Selected Constitutional Issues Related to Growth Management in the State of Hawaii

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Introduction

In a democracy, issues concerning the rights of individuals and the fairness of the state fall ultimately within the province of the judicial system. In an effort to articulate concepts of social justice, courts attempt to balance the various aspects of a legal controversy. As a result, the judiciary in the United States has laid a foundation of social ideals that governs the lives of all Americans.

The courts have already addressed some of the legal ramifications of growth control measures enacted by various states. This paper discusses these decisions in the context of the future of the State of Hawaii. The authors analyze the constitutionality of three measures considered by Hawaii's legislature and its administrative agencies to curtail population growth in the islands, specifically, residency requirements, land use controls and automobile limitations.

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The most direct way to limit population growth is to prohibit or severely restrict any person from moving to a new locality. Thus, in 1977 and 1978 the Hawaii legislature enacted residency requirement bills designed to decrease the number of people moving to Hawaii by limiting access to public employment within the state.[1] The first section of this article will examine the legal issues raised by these requirements. Regulations affecting the use of land and the availability of housing are means for reducing the effects of population growth, and such restrictions are usually primary concerns for persons considering emigration to Hawaii. The land use policies of various state regulatory agencies will thus be analyzed in the second section. Automobile limitations are of paramount value in protecting the environment and are another method of controlling growth. Consequently, the mandate of the Hawaii legislature respecting vehicle limitations[2] and the response of the state's Department of Transportation to that mandate will be considered extensively in the final section of this paper.

I. Legal Issues Related to Durational Residency Requirements

A. Present Requirements in Hawaii: A Summary

The Hawaii Constitution and various state statutes have imposed a number of durational residency requirements for specific occupations, professions and public offices.[3] In 1977, however, the state legis-

1. 1978 Haw. Sess. Laws, act 101, *see* note 13, *infra*; 1977 Haw. Sess. Laws, act 211, *codified at* HAW. REV. STAT. tit. 7, § 78-1 (Supp. 1977) (repealed 1978), *see* note 7 *infra*.

2. HAW. REV. STAT. tit. 17, § 279A-9 (1976).

3. The list of professions and offices specifically so restricted is as follows:

One-Year Residency Requirement: Occupations	
Heads of Departments	HAW. REV. STAT. tit. 4, § 26-31 (1976)
Chiropractors	HAW. REV. STAT. tit. 25, § 442-2 (1976)
Dentists	HAW. REV. STAT. tit. 25, § 448-9 (1976)
Fumigators	HAW. REV. STAT. tit. 25, § 450-5 (1976)
Masseurs	HAW. REV. STAT. tit. 25, § 452-13 (1976)
Naturopaths	HAW. REV. STAT. tit. 25, § 455-3 (1976)
Private Detectives and Guards	HAW. REV. STAT. tit. 25, § 463-6 (1976)
Embalmers, Morticians & Funeral Directors	HAW. REV. STAT. tit. 25, § 469-1 (1976)
One-Year Residency Requirement: Board and Commission Members	
Motor Vehicle Industry Licensing Board	HAW. REV. STAT. tit. 25, § 437-5 (1976)
Boxing Commission	HAW. REV. STAT. tit. 25, § 440-2 (1976)
Cable Television Advisory Committee	HAW. REV. STAT. tit. 25, § 440G-13 (1976)
Cemetery & Mortuary Board	HAW. REV. STAT. tit. 25, § 441-18 (1976)
Chiropractic Board	HAW. REV. STAT. tit. 25, § 442-3 (1976)
Collection Agency Board	HAW. REV. STAT. tit. 25, § 443-2 (1976)
Contractors License Board	HAW. REV. STAT. tit. 25, § 444-3 (1976)

lature supplemented those laws with a new restrictive provision. In his State-of-the-State Address on January 25, 1977, Governor George R. Ariyoshi had identified "the problem of excessive population" as "central to nearly every problem in our State"; he had therefore proposed "a Constitutional amendment permitting States to establish residency requirements for new arrivals for publicly supported programs such as welfare assistance, public employment and housing."[4]

It was not clear whether the governor intended that the Hawaii legislature should adopt durational residency requirements on its own or whether representatives of the state should endeavor to have Congress propose an amendment to the United States Constitution. The governor had expressed the hope that "some of our sister states such as California, New York, and Florida which attract a large number of

Contractors License Board	HAW. REV. STAT. tit. 25, § 444-3 (1976)
Board of Electricians & Plumbers	HAW. REV. STAT. tit. 25, § 448E-2 (1976)
Elevator Mechanics' Board	HAW. REV. STAT. tit. 25, § 448H-3 (1976)
Hearing Aid Dealers & Fitters Board	HAW. REV. STAT. tit. 25, § 451A-3 (1976)
Board of Massage	HAW. REV. STAT. tit. 25, § 452-4 (1976)
Board of Examiners in Naturopathy	HAW. REV. STAT. tit. 25, § 455-4 (1976)
Board of Nurses	HAW. REV. STAT. tit. 25, § 457-3 (1976)
Nursing Home Administration Board	HAW. REV. STAT. tit. 25, § 457B-4 (1976)
Dispensing Opticians Board	HAW. REV. STAT. tit. 25, § 458-2 (1976)
Board of Optometry	HAW. REV. STAT. tit. 25, § 459-3 (1976)
Board of Osteopathy	HAW. REV. STAT. tit. 25, § 460-4 (1976)
Pest Control Board	HAW. REV. STAT. tit. 25, § 460J-2 (1976)
Board of Pharmacists	HAW. REV. STAT. tit. 25, § 461-2 (1976)
Board of Photography	HAW. REV. STAT. tit. 25, § 462-3 (1976)
Board of Private Detectives & Guards	HAW. REV. STAT. tit. 25, § 463-2 (1976)
Board of Psychologists	HAW. REV. STAT. tit. 25, § 465-4 (1976)
Board of Veterinary Medicine	HAW. REV. STAT. tit. 25, § 471-3 (1976)
Three-Year Residency Requirement	
State Senate	HAW. CONST. art. III, § 7
Hawaiian Homes Commission	Hawaiian Homes Commission Act of 1920, § 202
Board of Professional Engineers, Architects, Surveyors & Landscape Architects	HAW REV. STAT. tit. 25, § 464-6 (1976)
Real Estate Commission	HAW. REV. STAT. tit. 25, § 467-3 (1976)
Five-Year Residency Requirement	
Governor	HAW. CONST. art. IV, § 1
Board of Barbers	HAW. REV. STAT. tit. 25, § 438-3 (1976)
Board of Cosmetology	HAW. REV. STAT. tit. 25, § 439-3 (1976)
Board of Examiners of Dentistry	HAW. REV. STAT. tit. 25, § 448-5 (1976)
Ten-Year Residency Requirement	
State Judges	HAW. CONST. art. V, § 3
State Supreme Court Justices	HAW. CONST. art. V, § 3

4. State-of-the-State Address by Hon. George R. Ariyoshi, delivered before the Ninth State Legislature (Jan. 25, 1977).

migrants would join us in this effort."[5] He also envisioned, however, that "[a]t times the program I am proposing will put this State in direct confrontation with the present laws of this land and possibly even the Constitution of the United States."[6]

Whatever the governor's original intention, the Ninth State Legislature did pass act 211, which imposed durational residency requirements for public employment in Hawaii.[7] The act provided generally that every position in state and local governmental service would be filled by a person who has been a resident of the state for at least one

5. *Id.*

6. *Id.*

7. 1977 Haw. Sess. Laws, act 211, *codified at* HAW. REV. STAT. tit. 7, § 78-1 (Supp. 1977) (repealed 1978). The act reads in its entirety:

SECTION 1. Section 78-1, Hawaii Revised Statutes, is hereby amended to read as follows:

Sec. 78-1 Citizenship and residence of government officials and employees; exemptions. (a) All officers, whether elective or appointive, in the service of the government of the State or in the service of any county or municipal subdivision of the State shall be citizens of the United States and residents of the State for at least three years immediately preceding their appointment.

(b) All employees in the service of the government of the State or in the service of any county of [*sic*] municipal subdivision of the State shall be [residents of the State and a citizen, national or permanent resident alien of the United States.] citizens, nationals or permanent resident aliens of the United States and residents of the State for at least one year immediately preceding their application for employment.

(c) For the purpose of obtaining services which are essential to the public interest for which no competent person with the qualifications under subsection (b) applies within forty-five days after the first publication of an advertisement of the position or a notice of an examination therefor, which advertisement or notice has been published more than once, and not oftener than once a week, in a newspaper of general circulation in the State, a person without the qualifications may, upon prior certification by the state director of personnel services of [*sic*] the city and county director of civil service or the county personnel director, whichever is applicable, and with the approval of the chief executive officer for the State or the political subdivision concerned, be employed.

[(d) The requirement of subsection (b) of residence shall not apply to a female resident who marries a non-resident and continues to reside in the State.]

(d) The requirement of residency, as defined under subsection (b) above, shall not apply to a resident who was a resident of the State for at least one year immediately before marrying a non-resident and who continues to reside in the State.

(e) For the positions involved in the performance of services in planning and executing measures for the security of Hawaii and the United States, the employees shall be citizens of the United States[.] in addition to meeting the requirement of residency in subsection (b).

(f) The requirement of residency, as defined under subsection (b) and the requirements of subsection (c) shall not apply to persons recruited by the University of Hawaii under the authority of Chapter 304-11; provided however, that all persons recruited as Administrative/Professional/Technical personnel of the University of Hawaii shall be subject to the requirement of residency; provided further that appointment of persons to positions requiring highly specialized technical and scientific skills and knowledge may be made without consideration of residency.

SECTION 2. Severability. If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 3. Statutory material to be repealed is bracketed. New material is underscored. In printing this Act, the revisor of statutes need not include the brackets, the bracketed material or the underscoring.

year, unless no competent person who satisfied this requirement of residency applied for the position. The act further provided, however, that "[t]he requirement of residency, as defined [in this act], . . . shall not apply to . . . [faculty members] recruited by the University of Hawaii . . . ."[8] An exception was also made for state university administrative positions "requiring highly specialized technical and scientific skills and knowledge . . . ."[9] No other exceptions were included. Furthermore, the act retained a three-year durational residency requirement for "elective or appointive" state, county or municipal offices.[10]

On August 1, 1977, the case of *Nehring v. Ariyoshi*[11] was filed in federal district court on behalf of four plaintiffs by the American Civil Liberties Union of Hawaii, challenging the constitutionality of act 211. Later that month, Judge Samuel P. King issued a temporary injunction restraining the enforcement of the statute.[12] In 1978, the legislature repealed the durational residency requirement imposed by act 211 and adopted in its place act 101,[13] which requires that the same public em-

SECTION 4. This Act shall take effect upon its approval.

This legislation amended former HAW. REV. STAT. tit. 7, § 78-1 (1976). Subsection (a) of this prior law had previously been held unconstitutional by the state supreme court. York v. State, 53 Haw. 557, 561, 498 P.2d 644, 647 (1972).

8. HAW. REV. STAT. tit. 7, § 78-1(f) (Supp. 1977).

9. *Id.*

10. HAW. REV. STAT. tit. 7, § 78-1(a) (1976).

11. 443 F. Supp. 228 (D. Hawaii 1977).

12. In his subsequent opinion granting plaintiffs a preliminary injunction, Judge King concluded that "[i]n my opinion, the denial of the opportunity to apply for public employment does have a sufficient enough impact upon the right to travel to require that the statute be justified by a compelling state interest." *Id.* at 237. The state offered two justifications: the need to control population growth and the need to grant preferences in employment to long-term residents. Judge King dismissed the latter contention, asserting that act 211 was "clearly not tailored to perform this function." *Id.* at 239. As for the former contention, Judge King responded:

> The central Constitutional objection to the approach proposed by the defendant is that the state seeks to achieve its goal by keeping people out of Hawaii. Indeed, the defendant admits that this is the purpose of the statute. If people migrate to Hawaii despite the residency requirement then they will continue to use more water and take up space. In other words, the durational residency statute is an attempt to establish an interstate immigration policy. The Supreme Court has repeatedly stated that "to the extent the purpose of [such a law] is to inhibit the immigration of [people] generally, that goal is constitutionally impermissible." . . . This is not to say that the State is powerless to attack the problems it faces. It can constitutionally seek to control growth through the use of zoning and other, more enlightened tools of economic planning.

Id. at 238 (citing Memorial Hosp. v. Maricopa County, 415 U.S. 250, 263-64 (1974); Shapiro v. Thompson, 394 U.S. 618, 629 (1969)).

13. 1978 Haw. Sess. Laws, act 101. The act reads, in its entirety:

> SECTION 1. Section 78-1, Hawaii Revised Statutes, is amended to read:
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> Sec. 78-1 Citizenship and residence of government officials and employees; exemptions. (a) All officers, whether elective or appointive, in the service of the government of the State or in the service of any county or municipal subdivision of the State shall be citizens of the United States and residents of the State for at least three years immediately preceding their appointment.

ployees covered by the 1977 act must simply be residents of Hawaii at the time of their application for employment. However, in also granting

(b) All employees in the service of the government of the State or in the service of any county or municipal subdivision of the State shall be citizens, nationals or permanent resident aliens of the United States and residents of the State [for at least one year immediately preceding] at the time of their application for employment.

"Resident" means a person who is physically present in the State at the time he claims to have established his domicile in the State and shows his intent is to make Hawaii his permanent residence. In determining this intent, the following factors shall be considered:

(1) maintenance of a domicile or permanent place of residence in the state;

(2) absence of residency in another state.

(c) For the purpose of obtaining services which are essential to the public interest for which no competent person with the qualifications under subsection [(a)] (b) applies within forty-five days after the first publication of an advertisement of the position or a notice has been published more than once, and not oftener than once a week, in a newspaper of general circulation in the State, a person without the qualifications may, upon prior certification by the State director of personnel services or the city and county director of civil service or the county personnel director, whichever is applicable, and with the approval of the chief executive officer for the State or the political subdivision concerned, be employed.

(d) The requirement of residency, as defined under subsection (b) above, shall not apply to a resident who was a resident of the State [for at least one year immediately] before marrying a non-resident and who continues to reside in the State.

(e) For the positions involved in the performance of services in planning and executing measures for the security of Hawaii and the United States, the employees shall be citizens of the United States in addition to meeting the requirement of residency in subsection (b).

(f) The requirements of [residency, as defined under] subsection (b), (c), and (g) [and the requirements of subsection (c)] shall not apply to persons recruited by the University of Hawaii under the authority of [Chapter] section 304-11; provided that all persons recruited as Administrative/Professional/Technical personnel of the University of Hawaii shall be subject to the requirement of residency as defined under subsection (b) and the requirement of subsection (g); provided further that appointment of persons to positions requiring highly specialized technical [and] or scientific skills and knowledge may be made without consideration of residency.

(g) A preference shall be granted to State residents who have filed resident income tax returns within the State or who have been claimed as a dependent on such a return at the time of their application for employment with the State of any county or municipal subdivision of the State.

For residents applying for positions covered by chapters 76 and 77, the preference shall be accomplished as provided in section 76-23.

For residents applying for positions not covered by chapters 76 and 77, the preference shall be accomplished by giving first consideration to such residents, if all other factors are relatively equal."

SECTION 2. Section 76-23, Hawaii Revised Statutes, is amended to read as follows:

"Sec. 76-23 Filling vacancy. All [vacancies and new positions in] vacant civil service positions shall be filled in the manner prescribed in this part or in section 78-1.

Whenever there is a position to be filled, the appointing authority shall request the director of personnel services to submit a list of eligibles. The director shall thereupon certify a list of five or such fewer number as may be available, taken from eligible lists in the following order: first the promotional lists, second the reemployment lists and third the open-competitive lists; provided, that with respect to the eligibles under unskilled classes, the director shall certify all of the eligibles on such list. The director shall submit eligibles in the order that they appear on the eligible list; provided that if the last of the five eligibles to be certified is one of two or more eligibles who have identical examination scores, such two or more eligibles shall be certified notwithstanding the fact that more than five persons are thereby certified to fill a vacancy; and further provided that, for each eligible without resident preference certified, a resident who has filed a resident income tax return within the State or who has been claimed as a dependent on such a return, as provided by section 78-1, shall also be certified.

preferences *among* resident applicants to those who have previously filed resident state income tax returns, act 101 retains a durational element that has led the A.C.L.U. to threaten further litigation.[14]

B. The Constitutionality of Durational Residency Requirements

1. The Traditional Tests

In order to evaluate the validity of act 211, it is necessary to consider the permissibility of residency prerequisites in general. Durational residency requirements in Hawaii are unconstitutional if they are inconsistent with the provisions of either the Hawaii Constitution, as interpreted by the state's supreme court, or the United States Constitution, as interpreted by the United States Supreme Court.

In any case where there are three or more eligibles in one department whose names appear as eligibles on an interdepartmental list, upon the request of the appointing authority of such department such three or more names shall be certified to him as eligibles on an intradepartmental eligible list; but where the interdepartmental list has been in existence for more than six months and there are five or more persons in the department qualified for the class, the department may request an intradepartmental promotional examination, in which case the director shall hold either an interdepartmental or an intradepartmental promotional examination. The order in which eligibles are placed on eligible lists shall be fixed by rule. The appointing authority shall make the appointment only from the list of eligibles certified to him unless he finds no person acceptable to him on the list certified by the director, in which case he shall reject the list and request the director to submit a new list, in which event the director shall submit a new list of eligibles selected in like manner; provided that the appointing authority states his reasons in writing for rejecting each of the eligibles on the list previously certified to him by the director or, in case of the counties, by the civil service commission. Eligible lists, other than reemployment lists, shall be effective for one year but this period may be extended by the director.

An appointing authority may fill a vacant position in his department by promoting any regular employee in the department without examination if the employee meets the minimum class qualifications of the position to which he is to be promoted, and if the position is in the same or related series as the position held by the employee; provided, that when there is no material difference between the qualifications of the employees concerned, the employee with the longest government [*sic*] service shall receive first consideration for the promotion.

Any regular employee receiving any such promotion without examination shall be ineligible for a second such promotion without examination prior to his having completed one year of satisfactory service in the position to which he was so promoted, but he may at any time be eligible for a promotion to any position through examination.

An employee filling a permanent position temporarily vacant may be given a permanent appointment to the position if it later develops that the vacancy will be permanent, provided he was originally appointed from an appropriate eligible list and the appointing authority certifies that he has been performing the duties of the position in a satisfactory manner.

SECTION 3. Severability. If any provision of this Act, or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 4. Statutory material to be repealed is bracketed. New material is underscored. In printing this Act, the revisor of statutes need not include the brackets, the bracketed material, or the underscoring.

SECTION 5. This Act shall take effect upon its approval.

14. Honolulu Star-Bulletin, May 26, 1978, at A8, col. 3.

The Hawaii Constitution contains due process and equal protection clauses identical to those found in the Fourteenth Amendment to the United States Constitution.[15] In the past, the Hawaii Supreme Court has interpreted identical provisions of the state constitution as imposing stricter limitations on governmental actions than those imposed by the United States Supreme Court.[16] However, in *Nehring v. Ariyoshi*,[17] Judge King refused to abstain in order to permit the state courts to apply the provisions of the Hawaii Constitution on the ground that those provisions did *not* safeguard interests different from those protected by the United States Constitution.[18] The Hawaii Constitution also contains a section including "inalienable rights"—language that originated in the Declaration of Independence of the United States, but which was not repeated in the text of the federal Constitution:

> All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty and the pursuit of happiness, and the acquiring and possessing of property. These rights cannot endure unless the people recognize their corresponding obligations and responsibilities.[19]

Because many persons wishing to move to Hawaii may be motivated by "the pursuit of happiness," this provision might provide an

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15. HAW. CONST. art. 1, § 4.

16. *See, e.g.*, State v. Kaluna, 55 Haw. 361, 367-71, 520 P.2d 51, 58-59 (1974) (held right to be free from unreasonable searches and seizures under HAW. CONST. art. 1, § 5, requires that intrusion into the personal privacy of individuals by the state be no greater than what is absolutely necessary in light of surrounding circumstances, despite the United States Supreme Court's rulings in United States v. Robinson, 414 U.S. 218 (1973), and Gustafson v. Florida, 414 U.S. 260 (1973), which upheld complete body searches incident to a lawful custodial arrest for driving without a valid license); State v. Santiago, 53 Haw. 254, 261-67, 492 P.2d 657, 662-65 (1971) (held custodial admission by a criminal defendant not properly apprised of his rights under Miranda v. Arizona, 384 U.S. 436 (1966), could not be used to impeach the defendant when he testifies at trial, despite a contrary ruling in Harris v. New York, 401 U.S. 222 (1971); relied solely on HAW. CONST. art. 1, § 8). Indeed, in State v. Texeira, 50 Haw. 138, 433 P.2d 593 (1967), the state supreme court noted:

> [T]he Hawaii Supreme Court, as the highest court of a sovereign state, is under the obligation to construe the state constitution, not in total disregard of federal interpretations of identical language, but with reference to the wisdom of adopting those interpretations for our state. As long as we afford defendants the minimum protection required by federal interpretations of the Fourteenth Amendment to the Federal Constitution, we are unrestricted in interpreting the constitution of this state to afford greater protection.

Id. at 142 n.2, 433 P.2d at 597 n.2. *Accord*, Oregon v. Hass, 420 U.S. 714, 719 (1975); Lego v. Twomey, 404 U.S. 477, 489 (1972); Cooper v. California, 386 U.S. 58, 62 (1967). *See generally* Cades, *Judicial Legislation in the Supreme Court of Hawaii: A Brief Introduction to the "Knowne Uncertaintie" of the Law*, 7 HAW. B.J. 58, 61-62 (1970).

17. 443 F. Supp. 228 (D. Hawaii 1977). *See* notes 11-12 and accompanying text *supra*.

18. *Id.* at 232-34 (citing Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 598 (1976)).

19. HAW. CONST. art. 1, § 2.

independent basis for challenging the state's durational residency requirements.[20] Indeed, with respect to durational residency requirements for employment, one court has observed that "The right to work for a living in one's chosen occupation is for most people a prerequisite to the pursuit of happiness."[21] The Hawaii Supreme Court has not yet adopted this approach;[22] in *York v. State*,[23] it did not refer to the state charter at all in its opinion holding an earlier three-year durational residency requirement for public employment invalid under the United States Constitution.[24]

20. *Cf.* State v. Kantner, 53 Haw. 327, 337, 493 P.2d 306, 311-12 (1972) (Abe, J., concurring), *cert. denied*, 409 U.S. 948 (1972) (said "the right to the 'enjoyment of life, liberty and the pursuit of happiness' includes smoking of marijuana"); State v. Shigematsu, 52 Haw. 604, 609-10, 483 P.2d 997, 1000 (1971) (said "life, liberty and the pursuit of happiness" encompass the right of movement and the right of association).

21. Keenan v. Board of Law Exam'rs, 317 F. Supp. 1350, 1362 (E.D.N.C. 1970). *Cf.* Acanfora v. Board of Educ., 359 F. Supp. 843, 850 (D. Md. 1973), *aff'd*, 491 F.2d 498 (4th Cir.), *cert. denied*, 419 U.S. 836 (1974) (cited the right to engage in a career as essential to the orderly pursuit of happiness).

22. *But cf.* State v. Shigematsu, 52 Haw. 604, 483 P.2d 997 (1971). That case involved a challenge to HAW. REV. STAT. tit. 37, § 746-6 (1968) (repealed 1973), which made it a misdemeanor to be present in a barricaded place that was being used for gambling purposes. The state supreme court observed that the statute ran afoul of HAW. CONST. art. 1, § 2, which was said to encompass the freedoms of movement and association. Of these two freedoms it was asserted:

> Also, we believe the importance of these fundamental rights is coming more and more to the foreground in our modern mobile and fluid society. Thus, it would be utmost folly to underestimate the influence of these two freedoms in our free society. Freedom would be incomplete if it does not include the right of men to move from place to place, to walk in the fields in the country or on the streets of a city, to stand under open sky in a public park and enjoy the fresh air, to lie down on a public beach and enjoy a sunbath, to visit a friend in his home and enjoy an evening together, and the right to associate with others in the enjoyment of an avocation or a vocation.

52 Haw. at 610, 483 P.2d at 1001. It is not entirely clear whether this "freedom of movement" espoused by the court encompasses interstate travel. Moreover, the state court has not clarified or expanded this language in *Shigematsu* during succeeding years. *See, e.g.*, State v. Baker, 56 Haw. 271, 280-82 & n.21, 535 P.2d 1394, 1399-1401 & n.21 (1975) (refused to find possession of contraband marijuana to be a fundamental right); State v. Cotton, 55 Haw. 138, 142, 516 P.2d 709, 711-12 (1973) (sustained law criminalizing the act of driving a motorcycle without wearing a safety helmet).

23. 53 Haw. 557, 498 P.2d 644 (1972).

24. *Id.* at 561, 498 P.2d at 647. In *York*, the state circuit court had held that the three-year residency requirement for state government employees, embodied in HAW. REV. STAT. tit. 7, § 78-1(a) (1976) (amended 1977 and 1978), was an unconstitutional violation of the equal protection clause of the Fourteenth Amendment, so its validity under that provision was the only issue presented on appeal. The state supreme court found that "[t]he statute create[d] an arbitrary classification without rational relation to a public employee applicant's capabilities of performing satisfactorily for the State." 53 Haw. at 560, 498 P.2d at 647. *See also* Potts v. Justices of Supreme Court, 332 F. Supp. 1392 (D. Hawaii 1971). In that case, a three-judge federal district court held a six-months durational residency requirement for taking the Hawaii bar examination invalid under the federal Constitution without mentioning its possible invalidity under the state constitution. *Id.* at 1398.

With regard to the latter charter, the critical provision for durational residency requirements is the equal protection clause of the Fourteenth Amendment. Probably the clearest statement of the tests governing the application of this clause was articulated by the United States Supreme Court in *Memorial Hospital v. Maricopa County*.[25] That decision struck down an Arizona durational residency requirement for non-emergency free medical care,[26] concluding that the requirement

> creates an "invidious classification" that impinges on the right of interstate travel by denying newcomers "basic necessities of life." Such a classification can only be sustained on a showing of a compelling state interest. Appellees have not met their heavy burden of justification, or demonstrated that the State, in pursuing legitimate objectives, has chosen means which do not unnecessarily impinge on constitutionally protected interests.[27]

On the basis of this formulation, it seems reasonable to conclude that a durational residency requirement will pass constitutional muster only if

25. 415 U.S. 250 (1974).

26. In *Maricopa County*, one Henry Evaro, an indigent suffering from chronic asthma, moved from New Mexico to Arizona in June of 1971. In July of that same year, he suffered a severe respiratory attack and was placed in Memorial Hospital, a nonprofit community facility. Memorial notified the Maricopa County Board of Supervisors, requesting that Evaro be transferred to a county hospital and that the county reimburse it for services already rendered. Under Arizona law, while individual county governments had a mandatory duty to care for the indigent sick, that duty was triggered only if the sick person had been a resident of the county for a year or more. ARIZ. REV. STAT. ANN. §§ 11-291, 11-297A (Supp. 1973-74) (repealed in part 1974). While a state trial court had found the residency requirement invalid, the state supreme court reversed this ruling, claiming that, absent such a requirement, the tax burden on county property owners would be unduly severe and waiting periods to gain access to county medical facilities would be prohibitively lengthy. Maricopa County v. Superior Court, 108 Ariz. 373, 376, 498 P.2d 461, 464 (1972).

27. 415 U.S. at 269. The "right to travel" does not explicitly appear in the United States Constitution, but it has been given extensive recognition by the Court over the years. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969); United States v. Guest, 383 U.S. 745, 757-58 (1966); Kent v. Dulles, 357 U.S. 116, 125-26 (1958); Twining v. New Jersey, 211 U.S. 78, 97 (1908). The right to travel freely within one's nation has also been recognized explicitly in article twelve of the International Covenant on Civil and Political Rights, which was written and approved by the United Nations General Assembly in 1966. This Covenant has been formally ratified by forty-two nations and is now a treaty binding those nations to the principles of human rights located therein. President Carter signed the Covenant on behalf of the United States in October 1977 and submitted it to the Senate for ratification in 1978. *See* Fischer, *The International Protection of Human Rights*, in THE CHANGING UNITED NATIONS: OPTIONS FOR THE UNITED STATES 45, 47 (D. Kay ed. 1977).

Article twelve of this Covenant reads as follows:

> a. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
>
> b. Everyone shall be free to leave any country, including his own.
>
> c. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security,

it neither interferes with interstate travel by denying newcomers the basic necessities of life nor penalizes such travel by denying some other basic right, such as that of the franchise,[28] or if it is justified by a state objective that is "legitimate" or "compelling" and that cannot be served by other means that would result in less interference with interstate travel.

2. Effects of Durational Residency Requirements

The United States Supreme Court's decisions in cases involving constitutional challenges to residency requirements thus appear to hinge on both the purpose for which the requirement has been imposed and the nature of the deprivation exacted upon the immigrant plaintiff. In *Memorial Hospital v. Maricopa County*,[29] the Court construed its earlier decision in *Shapiro v. Thompson*,[30] which had held durational residency requirements for state welfare benefits unconstitutional, as one concerning efforts by a state to interfere with the constitutional right of interstate travel by denying the migrant some of the "basic 'necessities of life.' "[31] It did so despite the fact that two dissenting justices in *Shapiro* had pointed out that the appellees in that case had found alternative means of assistance.[32] The Court in *Maricopa County* found

> public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant. . . .

International Covenant on Civil and Political Rights, art. 12, *reprinted in* 61 AM. J. INT'L LAW 870, 874-75 (1967). The word "State" in paragraph (a) is used to refer to the nation rather than individual states within the nation, and thus this Article appears to guarantee a right to travel freely within the United States. The full extent of the restrictions that are permitted under paragraph (c) is unclear. The Soviet Union, for instance, does carefully restrict the travel of its citizens even though it has formally ratified the International Covenant.

28. *See* Dunn v. Blumstein, 405 U.S. 330, 342 (1972). *Dunn* invalidated a Tennessee law requiring one year's residency within the state and three months' residency within a county as prerequisites for registering to vote. TENN. CODE ANN. §§ 2-201, 2-304 (1971) (amended 1972). The Court found that the franchise is a " 'fundamental political right, . . . preservative of all rights.' " 405 U.S. at 336 (quoting Reynolds v. Sims, 377 U.S. 533, 562 (1964)). It also concluded that the constitutional right to travel was impinged by the Tennessee law, *id.* at 338. No compelling state interest was found to justify such infringements. *See id.* at 343-60.

29. 415 U.S. 250 (1974). *See* notes 25-27 *supra.*

30. 394 U.S. 618 (1969).

31. 415 U.S. at 259. *See* Shapiro v. Thompson, 394 U.S. 618, 627 (1969).

32. *Shapiro* consolidated three separate suits. The first involved a pregnant unwed mother denied assistance under Connecticut's Aid to Families with Dependent Children (AFDC) program because she had not lived within the state for one year before filing her application. 394 U.S. at 622-23. The second involved four appellees who had applied for and been denied either AFDC assistance or benefits under an Aid to the Permanently and Totally Disabled program because they failed to meet the District of Columbia's one-year residency requirement. *Id.* at 623-25. The third suit involved two appellees denied AFDC assistance under Pennsylvania's welfare program because of a similar failure to meet a one-year prerequisite of residence. *Id.* at 625-27. But as two

it "clear that medical care is as much 'a basic necessity of life' to an indigent as welfare assistance,"[33] and thus refused to distinguish between emergency and non-emergency care.[34]

In contrast, the Court in *Shapiro* had stated that "waiting period" requirements for "determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth . . . may not be penalties upon the exercise of the constitutional right of interstate travel."[35] Although the Court subsequently determined that durational residency requirements for exercise of the franchise did penalize the right to travel,[36] it indicated in *Vlandis v. Kline*[37] that a reasonable durational requirement (*i.e.*, one year) could be imposed as a condition to obtaining low "resident" tuition rates.[38] Similarly, in *Sosna v. Iowa*,[39] the most recent Supreme Court decision dealing with durational residency requirements, the Court upheld a one-year requirement for obtaining a divorce, in part because the plaintiff was not "irretrievably foreclosed" but only "delayed" in being able to obtain the benefit she sought.[40]

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dissenters noted, "[t]he burden [on interstate travel] is uncertain because indigents who are disqualified from categorical assistance by residence requirements are not left wholly without assistance. All of the appellees in these cases found alternative sources of assistance after their disqualification." *Id.* at 650 n.5 (Warren, C.J., dissenting, joined by Black, J.).

33. 415 U.S. at 259.

34. *Id.* at 260-61.

35. 394 U.S. at 638 n.21.

36. *See* Dunn v. Blumstein, 405 U.S. 330 (1972). *See* note 28 *supra.*

37. 412 U.S. 441 (1973). *Vlandis* invalidated a Connecticut law requiring nonresidents enrolled in state universities to pay tuition fees at higher rates than state residents and creating an irrebuttable presumption of nonresidency based on the legal address of a married student who was outside the state at the time of application for admission or a single student who was outside the state at any time during the preceding year. CONN. GEN. STAT. § 10-329(b) (Supp. 1969), *amended*, 1971 Conn. Public Act No. 5, §§ 126(a)(2), 126(a)(3). The court deemed this presumption violative of due process. 412 U.S. at 453.

38. 412 U.S. at 452-54. In support of this proposition, the Court cited Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd summarily*, 401 U.S. 985 (1971), which had upheld a Minnesota tuition scheme similar to that involved in *Vlandis* except that the former plan allowed a student to rebut a presumption of nonresidency by submitting proof of domicile within the state for one year. 412 U.S. at 452-53 n.9.

39. 419 U.S. 393 (1975).

40. *Id.* at 406. In *Sosna*, the appellant, domiciled in New York, separated from her husband in 1971. In August, 1972, she moved to Iowa and, in the following month, petitioned a county court in that state for a dissolution of her marriage. The petition was denied pursuant to IOWA CODE § 598.6 (1973) (amended 1976), which required that a person filing such a petition have lived within the state at least one year. After noting that the states have virtually exclusive authority over the regulation of domestic relations, 419 U.S. at 404, the Court held that "the state interest in requiring that those who seek a divorce from its courts be genuinely attached to the State, as well as a desire to insulate divorce decrees from the likelihood of collateral attack, requires a different resolution of the constitutional issue presented than was the case in" *Shapiro,*

Whether a durational residency requirement for employment infringes upon a fundamental right for purposes of constitutional analysis is uncertain at best. The Supreme Court has indicated that a person's ability to pursue his or her vocation is protected by the Fourteenth Amendment.[41] In *Massachusetts Board of Retirement v. Murgia*,[42] however, the Court upheld a mandatory retirement law for state police officers, stating: "This Court's decisions give no support to the proposition, that a right of governmental employment *per se* is fundamental."[43] That this conclusion might in the future be limited to the circumstances of the *Murgia* case itself—*i.e.*, to the "non-fundamental" nature of retaining a government position instead of receiving a governmental pension—is at least a possibility.

Moreover, state courts have differed over whether the ability to obtain a position of public employment is a fundamental interest. For example, in *York v. State*,[44] the Hawaii Supreme Court referred to a "fundamental interest" in "the right to work and thereby sustain one's self and family," in striking down a durational residency requirement for public employment.[45] Similarly, in *State v. Wylie*,[46] the

Dunn and *Maricopa County*. *Id.* at 409. *Vlandis* was distinguished because the Court asserted that "[a]n individualized determination of physical presence plus the intent to remain, which appellant apparently seeks, would not entitle her to a divorce even if she could have made such a showing." *Id.*

41. *See* Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

42. 427 U.S. 307 (1976).

43. *Id.* at 313. In *Murgia*, Massachusetts law prescribed that uniformed state police officers had to retire at age fifty. MASS. GEN. LAWS ch. 32, § 26(3)(a) (1966). The Court concluded that strict scrutiny of the classification thereby created was unnecessary because neither interference with a fundamental right nor the disadvantaging of a suspect class was present. 427 U.S. at 312. After finding no fundamental right, the Court also claimed no suspect class existed, asserting that the aged "unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Id.* at 313. Under the rational basis test, the Massachusetts law was said to be permissible because the physical ability necessary to adequate preformance as a police officer generally declines with age. *Id.* at 315. Even Justice Marshall's dissent did not assert that employment could be a fundamental right; rather, he argued that the age classification constituted "the height of irrationality." *Id.* at 327. (Marshall, J., dissenting). *See also* Nyquist v. Mauclet, 432 U.S. 1, 13 (1977) (Burger, C.J., dissenting) (in a case involving state discrimination against certain classes of resident aliens, the Chief Justice argued that the particular deprivation involved (the denial of state tuition scholarship benefits) should be distinguished from deprivations of "the essential means of economic survival.")

44. 53 Haw. 557, 498 P.2d 644 (1972). *See* notes 23-24 and accompanying text *supra*.

45. *Id.* at 560, 498 P.2d at 646. As noted earlier, *see* note 24 *supra*, the actual holding in *York* was premised on the theory that the statute involved in that case could not be sustained under even the rational basis level of scrutiny. The court in *York* had cited Dunn v. Blumstein, 405 U.S. 330 (1972), to support the proposition that "a fundamental interest as the right to work and thereby sustain one's self and family cannot be impinged absent a showing of a rational

Alaska Supreme Court also held a one-year durational residency requirement for public employment unconstitutional under the equal protection clauses of both the state and federal constitutions, relying on the United States Supreme Court's decision in *Dunn v. Blumstein*[47] to support the finding that the requirement served to "penalize" interstate travel.[48] The state court did not, however, undertake any analysis of whether equal opportunity for public employment is a fundamental right. Subsequently, in *Hicklin v. Orbeck*,[49] the Alaska Supreme Court reaffirmed its ruling in *Wylie* and once again struck down a one-year durational residency requirement for employment connected with the development of the Alaska pipeline.[50] However, it also relied on the

relationship to a countervailing legitimate interest on the part of the State." 53 Haw. at 560, 498 P.2d at 646 (footnote omitted). Subsequently, however, in Nelson v. Miwa, 56 Haw. 601, 546 P.2d 1005 (1976), the Hawaii Supreme Court retrenched somewhat. *Nelson* involved a challenge to the retirement policy announced by the Board of Regents of the University of Hawaii, which permitted a succession of one-year appointments for faculty members between the ages of sixty-five and seventy upon a demonstration that the services of the person in question were needed; upon reaching age seventy, however, retirement was mandatory. *Id.* at 602-03, 546 P.2d at 1007. The court noted that in light of the fact that the state legislature had deemed age to be a suspect classification, *see* HAW. REV. STAT. tit. 20, § 349-6 (a) (1976), and in light of the fact that the appellant was not reappointed solely because his services were not determined to be essential, the university's policy was "not reasonably related to a state interest and [was] totally arbitrary." 56 Haw. at 612, 546 P.2d at 1013. In the course of so holding however, the court said:

> In *York*, this court, applying federal constitutional law as explained in *Dunn v. Blumstein* . . . unanimously agreed that the rational basis test was not "easily *met by the State*," . . . in the case of "a fundamental interest (which) . . . cannot be impinged absent a showing . . . *on the part of the State*." . . . The decision striking the requirement as unconstitutional was based upon the finding that a rational basis had not been demonstrated. . . . The rationale set forth in *Dunn* has since been relegated to minority status by *San Antonio School District v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973). Accordingly, the reasoning in *York* is not presently viable as a matter of federal constitutional law.

56 Haw. at 605 n.6, 546 P.2d at 1009 n.6 (emphasis in original).

46. 516 P.2d 142 (Alaska 1973).

47. 405 U.S. 330 (1972).

48. 516 P.2d at 147-48. Indeed, the court in *Wylie* focused on the fact that the state's asserted goal in enacting the durational residency requirement in question (that of reducing unemployment) could have been met by less drastic means. According to the court, it was not even clear that the prerequisite of residence would further the asserted goal since unemployment in Alaska was said to be caused by lack of education and vocational training. *Id.* at 149 & n.14.

49. 565 P.2d 159 (Alaska 1977), *rev'd in part*, 46 U.S.L.W. 4773 (U.S. June 22, 1978). For the United States Supreme Court's decision, *see* notes 316-332 and accompanying text *infra*.

50. The law in question, ALASKA STAT. § 38.40 (1976), required that all oil and gas leases, easements for oil or gas pipelines and unitization agreements, contain a clause providing that qualified Alaska residents be hired in preference to nonresidents. Based on these facts, the case was distinguishable from *Wylie* in that: (1) pipeline jobs are mostly in rural areas and workers therefore would not have to relocate themselves permanently, (2) the state initiated a training program for unskilled Alaskans in connection with pipeline employment, a fact that caused it to assert that the training program would be imperilled if employment preferences were not granted and (3) the jobs covered by Alaska Hire were all of short durational nature. 565 P.2d at 164.

Supreme Court's *Murgia* decision to support the assertion that there is no "fundamental right to work."[51] Perhaps the most persuasive precedent to support a contention that durational residency requirements for public employment neither interfere with nor penalize interstate travel, however, is the decision of the Supreme Judicial Court of Massachusetts in *Town of Milton v. Civil Service Commission*.[52] The court in that case upheld a preference for one-year residents of particular cities or towns in being appointed to the police forces of those localities, stating:

> We conclude that the denial of equal treatment on civil service lists for possible appointments to local police forces does not rise to the level of a denial of necessities of life or a fundamental political right. It is not a penalty on the "right to travel" and therefore need not be justified by a compelling State interest.

Nevertheless, the state court in *Hicklin* said that to the extent that the Alaska Hire Law defined bona fide residency too broadly, it was invalid. *Id.* at 165. *See generally* Alleyne, *Constitutional Restraints on the Preferential Hiring of Alaskan Residents for Oil Pipeline Construction*, 2 U.C.L.A.-ALASKA L. REV. 1 (1972); Comment, *Durational Residency Requirements: The Alaskan Experience*, 6 U.C.L.A.-ALASKA L. REV. 50 (1976).

51. 565 P.2d at 166. The Court distinguished three leading decisions finding that employment is a fundamental right, Truax v. Raich, 239 U.S. 33, 41 (1915); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 17, 485 P.2d 529, 539, 95 Cal. Rptr. 329, 339 (1971); and Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 579, 456 P.2d 645, 654, 79 Cal. Rptr. 77, 86 (1969). *Purdy* and *Truax* were rejected because they involved laws discriminating against aliens, a suspect classification to begin with; *Sail'er Inn* was differentiated because it involved employment discrimination based on sex. 565 P.2d at 166 n.11. Indeed, after *Purdy* and *Sail'er Inn*, the California Supreme Court declined to apply strict scrutiny to laws establishing qualifications for the practice of medicine. D'Amico v. Board of Medical Exam'rs, 11 Cal. 3d 1, 23-24, 520 P.2d 10, 22-23, 112 Cal. Rptr. 786, 799-800 (1974). *Accord*, Ganschow v. Ganschow, 14 Cal. 3d 150, 158, 534 P.2d 705, 709-10, 120 Cal. Rptr. 865, 870 (1975) (upheld statute creating two differently-treated classifications of child support obligations); Naismith Dental Corp. v. Board of Dental Exam'rs, 68 Cal. App. 3d 253, 260, 137 Cal. Rptr. 133, 136 (1977) (sustained statute limiting the number of places at which a dentist could practice unless the dentist was present at such place of practice at least 50% of the time during which it is open for business); California Chiropractic Ass'n v. Board of Administration, 40 Cal. App. 3d 701, 705, 115 Cal. Rptr. 286, 289 (1974) (upheld statute differentiating indirectly between physicians and chiropractors by authorizing disability policies to carry provisions that physiotherapeutic services would be paid only if rendered pursuant to the direction of one certified as a physician).

As the Alaska court in *Hicklin* noted, *Truax*, which involved a successful challenge to a state constitutional provision requiring employers to hire native-born citizens for at least 80% of their work forces, is distinguishable because it concerned discrimination against aliens. Moreover, even the United States Supreme Court in *Truax* observed that in some instances the state may have a legitimate special interest in denying aliens access to some forms of employment. Truax v. Raich, 233 U.S. at 39-40. Although the Court has questioned this "special interest" exception, *see* Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 604 (1976), it has most recently indicated that the exception is alive and well, in a case sustaining a New York law limiting appointment of members of the state police force to United States citizens. Foley v. Connelie, 98 S. Ct. 1067, 1072-73 (1978).

52. 365 Mass. 368, 312 N.E.2d 188 (1974).

> It is certainly true that the opportunity to earn a living is a fundamental right in our society. . . . But the right to earn a living is not at stake here. It is an equally basic axiom that there is no right to public employment. . . . Many years have passed since the decision of this court in *McAuliffe v. Mayor and Bd. of Aldermen of New Bedford*, 155 Mass. 216 [29 N.E. 517] (1892), but we believe Mr. Justice Holmes's observation at p. 220 of that opinion is still basically true: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."
>
> . . . .
>
> . . . [T]he burden which this statutory scheme imposes on those who have recently exercised their right to travel comes down to this: they may be placed at a relative disadvantage to one-year residents in the competition for a job to which they have no vested right. We conclude that this burden cannot be regarded as such a drastic deprivation of the rights of citizenship or the means of maintaining life as to trigger the extremely vigorous scrutiny of legislation implicit in the compelling State interest test.[53]

As a durational residency requirement, Hawaii's act 211 was particularly vulnerable to constitutional attack because it exempted a relatively small number of highly specialized positions that would probably be perceived as "occupations-of-choice," while it imposed the requirement of residency for the broad range of lower-level administrative and public works jobs that would represent "last ditch" employment opportunities for persons who would otherwise have to seek welfare benefits in order to survive.[54] Yet, as a practical matter, this exemption would appear to be the only sensible method to achieve the goal of reducing significantly in-migration without also impairing seriously the state's governmental functions. Framing the issue in *Nehring v. Ariyoshi*[55] as "whether or not Hawaii's statute . . . affects the right to travel in a significant way,"[56] Judge King concluded:

> At the hearing on the motion for a preliminary injunction, Robert Schmitt, a state statistician called by the defendant, testified that approximately 12% of the jobs available in Hawaii are with the State

53. *Id.* at 372-74, 312 N.E.2d at 192-93. The court therefore upheld the classification under a "substantial relationship" test, defined as follows:

> The public employer must, we think, in order to justify the use of a means of selection shown to have a racially disproportionate impact, demonstrate that the means is in fact substantially related to job performance. It may not, to state the matter another way, rely on any reasonable version of the facts, but must come forward with convincing facts establishing a fit between the qualification and the job.

Castro v. Beecher, 459 F.2d 725, 732 (1st Cir. 1972), *quoted in* 365 Mass. at 377, 312 N.E.2d at 195. The court in *Milton* simply extended the standard used in certain racial classification cases to the facts before it.

54. See notes 7-10 and accompanying text *supra.*

55. 443 F. Supp. 228 (D. Hawaii 1977). *See* notes 11-12 and accompanying text *supra.*

56. *Id.* at 235 n.15.

> and local government. There is no question in my mind that the forced inability of a new resident to apply for 12% of the available jobs is a penalty, particularly for those people who are generally trained for work performed primarily by government. Even though private jobs are still available, the universe of potential jobs is smaller. . . . With the exception of those with inherited wealth or those who are on the public dole, employment is the only way for people to provide themselves with the "necessities of life."[57]

One promising approach for protecting durational residency requirements from constitutional attack would be to identify a "benchmark" of public benefits that Americans can generally expect to find in moving from state to state thereby ensuring such that the denial to Hawaiian newcomers of only those benefits that exceed this benchmark would neither interfere with nor penalize interstate travel. Thus, for example, it could be argued that for the state to impose durational residency requirements for only those welfare benefits that exceed the national average, adjusted for Hawaii's higher cost of living, or for the state to prescribe waiting periods for only the public works jobs in excess of those provided on an average per capita basis by other states, would amount to no more than a policy of not encouraging disproportionate interstate travel to Hawaii.[58]

Careful analysis is also required to test the constitutional validity of durational residency prerequisites for private occupations or professions that were established prior to act 211. Some courts have viewed such requirements as interferences with fundamental rights,[59] but others have followed the suggestion in *Shapiro v. Thompson*[60] that they need not be so viewed.[61]

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57. *Id.* at 237 (footnote omitted).

58. By contrast, one *un*promising approach is embodied in a proposal known as the Hawaii Act, which would rigidly regulate movement to the islands and would restrict in-migration to those who had jobs arranged before they arrive. Not only might this approach infringe the right of interstate travel, *see* notes 25-28 and accompanying text *supra*, but it might also be violative of the equal protection clause of the Fourteenth Amendment, in that the restriction would seem to favor professional people who might more easily be able to arrange for employment in advance over the poor who rarely could. *See* Edwards v. California, 314 U.S. 160, 175 (1941).

59. *See, e.g.*, Lipman v. Van Zant, 329 F. Supp. 391, 401-04 (N.D. Miss. 1971) (invalidated one-year residency requirement for taking the state bar exam); Webster v. Wofford, 321 F. Supp. 1259, 1262 (N.D. Ga. 1970) (same); Keenan v. Board of Law Exam'rs, 317 F. Supp. 1350, 1361-62 (E.D.N.C. 1970) (same).

60. 394 U.S. 618 (1969). *See* note 35 and accompanying text *supra*.

61. *See, e.g.*, Kline v. Rankin, 352 F. Supp. 292, 294-95 (N.D. Miss. 1972), *rev'd on other grounds*, 489 F.2d 387 (5th Cir. 1974) (in dictum, indicated a ninety-day requirement for taking a state bar exam would be valid); Suffling v. Bondurant, 339 F. Supp. 257, 259-60 (D.N.M.), *aff'd sub nom.* Rose v. Bondurant, 409 U.S. 1020 (1972) (sustained six-months' residency requirement for admission to the bar). *Cf.* Shenfield v. Prather, 387 F. Supp. 676, 685-86 (N.D. Miss. 1974) (sustained diploma privilege exempting graduates of state university law schools from taking bar

The courts are also split as to the effect and constitutionality of durational residency requirements for members of state boards and commissions and for state offices. The Hawaii Supreme Court, for example, in a decision after *Shapiro v. Thompson*[62] but before *Dunn v. Blumstein*[63] and *Memorial Hospital v. Maricopa County*,[64] applied a "rational basis" test to uphold the constitutionality of a three-year residency requirement for the state house of representatives, without considering whether such a requirement interfered with or penalized interstate travel.[65] In contrast, the California Supreme Court held unconstitutional a two-year durational residency requirement for members of the city council of Santa Cruz in a decision rendered after *Dunn*. The court noted with respect to the appropriate standard of review:

> [I]t is abundantly clear that durational residence requirements imposed as a precondition to candidacy for public office must be tested by the "strict scrutiny" test, either because . . . the right to be a can-

exam); Huffman v. Montana Supreme Court, 372 F. Supp. 1175, 1182-83 (D. Mont.), *aff'd*, 419 U.S. 955 (1974) (same); Aronson v. Ambrose, 366 F. Supp. 37, 43-44 (D.V.I. 1972) (sustained requirement that bar applicant allege intent to reside and practice in Virgin Islands); Brown v. Supreme Court of Virginia, 359 F. Supp. 549, 557-58 (E.D. Va. 1973) (sustained rule requiring foreign attorneys seeking to practice in Virginia to become permanent residents and allege intent to practice within the state).

62. 394 U.S. 618 (1969). *See* notes 30-33 and accompanying text *supra.*

63. 405 U.S. 330 (1972). *See* note 28 *supra.*

64. 415 U.S. 250 (1974). *See* notes 25-27 and accompanying text *supra.*

65. *See* Hayes v. Gill, 52 Haw. 251, 473 P.2d 872 (1970). Indeed, when the majority in *Hayes* came to deal with issues raised under the federal Constitution, it dealt primarily with the problems raised by the case of Kramer v. Union Free School Dist., 395 U.S. 621 (1969). The court observed that prior to *Kramer*, the classification in question would be justified by a state's assertion of merely a rational basis. 52 Haw. at 258, 473 P.2d at 877. *Kramer*, however, had invalidated a New York law prohibiting residents otherwise eligible to vote in state and federal elections from voting in certain school district elections unless they either owned or leased realty in the district or were parents of children in local public schools; in so doing, the Court focused upon whether the law furthered a compelling state interest. 395 U.S. at 630-33. But the Hawaii Supreme Court distinguished *Kramer* by observing that the case involved an infringement of the right to vote whereas subsequently the United States Supreme Court had indicated in Turner v. Fouche, 396 U.S. 346, 362 (1970), that a statute restricting membership on school boards to freeholders need only be justified by a rational basis. In his dissent in *Hayes*, Justice Levinson pointed out not only that the United States Supreme Court had held that restrictions on a voter's choice of candidates infringe the rights of that voter just as much as a flat denial of the franchise, Powell v. McCormack, 395 U.S. 486, 547 (1969); Williams v. Rhodes, 393 U.S. 23, 31 (1968), but also that, after *Turner*, the Court had struck down a decision by the Maryland County Registry Board denying the vote to occupants of federal enclaves within the state and, in doing so, had said that the residence requirement thereby created would be subjected to a "close" level of scrutiny, Evans v. Cornman, 398 U.S. 419, 422 (1970). *See* 52 Haw. at 267-71, 473 P.2d at 882-84 (Levinson, J., dissenting). *See generally* Gordon, *The Constitutional Right to Candidacy*, 91 POL. SCI. Q. 471 (1976). Even Justice Levinson, however, avoided discussion of possible impingements on the right of interstate travel.

> didate for public office is a fundamental right in itself or because as held in the cases discussed above, such restrictions on the right to be a candidate impinge on other fundamental rights, namely the right to vote and the right to travel.[66]

A subsequent decision by a three-judge federal district court in New Hampshire, *Chimento v. Stark*,[67] found otherwise, sustaining a seven-year durational residency requirement for the office of state governor. In that case, the court rested its ruling in part on a determination that the requirement merely delayed the plaintiff's candidacy[68] and in

66. Thompson v. Mellon, 9 Cal. 3d 96, 102, 507 P.2d 628, 633, 107 Cal. Rptr. 20, 25 (1973). As authority for the proposition that the right to hold office is "fundamental," the state supreme court cited its own prior decisions in Zeilenga v. Nelson, 4 Cal. 3d 716, 484 P.2d 578, 94 Cal. Rptr. 602 (1971) (holding five-year residency requirement for board of supervisors imposed by the Butte County charter infringed a fundamental right in violation of the Fourteenth Amendment) and Camara v. Mellon, 4 Cal. 3d 714, 484 P.2d 577, 94 Cal. Rptr. 601 (1971) (holding three-year residency requirement for councilmanic candidates in Santa Cruz invalid). 9 Cal. 3d at 98-99, 507 P.2d at 630-31, 107 Cal. Rptr. at 22-23. It also cited the decision of Bullock v. Carter, 405 U.S. 134 (1972), in which it was stated with respect to a Texas scheme exacting filing fees of candidates:

> [T]he Court has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review. However, the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters. . . . [t]he Texas system creates barriers to candidate access to the primary ballot, thereby tending to limit the field of candidates from which voters might choose.
>
> . . . .
>
> Because the Texas filing-fee scheme has a real and appreciable impact on the exercise of the franchise, and because this impact is related to the resources of the voters supporting a particular candidate, we conclude . . . that the laws must be "closely scrutinized" and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster.

Id. at 142-44. From this language, it might be inferred that restrictions on candidacy are not subject to strict scrutiny. However, the California Supreme Court chose instead to rely on a number of federal decisions holding to the contrary, either because the challenged restrictions impinged the right to vote, the right to travel or both. *See, e.g.*, Green v. McKeon, 468 F.2d 883, 884-85 (6th Cir. 1972) (invalidated two-year residency requirement for all elective offices in the city of Plymouth, Michigan); Draper v. Phelps, 351 F. Supp. 677, 681 (W.D. Okla. 1972) (sustained six-months' prerequisite for candidates to state's house of representatives); Manson v. Edwards, 345 F. Supp. 719, 721-24 (E.D. Mich. 1972) (upheld provision requiring all candidates for Detroit's city council to be at least twenty-five years of age); Wellford v. Battaglia, 343 F. Supp. 143, 145-48 (D. Del. 1972) (invalidated residency requirement of five years for candidates seeking the mayoralty of the city of Wilmington); McKinney v. Kaminsky, 340 F. Supp. 289, 294-95 (M.D. Ala. 1972) (struck down five-year prerequisite for those seeking to serve as county commissioner of Montgomery County); Mogk v. City of Detroit, 335 F. Supp. 698, 700-01 (E.D. Mich. 1971) (struck down three-year residency requirement for members of city's charter revision commission); Bolanowski v. Raich, 330 F. Supp. 724, 726-30 (E.D. Mich. 1971) (invalidated three-year prerequisite for candidates for the mayoralty of the city of Warren); Hadnott v. Amos, 320 F. Supp. 107, 119 (M.D. Ala. 1970), *aff'd mem.*, 401 U.S. 968 (1971) (upheld one-year residency requirement for candidates for circuit judgeships); Stapleton v. Clerk for City of Inkster, 311 F. Supp. 1187, 1189 (E.D. Mich. 1970) (invalidated requirement that candidates for all elective or appointive city offices have been freeholders for at least two years).

67. 353 F. Supp. 1211 (D.N.H.), *aff'd mem.*, 414 U.S. 802 (1973).

68. 353 F. Supp. at 1216.

part on the following finding:

> [B]ecause of the nature of the residency requirement, the relationship between it and the right to travel is indirect and remote. We agree with Judge Doyle, concurring in *Draper v. Phelps*, 351 F. Supp. 677 (W.D. Okl. 1972):
>
> > . . . the right to public office can[not] be equated to the right to vote in relationship to the right to travel. Candidacy for public office is quite different from voting, and one does not travel from one place to another contemplating that he will offer himself to the voters for election to state office.
>
> Candidate durational residency requirements do not "penalize" the right to travel or force a person to choose between that right and a "basic" or "fundamental" right. It cannot be seriously argued that the inability to run for Governor is a real impediment to interstate travel. In *Dunn v. Blumstein, supra*, the residency requirement for voters in fact disenfranchised all those who moved into the State within the proscribed time limit. The members of such a class were and had the potential of being numerous. While the Governorship of New Hampshire may be a coveted prize, it is one that is seriously sought after by only a very few.[69]

The court also pointed out that the plaintiff could still run for "lesser" offices and distinguished decisions holding unconstitutional durational residency requirements for such lesser offices.[70] The *Chimento* decision, which also justified the durational residency requirement at issue on the basis of the state's objectives, was affirmed without opinion by the Supreme Court.[71]

More recent decisions have either taken the position that the denial of candidacy for public office does not interfere with interstate travel or have adopted the *Chimento* court's higher office/lesser office distinction.[72] In the case of *Henderson v. Fort Worth Independent*

69. *Id.* at 1218.

70. *Id.* at 1216 & n.10.

71. Chimento v. Stark, 414 U.S. 802 (1973).

72. *See, e.g.*, Billington v. Hayduk, 439 F. Supp. 975, 978-79 (S.D.N.Y. 1977) (struck down five-year resident freeholder requirement for office in Westchester County; utilized *Chimento*'s distinction about lesser offices); Russell v. Hathaway, 423 F. Supp. 833, 835 (N.D. Tex. 1976) (upheld one-year residency prerequisite for school district trustee candidates; said its decision was governed by *Chimento*); Sununu v. Stark, 383 F. Supp. 1287, 1290-92 (D.N.H. 1974), *aff'd mem.*, 420 U.S. 958 (1975) (upheld seven-year residency prerequisite for state senators; found, under *Chimento* and other cases, no infringement of the right to travel and sufficient compelling state interests); Alexander v. Kammer, 363 F. Supp. 324, 326 (E.D. Mich. 1973) (five-year and two-year prerequisites for city commissioners' posts invalidated; used *Chimento*'s lesser office distinction); Gilbert v. State, 526 P.2d 1131, 1135 (Alaska 1974) (upheld three-year requirement for candidacy for the state legislature; found no substantial interference with the right to travel); Cahnman v. Eckerty, 40 Ill. App. 3d 180, 181, 351 N.E.2d 580, 581 (1976) (sustained one-year prerequisite for aldermanic candidates; concluded candidacy is not a fundamental right); Lawrence v. City of

School District,[73] however, the court seemed to circumscribe significantly the concept of a higher office to which a durational residency requirement could constitutionally apply:

> [A]s pointed out by the court in *Chimento*, plaintiff there was eligible for a large number of public offices below that of governor. Thus, he was not completely barred from offering himself for service in state government. In the instant case, however, the position of school board trustee is the only one available for a person wishing to inject him or herself into the management and control of the local school district. There are no lesser offices available to satisfy this particular desire to serve the public.[74]

Accordingly, the court invalidated a three-year school board residency requirement as violative of the Fourteenth Amendment.[75] As demonstrated by the above cases, the constitutionality of Hawaii's residency requirements for administrative positions and public offices may, in many instances, be uncertain.

3. Objectives of Durational Residency Requirements

The United States Supreme Court has analyzed the constitutionality of several governmental objectives that have been offered as justifications for durational residency requirements that interfere with or penalize interstate travel, each of which merits separate discussion. The first objective is the exclusion of poor immigrants. In *Shapiro v. Thompson*,[76] the Court flatly declared that "the purpose of deterring the in-migration of indigents cannot serve as justification for the classification created by the one-year waiting period, since that purpose is constitutionally impermissible."[77] The second objective is saving

Issaquah, 84 Wash. 2d 146, 150-52, 524 P.2d 1347, 1349-50 (1974) (upheld one-year councilmanic requirement; utilized *Chimento*'s lesser office distinction).

73. 526 F.2d 286 (5th Cir. 1976). The case involved a requirement that candidates for the Fort Worth school board must have been freeholders in the school district for one year and qualified voters of that district for at least three years; since under Texas law, eligibility for general registration is conditioned upon residence within the state for one year, the local regulation had the effect of lengthening normal registration requirements. *Id.* at 289-90 & n.2.

74. *Id.* at 292-93.

75. *Id.* at 293. Later cases have, however, distinguished *Henderson*. *See, e.g.*, Daves v. City of Longwood, 423 F. Supp. 503, 506 (M.D. Fla. 1976) (sustained one-year requirement for candidates for city council; held said requirement, unlike that in *Henderson*, did not extend general residency requirements imposed by the state); Fleak v. Allman, 420 F. Supp. 822, 824 n.4 (W.D. Okla. 1976) (upheld six-months' residency prerequisite for state house of representatives; pointed out that this requirement was not as "long term" as the one in *Henderson*).

76. 394 U.S. 618 (1969).

77. *Id.* at 631. *See also* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 263-64 (1974).

money for the taxpayer. The Court has also rejected this purported justification:

> [A] State may not protect the public fisc by drawing an invidious distinction between classes of its citizens . . . so appellees must do more than show that denying free medical care to new residents saves money. The conservation of the taxpayers' purse is simply not a sufficient state interest to sustain a durational residence requirement which, in effect, severely penalizes exercise of the right to freely migrate and settle in another State.[78]

The third justification concerns the deterrence of the in-migration of indigents who relocate in order to obtain greater public benefits. The Court has rejected this purported justification with respect to residency prerequisites both for welfare benefits[79] and for non-emergency medical care.[80] In the latter instance, the Court took the following position: "An indigent who considers the quality of public hospital facilities in entering the state is no less deserving than one who moves into the state in order to take advantage of its better educational facilities."[81]

Fourth, there are also miscellaneous administrative justifications. The Court has held illegitimate the objective of reserving essential state benefits for persons who have contributed to a state by paying taxes.[82] It has also found durational residency requirements too drastic to serve as a "rule of thumb" for the determination of actual residency[83] or the prevention of fraud.[84] Similarly, durational residency requirements are viewed as irrelevant to budgetary planning.[85] Moreover, the Court has found "no rational basis" for distinguishing between new and old residents in order to withhold public benefits in an effort to induce persons to return to the labor force.[86] The major exception to this rule has been the decision in *Starns v. Malkerson*,[87] which held that non-res-

78. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 263 (1974). *See* Rivera v. Dunn, 329 F. Supp. 554, 558-59 (D. Conn. 1971), *aff'd mem.*, 404 U.S. 1054 (1972).

79. Shapiro v. Thompson, 394 U.S. 618, 631-32 (1969).

80. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 264 (1974).

81. *Id.*

82. Shapiro v. Thompson, 394 U.S. 618, 632-33 (1969).

83. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 268 (1974); Dunn v. Blumstein, 405 U.S. 330, 349-52 (1972); Shapiro v. Thompson, 394 U.S. 618, 636 (1969).

84. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 268 (1974); Dunn v. Blumstein, 405 U.S. 330, 345-49 (1972); Shapiro v. Thompson, 394 U.S. 618, 637 (1969).

85. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 269 (1974); Shapiro v. Thompson, 394 U.S. 618, 634-35 (1969).

86. Shapiro v. Thompson, 394 U.S. 618, 637-38 (1969).

87. 401 U.S. 985 (1971) *summarily aff'g* 326 F. Supp. 234 (D. Minn. 1970). *See* note 38 *supra.*

idents can be charged more by state universities.[88] Although the Court did not issue an opinion in that case, it was apparently influenced by the fact that state universities are supported by state taxpayers and the belief that those individuals should not be "penalized" with floods of out-of-state applicants if they decide to support a university system superior to that of neighboring states.[89]

The fifth rationale of excluding persons who do not have the "local viewpoint" has also been considered by the Court. In the context of striking down durational residency requirements for voting, the Court has made it clear that the maintenance of a homogeneous local outlook is not a permissible state objective.[90] The federal government and various states do, however, have a one-year residency requirement for serving on juries, and every court that has considered the constitutionality of such requirements has upheld them.[91] The stated reason for including a residency requirement in the federal jury statute was to assure "some substantial nexus between a juror and the community whose sense of justice the jury as a whole is expected to reflect."[92] This rationale could be applied persuasively in the context of residency prerequi-

88. The lower court in *Starns* stated:

> We believe that once the law affords recognition to the right of a State to discriminate in tuition charges between a resident and nonresident, that right to discriminate may be applied reasonably to the end that a person retains a nonresident classification for tuition purposes until he has completed a twelve-month period of domicile within the State. We believe that the State of Minnesota has the right to say that those new residents of the State shall make some contribution, tangible or intangible, towards the State's welfare for a period of twelve months before becoming entitled to enjoy the same privileges as long-term residents possess to attend the University at a reduced resident's fee. Accordingly, we hold that the regulation requiring a one-year domicile within the State to acquire resident classification for tuition purposes at the University is constitutionally valid.

Starns v. Malkerson, 326 F. Supp. 234, 241 (D. Minn. 1970).

89. *See id.* at 240-41. *See also* Clarke v. Redeker, 259 F. Supp. 117, 123 (S.D. Iowa 1966); Kirk v. Board of Regents, 273 Cal. App. 2d 430, 444-45, 78 Cal. Rptr. 260, 269 (1969), *appeal dismissed*, 396 U.S. 554 (1970). Indeed, Hawaii has similar limitations. By statute, tuition for a nonresident at the state university can be no less than twice that charged to residents; resident status is determined by (a) proof of physical presence within the state for twelve preceding months and (b) some indication of intent to resident permanently in the state, such as registration to vote, payment of taxes or so on. *See* HAW. REV. STAT. tit. 18, § 304-4 (1976).

90. Dunn v. Blumstein, 405 U.S. 330, 354-56 (1972).

91. *See* United States v. Owen, 492 F.2d 1100, 1109 (5th Cir. 1974); United States v. Perry, 480 F.2d 147, 148 (5th Cir. 1973); United States v. Ross, 468 F.2d 1213, 1215-16 (9th Cir. 1972), *cert. denied*, 410 U.S. 989 (1973); United States v. Gast, 457 F.2d 141, 143 (7th Cir.), *cert. denied*, 406 U.S. 969 (1972); United States v. Duncan, 456 F.2d 1401, 1406 (9th Cir. 1972); United States v. Armsbury, 408 F. Supp. 1130, 1134 (D. Or. 1976); Craig v. Wyse, 373 F. Supp. 1008, 1010 (D. Colo. 1974); Williams v. State, 51 Ala. App. 1, 4, 282 So. 2d 349, 352 (1973); Hampton v. State, 569 P.2d 138, 149 (Alaska 1977); Adams v. Superior Court, 12 Cal. 3d 55, 62-63, 524 P.2d 375, 380, 115 Cal. Rptr. 247, 252 (1974); Reed v. State, 292 So. 2d 7, 10 (Fla.), *cert. denied*, 419 U.S. 995 (1974). The federal provision is codified at 28 U.S.C. § 1865(b)(1) (Supp. V 1975).

92. [1968] U.S. CODE & CONG. NEWS 1796.

sites for government jobs that do require knowlege of local life-styles, such as police officers or clerk-receptionists in satellite city halls.[93]

The sixth rationale of limiting political rights, public positions and private professions and occupations to persons who are knowledgeable about local conditions and issues was analyzed in *Dunn v. Blumstein*.[94] The Court in that case found that, "as devices to limit the franchise to knowledgeable residents, the conclusive presumptions of durational residency are too crude."[95] It proceeded to state that:

> The classifications created by durational residence requirements obviously permit any longtime resident to vote regardless of his knowledge of the issues—and obviously many longtime residents do not have any. On the other hand, the classifications bar from the franchise many other, admittedly new, residents who have become at least minimally, and often fully, informed about the issues. Indeed, recent migrants who take the time to register and vote shortly after moving are likely to be those citizens, such as appellee, who make it a point to be informed and knowledgeable about the issues.[96]

This "crudeness" rationale has been applied by the California Supreme Court to strike down durational residency requirements for public offices generally,[97] and by the United States Court of Appeals for the Fifth Circuit to hold durational residency requirements for school board members unconstitutional.[98] Similarly, in *Potts v. Honorable Justices of Supreme Court of Hawaii*,[99] a federal district court in Hawaii found that "an inference that an 'understanding' of Hawaii's 'uniqueness' has any valid relevance to an applicant's . . . ability to be a sound lawyer here after admission is untenable."[100]

In *Town of Milton v. Civil Service Commission*,[101] however, the Supreme Judicial Court of Massachusetts found that the factors of greater familiarity with a city's or town's geography and its people jus-

93. *See generally* J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 71-82 (1977).

94. 405 U.S. 330 (1972).

95. *Id.* at 360.

96. *Id.* at 358.

97. *See* Thompson v. Mellon, 9 Cal. 3d 96, 103, 507 P.2d 628, 635, 107 Cal. Rptr. 20, 25, 27 (1973). *See* note 66 and accompanying text *supra*. *See also* York v. State, 53 Haw. 557, 560-61, 498 P.2d 644, 646-47 (1972).

98. *See* Henderson v. Fort Worth Independent School Dist., 526 F.2d 286, 292 (5th Cir. 1976). *See* notes 73-75 and accompanying text *supra*.

99. 332 F. Supp. 1392 (D. Hawaii 1971).

100. *Id.* at 1398. *See also* Lipman v. Van Zant, 329 F. Supp. 391, 400-01 (N.D. Miss. 1971); Webster v. Wofford, 321 F. Supp. 1259, 1261-62 (N.D. Ga. 1970); Keenan v. Board of Law Exam'rs, 317 F. Supp. 1350, 1369 (E.D.N.C. 1970).

101. 365 Mass. 368, 312 N.E.2d 188 (1974). *See* notes 52-53 and accompanying text *supra*.

tified a one-year residency requirement for eligibility to serve as a police officer in that locality, even if the requirement interfered with interstate travel:

> The preappointment preferences improve the chances that new appointees will possess the desired characteristics from the very outset of their service rather than requiring a "breaking-in" period of up to two years before the same degree of proficiency will be achieved by new residents. *We think it is clear that this preference is rationally related to the legitimate, indeed critical, public objective of preserving public order and safety.* Even were we to assume that the ramifications of this policy affecting the "right to travel" were such that a compelling State interest were required, we would be hardpressed to deny that the improvement in the effectiveness of police service is such an interest. "[T]he obligation of the government to protect life, liberty, and property against the conduct of the indifferent, the careless, and the evil-minded may be regarded as lying at the very foundation of the social compact."
>
> . . . .
>
> It is true that the statute attacked here may grant a preference to some applicants who lack the desired qualities while denying it to some who are amply qualified. But this does not negate the reasonableness of the classification. . . . It is impossible to draw legislative classifications to mathematical perfection, and the Fourteenth Amendment does not require such precision.[102]

Durational residency requirements for state offices have also been sustained on the basis of a perceived need for enhanced knowledge of the state by the Alaska Supreme Court in *Gilbert v. State*:[103]

> The asserted interest of the state in assuring that those who govern are acquainted with the conditions, problems, and needs of those who are governed cannot be questioned. Because Alaska is unique in its geography, the ethnic diversity of its peoples and the character of its economy, this interest may well assume even greater importance here than in many other states. A legislator is required to consider and vote upon matters which affect many parts of the state and involve many segments of its economy and its peoples. It is therefore not unreasonable for the state to provide for a three-year period in which a new resident may become familiar with his state before he may legislate solutions to its problems.
>
> . . . .
>
> We see no viable alternative means of advancing these important interests alleged by the state. Appellant suggests that these interests may be met by imposing some sort of subjective test upon potential legislators. We disagree. To create a subjective test of can-

102. *Id.* at 376, 312 N.E.2d at 194-95 (quoting Chicago v. Sturges, 222 U.S. 313, 322 (1911)) (emphasis added).

103. 526 P.2d 1131 (Alaska 1974). The court in this case sustained a three-year residency requirement on candidacy for the state legislature.

> didates' knowledge, understanding or character would necessarily place undue power in the hands of those who would implement such a standard.[104]

This argument for upholding durational residency requirements for public offices is bolstered by the United States Constitution itself, which contains a fourteen-year residency requirement for the Presidency,[105] a nine-year citizenship requirement for the Senate[106] and a seven-year citizenship requirement for the House of Representatives.[107] It is also important to note that durational residency as an indicator of familiarity with a state's peoples and problems might more readily be upheld as a valid employment criterion if it were legislatively identified as merely one factor in an evaluation of a prospective employee's qualifications. However, much would depend on the weight accorded to this one factor. Hawaii's act 101, for example, which provides that residents who have previously filed state income tax returns shall receive first consideration over other residents for non-civil service positions, provided that all other factors are relatively equal, would appear to accord durational residency minimal weight.

The seventh proffered justification of protecting the integrity of state legal institutions and the effectiveness of their judgments has not been fully explored. Although it is not clear from the opinion in *Sosna v. Iowa*[108] that the Court was insisting on a "compelling state interest" to justify the durational residency requirement for obtaining a divorce, it emphasized "the State's parallel interests both in avoiding officious intermeddling in matters in which another State has a paramount interest, and in minimizing the susceptibility of its own divorce decrees to collateral attack."[109]

Two other possible justifications for durational residency requirements should be considered, although the Supreme Court has not yet passed directly upon either of them. The first is the policy of monopolizing employment opportunities for longer-term state residents. This objective was set forth in a conference committee report on Hawaii's act 211, which stressed the "insular character of our State" and its "unprecedented type of cultural environment and particular life-style

104. *Id.* at 1135-36. *Cf.* Chimento v. Stark, 353 F. Supp. 1211, 1214-15 (D.N.H.), *aff'd mem.*, 414 U.S. 802 (1973) ("The propriety of legal lines which are drawn and classifications which are made cannot depend on precise mathematical equations.")

105. U.S. CONST. art. II, § 1, cl. 5.

106. *Id.* art. I, § 3, cl. 3.

107. *Id.* art. I, § 2, cl. 2.

108. 419 U.S. 393 (1975). *See* notes 39-40 and accompanying text *supra.*

109. *Id.* at 407.

which may cause adjustment difficulties" for emigrants, as barriers to out-migration to seek employment opportunities on the mainland.[110] In *York v. State*,[111] the Hawaii Supreme Court referred to the objective of monopolizing employment, but concluded without discussion that it did not justify a durational residency requirement for public jobs.[112] Thereafter the Alaska Supreme Court found the use of a durational residency requirement to reduce local unemployment neither legitimate nor a means that was calculated to interfere the least with interstate travel:

> We recognize the state's valid interest in upgrading Alaska's human resources, and in reducing the level of unemployment within the state. It does not appear, however, that the employment preference furthers the purpose of reducing unemployment except by deterring the in-migration of persons from other states. The personnel rules in question do not increase the number of available state employment opportunities, but simply limit the universe of persons who may compete for them. To the extent that the personnel rules "lower unemployment" by fencing out competition from other states, the rules impermissibly discriminate against persons who have recently traveled to the state. . . . The personnel rules creating an employment preference are poorly "tailored" to achieve the objective of lowering state unemployment. There are certainly available to the state other means for lowering unemployment which impose a lesser burden on the constitutionally protected right to interstate travel.[113]

In *Hicklin v. Orbeck*,[114] the Alaska Supreme Court reaffirmed this view, pointing out that:

> The extent to which the Alaska Hire Law in fact benefits unemployed Alaskans and those in job training is questionable. Alaska Hire does not distinguish among those who have been one-year residents; it gives all of them an absolute preference over those who are not one-year residents. A lifelong Alaskan employed in a private business or the public sector would be entitled to preference under Alaska Hire if he sought a new job. An unemployed person, or one who had just completed a private or public training course qualifying him for pipeline or petroleum employment, but who had taken an extended trip outside the state eleven months earlier, would be unable to obtain preference.
>
> While under strict scrutiny the correlation between the classification made by the statute and the goals sought to be achieved need

110. CONFERENCE COMM. REP. No. 11 ON S.B. No. 1350, S. DOC. No. 1, H. DOC. No. 2 (April 14, 1977).

111. 53 Haw. 557, 498 P.2d 644 (1972). *See* notes 23-24 and accompanying text *supra.*

112. *Id.* at 561 n.5, 498 P.2d at 647 n.5.

113. State v. Wylie, 516 P.2d 142, 149 (Alaska 1973) (footnotes omitted). *See* notes 46, 48 and accompanying text *supra.*

114. 565 P.2d 159 (Alaska 1977). *See* notes 49-51 and accompanying text *supra.*

> not be perfect, it must be sufficiently strong that the classification is the least drastic means to achieve those ends. We cannot say that a one-year durational residency requirement is the least drastic means available to the state in its quest for reduced unemployment and a stabilized economy. Therefore, we hold that AS 38.40.090(1)(A) violates the equal protection clauses of the federal and state constitutions. The challengers point out that the least drastic, and also the most effective, means to help the unemployed and recent trainees to find jobs, is to give an employment preference only to the unemployed and recent trainees.[115]

Finally, in *Nehring v. Ariyoshi*,[116] Judge King expressed skepticism about the legitimacy of reserving positions in public employment for Hawaiian residents who would have difficulty securing work on the mainland:

> In *York v. State* . . . , the State argued that a three-year residency requirement for public employment guaranteed that only "qualified" people would be hired. The Hawaii Supreme Court found this irrational and struck down the statute under the traditional equal protection test . . . . Now the state argues that the statute seeks to protect the less-qualified person![117]

However, in the absence of evidence[118] tending to show the number of

115. *Id.* at 164-65 (footnotes omitted). The Alaska court proceeded to observe that since employment is not a fundamental right and nonresidents do not comprise a suspect classification, rational basis scrutiny would be utilized in judging the validity of the remainder of the Alaska Hire law. *Id.* at 167. But the rational basis test under the state constitution required that a classification bear a fair and substantial relation to a permissible state interest, *see* State v. Erickson, 574 P.2d 1, 11-12 (Alaska 1978); Isakson v. Rickey, 550 P.2d 359, 362 (Alaska 1976), whereas the same test under the federal Constitution required that challenged economic or social welfare legislation be upheld if the legislature could have had any conceivable basis to believe that it furthered a state interest, whether or not that basis actually occurred to the lawmakers, *see* City of New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976); Dandridge v. Williams, 397 U.S. 471, 485 (1970); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Williamson v. Lee Optical Co., 348 U.S. 483, 487-89 (1955). However, the United States Supreme Court has also used the "substantial rationality" approach when important interests are at stake, as in cases involving claims of gender-based discrimination. *See* Craig v. Boren, 429 U.S. 190, 197 (1976); Reed v. Reed, 404 U.S. 71, 76 (1971). *See generally* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1971). The Alaska court applied this "substantial rationality" test to the statute before it, reasoning that the residency requirement of the Alaska Hire law limiting pipeline-related jobs to residents furthered permissible interests by ensuring that extraction of the state's natural resources would occur in a manner most beneficial to its citizens, 565 P.2d at 168-69, and that the indicia of residence relied upon were not unreasonable, *id.* at 170-71. The durational residency requirement had failed to satisfy this test because its impact was imprecise.

116. 443 F. Supp. 228 (D. Hawaii 1977). *See* notes 11-12 and accompanying text *supra*.

117. *Id.* at 239 n.24.

118. Subsequently, the Hawaii Senate Committee on Human Resources report on a bill that was to become act 101 stated:

> A recently completed study by the State Administration indicates that approximately 10% of those hired for jobs in State government during fiscal year 1976-77 were either

jobs that act 211 might have protected, Judge King concluded that even if this asserted objective were permissible, no rational relationship between it and the challenged legislation had been established.[119]

The second objective not yet examined by the United States Supreme Court is that of safeguarding a state's natural and cultural resources and environment from the destructive consequences of excessive population growth. As Governor Ariyoshi emphasized in his State-of-the-State Address:

> Too many people means too few jobs and too much competition for them; too many people means too little land for agriculture and parks and scenic vistas; too many people means too much crime and too much erosion of possibly our single most important commodity, the Aloha Spirit; too many people means too much pressure on all our governmental and private institutions.
>
> In short, too many people can spell disaster for this State.
>
> Hawaii is a national treasure, but it is a very fragile treasure, one which can be easily destroyed by over-population and excessive demands on its resources.[120]

With regard to the objective of protecting Hawaii's natural and cultural resources, it should be noted at the outset that this objective was not mentioned in the conference committee report on act 211.[121] Nor was the state able to offer in *Nehring v. Ariyoshi*[122] any evidence indicating the number of prospective immigrants who might be deterred from coming to Hawaii by act 211.[123] In the absence of such evidence, Judge King could find no rational basis for the legislation in terms of environmental protection.[124] Moreover, if act 211 or any other durational residency requirement is to be defended by reference to the objective of preservation, it is probably crucial that the requirement be part of a comprehensive scheme to preserve Hawaii's natural and cultural resources and that this scheme should also call for sacrifices on the part of the current residents. Adoption of a comprehensive growth-limitation-and-management program would assist in persuading the federal

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nonresidents or residents of less than one year duration at the time of their job application. This figure represents more than two and one-half times the incidence of "less than one-year residents" in the State's employed labor force.

COMMITTEE ON HUMAN RESOURCES REP. ON S.B. No. 1787-78, at 1-2 (Mar. 7, 1978).

119. 443 F. Supp. at 239.

120. State-of-the-State Address by Hon. George R. Ariyoshi, delivered before the Ninth State Legislature (Jan. 25, 1977).

121. *See* CONFERENCE COMM. REP. No. 11 ON S.B. No. 1350, S. DOC. No. 1, H. DOC, No. 2 (April 14, 1977).

122. 443 F. Supp. 228 (D. Hawaii 1977). *See* notes 11-12 and accompanying text *supra.*

123. *Id.* at 238-39.

124. *Id.* at 239.

courts that preservation, and not some other unacceptable objective, was the motivating factor behind the durational residency requirement; such a scheme would also help to demonstrate that alternative methods of preservation that would be less disruptive of interstate travel had already been utilized.[125]

If Hawaii were to confront an environmental or resource crisis comparable to a wartime situation, the United States Supreme Court might be willing to countenance even draconian and highly discriminatory measures affecting choice of residence, if the state believed such measures would help to relieve the crisis. In the absence of such an environmental or resource crisis, however, it is not clear whether the objective of preservation would be viewed by the Court as a sufficient justification for a durational residency requirement that interfered with or penalized interstate travel. The state's argument would be particularly susceptible to challenge if freeways and single-family subdivisions continued to be built while the state is claiming that it has reached the crisis point in its growth.

4. New Constitutional Tests

Recent decisions of the United States Supreme Court indicate that it may be favorably disposed to local efforts to curb population growth. Perhaps the clearest indication in this regard appeared in the 1974 decision of *Village of Belle Terre v. Boraas*,[126] which held that a residential community's restriction of its houses to "families" was constitutional.[127] In an opinion written by Justice Douglas, the Court recognized the important aesthetic, cultural and social values that are preserved and promoted by limitations on population[128] and dismissed

125. *See generally* Selinger & Schoen, *"To Purify the Bar": A Constitutional Approach to Non-Professional Misconduct*, 5 NAT. RES. J. 299, 324-25 n.89 (1965).

126. 416 U.S. 1 (1974). *See generally* Frame & Scorza, *Village of Belle Terre v. Boraas: Property Rights, Personal Rights and the Liberal Regime*, 2 HASTINGS CONST. L.Q. 935 (1975); Margolis, *Exclusionary Zoning: For Whom Does Belle Terre Toll?*, 11 CAL. WEST. L. REV. 85 (1974).

127. The municipal ordinance in question defined the word "family" to mean one or more persons related by blood, adoption, or marriage, or not more than two unrelated persons, living and cooking together as a single housekeeping unit and expressly excluding from the term lodging, boarding, fraternity or multiple-dwelling houses. It was challenged by six unrelated college students leasing a house together. *See* 416 U.S. at 2-4.

128. Indeed, the Court observed:

> 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. This goal is a permissible one . . . . The police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

416 U.S. at 9.

as unimportant the incidental infringements on the rights of travel and association imposed by such a zoning ordinance.[129]

Two subsequent decisions in the spring of 1976 recognized the importance of the implementation of a state's essential functions. In *Hughes v. Alexandria Scrap Corp.*,[130] the Court held that the State of Maryland could grant preferential treatment to entrepreneurs residing within its borders in its efforts to clear the landscape of derelict automobiles. The state's scheme was to grant bounty payments to persons who hauled away abandoned hulks, but receiving the bounty was made considerably easier if they brought these hulks to junk dealers in Maryland rather than to out-of-state dealers.[131] The Alexandria Scrap Corporation contended that this scheme discriminated against businesses in other states and therefore violated the commerce clause of the United States Constitution. The Court rejected this argument and thus permitted the state to prefer its own residents to those of other states.[132]

129. *Id.* at 7-8. *Cf.* Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897, 906-09 (9th Cir. 1975). The Ninth Circuit cited *Belle Terre* in order to sustain a municipal zoning scheme that severely limited development, indicating that if the challenged system of delegated zoning was considered objectionable, that complaint should be addressed to the legislature. *But cf.* Rasmussen v. City of Lake Forest, 404 F. Supp. 148, 151 (N.D. Ill. 1975). That case involved a challenge to a local law prohibiting sales of lots of less than 1-1/2 acres. The district court distinguished *Belle Terre*, indicating that that decision had been preceded by hearings as to the purpose and effect of the questioned ordinance and *Construction Industry Ass'n*, pointing out that Lake Forest, unlike Petaluma, had not announced a comprehensive development scheme.

More recently, however, the Court has distinguished *Belle Terre*. In Moore v. City of E. Cleveland, 431 U.S. 494 (1977), a challenge was raised against a municipal statute that defined the term family to include only single housekeeping units consisting of the nominal head of the household and his or her: (a) spouse, (b) unmarried children or such children of his or her spouse, provided such children have no progeny residing with them, (c) parents or the parents of his or her spouse or (d) dependent married or unmarried child, provided there was no more than one of such children residing in the household. *Id.* at 496 n.2. The plurality opinion of the Court observed that the law in *Belle Terre* affected only unrelated individuals, while East Cleveland's ordinance "slic[ed] deeply into the family itself." *Id.* at 498. Because of the intrusive nature of this law, a strict scrutiny level of review was applied and the challenged ordinance could not survive this degree of analysis. *See id.* at 499-500.

130. 426 U.S. 794 (1976).

131. Before the processor to whom the hulk was delivered could receive a bounty, he had to submit documentation indicating clear title to the derelict, consisting of a simple certificate, signifying that the person who transferred the vehicle had himself acquired title by following statutorily-prescribed procedures, and an indemnification agreement whereby the wrecker promised to remunerate the processor for liability to third parties; but a non-Maryland processor had to submit more complex documentation in order to receive his bounty, including a certificate of title, a police certificate vesting title and either a bill of sale from a police auction or a wrecker's certificate of title where applicable. *See id.* at 800-01.

132. The Court applied the test of Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970), in which it was stated that "the extent of the burden [on interestate commerce] that will be tolerated will . . . depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." In *Hughes*, the Court found no prohibition on

Similarly, in *National League of Cities v. Usery*,[133] the Court held that Congress could not impose minimum wage and maximum hour requirements on state governments.[134] It observed that while Congress can apply such regulations to businesses engaged in interstate commerce, which includes virtually every business, the state retains its own sovereignty, as recognized by the Tenth Amendment; consequently, the federal government cannot impose its views on the state if that imposition would interfere with an essential state function.[135] This precedent is particularly relevant to Hawaii's new residency requirements for public employment because the *National League of Cities* case may be read as a grant of broad freedom to the states in making decisions regarding their own employees without federal interference. Two federal district courts, however, have recently held *National League of Cities* inapplicable to a claim of age discrimination in state employment and have ruled that Congress can regulate such discrimination by state governments as part of its power to implement the equal protection clause of the Fourteenth Amendment.[136] Thus, the expansive approach of *Na-*

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the interstate flow of hulks, only an effort by the state to enter into the market for such commodities in order to bid up their price. 426 U.S. at 806. Applying the rational basis level of review, the Court similarly found that the state law was reasonably related to the purpose of ameliorating the environment; therefore, an equal protection challenge was also rejected. *Id.* at 814.

133. 426 U.S. 833 (1976). *See generally* Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165 (1977); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977).

134. The definition of "employer" under the Fair Labor Standards Act, which prescribed such wages and hours, had been amended in 1974 to include the term "public agencies," itself defined to encompass the government of a state or the subdivisions thereof. 29 U.S.C. §§ 203(d), 203(s)(5), 203(x) (Supp. V 1975).

135. 426 U.S. at 845-46. The Court observed that:

> One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime. The question we must resolve here, then, is whether these determinations are " 'functions essential to separate and independent existence,' " . . . so that Congress may not abrogate the States' otherwise plenary authority to make them.

Id. at 845-46 (quoting Coyle v. Oklahoma, 221 U.S. 559, 580 (1911) (quoting Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869)). In light of increased costs, possible curtailment of some state services and the displacement of state minimum wage restriction policies, interference with fundamental functions was found. *Id.* at 846-51.

136. *See* Remmick v. Barnes County, 435 F. Supp. 914, 916 (D.N.D. 1977); Aaron v. Davis, 424 F. Supp. 1238, 1240-41 (E.D. Ark. 1976). Both these cases involved claims that the Age Discrimination Employment Act, 29 U.S.C. §§ 621-634 (1970 & Supp. V 1975), one provision of which included states or the political subdivisions thereof within the definition of "employer," 29 U.S.C. § 630(b) (1970), could not be applied constitutionally to states. Each court pointed out that although *National League of Cities* had invalidated federal regulations of state activities based on the commerce clause, it had not indicated that federal regulations based on section five of the

tional League of Cities may not apply to situations in which Congress has enacted regulatory statutes pursuant to the enabling provisions of that amendment.

In its very first opinion of the October 1977 term, the Supreme Court again upheld local regulations over the environment, even when the regulations discriminated against out-of-state residents. The Court's decision in *County Board of Arlington County v. Richards*[137] strongly supports the position that a state may take steps to protect its environment and safeguard its quality of life notwithstanding the inconveniences that these steps may impose on persons coming into the state. In *Richards*, Arlington County had limited parking in a residential area near a large commercial and office complex to residents of the area, and this limitation was challenged as a denial of equal protection to commuters. The Virginia Supreme Court struck down the ordinance on the ground that it discriminated unconstitutionally against residents of Maryland, the District of Columbia and other parts of Virginia, and thus interfered with the right to travel.[138] The United States Supreme Court, however, unanimously reversed and reinstated the Arlington ordinance. The Court's brief opinion includes the following important language:

> To reduce air pollution and other environmental effects of automobile commuting, a community reasonably may restrict on-street parking available to commuters, thus encouraging reliance on car pools and mass transit. The same goal is served by assuring conve-

Fourteenth Amendment would be similarly invalid. Indeed, the Court in *National League of Cities* had declined expressly to rule on this point, 426 U.S. at 852 n.17, and, in a later decision, had held that the Eleventh Amendment did not bar a backpay suit against a state based on Title VII of the Civil Rights Act, Fitzpatrick v. Bitzer, 427 U.S. 445, 453-54 & n.9 (1976). In light of these factors, many lower federal courts have refused to apply the limitations expressed in *National League of Cities* to federal regulatory legislation based on the Fourteenth Amendment. *See, e.g.*, Stiner v. Califano, 438 F. Supp. 796, 800 n.4 (W.D. Okla. 1977) (suit seeking injunction against federal regulation requiring certain staffing ratios in day care centers receiving social security disbursements); Curran v. Portland Superior School Comm., 435 F. Supp. 1063, 1077 n.7 (D. Maine 1977) (sex-based discrimination claim based on Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e-2000e-17 (1970 & Supp V 1975)); State of Colorado v. Veterans' Administration, 430 F. Supp. 551, 559 (D. Colo. 1977) (suit seeking reimbursement of overpayments made by the Veterans' Administration to state educational institutions); Usery v. Edward J. Meyer Memorial Hosp., 428 F. Supp. 1368, 1375 (W.D.N.Y. 1977) (suit based on equal pay provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 203(d)(x), 206(a)(1), 207 (1970 & Supp. V 1975)); Brown v. County of Santa Barbara, 427 F. Supp. 112, 113-14 (C.D. Cal. 1977) (same); Usery v. Owensboro-Daviess County Hosp., 423 F. Supp. 843, 846 (W.D. Ky. 1976) (same); Usery v. Dallas Independent School Dist., 421 F. Supp. 111, 114-16 (N.D. Tex. 1976) (sex discrimination claim based on Title VII).

137. 98 S. Ct. 24 (1977).

138. County Bd. of Arlington County v. Richards, 217 Va. 645, 651, 231 S.E.2d 231, 235 (1977).

> nient parking to residents who leave their cars at home during the day. A community may also decide that restrictions on the flow of outside traffic into particular residential areas would enhance the quality of life thereby reducing noise, traffic hazards, and litter. By definition, discrimination against nonresidents would inhere in such restrictions.
>
> The Constitution does not outlaw these social and environmental objectives, nor does it presume distinction between residents and nonresidents of a local neighborhood to be invidious. The Equal Protection Clause requires only that the distinction drawn by an ordinance like Arlington's rationally promote the regulation's objectives.[139]

These four recent Supreme Court cases thus indicate that a state can attempt to define areas of essential state concern and pass legislation to protect those concerns. A comprehensive statewide approach would be essential to withstand a constitutional challenge, but the Court has nevertheless indicated that it may be open to legislation that would have the effect of limiting growth.

II. Legal Issues Related to "Assumption-of-Residency" Requirements

Another population control device, which could conceivably escape the constitutional objections to durational residency prerequisites would be the imposition of "actual" residency or "assumption-of-residency" requirements. "Durational" residency requirements stipulate that a person live within the jurisdiction for a fixed period of time. In contrast, an "actual" residency requirement demands that the person be currently living within the jurisdiction when he or she works for the local government or receives governmental benefits. These requirements have been passed by the councils of cities that want their municipal employees to live within the city limits, and the United States Supreme Court has ruled that they are constitutional.[140]

"Assumption-of-residency" requirements would mandate that an applicant be a bona fide resident of the jurisdiction before applying for

139. 98 S. Ct. at 26 (footnotes omitted).

140. *See* McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645 (1976). The ordinance challenged in that case required that all city employees also be city residents. After noting that prior cases had indicated that prerequisites of continuing residency might be permissible, *see* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 255 (1974); Dunn v. Blumstein, 405 U.S. 330, 342 n.13 (1972); Shapiro v. Thompson, 394 U.S. 618, 636 (1969), the Court simply labelled the Philadelphia continuing residency requirement as bona fide. 424 U.S. at 647. *Accord,* Andre v. Board of Trustees, 561 F.2d 48, 53 (7th Cir. 1977); Mogle v. Sevier County School Dist., 540 F.2d 478, 483 (10th Cir. 1976); Cook County College Teachers' Union, Local 1600 v. Taylor, 432 F. Supp. 270, 272 (N.D. Ill. 1977); Miller v. Krawczyk, 414 F. Supp. 998, 1001 (E.D. Wis. 1976).

a government job or license. Such a requirement would serve to deter in-migration by persons who were unable or unwilling to pay the costs of moving to Hawaii without any prior assurance of being employed when they arrived. In 1978, the Hawaii legislature enacted act 101, imposing an "assumption-of-residency" requirement for governmental positions formerly covered by act 211.[141]

A. The Constitutionality of "Assumption-of-Residency" Requirements

The constitutionality of "actual" residency requirements has been sustained by the courts in a number of situations. Thus, it has been held that a state need not provide welfare benefits to persons who are nonresidents.[142] Similarly, a state may prevent a person from voting until that individual has been in the state for fifty days in order to serve the state's important interest in accurate voter lists.[143] In the same fashion, persons who wish to be admitted to a state bar may be required to be actual residents of the state for a sufficiently lengthy time before admission to permit the bar authorities to interview them and otherwise more effectively investigate their qualifications.[144] Furthermore, a municipality may require that its employees be actual residents rather than commuters,[145] and a state may demand that a person who wishes to engage in the practice of law within its borders maintain a permanent residence there rather than in a neighboring state.[146]

With regard to the use of "actual" residency requirements to control population growth in Hawaii, however, the situations that have been considered by the courts would appear to be neither significant nor especially relevant. Hawaii does not have a commuter problem, and persons from other states who have been offered employment in Hawaii would generally be quite willing to maintain actual residences in Hawaii during the course of their employment. Hence, for a residency requirement to be an effective population control device, it would have to stipulate, as act 101 does, that a person must already

141. *See* note 13 and accompanying text *supra.*

142. *See* Shapiro v. Thompson, 394 U.S. 618, 636 (1969).

143. Marston v. Lewis, 410 U.S. 679, 681 (1973). *Accord,* Burns v. Fortson, 410 U.S. 686, 687 (1973).

144. *See* Lipman v. Van Zant, 329 F. Supp. 391, 401-04 (N.D. Miss. 1971) (ninety-day period sustained); Webster v. Wofford, 321 F. Supp. 1259, 1262 (N.D. Ga. 1970) (residency requirement must be "reasonable," not "onerous") (dictum).

145. McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645 (1976). For other cases in agreement, *see* note 140 *supra.*

146. Aronson v. Ambrose, 366 F. Supp. 37, 43-44 (D.V.I. 1972); Brown v. Supreme Court of Va., 359 F. Supp. 549, 557-58 (E.D. Va. 1973).

have assumed residency in Hawaii before his or her application could be considered. Such an "assumption-of-residency" requirement is, however, subject to three possible constitutional objections: the same equal protection-interference with interstate travel objection that has been leveled against durational residency requirements; the objection that an "assumption-of-residency" requirement burdens interstate commerce in violation of article one, section eight, clause three of the federal Constitution;[147] and the objection that such a requirement infringes the privileges and immunities of citizens guaranteed by article four, section two of the federal Constitution.[148]

The United States Supreme Court's opinion in *McCarthy v. Philadelphia Civil Service Commission*[149] does suggest that the Court would find that an "assumption-of-residency" requirement did not interfere with or penalize interstate travel.

> We have not . . . specifically addressed the contention made by appellant in this case that his constitutionally recognized right to travel interstate as defined in *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Dunn v. Blumstein*, 405 U.S. 330 (1972); and *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), is impaired. Each of those cases involved a statutory requirement of residence in the State for at least one year before becoming eligible either to vote, as in *Dunn*, or to receive welfare benefits, as in *Shapiro* and *Memorial Hospital*. Neither in those cases, nor in any others, have we questioned the validity of a condition placed upon municipal employment that a person be a resident *at the time* of his application.[150]

It can also be argued that if interferences with interstate travel arising from the denial of public employment and the franchise are to be treated as comparable restrictions, then the constitutionality of "assumption-of-residency" requirements for public employment follows logically from the Court's decision in *Dunn v. Blumstein*,[151] which upheld such requirements for voting. Language in *McCarthy* also indicates, however, that the Court intended to uphold only *continuing* residency requirements *while* a person was employed by a particular municipality. Therefore, "assumption-of-residency" requirements

147. U.S. CONST. art. I, § 8, cl. 3 vests exclusively in Congress the power to "regulate Commerce with Foreign Nations, and among the several States, and with Indian Tribes. . . ."

148. U.S. CONST. art. IV, § 2 stipulates that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

149. 424 U.S. 645 (1976). *See* note 140 and accompanying text *supra.*

150. *Id.* at 646 (footnotes omitted) (emphasis in original).

151. 405 U.S. 330 (1972). *See* note 28 *supra.*

might still be subject to strict scrutiny—especially in light of the exceptional costs involved in moving from the mainland to Hawaii.

> In this case appellant claims a constitutional right to be employed by the city of Philadelphia *while* he is living elsewhere. There is no support in our cases for such a claim.
>
> We have previously differentiated between a requirement of continuing residency and a requirement of prior residency of a given duration. Thus in *Shapiro*, . . . we stated: "The residence requirement and the one-year waiting-period requirement are distinct and independent prerequisites." And in *Memorial Hospital*, . . . the Court explained that *Shapiro* and *Dunn* did not question " 'the validity of appropriately defined and uniformly applied bona fide residence requirements.' "
>
> This case involves that kind of bona fide continuing residence requirement.[152]

In contrast, the Alaska Supreme Court in *Hicklin v. Orbeck*,[153] which upheld an "assumption-of-residency" requirement for public employment, read *McCarthy* as standing for the proposition that "[a] residency requirement does not penalize the right of interstate migration, unlike a durational residency requirement, because it does not burden those who have recently migrated interstate. Hence it is not subject to strict scrutiny on that ground."[154]

The Alaska court also concluded that an "Alaska Hire" law for jobs under state contracts for extracting or transporting oil and gas did not contravene the privileges and immunities clause. Early in the nation's history, Justice Bushrod Washington, in the case of *Corfield v. Coryell*,[155] had observed that the privileges and immunities protected by that clause included "[t]he right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise."[156] Relying, however, on the actual facts of the *Corfield* case and on those underlying the United States Supreme Court's 1877 decision in *McCready v. Virginia*,[157] both of which involved the rights of non-residents to gather shellfish in state waters, the three-justice majority on the Alaska court held that "Alaska

152. 424 U.S. at 646-47 (footnotes omitted) (quoting Memorial Hosp. v. Maricopa County, 415 U.S. 250, 255 (1974) (quoting Dunn v. Blumstein, 405 U.S. 330, 342 n.13 (1972)); Shapiro v. Thompson, 394 U.S. 618, 636 (1969)).

153. 565 P.2d 159 (Alaska 1977), *rev'd in part*, 46 U.S.L.W. 4773 (U.S. June 22, 1978). *See* notes 49-51, 106-07 and accompanying text *supra*.

154. 565 P.2d at 166 (citing McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645, 646-47 (1976); Lynden Transport, Inc. v. State, 532 P.2d 700, 706-07 (Alaska 1975)).

155. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

156. *Id.* at 552.

157. 94 U.S. (4 Otto) 391 (1877).

Hire [is] an economic measure justified by the 'natural resources exception,' the principle that a state may prefer its residents in dealing with natural resources it owns."[158] Interestingly, the majority did not rest its decision on a related claim, which was set forth in Conference Committee Report 11 on Hawaii's act 211, that public employment is itself a state resource that can be restricted to persons who have already assumed residence within the state.[159]

The two dissenting justices in the *Hicklin* case argued that the later decision of the United States Supreme Court in *Toomer v. Witsell*,[160] which refused to apply the "natural resources exception" to free swimming shellfish in coastal, as distinguished from inland, waters, had "[cast] serious doubt on the continued authority of *McCready*."[161] They quoted the following language from *Toomer*:

> The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional command that the State exercise that power, like its other powers, so as not to discriminate without reason against citizens of other States.
>
> These considerations lead us to the conclusion that the *McCready* exception to the privileges and immunities clause, if such it be, should not be expanded to cover this case.[162]

This assertion may require some modification in light of the United States Supreme Court's recent decision in *Baldwin v. Fish & Game*

158. 565 P.2d at 169.

159. *See* CONFERENCE COMM. REP. NO. 11 ON S.B. NO. 1350, S. DOC. NO. 1, H. DOC. NO. 2 (April 14, 1977). The Hawaii Senate Committee on Human Resources Report on the bill that was to become act 101 sought to justify the proposed statute's public employment preferences for residents who have previously filed state income tax returns on the ground that it would assure taxpayers of "rightful consideration for job opportunities which tax dollars create." COMMITTEE ON HUMAN RESOURCES REP. ON S.B.NO. 1787-78, at 2 (Mar. 7, 1978).

160. 334 U.S. 385 (1948).

161. 565 P.2d at 172 (Boochever, C.J., dissenting in part, joined by Rabinowitz, J.).

162. 334 U.S. at 402 (footnote omitted) *quoted in* 565 P.2d at 172 (Boochever, C.J., dissenting in part, joined by Rabinowitz, J.). The Court in *Toomer* was also able to distinguish *McCready* on its facts. The latter case sustained a Virginia law prohibiting citizens from planting oysters in the tidal waters of the Ware River; the Court therein called the right to engage in such planting "a property right, and not a mere privilege or immunity of citizenship." McCready v. Virginia, 94 U.S. (4 Otto) 391, 395 (1877). The primary law challenged in *Toomer*, however, was one imposing a tax on nonresident shrimp fishermen in South Carolina's three-mile maritime belt that was one hundred times greater than the amount exacted from resident fishermen. 334 U.S. at 389. The Court thus distinguished *McCready* by observing: (1) that that case dealt with fish that would remain in Virginia until removed by man, whereas the instant case dealt with free-swimming fish that are only temporarily in the coastal waters of any state and (2) that *McCready* concerned fishing in inland waters, while South Carolina sought to regulate shrimping in its mar-

Commission of Montana.[163] In that case, the Court reaffirmed the "natural resource exception," holding that a statute imposing discriminatory license fees on nonresident elk-hunters did not violate the privileges and immunities clause; but, in doing so, it observed that the Montana statute affected only the recreational interests of nonresidents and not their ability to earn a livelihood, as had been the case in *Toomer*.[164] Moreover, the dissenters in the *Hicklin* case argued[165] that an extension of the "natural resources exception" from restrictions on the disposition of state resources themselves to restrictions on employ-

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ginal sea. *Id.* at 401-02. These factors also led the Court in *Toomer* to conclude that the South Carolina law unduly burdened interstate commerce. *Id.* at 403-06. *See also* Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 281-82 (1977).

In a similar fashion, the Supreme Judicial Court of Massachusetts has also held that the state legislature's prohibition on coastal fishing by non-residents violated the privileges and immunities clause of the Constitution; in so doing, it observed that the "*McCready* case, if it retains any vitality, seems now to be restricted to shellfish or to tidewaters." Commonwealth v. Westcott, — Mass. —, —, 344 N.E.2d 411, 413 (1976), *vacated and remanded on other grounds*, 431 U.S. 322 (1977).

163. 98 S. Ct. 1852 (1978).

164. *Baldwin* involved a challenge to a Montana licensing scheme for elk-hunters that imposed license fees on non-residents which were 7 1/2 times greater than those exacted from residents. In discussing the privileges and immunities clause, the Court noted that state citizenship or residency could legitimately be used to restrict exercise of the franchise or access to public employment; it concluded that "[o]nly with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally." *Id.* at 1860. After mentioning the *Geer, McCready* and *Corfield* cases and the natural resources exception that they created, the Court observed:

> Appellants contend that the doctrine on which *Corfield* and *McCready* . . . all relied has no remaining vitality. We do not agree. Only last term, in referring to the "ownership" or title language of those cases and characterizing it "as no more than a 19th-century legal fiction," the Court pointed out that that language nevertheless expressed " 'the importance to its people that a state have power to preserve and regulate the exploitation of an important resource.' " . . . . The fact that the State's control over wildlife is not exclusive and absolute in the face of federal regulation and certain federally protected interests does not compel the conclusion that it is meaningless in their absence.

Id. at 1861 (quoting Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 284 (1977) (quoting Toomer v. Witsell, 334 U.S. 385, 402 (1948)). Consequently, the Court ruled that the "[a]ppellants' interest in sharing this limited resource on more equal terms with Montana residents simply does not fall within the purview of the Privileges and Immunities Clause." *Id.* at 1862. The Court went on to distinguish the class of cases represented by *Toomer*, stating:

> Appellants do not—and cannot—contend that they are deprived of a means of a livelihood by the system [of licensing] or of access to any part of the State to which they may seek to travel. We do not decide the full range of activities that are sufficiently basic to the livelihood of the Nation that the States may not interfere with a non-resident's participation therein without similarly interfering with a resident's participation. Whatever rights or activities may be "fundamental" under the Privileges and Immunities Clause, we are persuaded, and hold, that elk-hunting by non-residents in Montana is not one of them.

Id. In light of this assertion, it may be argued that *Baldwin* does not impair the rationale expressed by the dissenters in *Hicklin* because that latter case involved a restriction on the right to seek employment, an activity presumably more fundamental than elk-hunting.

165. 565 P.2d at 173-74 (Boochever, C.J., dissenting in part, joined by Rabinowitz, J.).

ment would be inconsistent with the basic philosophy regarding the privileges and immunities clause set forth in *Toomer*:

> The primary purpose of this clause, like the clauses between which it is located—those relating to full faith and credit and to interstate extradition of fugitives from justice—was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation. "Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists."
>
> In line with this underlying purpose, it was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.[166]

With respect to the burden on interstate commerce, the second possible constitutional objection to "assumption-of-residency" requirements, the Alaska court observed that although "no commerce clause claim is advanced against Alaska Hire,"[167] the United States Supreme Court's commerce clause decision in *Edwards v. California*[168] would not apply to the Alaska requirement:

> In *Edwards*, the Court held invalid a state law making it a crime to assist indigent non-residents to come into the state. In purpose and in effect, the law was a direct barrier to interstate travel and migration. Alaska Hire does not erect a barrier to interstate travel or migration. With the durational residence requirement stricken, it permits new as well as long-time residents to receive a preference. It gives the state's benefits to those who bear its burdens, without placing any limitation on who may voluntarily assume those benefits and burdens.[169]

As to the effects of "assumption-of-residency" requirements, this reasoning is not altogether convincing. If such requirements were to be adopted for the purpose of controlling a state's population, they would

166. 334 U.S. at 395-96 (footnotes omitted) (quoting Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868)).

167. 565 P.2d at 169.

168. 314 U.S. 160 (1941). In *Edwards*, the Court invalidated a law making it a crime to assist indigent non-residents to come into the state. A majority of five held that the law constituted a trade barrier in violation of the commerce clause. *Id.* at 173-74. Four concurring justices also argued that the statute infringed the right to interstate travel, one of the privileges and immunities conferred by the Fourteenth Amendment. *Id.* at 177-79 (Douglas, J., concurring, joined by Black & Murphy, JJ.); id. at 183 (Jackson, J., concurring).

169. 565 P.2d at 169.

seem to controvert the philosophy of the commerce clause expressed by the Supreme Court in the *Edwards* case:

> We have repeatedly and recently affirmed, and we now reaffirm, that we do not conceive it our function to pass upon "the wisdom, need, or appropriateness" of the legislative efforts of the States to solve such difficulties.
>
> But this does not mean that there are no boundaries to the permissible area of State legislative activity. There are. And none is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders. It is frequently the case that a State might gain a momentary respite from the pressure of events by the simple expedient of shutting its gates to the outside world. But, in the words of Mr. Justice Cardozo: "The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division."[170]

It is at least conceivable, however, that the Burger Court might find greater merit in a state's isolationist tactics where such tactics are employed for the purpose of preserving its natural and cultural resources than for the purpose of protecting its economic position. A key basis for such a distinction might be the potentially irreversible character of damage to the environment from excessive population growth, as contrasted with the usually cyclical and at least partially remediable character of economic depressions.

B. The Forms of "Assumption-of-Residency" Requirements

The "assumption-of-residency" requirement of Hawaii's act 101 defines "residency" as physical presence within the state at the time of establishing domicile, with an intention to reside in Hawaii permanently; the act further specifies that in determining intent, the maintenance of a permanent place of residence in Hawaii and the absence of one in another state shall be considered.[171] Presuming that "assumption-of-residency" requirements for public employment are constitutional, it would appear that the state has considerable discretion in determining the severity of such prerequisites. Given Hawaii's location, even a simple requirement that a person be physically present in the state would serve to deter in-migration by persons who could or would not spend the transportation costs to Hawaii without some previous as-

170. 314 U.S. at 173-74 (quoting Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 512 (1935)).

171. 1978 Haw. Sess. Laws, act 101. *See* note 13 *supra.*

surance of employment. In *Hicklin*, the Alaska Supreme Court sustained the applicability to public employment of a thirty-day waiting period, which was otherwise required to verify residence within the state for the purpose of voting.[172] Hawaii could in fact probably impose the maintenance of a place of residence within its borders as a requirement rather than treat it as one of several factors to be considered. The Alaska court decision also upheld such a prerequisite, after construing it to mean "being ordinarily physically present in Alaska, having a place within Alaska where one ordinarily stays, and having no such place elsewhere."[173] Such a requirement, which would mandate that a person actually move to Hawaii before applying for employment, is currently imposed as a prerequisite for any exercise of the franchise in Hawaii.[174]

Finally, the Alaska court also sustained the further requirement, similar to that of act 101, that a person applying for employment show "by all attending circumstances" that his intent is to make Alaska his permanent residence.[175] Relying on the United States Supreme Court's decision in *Vlandis v. Kline*,[176] which indicated that a "domicile" test constituted a "reasonable standard for determining the residential status of a student"[177] for tuition purposes, the state court equated permanent residency with domicile—although it acknowledged: " 'Permanent' does not require a promise to stay here forever."[178] To satisfy the subjective intent requirement, a person may be required to show that he or she does not claim residency in another state at the time of application or receive benefits from another state by virtue of his or her residency there.[179] Indications that a person has an "intent to remain and not to go elsewhere" may include paying taxes and registering an automobile; indications to the contrary may include physical presence outside the state in the last two years and voting outside the

172. Hicklin v. Orbeck, 565 P.2d 159, 171 (Alaska 1977). *See also* State v. Van Dort, 502 P.2d 453, 454-55 (Alaska 1972) (held thirty-day residency requirement for voters was the maximum permissible duration).

173. Hicklin v. Orbeck, 565 P.2d 159, 170 (Alaska 1977).

174. *See* HAW. REV. STAT. tit. 2, §§ 11-13(1), 11-13(4) (1976). Subsection one indicates that a place of residency is that place in which habitation is fixed and to which one who is absent intends to return; subsection four states that the mere intention to acquire a new residence without physical presence there will not establish residency.

175. Hicklin v. Orbeck, 565 P.2d 159, 169 (Alaska 1977).

176. 412 U.S. 441 (1973). *See* note 37 and accompanying text *supra*.

177. *Id.* at 454.

178. Hicklin v. Orbeck, 565 P.2d 159, 170 (Alaska 1977).

179. *Id.* at 169-70.

state.[180]

III. Legal Issues Related to Housing and Land Use

Land ownership in Hawaii is highly concentrated, resembling almost a feudalistic pattern.[181] Most land use decisions are thus made by only a few private corporations[182] and the public's input is generally minimal. Only small amounts of land are available for purchase and a smaller percent of the population own their own homes than in any other state.[183] As a result, large private landowners are currently making decisions that may irreversibly affect the state's future. Because of Hawaii's corporation laws, corporate directors managing large amounts of private capital or landholdings will make decisions ensuring the maximization of their profits.[184] Such a decisional calculus will generally lead corporations in Hawaii to substitute resort and residential de-

180. *Id.* at 170-71.

181. Under ancient Hawaiian custom, property was divided into *ahupuaas*, strips of land running from the sea to the mountains, thus enabling individual chieftans to utilize all the natural resources of the islands. Palama v. Sheehan, 50 Haw. 298, 300, 440 P.2d 95, 97 (1968). These *ahupuaas* were often subdivided into *ilis*, of which there were two varieties: the *Ili* of the *Ahupuaa*, a mere division of the latter for the convenience of the chief holding the *ahupuaa* and the *Ili Kupono*, subdivisions independent of the *ahupuaa*, which were managed by landlords (*Konohiki*) who paid tribute not to the chieftan of the *ahupuaa*, but to the king himself. *See* Territory v. Gay, 31 Haw. 376, 380-81 (1930); Harris v. Carter, 6 Haw. 195, 206-07 (1877). In 1846, an act was passed establishing a Board of Land Commissioners to Quiet Titles, Law of April 27, 1846, pt. I, ch. VII, art. IV, §§ 1-13 [1846] I Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands, at 107 (repealed 1854). Under this law, arbitration of land disputes was conducted under principles recognizing the ancient land schemes of the Hawaiians. Two years later, the king and 240 chieftans effected the Great Mahele of 1848, as a result of which two-fifths of the four million acres of land in the islands was vested with the native chiefs, 30,000 acres were given to commoners and the remainder was vested in the crown. Kemper, *The Antitrust Laws and Land: An Answer to Hawaii's Housing Crisis?*, 8 HAWAII B.J. 5, 7 (1971) [hereinafter cited as Kemper]. *See generally* J. CHINEN, THE GREAT MAHELE (1958). Transfer of title was not actually effected by the Great Mahele itself; a claimant had to petition the Land Commission to award him property. Distribution was generally accomplished by a grant of parcels bearing the traditional appellation *ahupuaa* or *ili*. *In re* Boundaries of Pulehunui, 4 Haw. 239, 240 (1879). Subsequently, surveyors demarcating the property awarded would rely on *Kamaaina* (native born) to tell them where the ancient *ahupuaas* or *ilis* had existed. *In re* Application of Ashford, 50 Haw. 314, 316, 440 P.2d 76, 77 (1968). *See* Town & Yuen, *Public Access to Beaches in Hawaii: 'A Social Necessity'*, 10 HAW. B.J. 5, 9-11 (1973). Thus, as the court in *Ashford* observed, Hawaii's land laws are unique in that "they are based on ancient tradition, custom, practice, and usage." 50 Haw. at 315, 440 P.2d at 77.

182. As one commentator has observed, the seventy-two largest landowners in the state own 47% of the property therein. Combining this figure with the percentage of land owned by the state and federal governments the resultant percentage is 95.5%. Kemper, *supra* note 181, at 7.

183. *See generally id.* at 5-7.

184. *See* HAW. REV. STAT. tit. 23, § 416-18 (Supp. 1977) (requires officers and directors of corporations to make decisions consistent with corporate bylaws.)

velopment for agricultural uses. Consequently, other considerations, such as environmental preservation and conservation and the agricultural and recreational needs of future generations, are subordinated to the profit motive. Only if the public sector actively intervenes will these other considerations be weighed. It is thus of vital importance that the public sector develop a comprehensive land use scheme for the state and that every possible legal device be used to restrain the unlimited development that would serve the short-term interests of the large private landowners.

A. State Bureaucratic Controls of Land Use: Existing Structure and Proposed Change

Three major commissions currently affect the development and utilization of land in the State of Hawaii: (1) the Land Use Commission,[185] (2) the Executive Board of the Department of Land and Natural Resources (the Land Board),[186] and (3) each county's Planning Commission.[187] Suggestions to change this structure, however, are being broached. For example, Lieutenant Governor Nelson Doi has re-

185. *See* HAW. REV. STAT. tit. 13, § 205-1 (1976). This law created a Land Use Commission consisting of nine members, one appointed from each county, the rest appointed at large. None of the commissioners are allowed to hold other public offices. *Id.* They are appointed by the governor for four-year terms and may receive no salaries, although they are reimbursed for actual expenses incurred in the performance of their duties. HAW. REV. STAT. tit. 4, § 26-34 (1976). Pursuant to law, land use districts consist of four types: urban, rural, agricultural and conservation; it is the task of the Land Use Commission to designate areas by these labels. HAW. REV. STAT. tit. 13, § 205-2 (1976).

186. *See* HAW. REV. STAT. tit. 4, § 26-15 (1976). The Land Board consists of six members, one appointed from each land district and two appointed at large by the governor pursuant to HAW. REV. STAT. tit. 4 § 26-34 (1976), *see* note 185 *supra.* Its duties are to manage and administer the state's public lands and the natural resources located thereon.

187. *See* HAW. REV. STAT. tit. 6, § 46-5 (1976). A Planning Commission for counties with populations of less than 100,000 is authorized to (a) formulate a master plan for development, (b) establish zoning regulations and (c) recommend the establishment of building zones. Members of such commissions are appointed pursuant to HAW. REV. STAT. tit. 4, § 26-34 (1976).

This structure raises an interesting issue. Because most of the commissioners on either the Land Use or Planning Commissions or the Land Board receive no salaries and thus earn their living by working in the private sector while serving only part-time as commissioners, serious conflicts of interest may develop when such persons cast votes actually or ostensibly favoring their private employers. Full-time, salaried commissioners (a) might feel more responsibility to the taxpayers and (b) might develop more expertise in the subject area with which they deal. But there may be serious drawbacks in having experts decide questions on technical bases at odds with the public interest. Another alternative would be elected rather than appointive commissioners, so that incumbents become more accountable to the public for the Commission's overall record, and opposition candidates with different land-use philosophies have an opportunity to secure public support for implementation of their views. But here, too, caution is necessary; many persons who could exercise such power wisely may not enjoy campaigning for office. At any rate, this is one aspect of Hawaiian land planning where change may be helpful.

cently proposed the Aina Malama Amendment,[188] which would constitutionalize land use designations and require a public referendum to make any change in classifications. Proposed changes would be nominated by public petition, by the Land Board, the Land Use Commission or the Federal Department of Parks and Recreation for lands within its jurisdiction. Public petitions would contain the signatures of a certain percentage of all registered voters residing in the county in which the land at issue is located. All petitions would be certified by the Chief Elections Officer[189] and would be voted on at the following general election or at a special election when the Chief Elections Officer is in receipt of twenty-five qualifying nominations. Approval would be required by a majority of the voters. An Aina Malama Commission would have the power to exercise final approval over any activity to be permitted on Aina Malama Lands. The United States Supreme Court indicated in *City of Eastlake v. Forest. City Enterprises*[190] that such public referenda prior to any change in land use or classification are constitutionally permissible. The majority opinion in that case argued that such referenda are constitutional because the people retain the sovereign right to govern themselves and can exercise that self-governance through any number of permissible forms.[191] The dissenters contended, however, that submitting specific land decisions to popular referenda might deny the affected parties their right to procedural due process.[192] The voters might decide erratically or might not have the expertise to decide wisely. Minority interests might be ignored. The majority of the Court responded to this contention by observing that such problems can occur under any decision-making procedure and that the Constitution does not prohibit

It should also be noted that the larger counties have developed complex planning agencies of their own. *See* CHARTER OF THE COUNTY OF HAWAII, HAW.,§§ 5-4.1 to 5-4.4 (1969); CHARTER OF THE CITY AND COUNTY OF HONOLULU, HAW., §§ 5-401 to 5-413 (1973); CHARTER OF THE COUNTY OF KAUAI, HAW., §§ 15.01 to 15.12 (1969); CHARTER OF THE COUNTY OF MAUI, HAW., §§ 8-8.1 to 8-8.5 (1977). For a description of the Honolulu planning experience, *see* Note, *Comprehensive Planning: Only As Certain As Your Survival*, 8 HAW. B.J. 15 (1971).

188. For the text of the Amendment, *see* OFFICE OF THE LT. GOVERNOR, CONSTITUTIONAL PROTECTION OF HAWAII'S LAND: WHY, WHEREFORE AND HOW?, App. A (1977).

189. *See* HAW. REV. CODE tit. 2, § 11-2 (1976). The Chief Elections Officer is the state's Lieutenant Governor, who is entrusted with the supervision of all elections.

190. 426 U.S. 668 (1976).

191. *See id.* at 672-74. The Court also rejected a due process challenge, stating that if a zoning restriction approved by the voters was deemed unreasonable by some, they could challenge it in state court; the federal Constitution was said to require no more. *Id.* at 677.

192. *See id.* at 680 (Powell, J., dissenting); *id.* at 686-95 (Stevens, J., dissenting, joined by Brennan, J.).

popular democracy.[193] Under this recent decision, the Lieutenant Governor's proposal would clearly be upheld. Thus, under either the existing bureaucratic regime or under the proposed referendum system, the citizens of the state retain the sovereign power to regulate land development. The question then remains: what technique of regulation is permissible?

B. Legal Implications of Selected Techniques

Attempting to avoid urban sprawl and overdevelopment, the State of Hawaii in 1961 enacted the first statewide land use law in the nation.[194] This law was designed to insure that urban growth occurred in designated areas and not in a haphazard manner as had been the prior experience. By the very nature of its existence, it also served as an additional obstacle that potential developers were forced to overcome and, theoretically, should have slowed development down to a manageable rate. This goal has not, however, been achieved. In other states, different planned development techniques have been tried, with mixed results. What follows are some examples of these different techniques and a discussion of how each scheme has fared in the courts. Existing controls in Hawaii that resemble each alternative are mentioned for comparison. When applicable on the county level, Honolulu's land regulation methods will also be used as examples.

1. Techniques Utilized by Other Communities

a. Timed Development: Ramapo, New York

In New York, the town of Ramapo adopted a comprehensive zoning ordinance in which the development of residential units was conditioned upon obtaining a special permit to be issued only on the accumulation of a number of development points.[195] Such points were based on the availability of five essential services,[196] which the landowner could either provide himself (and thus obtain early authorization of development) or wait until the township acquired the capability

193. *See id.* at 679 & n.13 (majority opinion).

194. *See* HAW. REV. STAT. tit. 13, §§ 205-1 to 205-37 (1976).

195. For detailed descriptions of the Ramapo plan, *see* Bosselman, *Can The Town of Ramapo Pass a Law to Bind the Rights of the Whole World?*, 1 FLA ST. L. REV. 234, 238-42 (1973); 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) [hereinafter cited as *Policy and Constitutionality*].

196. Namely, sewers, drainage, improved public parks or recreational facilities, roads improved with curbs and sidewalks, and firehouses. N.Y. TOWN LAW §§ 261, 263 (McKinney 1971).

of doing so. In conjunction with the special permit plan, the town of Ramapo also adopted a capital improvements program that set up an eighteen-year schedule for construction of all public facilities. Thus, the subdivision schedule was inherently tied to the eighteen-year capital improvements program and all landowners were assured of accumulating sufficient development points within that time span.[197]

A group of landowners and home builders challenged the Ramapo plan in a lawsuit. They questioned the validity of the ordinance on the grounds that it was: (a) exclusionary; (b) beyond the scope of relevant state enabling legislation; and (c) a taking without just compensation.[198] The plaintiffs also alleged that the power to control growth through sequential development limitations had not been delegated to the town and that the plan was unconstitutional as an invasion of property rights because it inherently destroyed the value and marketability of the property for residential use.[199] The New York Court of Appeals upheld the validity of the ordinance, but apparently not without some uneasiness:

> 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. . . .[200]

The New York court stated that it would not countenance exclusionary zoning but found that the sequential development and timed growth schemes at issue were not exclusionary but were, instead, valid attempts

197. Golden v. Planning Bd. of Ramapo, 30 N.Y.2d 359, 379-80, 285 N.E.2d 291, 301-03, 334 N.Y.S.2d 138, 152-53 (1972), *appeal dismissed*, 409 U.S. 1003 (1972). The initial six-year period was controlled by a capital budget so structured as to facilitate optimal provision of all the essential services enumerated; the second and third six-year periods were governed by a subsidization plan listing differing priorities for facilities.

198. 30 N.Y.2d at 363-64, 285 N.E.2d at 296-99, 334 N.Y.S.2d at 142-47. The appellate division had accepted the plaintiffs' contention that the Ramapo plan was unconstitutionally exclusionary. *See* Golden v. Planning Bd. of Ramapo, 37 App. Div. 2d 236, 248, 324 N.Y.S.2d 178, 186 (2d Dep't 1971).

199. Golden v. Planning Bd. of Ramapo, 30 N.Y.2d 359, 366, 285 N.E.2d 291, 294, 334 N.Y.S.2d 138, 142 (1972), *appeal dismissed*, 409 U.S. 1003 (1972).

200. 30 N.Y.2d at 375, 285 N.E.2d at 200, 334 N.Y.S.2d at 154. *See* Marcus Assoc., Inc. v. Town of Huntington, 57 App. Div. 2d 116, 119-21, 393 N.Y.S.2d 727, 729-30 (2d Dep't 1977) (sustained a zoning ordinance limiting the number of uses and occupants and setting a minimum floor area for each separate use; judicial self-restraint doctrine of *Golden* relied upon).

to supplement a community's goal of efficient utilization of land.[201]

b. Residential Development Control Systems: Petaluma, California

One of the most controversial of the new growth control ordinances has been adopted by Petaluma, California, a community that experienced rapid growth in the 1960's. Petaluma first imposed a temporary building moratorium in 1971; in August of 1972, it unveiled the new Residential Development Control System.[202] Under this scheme, a maximum of five hundred dwelling units could be built in any one year between 1972 and 1977; half of those units had to be single-family dwellings, while the other half had to be multiple-family dwellings.[203] In addition, three hundred of the units had to be built in the older portion of Petaluma so that only two hundred could be constructed in the eastern portion of the town, where most of the recent construction had taken place.[204] Determination of which developers would be allowed to build was based on an annual competition among builders who hoped to construct units in Petaluma during the coming year.[205]

In *Construction Industry Association v. City of Petaluma*,[206] the United States District Court for the Northern District of California held that the city's growth control plan violated the constitutional right of persons to travel and settle freely. The court asserted that the numerical regulation of the city's population precluded residents of other areas or regions from coming into the region and establishing a residence in Petaluma.[207] The city defended its plan by arguing that it had three

201. 30 N.Y.2d at 378, 285 N.E.2d at 302, 334 N.Y.S.2d at 152.

202. For a fuller discussion of the Petaluma plan, *see Policy and Constitutionality, supra* note 195, at 838-40. *See generally* Smith, *Does Petaluma Lie At the End of the Road From Ramapo?*, 19 VILL. L. REV. 739 (1974).

203. *See* Petaluma, Cal., Resolution 6113 N.C.S., Establishing a Residential Development Control System, August 21, 1972; and Petaluma, Cal., Resolution 6126 N.C.S., Modifying the General Plan By Adding Thereto a Housing Element, September 5, 1972.

204. *See* Petaluma, Cal., Resolution 6126 N.C.S., Modifying the General Plan by Adding Thereto a Housing Element, September 5, 1972. Under this scheme, 8-12% of future residential units would have to be constructed for low-and moderate-income people.

205. Competition proceeded in three stages. First, the city's residential evaluation board repudiated or approved proposals for development depending on the extent to which they conformed with the community's general and environmental plan. Under the next two stages

> (1) thirty points were assigned for sewer mains, drainage channels, fire protection, streets, and schools. Twenty-five points were required for issuance of a permit. (2) eighty points were allocated for design excellence, open space and trail links, inclusion of low cost housing, and necessary public facilities. Fifty points were required in this group.

Policy and Constitutionality, supra note 195, at 839 n.183.

206. 375 F. Supp. 574 (N.D. Cal. 1974), *rev'd*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

207. 375 F. Supp. at 581.

compelling state interests to justify the restrictions: (1) the inadequacy of existing sewage facilities; (2) the insufficiency of existing water supplies; and (3) the zoning power that assured Petaluma an inherent right to control its own rate of growth.[208]

Rejecting all these defenses, the district judge stated that the city had purposefully limited the quantity of a commodity (water) to justify a population limitation based on an alleged inadequacy of that commodity and, therefore, had failed to offer a compelling state interest in that regard.[209] The putative lack of adequate sewage facilities was dismissed with the observation that the city could have resorted to less burdensome alternatives, such as increasing the capacity of its existing treatment plants.[210] With regard to the sanctity of the zoning power, the court repudiated that argument on the ground that a municipality capable of supporting a natural population expansion may not limit growth simply because it does not prefer to grow at the rate that would occur under prevailing market demands.[211]

The United States Court of Appeals for the Ninth Circuit reversed the trial court, holding that the Construction Industry Association and local landowners did not have standing to assert the right to travel argument.[212] The Ninth Circuit also stated that the plan was not a violation of substantive due process but was instead a valid exercise of the police power to protect the public welfare.[213]

208. *Id.* at 582-83.

209. *Id.* at 583.

210. *Id.* at 582-83. In support of this conclusion, the district court relied on three Pennsylvania cases indicating that communities must deal positively with the problems of population growth rather than refusing to confront social change by announcing exclusionary zoning policies. *See* Appeal of Kit-Mar Builders, 439 Pa. 466, 474, 268 A.2d 765, 768-69 (1970); Appeal of Girsh, 437 Pa. 237, 244-45, 263 A.2d 395, 398 (1970); National Land & Investment Co. v. Kohn, 419 Pa. 504, 532, 215 A.2d 597, 612 (1965).

211. 375 F. Supp. at 583-84.

212. 522 F.2d at 904. The Ninth Circuit observed that the plaintiff had no standing to assert the rights of a group of unknown third parties allegedly excluded from Petaluma. In so holding, it relied on the ruling in Warth v. Seldin, 422 U.S. 490, 509 (1975), for the proposition that although the plaintiff-builders were adversely affected by the Petaluma ordinance, "their economic interests are undisputedly outside the zone of interest to be protected by any purported constitutional right to travel." 522 F.2d at 904. But the court also observed that the plaintiffs had standing to raise claims that the Petaluma scheme violated their own due process rights and unduly burdened interstate commerce. *Id.* at 905. *See generally* Note, *Warth v. Seldin: The Substantial Probability Test*, 3 HASTINGS CONST. L.Q. 485 (1976).

213. 522 F.2d at 908-09. The court remarked:

> If the present system of delegated zoning power does not effectively serve the state interest in furthering the general welfare of the region or entire state, it is the state legislature's and not the federal courts' role to intervene and adjust the system. . . . [T]he federal court is not a super zoning board and should not be called on to mark the point

c. Housing Limits: Boca Raton, Florida

In 1972, residents of Boca Raton, Florida, approved a referendum setting a housing limit of 40,000 dwelling units.[214] This limit had the effect of placing a ceiling of about 100,000 on the town's population. Except for single-family structures and duplexes, all housing construction was halted from November 1972 until March 1974 through a series of moratoria.[215] In the interim, a Moratorium Variance Advisory Board was established to review all replotting and rezoning in light of interim densities.[216]

In *Arvida Corp. v. City of Boca Raton*,[217] the city's plan was challenged on the grounds that the demand for moderately-priced housing could be met only through construction of multiple dwelling units and that low-density zoning to implement the city's requirements would not only raise the cost of housing but also bore no reasonable relationship to the city's ability to provide municipal services.[218] The federal court abstained from deciding the constitutional issue until the citizens of Boca Raton had an opportunity to vote on a referendum repealing the ordinance.[219]

d. Referenda: Eastlake, Ohio

The Eastlake City Charter required that any changes in existing land use be made through a city-wide referendum and be approved by a fifty-five percent margin.[220] Forest City Enterprises applied to the Eastlake Planning Commission for rezoning of its property to permit multi-family, high-rise development. The application was approved in 1971 and the Comprehensive Zoning Ordinance was amended to include the rezoning.[221] One year later, Forest City Enterprises applied

at which legitimate local interests in promoting the welfare of the community are outweighed by legitimate regional interests.

Id. at 908. *Accord*, Linmark Assocs., Inc. v. Township of Willingboro, 535 F.2d 786, 791 n.4 (3d Cir. 1976), *rev'd on other grounds*, 431 U.S. 85 (1977); Steel Hill Development, Inc. v. Town of Sanbornton, 469 F.2d 956, 960-61 (1st Cir. 1972); Sixth Camden Corp. v. Evesham Township, 420 F. Supp. 709, 723 (D.N.J. 1976). A similar policy of judicial self-restraint was relied upon by the Ninth Circuit to dispose of a commerce clause challenge to the Petaluma scheme. 522 F.2d at 909.

214. CITY CHARTER OF BOCA RATON, FLA., § 12.09 (1972).

215. *See* Boca Raton, Fla., Ord. Nos. 1744, 1745 (Nov. 15, 1972).

216. *See* Boca Raton, Fla., Ord. No. 1679 (June 27, 1972).

217. 59 F.R.D. 316 (S.D. Fla. 1973).

218. *See id.* at 318-19.

219. *Id.* at 324.

220. CITY CHARTER OF EASTLAKE, OHIO, art. VIII, § 3 (1971).

221. Forest City Enterprises, Inc. v. City of Eastlake, 41 Ohio St. 2d 187, 187, 324 N.E.2d 740, 742 (1975).

for parking and yard approval, which is a preliminary step to obtaining a construction permit; the Planning Commission denied the application because Forest City did not obtain voter approval of the council's amendment to the Comprehensive Zoning Ordinance.[222]

The Eastlake referendum requirement was subsequently challenged on the ground that it violated Forest City's right to due process. The Ohio Supreme Court held that the referendum requirement ensured that "the potentially arbitrary and unreasonable whims of the voting public" would decide the reasonable use of property.[223] As a result, the charter provision was deemed to constitute an unlawful delegation of legislative power, thereby circumventing the petitioner's right to due process of law.[224] The court also noted that no standards were established to ensure reasonable, rational and unarbitrary consideration of any petitions requiring referendum approval.[225]

On a writ of certiorari, the United States Supreme Court reversed the state court ruling and held that the referendum requirement did not violate the due process rights of the landowner.[226] A majority of the justices reasoned that the power to legislate is not a privilege given to the citizens by some external authority but instead, is a right retained by the people which they can reclaim.[227] This decision has important implications because the referendum can be a useful tool in controlling growth.

2. Comparison to Existing Hawaiian Techniques

Hawaii's Land Use Commission can be analogized to Ramapo's Planning Board in that both agencies are involved in the reclassification of land, thus enabling the development of residential units.[228] But the major difference between the two is that while Ramapo's Planning Board has a fixed set of guidelines to govern the outcome of requests for special permits, the Land Use Commission has no such criteria.[229] In addition, Ramapo's development technique is

222. *Id.* at 187-88, 324 N.E.2d at 742.

223. *Id.* at 195, 324 N.E.2d at 746.

224. *Id.* at 196, 324 N.E.2d at 746.

225. *Id.*

226. City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 679 (1976). *See* notes 190-93 and accompanying text *supra.*

227. *Id.* at 672.

228. For the duties of the Land Use Commission, *see* note 185 *supra.*

229. The relevant statute simply advises the Land Use Commission that (1) in establishing the boundaries of urban, rural, agricultural or conservation districts certain general policies such as reserving areas for foreseeable urban growth or protecting lands susceptible to intensive cultivation ought to be followed, (2) certain types of uses are deemed to characterize each type of district

tied into its eighteen-year capital improvements program, thereby providing its planning board with a built-in timing device. In contrast, the Hawaii Land Use Commission is bound by the state's general plan but that plan has no specifications regarding timed or sequential development.[230]

Moreover, after complying with state regulations, a developer in Hawaii must approach the county in which the proposed development is to occur in order to determine whether his proposed scheme conflicts with any county regulations or general plans.[231] Honolulu County has permitted all proposed development near existing public facilities. But when no public facilities exist or the extant facilities are inadequate, the county has collaborated with the developer to provide these services on a pro rata basis. In Hawaii Kai, for instance, the developer, Bishop Estates, absorbed the cost of a sewer system and in Miliani, the contractor, Castle and Cook, dedicated lands to public use for the necessary schools. The developers only agreed, however, to assume these costs in return for approval of a district boundary or zoning change; the general public still financed the expenses of both off-site facilities, such as highways, and the upkeep of necessary public services, such as police and fire stations.

The Comprehensive Zoning Code in each county is also a tool with which the government regulates growth to some extent.[232] The counties use this mechanism to control population densities. The code specifies the subject matter areas over which the zoning power can be exercised, subject matter areas that will affect the establishment of multi-family or single-family districts.[233] This approach is akin to those utilized in Petaluma and Boca Raton, in that by designating limited areas where multi-family and single-family dwellings can be constructed, the code restricts the amount of people living within the county's jurisdiction. Code provisions also permit control of the size of structures, thereby limiting the number of people a dwelling can

and (3) district boundaries are to be drawn after consideration of the relevant county's general plan. HAW. REV. STAT. tit. 13, § 205-2 (1976). *See also id.* § 205-16.1 (creating an eight-part interim land use guidance policy prescribing general guidelines for land use amendments, including accommodation of growth and development, the provision for a balanced housing supply, protection of existing conservation lands, etc.).

230. *See* HAW. REV. STAT. tit. 13, § 205-16 (1976). In 1978, the state legislature also enacted a comprehensive state planning statute that is presently uncodified.

231. *See* note 187 *supra.*

232. Under state law, each county is instructed to develop a long-range, comprehensive plan to be effectuated by zoning; the zoning power is to be exercised by ordinances that can relate to twelve specified subject areas. *See* HAW. REV. STAT. tit. 6, § 46-4 (1976).

233. *See id.*

contain.[234]

Hawaii has no zoning referendum requirement at the present time, but the Lieutenant Governor's proposed Aina Malama Amendment would establish just such a mechanism. The lands to be preserved would be designated "Aina Malama" and could only be classified as such or reclassified for development by a vote of the people. In light of the United States Supreme Court's decision in *City of Eastlake*,[235] this proposal would probably be constitutional.

Hawaii also has a tax incentive program designed to protect agricultural lands. Under the taxation laws in the state, owners desiring to use their land for ranching or other agricultural use and to have their property assessed at its market value for such use, must dedicate their lands for this purpose.[236] If the dedication request is approved, the owners forfeit the right to change the use of their lands for a period of ten years.[237] Owners may also voluntarily dedicate their lands for twenty years, thus increasing their special tax assessment privilege.[238] Under the ten-year plan, the land is valued at its highest and best agricultural use; under the twenty-year plan, the land is assessed at fifty percent of its highest and best agricultural use.[239] Failure of the owners to observe the restrictions on the use of their lands results in strict penalties. Not only is the special tax assessment privilege cancelled retroactively to the date of the petition for dedication, but all taxes that would have been incurred pursuant to a regular assessment (less the amount already paid) become due and payable, coupled with an annual penalty of ten percent.[240] Although these sanctions seem prohibitive, they may, in fact, be minor compared to the profits earned by changing land from an agricultural to an urban designation.

Hawaii thus already has several vehicles for an excellent growth control program. What the state lacks are more specific guide-

234. *See id.*

235. City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976). *See* notes 190-93 and accompanying text *supra.*

236. *See* HAW. REV. STAT. tit. 14, §§ 246-12(a), 246-12(b) (1976).

237. *Id.* § 246-12(c).

238. *Id.* § 246-12(a).

239. *Id.* § 246-12(b).

240. *Id.* § 246-12(d) (Supp. 1977). The constitutionality of a similar statutory scheme restricting land use has been upheld by one other state court. Andrews v. Lathrop, 132 Vt. 256, 315 A.2d 860 (1974) (upheld against constitutional challenge statutory scheme imposing special capital gains tax on the sale or exchange of land held less that six years except those involving lots under five acres that served as the taxpayer's residence; tax rates were proportional to the length of time the land was held by the seller and the rate of gain. *See* VT. STAT. ANN. tit. 32, §§ 10001-10010 (Supp. 1977)).

lines to govern land use decisions. The merits of the mainland models described are that they channel discretion and ensure greater consistency and predictability.

C. The Problems of Existing Rights and Unsettled Native Claims

Complicating the problem of land use regulation in the islands is the fact that the people of Hawaii have land use rights that are unique in the United States.[241] In addition, native Hawaiians have extensive unsettled claims to land and payments that are currently under consideration in Congress. Both these matters may give the state strong arguments in favor of limiting population growth, particularly with respect to the in-migration of newcomers.

1. Existing Rights of the People of Hawaii

Chapter seven of the Hawaii Revised Statutes states that even after private owners obtain title to land, "the people" still retain certain rights that cannot be taken away. Thus, section 7-1 states that the people shall not be deprived of "the right to take firewood, house-timber, aho cord, thatch, or ti leaf, from the land on which they live, for their own private use. . . ."[242] Similarly, the statute states that the people shall have the right to "drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple. . . ."[243]

In addition, the Hawaii Supreme Court has ruled that the public has rights in all of the beaches and coastlines of the islands. In the case of the *County of Hawaii v. Sotomura*,[244] the state court held in a condemnation proceeding of beachfront property that "the land below the *Ashford* seaward boundary line as to be redetermined belongs to the State of Hawaii, and the defendants should not be compensated therefor."[245] Thus, in *Sotomura* the court held that the state owns the land up to the vegetation line of the beach because local policy favors

241. *See* note 181 *supra.*

242. HAW. REV. STAT. tit. 1, § 7-1 (1976).

243. *Id.*

244. 55 Haw. 176, 517 P.2d 57 (1973).

245. *Id.* at 184, 517 P.2d at 63. The state court was referring to its prior decision in *In re* Application of Ashford, 50 Haw. 314, 440 P.2d 76 (1968), which held that a royal patent could not convey land beyond the high water mark and thus held that the seaward boundary between public and private beachfront property was "the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris." *Id.* at 315, 440 P.2d at 77. *See generally* Town & Yuen, *Public Access to Beaches in Hawaii: 'A Social Necessity,'* 10 HAW. B.J. 5 (1973); Note, *Hawaiian Beach Access: A Customary Right*, 26 HASTINGS L.J. 823 (1975).

extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible.

The full extent of the public's right of use over land and waterways is still uncertain, but these statutes and cases clearly hold that private rights of ownership are more restricted in Hawaii than in other states. Property is not as freely available for purchase as elsewhere and the rights of "owners" are severely limited. The state can therefore reasonably argue that it has an obligation to discourage new migration to the islands.

2. Unsettled Claims of Native Hawaiians

Native Hawaiians have often claimed that the division effected by the Great Mahele of 1848[246] and subsequent land decisions have illegally deprived them of their rights to ownership of land in the islands. This claim has its basis in the totally different view toward "property rights" held by Hawaiians in comparison with that held by the Westerners who came to the islands during the nineteenth century. In recent years, the legitimacy of the claims of native Hawaiians has been recognized by many observers at the federal level.

On June 27, 1974, a bill was submitted to the United States House of Representatives "to provide for the settlement of historic claims of the Hawaiian Natives."[247] The bill, as originally drafted, would have established a Hawaiian Native Fund of one billion dollars, deposited in ten equal yearly amounts, to be administered by the Secretary of Interior. Also, a corporation would be established to receive these funds and disburse them to benefit native Hawaiians; the board of directors of this corporation would be elected by such Hawaiians. This drive for reparations was spearheaded by a group that called themselves the "Aboriginal Lands of Hawaiian Ancestry" (ALOHA). The movement has gained its momentum primarily because of the success of the 1971 Alaska Native Claims Settlement Act.[248] Under the Alaska law, various indigenous peoples received almost one billion dollars and thirty-eight million acres of land. Native Hawaiians see many similarities between their land claims and those of the native Alaskans. In both cases, the argument is that the United States, without paying compensation to the indigenous population, gained title to land in terri-

246. *See* note 181 *supra.*

247. Hawaiian Native Claims Settlement Act, H.R. 15666, 93d Cong., 2d Sess. (1974); 120 CONG. REC. 21706 (1974).

248. 43 U.S.C. §§ 1601-1628 (Supp. V 1975).

tories that later became states.[249]

More recently, a proposal in lieu of the 1974 Hawaiian claims bill has been advanced by joint resolutions in the Ninety-Fifth Congress.[250] Instead of directly making monetary reparations to the native Hawaiians, these resolutions seek to establish a Hawaiian Native Claims Settlement Study Commission. Within one year of its creation, the commission would recommend to the Congress the alternatives by which the latter body could proceed to redress the injuries inflicted upon native Hawaiians. Because of this resolution, coupled with the increasing activism of many Hawaiians seeking land reparations, it is possible to argue that the State of Hawaii has a compelling interest in preserving lands for the native populace and that the state must therefore limit population growth to ensure that some land remains available for the eventual settlement.

There also exists the problem of native Hawaiian land claims against the federal government. Such claims can be compared to the situation of the American Indians in which some compensation has been allowed for the taking of tribal lands for governmental use. As stated by the Supreme Court in *Tee-hit-ton Indians v. United States*:[251] "Where the Congress by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently, compensation must be paid for subsequent taking."[252] It could be argued that Native Hawaiians have not yet received compensation for the less-than-fair treatment they suffered at the hands of the western settlers of Hawaii. For instance, questions are now being raised as to the legality and validity of the overthrow of the Hawaiian monarchy of Queen Lilliuokalani in 1893.[253] The explanation given by John L. Stevens, the United States Minister in Hawaii in 1893, was that in order to protect American citizens and property, he was forced to order the landing of marines in Honolulu to stop the Queen from restoring the monarchy.[254] However, President Grover Cleveland refused to submit the treaty of

249. *See* R. JONES, A HISTORY OF THE ALASKAN NATIVE CLAIMS (1973), in which it is pointed out that in both the Alaska and Hawaii Organic Acts, Congress left open the possibility of a future settlement of land claims.

250. *See* S.J. Res. 4, 95th Cong., 1st Sess. (1977); 123 CONG. REC. S17205 (daily ed., Oct. 17, 1977); *id.* S17378 (daily ed., Oct. 20, 1977); H.S.J. Res. 526, 95th Cong., 1st Sess. (1977); 123 CONG. REC. H6292 (daily ed., June 21, 1977).

251. 348 U.S. 272 (1955).

252. *Id.* at 277-78. *Accord*, Sioux Tribe v. United States, 316 U.S. 317, 326 (1942); Chippewa Indians v. United States, 301 U.S. 358, 375-76 (1937); Shoshone Tribe v. United States, 299 U.S. 476, 497 (1937); United States v. Creek Nation, 295 U.S. 103, 109-10 (1935).

253. *See generally* Levy, *Native Hawaiian Land Rights*, 63 CALIF. L. REV. 848 (1975).

254. M. TATE, THE UNITED STATES AND THE HAWAIIAN KINGDOM 232 (1965).

annexation of Hawaii in 1893 to the Senate, pointing to the unethical role the United States had played in the acquisition of the islands in the first place. His message to the Senate was:

> But for the notorious predilections of the United States minister for annexation, the committee of safety, which should be called the committee of annexation, would never have existed.
>
> But for the landing of the United States forces upon false pretexts respecting the danger to life and property the committee would never have exposed themselves to the pains and penalties of treason by undertaking the subversion of the Queen's Government.
>
> But for the presence of the United States forces in the immediate vicinity and in position to afford all needed protection and support the committee would not have proclaimed the Provisional Government from the steps of the Government building.[255]

Although the question has never been litigated in the courts, an argument could thus be made that certain lands that were taken by the federal government during the overthrow of 1893 should be returned to the native Hawaiians. Senate Joint Resolution four, currently under consideration in Congress, would provide a substantial basis for this conclusion because it states that "the Congress hereby declares that a wrong has been committed against the Aboriginal Hawaiians which the United States is obligated to endeavor to remedy."[256] Therefore, the state can argue that it must discourage migration to the islands to protect the unsettled claims of native Hawaiians.

D. The Taking Issue

The Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation. . . ."[257] This requirement is made applicable to state governmental action by the provision in the Fourteenth Amendment that a state shall not "deprive any person of . . . property, without due process of law. . . ."[258] Article one, section eighteen, of the Hawaii Constitution also states: "Private property shall not be taken or damaged for public use without just compensation."[259] With respect to land use controls in Hawaii, these requirements pose at least three significant questions: (1) Under what circumstances is the state constitution-

255. President's Message to Congress Relating to the Hawaiian Islands, H.R. EXEC. DOC. No. 47, 53rd Cong., 2d Sess., XIII (1893); 26 CONG. REC. 309, 312 (1893).

256. S.J. Res. 4, 95th Cong., 1st Sess. (1977); 123 CONG. REC. S17378 (daily ed. Oct. 20, 1977).

257. U.S. CONST. amend. V.

258. U.S. CONST. amend. XIV, § 1.

259. HAW. CONST. art. 1, § 18.

ally obligated to compensate a landowner whose property is subjected to land use controls? (2) If "just compensation" is required, how is it to be measured? (3) If "just compensation" is not required, when should some compensation nevertheless be paid?

1. Compensable Takings

Professor Frank Michelman has identified the general principles of law applicable to the just compensation requirement:

> Examination of judicial decisions and of legal commentary focused on them indicates that one of four factors has usually been deemed critical in classifying an occasion as compensable or not: (1) whether or not the public or its agents have physically used or occupied something belonging to the claimant; (2) the size of the harm sustained by the claimant or the degree to which his affected property has been devalued; (3) whether the claimant's loss is or is not outweighed by the public's concomitant gain; (4) whether the claimant has sustained any loss apart from restriction of his liberty to conduct some activity considered harmful to other people.[260]

More specifically, the following points should be emphasized with respect to certain land use problems and potential regulatory techniques in Hawaii. First, a diminution in the value of a piece of property by virtue of governmental action that makes changes in the currently permitted uses of that property more difficult will probably not be compensable if the currently permitted uses are economically reasonable ones.[261] Thus, Hawaiian regulations that would make it more difficult for land now limited to agricultural uses to be made available for housing developments could probably be adopted without providing for compensation. Indeed, some courts have recently ruled that a state's interest in protecting its environment is sufficient to enable it to preserve private property in its natural condition, even though the restriction may confine use of that property to limited agricultural, horticultural or recreational purposes.[262] This line of authority may be

260. Michelman, *Property Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1183-84 (1967) [hereinafter cited as Michelman]. *See generally* F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE (1973).

261. *See* Mugler v. Kansas, 123 U.S. 623, 668-69 (1887); D. GODSCHALK, D. BROWER, L. MCBENNETT & B. VESTAL, CONSTITUTIONAL ISSUES OF GROWTH MANAGEMENT 58-60 (1977) [hereinafter cited as CONSTITUTIONAL ISSUES]; J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 440-50 (1978).

262. *See, e.g.*, CEEED v. California Coastal Zone Conservation Comm'n, 43 Cal. App. 3d 306, 118 Cal. Rptr. 315 (1974) (sustained coastal initiative restrictions on development in permit areas pending formulation of a coastal zone plan so that development would not irreversibly commit resources to uses inconsistent with that plan); Rockville Fuel & Feed Co. Inc., v. City of Gaithersburg, 266 Md. 117, 291 A.2d 672 (1972) (sustained zoning amendment preventing con-

quite significant with respect to the preservation of Hawaiian swamp lands.

Second, a regulation that prohibits a previously permitted use of property may constitute a compensable taking if it results in too great a reduction in the value of the property. This is referred to as the diminution in value test:

> While some writers have urged a 50 per cent standard and others have calculated the point at which a taking is found to have occurred to average closer to 80 per cent, the degree of dimunition of property value sufficient to invalidate a regulation remains uncertain. Despite the lack of a single standard, this test is widely applied and is one of the two tests most likely to be used in growth management litigation.[263]

In applying this test, however, the appropriate measures of original and diminished value are crucial.[264] The recent decision of the New York

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struction of a concrete plant where it was shown that the amendment was to be followed by a comprehensive ordinance barring industrial uses from the "historic heart of the City"); Turnpike Realty Co. v. Town of Dedham, 362 Mass. 221, 284 N.E.2d 891 (1972) (sustained law restricting use of property in "flood plain" to protect neighboring lands and render unnecessary public flood control and relief expenditures); Meadowlands Regional Development Corp. Agency v. State, 112 N.J. Super. 89, 270 A.2d 418 (1970) (sustained reclamation act for state meadowlands that limited the uses to which owners of such lands could put their property); Just v. Marinette County, 56 Wis. 2d 7, 201 N.W. 2d 761 (1972) (sustained law specifying that use of wetland property would be restricted in order to safeguard the water purity and scenic aspects of a nearby lake).

263. CONSTITUTIONAL ISSUES, *supra* note 261, at 59. The status of the dimunition of value test in the Supreme Court is unsettled, although it formed the rationale for a number of important decisions on the taking issue. *See, e.g.*, Armstrong v. United States, 364 U.S. 40, 48 (1960); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922); Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908); Interstate Consol. St. Ry. v. Massachusetts, 207 U.S. 79, 87 (1907). *See also* Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962). But in other cases the Court has found proof of dimunition of value immaterial. *See, e.g.*, Queenside Hills Realty Co. v. Saxl, 328 U.S. 80, 82-83 (1946); Miller v. Schoene, 276 U.S. 272, 279-80 (1928); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388-89 (1926); Hadacheck v. Sebastian, 239 U.S. 394, 409-10 (1915). *See generally* Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 41-46 (1964).

264. The measure utilized by the Supreme Court was discussed recently in United States v. Fuller, 409 U.S. 488 (1973), a proceeding initiated by the government to condemn 920 acres of grazing lands. The Court observed that although the usual test is the fair market value of the property taken, that standard is to be applied in light of basic equitable principles of fairness. *Id.* at 490. It then proceeded to point out that fair market value will not include any appreciation in value caused by the government's own actions. *Id.* at 491(citing United States v. Cors, 337 U.S. 325, 334 (1949), in which the Court had previously held just compensation for requisitioned tug could not include appreciation in value of such a vessel caused by the government's increased wartime needs). The Court in *Fuller* therefore held that the value of the grazing land condemned could not include any element based on the use of the respondents' fee lands in conjunction with grazing land that they also utilized pursuant to a federal permit under the Taylor Grazing Act, 43 U.S.C. § 315b (1970). 409 U.S. at 493. *See also* United States v. 41,098.98 Acres of Land, 548 F.2d 911, 915 (10th Cir. 1977); United States v. 161 Acres of Land, 427 F. Supp. 582, 584 (D. Colo. 1977).

Court of Appeals in *Penn Central Transportation Company v. City of New York*[265] is significant with respect to measurements of value. In this case, the court sustained a restriction against the construction of an office building atop Grand Central Station, an officially designated historical landmark owned by Penn Central. It did so for three reasons: (1) the value of the property for development was "created not so much by the efforts of the property owner, but instead by the accumulated indirect social and direct governmental investment in the physical property, its functions, and its surroundings";[266] (2) the value of the property as restricted must be viewed in light of the contribution the station makes to the profitability of Penn Central's other "heavy real estate holdings in the Grand Central area, including hotels and office buildings";[267] and (3) under the regulation, Penn Central was still permitted to transfer its development rights over the station to other properties in the vicinity that it owned or that were owned by others.[268] Each of these reasons suggest bases on which previously permitted uses of property in Hawaii might be prohibited for legitimate public purposes without the payment of compensation. Some courts and commentators would impose an even less strict compensation requirement on governmental regulations of property. Professor John Costonis finds some support in judicial precedent for a test that would require compensation for the prohibition of previously permitted uses only if the regulation denied the property owner any "reasonable beneficial use" of the property, which is defined as "an intensity of development potential" that would "allow the landowner a reasonable economic return. . . ."[269] Obviously, the reasoning of the court in the *Penn Central* case would also be relevant in the application of such a "reasonable beneficial use" test.

Third, the State of Hawaii appears to have considerable leeway in imposing moratoria on the development of property within its borders, even in accordance with currently permitted uses. The leading case on

265. 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), *aff'd*, 46 U.S.L.W. 4856 (U.S. June 26, 1978). For a discussion of the decision of the United States Supreme Court in this case, *see* notes 306-315 and accompanying text *infra*. *See* Costonis, *The Disparity Issue: A Context for the Grand Central Terminal Decision*, 91 HARV. L. REV. 402 (1977).

266. 42 N.Y.2d at 331-32, 366 N.E.2d at 1275-76, 397 N.Y.S.2d at 916.

267. *Id.* at 333, 366 N.E.2d at 1276, 397 N.Y.S.2d at 920.

268. *Id.* at 334, 366 N.E.2d at 1277, 397 N.Y.S.2d at 920.

269. Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021, 1049-52 (1975) [hereinafter cited as Costonis]. *See also* Berger, *The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis*, 76 COLUM. L. REV. 799 (1976).

such moratoria is *Golden v. Planning Board of Town of Ramapo*,[270] in which the New York Court of Appeals upheld Ramapo's "over-all program of orderly growth and adequate facilities," which embodied "a sequential development policy commensurate with progressing availability and capacity of public facilities,"[271] even though this program could have resulted in a postponement of the subdivision development of some parcels of land for as long as eighteen years.[272] According to Professor Costonis,

> What saved the plan from being confiscatory was, in . . . [the court's] view, its deliberate inclusion of factors that mitigated its otherwise draconian impact and thereby satisfied fundamental considerations of fairness. Among the factors which elevated the economic return on affected lands from what was surely a negative value to what the majority found to be a Reasonable Beneficial Use return were: a residual right to construct a single family residence on plattable land; an interim reduction in real estate taxes keyed to the depreciation caused by the restrictions; an option afforded to the landowner to accelerate the construction date by providing the requisite public facilities; the right to proceed with development in accordance with the town's capital improvements timetable, whether or not the town met that timetable; the present vesting and assignability of the future right to develop; the benefit of substantial incremental values that would accrue in time to the restricted land as a consequence of the phased installation of public facilities pursuant to a carefully elaborated comprehensive plan; and the "temporary" nature of the restrictions, which were imposed, not to enhance the town's resource position, but to coordinate private advantage with public facilities and needs.[273]

2. Just Compensation

Professor Costonis has also argued that a land use regulation that does not allow for any "reasonable beneficial use" of the subject property may nevertheless be sustained if the regulation provides compensation for the difference between the value of the property as regulated and its value with respect to some "reasonable beneficial use."[274] It is equally possible that a landowner who was not offered such limited compensation could constitutionally be restricted, in terms of re-

270. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972), *appeal dismissed*, 409 U.S. 1003 (1972). *See* notes 195-20 and accompanying text *supra*.

271. 30 N.Y. 2d at 369, 285 N.E.2d at 296, 334 N.Y.S.2d at 144. *See generally* Note, *Phased Zoning: Regulation of the Tempo and Sequence of Land Development*, 26 STAN. L. REV. 585 (1974).

272. *See* note 197 and accompanying text *supra*.

273. Costonis, *supra* note 269, at 1056-57 (footnote omitted).

274. *Id.* at 1051-52. *See generally* Hagman, *Compensible Regulation: A Way of Dealing with Wipeouts from Land Use Control*, 54 U. DET. J. URB. L. 45 (1977).

lief, to an action for damages to recover it.[275] The traditional approach, however, has been for the courts to invalidate regulations that amount to compensable takings, leaving a state with only the alternative of exercising its eminent domain powers and paying "just compensation" for the entire fee interest in the properties that it still wishes to subject to its control. Under such an approach, "the valuation formula now applied takes as its measure the condemned parcel's 'highest and best use under existing or *reasonably probable land use controls*.' "[276]

Thus, if Hawaiian regulations that make changes in the currently permitted uses of property more difficult are deemed to be compensable takings and the state is forced to condemn the property to preserve the existing uses, some compensation would have to be paid under the traditional approach for potential expansions in permitted uses that could have been anticipated. Professor Costonis has protested against this additional measure of compensation, arguing that it "undercuts public governance as a valuation constraint," and calling it a "premium, which is solely the product of public action. . . ."[277] Once again, however, the reasoning of the New York Court of Appeals in the *Penn Central* case[278] may be pointing the way toward new valuation standards, which would exclude even currently-permitted-use measures of valuation to the extent that they are attributable to social and governmental contributions and which would exclude values based on anticipated use changes.[279] In Sweden, for example, there is no "just compensation" requirement but under that nation's Expropriation Act, market value is the standard governing compensation.[280] Nevertheless, under the same law,

> value increases occurring during the 10 years prior to expropriation will not be compensated unless the owner can show that they derive from some source other than expectations of changes in permitted uses. . . . [the theory being that] the municipality should not have to compensate expectation values derived principally from the municipality's efforts in planning, developing, and regulating the community.[281]

275. *See* Bosselman, *The Third Alternative in Zoning Litigation*, 17 ZONING DIG. 73, 112 (1965).

276. Costonis, *supra* note 269, at 1043 (emphasis in original).

277. *Id.* at 1043-44.

278. Penn Cent. Transportation Co. v. City of New York, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977). *See* notes 265-268 and accompanying text *supra*.

279. *See* Costonis, *supra* note 269, at 1044 n.103.

280. Expropriation Act, ch. 4, § 1, SVENSK FORFATTNINGSSAMLING 1972, 719 at 6.

281. Hildreth, *Coastal Land Use Control in Sweden*, 2 COASTAL ZONE MANAGEMENT J. 1, 16-17 (1975).

3. Voluntary Payments of Compensation

As has been previously noted, most land use regulations that merely diminish the value of certain pieces of property do not constitute "takings" for which compensation is required. Considerations of fairness and practicality, however, might still indicate that a state should pay at least some compensation to some landowners in certain circumstances.[282]

Land use regulations are justified only when they are calculated to result in net benefits to the public, *i.e.*, benefits from the regulations that exceed the burdens imposed by those regulations. Regulations that quite obviously fail to satisfy this net-benefit test and which provide no compensation for the burdens they impose, are likely to be struck down by the courts as unreasonable, arbitrary, capricious or as not designed to serve a public purpose.[283] With regard to land use regulations that satisfy the net-benefit test, however, a principal argument against the voluntary payment of compensation is that it is procedurally expensive to determine exactly who has been injured by such regulations and the extent to which each has been injured. These "settlement costs" or "process costs" would reduce the net benefits to the public from the regulations.[284] Nevertheless, a strong ethical argument can be made that, absent a specific intention to redistribute wealth,[285] it is inherently unfair to provide regulatory benefits to some people by imposing uncompensated regulatory burdens on others.[286] A second argument against payments to compensate for particular burdens is that, so long as all land use and other regulations are required to satisfy the

282. *See* Michelman, *supra* note 260, at 1250-53:

> We should notice the occasions upon which courts, in the course of rejecting plausible claims to compensation, trouble to observe that the legislature might, if it pleased, provide the compensation which the court cannot bring itself to exact. How can it be that payments of public funds to private individuals, not in satisfaction of legal liabilities of state or nation and not noticeably in pursuit of the "general welfare" (unless the general welfare embraces the need to satisfy the demands of fairness) would not be "waste" or "gifts" of public assets? The message seems to be that the courts recognize that they cannot, through the enunciation of doctrine which decides cases, adequately stake out the limits of fair treatment; that if the quest for fairness is left to a series of occasional encounters between courts and public administrators it can but partially be fulfilled; and that the political branches, accordingly, labor under their own obligations to avoid unfairness regardless of what the courts may require.

Id. at 1252 (footnotes omitted). The references cited in notes 283-293 *infra*, are to discussions of certain general concepts with respect to compensation that are drawn upon in the text; these discussions do not deal specifically with voluntary payments.

283. *See id.* at 1195-96.

284. *See id.* at 1214; B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 45-46, 73-76 (1977) [hereinafter cited as ACKERMAN].

285. *See* Michelman, *supra* note 260, at 1181-83; ACKERMAN, *supra* note 284, at 58.

286. *See* ACKERMAN, *supra* note 284, at 72-73.

net-benefit test, then the benefits obtained by individual persons from all such regulations will ultimately outweigh the burdens.[287] In response to this contention, however, one could argue that is unrealistic to think in these terms for persons who suffer major losses as a result of the implementation of land use controls.[288]

Apart from considerations of fairness, certain practical considerations also militate in favor of voluntary payments of compensation to landowners who would be injured by land use regulations. Politically, it might be much easier to secure the adoption of such regulations if compensation were to be paid.[289] Moreover, the failure to provide at least a reasonable amount of compensation could result in such high "costs" in the form of economic uncertainty, causing people to hesitate in making useful investments,[290] and political turmoil,[291] that the regulations in question would actually result in little or no net public benefit. Of course, neither fairness nor political or economic considerations require that a state compensate landowners for all losses arising from the continuation or imposition of land use controls. Persons who purchase property with the hope that current restrictions on its use might be lifted, at prices far below the value of the property if the restrictions were not in effect, cannot reasonably complain if their gamble does not succeed.[292] And even the justifiable expectations of long-term landowners may be undercut by "early warnings" from the state or county governments, to the effect that new land use regulations might be imposed or that existing ones might be made more stringent.[293]

IV. Legal Issues Related to Limiting Automobiles

State policies that limit automobile ownership, or curtail the use of automobiles, in the interests of combatting noise and air pollution and preserving the natural beauty of the state could also have the indirect effect of discouraging the in-migration of persons who place a high value on the availability of a rapid means of personal transportation. The problem is particularly pronounced in Hawaii. Oahu's streets may be approaching a congested level and the energy prospects for the fu-

287. *See* Michelman, *supra* note 260, at 1225-26.
288. *See id.*
289. *See* ACKERMAN, *supra* note 284, at 55-56.
290. *See id.* at 44-45.
291. *See id.* at 46-47.
292. *See* Michelman, *supra* note 260, at 1237-38.
293. *See id.* at 1238.

ture indicate that the state's motorists may not be able to rely on oil as a cheap fuel to provide them with convenient automobile transportation. In response to a statutory provision advocating a limitation of vehicles,[294] the State Department of Transportation issued a report on December 30, 1976, identifying four "constitutional problems" that may arise if the state passed a law setting a limit on the number of vehicles allowable within its borders: problems involving the right of interstate travel, the commerce clause, due process and equal protection clauses.[295] In fact, however, these constitutional "problems" are not major obstacles to a limitation of vehicular use, and the state should feel free to pursue various alternatives limiting the number of vehicles.

A. The Individual's Right of Interstate Travel

Although the United States Supreme Court has protected the right to travel in a number of different contexts, the Court has never stated that a person has the right to travel by any particular mode of transportation. Thus, as long as some modes of transportation to and within Hawaii are available, a limitation on automobile use would not interfere with the right to travel. Indeed, the Court has recently permitted airport taxes that do inhibit travel by raising the costs thereof, if the taxes are reasonably related to the costs of operating the airport or otherwise policing air traffic.[296]

It might be argued that because federal funds are used to build and maintain Hawaii's two freeways the state cannot interfere with access to those thoroughfares. But Hawaii—like all other states—already interferes with access to these routes in many ways and no one has ever argued that such state regulation is improper. For example, in order to use the intrastate freeways one must obtain a Hawaii driver's license, comply with the state's safety inspection and registration requirements and adhere to speed limits that are set by the state and enforced by Hawaiian police officers. Thus, although the federal government does finance the construction and maintenance of these routes, the states have always had primary responsibility for regulation of traffic and a state effort to limit automobile use based on valid state goals and not designed to discriminate against interstate commerce would fall within

294. HAW. REV. STAT. tit. 15, § 279-A(9) (1976).

295. *See* HAWAII STATE DEP'T OF TRANSPORTATION, REPORT TO THE NINTH STATE LEGISLATURE REGULAR SESSION OF 1977 ON HAWAII REVISED STATUTES CHAPTER 279-A SECTION 9, SUBJECT: LIMITING TRANSPORTATION UNITS 9 (1976) [hereinafter cited as TRANSPORT REPORT].

296. Evansville-Vanderburgh Airport v. Delta Airlines, 405 U.S. 707, 715-21 (1972).

this area of state power.[297]

B. The Commerce Clause

A state cannot interfere with the free flow of interstate commerce unless the benefits to the state in terms of increased health and safety outweigh the burdens imposed on commerce.[298] Thus, it could be argued that state limitations on vehicles interfere with commercial movements that require vehicular transportation and also interfere with the free movement of an item of commerce, *i.e.*, the vehicles themselves. In response to such a challenge, the state would have to show some health and safety benefits accruing to itself and its residents as a result of the limitations. If such a showing were made, then the Court would defer to the state legislature's judgment and permit the regulation to stand.

What type of a showing would be necessary? The Court has been

297. In the case of South Carolina State Hwy. Dep't v. Barnwell Bros., Inc., 303 U.S. 177 (1938), the Supreme Court upheld a South Carolina weight and size ordinance that effectively prohibited ninety percent of all trucks serving interstate commerce from being driven through the state. In doing so, it observed that highways were within the local control of the states and that the states had primary responsibility for their maintenance and regulation. *Id.* at 184-85. Recent lower court decisions have cited *Barnwell Bros.* for the propositions that state infringement of interstate commerce must be scrutinized under a balancing test or that regulatory means adopted by the state must reasonably relate to the end that it seeks to achieve. *See* Aldens, Inc. v. LaFollette, 552 F.2d 745, 753 (7th Cir. 1977); Proctor & Gamble Co. v. City of Chicago, 509 F.2d 69, 75 (7th Cir.), *cert. denied*, 421 U.S. 978 (1975); National Aviation v. City of Hayward, 418 F. Supp. 417, 425 (N.D. Cal. 1976); Raymond Motor Transp., Inc. v. Rice, 417 F. Supp. 1352, 1358-59 (W.D. Wis. 1976), *rev'd*, 98 S. Ct. 787 (1978); Trescott v. Conner, 390 F. Supp. 765, 767 (N.D. Fla. 1975); Aldens, Inc. v. Packel, 379 F. Supp. 521, 527, 529 (M.D. Pa. 1974); However, in the *Raymond Motor* case, which involved a challenge to various Wisconsin laws imposing a fifty-five foot length limitation on trucks being operated on the state's highways without a special permit, the Supreme Court did indicate that to the extent that *Barnwell Bros.* established a rational relationship standard for judging the constitutionality of state laws regulating the channels of interstate commerce, it had been superseded by the case of Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959), which asserted that the true standard was whether " 'the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical so as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it.' " *Id.* at 524 (quoting Southern Pac. Co. v. Arizona, 325 U.S. 761, 775-76 (1945)). The court in *Raymond Motors* did not, however, overrule *Barnwell Bros. in toto. See* Raymond Motor Transp., Inc. v. Rice, 98 S. Ct. at 795. Indeed, the Court examined the evidence concerning traffic safety carefully and concluded that the Wisconsin length limitations did not actually promote safety. *Id.* at 795-96. It also found some discrimination in favor of Wisconsin industries in the way in which the statutes had been applied. *Id.* at 797. The full import of the case in unclear, but the majority opinion acknowledged that "[o]ur holding is a narrow one," *id.*, so states probably retain considerable discretion to regulate transportation within their borders.

298. *See, e.g.*, Raymond Motor Transp., Inc. v. Rice, 98 S. Ct. 787, 795 (1978); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443-44 (1960); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 524 (1959); Southern Pac. Co. v. Arizona, 325 U.S. 761, 775-76 (1945). *See generally* J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW 252-56 (1978).

sympathetic to environmental concerns[299] and might very well accept a state's contention that its limitation on vehicles is justified by the health, safety, and overall environmental benefits that would accrue from such a limitation. The state's case would be particularly strong if only oversized cars were banned or if the limitation on automobiles is accompanied by purchases of other vehicles, such as buses. Under such an approach, it could be effectively argued that the net impact of the state's scheme would not be a burden on commerce but only a restructuring of commercial activity.

C. The Due Process Clause

The Department of Transportation's report states that a court will require that any vehicular limitation "have a real and substantial relation to the purpose sought to be accomplished; if the purpose of the legislation can be achieved through a less drastic or simpler means, the regulation will generally be held to be excessive."[300] No citation is given for this proposition. Indeed, the state of the law is such that a federal court would scrutinize such a statute under a much less rigorous standard, requiring only some rational basis for its enactment.

In the realm of economics and social welfare, the United States Supreme Court has decided that democratically-elected legislatures should be given a free hand to balance competing societal interests and that it is improper for components of the judiciary to substitute their own judgment in place of the legislative decision. As long as the legislature has some rational basis for its conclusion, the Court will defer to that judgment even if it is not the same conclusion that the judges would have reached had they been legislators.[301] In the context of vehicular use restrictions, the Court would undoubtedly defer to the judgment of a state legislature, as long as that judgment rests upon some plausible basis, because the decision is one calling for a balancing of competing economic and social value choices. If the lawmakers are attempting in good faith to solve problems of traffic congestion, pollution

299. *See* Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 442-43 (1960). But where the state seeks to protect its environment through means that conflict with federal controls, its efforts may be invalidated under the preemption doctrine. *See* Ray v. Atlantic Richfield Co., 98 S. Ct. 988, 998 (1978).

300. TRANSPORT REPORT *supra* note 295, at 9.

301. *See, e.g.*, County Bd. of Arlington County v. Richards, 98 S. Ct. 24, 26 (1977); Dean v. Gadsden Times Publishing Corp., 412 U.S. 543, 544-45 (1973); Dandridge v. Williams, 397 U.S. 471, 485 (1970); Williamson v. Lee Optical Co., 348 U.S. 483, 487-89 (1955); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 424-25 (1952).

and energy waste, and if alternative methods of transportation are provided, then the vehicle limitation would certainly be constitutional.

D. The Equal Protection Clause

The Department of Transportation's report argues that a vehicular limitation might discriminate against recent immigrants to the islands and thus violate their right to equal protection. The distribution of vehicles in our society is already discriminatory in the sense that one can obtain a vehicle only if one has the requisite funds and one can drive it only after reaching a specified age and passing certain standardized tests. But such discriminations have not been subject to close scrutiny because they are based on reasonable legislative judgments about how commodities and opportunities should be distributed.[302] A limitation on vehicles would also have to meet this minimal level of scrutiny and might be struck down if certain categories of persons were denied the opportunity to obtain vehicles either categorically or only after long waiting periods. If, on the other hand, the legislature establishes priorities in terms of need or family size and allows everyone to compete equally for the privilege of obtaining a vehicle, a court would surely defer to this legislative judgment. The court would also defer if a short waiting period were required before one could obtain a permit to operate a vehicle, as long as the period prescribed is related to reasonable administrative needs of the vehicular limitation law. The court is particularly likely to accept the limitation on vehicles if alternative methods of travel are freely available to all.

Thus, because state legislatures have traditionally regulated transportation, it is hard to imagine a court striking down a good faith legislative effort to reduce congestion, pollution, energy waste and other environmental hazards by limiting vehicles. Vehicular use has always been subject to careful regulation. As long as other methods of travel are provided, the legislature should feel free to impose any form of limitation on such use.[303]

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302. For the appropriate standard by which such cases are reviewed in the United States Supreme Court, *see* note 115 *supra.*

303. Indeed, an example of how such vehicular control could be accomplished is exemplified by the experience of Bermuda. That country, consisting of an island of only twenty square miles, had a population of 52,330 in 1970 and a total of 10,494 private private passenger automobiles, or a ratio of one vehicle for every five persons. BERMUDA FOREIGN AND COMMONWEALTH OFFICE, BERMUDA TRAFFIC REPORT FOR THE YEAR 1971, at 30, 60 (1975). The island has managed to maintain such a low ratio by limiting the number of automobiles to one per household and restricting the size of vehicles in terms of engine capacity and wheelbase length. Bermuda Motor Car Act of 1951, BERMUDA STATS. tit. 21, item 4 (1951) (amended 1971). *See*

Conclusion

This article has both surveyed the attempts by Hawaii and other communities to limit their growth and examined the judicial decisions governing direct and indirect growth control techniques. The federal courts have sometimes permitted the state to protect its own natural resources and have frequently permitted states to control and regulate matters that are local in scope even if incidental discriminations result. The Supreme Court has for some years been sympathetic toward a state's efforts to protect its environment and has generally permitted local regulation of the environment even when that regulation interferes with interstate commerce or the interest of national uniformity.

The use of residency requirements to manage growth is, by itself, constitutionally vulnerable. Such an approach may be defensible, however, if it is applied only to jobs that truly require knowledge of local conditions (such as service as a police officer or as a policy-making official in state or county government) or if it is part of a comprehensive plan to protect a state's natural and cultural resources. Reduced inmigration might also be a permissible result of reasonable measures to alleviate the state's pressing unemployment, welfare and environmental problems. Similarly, the Supreme Court has permitted local jurisdictions to require that its employees actually reside within the jurisdiction and it can therefore be argued that a state could require a person to be an actual resident before he or she could apply for a job within its borders. If a local regulation does discriminate against residents of other states, even incidentally, the federal court will carefully examine the state's motive and methods in order to ensure that such discrimination is not the real motive for enacting that regulation. The state may therefore defend its regulation more persuasively if it has adopted a comprehensive approach toward growth control and is pursuing this goal aggressively and consistently, demanding sacrifices of its own citizens as well as those of other states. Of course, it would be impermissible for a state to erect barriers against the poor from other states while

also CAL. VEH. CODE § 21100.5 (West Supp. 1978) (enabling Catalina Island to regulate the number of vehicles on its streets).

The Hawaii legislature has also considered similar approaches. In 1967, it considered Senate Bill 1093, which would have prescribed that passenger automobiles purchased after 1973 would be limited to a maximum of 3200 pounds and 196 inches in length. In 1975, House Bill 1508 was introduced, which would have placed on annual tax on automobiles with a graduated increase from 1/2 cent per pound for automobiles weighing 2,999 pounds or less to 1-1/4 cents per pound for automobiles weighing 5,000 pounds or more; in addition, the incidence of vehicle registration tax would have been correlated to the weight of a vehicle. Neither of these measures passed the state legislature.

still allowing wealthy immigrants to enter. Residency requirements affecting only welfare recipients are, therefore, the most difficult for a state to defend.

The utilization of land use controls that can reduce the impact of population growth and thus deter growth by controlling expansion also represents a promising means of regulation, although the Hawaiian system is flawed as a practical matter due to the lack of specific decision-making guidelines. The Supreme Court ruled two years ago that communities could require voter approval by referendum of all changes in land classification or zoning.[304] The lieutenant governor of Hawaii has drafted a proposed constitutional amendment that would adopt this approach. Arguments can be made for and against this proposal, but it has its merits and certainly does not appear to be constitutionally infirm.

Similarly, the state has wide leeway to regulate land use without being obliged to compensate landowners for lost profits. Although compensation may be appropriate in many cases because of considerations of fairness, the courts have been reluctant to require compensation if the regulation is designed to preserve environmentally sensitive land in its natural state or if some reasonable use for the land remains. Some caution is necessary, however. The holding of the New York Court of Appeals in the *Penn Central* case[305] that part of the increased value of property taken by the state cannot be claimed by the "owner" because of the public's contribution to that increase has broad implication. It could mean that private property owners can only claim as the fair value of "their" property the value actually resulting from their contributions to the property. Increases attributable to public decisions or fortuitous events would not be subject to compensation. If this decision is followed, then the state might be permitted to acquire land at less expense to set up agricultural parks, land trusts and carefully planned housing. The state would certainly be freer, under the New York view, to restrain development without having to pay the full cost.

Finally, with respect to state limitations on vehicular use or ownership, the federal Constitution imposes no substantial obstacles. A state can freely regulate driving and parking, as long as alternative means of transportation are provided. If the state does nothing to cur-

304. City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976). *See* notes 190-193 and accompanying text *supra.*

305. Penn Cent. Transp. Co. v. City of New York, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), *aff'd*, 46 U.S.L.W. 4856 (U.S. June 26, 1978). *See* notes 265-268 and accompanying text *supra.*

tail automobile use and continues to encourage such use by the construction of additional freeways, however, then a federal court may view other state efforts at growth with suspicion and may strike them down because of the absence of a consistent and comprehensive approach.

Postscript

During the final week of its 1977-78 Term, the United States Supreme Court handed down three decisions of considerable significance for the future of growth management in Hawaii.

In *Penn Central Transportation Company v. City of New York*,[306] the Supreme Court affirmed the decision of the New York Court of Appeals that a historical landmark law restricting the construction of a proposed office building over fifty stories in height atop Penn Central's Grand Central Station did not constitute a taking of the company's property without just compensation in violation of the Fifth Amendment.[307] Agreeing with Penn Central's concession that the test for compensability with regard to land use regulations generally is not the degree to which the value of the subject property would be diminished,[308] but rather the remaining value of "the uses the regulations permit,"[309] the Supreme Court nevertheless rejected the company's arguments that the former test should be applied in the case of landmark preservation restrictions.[310] It observed that while the New York statute might have a greater impact on some landowners, that fact could not serve as a basis for distinguishing the landmark law from general zoning ordinances, which might also operate with disproportionate severity.[311] The Court concluded that the remaining permitted uses of the Grand Central Station property—including the continued ability of the appellant to operate a railroad terminal containing office spaces and concessions, the possibility of obtaining approval for the construction of a smaller office building in the superadjacent air space and the

306. 46 U.S.L.W. 4856 (U.S. June 26, 1978).

307. Penn Cent. Transp. Co. v. City of New York, 42 N.Y.2d 324, 366 N.E.2d 324, 397 N.Y.S.2d 914 (1977). *See* notes 265-268 and accompanying text *supra*.

308. For a discussion prior to the Supreme Court's decision in *Penn Central* of a diminution in value standard, *see* note 263 and accompanying text *supra*.

309. 46 U.S.L.W. at 4863.

310. *Id.* at 4864.

311. *Id.*

fact that the value of development rights in that air space had been transferred by the city to eight other nearby sites—allowed the Company "not only to profit from the Terminal but [an opportunity] to obtain a 'reasonable return' on its investment."[312]

The Court in *Penn Central* explicitly refrained from passing upon "the question whether it is permissible or feasible to separate out the 'social increments' of the value of property"[313] to reduce the investment basis upon which a reasonable return must be allowed to avoid a compensable taking—an innovative analysis that had been undertaken by the New York Court of Appeals.[314] However, in holding that previously permitted uses of property may be prohibited without the payment of compensation so long as the owner continues to have "reasonable beneficial use" of that property,[315] the Supreme Court has sanctioned possibly quite far-reaching land use controls to preserve Hawaii's environment.

Concerning state residency requirements for employment, the Supreme Court held unanimously in *Hicklin v. Orbeck*[316] that the Alaska statute which required private employers to give persons who had already assumed residence in Alaska a preference over non-residents on jobs resulting from the exploitation of the state's oil and gas resources[317] unconstitutionally abridged the privileges and immunities of United States citizens.[318] However, the impact of this decision with respect to the constitutionality of Hawaii's act 101,[319] which imposes a similar "assumption of residency" requirement for most positions in *public* employment, is unclear for several reasons.[320]

First, the Court in *Hicklin* did not discuss assumption of residency prerequisites applicable only to public employment; indeed, it emphasized that the Alaska requirement could not be justified by reference to

312. *Id.* at 4865.

313. *Id.* at 4861 n.23. The Supreme Court observed, *inter alia*, that the "record upon which the Court of Appeals decided the case did not . . . contain a basis for segregating the privately created from the publicly created elements of the value of the Terminal site. . . ." *Id.*

314. *See* notes 266 and 305 and accompanying text *supra.*

315. 46 U.S.L.W. 4865. For a discussion of the "reasonable beneficial use" standard, *see* note 270 and accompanying text *supra.*

316. 46 U.S.L.W. 4773 (U.S. June 22, 1978).

317. *See* note 50 *supra.*

318. *See* U.S. CONST. art. IV, § 2. The decision of the Alaska Supreme Court, which the United States Supreme Court reversed, is discussed in the text accompanying notes 153-167 *supra.*

319. Haw. Sess. Laws 1978, act 101. *See* note 13 *supra.*

320. For a discussion prior to the Supreme Court's decision in *Hicklin* of the constitutionality of "assumption of residency" requirements, *see* text accompanying notes 149-180 *supra.*

the state's ownership of its natural resources[321] because the requirement applied even to private employers who "have no connection whatsoever with the State's oil and gas, perform no work on state land, have no contractual relationship with the State, and receive no payment from the State."[322] This reasoning leaves open the possibility that the Court would sustain "assumption-of-residency" requirements applicable only to positions in public employment by treating such positions either as state "resources"[323] or as attributes of state sovereignty.[324] Second, the Court did not rule that laws requiring discrimination against non-residents in private sector employment are invalid per se as a means of alleviating local unemployment.[325] The Court went no further than to characterize this strategy of discrimination as "at least dubious" constitutionally,[326] and as presenting "serious constitutional questions."[327] Third, the Court observed that even assuming that such a strategy were permissible, the Alaska Hire law was nevertheless defective because the state had both failed to establish that non-residents were " 'a peculiar source of the evil at which the [discriminatory] statute is aimed' "[328]: that is, that Alaska's unemployment problems were caused primarily by competition for jobs from non-residents, rather than by the inadequate job training and geographical remoteness of its unemployed residents.[329] In contrast, the state of Hawaii could conceivably make a showing that non-resident migrants *are* the chief cause of its unemployment problems.

321. The possible "natural resources" justification is discussed in the text accompanying notes 155-166 *supra*.

322. *See* note 143 and accompanying text *supra*.

323. *See* notes 118-121 and accompanying text *supra*.

324. 46 U.S.L.W. at 4776. The Court at this juncture also clarified portions of its discussion of the natural resources exception in Baldwin v. Fish & Game Comm'n, 98 S. Ct. 1852 (1978), *see* notes 163-164 and accompanying text *supra*. The Court in *Hicklin* observed that the mere fact that a state owns a resource does not mean that laws regulating the exploitation of that resource need not conform to the restrictions of the privileges and immunities clause; such ownership is no more than "a factor—although often the crucial factor—to be considered in evaluating whether the statute's discrimination against noncitizens violates the Clause." 46 U.S.L.W. at 4776. This conclusion was also said to be supported by the constitutional restrictions upon state interference with interstate commerce which were said to "inform analysis under the Privileges and Immunities Clause as to the permissibility of the discrimination the State visits upon nonresidents based on its ownership of the resource." *Id.* at 4777.

325. For a discussion of the constitutionality of imposing residency requirements to relieve unemployment, *see* notes 110-117 and accompanying text *supra*.

326. 46 U.S.L.W. at 4775 (citing Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1870) (held that Maryland law imposing discriminatory license regulations upon non-residents who sold goods within the city of Baltimore violated the privileges and immunities clause)).

327. *Id.* at 4776.

328. *Id.* at 4775 (quoting Toomer v. Witsell, 334 U.S. 385, 398 (1948)).

329. *Id.* at 4775.

On the other hand, the Court further determined that the Alaska statute was constitutionally defective as a method of relieving unemployment because it conferred upon "all Alaskans, regardless of their employment status, education, or training, a flat employment preference for all jobs covered by the Act."[330] As a result, it could not be demonstrated that the policy of reducing the number of state residents without jobs by compelling employers within the state to discriminate against non-residents was a strategy "closely tailored to aid the unemployed the Act is intended to benefit."[331] A similar objection might be raised against Hawaii's act 101, which, like the Alaska Hire law, affords an across-the-board grant of a job preference to state residents, whether or not they are unemployed or in a job training program. Moreover, the United States Supreme Court concluded its opinion in *Hicklin* by reaffirming the philosophy of national unity that had earlier been propounded by Justice Cardozo: "the Constitution 'was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.' "[332]

No recent decision by the Supreme Court has more clearly reflected this philosophy of national unity than *City of Philadelphia v. State of New Jersey*.[333] With only Justice Rehnquist and the Chief Justice dissenting, the Court held in this case that a New Jersey statute[334] which prohibited cities located outside the state from depositing their solid and liquid wastes at privately-owned New Jersey landfills was an unconstitutional burden on interstate commerce.[335] Finding the New Jersey legislature's motives in adopting the restriction of no constitutional significance—"it does not matter whether the ultimate aim of . . . [the statute] is to reduce the waste disposal costs of New Jersey residents or to save remaining open lands from pollution, for we

330. *Id.*

331. *Id.* at 4776. The Alaska Supreme Court had held a one-year residency requirement for pipeline-related jobs invalid on the basis of a similar rationale. Hicklin v. Orbeck, 545 P.2d 159, 164-65 (Alaska 1977); *see* note 115 and accompanying text *supra*. Since this portion of its decision was premised in part on a construction of the state's constitution and thus rested in part on an independent and adequate state ground, it was not cross-appealed. 46 U.S.L.W. at 4774 n.6.

332. 46 U.S.L.W. at 4777 (quoting Baldwin v. G.A.F. Seelig Inc., 294 U.S. 511, 523 (1935)).

333. 46 U.S.L.W. 4801 (U.S. June 23, 1978).

334. N.J. REV. STAT. § 13:11-10 (West Supp. 1977).

335. *See* U.S. CONST. art. I, § 8, cl. 3. The dissenters contended that the case was controlled by prior decisions indicating that a state could prohibit the importation of infectious or noxious commodities, even though such commodities were shipped through the channels of interstate commerce. 46 U.S.L.W. at 4805 (Rehnquist, J., dissenting, joined by Burger, C.J.) (citing Bowman v. Northwestern R.R. Co., 125 U.S. 465, 489 (1888)).

assume that New Jersey has every right to protect its residents' pocketbooks as well as their environment"[336]—the Court concluded that the local lawmakers could not ban disposal of out-of-state waste within the boundaries of New Jersey while continuing to permit the disposal on its landfills of equally deleterious in-state waste.[337] To the dissenting justices' plaintive insistence that, "New Jersey must out of sheer necessity treat and dispose of its solid waste in some fashion,"[338] the majority responded only with another forceful assertion of national unity:

> Today, cities in Pennsylvania and New York find it expedient or necessary to send their waste into New Jersey for disposal, and New Jersey claims the right to close its borders to such traffic. Tomorrow, cities in New Jersey may find it expedient or necessary to send their waste into Pennsylvania or New York for disposal, and those States might then claim the right to close their borders. The Commerce Clause will protect New Jersey in the future, just as it protects her neighbors now, from efforts by one State to isolate itself in the stream of interstate commerce from a problem shared by all.[339]

Some difficulty may be found in reconciling *City of Philadelphia* with a number of the Supreme Court's other recent decisions.[340] However, because commerce clause objections can be raised against restrictions on the activities of out-of-state persons as well as the free flow of commodities,[341] the views expressed by the seven-member majority in *City of Philadelphia* indicate that efforts by Hawaii to deal with its population, environmental and unemployment problems by discriminating against the citizens of other states will probably confront major constitutional barriers. At the very least, the decision seems to support the proposition that a state cannot impose restrictions on non-residents to

336. 46 U.S.L.W. at 4804. One possible basis for a distinction between economic and environmental objectives is suggested in the text following note 170 *supra*.

337. *Id.* at 4804-4805. The majority rejected the dissent's argument that the challenged statute was a legitimate quarantine law, pointing out that any danger to health arose not from the movement of waste through the state but rather as a result of its disposal at landfill sites, at which point the geographical origin of the waste was immaterial with respect to its disease-generating characteristics. *Id.* at 4804.

338. *Id.* at 4806 (Rehnquist, J., dissenting, joined by Burger, C.J.).

339. *Id.* at 4805.

340. *See, e.g.*, County Bd. of Arlington County v. Richards, 98 S. Ct. 24 (1977), *discussed in* text accompanying notes 137-139 *supra*; Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976), *discussed in* notes 130-132 and accompanying text *supra*. However, the Court in *City of Philadelphia* distinguished the *Hughes* case by characterizing it as a decision involving a state's "power to spend funds solely on behalf of state residents and businesses . . . ." 46 U.S.L.W. at 4804 n.6.

341. *See* notes 167-169 and accompanying text *supra*. *See also* Hicklin v. Orbeck, 46 U.S.L.W. 4773, 4777 (U.S. June 22, 1978).

achieve even its legitimate objectives without also exacting some substantial sacrifices from its own residents to achieve those same objectives.[342] Read more broadly, the decision may also mean that with respect to the necessities of a decent and dignified life,[343] a state may not treat citizens of other states any differently than its own citizens. Thus, as Governor Ariyoshi suggested a year ago,[344] a constitutional amendment may be required for Hawaii to implement a protectionist philosophy. The alternative, of course, would be for the state to adopt innovative and stringent, but non-discriminatory, growth management policies.

342. *See* note 124 and accompanying text *supra.*
343. *See* notes 25-75 and accompanying text *supra.*
344. *See* note 4 and accompanying text *supra.*