Hawaii at 294.

[103] *See supra* text accompanying notes 84-85.

[104] *See generally* Annot., 55 A.L.R. 3d 10, 16 (1974). For a discussion of the treatment in another jurisdiction of forfeiture provisions in agreements of sale, see generally Comment, *Forfeiture: The Anomaly of the Land Sale Contract*, 41 ALB. L. REV. 71 (1977) [hereinafter cited as *Forfeiture*]; Cane, *supra* note 67; Hetland, *Land Contracts*, CALIFORNIA REAL ESTATE SECURED TRANSACTIONS 53 (1970) [hereinafter cited as Hetland, SECURED TRANSACTIONS]; Hetland, *supra* note 2, at 759; Note, *Real Estate Finance - Installment Land Sale Contracts: Avoiding the Harshness of Forfeitures*, 15 LAND & WATER L. REV. 773 (1980); Nelson & Whitman, *The Installment Land Contract - A National Viewpoint*, B.Y.U. L. REV. 541, 543 (1977); Powell, *Reforming the Vendor's Remedies for Breach of Installment Land Sales Contract*, 47 S. CAL. L. REV. 191, 216 (1973); Comment, *Florida Installment Land Contracts: A Time for Reform*, 28 U. FLA. L. REV. 156, 159 (1975) [hereinafter cited as *Florida Land Contracts*].

ferring mortgage-like protection to the buyer.[105]

As in *Jenkins*, courts nationally have recognized that strict enforcement of forfeiture provisions often results in inequitable consequences to the buyer.[106] Previously, courts in most jurisdictions routinely enforced such provisions in the seller's favor.[107] The problem, however, with strict foreclosure pursuant to the terms of an agreement of sale lies in its effect of divesting the purchaser of an equitable interest in the property, as well as a right to recover any money paid towards the purchase price.[108] Thus, it often results in substantial loss to the buyer and a windfall to the seller.[109]

For example, in a Michigan case[110] relied on in *Jenkins*,[111] a purchaser under an installment contract paid more than three-fourths of the purchase price before becoming overdue on an installment. The actual amount overdue was relatively small, and the buyer acted in good faith by tendering full payment of the balance within a reasonable time. Strict forfeiture would strip the buyer of all his money paid in as well as any equity accrued due to increased property values. The seller, on the other hand, would retain both the property and the buyer's money. The court granted the buyer specific performance. The harsh effect of enforcing a forfeiture provision in an agreement of sale comprised a significant factor in the court's decision. The court noted that every payment made by the buyer reduces the seller's potential loss, the unpaid purchase price. Thus, the forfeiture provision ultimately increases the damages payable to seller as his actual possible damages decline.[112]

In recognizing these often unjust results, courts began to de-emphasize the contractual aspects of agreements of sale and began to substitute equitable considerations.[113] The defaulting buyer in many jurisdictions, including Hawaii, now may be accorded a right to restitution of liquidated damages exceeding seller's actual damages.[114] Courts also may decree specific performance for the

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[105] *See infra* notes 113-120 and accompanying text.

[106] Nelson & Whitman, *supra* note 104, at 544. *See infra* note 123.

[107] Nelson & Whitman, *supra* note 104, at 543. Enforcement of such provisions was based on a desire to carry out the intent of the parties, in spite of the often inequitable results. *Id.*

[108] Jenkins v. Wise, 58 Hawaii at 596-97, 574 P.2d at 1341 (1978).

[109] Nelson & Whitman *supra* note 104 at 543. *See also* Note, *Forfeiture and the Iowa Installment Land Contract*, 46 IOWA L. REV. 786, 788 (1961); *Florida Land Contracts, supra* note 101, at 159.

[110] Rothenberg v. Follman, 19 Mich. App. 383, 172 N.W.2d 845 (1969).

[111] *Jenkins*, 58 Hawaii at 597, 598, 574 P.2d at 1341.

[112] 19 Mich. App. at 393, 172 N.W. 2d at 851. However, forfeiture provisions do not have this effect where buyer is making interest only payments.

[113] Powell, *supra* note 104, at 216.

[114] *Forfeiture*, *supra* note 104, at 104 n.250 (citing cases from California, Georgia, Idaho, Louisiana, New York, Oregon and Utah). *See* Lee, *Defaulting Purchaser's Rights to Restitution Under the Land Sale Contract*, 20 U. MIAMI L. REV. 1, 7-12 (1965). In Gomez v. Pagaduan, 1

buyer where he or she subsequently performs without undue delay or where forfeiture would be harsh and unreasonable.[115] Agreements of sale law thus resembles early treatment of mortgages, where the mortgagor appealed to equity's discretion to allow an opportunity for redemption[116] after default.[117] This is not surprising, as an agreement of sale is a security device, much like a mortgage.[118] Both secure payment of the unpaid purchase price and transfer the beneficial rights associated with the property to the buyer.[119] Because both instruments serve virtually identical purposes, buyers under an agreement of sale now receive protections similar to those received by buyers under a mortgage.[120]

Hawaii App. 70, 613 P.2d 658 (1980), the Intermediate Court of Appeals held that a seller may keep a buyer's payments only to the extent that the amount is reasonably related to seller's actual damages. *See supra* notes 87-91 and accompanying text. In doing so, the court adopted the California rule for determining liquidated damages. *See* Kosloff v. Castle, 115 Cal. App. 3d 369, 171 Cal. Rptr. 308 (1981) (the buyer has an unqualified right to restitution, *i.e.*, relief from forfeiture of payments in excess of seller's actual damages); Kudokas v. Balkus, 26 Cal. App. 3d 744, 103 Cal. Rptr. 318 (1972) (enumerating the items to be included in actual damages).

[115] *See infra* note 123.

[116] Redemption is the process of cancelling and annulling a defeasible title to land, such as is created by a mortgage, by paying the debt or fulfilling the other conditions. BLACK'S LAW DICTIONARY 1149 (5th ed. 1979).

[117] D. DOBBS, *supra* note 79 at 865.

[118] McFadden v. Walker, 5 Cal. 3d 809, 816, 488 P.2d 1353, 1356, 97 Cal. Rptr. 537, 541 (1971) (the court noted Hetland's argument in *Secured Transactions*, *supra* note 104, that installment contracts should be treated as security devices and that therefore "the law governing those security devices should be adopted with appropriate modifications in determining the remedies for breaches of installment contracts"; a willfully defaulting vendee was thus entitled to cure his default before losing his interest); Rothenberg v. Follman, 19 Mich. App. 383, 387 n.4, 172 N.W.2d 845, 847 n.4 (1969) (there is no functional difference between a purchase money mortgage and an installment land contract); H & L Land Co., Inc. v. Warner, 258 So.2d 293 (Fla. 1972) (the buyer and seller under an agreement of sale are in essentially the same position as a mortgagor and mortgagee).

In Hawaii, although the courts have acknowledged the similarities between an agreement of sale and a mortgage, they have held that "purchasers under agreements of sale are not entitled to be treated as if they were mortgagors." Dang v. Mt. View Estate, 1 Hawaii App. 542, 621 P.2d 988 (1981). *See also* Kosloff v. Castle, 115 Cal. App. 3d 369, 171 Cal. Rptr. 308 (1981) (The installment contract is not a mortgage. The buyer has no absolute right of redemption, *i.e.*, specific performance).

[119] CONVEYANCE MANUAL, *supra* note 4 at 6-1.

[120] In *Rothenberg*, the court noted that despite the similarities between the two devices, the law of mortgages and installment land contracts developed separately. In mortgage law, at one time the defaulting mortgagor appealed to equity's discretion to allow him to redeem. However, his "right of redemption became so well established that after a while [he] did not have to show any special equity to invoke equity's power and the shoe was on the other foot — it then became necessary for the mortgagee to foreclose the mortgagor's equity of redemption . . . ." In contrast, the rights of the land contract purchaser have been largely shaped by contract principles. Specific performance and relief are discretionary, and the defaulting land contract purchaser has no absolute right of redemption. The present state of law regarding specific performance in favor of a

While courts still occasionally enforce forfeiture provisions in an agreement of sale,[121] courts in most jurisdictions now assume that such provisions will not be enforced automatically in the seller's favor.[122] Equitable relief for the buyer will be granted when justified, notwithstanding the presence of a "time is of the essence" clause.[123] *Kaiman I* thus aligns Hawaii with the majority of jurisdictions in this area of decisional law.

B. *Extension of* Jenkins *to DROA Contracts*: Kaiman II

The court's first decision, *Kaiman I*, has a limited scope because it only addresses an agreement of sale situation.[124] The *Kaiman* case, however, involves

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defaulting land contract purchaser is thus equivalent to the state of mortgage law preceding recognition of the equity of redemption as the mortgagor's undoubted right, when the court of equity relieved against forfeiture as a matter of discretion. 19 Mich. App. at 387-88 n.4, 172 N.W.2d at 847-48 n.4.

[121] *See* Michely v. Anthony, 2 Hawaii App. 193, 199, 628 P.2d 1031, 1035 (1981) (in law and equity, the court may enforce forfeiture where the parties enter into a contract whose terms clearly provide for forfeiture in the event of a material breach of its covenants).

[122] Nelson & Whitman, *supra* note 104 at 544. Except in states which approve forfeiture after a grace period has passed, seller reliance on contractual forfeiture provisions is unfounded. *Id.* at 576.

In addition to equitable relief from forfeiture by courts, several jurisdictions have enacted legislation attempting to alleviate the harshness of forfeitures either by incorporating a grace period within which late payments may be accepted, or by providing for foreclosure proceedings similar to those used under a mortgage. *Id.* at 544-46.

In 1983, two bills dealing with defaults under agreements of sale were introduced in the Hawaii legislature. *See* S.B. No. 414, 12th Leg. Reg. Sess. (1983); S.B. No. 413, 12th Leg. Reg. Sess. (1983). As a result, and in recognition of the problems arising with defaults under agreements of sale, a resolution was adopted in 1983 authorizing the Department of Commerce and Consumer Affairs to prepare a study on problems arising in connection with agreements of sale. *See* S.R. No. 66, 12th Leg. Reg. Sess.(1983).

In 1984, another bill was introduced that proposed treating agreement of sale foreclosures somewhat like mortgage foreclosures. *See* S.B. 2111, 12th Leg. Reg. Sess. (1984). The bill was not passed out of the Committee on Consumer Protection.

[123] *Jenkins*, 58 Hawaii 590, 597, 574 P.2d 1337, 1341; Rothenberg v. Follman, 19 Mich. App. 383, 172 N.W.2d 845 (1969); Cheney v. Libby, 134 U.S. 68 (1890); Moran v. Holman, 501 P.2d 769 (Alaska 1972); McFadden v. Walker, 5 Cal. 3d 809, 488 P.2d 1353, 97 Cal. Rptr. 537 (1971); Kosloff v. Castle, 115 Cal. App. 3d 369, 171 Cal. Rptr. 308, 311 (1981); Aden v. Alwardt, 76 Ill. App. 3d 54, 394 N.E.2d 716 (1979); Parkhurst v. Lebanon Pub. Co., 356 Mo. 934, 204 S.W. 2d 241 (1947); Mosso v. Lee, 53 Nev. 176, 295 P. 776 (1931); Radach v. Prior, 48 Wash. 2d 901, 297 P.2d 605 (1956). *See generally* Annot., 55 A.L.R. 3d 10 (1974). *See also infra* notes 104-22 and accompanying text.

[124] The statement of facts refers to "an action for specific performance under an agreement of sale," *Kaiman I*, 65 Hawaii at 637, 655 P.2d at 873. The holding concerns "a 'time is of the essence' clause in an agreement sale." *Id.* at 640, 655 P.2d at 874. In addition, the only two cases cited in the opinion are agreement of sale cases, *Jenkins v. Wise*, 58 Hawaii 590, 574 P.2d

DROA contracts rather than an agreement of sale. Since the court intended solely to clarify a question of law, it rendered no discussion of the underlying facts. The opinion thus left some uncertainty whether principles in *Jenkins* applied to DROAs as well as to agreements of sale. The seller's motion for reconsideration,[125] however, provided the court an opportunity to determine the significance, if any, of the differences between a DROA contract and an agreement of sale in deciding to grant or deny specific performance. The seller argued that unlike agreements of sale, most DROAs are short-term contracts which do not immediately transfer equitable ownership and risks of ownership to the buyer.[126]

In *Kaiman II*, the supreme court acknowledged that under a DROA the buyer's immediate equitable interest may be so slight "that it would not be inequitable to deny all relief."[127] The court also noted that under a DROA, a time is of the essence clause "could carry relatively substantial weight"[128] in determining whether a buyer's rights under the DROA should be forfeited.[129]

The court, however, declined to distinguish between a DROA and an agreement of sale, stating, "[T]he title of the land purchase contract whether DROA or agreement of sale, is not itself dispositive. The trial court should examine the specific land purchase terms and ask the basic question whether an inequitable forfeiture would occur, applying the principles laid down in *Jenkins v. Wise*."[130]

Thus by declining to distinguish between the two types of contracts, the supreme court extended the *Jenkins* principles favoring compensation over forfeiture in agreement of sale situations to DROA contracts. The court, however, failed to justify or explain its holding.[131] Furthermore, the following evaluation

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1337 (1978) and *Rothenberg v. Follman*, 19 Mich. App. 383, 172 N.W.2d 845 (1969).

[125] *Kaiman II*, 66 Hawaii 103, 659 P.2d 63 (1983).

[126] *Id.* at 104, 659 P.2d at 64. Specifically, movant Carmichael pointed to Cane, *supra* note 67, in which it is stated that most DROA contracts are short-term contracts involving escrow accounts, under which equitable ownership and the risks of ownership are not transferred to the buyer. In contrast, the usual agreement of sale is often a long-term contract under which equitable ownership is immediately transferred to the purchaser.

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] Although the court did not refer to the specific facts of *Kaiman*, those facts suggest two possible justifications for applying *Jenkins* principles to DROA contracts. First, in many cases, as in *Kaiman*, the DROA precedes an agreement of sale. The hardship imposed on the seller in case of a delay in payment in such a sitation is likely to be less severe than where the buyer is to tender the full purchase price on closing. *See infra* notes 213-17 and accompanying text. Second, the delay in payment in *Kaiman* was due in part to problems with escrow. Thus, the decision may reflect the thought that forfeiture after a slight delay due to escrow problems may be harsh, since problems in escrow frequently result in delays in closing. Ferrington, *supra* note 6, at 77 (1980). Such delays are typically encountered due to the buyer's inability to obtain financing or

of several possible justifications suggests that this extension of *Jenkins* to DROA contracts is unwarranted.

1. *The Marketing vs. Security Contract Distinction*

One possible reason for not acknowledging the dissimilarity between the two types of contracts may be the desire to treat all "land purchase contracts" under the same law. This approach is consistent with prior Hawaii caselaw in which the courts did not distinguish between different types of land purchase contracts.[132] The traditional reason for drawing no distinction, however, is rooted in the concept that each parcel of land is unique.[133] Given the uniqueness of each parcel, money damages fall short of the more complete remedy provided by specific performance.[134]

In contrast, the recent development in the law governing agreements of sale which gives the buyer greater protection than the traditional rules arose in response to considerations unique to agreement of sale situations.[135] The application of the same remedies to all contracts that relate in some manner to the purchase and sale of real property ignores notable differences between the various contracts that are now masked behind a common name.[136]

In other jurisdictions, courts do not accord buyers under marketing contracts,[137] such as DROAs, the same protections that have recently been granted buyers under security devices,[138] such as agreements of sale.[139] If time is of the essence in a marketing contract, specific performance is generally denied.[140] In

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produce the necessary cash within the time alloted for the closing of escrow, problems clearing title, and delays in the execution of documents transmitted through the mails. *Id.*

[132] *See supra* notes 78-79 and accompanying text.

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

[134] *Id.*

[135] The most influential factor in the development of agreement of sale law was the potential harshness of upholding forfeiture provisions as written. *See Jenkins*, 58 Hawaii at 596, 574 P.2d at 1341.

[136] For example, one writer distinguishes security devices, such as the agreement of sale or any agreement under which the seller retains title primarily as a security for the price, from a marketing contract which is intended to be the basic buy-sell agreement. Hetland, *supra* note 2, at 729.

[137] *See supra* note 14.

[138] *See supra* note 13.

[139] *See supra* notes 104-23 and accompanying text.

[140] *See* Blocker v. Lowry, 285 Ala. 448, 233 So.2d 233 (1970) (where contract for purchase of land provides that seller may declare forfeiture in event of non-payment and that time is of the essence, declaration of forfeiture will put an end to the interest of buyer, and seller is at liberty to act as if the contract has ceased); Allan v. Martin, 117 Ariz. 591, 574 P.2d 457 (1978)(when time for performance is material to the contract and one party fails to perform, the other party may treat the contract as ended); Leiter v. Eltinge, 246 Cal. App. 2d 306, 54 Cal. Rptr. 703 (1966)(where time was of the essence in an agreement to sell property, buyer did not timely

such situations, relief from forfeiture will only be granted according to traditional contract principles.[141]

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perform, and therefore was not entitled to specific performance or damages); Drazin v. American Oil Co., 395 A.2d 32 (D.C. 1978)(once time is set for performance under agreement to purchase real estate, the party whose duty it is to perform first must perform on that date, or be ready, willing and able to perform in order to get specific performance); H & L Land Co. v. Warner, 258 So.2d 293 (Fla. 1972)(rule that seller under installment sales contract cannot unilaterally extinguish buyer's equitable title upon buyer's default does not apply to ordinary short-term real estate contracts, which are intended to govern the rights and obligations of seller and buyer while the parties prepare for closing); Schildt v. Cokinos, 263 Md. 261, 282 A.2d 499 (1971)(when time is expressly declared to be of the essence in a contract for sale of land, a court in equity will ordinarily not grant specific performance where the buyer has failed to make payment within the specified time); Nedelman v. Meininger, 24 Mich. App. 64, 180 N.W.2d 37 (1970)(specific performance was denied where time was of the essence in a real estate purchase contract); McCain v. Cox, 531 F. Supp. 771 (D. Miss. 1982) (although the contract for sale of land does not expressly state that time is of the essence, where it is nevertheless manifest that time considerations are of paramount importance, prompt performance is essential); Menke v. Foote, 199 Neb. 800, 261 N.W.2d 635 (1978)(specific performance of a contract to purchase land is directed by the sound discretion of the court; it will not be granted where enforcement would be unjust or where the party seeking it has failed to perform); Holmby v. Dino, 647 P.2d 392 (Nev. 1982) (buyer did not have a reasonable time after the deadline provided in the sale and purchase agreement in which time was of the essence to comply with conditions for extension of escrow, and was not entitled to specific performance where he complied with conditions 16 days after deadline); E.E.E., Inc. v. Hanson, 318 N.W.2d 101 (N.D. 1982) (where time was of the essence of an earnest money agreement, purchaser's failure to pay the second earnest money payment on time discharged vendor from further duties under the contract, and thus buyer was not entitled to specific performance); Usinger v. Campbell, 280 Or. 751, 572 P.2d 1018 (1977) (a buyer who fails to tender performance within the specified time under an earnest money contract cannot ordinarily demand specific performance or damages); Miracle Revival Center Move of God Church v. Kindred, 615 S.W.2d 257 (Tex. 1981) (under a contract for sale of real estate, where buyer did not obtain financing until 21 days after date specified, the contract terminated and seller had no further obligation); Local 112, I.B.E.W. Bldg. Assoc. v. Tomlinson Dari-Mart, 30 Wash. App. 139, 632 P.2d 911 (1981)(where earnest money agreement provides that time is of the essence, a change in closing date requires agreement by both parties; the agreement expires by its own terms and neither party can specifically enforce the contract).

In a California case, Williams Plumbing Co. v. Sinsley, 53 Cal. App. 3d 1027, 126 Cal. Rptr. 345 (1975), the court applied rules established in agreement of sale cases and granted specific performance to a defaulting buyer under a marketing contract. The case was subsequently criticized and distinguished in Nash v. Superior Court, 86 Cal. App. 3d 690, 698-700, 150 Cal. Rptr. 394, 399 (1978), in which the court stated that the *Williams* court "appears not to have recognized that [the case on which it relied] was discussing a partially performed installment sale contract and not an executory agreement to deliver a deed for cash through an escrow."

[141] A defaulting buyer under a marketing contract may be granted specific performance where the seller has waived the right to demand specific performance by accepting late payments, Cedar Point Apts. Ltd. v. Cedar Point Inv. Corp., 693 F.2d 748 (8th Cir. 1982); Tomikawa v. Gama, 14 Hawaii 175 (1902); Maxted v. Stenberg, 166 Mont. 460, 534 P.2d 864 (1975); Soltis v. Liles, 275 Or. 537, 551 P.2d 1297 (1976), or by granting extensions of time, Foodmaker, Inc. v. Denny, 32 Md.App. 350, 360 A.2d 446 (1976); Kimm v. Andrews, 270 Md. 601, 313

The different purpose served by each contract and the divergent interests created by each justify the different treatment accorded each type of land purchase contract.[142] The purpose of the agreement of sale is to secure the buyer's performance of a promise to purchase property from the seller.[143] Under an agreement of sale, the buyer becomes vested with equitable and beneficial ownership.[144] Unless otherwise provided, he is entitled to immediate possession and assumes the risks of ownership.[145] The seller retains legal title essentially as a security for payment of the purchase price by the buyer.[146] In contrast, the purpose of the DROA is primarily to facilitiate the conveyance of property.[147] The seller retains title as in an agreement of sale, but the buyer does not usually

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A.2d 466 (1974); *cf.* Bolton v. Barber, 233 Ga. 646, 212 S.E.2d 766 (1975); Clark v. English, 319 So.2d 170 (Fla.App. 1975). A defaulting buyer may also be granted specific performance if the seller has failed to give reasonable notice of cancellation, Leiter v. Edinge, 246 Cal. App. 2d 306, 54 Cal. Rptr. 703 (1966), Lance v. Martinez-Arango, 251 So.2d 707 (Fla.App. 1971), or has contributed to the delay, Mezzanotee v. Freeland, 20 N.C. App. 11, 200 S.E.2d 410 (1973), or was unable at the time of default to convey marketable title, Maxted v. Stenberg, 166 Mont. 460, 534 P.2d 864 (1975); Swick v. Heaney, 43 A.D.2d 645, 349 N.Y.S.2d 444 (1973). A defaulting buyer may also be granted specific performance where the court finds that time was not essential, Jackson v. Holmes, 307 So.2d 470 (Fla.App. 1975); Padgett v. Bryant, 121 Ga.App. 807, 175 S.E.2d 884 (1970); Limpus v. Armstrong, 3 Mass. App. 19, 322 N.E.2d 187 (1975); Walker v. Weaver, 23 N.C.App. 654, 209 S.E.2d 537 (1974); Safeway System, Inc. v. Manuel Bros., Inc., 102 R.I. 136, 228 A.2d 851 (1967); Wood v. Wood, 216 Va. 922, 224 S.E. 2d 159 (1976).

[142] Hetland, *Secured Transactions*, *supra* note 104, at 102-104.

[143] CONVEYANCE MANUAL, *supra* note 4 at 6-1. "The real object sought to be attained by the retention of legal title by the vendor under an agreement of sale, and the inclusion of forfeiture provisions . . . is the performance by the vendee of his promise to pay the purchase price." *Jenkins*, 58 Hawaii at 597, 574 P.2d at 1341. *See also*, Rothenberg v. Follman, 19 Mich. App. 383, 172 N.W.2d 845; Mosso v. Lee, 53 Nev. 176, 295 P.2d 776 (1931) (court may provide relief against forfeiture where the stipulation is intended as a mere security for payment of money and precise compensation can be made).

[144] *Jenkins*, 58 Hawaii at 596, 574 P.2d at 1337.

[145] Explaining the interest created in the buyer under an agreement of sale the *Jenkins* court stated that although legal title to the property remains in the seller, "upon execution and delivery of the agreements of sale, there accrues to the vendee an equitable interest in the land . . . . The purchaser becomes vested with the equitable and beneficial ownership of the property. . .and unless the agreement provides otherwise, the vendee is entitled to its immediate possession." 58 Hawaii at 596, 574 P.2d at 1337; *see* Cane, *supra* note 67 at 78 n.99 (equity regards buyer as the real owner). *See also* Hofgard v. Smith, 30 Hawaii 88 (1929)(since seller only retains a naked legal title, the court allowed a mechanic's lien to be attached to buyer's equitable interest).

[146] Cane, *supra* note 67, at 78. As further insurance to the seller that the buyer will perform his end of the bargain, the agreement of sale generally provides for cancellation and forfeiture, at the seller's option, upon default of the buyer. Jenkins v. Wise, 58 Hawaii 592, 596, 574 P.2d 1337, 1341 (1978).

[147] Cane, *supra* note 67, at 75; Nelson & Whitman, *supra* note 104, at 542.

take possession or accept the risks of ownership until the conveyance occurs.[148]

Related to the interests of each party are the hardships each will incur if a court enforces a forfeiture provision. The hardship on the buyer will generally be greater under an agreement of sale since forfeiture will involve loss of possession and equitable interest.[149] Forfeiture in a DROA situation will usually only result in loss of deposit money.[150] Moreover, the seller is likely to suffer greater harm in DROA situations involving complete and immediate payment than under an agreement of sale[151] in which delays are frequent, and the probable injury caused by the delay is insignificant.[152] Under the DROA the delay may place the faultless seller in a worse position financially or otherwise. For example, especially in times of rising real estate values, the seller may be harmed by loss of opportunity to sell the property to another buyer, inability to buy another piece of property, or other consequential damages.[153] In some DROA cases, relief to the defaulting buyer may be more unjust to the seller than forfeiture is to the buyer.[154]

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[148] Cane, *supra* note 67, at 76.

[149] Regarding the potential hardship to buyer if forfeiture is upheld, the *Jenkins* court explained that "[s]trict foreclosure pursuant to the provisions of an agreement of sale has the effect of divesting the purchaser of his equitable interest in the property, as well as any right he may have to recover any monies he has paid in account of the purchase price." *Jenkins*, 58 Hawaii 592, 596-97, 574 P.2d 1337, 1341.

[150] A prospective buyer of real property generally makes an "earnest money" cash deposit as evidence of his good faith intention to complete the transaction. The deposit usually does not exceed 10% of the purchase price, and its primary purpose is to serve as a source of damages should buyer default. J. REILLY, *supra* note 13, at 151.

[151] Cane, *supra* note 67 at 79. This distinction is applicable primarily in the case of a cash-out sale. Where a DROA precedes an agreement of sale, the potential hardship to seller may not be as great. *See infra* notes 213-17 and accompanying text.

[152] In Parkhurst v. Lebanon Pub. Co., 356 Mo. 934, 204 S.W.2d 241 (1947), the trial court estimated the seller's damages to be "15 or 20 cents" on account of buyer's six-day delay in paying the third installment. *Id.* at 945, 204 S.W.2d at 247. In contrast, if no relief from forfeiture was granted, the buyer would lose approximately $4,000 which included $350 paid toward the purchase price of $6,200, and increased property values. *Id.* at 940, 945, 204 S.W.2d at 243, 247. *Cf.* WILLISTON ON CONTRACTS § 716 (3rd ed. 1962).

> The reason that payment or conveyance at the exact time is not 'of the essence,' even though delay will be a breach of contract . . . is that the injury caused by delay is little or nothing. Delays are frequent in these transactions, and it is the custom of men to overlook them, even though they may have stated in advance that they would not. *Id. See also infra* note 214.

[153] Cane, *supra* note 67, at 79 n.107.

[154] J. HETLAND, SECURED TRANSACTIONS, *supra* note 104, at 87.

2. *The Form Over Substance Dilemma*

The second possible explanation for declining to distinguish between the two types of contracts is the desire to evaluate real estate transactions in terms of their substance rather than form.[155] The substantive differences between a security device,[156] such as an agreement of sale, and a marketing contract,[157] such as a DROA, are not always reflected by the label of the contract.[158] Therefore using the contract's label to trigger different standards for granting specific performance may create an arbitrary distinction that invites the use of evasive devices by the parties to the contract.[159]

However, the problem of distinguishing the two contracts is not insurmountable. For example, one court applied a factual test to determine whether the parties intended to create a security contract.[160] Under this test the intent may be evidenced by such factors as the length of time the contract is to run, change in possession of the property, the number of installments to be made, and the percentage payable under the contract contrasted with other financing methods which may be involved.[161] Additionally, a court may examine any conduct or obligation required of the buyer consistent with ownership, rather than conduct more appropriate to a party having a contractual right to purchase during a short time period.[162] Sufficient evidence of intent is usually available to aid in differentiating the two contracts.[163]

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[155] In *Kaiman II*, the court stated "the title of the land purchase contract, whether DROA or agreement of sale is not itself dispositive. The trial court should examine the specific land purchase terms and ask the basic question whether an inequitable forfeiture would occur . . . ." 66 Hawaii at 104, 659 P.2d at 64.

[156] *See supra* note 13.

[157] *See supra* note 14.

[158] *See* J. Hetland, SECURED TRANSACTIONS, *supra* note 104, at 102-03.

[159] J. Hetland, *supra* note 2, at 760. *See also* Brigham v. First National Bank of Arizona, 129 Ariz. 160, 629 P.2d 996 (1981), which illustrates difficulties which may arise. An Arizona statute provides grace periods for forfeiture of purchaser's interest under installment land contracts, but not under cash transactions. Therefore, to benefit from this statute, the defaulting buyer attempted to argue that two earnest money deposits made under a contract for sale constituted "installments." However, the court found that the contract was not governed by the statute.

[160] Venable v. Harmon, 233 Cal. App. 2d 297, 300-301, 43 Cal. Rptr. 490, 492 (1965).

[161] *Id.*

[162] J. Hetland, SECURED TRANSACTIONS, *supra* note 96, at 103-04. Examples of conduct consistent with ownership include insurance or tax payments and improvements to the property, conduct evidencing a party having a contractual right to purchase includes obtaining financing, or examining title, soil condition or structure for defects. *Id.*

[163] *Id.* In addition, some jurisdictions have enacted legislation aimed at distinguishing the two types of contracts. *See* Hetland, *supra* note 2, at 759.

3. *The Benefit of the Bargain*

A view expressed in *Jenkins* offers the third possible justification for the holding in *Kaiman II*. The *Jenkins* court reasoned, "if the vendor obtains his money or his damages, he will have received the full benefit of his bargain."[164] This statement accurately describes an agreement of sale situation in which the penalty of forfeiture serves as a mere security for payment of the full purchase price.[165] However, it is not accurate in DROA situations which provide that time is of the essence for two reasons.

First, in DROA cases where a seller agrees to sell his or her property only on the condition that the buyer perform by a specified date, the seller has not received the benefit of his bargain unless the seller's freedom to alienate the property is fully reinstated once the buyer has failed to perform by the agreed-upon date.[166]

Second, since a forfeiture provision in a DROA serves a different purpose than in an agreement of sale, enforcing such a provision under a DROA is not necessarily objectionable.[167] The initial deposit under a DROA is much like an option. For example, the parties may agree that the buyer will make a $1,000 "deposit" which will be forfeited unless he or she purchases the land by a

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[164] 58 Hawaii at 597, 574 P.2d at 1341.

[165] *Id.*

[166] In E.E.E., Inc. v. Hansen, 318 N.W.2d 101 (N.D. 1982) the court discussed the policy reasons which support the strict enforcement of provisions making time of the essence. The court quoted Fergusson v. Talcott, 7 N.D. 183, 73 N.W. 207 (1897) stating:

> The owner of the land, having other business interests, may foresee that he will need or can use to great advantage the money on the very day named he can afford to sell on the terms specified. But he may be unwilling to sell on such terms if the payment is to be deferred. The profit to him may not be in the sale of the land, but in the use to which he can put the money, provided he can have it on the very day on which the vendee agrees to pay it.

E.E.E., Inc., at 105. The court noted that these reasons are as sound today as they were when pronounced in 1897. *Id.*

[167] Hetland, *supra* note 2, at 740-41. Reasons for supporting liquidated damages clauses include: 1) "Time is of the essence" means that time for performance was extremely relevant to the parties at the time the contract was made and losses from the delay, though real, are often unprovable (e.g., pain and suffering or potential loss of value); 2) to avoid the expenses of trial, of an expert witness to prove loss of value or other injury, and to remove the club of a litigious buyer. *Id.*

Where a defaulting purchaser has put up an "earnest money" deposit, as under a DROA, there is general agreement that the earnest money payment, which is treated something like reasonable liquidated damages, is not recoverable. D. DOBBS, *supra* note 79 at 862. *See* Rothenberg v. Follman, 19 Mich.App. 383, 394 n.16, 172 N.W.2d 845, 851 n.16 (1969) (the "forfeiture" as liquidated damages of deposit money paid by a purchaser under a preliminary agreement will not be disturbed if the amount represents an honest attempt to estimate the seller's actual injury in the event of default).

specified date. Although they have not expressly created an option, the parties may have had this intent.[168] In such a case it is difficult to consider the buyer a victim of forfeiture or the seller as being unjustly enriched.[169]

In summary, considering the interests and expectations of the parties to a DROA contract, the more traditional principles governing land purchase contracts represented by *Lum*[170] seem preferable to the *Kaiman* approach. The *Lum* approach allows the parties to contract freely in making time essential, thus creating a presumption that forfeiture will be upheld.[171] However, even under *Kaiman* the interests of the parties to a DROA may be taken into account in applying the *Jenkins* principles. Indeed, the supreme court in *Kaiman II* stated, "a 'time is of the essence clause' could carry relatively substantial weight upon default under a short-term DROA contract."[172] If this language is given effect, the *Kaiman* rule as applied to DROAs would not vary significantly from the rule established in *Lum*. However, the tentative nature of these statements together with the holding that *Jenkins* applies to all land purchase contracts, leaves the matter open to interpretation. Because subsequent cases decided by the Intermediate Court of Appeals have held that *Jenkins* applies equally to DROAs and agreements of sale,[173] *Kaiman*'s impact on DROAs might be greater than its language dictates.

IV. IMPACT

The *Kaiman* decision has a substantial impact on Hawaii real estate law because it applies to agreements of sale as well as DROA contracts, both of which are used extensively in Hawaii.

A. *Land Purchase Contract Law after* Kaiman

According to *Kaiman*, in determining whether to grant or deny specific performance, a trial court now "should examine the specific land purchase terms and ask the basic question whether an inequitable forefeiture would occur, applying the general principles laid down in *Jenkins v. Wise*."[174] The *Kaiman* court, however, failed to specify how these equitable principles should be applied.

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[168] D. DOBBS, *supra* note 79, at 824.

[169] *Id.*

[170] *See supra* notes 57-60 and text.

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

[172] 66 Hawaii at 104, 659 P.2d at 64.

[173] *See infra* notes 175-79 and accompanying text.

[174] 66 Hawaii at 104, 659 P.2d at 64.

Two recent Intermediate Court of Appeals decisions further develop these principles, and more clearly reveal the extent of *Kaiman*'s impact.[175] In *Scotella v. Osgood*[176] and *Cooper v. Schmidt*,[177] the Intermediate Court of Appeals declined to follow *Kaiman*'s equivocal language which acknowledged the differences between the DROA and the agreement of sale.[178] Rather, in *Scotella*, the Intermediate Court of Appeals interpreted *Kaiman* as holding that *Jenkins* applies with equal force to both types of contracts.[179]

In *Scotella* and *Cooper*, the Intermediate Court of Appeals derived several specific factors from the general principles in *Jenkins*. These factors, which apply to both agreements of sale and DROAs, include: 1) whether time truly is of the essence; 2) buyer's gross negligence, or deliberate or bad faith conduct; 3) the ability to reasonably and adequately compensate seller for his injury due to buyer's breach; and 4) whether denial of specific performance would result in an inequitable forfeiture.[180]

With respect to the first factor, a finding that time is of the essence clearly will not defeat the buyer's right to specific performance.[181] However, such a finding constitutes a prerequisite for the seller who wishes to enforce a forfeiture provision. The seller must meet the burden of proving that time truly is of the essence, and that the buyer thus has breached the contract.[182] In proving time is of the essence, the cases imply that a "time is of the essence" clause alone is not sufficient.[183] In *Kaiman*, *Scotella* and *Cooper* the courts found the intention

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[175] Scotella v. Osgood, 4 Hawaii App. 20, 659 P.2d 73 (1983); Cooper v. Schmidt, 4 Hawaii App. 115, 661 P.2d 724 (1983). However, in *Scotella*, the Intermediate Court of Appeals questioned the source of authority for granting specific performance to a buyer in material breach. 4 Hawaii App. at 24 n.4, 659 P.2d at 76 n.4.

[176] 4 Hawaii App. 20, 659 P.2d 73 (1983).

[177] 4 Hawaii App. 115, 661 P.2d 724 (1983).

[178] *See supra* notes 127-30 and accompanying text.

[179] The *Scotella* court stated "the rule applies with equal force to agreements of sale as in *Jenkins v. Wise*, and to DROAs as in *Kaiman Realty, Inc. v. Carmichael*." The court went on to discuss the rules for granting or denying specific performance in terms of the broad phrase "land purchase contracts." 4 Hawaii App. at 24, 659 P.2d at 76. This phrase was meant to encompass *any* contract for the purchase of land. *Id.* at 24 n.1, 659 P.2d 74 n.1.

[180] *Cooper*, 4 Hawaii App. at 121, 661 P.2d at 727; *Scottella*, 4 Hawaii App. at 25, 659 P.2d at 77.

[181] *Kaiman I*, 65 Hawaii at 640, 655 P.2d at 874.

[182] According to the Intermediate Court of Appeals, the first two questions a trial court should ask are (1) whether time was "truly of the essence," and if so (2) whether under rules applicable at law, the buyer materially breached the contract. Cooper v. Schmidt, 4 Hawaii App. at 121, 661 P.2d at 727. If there has been no material breach, the contract remains enforceable by the buyer as written, and the seller must perform according to the terms of the contract.

[183] Such "boiler plate" provisions are accorded little weight since they appear in many standard form land contracts and are frequently signed without regard to whether the words have any practical or legal significance for the case at hand. Rothenberg v. Follman, 19 Mich. App. 383,

to make time essential in the overt actions of the parties, rather than strictly from the contractual terms.[184]

The other three factors enumerated in *Scotella* and *Cooper*, further burden the seller to show that forfeiture would not be unjust.[185] First, he or she may show that the buyer acted in bad faith or with gross negligence.[186] Second, the seller may show that the injury resulting from the buyer's breach cannot be reasonably and adequately compensated.[187] In this respect, the seller must counter the well-established policy that favors compensation by way of awarding interest over forfeiture.[188] Third, the seller may show that the buyer's immediate equitable interest is so slight that forfeiture would not be inequitable.[189] In a rising

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391-92 n.14, 172 N.W.2d 845, 850 n.14 (1969). In addition, the 1984 DROA form contains an "extender clause." *See supra* note 3. Such clauses infer a lack of crucial significance on the specified date. Katemis v. Westerlind, 120 Cal. App. 2d 537, 261 P.2d 553 (1953). A seller may strengthen his or her chances of upholding forfeiture in several ways: (1) explicitly provide in the special provisions on the front of the DROA that time is of the essence, and the reasons that timely performance is essential; (2) provide that performance by the buyer before a specified date is a condition precedent to the seller's obligation to convey the property; (3) provide that performance by the buyer before a specified date is in consideration for the seller's promise to convey the property. Alternatively, a seller may guarantee that a buyer who does not perform by a specified date will have no further rights to purchase the property through the use of an option. *Jenkins* has been held not to apply to an option contract on the grounds that it is an executed, not an executory contract. In re Continental Practices, 15 Bankr. 732 (D. Hawaii 1981).

[184] In *Kaiman* although the contract contained no "time is of the essence" clause, the court placed great emphasis on the fact that sellers had crossed out the thirty-day extension clause on the DROA form. 2 Hawaii App. at 501, 634 P.2d at 606.

In *Cooper*, in addition to a "time is of essence" clause in the Land Exchange Contract, the buyer wrote to the seller informing him that he intended to complete closing by the date specified, and that no further extensions would be granted. 4 Hawaii App. at 118, 661 P.2d at 726.

In *Scotella*, although the DROA did not expressly stipulate that "time is of essence," the contract taken as a whole, at a time when real estate prices were rising rapidly, together with the buyers' numerous telephone inquiries to various persons concerning the status of the transaction, indicated that time was of the essence. 4 Hawaii App. at ___, 659 P.2d at 75.

[185] The burden on seller stems from *Jenkins* which creates a presumption in favor of specific performance by stating "[C]ourts in equity will generally grant relief against forfeiture and decree specific performance of the agreement, provided that buyer's breach has not been due to gross negligence, or deliberate or bad-faith conduct on his part, and the buyer can reasonably and adequately be compensated for his injury. 58 Hawaii at 597, 574 P.2d at 1341.

[186] *Kaiman* I, 65 Hawaii at 640, 655 P.2d at 874; *Cooper*, 4 Hawaii App. 120, 661 P.2d at 727, *Scotella*, 4 Hawaii App. 23, 659 P.2d at 76.

[187] *Kaiman* I, 65 Hawaii at 640, 655 P.2d at 874; *Cooper*, 4 Hawaii App. at 120, 661 P.2d at 727; *Scotella*, 4 Hawaii App. at 23, 659 P.2d at 76. *See* Cane, *supra* note 67 at 79 n.106; Hetland, *supra* note 2, at 738-41. *See also supra* notes 138-140 and accompanying text.

[188] Equity favors compensation, as by payment of interest to the injured party, rather than forfeiture against the defaulting party where no injustice would result. Jenkins v. Wise, 58 Hawaii at 597, 574 P.2d at 1341; Bohnenberg v. Zimmerman, 13 Hawaii at 7.

[189] *Cooper*, 4 Hawaii App. at 120, 661 P.2d at 727.

real estate market, this may be difficult to prove. For example, in *Cooper*, the court found that an inequitable forfeiture would result based solely on a substantial increase in property value.[190]

It is interesting to note the absence of comment on the seller's conduct from the list of factors which affect the balance of equities. However, other cases focus on a seller's actions in granting or denying relief. Thus, a seller must be cautioned against accepting late payments[191] or contributing to the delay in any way.[192] He or she also must promptly declare forfeiture.[193] Courts tend to construe such conduct as a waiver of the seller's right to enforce cancellation, and thus, an excuse for the buyer's default.[194]

The considerations advanced in *Kaiman* and the subsequent cases appear to protect the interests of both parties. However, the decision actually places an additional burden on the seller to show why forfeiture would not be unjust in each case. In an agreement of sale situation, since the seller must always initiate judicial cancellation,[195] shifting the burden of proof results in reducing the seller's chances of upholding a forfeiture. However, under a DROA, even if the time for performance was critical and was so stated in the contract, the seller is denied the quick contractual remedy of forfeiture. The court's preference for granting relief from forfeiture[196] is likely to encourage the buyer under a DROA to seek specific performance after he or she has defaulted. Thus *Kaiman*'s policy against forfeiture penalizes the seller, forcing him or her to resort to the judicial system more frequently to protect his or her rights. While the seller may ultimately prevail, his or her rights to dispose of property within reasonable time limits remain effectively denied in the interim while awaiting the outcome of a trial.[197]

Kaiman also shifts the trial court's focus from whether time is of the essence to whether denial of forfeiture would be unjust. Under *Lum* and *Bohnenberg*, the court's key inquiry concerned whether time was of the essence. This involved

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[190] *Id.*

[191] Tomikawa v. Gama, 14 Hawaii 175 (1902).

[192] In re Sing Chong, 1 Hawaii App. 236, 617 P.2d 578 (1980) (sellers can't take advantage of a delay for which they were at least 50% responsible).

[193] Leiter v. Ettinger, 246 Cal. App. 2d 306, 54 Cal. Rptr. 703 (1966); Lance v. Martinez-Arango, 251 So.2d 707 (Fla.App. 1971).

[194] *See supra* note 141; Nelson & Whitman *supra* note 104 at 548-50.

[195] Since title insurers usually refuse to recognize non-judicial cancellation, for all practical purposes non-judicial cancellation is not an advantage to seller under an agreement of sale. CONVEYANCE MANUAL, *supra* note 4 at 6-2.

[196] *See supra* note 188 and accompanying text.

[197] Although a seller may be required to convey land, he or she may still seek damages caused by the delay in payment, including costs and expenses of protecting his interest. The trial court has considerable discretion in determining the amount of the award. *Rothenberg v. Follman*, 19 Mich.App. at ___, 172 N.W.2d at 852.

determining the parties' intent at the time the contract was formed.[198] While this question continues to be relevant,[199] the key inquiry now focuses on whether a forfeiture would render a harsh and unreasonable result.[200] Such an inquiry encompasses the trial court's evaluation of the parties' position at the time of forfeiture, using standards that are admittedly imprecise.[201]

This shift in the burden between the parties and in the focus of the trial court has effected some positive results. For example, "time is of the essence" clauses no longer engender harsh and unreasonable forfeitures under an agreement of sale.[202] Likewise, such provisions cannot preclude equitable intervention where they result from unequal bargaining power between the parties or exist as standard boilerplate language on printed forms.[203]

However, in DROA situations, the negative results outweigh the positive. *Kaiman* hinders any attempt by a buyer and a seller to reasonably assess their future needs and circumstances, and to eliminate some uncertainty in the event of default. The timing of closing a transaction may be crucial to the seller's ability to purchase another piece of property, or simply to realize maximum profits.[204] In these cases, *Kaiman* limits the use of a "time is of the essence" provision as a mechanism to compel timely performance.

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[198] The law will strictly enforce the agreement of the parties as they have made it; but, in order to find out the scope and true effect of such agreement, it will not only look into the written contract which is evidence of their agreement, but it will also look into their acts and conduct in the carrying out of the agreement in order to fully determine their true intent. *Williston supra* note 152 §852 n.1.

The inquiry of whether time is essential may include the nature of the contract, or market conditions, or other significant factors such as to make time of vital importance. *Id.* at § 846.

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

[200] *Kaiman* I, 65 Hawaii at 640, 655 P.2d at 874; *Kaiman* II, 66 Hawaii at 104, 659 P.2d at 64.

[201] In *Scotella*, the Intermediate Court of Appeals recognized that "the standards to be used by the trial court in deciding whether an inequitable forfeiture would occur if specific performance is denied are imprecise." 4 Hawaii App. at 24, 659 P.2d at 76.

[202] *See supra* notes 113-23 and accompanying text. The essentially unfair nature of the clause in an agreement of sale is evident when it is analyzed as a stipulation for the payment of liquidated damages upon default. *See supra*, notes 108-12 and accompanying text.

[203] In Rothenberg v. Follman, 19 Mich. App. 383, 391-92 n.14, 172 N.W.2d 845, 850 n.14, the court noted that "boilerplate" provisions appear in many standard form land contracts, and are frequently signed without regard to whether the words have any practical or legal significance to the case at hand.

[204] Cane, *supra* note 67, at 79 n.107. *See also* Hetland, *supra* note 2, at 738-41 for an example of dire consequences to seller as a result of buyer's default.

B. *The Scope of* Kaiman*'s Impact on DROA Law: The Creation of Uncertainty*

In agreement of sale situations, *Kaiman* comports with the interests and expectations of the parties. It allows for equitable relief despite forfeiture clauses in the contract where the result would be harsh and unreasonable.[205] Thus, to the extent that *Kaiman* essentially reaffirms *Jenkins* in this area, it provides a welcome and expected addition to the developing caselaw.[206]

However, *Kaiman*'s broader, and more unexpected impact is on DROA contracts. While *Kaiman* clearly maintains that *Jenkins* principles govern DROAs,[207] the broad interpretation of *Kaiman* in subsequent cases[208] does not necessarily follow from either *Kaiman*'s language or the policy justifications for favoring specific performance of an agreement of sale.

In *Kaiman*, the supreme court both explicitly and implicitly acknowledged that differences between agreements of sale and DROAs may be significant in determining whether to grant equitable relief from forfeiture.[209] The court's express statement regarding "time is of the essence" clauses in DROAs[210] clearly justifies giving such clauses greater weight in determining whether to uphold forfeiture under a DROA than under an agreement of sale. Also important is the court's implicit recognition that substantive differences between the two contracts may justify forfeiture under one, though not the other. The court noted that the equitable interests created by each contract differ markedly[211] such that "under many or most short-term DROA contracts, the purchaser's immediate equitable interest is so slight that it would not be inequitable to deny all relief to the purchaser upon a showing of the purchaser's default."[212]

Although not incorporated into the court's holding, this statement illustrates

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[205] *See supra* notes 108-23 and accompanying text.

[206] However, as a result of *Kaiman* and *Jenkins*, an agreement of sale may be considered a less attractive method of seller-provided financing as compared with a purchase money mortgage. Since courts have become unwilling to cancel an agreement of sale according to its forfeiture provisions, little advantage remains to seller under an agreement of sale. CONVEYANCE MANUAL, *supra* note 4, at 6-31. On the other hand, a purchase money mortgage is more attractive to buyer. Since legal title passes to buyer on closing, uncertainties inherent under an agreement of sale regarding seller's ability to produce legal title are eliminated. For a comparison of agreements of sale and purchase money mortgages see *id.*, at 6-1. *See also* Hetland, *supra* note 2, at 774.

[207] *See supra* text accompanying note 130.

[208] Scotella v. Osgood, 4 Hawaii App. 20, 659 P.2d 73 (1983); Cooper v. Schmidt, 4 Hawaii App. 115, 661 P.2d 724 (1983). *See supra* note 179 and accompanying text.

[209] *See supra* notes 127-29 and accompanying text.

[210] In *Kaiman* II the court stated that "a 'time is of the essence' clause could carry relatively substantial weight upon default under a short-term DROA contract." 66 Hawaii at 104, 659 P.2d at 64.

[211] *Kaiman* II, 66 Hawaii at 104, 659 P.2d at 64.

[212] *Id.*

why the policy favoring compensation over forfeiture in an agreement of sale fails to justify granting specific performance under the DROA. The policy of avoiding harsh forfeiture of a buyer's equitable interest under an agreement of sale does not apply to a DROA situation in which the buyer has little or no equitable interest at the time of default.

The court's recognition of these differences could limit *Kaiman*'s impact on DROAs in at least two unresolved issues regarding DROAs. The first question concerns the treatment of DROAs which precede financing by means other than an agreement of sale. In cases such as *Kaiman*, where the DROA precedes an agreement of sale, the interests and risks of the parties under the agreement of sale arguably over-shadow their interests under the DROA. Since the seller intends to remain a party to the transaction for the duration of the agreement of sale,[213] and only expects a deposit or a downpayment, any delay in closing will probably result in insubstantial injury easily compensated by interest payments.[214] However, if the DROA precedes a cash-out transaction,[215] the seller does not intend to remain a party to the transaction after closing.[216] He or she expects the full purchase price, the timely receipt of which may be critical to other important transactions of the seller.[217] If the seller attaches great importance to performance by a specified date, the likelihood that the seller will suffer significant injury arises because the delay cannot be compensated by the payment of interest.[218] Without timely performance, the seller will not receive the full benefit of his bargain. Thus, while *Kaiman* theoretically governs DROAs which precede both agreements of sale and cash-out transactions, differences between the two must be weighed in evaluating the effect of a "time is of the essence" clause.

The second issue concerns the applicability of the *Gomez* holding, requiring

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[213] Hetland, *supra* note 2, notes that "[t]he initial deposit is, after all, the first installment under an integrated contract. Usually, though, its earnest money on binder function causes it to be treated separately by the parties." *Id.* at 732 n.107.

[214] Courts suggest that a seller may be compensated for a buyer's delay by the payment of interest. For example, in *Bonnenberg*, 13 Hawaii 4, the Hawaii Supreme Court stated, "[e]quity favors compensation, as by the payment of interest to the injured party . . . ." *Id.* at 7. In Aden v. Alwardt, 76 Ill. App. 3d 54, 394 N.E.2d 716 (1979), the court stated, "[i]t is especially well settled that where the agreement is simply one for the payment of money, a forfeiture of land incurred by the non-performance of the agreement will be set aside . . . on the payment of the debt, interest and costs . . . ." *Id.* at 61, 394 N.E.2d at 721.

[215] Cash-out refers to the fact that the seller desires to receive the complete sales price in cash, rather than accept less cash initially and take back a purchase money mortgage in a contract for deed (agreement of sale). J. REILLY, *supra* note 13, at 70.

[216] *See supra* note 214.

[217] *See supra* note 204 and accompanying text.

[218] *See supra* notes 153, 204 and accompanying text.

restitution of excess liquidated damages,[219] to DROA contracts. In enumerating the factors that express its understanding of the *Kaiman-Jenkins* principles, the Intermediate Court of Appeals in *Scotella* stated, "even if the trial court declines to grant relief from cancellation of the contract, it may order the return of that portion of the money paid which would constitute a penalty rather than reasonable liquidated damages."[220] In essence, this statement expresses the equitable principles of *Gomez*. It requires an accounting between the parties and a return of payments over and beyond the seller's actual damages after the breach occurs.

Application of *Gomez* to DROA contracts virtually eliminates the use of liquidated damages in DROAs.[221] The elimination of liquidated damages raises difficulties because they comprise a desirable aspect of the marketing contract.[222] To the extent that a liquidated damages provision anticipates probable actual loss in the event of default, it does not constitute a forfeiture.[223] Rather, it allows the parties to avoid both forfeiture and expensive litigation.[224]

Moreover, extending *Gomez* to DROAs would align Hawaii with a minority of jurisdictions. While courts in most jurisdictions accept the restitutionary rule stated in *Scotella* as it applies to the agreement of sale,[225] they generally deny recovery of "earnest money" deposits,[226] such as those under a DROA.[227] The divergent treatment of DROAs and agreements of sale again reflects the different interests created under the two contracts.

To the extent that these two issues require a weighing of equities, the court's acknowledgement of the differences between a DROA and an agreement of sale could benefit the seller who seeks cancellation of the DROA. Thus, although *Kaiman* places a burden on the seller, the court's own language provides the seller's strongest arguments in the yet unresolved areas of law governing DROAs.

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[219] *See supra* notes 87-91 and accompanying text. Liquidated damages require a prospective appraisal of probable actual loss. An enforceable liquidated damages clause has two requirements. At the time the parties executed the contract, it must have appeared to them impractical or extremely difficult to fix actual damages and the amount selected must bear some reasonable relation to probable actual loss. J. HETLAND, SECURED TRANSACTIONS, *supra* note 104, at 90.

[220] 4 Hawaii App. at 25, 659 P.2d at 76.

[221] Paragraph H of the 1984 DROA form, *supra* note 3, provides that in the event of default, seller may retain the initial deposit and all additional deposits as liquidated damages.

[222] *See supra* note 167 and accompanying text.

[223] D. DOBBS, *supra* note 79, at 865.

[224] J. HETLAND, SECURED TRANSACTIONS, *supra* note 104, at 90-91.

[225] *See supra* note 114 and accompanying text.

[226] "Earnest money" is a cash deposit (including initial and additional deposits) paid by the prospective buyer of real property as evidence of good faith intention to complete the transaction. It usually does not exceed ten percent of the purchase price and its primary purpose is to serve as a source of payment of damages should the buyer default. J. REILLY, *supra* note 13, at 151.

[227] *See supra* note 167.

CONCLUSION

"Land purchase contracts" traditionally received special consideration in equity, due to the "uniqueness" of each parcel of land.[228] More recently, courts recognized that the general principles applicable to all land contracts often result in harshness under certain types of contracts, such as an agreement of sale. Thus, the courts began to extend greater relief from forfeiture under these contracts.[229]

In *Kaiman I* the Hawaii Supreme Court shaped Hawaii law in accordance with these concerns by holding that a "time is of the essence" clause in an agreement of sale will not preclude specific performance in favor of a defaulting buyer.[230] This holding clarifies the principles established in *Jenkins v. Wise*, and provides the most recent addition to the developing caselaw in this area.

In *Kaiman II* the court extended these added protections to buyers under the DROA.[231] The court has once again placed all land purchase contracts on an equal footing.[232] However, the policies for granting special protections to buyers under agreement of sale-type contracts fail to support adequately *Kaiman*'s extension to other land purchase contracts.

Relief from strict enforcement of forfeiture provisions under an agreement of sale is consistent with both the parties' interests under the contract and the public interest in mitigating harsh forfeitures.[233] In contrast, the DROA more often requires timely performance and certainty of outcome in the event of default.[234] In many DROA cases, the individual's ability to bargain freely for enforceable provisions outweighs the competing interest in avoiding forfeitures of small deposit amounts.

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[228] *See supra* note 79.

[229] *See supra* notes 104-23 and accompanying text.

[230] 65 Hawaii at 640, 655 P.2d at 874.

[231] *See supra* note 130 and accompanying text.

[232] The court's holding in *Kaiman II* used the phrase "land purchase contract," which was later defined in *Scotella* as "any contract for the sale of land whether or not improvements are included." 4 Hawaii App. at 21 n.1, 659 P.2d at 74 n.1. The use of this broad term seems to indicate that all land contracts are to be governed by *Jenkins* principles. Indeed, in Cooper v. Schmidt these principles were applied to a "Land Exchange Agreement." 4 Hawaii App. at 117-21, 661 P.2d at 725-27.

It seems, however, that the *Kaiman* rule is at least limited to executory contracts. *Jenkins* has been held not to be applicable to an option contract on the grounds that it is an executed, not an executory contract. In re Continental Properties, 15 Bankr. 732 (D. Hawaii 1981). This limitation is well supported. First, unlike other land contracts, options are of such a nature that time is generally of the essence. 17 AM JUR 2D *Contracts* §335 (1964); Annot., 72 A.L.R.2D 1127 (1960). Second, loss of the amount paid for an option is not considered a forfeiture, but payment of the agreed consideration. J. HETLAND, SECURED TRANSACTIONS, *supra* note 104, at 70.

[233] *See supra* notes 104-23 and 142-46 and accompanying text.

[234] *See supra* notes 151-53 and accompanying text.

In *Kaiman II*, the court acknowledged the substantive differences between the agreement of sale and the DROA.[235] However, the court declined to distinguish between the two contracts in determining whether to grant relief from forfeiture.[236] By acknowledging differences between the two contracts while purportedly applying the same rules to each, *Kaiman II* has created uncertainties in the law governing DROAs.

Thus, following *Kaiman*, the law may go in either of two directions. The supreme court may clearly adopt a policy which places all "land purchase contracts" on an equal footing.[237] Conversely, the court may expand on its proposition in *Kaiman II* that "a time is of the essence clause could carry relatively substantial weight upon default under a short term DROA contract."[238] This approach places greater weight on the type of land purchase contract involved. Thus, trial courts may afford "substantial weight"[239] to a "time is of the essence" clause, especially in those DROAs which precede cash-out sales.[240] Likewise, liquidated damages provisions in DROAs may be enforced as written.[241] In this manner, the *Kaiman* holding may be limited to its facts.

Whichever direction the court chooses will have an impact on real estate transacations. While it may be difficult to adopt a policy that favors neither the buyer nor the seller, the goal of land purchase contract law should be the promotion of certainty under a contract and the avoidance of unnecessarily harsh results. Thus, to the extent that a land purchase contract accurately reflects the parties' interest and expectations, the contract should control the parties' performance and remedies. When an express "time is of the essence" clause in a DROA reflects the parties' intent, a forfeiture provision in the DROA should be given effect. The court should strive to adopt a policy which most accurately reflects the parties' interests, and formulate criteria more precisely designed to effectuate the parties' intent.

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[235] *See supra* notes 126-29 and accompanying text.

[236] *See supra* note 130 and accompanying text.

[237] The court might wish to adopt such an approach in the interest of promoting home ownership. However, under this policy, the danger of rules favoring the buyer is that the seller as well as the buyer is likely to be a homeowner. The seller's opportunity to purchase his own home may depend on closing the first transaction on time. Also, many buyers (as in the instant case) are themselves knowledgeable investors or brokers, rather then unsophisticated owner-occupants in need of equitable protection.

[238] *Kaiman* II, 66 Hawaii at 104, 659 P.2d at 64.

[239] *Id.*

[240] *See supra* notes 213-18 and accompanying text.

[241] *See supra* notes 219-27 and accompanying text.

Wakabayashi v. Hertz: Circumstantial Evidence as Proof of Defect in Strict Products Liability

I. INTRODUCTION

In *Wakabayashi v. The Hertz Corporation*,[1] the Hawaii Supreme Court addressed the issue of whether a plaintiff may prevail in a products liability action where the plaintiff relies entirely on circumstantial evidence of an automobile defect and where an inspection of the vehicle disclosed no direct evidence of a defect which could have caused the accident.[2] The court held that the evidence, consisting of the user's testimony and corroborating eyewitness testimony, was sufficient to yield an inference that a defective condition in the automobile caused the accident.[3] This casenote will examine the treatment of circumstantial evidence in the product liability cases decided by the Hawaii Supreme Court and the implications for the use of such evidence in future cases.

II. FACTS

On February 17, 1977, David Wakabayashi, a visiting Los Angeles optometrist, rented a 1975 Chevrolet Chevelle from the Hertz Corporation (Hertz).[4] The car had been driven 22,577 miles prior to its rental by Wakabayashi, who then drove it another 120 miles before the accident occurred. On February 21, three days after renting the car, he stopped at the entrance to a basement garage to obtain a parking stub from the attendant. Wakabayashi placed the car in

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[1] 66 Hawaii 265, 660 P.2d 1309 (1983).

[2] The Hertz Corporation raised two other issues on appeal. *See infra* note 11.

[3] 66 Hawaii at 271, 660 P.2d at 1313. The case was decided by a four-person court (Lum, Nakamura, Padgett, and Hayashi, JJ.). Chief Justice Richardson retired after hearing the oral argument. HAWAII REV. STAT. § 602-10 (Supp. 1979) provides:

> After oral argument of a case, if a vacancy arises or if for any other reason a justice is unable to continue on the case, the case may be decided or disposed of upon the concurrence of any three members of the court without filling the vacancy or the place of such justice.

[4] The facts surrounding the accident are recounted in the opinion of the court. 66 Hawaii at 267, 660 P.2d at 1311.

"park," keeping his right foot on the brake pedal. After receiving the stub, Wakabayashi shifted the car into "drive" and released the brake pedal. He then touched or was about to touch the accelerator pedal when the car shot down the ramp "with a roar." Wakabayashi depressed the brake pedal, and though there was resistance, the car did not stop. Wakabayashi sustained injuries when he swerved to avoid a pedestrian and rammed into a concrete pillar.

Wakabayashi brought suit, alleging that the car was defective when rented and that Hertz was liable for damages under the theory of strict products liability.[5] Wakabayashi conceded at trial that he had no direct proof of a specific defect that caused the vehicle to accelerate out of control.[6] The evidence of a defect consisted of his own testimony, the statements of his passengers, and the parking attendant's testimony that she saw the brake lights of the car on as it raced down the ramp.[7] Although Wakabayashi employed an expert to examine the car, the expert was not called as a witness at trial.[8]

At the end of Wakabayashi's case, the trial court denied Hertz's motion for a directed verdict.[9] The jury returned a special verdict for the plaintiff,[10] and an appeal was taken.[11] The Hawaii Supreme Court affirmed the decision in part and reversed in part.[12]

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[5] *Id.* Hertz defended by claiming that the vehicle was not defective, and that if it was defective, the vehicle's manufacturer would be responsible. Hertz then filed a third-party suit against General Motors Corporation (GM Corp.).

[6] *Id.* at 268, 660 P.2d at 1312.

[7] *Id.* In defense, both Hertz and GM Corp. relied on the absence of a discovered defective or broken part. GM Corp. also produced expert testimony that the vehicle could not have accelerated as it did unless Wakabayashi had depressed the accelerator pedal instead of the brake pedal. *Id.*

[8] *Id.* at 271, 660 P.2d at 1314.

[9] *Id.* at 269, 660 P.2d at 1312.

[10] Answering special interrogatories, the jury found that the vehicle was defective, the defect was a proximate cause of the accident, Wakabayashi suffered damages of $150,000 as a result, and that the defect was present when the car was initially sold. 66 Hawaii at 268, 660 P.2d at 1312.

[11] In addition to the principal issue, Hertz claimed it had been prejudiced by the trial court's refusal to allow Hertz to introduce as evidence the fact that the plaintiff did not call his expert witness for testimony, from which fact the jury might have inferred that the vehicle had no defect. *Id.* at 271-72, 660 P.2d at 1314. The trial court did allow GM Corp. to present the same evidence at a later time, but after Hertz had rested its case. Opening Brief by The Hertz Corp. at 17, Wakabayashi v. Hertz (Sup.Ct. No. 7769). The supreme court held that no actual prejudice had occurred since the jury eventually was given the information. 66 Hawaii at 271-72, 660 P.2d at 1314.

Hertz also claimed the trial court had committed reversible error by refusing to qualify one of Hertz's witnesses as an expert. The supreme court held that the trial court's decision was not a clear abuse of discretion since the witness was not familiar with the particular model of car in question nor with some of its essential parts. *Id.*

[12] The court affirmed the judgment against Hertz in favor of Wakabayashi, and reversed the

III. BACKGROUND

A central issue in any products liability action is whether the product is actually defective.[13] Direct evidence of a specific defect that caused the accident has the highest probative value; for this reason, it is preferred by courts.[14] It is often said that the mere fact that a product-related accident has occurred is an inadequate basis from which to infer a defect exists.[15] In some cases, however, very little evidence beyond the fact of the accident itself has been sufficient to establish a defect.[16] Courts have allowed the existence of a defect to be estab-

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judgment against GM Corp. in favor of Hertz. *Id.* at 267, 660 P.2d at 1311.

On appeal, GM Corp. had asserted that it should have been allowed to discover facts known or opinions held by Wakabayashi's expert, according to HAWAII R. CIV. P. 26(b)(4)(B). The rule allows the deposition of an expert who is not expected to testify at trial if "exceptional circumstances" are shown. GM Corp. claimed such circumstances existed since (1) the automobile in question was destroyed before GM Corp. had been brought into the suit; (2) the only other expert opinion available was that of GM Corp.'s primary adversary, Hertz; and (3) Wakabayashi's expert might have had additional information since he inspected the vehicle at a different time than Hertz's expert. *Id.* at 273-75, 660 P.2d at 1314-15. The appellate court held that "exceptional circumstances" had been shown and reversed and remanded for retrial of Hertz's claim against GM Corp. *Id.* at ___, 660 P.2d at 1316.

[13] The elements of the prima facie case in strict products liability are (1) the seller or lessor is in the business of selling or leasing the product; (2) the product was defective when it left the control of the seller or lessor; (3) the defect caused the plaintiff's injury; and (4) there was no substantial change in the product after the sale or lease. Stewart v. Budget Rent-a-Car, 52 Hawaii 71, 75, 470 P.2d 240, 243 (1970). *See also* W. KIMBLE & R. LESHER, PRODUCTS LIABILITY 228-29 & n.1 (1979).

[14] *See, e.g.*, Lindsay v. McDonnell Douglas Aircraft Corp., 460 F.2d 631, 638 (8th Cir. 1972) (admiralty law) ("Courts would prefer even in a strict liability case to have proof of a specific defect causing the accident.")

[15] *See, e.g.*, Beerman v. Toro Manufacturing Corp., 1 Hawaii App. 111, 115, 615 P.2d 749, 753 (1980) ("[T]he mere happening of an accident does not justify the inference that the product was defective."); Scanlon v. General Motors Corp., 65 N.J. 582, 326 A.2d 673, 677 (1974) ("As a rule the mere occurrence of an accident is not sufficient to establish that the product was not fit for ordinary purposes."); J. BEASLEY, PRODUCTS LIABILITY AND THE UNREASONABLY DANGEROUS REQUIREMENT 349-60, 353 (1981) ("The mere fact that an accident occurred can never by itself establish *prima facie* causal defectiveness."). *But see* Phelan & Falkof, *Proving a Defect in a Commercial Products Liability Case*, 24 TRIAL LAW. GUIDE 10, 24 (1980) ("[S]ome courts hold that in strict products liability actions, the mere showing of product malfunction may raise the inference of a defect.").

[16] *See* Hughes v. Jawa, 529 F.2d 21 (8th Cir.1976) (expert who had not examined available vehicle hypothesized about possible causes); Tweedy v. Wright Ford Sales, Inc., 64 Ill.2d 570, 357 N.E.2d 449 (1976) (no evidence by defendant of abnormal use of auto by plaintiff or of reasonable alternate causes); Brownell v. White Motor Corp., 260 Or. 251, 490 P.2d 184 (1971) (sound of "bang" plus evidence negating negligence by plaintiff); *see also* Vanek v. Kirby, 253 Or. 494, 450 P.2d 778 (1978) (complaint which stated car was uncontrollable in normal operation ruled sufficient to withstand a motion for Judgment on the Pleadings). *But see* LoBrono v. Gene Ducote Volkswagen, 403 So.2d 723 (La. 1981) (expert testimony that accelerator cable had

lished entirely or in part by circumstantial evidence.[17]

The types of circumstantial evidence used by plaintiffs to establish the existence of a defect generally fall into six broad categories: (1) pattern of the accident; (2) elimination of alternative causes; (3) occurrence of the accident itself; (4) expert opinion; (5) life history of the product; and (6) similar products and uses.[18]

The first type of evidence, pattern of the accident, consists of testimony about the events leading up to the accident. For example, this could include a description by the user of an unusual noise or of difficulty in controlling the car just prior to the accident.[19]

The second type, elimination of alternative causes, may include either expert testimony or user/witness testimony. The expert's testimony may be used to eliminate all mechanical explanations other than the defect, while user/witness testimony might eliminate human failings as a cause.[20]

"tendency" to bind up only if manually manipulated held insufficient); Jensen v. American Motor Corp., 50 Md. App. 226, 437 A.2d 242 (1981) (sound of "squealing" of tires with no other evidence or examination of car insufficient); Scanlon v. General Motors Corp., 65 N.J. 582, 326 A.2d 673 (1974) (expert's hypothesis that the defect was a broken carburetor cam refuted by the actual product introduced by defendant).

[17] *See, e.g.*, Lindsay v. McDonnell Douglas Aircraft Corp., 460 F.2d 631, 634 (8th Cir. 1972) (admiralty law) (testimony of witness that airplane which was completely destroyed had been on fire before crashing); Greco v. Buccioni, 283 F. Supp. 978, *aff'd*, 407 F.2d 87, 90-91 (3d Cir. 1969) (history of malfunction plus negation of other reasonable causes); Ontai v. Straub Clinic and Hospital, Inc., 66 Hawaii 241, 249-50, 659 P.2d 734, 741-42 (1983) (testimony of events, absence of other causes; expert testimony as to possible defect); Farmer v. International Harvester Co., 97 Idaho 742, 553 P.2d 1306, 1312 (1976) (truck in well-maintained condition; physical sensation felt by driver prior to accident suggestive of metal fracture; expert testimony on possible fracture). For other cases relying on circumstantial evidence, see *supra* note 16. For a general discussion on proof of defect, see BEASLEY, *supra* note 15; Rheingold, *Proof of Defect in Product Liability Cases*, 38 TENN. L. REV. 325 (1971).

[18] O'Meara, *Strict Liability in Tort: Reliance on Circumstantial Evidence to Prove a Defect*, 27 FED'N INS. COUNS. Q. 129, 131-33 (1977) (the author states that most courts require that plaintiffs produce two or more types of circumstantial evidence as proof of a defect in order to withstand a motion for a directed verdict); Rheingold, *supra* note 17, at 327-39 (lists six possible types of evidence as (1) nature of the product; (2) pattern of the accident; (3) life history of the product; (4) similar products and uses; (5) elimination of alternate cause; and (6) the happening of the accident); *See also* Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 564-65 (1969) (five descriptive categories of evidence).

[19] *See, e.g.*, Stewart v. Budget Rent-a-Car, 52 Hawaii 71, 72, 470 P.2d 240, 242 (1970) (car could not be controlled; jerked to the left when brakes applied); Moraco v. Ford Motor Co., 66 N.J. 454, 332 A.2d 599, 601 (1975) ("gink" heard and wheels felt as if locked); Henningson v. Bloomfield, 32 N.J. 358, 161 A.2d 69, 75 (1960) (wheel spun in hands after sensation that something had cracked); Brownell v. White Motor Corp., 260 Or. 251, 490 P.2d 184, 185 (1971) ("bang" heard before car hit wall).

[20] *See, e.g.*, Franks v. National Dairy Prod. Corp., 414 F.2d 682, 684-85 (5th Cir. 1969) (no

The third type, occurrence of the accident itself, is analogous to the basic principle underlying the doctrine of res ipsa loquitur.[21] Instead of an inference of negligence being raised by the accident, an inference of a defect in the product is permitted under certain circumstances. In other words, an inference is permitted that the accident would not have occurred but for a defect in the product. However, a court might discuss in broad terms how this type of inference may be drawn from the accident without referring to the principle by the name of res ipsa loquitur.[22]

Expert opinion, the fourth type of circumstantial evidence, is valuable in establishing the nature of the product. The expert might describe either her examination of the particular product in question or the type of product in general.[23]

The fifth type of evidence, life history of the product, would include testi-

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foreign substance in shortening when it exploded; no abnormal use); Stewart v. Budget Rent-a-Car, 52 Hawaii 71, 77-78, 470 P.2d 240, 244 (1970) (car had been properly used prior to accident; weather was clear); Farmer v. International Harvester Co., 97 Idaho 742, 553 P.2d 1309, 1313-14 (1976) (driving conditions good; truck well-maintained); Tweedy v. Wright Ford Sales, Inc., 64 Ill.2d 570, 357 N.E.2d 449, 452 (1976) (no abnormal use; vehicle well-maintained; driver familiar with area).

[21] The negligence doctrine of res ipsa loquitur applies " 'whenever a thing that produced an injury is shown to have been under the control and management of the defendant and the occurrence is such as in the ordinary course of events does not happen if due care has been exercised.' " Cozine v. Hawaiian Catamaran, Ltd., 49 Hawaii 77, 82, 412 P.2d 669 (1966) (citations omitted). For the use of the doctrine in a strict liability action see, *e.g.*, Stewart v. Ford Motor Co., 553 F.2d 130, 138 (D.C. Cir. 1977) (car veered off road; driver negligence negated); Harrell Motors, Inc. v. Flanery, 272 Ark. 105, 612 S.W.2d 727, 728-29 (1981) (van twice went from "park" into "reverse"); Embs v. Pepsi-Cola Bottling Co., 528 S.W.2d 703, 706 (Ky. 1975) ("There are some accidents, as where a beverage bottle explodes in the course of normal handling, [in this case while sitting on the floor,] as to which there is common experience that they do not ordinarily occur without a defect; and this permits the inference of a defect."); Rogers v. Dorchester Ass'n., 32 N.Y.2d 53, 300 N.E.2d 403, 405-06, 347 N.Y.S.2d 22, 26-28 (1973) (elevator doors failed to retract); Marathon Battery Co. v. Kilpatrick, 418 P.2d 900, 912 (Okla. 1965) (battery exploded during normal use); *see also* Greco v. Bucciconi, 283 F.Supp. 978, *aff'd*, 407 F.2d 87 (3d Cir. 1969) (evidence that mechanical loader dropped goods prematurely was sufficient to allow inference of a defect).

[22] O'Meara, *supra* note 18, at 132-33. *See, e.g.*, Corbin v. Camden Coca-Cola Bottling Co., 60 N.J. 425, 290 A.2d 441, 444 (1972) ("It is common knowledge that bottles do not ordinarily fall out of properly made cartons which are not mishandled. Therefore, the jury could reasonably conclude that the carton was defective at the time of the plaintiff's injury.")

[23] *See, e.g.*, Haulcy v. Chrysler Motor Corp., 415 So.2d 322, 325-26 (La. App. 1982) (expert testimony based on inspection of system and analysis of plaintiff's testimony established that brakes were not defective); Moslander v. Dayton Tire & Rubber Co., 628 S.W.2d 899, 904 (Mo. App. 1981) (expert testimony on manufacturing defect which caused tire to lose air); *see also* Montoya v. General Motors Corp., 88 N.M. 583, 544 P.2d 723, 725-26 (1975) (resolution of issue raised by expert testimony on cause of broken axle and contrary physical fact is for jury to decide).

mony about its age, maintenance record, and ownership history.[24] Any indication of previous problems would be particularly important.

Similar products and uses, the final category of circumstantial evidence, is especially useful in establishing design defects when the individual product that caused the injury is unavailable.[25]

Questions over the use and sufficiency of circumstantial evidence have generated much controversy.[26] Although fact patterns can result in different outcomes, most courts are following the same basic standard: whether the circumstances taken as a whole would permit a jury to find that the likelihood of a defect causing the injury predominates over other reasonable explanations.[27] The Hawaii Supreme Court has not explicitly stated its standard for circumstantial evidence.[28]

IV. Developments in Hawaii

Stewart v. Budget Rent-a-Car established strict liability of manufacturers and lessors for injuries caused by defective products in Hawaii.[29] The plaintiff in *Stewart* had rented a virtually new car.[30] The car began veering to the left in spite of plaintiff's attempts to control it with the steering wheel.[31] She applied the brakes, which caused the car to "jump or jerk" further to the left and over an embankment, resulting in serious injury to the plaintiff.[32]

The court in *Stewart* also described the kinds of proofs that could be used as evidence of a defect:

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[24] *See, e.g.*, Kridler v. Ford Motor Co., 422 F.2d 1182 (3d Cir. 1970); Bombardi v. Pochel's Appliance and TV Co., 10 Wash. App. 243, 518 P.2d 202, 205 (1973) (testimony tracing entire service history of television set which caught fire).

[25] *See, e.g.*, Beerman v. Toro Manufacturing Corp., 1 Hawaii App. 111, 615 P.2d 749 (1980) (plaintiff was not required to identify which of several indentical lawnmowers had caused the injury).

[26] *See generally* Barker, *Circumstantial Evidence in Strict Liability Cases*, 38 Alb. L. Rev. 11 (1973); Rheingold, *supra* note 17; Sheldon, *Circumstantial Proof in Products Liability Cases: A Dangerous Precedent*, 30 Fed'n Ins. Couns. Q. 265 (1980); Note, *Proof of Defect in a Strict Products Liability Case*, 22 Me. L. Rev. 189 (1970) [hereinafter cited as Note, *Proof of Defect*]; Note, *Products Liability and the Problem of Proof*, 21 Stan. L. Rev. 1777 (1969) [hereinafter cited as Note, *Products Liability*].

[27] Beasley, *supra* note 15, at 354; O'Meara, *supra* note 18, at 134.

[28] For a discussion of the court's position, see Section VI at notes 66-83 and accompanying text.

[29] 52 Hawaii 71, 470 P.2d 240 (1970).

[30] The car had been rented five times and driven only 2,829 miles. *Id.* at 79, 470 P.2d at 245.

[31] *Id.* at 72, 470 P.2d at 242.

[32] *Id.*

> The most convincing evidence is an expert's pinpointing the defect and giving his opinion on the precise cause of the accident after a thorough inspection. If an accident sufficiently destroys the product, or the crucial parts, then an expert's opinion on the probabilities that a defect caused the accident would be helpful. If no such opinion is possible, as in the present case, the user's testimony on what happened is another method of proving that the product was defective. If the user is unable to testify, as where the accident killed him or incapacitated him, no other witness was present at the time of the accident, and the product was destroyed, the fact of the accident and the probabilities are all that remain for the party seeking recovery. At this point the plaintiff can attempt to negate the user as the cause and further negate other causes not attributable to the defendant. These kinds of proof introduced alone or cumulatively are evidence which help establish the presence of a defect as the cause of the damage.[33]

The court went on to hold that the plaintiff's testimony of the events immediately preceding the accident was sufficient to support an inference that a defect existed in the car.[34] The court also noted that the additional testimony by the user tended to negate other possible causes of the accident.[35] In addition to the plaintiff's testimony, there was testimony by an expert witness. However, the expert could not determine the exact cause of the accident or give his opinion as to the existence of a defect because of the condition of the car.[36]

Since deciding *Stewart* in 1970, the Hawaii Supreme Court has not dealt directly with the issues surrounding the use of circumstantial evidence in a manufacturing defect case until *Wakabayashi*.

V. ANALYSIS

In *Wakabayashi*, the primary issue raised by Hertz on appeal was whether the plaintiff had presented sufficient evidence to make a prima facie showing of a defect in the automobile. Hertz agreed with the plaintiff that *Stewart* was the leading case on strict products liability in Hawaii, but disagreed on the proper interpretation and application of *Stewart*.[37]

Hertz relied on a two-part argument. Hertz first proposed that circumstantial evidence used alone, without some direct proof, is insufficient as a matter of law

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[33] *Id.* at 76, 470 P.2d at 243-44.

[34] *Id.* at 77, 470 P.2d at 244.

[35] The road was straight and level; the weather was clear; the car had not previously been taken on bumpy roads. *Id.* at 77-78, 470 P.2d at 244.

[36] The car had been cut in half. The plaintiff's expert first inspected the front half; when he attempted to examine the rear half, he found that many parts had been "cannibalized." Although the steering mechanism was found broken, because of the car's condition, he was unable to say whether the break caused the accident or vice versa. *Id.* at 73, 78, 470 P.2d at 242, 244.

[37] 66 Hawaii at 269, 660 P.2d at 1312.

to establish the existence of a defect.[38] Hertz's second proposition was a fallback position: if a court will accept circumstantial evidence of a defect without concomitant direct proof, then it should do so only when direct proof is unavailable. Hertz argued that the court in *Stewart* had emphasized the unavailability of direct evidence when holding that the circumstantial evidence presented in that case was sufficient to establish a defect.[39] In contrast, the damage to Wakabayashi's car did not preclude the possibility of finding a defect, and Hertz argued that the proffered circumstantial evidence must be insufficient since Wakabayashi presented no direct evidence through expert testimony.[40]

The supreme court, in responding to the first part of Hertz's argument, described the facts of the *Stewart* case and stated that "[t]he *only* evidence of a defect presented by plaintiff was her own testimony describing the events immediately preceding the accident."[41] The court implied that the expert testimony about the steering mechanism was not useful because of its uncertainty and noted that there were no eyewitnesses to substantiate the plaintiff's testimony.[42]

The court then quoted portions of *Stewart*, stating that the " 'most convincing evidence is an expert's pinpointing the defect.' "[43] However, " '[i]f no such opinion is possible . . . the user's testimony on what happened is another method of proving that the product was defective.' "[44] Given these statements and the court's emphasis that " 'circumstantial evidence is certainly admissible to establish a defect and the fact that it caused the accident,' "[45] one could infer that the use of circumstantial evidence by itself would not be insufficient as a matter of law.

The court did not elaborate further on the implication that direct evidence of a defect is not required in order to withstand a motion for a directed verdict. However, the proposition that circumstantial evidence alone is sufficient is one

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[38] Wakabayashi, in contrast, contended that circumstantial evidence could suffice in establishing a defect when the claim is based on strict products liability. *Id.* at ___, 660 P.2d at 1312.

[39] 66 Hawaii at 271, 660 P.2d at 1313. The court in *Stewart* had stated that "where there is no additional eye witness, as in the present case, and where the only expert was unable to form an opinion because of the damaged condition of the car and the subsequent changes in the car's condition," a directed verdict still may not be justified as a matter of law. 52 Hawaii at 76-77, 470 P.2d at 244. The court also stated that "if no [expert] opinion is possible, as in the present case, the user's testimony on what happened is another method of proving that the product was defective." *Id.* at 76, 470 P.2d at 243.

[40] 66 Hawaii at 270, 660 P.2d at 1313.

[41] *Id.* (emphasis added).

[42] *Id. See supra* note 36.

[43] *Id.* at 270, 660 P.2d at 1313 (quoting 52 Hawaii at 76, 470 P.2d at 243).

[44] *Id.*

[45] *Id.* (quoting 52 Hawaii at 77, 470 P.2d at 244).

that is widely accepted.[46]

In responding to Hertz's second argument that direct proof of a defect ought to be required when the car is available for inspection, the court noted that the " 'nature and quality of evidence used in products liability cases to show the defect and the nexus between the defect and the accident naturally varies.' "[47] The court rejected the notion that the availability of the product should determine whether circumstantial evidence alone would suffice by choosing not to interpret *Stewart* so restrictively.[48]

In looking at the evidence, the court focused on the additional circumstantial evidence that tended to substantiate the user's own testimony of the "bizarre accident."[49] Not only did Wakabayashi's passengers corroborate his account, but more importantly, the parking attendant at the garage had observed the brake lights on when the car went down the ramp. The court stated that the combined evidence was sufficient to support an inference that a defect existed, and that the case was "clearly one for consideration by the jury."[50]

In terms of the categories discussed previously,[51] the evidence in *Wakabayashi* falls into two areas. Wakabayashi's own account of the accident and the statements of his passengers could be placed into the "pattern of the accident" category. The actions of the car would be the first indication that something might have been wrong with it. The evidence of the parking attendant would fall into the "elimination of alternate causes" category. Her testimony that she saw the brake lights on tends to negate the negligence of Wakabayashi at the time of the accident. Without this testimony, it would be difficult to rebut the inference that Wakabayashi had accidently depressed the

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[46] *See e.g.*, Stewart v. Ford Motor Co., 553 F.2d 130, 137 (D.C. Cir. 1977) (applying D.C. law) (use of circumstantial evidence undisputed); Sherman v. Puritan-Bennett Corp., 544 F.Supp. 159, 161 (E.D. Wis. 1982) (applying Pennsylvania law) (direct evidence helpful but not essential); Moslander v. Dayton Tire & Rubber Co., 628 S.W.2d 899, 904 (Mo. App. 1981) (circumstances will suffice). *See also* BEASLEY, *supra* note 15, at 355 and cases cited in support. *But see* Sheldon, *Circumstantial Proof in Products Liability Cases: A Dangerous Precedent*, 30 FED'N INS. COUNS. Q. 265, 271 ("[C]ourts have found for plaintiffs on very little evidence.").

There are three reasons usually offered to justify the widespread use of circumstantial evidence. First, concrete, specific evidence is rare in products liability cases. Even if the product is inspected, the causes of a putative malfunction may not be apparent. Second, there may be few witnesses available to provide additional information about the accident. Third, the product may be too damaged to produce a meaningful assessment or it may be completely unavailable. For these reasons, circumstantial evidence is widely accepted as a means of proving the existence of a defect. BEASLEY, *supra* note 15, at 353.

[47] 66 Hawaii at 271, 660 P.2d at 1313 (quoting 52 Hawaii at 76, 470 P.2d at 243).

[48] *Id.* ("We do not choose to apply the relevant holdings in *Stewart* so restrictively even though the damaged Chevelle was available for inspection.").

[49] *Id.*

[50] *Id.*

[51] *See supra* part III of text beginning at note 13 and accompanying text.

accelerator pedal instead of the brake pedal.

The evidence in *Stewart* covered three areas. First, there was the plaintiff's testimony of events before the accident.[52] Second, there was some discussion of evidence which served to eliminate alternate causes.[53] Third, there was expert testimony about a broken part, although it was not certain if the part broke before or after the accident.[54]

The evidence offered by the plaintiff in each case is of roughly equivalent sufficiency in terms of establishing the existence of a defect. Both cases had plaintiff/user testimony about the events leading to the accident. In *Stewart*, there was no eyewitness testimony, but there was testimony about a broken part which could have caused the accident. In *Wakabayashi*, on the other hand, there was no identifiable defect, but there were eyewitnesses whose testimony substantiated the plaintiff's version of the events.

Although there might be relative equivalency between the two cases in terms of the evidence in support of a defect's existence, the evidence presented in *Wakabayashi* also included some strong detracting factors. Unlike the car in *Stewart*, the vehicle in *Wakabayashi* was not damaged to such an extent that an expert could not form an opinion about a possible defect.[55] Wakabayashi's expert examined the car but could not find or suggest a possible defect.[56] The court implied that the absence of a discoverable defect was relevant evidence,[57] but it did not indicate what influence this might have had on the overall sufficiency of the evidence.

The court in *Wakabayashi* did not compare the facts of the case with those in *Stewart*. Instead, it simply stated that the facts as presented by Wakabayashi were sufficient.[58] However, the court was viewing the evidence in reference to Hertz's motion for a directed verdict and would have reversed the trial court only if there was " '*no* evidence to support a jury verdict' " in Wakabayashi's

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[52] *See supra* notes 30-32 and accompanying text.

[53] The plaintiff's negligence as one possible alternate cause was negated by the fact that the car had not been taken on bumpy roads after it was rented, the weather was clear, and the highway was straight and level at the time of the accident. 52 Hawaii at 77-78, 470 P.2d at 244.

[54] *See supra* note 36 and accompanying text.

[55] The court did not describe the actual amount of damage, stating only that no broken parts or identifiable defects were found. 66 Hawaii at 268, 660 P.2d at 1312.

[56] Wakabayashi conceded that he could not offer direct evidence of a defect. *Id.* at 268, 270, 660 P.2d at 1312, 1313.

[57] The implication that the absence of a discoverable defect was relevant is drawn from the court's discussion of Hertz's second claim of reversible error. *See supra* note 11. In noting that the trial court later included the evidence originally excluded, the supreme court stated: "where essentially the same evidence is given by other witnesses or other means, the trial court's exclusion of *relevant* evidence constitutes harmless error." 66 Hawaii at ___, 660 P.2d at 1314 (emphasis added).

[58] 66 Hawaii at 271, 660 P.2d at 1313.

favor.[59] As there was *some* evidence in Wakabayashi's favor, the court left it to the jury to determine whether the absence of a discoverable defect significantly detracted from the sufficiency of the evidence without explicitly defining a minimum standard for the use of circumstantial evidence.

In defining a minimum standard for circumstantial evidence, other courts have said that the failure to inspect an available vehicle or to produce the product itself when possible to do so might lower the credibility of the evidence but would not render it insufficient as a matter of law.[60] Typically, the weighing of evidence is a function reserved for the jury to perform.[61]

Another difference between the two cases which bears on the sufficiency of the evidence is the use in each case of evidence negating the user's own negligence. Wakabayashi did present evidence that tended to negate his own negligence at the time of the accident, but he did not offer any evidence negating negligence *before* the accident. In *Stewart*, evidence that the plaintiff did not misuse the car *prior* to the accident contributed to the overall sufficiency of the evidence.[62] Since the car in *Wakabayashi* was older than the car in *Stewart*, any improper driving before the accident could weaken the inference that a defect existed at the time Wakabayashi rented the car.[63] The negation of the plaintiff's negligence is not formally a part of the prima facie case; however, one court has considered this to be essential if the evidence is weak in other respects.[64] The negation of the user's own potential negligence as a cause of the

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[59] *Id.* (quoting *Stewart*, 52 Hawaii at 77, 470 P.2d at 244) (emphasis added).

[60] Brownell v. White Motor Corp., 260 Or. 251, 490 P.2d 184, 187 (1971) ("That the product is inspectable, or destroyed and not inspectable is not a sound basis for deciding whether or not the inference of a defect can be drawn"); *see also* Hughes v. Jawa, 529 F.2d 21, 25 (8th Cir. 1976) (testimony of expert witness with weak qualifications who had not inspected the vehicle still presented sufficient inference of a defect to preclude entry of summary judgment); Beerman v. Toro Manufacturing Corp., 1 Hawaii App. 111, 615 P.2d 749 (1980) (the specific lawnmower out of the six to eight that could have caused the injury need not be produced); *cf.* Jensen v. American Motor Corp., 50 Md. App. 226, 437 A.2d 242, 246 (1981) (failure to inspect vehicle *and* inadequate testimony contributed to the "complete absence of essential facts from which an inference of a defect may reasonably be drawn").

[61] Striker v. Nakamura, 50 Hawaii 590, 594, 446 P.2d 35, 38 (1968) ("It is the law in Hawaii that questions concerning credibility of witnesses and the weight of evidence are for the jury alone to decide . . . ."); *see also* Scanlon v. General Motors Corp., 65 N.J. 582, 326 A.2d 673, 681 n.7 (1974) (trier of fact free to draw adverse inference about the existence of a defect when no justification is offered as to failure to inspect or to produce available product).

[62] 52 Hawaii at 77-78, 470 P.2d at 244 (The fact that the plaintiff had not taken the car on bumpy roads since renting it and was driving on a straight and level highway at the time of the accident on a clear day "tended to negate any causation not attributable to the [defendants].").

[63] An older car could be more susceptible to problems that develop as a result of misuse.

[64] Jakubowski v. Minn. Mining & Mfg., 80 N.J. Super. 184, 193 A.2d 275, 279 (1963) (judgment for the defendant on the strict liability and breach of warranty issues reversed in part and the case remanded for trial on the issue of breach of warranty only). The plaintiff was injured

injury may be particularly important when the user is in control of the product.[65] Yet the court in *Wakabayashi* did not comment on this type of evidence.

VI. IMPACT

Wakabayashi and *Stewart* have initially defined the circumstances under which one who places a defective product into the stream of commerce may be held liable. It is important, therefore, to understand how the court has approached these cases and what is likely to follow.

The court in *Wakabayashi* did not explicitly define a standard for the minimum amount of circumstantial evidence necessary to establish the existence of a defect. In both *Stewart* and *Wakabayashi*, the court referred only to the standard used in deciding a motion for directed verdict.[66] The only other reference on point is the court's statement in *Stewart* that "whether the proof is of the sufficient quantum to get past a motion for a directed verdict . . . will depend on each case."[67]

In contrast, other courts have explicitly stated that the circumstantial evidence relied upon must show that the existence of a defect is "more probable than not."[68] Since the Hawaii Supreme Court has stated that a motion for

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when the grinding disk on a rotary sander broke. The disc was not produced at trial or examined for what had caused the break. The court stated that for the plaintiff to rely on the res ipsa loquitur doctrine, "he must demonstrate that the cause . . . was something which lay within defendant's responsibility. In short, he has the burden of introducing evidence to exclude the possibility that the injury was due to his own conduct. . . ." *Id.* at 279. *Cited with approval in* Jakubowski v. Minn. Mining & Mfg., 42 N.J. 177, 199 A.2d 826, 829 (1964) (the N.J. Supreme Court reversed the Appellate Division's remand on the warranty issue and affirmed the trial court's dismissal of the case).

The court in *Stewart* noted this case during its discussion of the evidence negating alternate causes. 52 Hawaii at 77 n.6, 470 P.2d at 244 n.6.

[65] *See* Barker, *supra* note 26, at 16-17. The Hawaii Supreme Court recently recognized another aspect of the role that a user's negligence may play in liability for defective products by merging comparative negligence with strict products liability. Kaneko v. Hilo Coast Processing, 65 Hawaii 447, 654 P.2d 343, 352 (1982).

[66] *Wakabayashi*, 66 Hawaii at 271, 660 P.2d at 1313; *Stewart*, 52 Hawaii at 77, 470 P.2d at 244.

[67] 52 Hawaii at 76, 470 P.2d at 244.

[68] O'Meara, *supra* note 18, at 134. For examples of standards, see St. Paul Fire & Marine Insurance Co. v. Michelin Tire Corp., 12 Ill. App. 3d 165, 298 N.E.2d 280, 297 (1973) ("more probable than not"); Lee v. Crookston Coca-Cola Bottling Co., 290 Minn. 321, 188 N.W.2d 426, 434 (1971) ("more probable than not"); Hale v. Advance Abrasives Co., 520 S.W.2d 656, 658 (Mo. App. 1965) ("point reasonably to the desired conclusion"); Danielson v. Richards Mfg. Co. Inc., 206 Neb. 676, 294 N.W.2d 858, 861 (1980) (" 'reasonably probable, not merely possible' ") (quoting Popken v. Farmers Mutual Home Ins. Co., 180 Neb. 250, 255, 142 N.W.2d 309, 313 (1966)); State Auto Mutual Ins. Co. v. Chrysler Corp., 36 Ohio St. 2d 151,

directed verdict is granted only when "there is no evidence to support a jury verdict,"[69] it appears that a plaintiff has a minimal burden to meet in providing enough circumstantial evidence to reach the jury. The court may be implicitly including a "more probable than not" concept within the directed verdict standard; however, under the standard as stated, there is an increased likelihood that the evidence presented to the jury may allow for greater speculation as to the true cause of the accident.[70] By setting a seemingly low standard for a directed verdict, the Hawaii Supreme Court may have placed a difficult burden upon the lower courts in attempting to guard against fraudulent claims.

Two questions still remain after *Wakabayashi*: (1) what are the current guidelines for the minimum amount of evidence necessary to prove a product is defective; and (2) what are the ramifications of the implicit standard set by *Wakabayashi*?

A. Minimum Amount of Evidence

Adoption of strict liability "in no way dispenses with the requirements of proof that the product was in some way defective and that the damages were

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304 N.E.2d 891, 895 (1973) ("preponderance of probability"); Kirkland v. General Motors Corp., 521 P.2d 1353, 1354 (Okla. 1974) (degree of certainty need not support only one reasonable conclusion and exclude all others); Bombardi v. Pochel's Appliance and TV Co., 9 Wash. App. 797, 515 P.2d 540, 545 (1973) (greater probability of a defect than of another explanation), *modified on reh'g*, 10 Wash. App. 243, 518 P.2d 202 (1973); Shipton Supply Co., Inc. v. Bumbaca, 505 P.2d 591, 594 (Wyo. 1973) ("exclude other reasonable hypotheses with a fair amount of certainty").

[69] The full passage reads: "A directed verdict may be granted only when after disregarding conflicting evidence, giving to the plaintiff's evidence all the value to which it is legally entitled, and indulging every legitimate inference which may be drawn from the evidence in plaintiff's favor, it can be said that there is no evidence to support a jury verdict in his favor." *Wakabayashi*, 66 Hawaii at 271, 660 P.2d at 1313; *Stewart*, 52 Hawaii at 77, 470 P.2d at 244. Although the court cited both Young v. Price, 48 Hawaii 22, 395 P.2d 365 (1965), and Elmore v. Am. Motors Corp., 70 Cal. 2d 578, 75 Cal. Rptr. 652, 451 P.2d 84 (1969), the court followed the *Elmore* standard. 451 P.2d at 87. The standard from *Young* reads: "[I]f the evidence and the inferences . . . are of such character that reasonable persons in the exercise of fair and impartial judgment may reach different conclusions upon the crucial issue, then . . . the issue should be submitted to the jury." 48 Hawaii at 24, 395 P.2d at 367. The standard from *Elmore* is virtually identical to the standard quoted in *Wakabayashi*.

[70] Sherman v. Puritan-Bennett Corp., 544 F. Supp. 159, 162 (E.D. Wis. 1982) (applying Pa. law) ("where the explanation consistent with a defect is no more probable than an explanation inconsistent with a malfunction, . . . the issue is not one for the jury to decide, for the jury cannot be permitted to speculate"); Jensen v. Am. Motors Corp., 50 Md. App. 226, 437 A.2d 242, 245 (1981) ("proof of a defect must arise above surmise, conjecture or speculation"). *But see* Stewart v. Ford Motor Co., 553 F.2d 130, 138 (D.C. Cir. 1977) (applying D.C. law) ("courts have refused to allow a case to go to the jury only in the most egregious instances of failure of proof").

caused by the defect."[71] How the Hawaii Supreme Court defines "in some way defective" is critical in understanding how the court determines the sufficiency of the evidence on this point.

In defining "in some way defective," the Hawaii Supreme Court has rejected the Restatement of Torts definition of a defective product as that which is "dangerous to an extent *beyond* that which would be contemplated by an ordinary consumer who purchases or uses it."[72] The Hawaii Supreme Court holds that for the product to be considered dangerously defective the plaintiff must show only that the product "does not meet the reasonable expectations of the ordinary consumer or user as to its safety."[73] Arguably, if a product malfunctioned and caused an injury, it would not meet the reasonable expectations of most consumers. Therefore, a plaintiff who can prove that the product malfunctioned has essentially proved that the product is defective.[74] Proving that the product malfunctioned then becomes the lowest threshold a plaintiff must meet to avoid a directed verdict for the defendant.

In *Wakabayashi*, the court focused on the testimony of the parking attendant as the supporting evidence of a malfunction.[75] A crucial question arises: if there had been no witness who saw the brake lights on, would the case still have been sent to the jury? Without this evidence, there would be little to substantiate the plaintiff's testimony and to counter-balance the fact that no specific defect was found. Although the court did not discuss this question, it is possible to determine a likely outcome by looking at the court's statements in *Stewart* and at the general attitude of the court in adopting strict liability.

In *Stewart*, the court stated that the testimony of the user alone was sufficient.[76] However, the court also described the other evidence presented and

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[71] *Stewart*, 52 Hawaii at 75, 470 P.2d at 243.

[72] *See* Ontai v. Straub Clinic and Hospital, Inc., 66 Hawaii 241, 245 n.1, 659 P.2d 734, 739 n.1 (1983) (quoting Restatement [Second] of Torts § 402A comment i (1965)) (emphasis added.) ("We have chosen not to follow the Restatement in this regard."). The court did not mention that in *Brown v. Clark Equipment Co.*, it explicitly approved a trial court's instruction that used words nearly identical to the Restatement version it is now rejecting. *See Brown* 62 Hawaii 530, 541-42, 618 P.2d 267, 275 (1980) ("[T]he [trial] court defined the meaning of defective condition using language of 402A, Comment i, which . . . is consonant with our holding in *Stewart*.").

[73] *Ontai*, 66 Hawaii at 245, 659 P.2d at 739.

[74] Farmer v. International Harvester Co., 97 Idaho 742, 553 P.2d 1306 (1976) (no distinction between "malfunction" and "defect" since a malfunction does not ordinarily occur within the reasonable contemplation of a consumer in the absence of a defect).

[75] *See* 66 Hawaii at 271, 660 P.2d at 1313 ("In addition to Wakabayashi's account, . . . there were the statements of the passengers . . . and, *more significantly*, the testimony of the parking attendant.") (emphasis added).

[76] 52 Hawaii at 77, 470 P.2d at 244 ("We think the testimony of the plaintiff . . . was sufficient to yield an inference that there was a defective condition."). *But see* Barker, *supra* note 26, at 13 (some objective evidence of malfunction ought to be supplied); Note, *Products Liabil-*

noted that the quantum of evidence "taken as a whole . . . was sufficient to go to the jury."[77] From this language alone, it is not clear just how important the additional evidence in *Wakabayashi* might have been in meeting the plaintiff's burden of proof.

There is, however, another indication from *Stewart*. In a footnote, the court referred to the use of the res ipsa loquitur doctrine in strict products liability[78] by mentioning that "[i]n the most extreme circumstances a court might hold that where no specific defect can be shown, recovery is to be allowed anyway as a carefully driven vehicle does not leave the road in the absence of a defect in the car."[79] The facts in *Wakabayashi*, without the testimony of the parking attendant, perhaps could be considered "extreme circumstances" if Wakabayashi could still offer some evidence that he had been operating the car carefully.[80] Under these facts, the case may still be sent to the jury. However, until the court actually applies its dicta regarding "extreme circumstances," it is difficult to say whether the hypothetical lies within the court's meaning.

Another indication that the court would favor sending the case to the jury lies in its rationale in adopting strict products liability: "the public interest in human life and safety requires the *maximum* possible protection that the law can muster against dangerous defects in products. . . . A lessor, like the seller, is in a better position to know a defect and control it, as well as distribute any resulting losses."[81] In addition, the court has liberalized the Restatement of

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ity, *supra* note 26, at 1785 (courts should be wary of allowing a plaintiff's testimony alone to suffice as proof of malfunction).

[77] *Stewart*, 52 Hawaii at 78, 470 P.2d at 244.

[78] For background, see *supra* notes 21-22 and accompanying text.

[79] *Stewart*, 52 Hawaii at 76 n.5, 470 P.2d at 244 n.5.

[80] *Cf.* Winter v. Scherman, 57 Hawaii 279, 554 P.2d 1137 (1976) (negligence action applying the principle of res ipsa loquitur). The plaintiff's decedent and the defendant's decedent were involved in an unwitnessed one-car accident. The court held that the defendant's decedent, as the driver of the vehicle, was negligent as a matter of law since there was no evidence of careful driving at the time of the accident. The jury verdict in favor of the defendant was reversed and judgment was entered for the plaintiff. The res ipsa loquitur doctrine is usually applied as a procedural device only, allowing the plaintiff to reach to the jury on a permitted inference of negligence. If, however, the inference is of such compelling strength that reasonable people could not disagree as to the conclusion, then an inference derived under the doctrine is treated like any other proper inference. A directed verdict may be granted unless sufficient evidence is offered in opposition. *See generally* McCORMICK, EVIDENCE 804-05 (2d ed. 1972).

[81] *Stewart*, 52 Hawaii at 74-75, 470 P.2d at 243 (emphasis added), *cited with approval in* Kaneko v. Hilo Coast Processing, 65 Hawaii 447, 453, 654 P.2d 343, 346-47 (1982).

It should be pointed out that lessors are not in a strictly equivalent position with sellers. Since lessors are also liable for defects which arise during the use of the goods in their business, they have no cause of action against the manufacturer under those circumstances. Note, *Liability of the Bailor for Personal Injuries Caused by Defective Goods*, 51 N.C.L. REV. 786, 800 (1973). The lessor's only measure of control is to monitor carefully the condition of the goods and remove

Torts requirement that a defective product be "unreasonably" dangerous.[82] In Hawaii, a product need only be considered dangerous.[83] The court in *Wakabayashi* also interpreted the holding in *Stewart* to allow for the maximum introduction of circumstantial evidence by not limiting its use to facts strictly similar to *Stewart*. The foregoing expressions of the court's position indicate that the court is likely to allow even a case with weak evidence to be sent to the jury as the trier of fact.[84]

B. Ramifications of the Present Standard

The Hawaii Supreme Court has set a minimal quantum of evidence for the plaintiff to produce to avoid a directed verdict. Standards similar to this[85] have been both applauded and criticized for their effect on the relative burdens on the plaintiff and the defendant at trial.

The minimal standard is applauded as a reasonable means by which a deserving plaintiff may reach the jury.[86] This has been justified "by the realities of product litigation."[87] For instance, a plaintiff generally has a difficult time in pinpointing a specific defect and in tracing the history of a product once it has left the manufacturer's control. In addition, expert witnesses in a particular area may be difficult to obtain, either because of cost or unavailability.[88] Finally, it is the manufacturing defendant who "knows" the product, knows why that particular design was chosen and the specifics of how the product was manufactured.[89]

The standard is criticized for the increased burden it places on the defendant.[90] A defendant already contends with delayed notice of a suit, forced reli-

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them from the inventory when they approach the limit of safe performance. *Id.* at 802.

[82] RESTATEMENT (SECOND) OF TORTS § 402A (1965) ("One who sells any product in a defective condition unreasonably dangerous . . . is subject to liability. . . .").

[83] Ontai v. Straub Clinic and Hospital, Inc., 66 Hawaii 241, 659 P.2d 734 (1983); Brown v. Clark Equipment Co., 62 Hawaii 530, 618 P.2d 267 (1980); Stewart v. Budget Rent-a-Car, 52 Hawaii 71, 470 P.2d 240 (1970). Although the Hawaii court was following a precedent set elsewhere, Cronin v. J.B.E. Olson Corp., 8 Cal.3d 121, 104 Cal. Rptr. 433, 501 P.2d 1153 (1972), few other jurisdictions have emulated the move, J. HENDERSON & R. PEARSON, THE TORTS PROCESS 673 (1981).

[84] One commentator has stated that a majority of cases should be sent to the jury even if the evidence is " 'circumstantial' or 'thin.' " Rheingold, *supra* note 17, at 342.

[85] *E.g.* Elmore v. Am. Motors Corp., 70 Cal. 2d 578, 75 Cal. Rptr. 652, 451 P.2d 84 (1969). *See supra* note 68.

[86] Rheingold, *supra* note 17, at 343; *see also* Note, *Products Liability*, *supra* note 26.

[87] Rheingold, *supra* note 17, at 343.

[88] Note, *Products Liability*, *supra* note 26, at 1782-83.

[89] Rheingold, *supra* note 17, at 343.

[90] *See generally* R. EPSTEIN, MODERN PRODUCTS LIABILITY LAW 160-65 (1980) ("The standard

ance on the plaintiff's version of the accident, and possible disposal of the product before the suit is instigated.[91] Added to these inherent defense problems is the fact that the minimal standard might allow a weak case to go to the jury in spite of the increased possibility of speculation.

It has been suggested that some courts in effect have shifted the burden of producing evidence to the defendant when a case is allowed to reach the jury on weak evidence.[92] However, if such is the case, every defendant must come forward with evidence to counter the jury's belief in the plaintiff's evidence.[93] Strictly speaking, no burden actually has been shifted unless the plaintiff would win a motion for a directed verdict if the defendant did not come forward.[94]

Nonetheless, if the plaintiff need only prove that the product malfunctioned while being reasonably used, in order to reach the jury,[95] then the effect may be the same as if the burden of production actually had been shifted to the defendant. This is one possible implication following *Wakabayashi*. Although the Hawaii Supreme Court in *Wakabayashi* did not imply that it was shifting the burden of producing evidence to the defendant, the court has indicated its approval of a similar shift in *Ontai v. Straub Clinic and Hospital, Inc.*,[96] a recent design defect case.[97] In *Ontai*, the court approved of the formulations laid out

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invit[es] the jury to find for the plaintiff when the vast bulk of the evidence is against him."); Sheldon, *supra* note 26, at 277-79; Note, *Proof of Defect*, *supra* note 26, at 196-97.

Sheldon points out that when plaintiffs are compensated on very weak evidence, one of the main justifications for strict products liability is forgotten — prevention of accidents by placing the cost of accidents on manufacturers as an incentive to improving product safety. His rationale is that without clear evidence of defectiveness, the manufacturer is unable to remedy whatever defect there may be; therefore, "the public bears the cost of accidents but receives no safety assurances in return." Sheldon, *supra* note 26, at 278-79.

[91] For example, in *Wakabayashi*, the automobile had been destroyed before the third-party defendant GM Corp. had been brought into the suit. *See supra* notes 5 & 12.

[92] Sheldon, *supra* note 26, at 277; Note, *Products Liability*, *supra* note 26, at 1784. The case discussed by these commentators is Greco v. Bucciconi, 283 F. Supp. 978, *aff'd*, 407 F.2d 87 (3d Cir. 1969). The verdict for the plaintiff was sustained upon showing that the fingers of an apparatus used to support piles of steel retracted when they should have remained extended.

[93] Brownell v. White Motor Corp., 260 Or. 251, 490 P.2d 184, 186 (1971) (court acknowledged that the defendants might be placed at a disadvantage in bringing forward evidence to prove a negative).

[94] MCCORMICK, EVIDENCE 792 (2d ed. 1972) ("It is simpler to limit 'duty of going forward' to the liability, on resting, to an adverse ruling, and to regard the stage just discussed (where the situation is that if both parties rest, the issue will be left to the jury) as one in which neither party has any duty of going forward."). For a general discussion on burden of proof, see *id.* §§ 337-38.

[95] *See supra* notes 72-74 and accompanying text.

[96] 66 Hawaii 241, 659 P.2d 734 (1983).

[97] This is not to imply that the two types of product defects are completely equivalent. A burden shift in a design defect case could be more justified on a policy basis. The potential for harm is far greater with respect to design defects since each item produced has the same defect, unlike a manufacturing defect which usually affects a relatively small number of items.

in *Barker v. Lull Engr. Co.*,[98] a California case in which the defendant had the burden of proving the design was not defective once the plaintiff showed the design caused the injury.[99] Although the court in *Ontai* did not state specifically that the burden of producing evidence would be shifted to the defendant, it has at least considered the possibility as appropriate.[100]

Another possible implication of *Wakabayashi* is that some defendants may be prejudiced by allowing the plaintiff to reach the jury under such minimal requirements.[101] It could be extremely difficult for a defendant to rebut the permitted inference of a defect if all the defendant can hope to show is that there may have been other possible causes of the accident.[102] Likewise, an attempt to show directly, that the accident could not have occurred in the manner stated may well be futile.[103] This is especially likely in cases in which the product is unavailable for either side to examine[104] and the manufacturer is unable

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[98] 20 Cal.3d 413, 432, 573 P.2d 443, 455-56, 143 Cal. Rptr. 225 (1978) ("a product may . . . be found defective in design if the plaintiff demonstrates that the product's design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design").

[99] *Ontai*, 66 Hawaii at 246, 659 P.2d at 739-40. Note, however, that the *Hawaii Reports* quotation of the statement in *Barker* is incorrect in that it leaves out the crucial statement "the defendant fails to establish, in light of." The *Pacific Reporter* version is correct.

[100] *See also* Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 884-84 (Alaska 1979) (design defect case which followed the formulation in *Barker* for shifting the burden of proof). *See supra* note 98; Embs v. Pepsi-Cola Bottling Co., 528 S.W.2d 703 (Ky. 1975) (multiple defendants should be required to come forward with evidence disproving their own responsibility).

[101] *See* Lee v. Crookston Coca-Cola Bottling Co., 290 Minn. 321, 188 N.W.2d 426, 435 (1971) (Peterson, J., dissenting) ("[T]he practical result [of resorting to the doctrine of res ipsa loquitur] is to impose absolute liability . . . in bottle explosion cases. . . . The manufacturer is effectively stripped of any defenses for, if the interested persons testify that there was no mishandling, it is now for all practical purposes impossible to adduce expert testimony upon which a jury may make a contrary finding."); Sheldon, *supra* note 26, at 271 ("[P]roducts liability law is close to becoming an inefficient system of absolute liability."); Note, *Proof of Defect*, *supra* note 26, at 192 & n.24 (manufacturers may be held liable for non-defective products); *cf.* Note, *Products Liability*, *supra* note 26, at 1786 (although a manufacturer may be subject to absolute liability in some cases, it "is certainly preferable to placing the burden of determining the cause of a product failure on the plaintiff. . . .").

[102] Note, *Products Liability*, *supra* note 26, at 1785; P. SHERMAN, PRODUCTS LIABILITY FOR THE GENERAL PRACTITIONER 326 (1981).

[103] Powell & Hill, *Proof of Defect or Defectiveness*, 5 U. BALT. L. REV. 77, 91 (1975) (burden of persuading the jury that product could not have caused the harm requires "proof of a negative proposition to an often skeptical jury, and in many cases, testimony from a witness that 'I have seen it happen' will not only rebut the testimony of the defendants' experts, but will damage their credibility.") In *Wakabayashi*, the third-party defendant, GM Corp., offered expert testimony that the vehicle could not have accelerated in the manner described unless Wakabayashi had depressed the accelerator rather than the brake. 66 Hawaii at 268, 660 P.2d at 1312.

[104] *See, e.g.*, Lindsay v. McDonnell Douglas Aircraft Corp, 460 F.2d 631 (8th Cir. 1972)

to provide eyewitnesses.

On the other hand, the Hawaii Supreme Court has recognized that "[s]trict products liability was never intended to be 'absolute liability' " by incorporating the concept of comparative negligence into strict liability as a means of achieving a more equitable result.[105] The use of comparative negligence will reduce the financial burden on some defendants. However, the possibility that the defendant will be found liable in the first place even on weak evidence still exists.[106]

VII. CONCLUSION

Wakabayashi v. Hertz has clarified the role that circumstantial evidence may play in a strict products liability case. Although the Hawaii Supreme Court recognizes that specific, direct evidence of a defect in the product is the most convincing evidence, it has not accepted the argument that to allow circumstantial evidence, by itself, to suffice as proof of a defect would "only invite jury speculation and a flood of litigation even where there is no evidence of defects in the products."[107]

Circumstantial evidence may be offered as the sole evidence of a defect, and under certain circumstances, the existence of a defect may be shown by the fact that the product malfunctioned when a specific defect cannot be located. Although only the user's testimony about the malfunction may suffice in rare cases, a stronger case is presented if other witnesses corroborate the testimony and other possible causes are negated.

An expert witness testifying about the existence of a specific defect and tracing the defect to the defendant is, of course, the standard in products liability. It remains to be seen whether the numerous uses of circumstantial evidence define a new standard which supplants the traditional reliance on expert testimony.

Sharon Burnham Takeuchi

(admiralty law) (crash of airplane into ocean); McCann v. Atlas Supply Co., 325 F. Supp. 701 (W.D. Pa. 1971) (tire burst into flames after losing air); Embs v. Pepsi-Cola Bottling Co., 528 S.W.2d 703 (Ky. 1975) (bottle fragments thrown away after explosion); Bombardi v. Pochel Appliance and T.V. Co., 9 Wash. App. 797, 515 P.2d 540 (1973), *modified on reh'g*, 10 Wash. App. 243, 518 P.2d 202 (1973) (television as source of fire was completely destroyed).

[105] Kaneko v. Hilo Coast Processing, 65 Hawaii 447, 463, 654 P.2d 343, 353 (1982) (citation omitted).

[106] These dangers do not exist in every case, of course. In addition, there are several arguments in favor of minimizing the barriers facing plaintiffs. *See supra* note 86-89 and accompanying text. Finally, juries can and do recognize when the plaintiff's claim is without merit.

[107] 66 Hawaii at 269, 660 P.2d at 1312.

PREEMPTION DOCTRINE: Airport Development Acceleration Act of 1973 — *Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, ___ U.S. ___, 104 S.Ct. 291, 78 L.Ed.2d 10 (1983)

INTRODUCTION

The United States Supreme Court, in a unanimous decision delivered by Justice Marshall, reversing the Hawaii Supreme Court, has held that the Airport Development Acceleration Act of 1973,[1] 49 U.S.C. § 1513(a) preempted a Hawaii statute,[2] Hawaii Rev. Stat. § 239-6 which levied a tax on the gross

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[1] 49 U.S.C. § 1513, in relevant part, reads:

State Taxation of air commerce.

(a) Prohibition; exemption. No State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia; the territories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling *in air commerce or on the carriage of persons traveling in air commerce* . . . or on the sale of air transportation *or on the gross receipts derived therefrom*; except that any State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) which levied a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom prior to May 21, 1970 shall be exempt from the provisions of this subsection until December 31, 1973. (emphasis added)

(b) Permissible State taxes and fees. . . . [N]othing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

[2] HAWAII REV. STAT. § 239-6 reads as follows:

income of inter-island airlines operating within the state.[3] The Court, in construing the plain meaning and legislative history of the federal statute concluded that Congress had intended to prohibit any state tax based on the gross receipts of an air carrier. The Court, by so holding, has sent a clear message to the State of Hawaii that, regardless of the decision's disruptive effects upon state systems of taxation, the resolution to such problems lies in the hands of Congress.

THE CASE

In 1978, appellant Aloha Airlines, Inc. sought refunds of all gross receipt taxes paid between 1969 and 1977 pursuant to Hawaii Rev. Stat. § 239-6, arguing that the state statute was preempted by 49 U.S.C. § 1513(a). After a summary denial by the Hawaii Director of Taxation and a rejection by the Hawaii Tax Appeal Court, the case was appealed to the Hawaii Supreme Court.[4] The state court examined the relevant legislative history of the federal statute and concluded that Congress had intended to only prohibit states from imposing ticket or head taxes.[5] In addition, the court concluded that the state tax was not truly a gross receipts tax; rather it was more in the nature of an *ad*

Airlines, certain carriers. There shall be levied and assessed upon each airline a tax of four per cent of its gross income each year from the airline business; provided that if an airline adopts a rate schedule for students in grade twelve or below traveling in school groups providing such students at reasonable hours a rate less than one-half of the regular adult fare, the tax shall be three per cent of its gross income each year from the airline business. There shall be levied and assessed upon each motor carrier, each common carrier by water, and upon each contract carrier other than a motor carrier, a tax of four per cent of its gross income each year from the motor carrier or contract carrier business. The tax imposed by this section is a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value, and is in lieu of the tax imposed by chapter 237 but is not in lieu of any other tax.

[3] The two interisland airlines involved in the dispute were Aloha Airlines, Inc. and Hawaiian Airlines, Inc.. Both are Hawaii corporations that carry passengers, property and mail between islands of the State of Hawaii. While on its face, this activity seems completely intrastate, it is now well settled that transportation over the international waters between the islands of Hawaii constitutes "interstate or overseas air transportation". *See* 49 U.S.C. § 1305(b)(2) (Supp. IV 1980), added by Section 4(a) of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, 1708 (1978). *See also* Stipulation of Facts in the Hawaii Tax Appeal Court ¶ 5 (J.A. 15-16), wherein Appellant and Hawaii Director of Taxation have stipulated for purposes of this case that Public Service Company tax assessments "are measured by Taxpayer's (Appellant's) gross receipts from the carriage of persons by air between islands of the State of Hawaii over international waters."

[4] Shortly after Aloha's request for a refund, appellant, Hawaiian Airlines, Inc. filed a similar action. Both actions were rejected in separate decisions by the Tax Appeal Court. *See* In re Aloha Airlines, Inc., No. 1772 (Hawaii Ct. Tax App. 1978); In re Hawaiian Airlines, Inc., Nos. 1853, 1868 (Hawaii Ct. Tax App. 1980). The companies then joined in a consolidated appeal to the Hawaii Supreme Court.

[5] In re Aloha Airlines, Inc., 65 Hawaii 1, 17, 647 P.2d 263, 274 (1982).

valorem tax on the real and personal property of the airlines.[6] Based on this reasoning, the court affirmed the tax court's decision that 49 U.S.C. § 1513(a) did not preempt Hawaii Rev. Stat. § 239-6.[7]

The United States Supreme Court reversed the Hawaii decision on three principal grounds. The first and primary ground was its construction of the federal statute — 49 U.S.C. § 1513. While the Hawaii Supreme Court based its analysis on an alleged contradiction or conflict between subsection (a) and subsection (b) of § 1513,[8] the U. S. Supreme Court found the language clear and unambiguous.[9] Since § 1513(a) explicitly prohibited states from imposing a gross receipts tax on airlines and Hawaii Rev. Stat. § 239-6 imposed just such a state tax on the gross receipts of the appellant-airlines, the Court had little difficulty in holding that Congress has expressly intended preemption.[10]

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[6] The court relies principally on an early Hawaiian case in which the then territorial court concluded that the public utility tax (the predecessor to the public service company tax) " 'imposes a tax comparable to the *ad valorem* real and personal property tax otherwise imposed.' " 65 Hawaii at 7, 647 P.2d at 268 (citing Hawaii Consolidated Railway v. Borthwick, 34 Hawaii 269, 281 (1937), *aff'd.* 105 F.2d 286 (1939)).

[7] *Id.* at 19, 647 P.2d at 275.

[8] The court concluded, based on somewhat questionable logic, that since those taxes exempted in § 1513(b) are necessarily derived from the "gross receipts" of an airline, the thrust of this clause contradicts the prohibitory language of subsection (a). *Id.* at 10-11, 647 P.2d at 270. The U.S. Supreme Court, however, flatly rejected the finding of any "paradox" between the two subsections. "Section 1513(b) clarifies Congress's view that States are still free to impose on airlines and air carriers 'taxes other than those enumerated in subsection (a), such as property taxes, net income taxes, and franchise taxes.' " ___ U.S. ___, 104 S.Ct. at 294 n.6, 78 L.Ed.2d at 15 n.6

[9] ___ U.S. ___, 104 S.Ct. at 294, 78 L.Ed.2d at 14-15. The Court applied the so-called "plain meaning rule" which has been a fundamental aspect of the Court's construction of congressional statutes for quite sometime. *See* American Tobacco Co. v. Patterson, 456 U.S. 63 (1982); Central Trust Co. v. Official Creditors' Committee of Gerger Enterprises, Inc., 454 U.S. 354 (1982); Adams Exp. Co. v. Kentucky, 238 U.S. 190 (1915); United States v. Goldenberg, 168 U.S. 95 (1897).

[10] The preemption doctrine basically provides that when a state's statute is in conflict with a federal statute, the state statute must fall. This concept of federal supremacy is firmly rooted in Article VI, Section 2 of the Constitution commonly known as the supremacy clause. The clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The doctrine was first enumerated in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 41 (1824) and has been the source of much confusion ever since. *See* Note, *A Framework for Preemption Analysis*, 88 YALE L.J. 363 (1978) [hereinafter cited as *Preemption Analysis*]. For additional general discussions of the preemption doctrine see Hirsh, *Toward a New View of Federal Preemption*, 1972 U. ILL. L.F. 515; Note, *The Preemption Doctrine - Shifting Perspectives on Federalism and the*

The Court also rejected the Hawaii court's interpretation of the legislative history underlying 49 U.S.C. § 1513.[11] The Hawaii Supreme Court had concluded that Congress had intended to only prohibit the states from imposing ticket or "head" taxes.[12] The U. S. Supreme Court, however, found that "the legislative history abounds with references to the fact that § 1513(a) also preempts state taxes on the gross receipts of airlines."[13] In a revealing footnote the Court pointed to the fact that Congress had been given an opportunity to exempt an Ohio gross receipts tax similar to Hawaii Rev. Stat. § 239-6 but declined to do so.[14]

Burger Court, 75 COLUM. L. REV. 623 (1975) [hereinafter cited as *Shifting Perspectives*]; Comment, *Preemption Doctrine in the Environmental Context: A Unified Method of Analysis*, 127 U. PA. L. REV. 197 (1978); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-23, at 376 (1976).

The Hawaii Court felt compelled under Rice v. Santa Fe Elevator Corp., 331 U. S. 218 (1947) to thoroughly delve into the legislative history of the federal statute to determine congressional intent. 65 Hawaii at 13-18, 647 P.2d at 271-74. The court, however, in a footnote clarifies the impact of *Rice* upon the application of the preemption doctrine.

Rice and its progeny, however, involved the implicit preemption of state statute. Rules developed in these cases apply when a court must decide whether a state law should be preempted even though Congress has not expressly legislated preemption. These rules, therefore, have little application when a court confronts a federal statute such as § 1513(a) that explicitly preempts state laws. ___ U.S. ___, 104 S.Ct. at 294 n.5, 78 L.Ed.2d at 15 n.5.

Preemption of state tax statutes has provided a particularly thorny problem for the Court because of the Court's recognition of the states' sovereign power of taxation. For a general discussion of the states' sovereign power of taxation see Parnell, *Constitutional Considerations of Federal Control Over the Sovereign Taxing Authority of the States*, 28 CATH. U. L. REV. 227 (1979).

[11] ___ U.S. ___, 104 S.Ct. at 294-95, 78 L.Ed.2d at 15-16.

[12] *See supra* note 6.

[13] In footnote 8, the Court cites several pieces of legislative history in support of its conclusion that Congress intended to prohibit state gross receipt taxes as well as state head or passenger taxes. ___ U.S. ___, 104 S.Ct. 295 n.8, 78 L.Ed. 2d at 15 n.8. While the House and Senate Committee reports referred to merely reiterate the language of the statutes, statements made by Senator Cannon and Representative Devine make it obvious that the preemption also includes gross receipts taxes. Mr. Devine stated "the purpose of the bill was twofold - to prohibit the imposition *of head taxes or gross receipts taxes by airport operators or States*, and at same time to increase the Federal share of funding for airport projects in medium and smaller cities." 119 CONG. REC. 17,345 (1973) (emphasis added). Senator Cannon while outlining the provisions of the bill stated "[f]inally, our bill prohibits discriminating State and local taxation on airline passengers and on the gross receipts derived from air transportation" 119 CONG. REC. 18,045 (1973).

[14] In ___ U.S. ___, 104 S.Ct. at 294-95 n.7, 78 L.Ed.2d at 15 n.7, the Court cites the strongest evidence in terms of legislative history that Congress had no intention of exempting gross receipts taxes. During house hearings on the act the committee declined to expand § 1513(b) to allow state "gross receipts taxes fairly apportioned to a state" as per a request of the Ohio Tax Commission. *See* H.R. 4082 before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, 93d Cong., 1st Sess., 246-253 (1973). *See also* Ohio Op. Att. Gen. 73-117 (Nov. 20, 1973) in which the Ohio Attorney General concluded that Ohio's gross receipts tax was preempted.

In the final step of its analysis, the Court addressed the issue of whether by being characterized as a property tax measured by gross receipts rather than a true gross receipts tax, Hawaii Rev. Stat. § 239-6 escaped the preemption of § 1513(a) and fell within the exemptions enumerated in § 1513(b). The Court reasoned that the Hawaii legislature had probably characterized the tax in this manner so as to avoid any constitutional challenges under the Commerce Clause.[15] The Court found, however, that this was not a determinative issue and turned again to the plain meaning of the prohibiting language in § 1513(a). Subsection (a) expressly prohibited "indirect" taxes on the gross receipts of an airlines.[16] Based upon this prohibition, the Court concluded that a tax measured by gross receipts, whether characterized as a property tax or not, was "at least an 'indirect' tax on the gross receipts of an airline."[17] As a result, the Court held that the state statute was preempted.

COMMENTARY

The preemption doctrine has been the subject of much commentary attempting to reconcile the Court's decisions into some doctrinally consistent pattern. One commentator has suggested that the Court's shifting perspectives on federalism is the touchstone for rationalizing the Court's decisions.[18] Another commentator has argued that the "decisions can be rationalized according to the protection afforded by the state law in question."[19] In general, it has been noted that this area of law is abstract and often ad hoc in nature.[20] The Court itself has indicated that this area of the law, by its very nature, is not one subject to "rigid formulas" or an "infallible constitutional test."[21]

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[15] See ___ U.S. ___, 104 S.Ct. at 295 n.9, 78 L.Ed.2d at 15 n.9. As already indicated, the Court has struggled to enumerate a fair and just standard by which to judge whether a state tax statute has been preempted by the Commerce Clause. *See supra* note 10. However, as the Court has indicated, this is not at issue here. For an in depth discussion of the four part test developed in this area by the Court in Complete Auto Transit, Inc. v. Brady, 430 U. S. 274 (1977) see Note, *State Taxation on the Privilege of Doing Interstate Business: Complete Auto Transit, Inc. v. Brady*, 19 B.C.L. REV. 312 (1978).

[16] *See supra* note 1.

[17] *See* ___ U.S. ___, 104 S.Ct. at 295 n.7, 78 L.Ed.2d at 15 n.7.

[18] *See Shifting Perspectives, supra* note 10, at 626.

[19] *See Preemption Analysis, supra* note 10, at 363.

[20] Hirsch, *supra* note 10, at 520-21.

[21] In a very illuminating description of the difficulties presented to the Court when confronted with a preemption problem, the Court, in Hines v. Davidowitz, 312 U.S. 52 (1941), stated:

> [t]here is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the follow-

In the present case, the Court was confronted with what is arguably the most clear cut scenario for preemption - an explicit conflict between the language and intent of federal and state statutes.[22] The Court simply applied the long accepted "plain meaning" doctrine of statutory construction and struck down the state law.[23] As a consequence, the Court's decision provides little in terms of precedential value for those weary scholars attempting to discern some pervasive rationale for the application of the preemption doctrine.

The decision's real impact is upon the tax coffers of those states which continue to levy such taxes. The Court has made it clear that it is "bound by the plain language of the statute" (§ 1513). If the states feel unduly burdened by the removal of this source of tax revenue they must look to Congress for a remedy.[24]

CONCLUSION

Aloha Airlines, Inc. v. Director of Taxation of Hawaii exemplifies the Court's simplest application of the federal preemption doctrine. Relying on the plain meaning of the federal statute, the Court held that Hawaii Rev. Stat. § 2396 was in explicit conflict with 49 U.S.C. § 1513(a) and thereby was preempted. Although the Court recognized that the decision may have a disruptive effect upon state systems of taxation it concluded that the remedy for such problems now rests with Congress.

Robert J. Lombardi

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ing expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula.

Id. at 67.

[22] L. TRIBE, *supra* note 10, § 6-23 at 377 (1976)

[23] *See supra*, note 9.

[24] *Id.*

TAXATION: Deductibility of Business Meals — *Moss v. Commissioner of Internal Revenue*, 80 T.C. 1073 (1983)

The United States Tax Court recently held that a law partner's distributive share of the costs of daily partnership lunch meetings is a non-deductible personal expenditure. The decision is significant because it addresses the gray area involving the deductibility of business meals.[1] The majority opinion focused upon the inherently non-deductible personal nature of the meals while the concurring opinion focused more upon the frequency of the expenditure. Neither opinion specified which factor or what level of frequency would render other business meal expenses non-deductible. Thus, the court left unresolved whether the cost of an occasional luncheon business meeting would be a deductible business expense. In light of this unsettled issue, the ability of professionals and other businesspersons to deduct the cost of meals eaten at business meetings may be substantially limited.

Taxpayer, an attorney, was a partner in a six- to seven-member law firm that claimed, in each of two years, a deduction for "meetings and conferences"

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[1] This article deals only with the business meal deduction under I.R.C. § 162 (1954). The term "business meal," as used herein, refers to a meal consumed by the taxpayer for business purposes, alone or with his business associates and/or employees. This is distinguished from a meal that is consumed by a businessperson and his client, which may be deductible as a business entertainment expense according to I.R.C. § 274 (1954). *See* I.R.C. §§ 162, 274 and related regulations. *See also* 13 PRAC. ACCT. 31-39 (Jan.-Feb. 1980) and 15 PRAC. ACCT. 17-26 (Aug. 1982).

The deductibility of business meals is also an issue separate from the deductibility of the costs of company cafeterias and executive dining rooms and meals consumed therein. Where such facilities are furnished primarily for the benefit of the employees, the operating expenses of the facility, as well as the expenses of the meals, are clearly deductible. Treas. Reg. § 1.274-2(f)(2)(ii). *See generally* 4A MERTENS, LAW OF FED. INCOME TAXATION § 25.100m (1983).

Thus, the Internal Revenue Service (hereinafter, the Service) applies varying standards of deductibility depending upon whether the businessperson's meals are consumed on or off the business premises. This dichotomy presents an inconsistency. Why should it matter *where* a meal is served, as long as the meal is consumed in connection with a business purpose? Perhaps the position of the Service is that meals consumed in company dining rooms are part of a unitary process; since the physical dining facilities, dining personnel costs, and other operating expenses are routinely deductible or depreciable, so too are the meals consumed in the dining facility. The Service may be striving more toward administrative convenience rather than logical application of a tax concept.

under I.R.C. § 162.[2] Taxpayer, claimed his distributive share of the firm's expense on his individual return.[3]

The firm had an unwritten policy of holding daily business meetings at a small, quiet cafe near their office and the courts. The noon hour was the most convenient and practical time for the firm to hold its daily meetings. Since the courts were almost always in recess at noon, most of the attorneys could attend. The cafe provided a good location, efficient service, reasonable prices, and a place where judges could easily locate the attorneys.[4]

Over lunch, the attorneys would discuss their insurance defense litigation caseload and case assignments; discuss issues and problems that arose that particular morning; advise each other on how to handle pending matters; obtain approval of the senior partner on settlement negotiations; and engage in a certain amount of social banter. Attorneys attended whenever and for as long as possible, sometimes eating and sometimes just joining in the discussions. The law firm paid for the meals eaten during these meetings. These expenses represented the bulk of the firm's meetings and conferences expense.[5]

The taxpayer claimed that the costs of the lunch meetings were ordinary and necessary business expenses qualifying under I.R.C. § 162.[6] The Service disallowed the taxpayer's distributive share of the expense in its statutory notice of deficiency, asserting that the lunch expenses were personal and therefore nondeductible personal expenses under I.R.C. § 262.[7]

The Tax Court held that the daily business lunch meetings were not deductible under § 162, and that they were instead non-deductible personal expenditures under § 262. In a separate opinion, nine judges of the 18-member panel,[8] concurred in the result.

The majority noted that the purpose of the Internal Revenue Code is to tax all accessions to wealth, from whatever source derived,[9] and that while business deductions reduce taxable income,[10] personal living expenses do not.[11] The

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[2] 80 T.C. 1073, 1074 (1983). The partnership return showed a 1976 expense of $7,894.00, of which $7,113.85 was attributed to meal costs at lunch meetings. In 1977, the figures were $8,670.00 and $7,967.85, respectively. *Id.* at 1075, n.4.

[3] *Id.* at 1074.

[4] *Id.*

[5] Complete facts of the case are recounted by the court at 80 T.C. 1073, 1074-75.

[6] *Id.* at 1075-76. Unless otherwise noted, all section references are made to the Internal Revenue Code of 1954, as amended, in effect at the time of the decision.

Alternatively, the taxpayer claimed that the expenses qualified for deductions as outlays for education under Treas. Reg. § 1.162-5. *Id.* at 1076.

[7] *Id.* See text of § 262 *infra* at note 18.

[8] Ordinarily, 19 judges sit on the Tax Court. There was one vacancy at the time this case was decided.

[9] 80 T.C. 1073, 1076 (1983). *See* I.R.C. § 61 (1954).

[10] 80 T.C. 1073, 1076 (1983). *See* I.R.C. § 162 (1954), which states in pertinent part:

court pointed out that the dividing line between §§ 162 and 262 is close, and that in such situations the taxpayer bears the burden of proof.[12] The court also stated that § 262 will take precedence over § 162 in such situations.[13]

In this case, the court noted that the line was indeed close. It recognized that the partners incurred the costs of the lunch meeting in the course of earning their income.[14] The court also recognized the taxpayer's argument that the lunch meetings were ordinary and necessary,[15] because the noon hour was a

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"There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . ." *Id.*

[11] 80 T.C. 1073, 1076 (1983). *See* I.R.C. § 262 (1954), which states: "Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses." *Id.*

[12] 80 T.C. 1073, 1076 (1983), (citing Welch v. Helvering, 290 U.S. 111 (1933) and Rule 142 (a), Tax Court Rules of Practice and Procedure).

[13] 80 T.C. 1073, 1076 (1983), (citing Sharon v. Comm'r, 66 T.C. 515, 522-23 (1976), *aff'd*, 591 F.2d 1273 (9th Cir. 1978)).

The text of § 262 is, however, susceptible to different interpretations. Section 262 begins, "Except as otherwise expressly provided in this chapter . . . ." Because Congress failed to specify exactly which code sections were excepted from § 262, this phrase might have been referring to code provisions which specifically allow deductions for personal expenditures, e.g., § 213, medical expenses and § 165(c)(3), casualty and theft losses. Congress may have intended that these code sections were the only exceptions to the general non-deductibility of personal expenditures under § 262, and that § 262 would control if it conflicted with any other code provision. In contrast, Congress might have been referring to § 162, trade or business expenses' as an express exception to § 262. Section 162(a)(2) specifically allows a deduction for meals and lodging expenses incurred during business travel, even though such meals and lodging are ordinarily personal expenses. Furthermore, because § 274 limits the deductibility of certain business entertainment expenses, § 162(a) impliedly allows deductions for business entertainment under certain circumstances. If Congress intended that § 162 was one of the specific exceptions to § 262, then § 162 arguably takes precedence over § 262 whenever the two sections conflict.

Thus, the majority's rule that § 262 takes precedence over § 162 is disturbing because, if taken to its logical extreme, business meals would never be deductible. For example, since a business meal always involves personal consumption of a meal in connection with business discussion, the personal component will conflict with and take precedence over the business component, rendering the entire transaction non-deductible under § 262.

[14] 80 T.C. 1073, 1076 (1983).

[15] *Id.* at 1077. The "ordinary and necessary" requirement is the first hurdle to overcome before an expense is deemed deductible under § 162. "Necessary" is the easiest of the two elements to fulfill — the United States Supreme Court has defined "necessary" as "appropriate and helpful." Welch v. Helvering, 290 U.S. 111, 113 (1933). The "ordinary" requirement has been the subject of much more controversy, but the *Welch* Court did articulate a definition:

> Ordinary in this context does not mean that the payments must be habitual or normal in the sense that the same taxpayer will have to make them often . . . the expense is an ordinary one because we know from experience that payments for such a purpose, whether the amount is large or small, are the common and accepted means [of responding to a business need] . . . .

Id.

logical and convenient time to coordinate case assignments.[16] Furthermore, the attorneys argued that the meeting was part of their working day, rather than a reprieve from their business affairs; they did not feel free to make alternate plans, or to eat elsewhere.[17]

The court noted that the Service focused not on why the attorneys were brought together, but on the fact that they ate lunch during these meetings. The court interpreted the Service's position as arguing while the meeting may have been ordinary and necessary to business, the outlay was for meals, a personal item.[18]

First, the court recited the traditional rule that if a personal living expense is to qualify under § 162, the taxpayer must demonstrate that it was "different from or in excess of that which would have been made for the taxpayer's personal purposes."[19] The court then cited a line of cases wherein taxpayers had been unsuccessful in deducting meals consumed in connection with business.[20] The court then rejected the taxpayer's reliance on dicta in *Wells v. Commissioner*, that an occasional staff lunch meeting might be deductible.[21] The court stated

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[16] 80 T.C. 1073, 1076-77 (1983).

[17] *Id.* at 1077

[18] *Id.*

[19] *Id.* (citing Sutter v. Comm'r, 21 T.C. 170, 173 (1953)). The court noted, without citation to case law or other authority, that where a proper business purpose and relationship are established, the expenses are presumed to be different from the one the taxpayer would normally have made. *See* 80 T.C. 1073, 1077, n.9. It appears that the court is referring to an administrative practice whereby the Service applies the *Sutter* doctrine only "to abuse cases where the taxpayer claims a deduction for substantial amounts of personal living expenses." Rev. Rul. 63-144, Q. 31, 1963-2 C.B. 129, 135. *See* Fenstermaker v. Comm'r, 36 T.C.M. 898 (1978). *But see* Letter Ruling 8006004, October 26, 1979, which may mark a departure from that administrative policy.

[20] 80 T.C. 1073, 1077-78 (1983). The court cited Fife v. Comm'r, 73 T.C. 621 (1980) (attorney may not deduct the cost of his meals eaten at restaurants before early morning or late night client meetings); Ma-Tran v. Comm'r, 70 T.C. 158 (1978) (corporation may not deduct the cost of officer's locally consumed meals absent travel or compliance with § 274); Drill v. Comm'r, 8 T.C. 902 (1947) (construction worker cannot deduct the cost of dinners on nights he worked overtime). *See also*, Hirschel v. Comm'r, 41 T.C.M 1298 (1981), *aff'd* without published opinion, 685 F.2d 424 (2d Cir. 1982) (student may not deduct cost of meals consumed prior to night classes); Moscini v. Comm'r, 36 T.C.M. 1002 (1977) (patrolman may not deduct restaurant meals eaten while on duty although he was forbidden to leave city limits to eat at home or to eat a home-prepared meal in his car); Antos v. Comm'r, 35 T.C.M 387 (1976), *aff'd* without published opinion, 570 F.2d 350 (9th Cir. 1978) (CPA may not deduct the cost of meals eaten while working late in his office).

[21] 36 T.C.M. 1698 (1977). In *Wells*, the head of a large public defender's office frequently took staff members to lunch or dinner at restaurants or taxpayer's private club in order to discuss the operation of the office. The Tax Court held that neither the meals nor the club dues were deductible business expenses. The court disallowed the deduction; even though the expenses may have benefitted the office of the public defender, they did not benefit the taxpayer, individually,

that dicta in a memorandum decision is not controlling, and that occasional lunch meetings are a "far cry from the daily sustenance" involved in this case.[22]

According to the court, taxpayer's lunch meetings were no different from the non-deductible situation of an attorney who spends his lunch hour preparing for an afternoon trial — in both cases, the attorney spends an extra hour at work. The mere fact that this time was spent over the noon hour "does not convert the cost of daily meals into a business expense to be shared by the Government."[23]

Additionally, the court recognized that business necessity does not make a business meeting deductible. It analogized the business meal to other costs, e.g., commuting, business attire, etc., which, although contributing to one's business success, are inherently personal expenses.

Daily business lunch meetings are not deductible § 162 expenses even if such meetings are ordinary and necessary. The court declined to specify whether the costs of an occasional lunch meeting would be deductible. Taken strictly, the opinion could be interpreted to mean that meals are so inherently personal that they can never be deducted, absent qualification as a § 274 business entertainment expense or a § 162(a)(2) expense incurred during business travel away from home. This interpretation, if accurate, would be wide-sweeping and would invalidate the standard practices of many professionals, especially attorneys, who regularly deduct the cost of staff lunch meetings.[24]

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in his position as head of the office. *Id.*

[22] 80 T.C. 1073, 1078 (1983).

The court then discussed *Sibla v. Comm'r*, and *Cooper v. Comm'r*, two Tax Court decisions that were later consolidated in a Ninth Circuit opinion and which allowed deductions for meals taken on a regular basis. 611 F.2d 1260 (9th Cir. 1980), *affirming* 68 T.C. 422 (1977) and 67 T.C. 870 (1977), respectively. Both cases involved firemen who were required to contribute to a meal fund for every day they were on duty, regardless of whether they ate at the station. The Ninth Circuit held that because the taxpayer's situations were unusual and unique, the expenses were business rather than personal. Later cases have confined these holdings to their facts. *See* Duggan v. Comm'r, 77 T.C. 911 (1981) and Banks v. Comm'r, 42 T.C.M. 1016 (1981) (no deductions for non-mandatory contributions to firemen's meal fund).

The *Sibla* court also sustained the firemen's expense by analogy of § 162 to § 119—that the same considerations are involved with the deductibility of a meal for the employer as with the includibility of the value of the meal into income for the employee. 611 F.2d 1260 (9th Cir. 1980). Section 119 provides a limited exception to § 61, whereby meals furnished to employees are excludable from the employee's income if he is subject to substantial restrictions in eating such meals. *See* I.R.C. § 119(a)-(b) and Treas. Reg. § 1.119-1 . *See also* Comm'r v. Kowalski, 434 U.S. 77 (1977) and Moscini v. Comm'r, 36 T.C.M. 1002 (1977).

The *Moss* court discussed the taxpayer's argument that a § 162/§ 119 analogy applies in the present case. The court then rejected taxpayer's argument that the expense was solely for the benefit of the law firm, not for his personal benefit.

[23] 80 T.C. 1073, 1080 (1983).

[24] *Id.* at 1080-81 (citing Amend v. Comm'r, 55 T.C. 320, 325-26 (1970)).

The concurrence in *Moss* articulated a somewhat different rationale. The concurring opinion stated that it did not view the majority opinion as disallowing the costs of meals in all instances where only partners and co-workers are involved: "[w]e have here findings that the partners met at lunch because it was 'convenient' and 'convenient' 5 days a week, 52 weeks per year."[25]

The concurring opinion, which arguably has precedential value equal to that of the main opinion,[26] seems to pinpoint the majority's primary objection to the deduction—that the daily lunch expenses are much too frequent to be deductible. The concurrence, however, also implies that were such lunch meetings held less frequently, they might have been deductible. Convenience (versus business necessity) and frequency of the lunch meetings, seem to be the two factors upon which the concurring opinion focused. Unfortunately, the concurring opinion provided no guidelines as to the level of frequency that would render a business meal expense non-deductible.[27]

Also significant was the fact that in all the cases cited by the the cases involved meals consumed by the taxpayer alone.[28] Except for *Wells*, none of the

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On a final note, referring to the taxpayer's alternate claim that the meal expense was an educational expenditure, the court stated: "Combining nourishment and enlightenment does not make the nourishment deductible." 80 T.C. 1073, 1081 (1983).

This statement is disturbing because the majority arguably deems non-deductible many forms of educational outlays. It remains unclear, for example, whether continuing legal education (CLE) luncheon seminars would be a deductible educational expenditure. Such CLE luncheon seminars would arguably be "combining nourishment with enlightenment." Certainly a great majority of attorneys and other professionals have routinely deducted such CLE expenses in the past. The majority leaves open, however, the question of whether their statement applies to CLE seminars where meals are served. Perhaps CLE luncheon seminars are distinguishable from the instant case in that the cost of CLE seminars represent occasional, isolated expenses, as opposed to the daily expenses incurred in *Moss*.

[25] 80 T.C. 1080, 1082 (1983).

[26] Whenever the U.S. Tax Court is equally divided on a particular case, the Chief Judge has traditionally decided which opinion will be the majority opinion, and which will be the concurring or dissenting opinion. In this case, therefore, the Chief Judge very likely made this designation.

In *Moss*, since nine judges joined in the majority opinion, and nine judges joined in the concurring opinion, the opinions arguably have equal precedential value. It is unclear, however, whether the concurring opinion could be cited as substantial authority in order to avoid making adequate disclosure to the Service in similar fact situations.

[27] The division in the court may be one of emphasis only. The majority does not specify whether it was the consumption of meals or the frequency of the meetings, or a combination of the two, that rendered the business lunch meeting expense non-deductible. The concurrence focuses upon the frequency of the expenditure. Query whether the court disposed of the issue upon the stated facts or whether the court essentially questioned the business necessity of the meeting. Perhaps the court did not believe that the attorneys were really engaging in business discussions at all of their daily lunch meetings.

[28] *See supra* note 21.

cases involved meals consumed with partners or co-workers. Although the Tax Court in *Wells* denied a deduction for the costs of meals at the taxpayer's staff meetings, it did so because the expenditure benefitted the taxpayer's entire office, not his personal position.[29]

Thus, the *Moss* decision leaves open the question of whether the cost of an occasional staff luncheon meeting, paid for by a taxpayer and benefitting a taxpayer's personal business position, would be deductible as a § 162 ordinary and necessary business expense. By declining to settle this issue, the court was perhaps attempting to limit the application of the opinion to similar fact situations. In so doing, however, the court undermined the Service's established practice of routinely allowing deductions for meals consumed in conjunction with business meetings. Professionals and tax advisors should continue to approach this type of situation cautiously, pending further treatment by the Service and courts of the issues yet to be resolved.

Wendy K. Kuwamoto

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[29] *See supra* note 22.

Due-On-Sale Clauses: Garn-St. Germain Depository Institutions Act

INTRODUCTION

In part because of continuing controversy and uncertainty in the financial community regarding the enforceability of the due-on-sale provisions[1] in real estate loans, Congress, in October 1982, enacted the Garn-St. Germain Depository Institutions Act (the Act).[2] The Act preempts all state efforts to regulate the enforcement of due-on-sale clauses except certain permitted transfers and "window period" loans.[3] Since the "window period" exception has no relevance to Hawaii, it will not be dealt with here.[4] The following discussion is intended as a brief introduction to those sections of the Act and those regulations promulgated pursuant to the Act, which deal with due-on-sale clauses and are of direct significance to Hawaii's financial and real estate community.

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[1] A typical due-on-sale clause provides:

> If the [debtor] shall sell, convey, transfer or further encumber said property or any part thereof, or any interest therein, or shall be divested of title or any interest therein in any manner or way, whether voluntarily or involuntarily, without the prior written consent of the [secured party], [secured party] shall have the right, at its option, to declare any indebtedness or obligations secured hereby immediately due and payable, irrespective of the maturity date specified in any note evidencing the same.

Dunn, *Selected Current Legal Issues in Mortgage Financing*, 13 REAL PROP., PROB. AND TR. J. 812, 824 (1978).

[2] Pub. L. No. 97-320. Sect. 341. 96 Stat. 1469 (1982).

[3] A "window period" loan is "one 'made or assumed' during the period beginning on the date a state prohibited, by statute or judicial decision, 'the unrestricted exercise of due-on-sale clauses' and ending on October 15, 1982," 48 Fed. Reg. 21554. 21555 (1983) (to be codified at 12 C.F.R. Part 591).

[4] Basically, Hawaii has no state statutes, constitutional provisions, or case law which restricts enforcement of due-on-sale clauses. Colorado, Iowa, New Mexico, and Utah have adopted statutes restricting enforcement. Georgia and Minnesota have adopted laws on the subject. Arizona, Arkansas, California, and Michigan Supreme Courts have established restrictions on the enforcement of due-on-sale "clauses." Barad and Layden, *Due-on-Sale Law as Preempted by the Garn-St. Germain Act*, 12 REAL EST. L.J. 138, 138-39 (1983).

A Short History

The enforceability of due-on-sale clauses has been the subject of considerable debate for over a decade. At the heart of this conflict was the issue of whether lending institutions could exercise their right to accelerate a loan under the due-on-sale provisions in their real estate mortgages. State courts and legislatures which had addressed the problem had reached conflicting results. Several states had allowed enforcement, reasoning that lenders had a legitimate right to enforce such clauses in order to avoid the deleterious effects of being unable to adjust their long term mortgage portfolios to the prevailing short-term deposit interest rates.[5] Other states prohibited enforcement, finding that the due-on-sale clause was an unreasonable restraint on the alienation of the property.[6] The issue of whether state or federal law controls when a federal lender exercises its due-on-sale clause was resolved by the United States Supreme Court in *Fidelity Federal Savings & Loan Association v. de la Cuesta*.[7] The Court concluded that regulations promulgated by the Federal Home Loan Bank Board (the Board or FHLBB), pursuant to the Home Owners Act of 1933, preempted state law concerning the enforcement of due-on-sale clauses by federal associations.[8] As a result of this decision, however, state chartered institutions that were prohibited by state law from enforcing such clauses found themselves at a significant disadvantage. Mortgages in which the due-on-sale clause could not be enforced were not nearly as saleable on the secondary mortgage market as those mortgages with enforceable clauses.[9] This factor along with the fact that these enforcement restrictions were having a substantial detrimental effect upon new home buyers

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[5] *See* Occidental Savings & Loan Association v. Venco, 206 Neb. 469, 293 N.W.2d 843 (1980); Century Federal Savings & Loan Ass'n v. Van Glabo, 144 N.J. Super. 48, 364 A.2d 558 (1976); Crockett v. First Federal Savings & Loan Ass'n, 289 N.C. 620, 244 S.E.2d 580 (1976); Stith v. Hudson City Savings Institution, 63 Misc.2d 863, 313 N.Y.S.2d 804 (1970).

[6] *See, e.g.*, First S. Fed. Sav. & Loan Ass'n v. Britton, 345 So.2d 300 (Ala. Civ. App. 1972); Baltimore Life Ins. Co. v. Ham, 15 Ariz. App. 78, 486 P.2d 190 (1971); Tucker v. Pulaski Fed. Sav. & Loan Ass'n, 252 Ark. 849, 481 S.W.2d 725 (1972); Tucker v. Lassen Sav. & Loan Ass'n, 12 Cal.3d 629, 116 Cal. Rptr. 633, 526 P.2d 1169 (1974); Coast Bank in LaSala v. American Sav. & Loan Ass'n, 5 Cal.3d 864, 97 Cal. Rptr. 849, 489 P.2d 113 (1971); Clark v. Lachenmeier, 237 So.2d 583 (Fla. App. 1970); Sanders v. Hicks, 317 So.2d 61 (Miss. 1975).

[7] 458 U.S. 141 (1982).

[8] Bank Board Resolution No. 75-647 provides in part:

> The due on sale clause is vital and necessary to enable savings and loan associations to adjust their loan portfolios towards current market rates, thereby protecting the association's financial stability, and enabling them to make new home loans at lower interest rates than otherwise would be necessary to maintain an adequate yield on their mortgage portfolios.

See also 12 CFR §§ 545.8-3(g) and 556.9(c) (1981).

[9] Depositors Institution's Amendments of 1982 — Report of the Senate Comm. on Banking, Housing and Urban Affairs, Fed. Banking L. Rep. (CCH) Sect. 937 (Special 2) at 21 (1982).

and the financial industry as a whole, finally led Congress to act.[10] The result was the federal preemption enumerated in the Garn-St. Germain Depository Institutions Act of 1982.

THE ACT

The main body of the federal statute is found in Section 341(b)(1) of the Act which allows a lender to enforce a due-on-sale clause in a real estate loan "[n]otwithstanding any provision of the constitution or laws (including judicial decisions) of any state to the contrary."[11] The regulations promulgated by the FHLBB pursuant to the Act[12] reinforce the broad sweep of this preemption by broadly defining just who qualifies as a "lender"[13] and just what type of "sale or transfer" triggers a due-on-sale clause.[14]

Section 341(b)(2) indicates that the lender's right to exercise the due-on-sale clause is now exclusively governed by the contract except as limited by the permitted transfers enumerated in subsection (d). One of the more stridently argued issues prior to the passage of the Act was whether a lender might waive his rights to enforce the due-on-sale clause in return for the borrower's promise to accept an escalation in the mortgage interest rate. The FHLBB has made it

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[10] *Id.*

[11] Pub. L. No. 97-320, § 341(b)(1).

[12] Section 341(e)(1) authorizes the FHLBB, in consultation with the Comptroller of the Currency and the National Credit Union Administration Board, to issue rules and regulations governing the implementation of this section.

[13] FHLBB Regulation § 591-2(g) states:

> (g) "Lender" means a person or government agency making a real property loan, including without limitation, individuals, Federal associations, state-chartered savings and loan associations, national banks, state-chartered banks and state-chartered mutual savings banks, Federal credit unions, state-chartered credit unions, mortgage banks, insurance companies and finance companies which make real property loans, manufactured-home retailers who extend credit, agencies of the Federal government, any lender approved by the Secretary of Housing and Urban Development for participation in any mortgage insurance program under the National Housing Act, and any assignee or transferee, in whole or part, of any such persons or agencies.

[14] FHLBB Regulation Sect. 591-2(b) states:

> (b) "Due-on-sale clause" is a contract provision which authorizes the lender, at its option, to declare immediately due and payable sums secured by the lender's security instrument upon a sale or transfer of all or any part of the real property securing the loan without the lender's prior written consent. For purposes of this definition, a "sale or transfer" means the conveyance of real property of any right, title or interest therein, whether voluntary or involuntary, by outright sale, deed, installment sale contract, land contract, contract for deed, leasehold interest with a term greater than three years, lease-option contract or any other method of conveyance of real property interests.

48 Fed. Reg. 21554, 21561 (1983).

clear that section 341(b)(2) does not prohibit a lender from imposing any non-contractual term as a condition of waiving a due-on-sale clause, if state law governing enforcement of the contract would permit such a requirement.[15] The regulations, however, also state that if the mortgage is being assumed and the transferee agrees to a higher interest rate in return for the lender's waiver, the lender must release the original borrower from all contractual liability under the mortgage.[16] In other words, the lender "will be deemed to have made a new loan to the existing borrower's successor in interest."[17]

Section 341(b)(3) of the Act is a somewhat unusual provision in that it merely "encourages" lenders to permit assumptions at blended rates. A blended rate is the average between the contract and the prevailing market rates.[18] FHLBB regulations reiterate that this section is "permissive," ensuring that it is clearly understood that the Act does not impose a mandatory obligation on the lenders to offer such rates.[19] Obviously it is the effectiveness of such "encouragement" that remains in doubt.

Section 341(d), which provides a list of nine circumstances under which exercise of the due-on-sale clause is prohibited, warrants particular attention. Of primary significance is that this section has been fundamentally modified by the FHLBB in the promulgation of its regulations. Although the language of the Act implies no distinctions as to the type of loans affected by these prohibitions, the FHLBB has limited their applicability to borrower-occupied home loans.[20] In other words, all loans other than those made to owner occupants are not subject to the limitations set forth in Section 341(d).

The limitations themselves are as follows:

> 1) The creation of a lien or other encumbrance subordinate to the lender's security instrument which does not relate to a transfer of rights of occupancy in the property;[21]
>
> 2) The creation of a purchase money security interest for household appliances;
>
> 3) A transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety;
>
> 4) The granting of a leasehold interest of three years or less not containing an option to purchase;[22]

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[15] 48 Fed. Reg. 21554, 21558 (1983).

[16] *Id.* at 21560.

[17] *Id.*

[18] Barad and Layden, *supra* note 4, at 148.

[19] 48 Fed. Reg. 21554, 21558 (1983).

[20] *Id.* at 21559.

[21] *Id.* The FHLBB closes any potential loophole created by this language by indicating that a contract for deed (Agreement of Sale) does not fall within this limitation.

[22] *Id.* Note, however, that the FHLBB stipulated that "the requirement of owner-occupancy

5) A transfer to a relative resulting from the death of a borrower;

6) A transfer where the spouse or children of the borrower becomes an owner of the property;

7) A transfer resulting from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property;

8) A transfer into an inter vivos trust in which the borrower is and remains a beneficiary and which does not relate to the transfer of rights of occupancy in the property; and

9) Any other transfer or disposition described in regulations prescribed by the Federal Home Loan Bank Board.

Subsection 8 is of particular interest to Hawaii because recent legislation has authorized transfers of property into land trusts.[23] One of the significant characteristics of this arrangement is that the beneficiary of the trust may sell his beneficial interest (which has been transformed into personal property by the creation of the land trust) in the property without the necessity of recording the transaction. Since notice to the lender could be given only with the consent of the beneficiary, there existed, under 341(d)(2), a clear means by which the borrower might circumvent the enforcement of a due-on-sale clause. To close this loophole the Board has modified the regulations to require that a borrower must provide reasonable means acceptable to the lender to assure timely notice of any subsequent transfer of the beneficial interest or change in occupancy.[24]

Finally, the regulations permit a Federal lender to concurrently charge a prepayment penalty upon exercise of due-on-sale clauses included in all loans except those originated between July 31, 1976 and May 10, 1983.[25] The Board, however, has clarified this provision by indicating that state, not federal law, will determine a lender's ability to impose a prepayment or equivalent fee upon due-on-sale acceleration.[26]

CONCLUSION

The uncertainty and controversy concerning the enforceability of due-on-sale clauses has finally been put to rest with the enactment of the Garn-St. Germain

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applies only at the time the loan securing the property was initially made, not at the time the owner enters into a lease with a tenant."

[23] Land Trust Act. HAWAII REV. STAT. § 558 (1978).

[24] 48 Fed. Reg. 21554, 21558 (1983).

[25] *Id.*

[26] *Id.* at 21559.

Depository Institutions Act of 1982. All lenders in Hawaii may now include and enforce such provisions in their real estate loans subject only to the equitable limitations enumerated in the Act and FHLBB regulations.

R. Lombardi

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