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Kaneohe Bay Cruises v. Hirata: Are Commercial Jet Skiers In Hawaii And Endangered Species?

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KANEOHE BAY CRUISES V. HIRATA: ARE COMMERCIAL JET SKIERS IN HAWAII AN ENDANGERED SPECIES?

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I. INTRODUCTION

The beautiful coastal waters of Hawaii teem with boaters much of the year. Adding to the congestion is the increasing use of thrill craft,[1] more commonly known as the "Jet Ski" or personal water craft. The thrill-craft market has grown enormously since these items were first introduced in 1970.[2] Over 300,000 thrill craft are in operation today throughout the United States.[3] Heavy thrill-craft use has also given rise

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1. The State of Hawaii defines "thrill craft" [as] any motorized vessel that falls into the category of personal water craft, and which:

(1) Is generally less than thirteen feet in length as manufactured;

(2) Is generally capable of exceeding a speed of twenty miles per hour; and

(3) Can be operated by a single operator, but may have the capacity to carry passengers while in operation.

The term includes, but is not limited to, a jet ski, waverunner, wet bike, surf jet, miniature speed boat, hovercraft, and every description of vessel which uses an internal combustion engine powering a water jet pump as its primary source of motive propulsion, and is designed to be operated by a person or persons sitting, standing, or kneeling on, or being towed behind the vessel.

HAW. REV. STAT. tit. 12, § 200-23 (Supp. 1992).

2. "With the American public's burning hunger for outdoor recreational products the Jet Ski was a natural high-demand product. No other country on Earth has made available to its general public a greater potential for mass recreational activities...." Joseph M. Moch & Charles E. Dadswell, *Jet Skis; Wet ATV's?* 54 TEX. B.J. 1014 (1991).

3. Chris Pattorozzi, *Recreational Boating Safety: State Policies and Programs*, National Conference of State Legislatures, State Issues and Policy Analysis Program, Aug. 1992, at 25 (1992).

to an increase in boating-related accidents and fatalities.[4] Due to the increase in injuries and harm to the environment, many states and communities are passing legislation strictly regulating or banning the use of thrill craft in state waters.[5]

In *Kaneohe Bay Cruises, Inc. v. Hirata*,[6] the Supreme Court of Hawaii upheld a statute banning commercial operation of thrill craft on certain bays during weekends and holidays while permitting recreational use of such vessels on the same bays to remain unrestricted. The Hawaii Legislature enacted the ban to mitigate the risk of harm to the public and the environment caused by heavy use of such thrill craft. Plaintiffs challenged Hawaii's authority to enact such restrictions on a number of constitutional grounds. The *Kaneohe Bay* court held that the statute did not violate the equal protection clause of the federal and state constitutions because the ban was rationally related to a legitimate state purpose.[7]

This Note will first describe briefly the coastal state's authority to control its coastal waters. Second, the efforts of Hawaii and other coastal states to protect their coastal waters from the harmful effects of boat traffic through regulation and, in Hawaii's case, prohibition of certain classes of thrill craft will be examined. The Note will also examine the few cases which have challenged these statutes in order to determine whether the *Kaneohe Bay* decision is consistent with the body of case law.

In *Kaneohe Bay,* the Hawaii Supreme Court permitted the Legislature to give priority to recreational use over commercial use of thrill craft in Hawaii's Kaneohe and Maunalua Bays. No other state in the country has taken the approach of banning commercial use while permitting recreational use of the same class of thrill craft. This Note contends that the *Kaneohe Bay* decision upholding such a statute provides states with an important, yet tenuous, precedent in preserving the coastal environment.

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4. In 1989, ski craft were involved in 850 accidents, causing 25 deaths and 407 individual injuries. Moch & Dadswell, *supra* note 2, at 1014 (citing statistics obtained from the U.S. Department of Transportation, U.S. Coast Guard, Wash., D.C.).

5. Pattorozzi, *supra* note 3, at 26-28.

6. 861 P.2d 1 (Haw. 1993).

7. *Id.* 7-9. The Hawaii Supreme Court also upheld the statutory ban because no federal law preempted it. *Id.* at 9-10.

II. HISTORICAL AND LEGAL BACKGROUND OF STATE'S AUTHORITY TO REGULATE THE COASTAL WATERS

A. Federal Basis of the State's Authority

In the years following World War II, the federal government attempted to obtain jurisdiction over all coastal resources below the low-tide line of the U.S. coast.[8] Despite these efforts, however, the coastal states retained management control over their coastal waters when Congress passed the Submerged Lands Act of 1953[9]. The Act recognized that title to, and the power to manage, the lands beneath the navigable waters[10] within the boundaries of the states belonged to the respective states. Thus, the coastal states could exercise complete sovereignty within their coastal waters out to the seaward limit (of three miles) of the territorial sea with only a few exceptions.[11]

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8. JOHN M. ARMSTRONG & PETER C. RYNER, COASTAL WATERS: A MANAGEMENT ANALYSIS 20-21 (1978). For example, "the Truman Proclamation of September 28, 1945 ... claimed exclusive U.S. jurisdiction over the natural resources of the continental shelf ... [and] resulted in a series of federal challenges to state control of submerged lands in the U.S. Supreme Court." *Id.* at 21. Furthermore, in three landmark decisions, U.S. v. California, 332 U.S. 19 (1947), U.S. v. Texas, 339 U.S. 707 (1950), and U.S. v. Louisiana, 339 U.S. 699 (1950), the U.S. Supreme Court held that the federal government, rather than states, had paramount rights in the submerged lands and natural resources of the territorial seas of the United States.

9. 43 U.S.C. §§ 1311-1315 (1988) [hereinafter SLA]. 43 U.S.C. § 1311(b) (1988) provides that: "The United States releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources...."

10. 16 U.S.C. § 1301(a) (1988). "Navigable waters" are those waters which "form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." United States v. Appalachian Elec. Power Co., 311 U.S. 377, 406 n.21 (1940) (quoting The *Daniel Ball*, 77 U.S. 557, 563 (1870)).

11. David M. Foreman et al., *Filling in a Jurisdictional Void: The New U.S. Territorial Sea*, 2 TERR. SEA J. 1, 35-36 (1992). *See also*, Jeffrey C. Good, *State-Federal Conflict Over Naval Defensive Sea Areas in Hawaii*, 14 HAW. L. REV. 595, 595 n.3 (1992). The geographical extent of this state jurisdiction is not entirely clear. *See generally*, Foreman, *supra*, at 33-44. In 1988, President Reagan issued a Proclamation extending the U.S. territorial sea from three to twelve nautical miles. Proclamation No. 5928, 3 C.F.R. 547 (1989), *reprinted in* 43 U.S.C. § 1331 notes (1988).

Traditionally, the sea boundaries of a coastal state are fixed with reference to its

To strengthen the states' ability to manage their coastal lands and waters, Congress passed the Coastal Zone Management Act of 1972[12] (CZMA), in an effort to preserve, protect, and enhance the resources of the Nation's coastal zone.[13] The CZMA encouraged states to effectively exercise their responsibilities in the coastal zone by funding the establishment of state programs to protect and develop the states' coastal waters.[14] The CZMA required that state programs should at least provide for the protection of the natural resources with management procedures that minimized the loss of life and property. Additionally, the CZMA ensured the public's right to the coastal waters for recreational purposes.[15] Congress also encouraged states to create special management plans for specific geographic areas within sensitive areas of

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"inland waters" and "marginal sea." "The outer sea boundary is deemed to be a line which runs parallel to and seaward from the coast," and the territorial or marginal sea runs from that the land mass to that line. "Where the shoreline is characterized by irregular bays, inlets, and harbors and random nearby islands the waters within these irregular configurations are considered 'inland waters' of the nation or state, subject to its sovereignty, dominion and control." People v. Weeren, 607 P.2d 1279, 1281 (Cal. 1980).

12. 16 U.S.C. §§ 1451-1464 (1988) (as currently amended at 16 U.S.C.S. §§ 1451-1464 (1994)) [hereinafter CZMA].

13. 16 U.S.C. § 1452 (1988 & Supp. V 1993).

14. 16 U.S.C. § 1452(2) (1988 & Supp. V 1993). In enacting the Coastal Zone Management Act, Congress found:

> The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone by assisting the states, in cooperation with Federal and local governments and other vitally affected interests, in developing land and water use programs for the coastal zone, including unified policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance.

16 U.S.C. § 1451(i) (1988). Congress also declared it to be the national policy:

> to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and esthetic values as well as the needs for compatible economic development....

16 U.S.C. § 1452(2) (1988 & Supp. V 1993).

15. 16 U.S.C. § 1452(2)(D) (1988 & Supp. V 1993).

the coastal zone.[16] Subsequently, many states adopted coastal zone management laws and programs.[17]

B. Constitutional Authority of the State to Regulate Its Coastal Waters and Prohibit Classes of Users

All states, including Hawaii, have two basic sources of power to regulate their coastal waters. The first source arises from each state's ownership of the lands beneath coastal waters and the natural resources within these lands and waters (to the degree that the Submerged Lands Act and other federal legislation recognizes the state's ownership). Second, each state is the sovereign protector of the health, safety and welfare of its citizens.[18] Thus, the police power of the state permits regulation of land and water under its authority in order to further the public welfare.

Safeguards exist to protect the public's use of the coastal waters. First, under state law the public has certain rights in the coastal waters as set forth in the public trust doctrine.[19] Second, the public is protected from arbitrary and capricious regulation that classifies, for example, users of coastal waters in a discriminatory manner under the equal protection clauses of the state[20] and U.S.[21] Constitutions.

In *Maeda v. Amemiya*,[22] the Hawaii Supreme Court set forth the test to determine whether a statute violates the equal protection clause. The

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16. 16 U.S.C. § 1452(3) (1988 & Supp. V 1993). *See also* 16 U.S.C. § 1453 (17) (1988) (defining "special area management plan").

17. Hawaii enacted its coastal zone management statute in 1977. HAW. REV. STAT. tit. 13, § 205A (1985 & Supp. 1992). California enacted its Coastal Zone Management Program as part of the California Coastal Act in 1976. CAL. PUB. RES. CODE §§ 30008-30263 (1995).

18. ARMSTRONG & RYNER, *supra* note 8, at 25.

19. *See generally* National Audubon Soc. v. Sup. Ct., 658 P.2d 709, 721-725 (Cal. 1983). *See also* Ralph W. Johnson et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State,* 67 WASH. L. REV. 521, 567 (1992). The public trust doctrine guarantees the public certain rights in the navigable waters of the states. These rights include navigation, commerce, fishing, boating, and other forms of water recreation. The doctrine also confers on the public the right to preserve the navigable waters and adjacent lands within the public trust in their natural state. Full discussion of the public trust doctrine is beyond the scope of this Note.

20. *See, e.g.,* HAW. CONST. art. I, § 5.

21. U.S. CONST. amend. XIV, § 1.

22. 594 P.2d 136 (Haw. 1979).

Maeda court held that a statute classifying persons permitted to catch nehu (tuna) was rationally related to the legislative purpose of conservation and allocation.[23] Thus, the statute was not violative of equal protection as favoring one commercial class of tuna fishermen over other commercial and recreational tuna fishermen. The court stated that three criteria should be examined when determining whether a statute is in violation of the equal protection clause: "the character of the classification in question; the individual interests affected by the classification; and the governmental interest asserted in support of the classification."[24]

If the regulation or classification does not interfere with the exercise of a fundamental right, or does not discriminate against a suspect class, then statutory classification of economic interests should be examined under the rational basis test.[25] The test of constitutionality is whether the statute has a rational relation to a legitimate state interest.[26] The Hawaii Supreme Court has explained this test as whether the "Legislature rationally could have believed that the ... [classification] would promote its objective."[27] In making this inquiry, a court will not look for empirical data in support of the statute.[28] "[T]he burden is on the plaintiff to show that the statute is arbitrary and capricious and that it bears no relation to the object of the legislation."[29]

C. Coastal Waters Management in Hawaii

Hawaii passed its coastal zone management statute in 1977. Two of the objectives of the statute are to protect the recreational resources and the ecosystem of the coastal zone.[30] The Legislature originally defined "coastal zone management area" to include the waters from the shoreline to the seaward limit of the State's jurisdiction."[31] The Hawaii Legisla-

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23. Maeda v. Amemiya, 594 P.2d at 143.

24. *Id.* at 140 (quoting Dunn v. Blumstein, 405 U.S. 330, 335 (1972).

25. *Id.* at 141.

26. *Id.*

27. *In re* Bacchus Imports, Ltd., 656 P.2d 724, 730 (Haw. 1982) (quoting Western & Southern Life Ins. Co. v. State Board of Equalization, 451 U.S. 648, 671 (1981)).

28. Nagle v. Board of Education, 629 P.2d 109, 112 (Haw. 1981).

29. State v. Cotton, 516 P.2d 715, 717 (Haw. 1973).

30. HAW. REV. STAT. tit. 13, § 205A-2 (1985) (approved by the United States government pursuant to Public Law No. 92-583).

31. HAW. REV. STAT. tit. 13, § 205A-1 (Supp. 1992). The definition of "coastal zone management area" was amended in 1992 to include "all lands of the State and the

ture stated as its first objective and policy to provide recreational resources for the public in the coastal zone.[32] The Legislature elaborated that this objective was to be fulfilled by protecting coastal resources uniquely suited for recreational purposes[33] and by encouraging expanded public recreational use of coastal waters having recreational value.[34] Hawaii's policy is to protect valuable coastal ecosystems from disruption and to minimize adverse impacts on all coastal ecosystems.[35] The state's economic policy in the coastal management zone supports its recreational and environmental policies by providing funds for "public and private facilities and improvements important to the State's economy in *suitable locations*."[36]

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area extending seaward from the shoreline to the limit of the State's police power and management authority, including the United States territorial sea." HAW. REV. STAT. tit. 13, § 205A-2 (1993).

32. HAW. REV. STAT. tit. 13, § 205A-2 (Supp. 1992 & 1993 Comp.). This section states, in part:

(b) Objectives.
  (1) Recreational resources;
    (A) Provide coastal recreational opportunities accessible to the public.
  ...
(c) Policies.
  (1) Recreational resources;
    (A) Improve coordination and funding of coastal recreational planning and management; and
    (B) Provide adequate, accessible, and diverse recreational opportunities in the coastal zone management area by....

33. HAW. REV. STAT. tit. 13, § 205A-2(c)(1)(B)(i) (Supp. 1992 & 1993 Comp.).

34. HAW. REV. STAT. tit. 13, § 205A-2(c)(1)(B)(v) (Supp. 1992 & 1993 Comp.). The 1993 amendment reworded this clause to further strengthen the state's policy to provide adequate, accessible, and diverse recreational opportunities in the coastal zone management area by: "[e]nsuring public recreational use of county, state, and federally owned or controlled shoreline lands and waters having recreational value consistent with public safety standards and conservation of natural resources." *Id.*

35. HAW. REV. STAT. tit. 13, § 205A-2(b)(4)(A) (1985).

36. HAW. REV. STAT. tit. 13, § 205A-2(b)(5)(A) (1985) (emphasis added).

D. Kaneohe and Maunalua Bays

Kaneohe and Maunalua Bays are heavily utilized by the public.[37] The bays are also home to humpback whales and green sea turtles.[38] In response to the increased use of thrill craft and their threat to public users and the environment, the Hawaii Legislature passed Act 247 directing the Department of Transportation[39] to adopt and promulgate rules to regulate the operation of thrill craft in Hawaiian waters. Thereafter, in 1988, the Department of Transportation adopted and promulgated the Ocean Recreation Management Rules and Areas in which commercial thrill-craft operations were restricted in certain areas of Kaneohe Bay.[40] In 1989, the legislature passed Act 342, requiring the Department of Transportation to adopt additional restrictions on thrill-craft operation. The legislature recommended time periods during which such operations would be entirely banned.[41] Pursuant to Act 342, the Department of Transportation proposed amendments to ban commercial operation of thrill craft in Kaneohe Bay on weekends and holidays.[42] Finally, in 1990, the legislature passed Act 313 banning commercial thrill-craft operation in Kaneohe Bay and Maunalua Bay on weekends and holidays, and also banning all commercial ocean recreation activities on Sundays.[43]

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37. *See infra* note 41. "[T]he waters encompassed by Kaneohe Bay ... are of central importance to the state's $500 million ocean recreation industry." 14 U. HAW. L. REV. 595, 596 n.8 (1992) (quoting HAWAII OCEAN AND MARINE RESOURCES COUNCIL, HAWAII OCEAN RESOURCES MANAGEMENT PLAN 18 (1991)).

38. *See* Greenpeace v. DOT, No. 88-00907 ACK 1990 U.S. Dist. Lexis 16527 at *1 (D. Haw. July 30, 1990). *See also,* Arline Bleeker, *Breathtaking Sights for the Whale Followers*, CHICAGO TRIB., Feb. 6, 1994, at 6K.

39. In 1991 the Department of Land and Natural Resources assumed control over Hawaii's ocean recreation and coastal areas programs and established the Board of Land and Natural Resources to administer the programs. HAW. REV. STAT. tit. 12, §§ 200-2, 200-3 (Supp. 1992). Other duties of the department were to classify vessels into appropriate categories and classes. HAW. REV. STAT. tit. 12, § 200-24 (Supp. 1992).

40. Kaneohe Bay Cruises, Inc. v. Hirata, 861 P.2d 1, 4 (Haw. 1993).

41. The legislature found that "because areas such as Kaneohe Bay ... are heavily utilized by the public, it has been proposed that all commercial ocean recreation activities be banned on weekends and holidays." *Id.* at 1.

42. *Id.*

43. The Act is now codified in HAW. REV. STAT. tit. 12, §§ 200-37 - 200-38 (Supp. 1992 & 1993 Comp.). The Hawaii Legislature stated the following as one of the Act's purposes:

In view of the inherently risky nature of thrill craft and high-speed motorized

E. Other States' Thrill-Craft Laws

At least twenty-eight states, including Hawaii, have passed legislation regulating thrill craft.[44] Almost all the states that have thrill-craft legislation have utilized a preventative strategy rather than a prohibitive approach. Rather than ban thrill craft from certain areas, most states have emphasized education and safety by imposing safety restrictions and age limits on thrill-craft users.[45] Some states have prohibited or acknowledged the power to prohibit thrill craft within particular or special areas, but none have banned only a commercial class of thrill craft or other personal water craft.[46] A California Attorney General Opinion concluded that a local agency may prohibit personal water craft on all navigable waters within its jurisdiction if the use of personal water craft is incompatible with one or more other public uses on such waters.[47] However, the ban must be neither arbitrary nor discriminatory

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vessels and the documented injuries and deaths that thrill craft and high-speed motorized vessels have inflicted on people, the legislature declares that the unrestrained operation of thrill craft and high-speed motorized vessels in the waters of the State poses an unacceptable risk of harm to humans and the environment.

The Legislature is cognizant that, except as otherwise provided by law, all ocean areas appertaining to any government management shall be and are forever granted to the people, for the free and equal use by all persons. However, the State is mindful that in managing and regulating ocean use, priority should be given to those seeking non-commercial recreational opportunities as opposed to those seeking commercial recreational opportunities. To be a commercial operator is a privilege and not an exclusive right.

Act 313, § 1, 1990 Haw. Sess. Laws 972.

44. AL, AZ, CT, DE, FL, GA, HI, IL, LA, MD, ME, MA, MI, MN, MO, MT, NH, NJ, NV, NY, OK, RI, SD, TX, VT, VA, WA, WI. Search of LEXIS, States Library, ALL CODES File. CA, MS, NC, PA, and SC have pending legislation.

45. *See, e.g.*, DEL. CODE ANN. tit. 23, § 2212 (Supp. 1994). The Delaware statute regulates the age of the operator, the time of day when personal water craft may be operated, a personal floatation requirement, required equipment, the manner of operation, and the speed in certain areas, among other things.

46. *See, e.g.*, N.H. REV. STAT. ANN. § 270:74 (Supp. 1994) (prohibiting ski craft on fifteen lakes and ponds); N.J. REV. STAT. ANN. § 12:7-63 (West Supp. 1994) (prohibiting personal water craft within Point Pleasant Canal in the County of Ocean and Cape May Canal in the County of Cape May); N.Y. NAV. LAW § 73-a(f) (McKinney Supp. 1995) (prohibiting operation of personal water craft within five hundred feet of any designated bathing area).

47. 74 Op. Att'y Gen. Cal. 174 (1991).

as to personal water craft.[48]

Apart from the *Kaneohe Bay* decision, only three challenges to state thrill-craft restrictions have been reported.[49] Thus, there has been very little litigation over the constitutionality of the various states' thrill-craft statutes and ocean management plans. Furthermore, none of the cases has challenged a statute which classified users of thrill craft. However, much case law exists in other fields of ocean and coastal law which examines the constitutionality of the classification of ocean users.[50]

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48. *Id.* The Attorney General Opinion based its decision on the following three general principles: "(1) under the guise of the police power, a local agency may not completely prohibit what is otherwise lawful, (2) it may not unreasonably discriminate between objects which are similarly situated under the law, and (3) restrictions placed upon the recreational use of navigable waters are not favored."

49. *See In re* Toczko, 618 A.2d 800, 801-806 (N.H. 1992) (upholding the validity of a statute which regulated ski craft and authorized the commissioner of the department of safety to promulgate procedural rules for conducting public hearings on whether to prohibit or restrict the use of ski craft on the state's ponds, lakes, and rivers, where the plaintiff had alleged that the procedures followed by the commissioner pursuant to the statute had violated both the statute and the State Administrative Procedure Act by not providing for adjudicative hearings); Christ v. Maryland Dep't of Natural Resources, 644 A.2d 34 (Md. 1994) (upholding the validity of a Maryland Department of Natural Resources regulation prohibiting the operation of personal water craft in Maryland waters by an individual less than 14 years of age); Warren v. Bridgman City Comm., Mich. Ct. of Appeals Unpublished Opinions 19, reported in Lawyers Weekly No. 15834 (holding that a city ordinance banning the launching of ski craft from a public boat launch was rationally related to the legitimate public interest of swimmer safety and curtailing excessive noise, and was thus constitutional).

See also Personal Ass'n Watercraft Indus. v. Dep't of Commerce, 48 F.3d 540 (D.C. Cir. 1995) (upholding federal regulations governing personal watercraft in the Monterey Bay Nat'l Marine Sanctuary).

50. The following cases apply to the classification of the sizes of boats allowed in state waters: Atlantic Prince v. Jorling, 710 F. Supp. 893 (E.D. N.Y. 1989) (holding that a New York statute prohibiting use of boats longer than ninety feet from fishing in New York waters violated the commerce and equal protection clauses because it discriminated against out-of-state fishermen and the court could find no rational relation between the regulation and the local purpose); *contra* Davrod v. Coates, 971 F.2d 778 (1st Cir. 1992) (upholding a similar Massachusetts statute barring boats longer than ninety feet from fishing in state waters as not a violation of the commerce, privileges and immunities, and equal protection clauses where the Court found the rule applied to all fishing vessels and of the fishing vessels longer than ninety feet in length, far more of them were Massachusetts vessels than out-of-state vessels).

For cases addressing the classification of fishermen in state waters, *see, e.g.*, Mullaney v. Anderson, 342 U.S. 415 (1952); Toomer v. Witsell, 334 U.S. 385 (1948) (striking down South Carolina statute regulating the taking of migratory shrimp which

III. THE HAWAII SUPREME COURT'S DECISION IN *KANEOHE BAY*

In response to Act 313 which banned the commercial operation of thrill craft on weekends and holidays in Kaneohe and Maunalua Bays,[51] the plaintiffs-appellants Kaneohe Bay Cruises, Inc., Seig Schuster, President of Kaneohe Bay Cruises, and Yoshimasa Yamaguchi, a tour agent, (K-Bay) filed a complaint for declaratory and injunctive relief.[52] Kaneohe Bay Cruises operated a tour boat and water sports business which included thrill-craft operations. Yoshima Yamaguchi operated a tour business which catered to Japanese tourists. K-Bay brought suit against Edward Y. Hirata, individually and in his capacity as the Director of the State Department of Transportation, and David E. Parsons, individually and in his capacity as the State Boating Manager of the State Department of Transportation (the State).[53]

K-Bay sought a declaration that section four of Act 313[54] was unconstitutional as violative of equal protection under both the federal and Hawaii State constitutions. K-Bay further alleged that section four invidiously discriminated against persons based on their race, national origin, and alienage (specifically, Japanese tourists). K-Bay claimed that the Act was preempted by federal law. K-Bay also sought a permanent injunction against the enforcement of section four of Act 313.[55]

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required an annual license fee of $25 for resident owners and $2500 for nonresidents as a violation of the privileges and immunities clause of the U.S. Constitution); Organized Fishermen of Fla. v. Watt, 590 F. Supp. 805 (S.D. Fla. 1984) (upholding federal regulation banning all commercial fishing in Everglades National Park); Tangier Sound Waterman's Ass'n v. Douglas, 541 F. Supp. 1287 (E.D. Va. 1982); Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson, 571 P.2d 1373 (Wash. 1977).

51. Act 313 is codified at HAW. REV. STAT. tit. 12, § 200-37 (Supp. 1992 & 1993 Comp.) and states in relevant part:

> (g) During all weekends and state and federal holidays, no commercial operator shall operate a thrill craft, or engage in parasailing, water sledding or commercial high speed boating, or operate a motor vessel towing a person engaged in water sledding or parasailing in Kaneohe Bay and Maunalua Bay on Oahu[.]
>
> (h) On Sundays, all commercial ocean recreation activities, including those listed in this section, shall be prohibited on Oahu in Kaneohe Bay and Maunalua Bay.

52. Kaneohe Bay Cruises, Inc. v. Hirata, 861 P.2d at 4-5.

53. *Id.*

54. *Id.* at 5.

55. *Id.* at 4-5.

On November 23, 1990, the circuit court granted the State's motion for summary judgment. The circuit court made three conclusions. First, Act 313 was rationally related to the "perceived evil that it seeks to regulate."[56] Second, Act 313 "neither facially nor as applied discriminated against any particular group."[57] Lastly, Act 313 was not subject to federal preemption.[58]

On appeal, K-Bay made several arguments. First, K-Bay conceded that the rational basis test was the correct standard to be applied in this case.[59] K-Bay, however, argued that the circuit court erred in finding that Act 313 did not violate the equal protection clauses of both federal and Hawaii State constitutions by singling out commercial thrill-craft operators and prohibiting them from using thrill craft on weekends and holidays.[60] In support of this argument, K-Bay attempted to demonstrate that there were no significant differences between recreational and commercial users of thrill craft.[61] Therefore, K-Bay argued, the legislature could not have had a rational basis for its classification.[62]

Second, K-Bay argued that the circuit court erred in determining that the Act did not discriminate against any particular group. K-Bay claimed that Act 313 invidiously discriminated against Japanese tourists.[63] Because much of its business was derived from the Japanese, the statute would effectively ban such tourists from using thrill craft on weekends and holidays.

Third, K-Bay argued that the circuit court erred in finding that Act 313 was not preempted by federal law. K-Bay claimed that the federal government has not imposed any use restrictions on the waters of Kaneohe Bay, including thrill-craft operations, and that, therefore, Hawaii was preempted from instituting such restrictions. They also claimed that federal law preempts the field of mandatory performance

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56. *Id.* at 5.
57. *Id.*
58. *Id.* at 9-10.
59. *Id.* at 6.
60. *Id.* at 6-9.
61. *Id.* at 6.
62. *Id.* at 6-7. K-Bay also contended that the legislature did not have enough empirical data upon which to have based its conclusions regarding the dangers of increased thrill craft use in Kaneohe Bay and Maunalua Bay. *Id.* at 7.
63. *Id.* at 9.

standards for safety equipment in recreational vessels.[64] Thus, the State is precluded from restricting thrill-craft operations in the Bays.

The State argued that the circuit court was correct in concluding that the Act was rationally related to the legitimate government interests of water safety and environmental preservation of the Bays. Additionally, the State asserted that K-Bay failed to sustain its burden of offering evidence to rebut the presumed constitutionality of the statute.[65] The State also argued that K-Bay lacked standing to claim discrimination.[66] The State's last argument was that federal law did not preempt Act 313 because the federal government has not regulated, nor evinced any intention to occupy, this field.[67]

The Hawaii Supreme Court held that the statute banning commercial thrill-craft operation, while permitting recreational operation on weekends and holidays in Kaneohe and Maunalua Bays, was constitutional. The court found that the Hawaii legislature passed the statute for the legitimate government purpose of water safety and environmental preservation in the Bays.[68] K-Bay failed to demonstrate that the legislature could not reasonably have conceived that prohibiting commercial thrill-craft operations on weekends and holidays would make the Bays safer for the public and the environment. The court did not rely on nor cite empirical data in support of the statute, but relied on common sense to conclude that a prohibition of commercial thrill craft would "necessarily tend to make the Bays less congested and safer for the remaining users."[69] The court stated that because this logic is "self-evident," it is, therefore, rational.[70] The court justified the State's classification of thrill craft by citing a previous opinion which stated that "equal protection does not mean government must choose between attacking every aspect of a problem or not attacking the problem at all."[71] As long as the statute's purpose was legitimate, the government could take one step at a time in order to resolve the problem.[72]

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64. *Id.*
65. *Id.* at 7-8.
66. *Id.* at 9.
67. *Id.* at 9-10.
68. *Id.* at 7-8.
69. *Id.* at 7.
70. *Id.*
71. *Id.* at 8 (quoting Nakano v. Matayoshi, 706 P.2d 814, 822 (Haw. 1985)).
72. *Id.*

The court brushed aside K-Bay's other two arguments. First, because constitutional rights can not be vicariously asserted, the plaintiffs lacked standing.[73] None of the plaintiffs in this case was a tourist, and, thus, a class of persons who would have been adversely affected by the ban in Act 313 on commercial thrill-craft operations in the Bays on weekends and holidays.[74] Second, the court referred to K-Bay's federal preemption argument as a *non-sequitur*.[75] Therefore, the Hawaii Supreme Court affirmed the circuit court's order granting summary judgment in favor of the State.

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73. *Id.* at 9.

74. *Id.*

75. *Id.* Although the federal preemption argument is beyond the scope of this Note, thrill craft legislation will raise some interesting preemption issues if the federal government delves into the field. Under both Hawaii law, HAW. REV. STAT. tit. 12, § 200-23 (Supp. 1992 & 1993 Comp.), and federal law, 1 U.S.C. § 3 (1988), a "vessel" is defined to include every description of water craft used or capable of being used as a means of transportation on or in the water. Hawaii has further defined and restricted thrill craft and ocean use activities apart from other vessels. HAW. REV. STAT. tit. 12 §§ 200-37 (Supp. 1992), 200-39 (Supp. 1992 & 1993 Comp.) These statutes distinguish between commercial and recreational use of thrill craft. However the federal law uses the catch-all phrase, "recreation vessel," which is defined as a vessel "manufactured or operated primarily for pleasure: or ... leased, rented, or chartered to another for the latter's pleasure." 46 U.S.C. § 2101(25) (1988). This sets up a dichotomy between federal and state law. Under Hawaii law, the thrill craft chartered for pleasure becomes a "commercial thrill craft," while under federal law it remains a "recreational vessel." Andrew W. Anderson & F. David Famulari, *Practice Guide: Pleasure Boats*, 4 U.S.F. MAR. L.J. 99, 101 (1992).

The federal government, through the U.S. Coast Guard which promulgates uniform national safety standards for numbering, manufacturing, and equipping recreational vessels, has a central role in the recreational boating industry. *See, e.g.*, 46 U.S.C. §§ 4301-4311 (West 1988). The Coast Guard also provides a national network for administering documented recreational vessels, the national aids to navigation system, and the national search and rescue system. Anderson & Famulari, *supra*, at 128. On waters within state jurisdiction, the Coast Guard assists state authorities in enforcing recreational boating safety. *Id.* at 129.

"While it is difficult to predict the outcome, state and local efforts to establish special safety equipment requirements and to restrict the waters that these 'vessels' use probably will be successful under the theory that the regulations apply only to recreational activity and not to navigation in interstate or foreign commerce." *Id.* at 129.

IV. DISCUSSION

The *Kaneohe Bay* decision manifests an intention by the Supreme Court of Hawaii to permit the legislature to prioritize the public's activities in certain "ocean management areas."[76] The decision is in line with the policy of the Hawaii Legislature to provide and preserve recreational resources for the public.[77] In contrast to other states' approaches,[78] Hawaii's classification strategy, which prohibits commercial thrill-craft use and permits recreational use in congested coastal waters, is unique in the United States. The question then is whether the *Kaneohe Bay* decision is sound enough to provide other states with a model for management of their coastal zones.

The Hawaii Supreme Court correctly utilized the rational relation standard set forth in the Hawaii equal protection cases. However, a better prepared plaintiff could possibly have rebutted the statute's presumption of constitutionality. The court accurately stated that in making the rational relation inquiry, it would not look for empirical data in support of the statute.[79] The court did not imply that K-Bay could *never* bring forth evidence to rebut the presumed constitutionality of the statute.[80] The court correctly placed the burden on K-Bay to offer evidence to rebut the constitutionality of the statute. However, K-Bay did not satisfy its burden to bring forth sufficient evidence to prove the lack of differences between commercial and recreational thrill craft.[81]

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76. The Legislature's intent to prioritize ocean uses is unambiguous. "[T]he State is mindful that in managing and regulating ocean use, priority should be given to those seeking non-commercial recreational opportunities. To be a commercial operator is a privilege and not an exclusive right." Act 313, § 1, 1990 Haw. Sess. Laws at 972.

77. *See supra* notes 33-39 and accompanying text.

78. *See supra* notes 44-50 and accompanying text.

79. *See supra* note 33.

80. Kaneohe Bay Cruises, Inc. v. Hirata, 861 P.2d at 7 (quoting State v. Cotton, 516 P.2d 715, 717 (Haw. 1973)).

81. Kaneohe Bay Cruises, Inc. v. Hirata, 861 P.2d at 10-11. K-Bay failed to offer, at the circuit court level, depositions from a marine patrol officer and a state boating manager in order to prove the lack of difference between commercial and recreational thrill craft. K-Bay claimed that it had been unable to schedule these depositions in time to have them available for the summary judgment hearing. Thus, K-Bay moved for a reconsideration of the summary judgment order. The circuit court denied the motion noting that both witnesses were readily available to K-Bay and with the exercise of due diligence, K-Bay could have obtained their deposition testimony. K-Bay also attempted to use its motion for reconsideration to introduce several videotapes purportedly

Sufficient evidence of homogeneity would have proven that the classification did not rationally relate to the legitimate government purpose of protecting the public and the environment. In *Maeda v. Amemiya*,[82] the Hawaii Supreme Court relied on extensive trial court findings in order to conclude that a classification that differentiated between commercial tuna fisherman and all other commercial and non-commercial fishermen was rationally related to the legitimate state purposes of conservation and allocation of tuna and enforcement of tuna regulations.[83] Therefore, the Hawaii Supreme Court did not ultimately slam the door on a properly pleaded equal protection claim.

The Hawaii Supreme Court's refusal to consider K-Bay's discrimination argument may destabilize Hawaii's coastal management strategy. Act 313 will effectively prevent tourists and nonresidents, the users of these commercial thrill craft, from using the waters of Kaneohe and Maunalua Bays on weekends and holidays. Although the court correctly made a narrow holding by not addressing K-Bay's discrimination claim, the Hawaii Supreme Court is opening itself up to a legitimate discrimination claim that could be made by a nonresident in the future. The United States Supreme Court has declared similar resident/nonresident discrimination to be unconstitutional under the Privileges and Immunities and Equal Protection Clauses.[84]

As the number of thrill-craft accidents in the coastal waters of other states continually rise, states will be looking for more effective ways to restrict the uses of thrill craft. The *Kaneohe Bay* decision is significant because it upholds a new strategy by which states may be able to handle the ever growing thrill-craft problem. To invoke this strategy, a state must first establish the appropriate federally approved coastal zone management program. Second, the state must set goals with the emphasis on protecting recreational and environmental resources. Third, the state should establish ocean recreation management areas. Finally, the state may establish classifications of thrill-craft users within the ocean recreation management areas. This strategy will not be effective in all states, however. Those states which have expressed an intention not to

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illustrating that weekend and holiday thrill craft traffic in Kaneohe Bay was not as heavy as the State believed. *Id.*

82. 594 P.2d 136, 143-144 (Haw. 1979).

83. *Id.* at 143. In this case, the Hawaii court gave a detailed list of the findings of the trial court that were relevant factors in differentiating between commercial tuna fishermen and all other commercial and noncommercial fishermen.

84. *See supra* note 50.

establish classes of personal water craft operators, such as California, may lack sufficient equal protection precedent to establish a similar program.[85] Nevertheless, *Kaneohe Bay* provides states with a powerful tool in their efforts to protect the public and environment from the devastating effects of the operation of thrill craft in congested coastal waters.

V. CONCLUSION

The Hawaii Supreme Court accurately interpreted its equal protection case law and correctly upheld Act 313 which prohibited commercial thrill craft, while permitting recreational thrill craft, in the ocean recreation management areas of Hawaii. However, the vitality of the holding of *Kaneohe Bay* should not be overestimated. The decision does not completely protect the Hawaii thrill-craft strategy because it leaves open several avenues for a better prepared non-resident plaintiff to challenge Act 313. Thus, Hawaii's strategy may not be a stable model for other states. They should deal with the thrill-craft problem through comprehensive plans, as set forth above, rather than rely on a vulnerable classification scheme.

85. *See supra* notes 47-48.