The Lum Court and Native Hawaiian Rights

by Melody Kapilialoha MacKenzie*

I. Introduction

Since Herman Lum became Chief Justice of the Hawaii Supreme Court in 1983, the court has issued relatively few opinions dealing with Native Hawaiian issues. Those few opinions may not be sufficient to allow a fair assessment of the Lum Court's attitude toward Native Hawaiian rights. Only five published decisions can be identified as dealing with "purely" Native Hawaiian issues. The rest, while brought by Hawaiians and affecting Native Hawaiian concerns are not strictly Hawaiian rights cases. The few cases heard and determined by the court indicate that the Lum Court is not receptive to Native Hawaiians rights. Indeed, *none* of the cases expands or advances those rights.

With one important exception, *Ahia v. Department of Transportation*,[1] all of the court's Native Hawaiian rights decisions have been rendered by a unanimous court. Many of the decisions issued are in fact memorandum opinions and have no precedential effect. These opinions are discussed here because they mark a disturbing trend by the court to issue memorandum opinions even where a published opinion could clarify or develop the existing body of law.

II. The Native Hawaiian Trusts

Perhaps the clearest opportunity for the Lum Court to play a more dynamic, but still judicially appropriate, role in recognizing Native

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* B.A., Beloit College, Beloit, Wisconsin; J.D., Wm. S. Richardson School of Law, 1976. The author clerked for Chief Justice William S. Richardson of the Hawaii Supreme Court from 1976 to 1980.

[1] 69 Haw. 538, 751 P.2d 81 (1988) (Nakamura, J.).

Hawaiian rights is in interpreting the two Native Hawaiian trusts—the Hawaiian Home Lands Trust and the Public Land Trust. The court's task in these instances would be merely to construe the applicable statutes establishing the trusts consistent with the state's fiduciary responsibility. The court's decisions, however, have been disappointingly conservative, merely confirming the status quo or worse.

A. The Hawaiian Home Lands Trust

In 1921, the United States Congress passed the Hawaiian Homes Commission Act (HHCA),[2] setting aside between 188,000 acres and 203,000 acres of public trust lands for homesteading by Native Hawaiians.[3] Under the HHCA, Native Hawaiians could obtain ninety-nine year leases at the rate of a dollar per year, for residential, pastoral, and agricultural lots. The HHCA also provided for services to assist the beneficiaries with the establishment of these homesteads. Congress, however, restricted eligibility for the program to Native Hawaiians of fifty percent or more Hawaiian blood. Primary responsibility for administration and management of the Hawaiian Homes program was transferred to the State of Hawaii as a condition of statehood.[4] The program is now administered by a state agency, the Department of Hawaiian Home Lands, whose executive board is the Hawaiian Homes Commission. The federal government, however, still retains responsibility for certain aspects of implementing the original act and Congress has retained the power to amend the act.[5]

In 1985, the Hawaiian Homes Commission (Commission), leased 4.3 acres of Hawaiian Homes lands to the Department of Transportation (D.O.T.) for a public boat ramp at Kaulana, Kama'oa-Pu'u'eo, Ka' for $10,575, or the construction of certain improvements designed to accelerate homesteading in the area. Several beneficiaries challenged the Commission's authority, under section 204 of the HHCA, to lease the area to a public agency. Section 204(2) authorizes the Commission

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[2] 42 Stat. 108 (1921), *reprinted in* 1 HAW. REV. STAT. at 167-205 (1985) (adopted in the HAW. CONST. art. XII, § 1).

[3] See MELODY KAPILIALOHA MACKENZIE, NATIVE HAWAIIAN RIGHTS HANDBOOK 43-76 (1990), for a detailed analysis of the HHCA and its implementation.

[4] Hawaii Admission Act §§ 4, 5, 73 Stat. 4 (1959), *reprinted in* 1 HAW. REV. STAT. at 86-89 (1985).

[5] *Id.*; HHCA § 223, 42 Stat. 108 (1921), *reprinted in* 1 HAW. REV. STAT. at 167-205 (1985).

to lease lands not required for homesteading to the public. The beneficiaries contended that a government agency, such as the D.O.T., is not a member of the public within the meaning of section 204(2).

The Hawaii Supreme Court in *Ahia v. Department of Transportation*, in a three-to-two decision, agreed with the Commission that section 204 allows such a disposition.[6] In a lengthy opinion, Justice Nakamura, writing for the majority, determined that the elimination of the term "general public" in an earlier version of section 204(2) and the substitution of the term "public" indicated an intention by the legislature to include government agencies.[7] According to the majority, the term "general public" refers to the people or community at large, but does not include organized government.[8] The legislative committee reports on the amendment indicated that one of its purposes was to "grant the Department of Hawaiian Home Lands (Department) full authority to manage available Hawaiian home lands not required for leasing[.]"[9] The committee reports, however, gave no reason for the deletion of "the general public" and the substitution instead of "the public."[10] The court concluded, however:

> In light of the stated purpose to invest the Commission with 'full authority to manage retained available . . . lands,' we think the amendment could only have been meant to dispel any notion that the Commission was not vested with such authority, including the power to lease to the government or its agencies 'available lands not required for leasing [as homestead lands to beneficiaries].'[11]

The majority opinion did not specifically address whether this disposition constituted a breach of the Commission's trust responsibility, but given the court's handling of other issues raised by the beneficiaries, it is unlikely that the majority would have found a breach of the trust. For instance, the beneficiaries had asserted that the lands in question were immediately needed for homesteading purposes. In disposing of that issue, the majority recognized that the Kama'oa-Pu'u'eo lands had never been leased to Native Hawaiians for homesteading, but justified the Commission's decision to lease the lands to the D.O.T.

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[6] 69 Haw. 538, 751 P.2d 81 (1988).

[7] *Id.* at 548, 751 P.2d at 88.

[8] *Id.* at 547, 751 P.2d at 88.

[9] *Id.* at 547, 751 P.2d at 87 (citing SEN. STANDING COMM. REP. NO. 600-76, *reprinted in* 1976 HAW. SEN. J. 1141).

[10] *Id.*

[11] *Id.*

as one that would bring water to the area and make it possible to start a homesteading program.[12]

The minority opinion,[13] written by Justice Padgett, with Justice Hayashi concurring, addressed the breach of trust question. Under the second paragraph of HHCA section 204(2), in giving a lease for "commercial, industrial, or other business purposes" the Department is required to give preference to Native Hawaiians. The appellants, Native Hawaiian beneficiaries, had alleged that they were willing and able to take the lease in question. The majority opinion rejected the notion that the lease was for a commercial purpose. Justice Padgett pointed out, however, that the two terms are not mutually exclusive; a boat ramp may be used by the public but can also serve a commercial purpose if fees are charged.[14] The minority concluded that as long as the lease had commercial as well as public aspects to it, the Commission had a fiduciary responsibility to, at least, give consideration to making the lease to beneficiaries.[15] Justice Padgett also took the Commission and Department to task, reminding them that they, unlike other government agencies, are held to higher fiduciary responsibilities in dealing with beneficiaries.[16]

The minority opinion then examined the construction of section 204(2). Another provision of HHCA, section 207(c), allows the Department to grant utility easements and licenses for public purposes. If section 204(2) can be read as giving the Department the authority to lease lands for public purposes, then, Padgett argued, the provisions of section 207(c) are "mere surplusage, devoid of any effect."[17]

Advocating a "holistic" approach, Justice Padgett concluded that the HHCA contains a "complete framework for dealing with the trust lands."[18] This framework allows the Commission to make certain dispositions for public purposes and, with restrictions, to make leases to the public. It does not, in the minority's judgment, grant the Commission the unrestricted power to make leases for public purposes to other government agencies.[19] Justice Padgett, in an important foot-

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[12] *Id.* at 550, 751 P.2d at 89.
[13] *Id.* at 552, 751 P.2d at 89 (Padgett, J., dissenting).
[14] *Id.* at 553, 751 P.2d at 90.
[15] *Id.* at 554, 751 P.2d at 91.
[16] *Id.* at 553, 751 P.2d at 91.
[17] *Id.* at 556, 751 P.2d at 92.
[18] *Id.* at 557, 751 P.2d at 93.
[19] *Id.* at 557-58, 751 P.2d at 93.

note, recognized that his construction of the HHCA would require legislative action to validate certain dispositions of trust lands made by the Department. He concluded, however,

> [I]f there is to be a power, in the Department, to turn over trust lands to other government agencies, it should be as a result of express language enacted by the legislature and approved by Congress with a full public debate on the desirability and the terms thereof. We owe the trust and its Native Hawaiian beneficiaries no less.[20]

In another case involving a dispute between the Department of Hawaiian Home Lands and an individual lessee, Justice Padgett, writing for a unanimous court, held that a special proceeding instituted by the Hawaiian Homes Commission to enforce a decision to terminate a homestead lease was a civil action which, under Rule 4 of the Hawaii Rules of Civil Procedure, requires the service of a summons and allows the defendant twenty days to answer. In *In re Smith*,[21] a Native Hawaiian homesteader who had been loaned $25,000 by the Commission for construction of his home, withheld payments because of defective electrical wiring done by the contractor, who had been contracted by the Commission to build the house.[22] No summons to Smith was issued by the circuit court and Smith was not given an opportunity to respond as required by Rule 4.[23]

The supreme court held that the circuit court lacked jurisdiction to enter a judgment granting the Hawaiian Homes Commission's petition to recover Smith's leasehold and ordering Smith to vacate the leasehold. The court found that the Commission's procedure of filing a special proceeding to ask the circuit court to enforce a "Writ of Assistance" was not cognizable under any court rules and the entire proceeding violated Smith's due process' rights.[24]

The *Smith* decision is the only published opinion in which the Lum Court has unanimously supported the rights of a Native Hawaiian individual or organization. The court may have been influenced by the equities of the situation—Smith was not able to get insurance for his home because of the wiring deficiencies, the Commission had not required the contractor to correct the deficiencies, and Smith had been

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[20] *Id.* at 558 n.1, 751 P.2d at 93 n.1.
[21] 68 Haw. 466, 719 P.2d 397 (1986) (Padgett, J.).
[22] *Id.* at 467, 719 P.2d at 399.
[23] *Id.* at 469, 719 P.2d at 400.
[24] *Id.* at 471, 719 P.2d at 401.

making his payments into an informal escrow account. Moreover, the court did not treat the case as a native rights case but analyzed it merely as a violation of individual due process rights.

B. The Public Land Trust

The Hawaii Supreme Court, in *Trustees of the Office of Hawaiian Affairs v. Yamasaki*,[25] based its ruling on the "political question" doctrine and refused to determine two important questions on entitlements to the Office of Hawaiian Affairs from the public land trust.

The public land trust originates in language found in the Joint Resolution of Annexation[26] ceding Hawai'i's sovereignty and conveying about 1.7 million acres of Government and Crown Lands to the United States. The resolution provided that existing laws of the United States relative to public lands would not be applicable to Hawai'i. Another provision of the joint resolution stated that "all revenues from or proceeds of [the public lands] . . . shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."[27]

The 1900 Organic Act establishing Hawai'i's territorial government provided that the public lands, with certain exceptions, would remain in the possession, use, and control of the Territory.[28] Another provision of the Organic Act stated that the proceeds from the territory's sale, lease, or other disposition of these ceded lands should be deposited in the territory's treasury for "such uses and purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent with the Joint Resolution of Annexation."[29]

Upon statehood, the public lands (the former Government and Crown lands) were returned to the state as a public trust. Section 5(f) of Hawai'i's Admission Act states that the lands, and income and

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[25] 69 Haw. 154, 737 P.2d 446 (1987) (Nakamura, J.).

[26] Joint Resolution of Annexation of July 7, 1898, 30 Stat. 750 (1898).

[27] *Id.* A U.S. Attorney General's Opinion characterized the joint resolution's provision: "The effect of [the language] was to subject the public lands in Hawaii to a special trust, limiting the revenue from or proceeds of the same to the uses of the inhabitants of the Hawaiian Islands for education or other purposes." 22 OP. ATT'Y GEN. 574 (1899).

[28] Act of Apr. 30, 1900, ch. 339, § 91, 31 Stat. 141 (1900).

[29] *Id.* § 73(4)(e).

proceeds from the sale or other disposition of the lands, shall be held by the state as a public trust for five trust purposes, including the betterment of the conditions of Native Hawaiians, as defined in the Hawaiian Homes Commission Act as amended.[30]

Prior to 1978, the state had interpreted the section 5(f) provision to require that the proceeds and income from the public land trust be used for the fulfillment of any one of the five trust purposes and the state chose to make that one purpose public education. At the 1978 Constitutional Convention, however, the Hawaiian Affairs Committee sought to clarify and implement the Admission Act's trust language relative to Native Hawaiians. As a result, three new sections were added to the state constitution fundamentally altering the state's role in implementing the section 5(f) trust language. Article XII, section 4 specified that the lands in the public land trust (with the exception of the Hawaiian Home Lands) are held by the state as a public trust for Native Hawaiians and the general public. Article XII, section 5 established an Office of Hawaiian Affairs (O.H.A.) to be governed by a nine-member board of trustees, which would hold title for the benefit of Hawaiians and Native Hawaiians to all real or personal property, set aside or conveyed to it. Article XII, section 6 set forth the powers of the O.H.A. board of trustees and made it clear that a pro rata portion of the income and proceeds from sale or other disposition of the public land trust was included within the property that O.H.A. was to hold in trust.

The Constitution did not specify, however, what O.H.A.'s pro rata share would be. In 1980, the state legislature set the amount to be received by O.H.A. from the proceeds and income generated by the public land trust at twenty percent.[31] However, many issues relating to the public land trust and its proceeds and income remained. Disputes over whether specific parcels of land were part of the trust, questions as to whether "income" meant gross or net income, and problems in defining "proceeds" plagued O.H.A. and hampered it in carrying out its responsibilities to Native Hawaiians.

It was against this background that *Trustees of the Office of Hawaiian Affairs v. Yamasaki*[32] was decided. O.H.A. Trustees filed two separate suits. The first suit, brought against the Attorney General, the Chair

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[30] Hawaii Admission Act § 5(f), 73 Stat. 4 (1959).

[31] Act 273, 10th Leg., 2nd Sess., 1980 Haw. Sess. L. 525 (codified in HAW. REV. STAT. § 10-13.5 (1980)).

[32] 69 Haw. 154, 737 P.2d 446 (1987).

of the Board of Land and Natural Resources, and the Director of Finance, in their official capacities, sought a declaration that O.H.A. was entitled to twenty percent of the damages received by the state in settlement of a lawsuit for the illegal mining of sand from Pohaku Beach, ceded lands, on Moloka'i.[33] The state had received land from Molokai Ranch valued at $1,279,006 as damages in the suit.[34] O.H.A. alleged that it was entitled to receive an undivided twenty percent interest in the land or a cash amount equal to twenty percent of the appraised value of the land.[35] The Trustees also sought mandatory relief to enforce the judgment.[36]

The second suit, brought against the Director of Transportation and the Aloha Tower Development Corporation, sought a declaration that O.H.A. was entitled to twenty percent of the income and the proceeds from sales, leases, or other disposition of lands surrounding harbors on all the major islands, land on Sand Island, land on which Honolulu International Airport is located, and land on which the Aloha Tower Complex stands.[37]

The state moved to dismiss the actions contending that O.H.A. lacked standing to sue and the suits were barred by sovereign immunity.[38] After consolidation for hearing, the circuit court denied the state's motions but granted leave to seek interlocutory appellate review.[39] State officials appealed. The Hawaii Supreme Court declined to rule on the sovereign immunity or standing questions stating that, after examining the facts, they found the issues "to be of a peculiarly political nature and therefore not meet for judicial determination."[40]

With regard to the questions raised in the first action, the court stated:

> Nothing in [Hawaii Revised Statute] § 10.5, where the public land trust is described, serves as statutory base for a ruling that such damages are funds derived from the public land trust or that a pro rata portion of

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[33] *Id.* at 165-66, 737 P.2d at 453.

[34] *Id.* at 166 n.14, 737 P.2d at 453 n.14.

[35] *Id.* at 166, 737 P.2d at 453.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 167, 737 P.2d at 454.

[39] *Id.*

[40] *Id.* at 175, 737 P.2d at 458 (quoting Colegrove v. Green, 328 U.S. 549, 552 (1946)).

> the land conveyed to the State in lieu of the damages should in turn be conveyed to the Trustees of OHA. Either ruling would be rendered possible only by an initial policy determination by the court of a kind normally reserved for nonjudicial discretion.[41]

In looking at the second case, the court was influenced by the fact that the state had already made commitments for the revenues from the harbors and airports.[42] Construction of the state's harbors and airports is financed through bond sales and a state guarantee that revenues obtained from the operation of these facilities will be used to repay bondholders. The court concluded:

> Were the circuit court to enjoin the Director of Transportation as prayed by the Trustees, he would be compelled to renege on the State's pledge. It would be unrealistic, to say the least, for us to conclude this could have been the intent of the legislature when the language of [Hawaii Revised Statute section] 10-13.5 was adopted.[43]

Moreover, the court appeared to believe that even when O.H.A.'s share of the public lands trust fund was fixed at twenty percent by the state legislature, the trust res was undetermined. The court found evidence of this in the act authorizing the legislative auditor to complete the inventory of ceded lands and study the use and distribution of revenues from ceded lands. The court noted that all four committees to which the measure was referred found there were uncertainties with respect to ceded lands comprising the trust and the funds derived therefrom.[44] The court also noted that the Legislative Auditor's Final Report of December 1986 stated that the uncertainties surrounding the trust and funds derived therefrom could not be resolved without further legislative action.[45] Consequently, the court, following the lead of the Legislative Auditor, concluded that the issues were better left for resolution by the legislature than the judiciary.[46]

Two and half years later, the O.H.A. Trustees and Governor Waihee announced a settlement of the ceded lands dispute, which was ultimately approved by the legislature.[47]

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[41] *Id.* at 174-75, 737 P.2d at 458.

[42] *Id.* at 175, 737 P.2d at 458.

[43] *Id.*

[44] *Id.* at 173, 737 P.2d at 457.

[45] *Id.* at 174, 737 P.2d at 457-58.

[46] *Id.* In October 1987, the United States Supreme Court declined to review the *Yamasaki* decision. 484 U.S. 898 (1987) (denying certiorari).

[47] Under the terms of the settlement, approved by the 1990 Legislature as Act 304,

In 1991, the relationship between individual Native Hawaiians and the public trust lands under the Aloha Tower Development Complex was reviewed by the court. In *Kaapu v. Aloha Tower Development Corporation*,[48] Kekoa Kaapu challenged the procedures used by the Aloha Tower Development Corporation to select a developer for the Aloha Tower complex. After filing a lawsuit for injunctive relief, Kaapu filed a notice of pendency of action at the bureau of conveyances. The trial court subsequently granted an order expunging the notice. On reviewing that order, the supreme court examined the lis pendens statute and the property interest it was designed to protect. Kaapu claimed an interest in the land because as a Hawaiian or Native Hawaiian, he had a "recognized, though unsettled, interest in ceded lands which underlie much of the 'Aloha Tower' project area . . . ."[49] In determining whether that interest was sufficient to give Kaapu standing to file a notice of lis pendens, the court inferred that an individual Native

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both the trust corpus and trust revenues have been defined. Act 304 provides that all Hawaii Admission Act section 5(b), 5(e), and Pub. L. No. 88-233 lands, with the exception of Hawaiian Homes trust lands, are subject to the trust, regardless of departmental jurisdiction. This means that all lands in these categories, whether administered by the Department of Land and Natural Resources, D.O.T., or any other state department, are subject to the O.H.A. entitlement.

Revenues have been segregated into two categories—sovereign and proprietary income.

Sovereign income is the income which the state generates as an exercise of governmental or sovereign power. This income is not subject to the O.H.A. trust provision. Among the revenues included in the sovereign category are personal and corporate income taxes, general excise taxes, fines collected for violations of state law, and federal grants or subsidies.

Proprietary income is the income generated from the use or disposition of the public trust lands. Included in this category are rents, leases, and licenses for the use of trust lands, minerals, and runway landing fees. Proprietary income is subject to the O.H.A. trust provision.

The settlement also sets forth specific guidelines for determining amounts due for previous years including the use of the sovereign and proprietary income categories to segregate income generated on trust lands calculated from the effective date of the 20 percent formula (June 16, 1980) and payment of the allowed statutory interest compounded annually on the actual amounts due. After all the calculations have been made and the total amounts due for previous years are determined, the trustees and governor have agreed that O.H.A. may take amounts due for previous years in the form of money, land, or a combination of money and land. While the exact amounts are still being calculated, it is estimated that O.H.A. will be entitled to an additional $7-8 million a year as a result of the settlement.

Act 304, 15th Leg., 2nd Sess., 1990 Haw. Sess. L. 947.

[48] 72 Haw. 267, 814 P.2d 396 (1991).

[49] *Id.* at 268, 814 P.2d at 397.

Hawaiian's interest in lands under the Aloha Tower Development could be no greater than that given to the O.H.A. by statute. Under applicable statutes, O.H.A. merely has a right to a percentage income from the development of the lands, it does not have a claim to title or control over the use or development of the land. Consequently, the court concluded, "[i]f the trustees [of O.H.A.] have no more than that power, then appellant has no more than that power . . . . [Kaapu's] remedy may lie in seeking injunctive relief, which [he] has done; however, he is not entitled to place a cloud on the subject property."[50]

More recently, the supreme court issued a memorandum opinion in a case alleging a breach of O.H.A.'s fiduciary duties. In *Kepoo v. Burgess,*[51] four Hawaiians and Native Hawaiians challenged O.H.A.'s authority to use section 5(f) funds to conduct a referendum on the whether the blood quantum distinction between "Hawaiians" and "Native Hawaiians" should be eliminated.[52] Appellants alleged a breach of fiduciary duty in that the O.H.A. Trustees advocated a single definition of "Native Hawaiian" as one with *any* amount of Hawaiian blood and expended trust funds to inform and educate the Hawaiian community about the single definition referendum.

The circuit court had granted O.H.A.'s summary judgment motion, finding that: "The betterment of the conditions of native Hawaiians can be achieved in many ways. Programs such as the single definition referendum that promote self-definition is one of the many ways to achieve the betterment of the conditions of native Hawaiians even though all Hawaiians would benefit."[53] The supreme court found no reversible error and summarily affirmed.[54]

The authority of the O.H.A. trustees to use section 5(f) funds for various activities has been raised previously[55] and undoubtedly will be raised again. The supreme court could have used the *Kepoo* case to

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[50] *Id.* at 270, 814 P.2d at 398.

[51] S. Ct. No. 14770 (June 25, 1991).

[52] A "Native Hawaiian" as defined in the Hawaiian Homes Commission Act, and applicable federal and state law dealing with the public land trust, is one with not less than fifty per cent Hawaiian blood. A "Hawaiian" is one with any percentage of Hawaiian blood. HAW. REV. STAT. § 10-2 (Supp. 1991).

[53] Kepoo v. Burgess, Civ. No. 88-2987-09, (Haw. 1st Cir.) (summary judgment granted Aug. 28, 1990).

[54] S. Ct. No. 14770 (June 25, 1991).

[55] *See* Price v. Akaka, 928 F.2d 824 (9th Cir. 1990).

give guidance to the trustees and beneficiaries on the authorized uses of trust funds. It chose not to do so. Moreover, in the *Kepoo* decision, the supreme court noted its

> disagreement with [the O.H.A. trustees'] assertion that the legislature may alter the intended purposes of the section 5(f) public trust. In creating the section 5(f) public trust, Congress directed that all proceeds of the trust were to be used for 'one or more' of five statutory purposes. . . . We therefore believe that the statutory purposes of the section 5(f) trust may not be changed without Congressional approval.''[56]

If indeed, as the memorandum opinion indicates, O.H.A. raised the argument that the state could change the trust purposes established in section 5(f) of the Admission Act, then the court should have published an opinion dispelling that notion, rather than merely allude to it in a decision lacking precedential effect.

III. Religious Freedom

In *State v. Lono*,[57] members of the Temple of Lono were arrested and charged with camping without a permit at Kualoa Regional Park. Kualoa is a sacred site and the location of an ancient heiau dedicated to Lono. Park regulations did not allow extended camping periods, and Temple members had entered and remained in the park for periods from three weeks to four months in order to perform various ceremonies. One of the religious practices involved sitting in a meditative state until experiencing *h'ike a ka pō* or night visions, providing inspiration and guidance. In their defense, Temple members challenged the park regulation as an infringement upon religious freedom. The trial court determined that defendants ''religious interest in participating in dreams at Kualoa Regional Park are not indispensable to the Hawaiian religious practices, and further the Defendants' practices in exercising their religious beliefs . . . are philosophical and personal and therefore not entitled to First Amendment protection.''[58] The Hawaii Supreme Court also gave short shrift to the religious freedom argument, affirming the trial court in a memorandum opinion.[59]

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[56] S. Ct. No. 14770 (June 25, 1991) at 2.

[57] S. Ct. No. 9571 (Apr. 3, 1985).

[58] Order Denying Motion to Dismiss at 4, *State v. Lono*, Case Nos. CTR 1-21 (Sept. 2, 1982); CTR 1-26 (Sept. 9, 1982); CTR 22 (Sept. 10, 1982); and CTR 5-8 (Oct. 1, 1982).

[59] 67 Haw. 679 (S. Ct. No. 9571, Apr. 3, 1985).

In the only published opinion dealing with the exercise of Native Hawaiian religion, *Dedman v. Board of Land and Natural Resources*,[60] the Hawaii Supreme Court applied the test adopted by the United States Supreme Court in *Wisconsin v. Yoder*.[61] In *Yoder*, members of the Amish sect refused to permit their children to continue formal education beyond the eighth grade. The Amish valued and practiced agricultural work and feared higher education would endanger their children's salvation. Their refusal to allow their children to attend school, however, violated Wisconsin's compulsory school attendance laws. The Supreme Court reviewed the burden imposed by the school attendance law on Amish religion. The Court then held that the state's interest in education was sufficiently compelling to overcome the Free Exercise Clause protection of Amish religious practices.[62]

In *Dedman*, Native Hawaiians challenged a Board of Land and Natural Resources' (B.L.N.R.) decision permitting geothermal development in an the Wao Kele 'O Puna rainforest, an area significant to native religious practitioners who honor the deity Pele.[63] The Pele practitioners claimed that the proposed development would impinge on their right to free religious exercise, since geothermal development requires drilling into the body of Pele and taking her energy and lifeblood.[64]

The Hawaii Supreme Court first acknowledged the sincerity of the religious claims at issue.[65] It then considered whether the B.L.N.R.'s approval of the proposed geothermal development would unconstitutionally infringe upon Native Hawaiian religious practice.[66] On this question, the court found controlling the absence of proof that religious ceremonies were held in the area proposed for development.[67] Without evidence of a burden on the free exercise of native religion, the court did not reach the compelling state interest question. Accordingly, the

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[60] 69 Haw. 255, 740 P.2d 28 (1987), *cert. denied*, 485 U.S. 1020 (1988).

[61] 406 U.S. 205 (1972).

[62] *Id.* at 234.

[63] Dedman v. Bd. of Land and Natural Resources, 69 Haw. 255, 256, 740 P.2d 28, 31 (1987) (Lum, C.J.), *cert. denied*, 485 U.S. 1020 (1988).

[64] *Id.* at 259-260, 740 P.2d at 32. According to Native Hawaiian religious belief, the area proposed for geothermal development is considered the home of Pele, the volcano goddess.

[65] *Id.* at 260, 740 P.2d at 32.

[66] *Id.*

[67] *Id.* at 261, 740 P.2d at 33.

court concluded that no Free Exercise Clause violation had occurred.[68]

The Lum Court's application of a narrow analysis of free exercise infringement accounted for its failure to find any burden on Native Hawaiian religious practices. Under the court's view, a burden on the free exercise of religion exists when government action regulates or directly impinges on Native Hawaiian religious practices. Furthermore, only government conduct which compelled irreverence of religious beliefs or penalized individuals for their religious actions would warrant free exercise protection. Certainly, few native religious practitioners could meet this standard.

Any doubt concerning the Hawaii Supreme Court's constitutional analysis of free exercise protection dissolved with the United States Supreme Court's decision in *Lyng v. Northwest Indian Cemetery Protective Association*[69] and its subsequent refusal to review the *Dedman* decision.[70] *Lyng* reinforces the limited interpretation of the Free Exercise Clause advanced in *Dedman* and thereby places the unfettered practice of Native Hawaiian religion at serious risk. Moreover, the distinctiveness of Native Hawaiian religion, markedly different from traditional Judeo-Christian doctrines, makes it especially vulnerable and renders its continued protection under the Free Exercise Clause elusive.

In the *Dedman* case, the state constitutional amendment protecting traditional and customary rights of Native Hawaiian *ahupua'a* tenants was not specifically implicated. This may have been because those challenging the B.L.N.R. action did not claim to live within the *ahupua'a* where the land was located nor to have such rights. Thus, the Hawai'i courts have never interpreted this constitutional amendment in the context of a religious freedom claim.[71] However, given the fact that the Hawaii Supreme Court in *Dedman* failed to give any greater protection to native religious practitioners under Hawai'i's own constitutional religious freedom provision,[72] it would appear unlikely

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[68] *Id.* at 261-62, 740 P.2d at 32-33.

[69] 485 U.S. 439 (1988).

[70] 485 U.S. 1020 (1988) (denying cert. for *Dedman*, 69 Haw. 255, 740 P.2d 28 (1987)).

[71] *But see* Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 11-12, 656 P.2d 745, 751-52 (1982) (finding that HAW. REV. STAT. § 1-1 may be used as a vehicle for the continued existence of those commoner's rights which continue to be practiced and cause no harm to the interests of others).

[72] HAW. CONST. art. I, § 4 reads, in part: "No law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

that the Lum Court would be sympathetic to an argument based on *ahupua'a* tenant rights.

Most recently, the Hawaii Supreme Court has reviewed a group of trespass convictions arising out of Hawaiian protests over geothermal development in the Wao Kele 'O Puna rainforest. In a series of memorandum opinions[73] issued in the fall of 1991, the court gave little credence to arguments that the geothermal developer violated the defendants' free exercise of religion by prohibiting access to the development site. The defendants wished to conduct a religious ceremony at the site to heal damage to Pele caused by geothermal drilling. In *State v. McGregor*,[74] the most detailed of the memorandum opinions, the court examined whether there was a sufficiently close nexus between the state and the challenged action, in this case prohibiting McGregor from entering the geothermal well site area to conduct a religious ceremony. If such a nexus existed, then the action of the geothermal developer could be treated as an action of the state itself.[75] Not surprisingly, the court found that the defendant had not met her burden of showing by clear and convincing evidence that the state directed, encouraged, or supported the private developer in prohibiting access to the geothermal drill site.[76] The court thus determined that there was no state action and that McGregor's arrest for trespassing did not violate her free exercise of religion.[77]

IV. Hawaiian Customary Adoption—*Hānai*

Adoption comprised an integral part of ancient Hawaiian life and customary adoption continues to exist even today. Perhaps the most generally recognized form of adoption is *hānai*, meaning "to feed." *Hānai* refers to a child who is reared, educated, and loved by someone other than the natural parents. The *hānai* relationship occurs most often within the family, so the child is rarely raised by strangers. Tradition-

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[73] State v. Lee, S. Ct. No. 14984 (Oct. 15, 1991); State v. Kanahele, S. Ct. No. 15069 (Oct. 15, 1991); State v. Lee, S. Ct. No. 14874 (Oct. 16, 1991); State v. Luning, S. Ct. No. 15063, State v. Eaton, S. Ct. No. 15279, State v. Kaipo, S. Ct. No. 15280, State v. Kaleiwahea, S. Ct. No. 15281, State v. Dedman, S. Ct. No. 15092 (Dec. 18, 1991).

[74] S. Ct. No. 14985 (Sept. 26, 1991).

[75] *Id.* at 3.

[76] *Id.* at 4.

[77] *Id.*

ally, the permanent quality of the *hānai* relationship made it a near equivalent of legal adoption. However, early Hawai'i cases recognized that not all *hānai* relationships carried with them the right to inherit property. In 1841, the Hawaii Legislature adopted its first written law of adoption and subsequently, Hawai'i's courts refused to give legal recognition to *hānai* or other customary adoptions unless the statutory adoption procedures had been followed.

Today, Hawai'i's courts continue to distinguish between legal adoption and *hānai* relationships. In an opinion written by Justice Padgett in *Maui Land and Pineapple Co. v. Naiapaakai Heirs of John Keola Makeelani*,[78] the Hawaii Supreme Court refused to reconsider the case law surrounding customary adoption. In that case, the *hānai* children of John Keola claimed an interest in his property based on customary adoption. The Hawaii Supreme Court stated:

> [W]hile adoption by custom was recognized in early times beginning in 1841 and continuing until the present time (and thus in effect during the period when appellants were hanaied by John Keola), there were written statutes of adoption which had to be followed in order to constitute the adoptee's legal heirs of the adopters. Even prior to the enactment of any statutes on the subject of adoption, the mere fact that one was a "keiki hanai" did not, by Hawaiian custom, carry with it a right of inheritance.[79]

The appellants had argued that the court should adopt the doctrine of equitable adoption, which had been used in Alaska to uphold Alaskan Native cultural adoptions with attendant inheritance rights.[80] In the Alaska case, the Alaska Supreme Court had placed great emphasis on differences between the Anglo-American judicial system and the traditional Alaska Native practices and the cultural difficulties experienced by Alaska Natives in dealing with the Anglo-American judicial system. The Alaska court held that equitable adoption, in which the factual circumstances of each case are examined to determine whether there was an intent to adopt, "is an appropriate vehicle which can be utilized in intestate succession cases to avoid hardship created in part by the

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[78] 69 Haw. 565, 751 P.2d 1020 (1988) (Padgett, J.).

[79] *Id.* at 568, 751 P.2d at 1021-22.

[80] Calista Corporation v. Mann, 564 P.2d 53 (Alaska 1977) (applying the equitable adoption doctrine to allow two native Alaskan women who had been adopted in the culturally accepted manner of their tribes to receive shares of stock in their parents' native corporations organized under the Alaska Native Claims Settlement Act).

diversity of cultures found within this jurisdiction."[81] The Hawaii Supreme Court, however, was unwilling to accord any significance to the difficulties experienced by Native Hawaiians in confronting the differences between Hawaiian cultural practices and the Western judicial system.[82]

V. Conclusion

The Native Hawaiian rights cases decided by the Hawaii Supreme Court since 1983 appear to fall into a pattern which can be characterized as a fidelity to established precedent and an avoidance of "hard" issues.

Both *Dedman*[83] and the *Naaiapaakai*[84] decision on customary adoption demonstrate the Lum Court's adherence to established precedent. The court has not ventured beyond the status quo. It has consistently declined the opportunity to expand the law and give recognition to the unique cultural and religious claims of Native Hawaiians. Even in *Ahia v. Department of Transportation*,[85] where the court could have stayed well within precedent and ruled, as urged by the minority, on the breach of trust issue, the majority chose to rest its decision on a strained and questionable reading of the H.H.C.A.

The court's tendency to avoid "hard" issues is exemplified by the *OHA v. Yamasaki*[86] decision. In *Yamasaki*, the court sua sponte ruled on the basis of the political question doctrine, a doctrine that had never been raised or argued by the state. Indeed, the only questions before the supreme court in *Yamasaki* were O.H.A.'s standing to bring suit and whether sovereign immunity could be asserted by one arm of the state against another arm of the state. These initial issues could have been determined by the court and the cases returned to the circuit court for further proceedings which might have, given the opportunity,

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[81] *Id.* at 61-62.

[82] Contrast the *Naiapaakai* case with the supreme court's decision in Leong v. Takasaki, 55 Haw. 398, 520 P.2d 758 (1974) (allowing a recovery for emotional distress caused by seeing a step-grandmother hit by a car). The *Leong* case shows a willingness by the Court at that time to recognize the diversity of cultural practices in Hawai'i. *Id.* at 410-11, 520 P.2d at 766.

[83] 69 Haw. 255, 740 P.2d 28 (1987), *cert. denied*, 485 U.S. 1020 (1988); see *supra* part III for a discussion of *Dedman*.

[84] 69 Haw. 565, 751 P.2d 1020 (1988); see *supra* part IV for a discussion of *Naiapaakai*.

[85] 69 Haw. 538, 751 P.2d 81 (1988); see *supra* part II.A. for discussion of *Ahia*.

[86] 69 Haw. 154, 737 P.2d 446 (1987); see *supra* part II.B. for discussion of *Yamasaki*.

clarified the legislature's intent in enacting the O.H.A. entitlement provision.

Finally, this article has cited numerous cases which have been decided by the supreme court in memorandum opinions. While there may be many justifiable reasons, including judicial efficiency, for issuing memorandum opinions, the court should not ignore the need of the legal community and, indeed, the community at large, for judicial guidance. Will questions that have been raised on appeal be argued again and again because of the court's reluctance to issue published and precedent setting opinions? What are the costs to litigants and the public by relitigating principles previously decided by the court in memorandum opinions? More importantly, is the court, by its silence, abdicating its role to create and guide the development of our common law? These are difficult and troubling questions not only for Native Hawaiians, but for Hawai'i as a whole.