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Lane Kaiwi Opulauoho

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TRUST LANDS FOR THE NATIVE HAWAIIAN NATION: LESSONS FROM FEDERAL INDIAN LAW PRECEDENTS¹

*Lane Kaiwi Opulauoho**

E hō‘ā kākou i ka lama kūpono

Let us light the torch of justice and reconciliation²

From time immemorial, Native Hawaiians,³ the aboriginal peoples who settled the isolated Hawaiian Archipelago surrounded by the vast Pacific

1. The trust lands, or “ceded” lands, are comprised of the crown and government lands that were summarily seized and confiscated when Hawai‘i was annexed to the United States in 1898. These lands numbered approximately 1.5 to 1.8 million acres, a substantial part of which was originally intended for private ownership by King Kamehameha III (Kauikeaouli), his heirs and successors, and the government lands that were to support and sustain the Kingdom of Hawai‘i. *See generally* JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI‘I? (2007); NATIVE HAWAIIAN LAW: A TREATISE (Melody Kapilialoha MacKenzie et al. eds., 2015) [hereinafter NATIVE HAWAIIAN LAW TREATISE]; DAVIANNA PŌMAIKA‘I MCGREGOR & MELODY KAPILIALOHA MACKENZIE, OFFICE OF HAWAIIAN AFFAIRS, MO‘OLELO EA O NĀ HAWAI‘I: HISTORY OF NATIVE HAWAIIAN GOVERNANCE IN HAWAI‘I (Aug. 19, 2014), https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/McGregor-and-MacKenzie-History_of_Native_Hawaiian_Governance.pdf [hereinafter MO‘OLELO].

* Lane Kaiwi Opulauoho is a May 2018 graduate of the University of Hawai‘i at Mānoa William S. Richardson School of Law, earning his J.D. and the Native Hawaiian Law Certificate from Ka Huli Ao Center for Excellence in Native Hawaiian Law. A version of this Article was originally submitted for his second-year seminar, and this one was entered into the *American Indian Law Review* Writing Competition at the University of Oklahoma College of Law for the 2017-18 season. He was awarded the second-place prize for this submission. He offers sincere gratitude to Professors Melody K. MacKenzie and Susan K. Serrano for their aloha, guidance, and mana‘o. And to his Opulauoho ‘Ohana for their unwavering love and unfettered support; his sister Leslie Lynn Opulauoho, brother Lee Keli‘i Opulauoho, and nephew Miles Ikaika Opulauoho. Me ke aloha pumehana.

2. *See* U.S. DEP’T OF INTERIOR & U.S. DEP’T OF JUSTICE, FROM MAUKA TO MAKAI: THE RIVER OF JUSTICE MUST FLOW FREELY: REPORT ON THE RECONCILIATION PROCESS BETWEEN THE FEDERAL GOVERNMENT AND NATIVE HAWAIIANS 6 (Oct. 23, 2000) [hereinafter MAUKA TO MAKAI], <https://www.doi.gov/sites/doi.gov/files/migrated/ohr/library/upload/Mauka-to-Makai-Report-2.pdf>.

3. For the purposes of this Article, the author defers to various scholars’ explanation of the term “Native Hawaiian” as “refer[ring] to all persons descended from the Polynesians who lived in the Hawaiian Islands when Captain James Cook arrived in 1778.” VAN DYKE, *supra* note 1, at 1 n.1. This concept should not be confused with the Hawaiian Homes Commission Act of 1920 definition of “native Hawaiian” as “persons with at least 50 percent Hawaiian blood.” *Id.* at 237 n.2; NATIVE HAWAIIAN LAW TREATISE, *supra* note 1, at

Ocean, have lived and prospered.⁴ These peoples provided the foundation of a nation that exercised sovereignty over these islands. This jurisdiction has had several titles: first, the Hawaiian Kingdom, a constitutional monarchy; then, the Republic of Hawai‘i; next, the Territory of Hawai‘i; and now, the State of Hawai‘i.⁵ The eight major islands, spanning approximately 4,126,000 acres, are comprised of Hawai‘i Island, Maui, Lana‘i, Kaho‘olawe, Moloka‘i, O‘ahu, Kaua‘i, and Ni‘ihau.⁶ An additional 124 smaller islands and atolls, extending up to the Northwestern-most point of Hōlanikū (“Kure Island”), provide 254,418.10 acres to the recorded

31 (citing Davianna Pōmaika‘i McGregor, *‘Āina Ho‘opulapula: Hawaiian Homesteading*, 24 HAWAIIAN J. HIST. 1, 21-27 (1990)); KĒHAULANI KAUANUI, HAWAIIAN BLOOD: COLONIALISM AND THE POLITICS OF SOVEREIGNTY AND INDIGENEITY 152-61 (2008); *see also* HAW. CONST. art. XII, § 6; HAW. REV. STAT. § 10-2 (2002) (current through 2018) (defining “Hawaiian” as “any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii”).

4. MO‘OLELO, *supra* note 1, at 24. Both the 2014 published version of this report and a larger (1018 pages) unpublished version draw from a wide spectrum of recognized Native Hawaiian and other scholars. *See, e.g., id.* at 20 n.31 (citing SAMUEL MANAIKALANI KAMAKAU, RULING CHIEFS OF HAWAI‘I (1961) [hereinafter KAMAKAU, RULING CHIEFS OF HAWAI‘I]; SAMUEL MANAIKALANI KAMAKAU, KA PO‘E KAHIKO: THE PEOPLE OF OLD (1992); SAMUEL MANAIKALANI KAMAKAU, NA HANA A KA PO‘E KAHIKO: THE WORKS OF THE PEOPLE OF OLD (1992); DAVIDA MALO, HAWAIIAN ANTIQUITIES (Honolulu: Bernice Pauahi Bishop Museum Press, 1951) (Nathaniel Emerson trans., 1898); E.S. CRAIGHILL HANDY, ELIZABETH GREEN HANDY & MARY KAWENA PUKUI, NATIVE PLANTERS IN OLD HAWAII: THEIR LIFE, LORE, AND ENVIRONMENT (rev. ed. 1991); PATRICK V. KIRCH, FEATHERED GODS AND FISHHOOKS: AN INTRODUCTION TO HAWAIIAN ARCHAEOLOGY AND PREHISTORY (1985); 4 ABRAHAM FORNANDER, FORNANDER COLLECTION OF HAWAIIAN ANTIQUITIES AND FOLKLORE (1916-17) (published in three parts); 6 *id.* (1919) (published in three parts); ABRAHAM FORNANDER, AN ACCOUNT OF THE POLYNESIAN RACE: ITS ORIGINS AND MIGRATIONS, ANCIENT HISTORY OF THE HAWAIIAN PEOPLE TO THE TIMES OF KAMEHAMEHA I (C.E. Tuttle Co., 1969) (1878-85) (combined edition of original three-volume work); MARTHA WARREN BECKWITH, THE KUMULIPO: A HAWAIIAN CREATION CHANT (1972)).

5. MO‘OLELO, *supra* note 1, at 20.

6. *Id.* at 10 (providing substantial context of the origins of Native Hawaiians and their immediate past and present relationships, which evidences the integral trust relationship between the United States and the Native Hawaiian experience). *See also* W.D. ALEXANDER, A BRIEF HISTORY OF THE HAWAIIAN PEOPLE 14 (1891), for a listing of the eight major islands.

total.⁷ In 2006, this area was designated and became more widely known as Papahānaumokuākea Marine National Monument.⁸

Immediately prior to the 1893 illegal overthrow of the constitutional monarch Queen Lydia Kāmaka‘eha Lili‘uokalani Dominis (Queen Lili‘uokalani), these lands of Hawai‘i experienced many changes.⁹ The indigenous people did not understand or fully comprehend the Western concept and value of land.¹⁰ Professor Jon M. Van Dyke noted that under the traditional system, “[t]he ‘Āina could not be owned, or even really possessed, in the way westerners view private property. Instead, the Ali‘i and maka‘āinana cultivated a relationship with the ‘Āina based on different values.”¹¹ Theirs was a complex and rooted culture based on subsistence and sustainability. These values are evidenced in “[a]loha ‘āina (love and respect for the land) and mālama ‘āina (taking care of the land).”¹² Native Hawaiians relied on partnerships and relationships built from reliance on each other for food, shelter, clothing, and ultimately, some semblance or sense of security.¹³ When Western contact occurred in 1778,¹⁴ life as Native Hawaiians knew it irreparably changed.¹⁵

7. *Id.* For more general information about the federal marine monument, see PAPAĀNAUMOKUĀKEA MARINE NATIONAL MONUMENT, <http://www.papahanaumokuakea.gov/> (last visited Apr. 11, 2017).

8. PAPAĀNAUMOKUĀKEA MARINE NATIONAL MONUMENT, *supra* note 7.

9. MO‘OLELO, *supra* note 1, at 34-35, 42-44, 378-84. To shed further light on the story of Hawai‘i’s last reigning monarch, see generally LILI‘UOKALANI, HAWAI‘I’S STORY BY HAWAI‘I’S QUEEN (Boston, Lothrop, Lee & Shepard 1898) (diacritical marks respectfully added to the author and title); HELENA G. ALLEN, THE BETRAYAL OF LILI‘UOKALANI: LAST QUEEN OF HAWAI‘I 1838-1917 (1982) (diacritical marks respectfully added to the title).

10. “The concept of private ownership of land” was contrary to the Native Hawaiian way and “had no place in early Hawaiian thought.” See NATIVE HAWAIIAN LAW TREATISE, *supra* note 1, at 9 (citing E.S. CRAIGHILL HANDY, ELIZABETH GREEN HANDY & MARY KAWENA PUKUI, NATIVE PLANTERS IN OLD HAWAI‘I: THEIR LIFE, LORE, AND ENVIRONMENT 41-53 (rev. ed. 1991)).

11. VAN DYKE, *supra* note 1, at 18.

12. See MO‘OLELO, *supra* note 1, at 500.

13. See *id.* at 31-32.

14. Captain James Cook had traversed the Pacific Ocean numerous times before actually stumbling upon Hawai‘i on January 18, 1778. GAVAN DAWS, SHOAL OF TIME: A HISTORY OF THE HAWAIIAN ISLANDS 1 (1968). Some say it was understandable, for the Pacific Ocean was “immense—the biggest single feature of the earth’s surface—and the islands were tiny.” *Id.* at xi.

15. History recognizes Captain James Cook as the first Western contact with the Hawaiian Islands and its people. Additionally, Cook and his crew also introduced a number of foreign diseases that particularly devastated the Native Hawaiian people who did not have the requisite immunities. The numbers of Native Hawaiians substantially decreased as

The impact of Captain James Cook's arrival was substantial, as Native Hawaiian historian Samuel Manaiakalani Kamakau explicated:

The fruits and the seeds that his . . . actions planted sprouted and grew, and became trees that spread to devastate the people of these [Hawaiian] islands:

1. Gonorrhoea together with syphilis.
2. Prostitution.
3. The false idea that [Cook] was a god and worshipped.
4. Fleas and mosquitoes.
5. The spread of epidemic diseases.
6. Change in the air we breathe.
7. Weakening of our bodies.
8. Changes in plant life.
9. Change in religions, put together with pagan religions.
10. Change in medical practice.
11. Laws in the government.¹⁶

Over the approximately 115 years from the moment of initial contact until the overthrow of the sovereign and rightful government of the Hawaiian Kingdom, the vibrant life Native Hawaiian people had created was shaken to the core.

Fast-forward to October 14, 2016, when the U.S. Department of the Interior (DOI) issued its final rule ("DOI Rule") entitled "Procedures for Reestablishing a Formal Government-to-Government Relationship with the Native Hawaiian Community."¹⁷ Issuance of the DOI Rule followed many attempts to create federal legislation addressing this formal relationship,

diseases such as smallpox, measles, whooping cough, cholera, and dysentery substantially diminished the population. See MO'OLELO, *supra* note 1, at 582-83.

16. *Id.* at 114 (quoting SAMUEL MANAIAKALANI KAMAKAU, KE KUMU AUPUNI 57 (1996), translated in NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM 22 (2004)).

17. 81 Fed. Reg. 71278 (Oct. 14, 2016) (codified at 43 C.F.R. pt. 50). Issued by the Secretary of the Department of the Interior, this final rule had been contemplated for a number of years and is of considerable importance in this Article.

primarily at the behest of then-Senator Daniel K. Akaka.¹⁸ The DOI Rule established the “administrative procedure and criteria that the Secretary would use if the Native Hawaiian community forms a unified government that then seeks a formal government-to-government relationship with the United States.”¹⁹ The summary of the rule goes on to state: “Consistent with the Federal policy of self-determination and self-governance for indigenous communities, the Native Hawaiian community itself would determine whether and how to reorganize its government.”²⁰

The concepts of self-governance and self-determination have been points of contention for many in the Native Hawaiian community over the succeeding generations since Queen Lili‘uokalani was dethroned and imprisoned for treason, leading to the overthrow of the sovereign monarchy.²¹ In light of the federal DOI Rule addressing the government-to-government relationship between Native Hawaiians and the United States, this Article suggests that the land base of the organized Native Hawaiian governing entity, the Native Hawaiian Nation,²² should be based substantially, if not wholly, on the former crown and government (ceded) lands that were summarily seized at the time of Hawai‘i’s annexation in 1898.

The history of Native Hawaiians is rich with innovation and growth and imbued with spirit. Thus, it is a further purpose of this Article to support and provide a workable roadmap of next steps for the Native Hawaiian Nation. Once the monumental task of establishing the government-to-government relationship is complete, there are several obstacles that must be navigated in order for Native Hawaiians to fully embody self-

18. Senator Daniel Kahikina Akaka, along with considerable support from the congressional delegation from Hawai‘i, including the late Senator Daniel K. Inouye, spent many years advocating for federal recognition of Native Hawaiians. Beginning around 1999 until 2013, Akaka’s efforts went through multiple iterations and substantial negotiation with presidential administrations, with much pushback from both people on the continent and some Native Hawaiians in Hawai‘i. It is contended that the recent U.S. Department of Interior rule might trace its genesis to Senator Akaka’s efforts. *See NATIVE HAWAIIAN LAW TREATISE, supra* note 1, at 312-13.

19. 81 Fed. Reg. at 71278.

20. *Id.*

21. Initially introduced and discussed *supra* note 9. *See also NATIVE HAWAIIAN LAW TREATISE, supra* note 1, at 19-23 (discussing the specific events leading to the overthrow of the Hawaiian kingdom).

22. For the purposes of this Article, the author uses the term “Native Hawaiian Nation” in anticipation of the collective of Native Hawaiian people establishing an actual governing entity recognized by the United States federal government, with a name that will likely stem forth from that final decision.

governance and exercise self-determination. Under international law, these rights are afforded to Native Hawaiians as “indigenous peoples” as defined in the United Nations’ Declaration on the Rights of Indigenous Peoples (UNDRIP).²³

As a roadmap of this journey, Part I will provide a history of Hawai‘i as viewed and interpreted through the lens of Native Hawaiian scholars, both legal and otherwise. These accounts evince where Native Hawaiian people have been and where they are currently through mo‘olelo (“stories”), mo‘okū‘auhau (“genealogy”), and more recently, within the legal context. Furthermore, this Part will focus on key points in the history of Native Hawaiian Ali‘i (“Rulers”), highlighting specific periods in history. It is in this Part that the Māhele (“land division”) of 1848, from which the “ceded” lands derive, will be closely discussed. Further history will be provided in order to give context to the reasoning behind the Native Hawaiian Nation’s need to potentially access these specific lands.

Part II will address the federal DOI Rule with additional, in-depth discussion and a breakdown as to the stated requirements for federal recognition. Next, Part III will introduce and address federal Indian law, the legal framework to be applied when navigating the federal government-to-government relationship, as well as the options for land transfers that allow the Native Hawaiian Nation the land base from which to thrive and prosper. Further, Part IV will delve more in-depth into these options for land transfers.

Part V will present prior legislation and acts of Congress specifically addressing Native Hawaiian issues, the Office of Hawaiian Affairs, and the Department of Hawaiian Home Lands. Finally, Part VI will discuss and present potential next steps for the Native Hawaiian Nation once formal federal recognition occurs. This last Part will also address practical considerations and the realities of the current political climate, as well as the most recent and contentious confirmation of Brett M. Kavanaugh, the newest Associate Justice of the Supreme Court of the United States.

23. Though outside the purview of this Article, Native Hawaiians and other indigenous peoples of the world are afforded core rights, specifically the right to self-determination. For example, Article 3 of the Declaration states: “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” G.A. Res. 61/295, Annex, art. 3, Declaration on the Rights of Indigenous Peoples (Oct. 2, 2007); *see also* MO‘OLELO, *supra* note 1, at 4-6 (providing substantial background for events leading up to the Declaration and eventual vote of support by the United States under the leadership of President Barack Obama).

I. A History of Hawai‘i

The Hawaiian people are the living descendants of Papa[nuihānaumoku], the earth mother, and Wākea, the sky father. They also trace their origins through Kāne of the living waters found in streams and springs; Lono of the winter rains and the life force for agricultural crops; Kanaloa of the deep foundation of the earth, the ocean and its currents and winds; Ku of the thunder, war, fishing and planting; Pele of the volcano; and thousands of deities of the forest, the ocean, the winds, the rains and the various other elements of nature This unity of humans, nature and the gods formed the core of the Hawaiian people’s philosophy, world-view and spiritual belief system.²⁴

Native Hawaiians “trace the origins of [their] people to early Polynesian planters, fishers, healers, artists, engineers, priests, astronomers, and navigators and beyond them to the life forces of the land [‘Āina] itself.”²⁵ From the ahupua‘a system of land management,²⁶ to traditional knowledge of la‘au lapa‘au (“medicinal plants”), as well as herbs and roots, the Native Hawaiians maintained a subsistence system and culture that worked for thousands of years.²⁷ Just around the time of initial Western contact, a ruler emerged from the Ali‘i that dotted the landscape across the islands. His name was Kamehameha I, recognized as one of the greatest warriors and rulers to have lived.²⁸ Through strategic warfare and negotiated surrender, King Kamehameha was able to unite the islands under his rule, causing

24. NATIVE HAWAIIAN LAW TREATISE, *supra* note 1, at 6 (citing DAVIANNA PŌMAIKA‘I MCGREGOR, THE CULTURAL AND POLITICAL HISTORY OF HAWAIIAN NATIVE PEOPLE, IN OUR HISTORY, OUR WAY: AN ETHNIC STUDIES ANTHOLOGY 335-36 (Gregory Yee Mark, Davianna Pōmaika‘i McGregor & Linda A. Revilla eds., 1996)).

25. Noa Emmett Aluli & Davianna Pōmaika‘i McGregor, ‘Aina: Ke Ola O Na Kanaka ‘Oiwī: Land: The Health of Native Hawaiians (n.d.), <https://www.nlm.nih.gov/exhibition/avoyagetohealth/pdf/LandandHealth.pdf> (unpublished book chapter).

26. The ahupua‘a is generally described as land extending from mauka (the mountains) to makai (the ocean), typically “‘r[unning] like a wedge from sea to mountains,” and in traditional times was overseen by ali‘i (chiefs), managed by konohiki (land agents), and cultivated by the maka‘āinana (commoners). NATIVE HAWAIIAN LAW TREATISE, *supra* note 1, at 8-9.

27. See *supra* notes 11-12 (defining Native Hawaiian subsistence culture through aloha ā‘ina and mālama ā‘ina).

28. See MO‘OLELO, *supra* note 1, at 159-60 (discussing Kamehameha’s “rise to power” and the strategic, calculated steps taken to accomplish this feat).

peace to form across the island chain. This feat earned him the accepted title of Kamehameha the Great.²⁹

Shortly after the death of Kamehameha I in 1819, Calvinist missionaries arrived from the continental United States looking to bring a new religious belief system to the native people that “focused upon the salvation of humans . . . [teaching] that humans were superior to the land and other living creatures.”³⁰ “Their teachings, laced with cultural condescension, were critical of the cultural practices and traditional nature-based spiritual belief system of the Native Hawaiians.”³¹ It was at this juncture that the landscape of Hawai‘i continued along the path of great change. The influence of Westerners became more pronounced not only to the maka‘āinana (“commoners”), but more impactfully and persuasively upon the Ali‘i (“Chiefs”).³²

King Kamehameha III (Kauikeaouli) was the longest reigning sovereign of the Hawaiian Islands.³³ When his brother, King Kamehameha II (Liholiho), died of measles in 1824, Kauikeaouli was only nine years old. Thus, Hawai‘i was under the control of Ka‘ahumanu, the Kuhina Nui (Regent/Premier), and Kalanimōkū, the Kālainmoku (Minister/Counselor).³⁴ Upon the death of Premier Ka‘ahumanu in 1832, “Kamehameha III assumed the full authority of [the] office [of Ali‘i]” at the young age of eighteen.³⁵ Kamehameha was later acknowledged and known by Hawaiians as “Kamehameha the Good.”³⁶ “[H]is life spanned the period of greatest turmoil and transition among Hawaiians.”³⁷

29. Davianna Pōmaika‘i McGregor & Melody Kapilialoha MacKenzie, Mo‘olelo Ea O Nā Hawai‘i: History of Native Hawaiian Governance in Hawai‘i 855 n.1871 (Dec. 21, 2015) (unpublished manuscript, on file with author) [hereinafter Mo‘olelo Manuscript] (speaking to the lands divided in the Māhele and given to members of the Kamehameha dynasty).

30. See MO‘OLELO, *supra* note 1, at 28.

31. *Id.* at 28-29; see also VAN DYKE, *supra* note 1, at 22-23 (noting the quick integration of the missionaries into Hawaiian society and their opening of schools, which included individual missionaries who became instructors and advisors to the Ali‘i).

32. Scholars have oft posed questions pondering the thought-process Ali‘i employed when making the decision to generally abandon traditional and customary beliefs in order to navigate the ways of the foreigners. These decisions were essentially a precursor to assimilation. See, e.g., VAN DYKE, *supra* note 1, at 22-23.

33. See *id.* at 31.

34. See *id.* at 23 (citing KAMAKAU, RULING CHIEFS OF HAWAI‘I, *supra* note 4, at 257-58); see also MO‘OLELO, *supra* note 1, at 29.

35. See MO‘OLELO, *supra* note 1, at 29.

36. See VAN DYKE, *supra* note 1, at 31 (citing Prince J. K. Kalaniana‘ole, *The Story of the Hawaiians*, 21 MID-PAC. MAG. 117, 123 (1921)).

37. *Id.*

Under Kamehameha III, attempts were made to implement the concept of Western ways slowly, but surely. The king's intent was to acclimate his people to the new ways as expeditiously as possible, while maintaining some sort of balance and building in protections for his people. Therefore, Kauikeaouli introduced to the Hawaiian people the 1839 Declaration of Rights, described by Prince Jonah Kūhiō Kalaniana'ole³⁸ as "[t]he Hawaiian Magna Charta."³⁹ The prince further explained that the document was significant because it was "the free surrender of power 'by a wise and generous ruler, impressed and influenced by the logic of events, by the needs of his people, and by the principles of the new civilization that was dawning on his land.'"⁴⁰

In 1840, Kauikeaouli took the bold step to protect the interests of all Native Hawaiian inhabitants of the kingdom by promulgating the first constitution of Hawaii.⁴¹ The preface of the constitution formally held that "the land[s] belonged to the chiefs and people," whilst the king remained as trustee (not an owner in the Western sense) in its entirety:

Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had the management of the landed property. Wherefore, there was not formerly, and is not now any person who could or can convey away the smallest portion of land without the consent of the one who had, or has the direction of the kingdom.⁴²

Arising from this provision, trust concepts were effectively formalized. These concepts had historically been familiar to the Hawaiian people, yet, "for the first time, the interests of the people, the chiefs, and the king in the land were specifically acknowledged."⁴³ It is noted that the 1840

38. For the purposes of this Article, the more current identifier of Prince Kūhiō has been replaced by the name he was commonly referred to during his time, that of Prince Kalaniana'ole. *See generally* Delegate Kalaniana'ole File, Hawai'i State Archives, Honolulu, Haw. (accessed by author in January 2017).

39. *See* VAN DYKE, *supra* note 1, at 26.

40. *Id.*

41. *Id.*

42. NATIVE HAWAIIAN LAW TREATISE, *supra* note 1, at 11.

43. *See id.* This acknowledgement is important, as the established rights of Native Hawaiian tenancy and preservation of maka'āinana (commoners) rights in the land was

Constitution embodied the attempts by the king to “deal with the increasing conflicts between Hawaiians and foreigners over land.”⁴⁴

A number of years later in 1845, the King established a Board of Commissioners to Quiet Land Titles (“Land Commission”), which was “fueled by the fear of a foreign takeover of the islands.”⁴⁵ In conjunction with the Land Commission and through advice and formulation from Kingdom of Hawai‘i Judge William Little Lee, “the king would retain his private lands ‘subject only to the rights of the tenants.’”⁴⁶ “The remaining land of the kingdom would be divided into thirds”: the Hawaiian government would receive one part, another was to be given to the chiefs and konohiki (“land managers”), and the final part was to be made available to the maka‘āinana (“native tenants”).⁴⁷ Professor Kamanamaikalani Beamer has written, “In reference to the principles of the Māhele, Lyons noted, ‘The theory which was adopted, in effect, was this: that the King, the chiefs, and the common people [maka‘āinana] held each undivided shares, so to say, the whole landed estate.’”⁴⁸ With regard to the reservation of maka‘āinana rights to the land, Professor Beamer goes on to present an analogy that is an apt description in the world we live today: “[T]o conceptualize this principle is to imagine all the Hawaiian ‘āina [(“land”)] as a cake with three distinct layers. The Māhele was the instrument to remove the layers of the king and chiefs, leaving the maka‘āinana layer in perpetuity.”⁴⁹ The concepts of the reservation of rights and preservation of maka‘āinana entitlements to the ‘āina in perpetuity are foundational to the argument that these lands should be accessible by the Native Hawaiian Nation to fund future efforts. These concepts will be discussed further in this Article.

The Māhele was borne from the need to acclimate the Native Hawaiian people to the ways of the Westerners living on the islands and demanding access to land, either to be held in lease or in fee.⁵⁰ The genesis of the Māhele was essentially advanced by the King’s Privy Council (specifically,

finally iterated in a written, legal document of the Kingdom of Hawai‘i after existing for many generations. *See id.* at 11-12.

44. *Id.* at 12.

45. *Id.*

46. *Id.* at 13.

47. *Id.*

48. KAMANAMAIKALANI BEAMER, NO MĀKOU KA MANA: LIBERATING THE NATION 142 (2014).

49. *Id.*

50. *See VAN DYKE, supra* note 1, at 30-31.

Minister of the Interior Gerritt P. Judd), coupled with amendments added by the pen of Judge William Little Lee on December 14, 1847, and adopted by the council on December 18.⁵¹ However, it was Kauikeaouli as Mō‘i (“King”) who deserves credit for recognition of the substantial need to organize and divide the lands and create fee simple title for his people.⁵² His efforts were especially needed for those Native Hawaiian citizens surviving amid the mass onslaught of introduced diseases and the substantial effects of health problems ravaging the kingdom.⁵³ The Native Hawaiian people were dying at an alarming rate, and many had left their ancestral ahupua‘a to pursue other ventures, including the new trading society that developed in response to the uptick in the whaling industry.⁵⁴

Known as the “Great Land Divide,” on March 7, 1848, the Māhele initially divided the lands of Hawai‘i with 2.5 million acres going to Kamehameha III and approximately 1.6 million acres to the ali‘i (“chiefs”).⁵⁵ The following day, the king further separated his land holdings, retaining about 984,000 acres for himself, his heirs, successors, and beneficiaries.⁵⁶ Approximately 1.5 million acres were designated as the lands of the Hawaiian government remaining “subject to any claims of the maka‘āinana (“commoners”),” and later designated as government lands.⁵⁷

Through the creation of the Board to Quiet Land Title, maka‘āinana could file claims to ancestral lands.⁵⁸ These claims were to be proven through mo‘okuāuhau (“genealogy”), “testimony of Ali‘i and other witnesses, and the customs and traditions of the community, [which] were designed to provide the people with an understanding of how land disputes

51. *Id.* at 40.

52. *Id.* at 30-31.

53. *Id.* It is notable that the numbers of Hawaiians quickly dwindled from 1778 to around 1847, when the Māhele was being considered. While estimates vary, the Office of Hawaiian Affairs offers a glimpse at the population of the Hawaiian Islands from 1778-1896, and its conservative estimates show a decline from 300,000 to just over 87,000 in 1849—a staggering decline of over 70%. *See Table 1.01: The Population of the Hawaiian Islands: 1778-1896*, NATIVE HAWAIIAN DATA BOOK, <http://www.ohadatabook.com/T01-01-11.pdf> (last visited Oct. 23, 2018) (citing ROBERT C. SCHMITT, DEMOGRAPHIC STATISTICS OF HAWAI‘I: 1778-1965 (1968); ROBERT C. SCHMITT, HISTORICAL STATISTICS OF HAWAI‘I (1977)).

54. VAN DYKE, *supra* note 1, at 30-31.

55. *See* NATIVE HAWAIIAN LAW TREATISE, *supra* note 1, at 14.

56. *See* VAN DYKE, *supra* note 1, at 42.

57. *Id.*

58. *See id.* at 33-36. The rules were promulgated in a number of principles adopted by the Commissioners on August 20, 1846. *Id.* at 35.

would be resolved.”⁵⁹ It has been written that the Māhele was disastrous for the maka‘āinana because only about 28,658 acres of the roughly 1.5 million acres set aside by Kauikeaouli were actually dispersed.⁶⁰ This constituted less than one percent of the lands made available to them.⁶¹ This paltry number clearly evidences that the maka‘āinana were uninformed as to the magnitude of this division and their potential claims to the ‘Āina.⁶²

Some blame overzealous ali‘i rulers for this inaction to the division of land; others fault konohiki managers of the ahupua‘a for failure to educate or provide assistance to the maka‘āinana in navigating the process of accessing these lands and explaining what it would provide them.⁶³ It is further implied that the maka‘āinana could not reconcile the subsistence culture they had known so intimately with the Western concept of ownership in fee simple title, an entirely foreign concept to the Hawaiians.⁶⁴

After the overthrow of the constitutional monarchy in 1893, it became abundantly clear to those representatives in the Hawai‘i Territorial Legislature that the Hawaiian race was quickly dying and that it was necessary to “rehabilitate’ the race.”⁶⁵ Efforts led by Hawai‘i’s territorial Senator John Henry Wise, and advocated for in Congress by Delegate Prince Kalaniana‘ole, led to the Hawaiian Homes Commission Act (HHCA) of 1920. This Act was hotly debated by Senate members from the Committee on the Territories and Puerto Rico.⁶⁶ Senator Wise provided impassioned testimony on behalf of the Native Hawaiian people:

The Hawaiian people are a farming people and fishermen, out-of-door people, and when they were frozen out of their lands and driven into the cities, they had to live in the cheapest places, tenements. That is one of the big reasons why the Hawaiian people are dying. Now, the only way to save them, I contend, is

59. *See id.*

60. *See* NATIVE HAWAIIAN LAW TREATISE, *supra* note 1, at 15.

61. *Id.*

62. *See id.*

63. There was a different process between the social strata of the Kingdom of Hawai‘i. The Ali‘i had a specific method and process for claiming lands, as did the Konohiki and the Maka‘āinana. *See* VAN DYKE, *supra* note 1, at 35 n.35 (noting the Konohiki and their heirs had the most extended deadline, lasting until January 1, 1895, to file Māhele claims).

64. *See id.* at 46 (addressing the confusion of maka‘āinana because prior to the Māhele “they had always had access to whatever lands . . . of the Ahupua‘a [necessary for] pasturing, fishing, and gathering, in exchange for providing some labor to the Konohiki”).

65. *See id.* at 237.

66. *See, e.g.*, COMM. ON TERRITORIES, REHABILITATION OF NATIVE HAWAIIANS, H.R. REP. NO. 66-839 (1920).

to take them back to the lands and give them the mode of living that their ancestors were accustomed to and in that way rehabilitate them.⁶⁷

In the April 1920 committee report, it is prudent to look at additional testimony presented by former Department of the Interior Secretary Franklin Knight Lane,⁶⁸ as well as testimony from Prince Kalaniana'ole given in the December 1920 Senate hearings.⁶⁹ Over the year of its introduction, the "Rehabilitation Bill"⁷⁰ went through several iterations and compromise was required by both sides. Most notable was Prince Kalaniana'ole's compromise of "any" Native Hawaiian blood to not less than "half" Native Hawaiian blood.⁷¹ Furthermore, vigorous debate occurred over the lands that would be opened to homesteading by Native Hawaiians. Large sugar interests successfully lobbied Congress to limit the lands to just over 200,000 acres of "ceded" lands the sugar interests had leased that were not prime agricultural properties.⁷² Professor Van Dyke observes that the "high blood quantum restriction has minimized the Act's

67. S. REP. NO. 111-162, at 10 (2010), <https://www.congress.gov/111/crpt/srpt162/CRPT-111srpt162.pdf> (quoting Proposed Amendments to the Organic Act of the Territory of Hawaii: Hearings Before the H. Comm. on the Territories, 66th Cong. 39 (1920)) (advancing the case that the rehabilitation bill was absolutely necessary to get Native Hawaiians back to their lands and to prosper once more).

68. Former Secretary of the Interior Franklin Knight Lane also provided testimony to the Committee, stating, "One thing that impressed me [in Hawai'i] was the fact that the natives of the island, who are our wards, I should say, and for whom in a sense we are trustees, are falling off rapidly in numbers and many of them are in poverty." *Id.*

69. "Prince Kalaniana'ole said that at the time of the Māhele, "a one-third interest of the common people had been recognized, but ignored in the division, and . . . had reverted to the Crown, presumably in trust for the people." *See VAN DYKE, supra* note 1, at 241 (citing the December 1920 Senate Hearings, Senate Comm. on Territories, 66th Cong., 3d Sess. (Dec. 14, 1920)).

70. As noted in the Committee Report, the HHCA was entitled, "Rehabilitation of Native Hawaiians." *See id.* at 242.

71. The HHCA definition of "native Hawaiian" is, to this day, a highly sensitive issue causing extreme emotions as to definition of a race of people, and qualifying whether each individual should be a beneficiary to the Act. While not the focal point of this Article, an important undertaking would be to address the perceived worthiness of all Hawaiians in light of the stated HHCA definition from the 1920s.

72. *See VAN DYKE, supra* note 1, at 246-47 (representing that the majority Republican view was greatly influenced by large sugar interests who "found receptive ears in the executive and legislative branches for their concerns," leading to the raising of the blood quantum requirement). Note that the total amount of land set aside for the HHCA was 203,500 acres essentially in reserve until it was proven the "initial five-year trial phase" had been a success. *Id.* at 248.

effectiveness and has also had the effect of imposing an artificial barrier that has divided the Hawaiians as a people.”⁷³ This Act of Congress, however, evidenced for future generations the unique trust obligation that was established between Native Hawaiians and the federal government.⁷⁴

In 1959, Hawai‘i became the fiftieth state of the United States of America.⁷⁵ In a compact with the new State of Hawai‘i, the United States handed over management of the Department of Hawaiian Home Lands.⁷⁶ Section 5(f) of the Hawai‘i Admission Act addresses the creation of the public trust lands, comprising the “ceded” crown and government lands, and establishes the trust purposes:

[S]uch lands and the income therefrom, shall be held by said State [of Hawai‘i] as a public trust for [1] the support of the public schools and other public educational institutions, [2] *for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended*, [3] for the development of farm and home ownership on as widespread a basis as possible [,] [4] for the making of public improvements, and [5] for the provision of lands for public use.⁷⁷

The Constitutional Convention of 1978 brought about numerous changes to the Native Hawaiian community that benefitted many. At the time, these changes were likely viewed as revolutionary, if not arising out of necessity.⁷⁸ It was during this timeframe that the Office of Hawaiian Affairs

73. *Id.*

74. *See Ahuna v. Dep’t of Hawaiian Home Lands*, 640 P.2d 1161, 1167 (Haw. 1982) (explaining further the trust relationship with specific reference to its establishment).

75. Admission Act of Mar. 18, 1959, Pub. L. No. 86-3, §§ 4, 5(f), 73 Stat. 4, 5-6.

76. *See id.* § 4, 73 Stat. at 5 (requiring the new state to adopt the HHCA as part of its constitution).

77. *Id.* § 5(f), 73 Stat. at 6 (distilling the trust purposes as written, as a condition of statehood) (emphasis added); *see also The Public Land Trust*, NA‘I AUPUNI 2 ([http://naiaupuni.org/docs/pres/mm/Public%20Land%20Trust%20Summary%20\(8.15\).pdf](http://naiaupuni.org/docs/pres/mm/Public%20Land%20Trust%20Summary%20(8.15).pdf)) (last visited Jan. 2, 2019). This latter source was “[d]eveloped for the Native Hawaiian Law Training course for State Councils, Boards & Commissions presented by Ka Huli Ao Center for Excellence in Native Hawaiian Law and funded by the Office of Hawaiian Affairs.” *Id.* at 1.

78. The Constitutional Convention of 1978 created the Office of Hawaiian Affairs and added three new provisions that “fundamentally alter[ed] the state’s role in implementing section 5(f)’s trust language.” *See NATIVE HAWAIIAN LAW TREATISE*, *supra* note 1, at 33.

was created, later managing a pro rata share of the revenues gained through leases or other disposition of the “ceded” lands.⁷⁹

In subsequent years, an array of cases have explicitly challenged the legality and constitutionality of Native Hawaiian programs.⁸⁰ Other challenges seek to enforce the laws that established such programs and fortify the purposes of protecting legislation that maintain safeguards for Hawaiians.⁸¹ These cases evidence a sampling of the extremely contentious litigation as to the funding of the Department of Hawaiian Home Lands pursuant to the compact between the United States government and the State of Hawai‘i and its intended beneficiaries. The cases further indicate a general attack on Native Hawaiian programs.⁸²

One notable case, *Rice v. Cayetano*, rose to the Supreme Court of the United States.⁸³ When OHA was created at the Constitutional Convention of 1978, there were provisions included in amendments to the Hawai‘i State Constitution calling for the creation of “a board of trustees made up of Hawaiians” and limiting persons that could vote in the elections for the board to those of “Native Hawaiian ancestry.”⁸⁴ Harold “Freddy” Rice,

79. The language of the “pro rata” share, as well as the subsequent determination of 20%, came in 1980, pursuant to Act Relating to the Office of Hawaiian Affairs, No. 273, 1980 Haw. Sess. Laws 525 (codified at HAWAII REV. STAT. § 10-13.5); see VAN DYKE, *supra* note 1, at 260 n.46.

80. See generally *Rice v. Cayetano*, 528 U.S. 495 (2000); *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 470 F.3d 827 (9th Cir. 2006) (en banc); *Arakaki v. Lingle*, 477 F.3d 1048 (9th Cir. 2007); *Corboy v. Louie*, 283 P.3d 695 (Haw. 2011).

81. See generally *Ahuna v. Dep’t of Hawaiian Home Lands*, 640 P.2d 1161 (Haw. 1982); *Kahawaiola‘a v. Norton*, 386 F.3d 1271 (9th Cir. 2004); *Kalima v. State*, 137 P.3d 990 (Haw. 2006); *Nelson v. Hawaiian Homes Comm’n*, 277 P.3d 279 (Haw. 2012).

82. The use of the phrase “extremely contentious” evidences the many facets of Native Hawaiian programs that have come under attack over the years. Some of these challenges have been raised by native Hawaiian beneficiaries, such as in *Kahawaiola‘a* and *Kalima*, alleging a breach of duty or trust obligations. Other attacks are mounted by groups of people not expressly benefitting from these programs, as they feel it is unconstitutional that they are not allowed to exercise specific rights. See cases cited *supra* note 80 (*Corboy*, *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, and *Rice*).

83. 528 U.S. 495 (2000). There has been extensive scholarship, legal and otherwise, reviewing the case in-depth. For a more comprehensive analysis than this Article could purport to provide, see, e.g., Kathryn Nalani Hong, *Understanding Native Hawaiian Rights: Mistakes and Consequences of Rice v. Cayetano*, 15 ASIAN AM. L.J. 9 (2008); Mililani B. Trask, *Rice v. Cayetano: Reaffirming the Racism of Hawaii’s Colonial Past*, 3 ASIAN-PAC. L. & POL’Y J. 352 (2002); J. Kehaulani Kauanui, *The Politics of Blood and Sovereignty in Rice v. Cayetano*, 25 POLAR 110 (2002); Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747 (2000).

84. See NATIVE HAWAIIAN LAW TREATISE, *supra* note 1, at 33.

though not of Hawaiian ancestry, was a descendant of one of the earliest missionary families.⁸⁵ In 1996, he attempted to vote on the OHA ballot for the board of trustees.⁸⁶ He was not allowed to do so and thus challenged the voting process as unconstitutional.

In a 7-2 decision, the U.S. Supreme Court held that the Hawaiian ancestry requirement was race-based and therefore violated the Fifteenth Amendment, which protects the rights of citizens to vote regardless of “race, color, or previous condition of servitude.”⁸⁷ Written by Associate Justice Anthony Kennedy, the majority opinion sought to rewrite Hawaiian history through colonial rhetoric, factual errors, and omissions that were in stark contrast to opinions rendered by the Hawai‘i Supreme Court and other Hawai‘i courts.⁸⁸ Justice Kennedy’s opinion was vastly different from the Apology Resolution issued by the joint houses of Congress seven years prior,⁸⁹ and of similar variance with the joint report issued by the Departments of Interior and Justice entitled “From Mauka to Makai: The River of Justice Must Flow Freely, Report on the Reconciliation Process

85. *See Rice*, 528 U.S. at 510.

86. *Id.*

87. U.S. CONST. amend. XV, § 1.

88. Opinions authored by Hawai‘i State Supreme Court Justices, and others, beginning in the 1970s when Chief Justice William S. Richardson served on the court, tended to portray Native Hawaiians in a much more enlightened manner. Instead of viewing Hawaiians as “heathens,” “savages” or “less than,” opinions seemed infused with historical context that reflected the actual realities of the indigenous, aboriginal peoples of the Hawaiian Islands. *See, e.g., Kalima v. State*, 137 P.3d 990, 994 (Haw. 2006) (providing a more thorough recounting of the historical background and genesis of the HHCA); *Pele Def. Fund v. Paty*, 837 P.2d 1247, 1269-70 (Haw. 1992) (extending Kalipi rights to the Native Hawaiian plaintiffs with a more nuanced analysis of Hawai‘i statutes and provisions in the Hawai‘i State Constitution); *Ho‘ohuli v. Ariyoshi*, 631 F. Supp. 1153, 1154-56 (D. Haw. 1986) (regarding the intent of Hawai‘i legislators to address “concern[s] about the welfare of all people of Hawaiian ancestry and about the preservation of aboriginal culture”); *Kalipi v. Hawaiian Trust Co., Ltd.*, 656 P.2d 745, 749 (Haw. 1982) (providing a more in-depth and descriptive view of the history of Hawai‘i and Native Hawaiian traditions and customs). *But see Rice*, 528 U.S. at 499-507 (drawing specific attention to the illustration of Queen Lili‘uokalani’s overthrow of 1893 by simplistically stating it as “replac[ing] the monarchy with a provisional government”).

89. *See Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii*, Pub. L. No. 103-150, 107 Stat. 1510 (1993) [hereinafter Apology Resolution]. For example, the first “Whereas” of the Joint Resolution acknowledges Native Hawaiians’ “highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion.” *Id.* pmb., 107 Stat. at 1510.

Between the Federal Government and Native Hawaiians.”⁹⁰ The characterization and treatment of Native Hawaiians as a people were given much greater depth and sensitivity in both the aforementioned Apology Resolution and the “Mauka to Makai” joint report than Justice Kennedy’s opinion allowed. Later in this Article, the *Rice* opinion will be further fleshed out and evaluated.

Shortly after *Rice v. Cayetano*, “companion” litigation appeared in the form of *Arakaki v. Hawaii*, which, through the opinion of the Ninth Circuit Court of Appeals, revoked the Native Hawaiian ancestry requirement to be an OHA trustee by using the same grounds as *Rice*.⁹¹ In *Arakaki*, the State of Hawai‘i appealed the lower court’s grant of summary judgment to the plaintiffs.⁹² The court held that “[Sec.] 5, Art. XII, of the Hawai‘i Constitution, and Haw. Rev. Stat. § 13D-2, to the extent that they require[d] OHA trustees be Hawaiian, violate[d] the Equal Protection Clause, the Fifteenth Amendment, and § 2 of the Voting Rights Act.”⁹³ Amid strong objection by the State, Circuit Judge A. Wallace Tashima applied the exact reasoning employed in *Rice*: “(1) OHA is as an ‘arm of the State’; [94] (2) trustee elections are ‘elections of the State’ in which all citizens should have an equal voting interest; [95] and (3) the Hawaiian ancestry requirement is ‘race-based’ [96] [and should] apply equally in this case.”⁹⁷ Judge Tashima went on to hold that “[t]here [was] no principled basis on which to distinguish the[] holdings in this case.”⁹⁸

The pending threat of challenges to Native Hawaiian rights, and many of the programs that benefit them, remains at an unstable and tenuous point in the nation’s history. Similar threats are faced by other indigenous peoples around the globe. In 2017, a Guam district court opinion, *Davis v. Guam*, magnified the challenges that indigenous peoples are fighting globally.⁹⁹

90. MAUKA TO MAKAI, *supra* note 2.

91. 314 F.3d 1091, 1098 (9th Cir. 2002). The word “companion” is employed in the body of this Article because the initial stripping of Native Hawaiians’ rights began with *Rice* and was subsequently furthered in *Arakaki*. This litigation occurred about two years after the *Rice* opinion was handed down.

92. *Id.* at 1094.

93. *Id.*

94. *Id.* at 1095 (quoting *Rice v. Cayetano*, 528 U.S. 495, 521-22 (2000)).

95. *Id.* (quoting *Rice*, 528 U.S. at 521-22).

96. *Id.* (quoting *Rice*, 528 U.S. at 515-17).

97. *Id.*

98. *Id.*

99. *Davis v. Guam*, No. 11-00035, 2017 U.S. Dist. LEXIS 34240 (D. Guam Mar. 8, 2017).

The instant *Davis* action was substantially similar to the fight in *Rice*; however, the alleged discriminatory voting schema limited voters to “Native Inhabitants of Guam.”¹⁰⁰ This definition derived from a law passed by the Guam legislature and was promulgated to provide for a “Political Status Plebiscite.”¹⁰¹ Similar to *Rice*, Judge Frances M. Tydingco-Gatewood was tasked with deciding if denying Davis’s “right” to vote in the plebiscite, because he was not a Native Inhabitant of Guam, substantiated Fifth, Fourteenth, and Fifteenth Amendment violations, as well as violations of the Voting Rights Act and the Guam Organic Act.¹⁰² Not coincidentally, Judge Tydingco-Gatewood held this was a violation of the Fifteenth Amendment, citing *Rice v. Cayetano*.¹⁰³ Perhaps more jarring in the opinion is that Judge Tydingco-Gatewood took a giant leap past *Rice*, holding that the Guam plebiscite law also violated the Fourteenth Amendment Equal Protection Clause.¹⁰⁴ Her reasoning lay wholly on defining “Native Inhabitants of Guam” as a race-based classification; hence, this resulted in finding violations of both the Fourteenth and Fifteenth Amendments.¹⁰⁵

While this was understandably concerning to all indigenous peoples, especially Native Hawaiians, it must be noted that *Davis v. Guam* is a district court ruling. It is, at best, persuasive to all other jurisdictions. However, the appeal to this decision was recently heard in the Ninth Circuit on October 11, 2018, and thus the issues and challenges surrounding the Fourteenth and Fifteenth Amendments, inter alia, will be tested. It is unknown which way the panel might rule. If by some chance the Ninth Circuit were to reverse the district court holding, a petition for certiorari to the U.S. Supreme Court would likely provide disastrous results for indigenous peoples, considering its current makeup. As the Native Hawaiian Nation contemplates how to realistically move forward within the

100. *Id.* at *3.

101. Further citation has been made in the instant opinion to a section directly dealing with the plebiscite and subsequent definitions. *See* 3 GUAM CODE ANN. § 21001(e) (2018). The purpose of the plebiscite was to ask the native inhabitants of Guam which of three political status options they preferred: Independence, Free Association with the United States, or Statehood. *Davis*, 2017 U.S. Dist. LEXIS 34240 at *3. Notably, this option was never offered to Native Hawaiians when considering Statehood in 1959, which was “criticized by some because it did not list other self-determination options as possibilities, including independence or a freely associated status.” *See* VAN DYKE, *supra* note 1, at 254.

102. *Davis v. Guam*, 2017 U.S. Dist. LEXIS 34240 at *2-3.

103. *Id.* at *9-29.

104. *Id.* at *29-35.

105. *Id.* at *12-13.

established DOI procedure, though outside the scope of this Article, one can only hope that the many necessary next steps can be taken to unify the nation.

II. U.S. Department of the Interior Rule

Issued on October 14, 2016, the federal DOI Rule is a roadmap that may guide the Native Hawaiian Nation as it considers how to mobilize and group together, eventually holding a democratic election in its quest to formally organize and achieve federal government-to-government recognition.¹⁰⁶ In the “Background” section of the rule, the DOI acknowledges the “unique legal relationship” the Native Hawaiian community has with the United States.¹⁰⁷ The DOI goes on to state that the Native Hawaiian community has an “inherent sovereign authority that has not been abrogated or relinquished, as evidenced by Congress’s consistent treatment of this community over an extended period of time . . . [and] enact[ment] [of] more than 150 statutes recognizing and implementing a special political and trust relationship with the Native Hawaiian community.”¹⁰⁸ Further on in the document, the DOI provides steps the Native Hawaiian Nation may take to establish and obtain official recognition via a government-to-government relationship with the United States.¹⁰⁹ While the general rule addresses the overarching method to obtain this federal recognition, there are a number of specific parts that require detailed attention.

For example, section 50.10 in subpart B addresses the “required elements of a request to reestablish a formal government-to-government relationship with the United States.”¹¹⁰ As detailed, the request would require seven elements:

- a) A written narrative with supporting documentation thoroughly describing how the Native Hawaiian community drafted the governing document, as described in § 50.11;

106. *See* Procedures for Reestablishing a Formal Government-to-Government Relationship with the Native Hawaiian Community, 81 Fed. Reg. 71278 (Oct. 14, 2016) (codified at 43 C.F.R. pt. 50).

107. *Id.* at 71278.

108. *Id.*

109. There are three subparts to the Rule: Subpart A—General Provisions; Subpart B—Criteria for Reestablishing a Formal Government-to-Government Relationship; and Subpart C—Process for Reestablishing a Formal Government-to-Government Relationship. *See id.* at 71318-19.

110. 43 C.F.R. § 50.10 (2017).

b) A written narrative with supporting documentation thoroughly describing how the Native Hawaiian community determined who could participate in ratifying the governing document, consistent with § 50.12;

c) The duly ratified governing document, as described in § 50.13;

d) A written narrative with supporting documentation thoroughly describing how the Native Hawaiian community adopted or approved the governing document in a ratification referendum, as described in § 50.14;

e) A written narrative with supporting documentation thoroughly describing how and when elections were conducted for government offices identified in the governing document, as described in § 50.15;

f) A duly enacted resolution of the governing body authorizing an officer to certify and submit to the [DOI] Secretary a request seeking the reestablishment of a formal government-to-government relationship with the United States; and

g) A certification, signed and dated by the authorized officer, stating that the submission is the request of the governing body.¹¹¹

The onus, therefore, is completely upon the Native Hawaiian Nation and is predicated on organizing as only one governing entity. However, the Native Hawaiian government “may include political subdivisions with limited powers of self-governance defined in the Native Hawaiian government’s governing document.”¹¹² During the Advance Notice for Preliminary Rulemaking (ANPRM), the Chair of the Department of Hawaiian Home Lands, Jobie M. Masagatani, submitted an eight-page comment. This comment requested, in the Native Hawaiian way, that the DOI allow for the possibility of multiple governing entities, similar to the *aha moku* (“Island”) councils.¹¹³ The purpose of modeling the *aha moku*

111. *Id.*; *see id.* §§ 50.11-.15.

112. *Id.* § 50.03.

113. *See* Letter to the Honorable Sally Jewell, Department of the Interior (DOI) Secretary, Addressing 43 CFR § 50.3, at 4 (Dec. 30, 2015) (submitted comment, on file with author). *Aha Ali‘i* is generally defined as the “Council of Chiefs,” while *Moku* is defined as

councils was that many societies, fraternal orders, and organized groups, such as the Hawaiian civic clubs, were already established in the Native Hawaiian community through homestead councils and associations existing on Hawaiian home lands.¹¹⁴

Therefore, the nation could likely access these well-established groups as an initial framework of formation. The nation could hopefully elicit and expedite support from these Native Hawaiian groups, as well as offer a broader range of options to the Department of the Interior.¹¹⁵ However, the final rule lacked this requested inclusion¹¹⁶ by stating that “[t]he Secretary will reestablish a formal government-to-government relationship with only one sovereign Native Hawaiian government.”¹¹⁷ This is an important consideration because as the Native Hawaiian Nation works towards coming together, the opportunity of creating political subdivisions can still be maximized to the benefit of the people, taking into consideration cultural and historical precedents by remaining mindful of the Native Hawaiian way.

Conversely, the Office of Hawaiian Affairs (OHA) is in the process of readying the state agency, and its beneficiaries, for the eventual transfer of oversight for the lands under its administration and the pro rata share of payments arising under the public lands trust.¹¹⁸ In anticipation of the

an “island or district on the island.” More recently, the two definitions have been merged with Aha Moku, meaning “Island Councils.” *See also* Ass’n of Haw. Civic Clubs Res. 12-32 (adopted Oct. 20, 2012), *cited in* Mo’olelo Manuscript, *supra* note 29, at 939 n.2193 (discussing present-day Aha Moku systems based on traditional management of the environment and supported by the Association of Hawaiian Civic Clubs).

114. The goal of the DHHL, as explained to the author by R. Hokulei Lindsey, federal rules administrator at the state agency, was to provide the DOI with options. Ultimately, the DHHL contended that these groups could navigate the process relatively quickly and seemingly in an advantageous manner to establish the federal government-to-government recognition. Interview with R. Hokulei Lindsey (Feb. 27, 2017) (notes on file with the author) (citing Letter to the Honorable Sally Jewell, *supra* note 113).

115. *Id.*

116. *See* 43 C.F.R. § 50.3 (2017) (addressing the question, “May the Native Hawaiian community reorganize itself based on island or other geographic, historical, or cultural ties?”).

117. *Id.*

118. An Office of Hawaiian Affairs agency brochure clarifies this position in the “Strategic Results” section: “Transfer Assets to Entity: Adoption by the Board of Trustees of a Transition Plan that includes the legal transfer of assets and other resources to the new Native Hawaiian governing entity.” OFFICE OF HAWAIIAN AFFAIRS, EMPOWERING HAWAIIANS: STRENGTHENING HAWAI‘I: 2010-2018 STRATEGIC PLAN (n.d.) (promotional

federal government-to-government recognition of the Native Hawaiian Nation, many working at the OHA are preparing for what will occur once self-determination and self-governance is closer to realization. The agency is also contemplating whether it should “dissolve” once the transfer to the Native Hawaiian Nation is complete or whether some entity or semblance of the original entity should remain to manage the lands until a specified time in the future.¹¹⁹

As the Native Hawaiian Nation contemplates next steps, the Department of the Interior has laid out an actionable plan if the nation wants to pursue the formal government-to-government relationship that the United States has proposed. While there may be disadvantages that come from federal recognition, perhaps there are more benefits outweighing those concerns. This is especially true given the current state of affairs in the State of Hawai‘i with respect to Native Hawaiians.¹²⁰ The anticipated federal protections that may be offered to the nation, especially regarding Native Hawaiian programs, benefits, and funding, could serve as a catalyst for unifying the lāhui (“Nation”) for generations to come.

III. History of Federal Indian Law

As a practical matter, and in contemplation of the somewhat imminent federal government-to-government relationship as defined by the DOI Rule, it is important to present the legal framework the Native Hawaiian Nation should remember when evaluating how to move forward in accessing the “ceded” lands. The best method is reviewing federal Indian law.¹²¹ While

brochure), https://www.scribd.com/document/252912027/OHA-Strategic-Plan-WEB-BRIEF#from_embed.

119. See Interview with Derek Kauanoē, former Governance Manager, OHA (Feb. 17, 2017) (notes on file with author).

120. A recent Hawai‘i Supreme Court decision illustrates the continuing struggle between Native Hawaiians and the State regarding desecration of sacred sites. Special attention should be given to Associate Justice Michael D. Wilson’s dissent (addressing, *inter alia*, Native Hawaiian cultural resources). See *In re* Contested Case Hearing re Conservation Dist. Use Application (CDUA) Ha-3568 for the Thirty Meter Telescope at the Mauna Kea Sci. Res., Nos. SCOT-17-0000777, SCOT-17-0000811, SCOT-17-0000812, 2018 Haw. LEXIS 230 (Oct. 30, 2018).

121. While this Article endeavors to provide a balanced view of federal Indian law as applied to Native Hawaiians, it is important to note that scholarship is extensive in this area. The author suggests a deeper inquiry to fully understand the context of the relationship between the United States and Indian tribes, its evolution, and relevance to Native Hawaiians and other indigenous, aboriginal peoples. See, e.g., STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* (4th ed. 2012); COHEN’S *HANDBOOK OF FEDERAL INDIAN*

the greater indigenous peoples' fight for recognition and validation by the dominant State is not limited solely to Indian tribes, this body of legal precedent is highly informative for the Native Hawaiian Nation as it pertains to a government-to-government relationship with the United States.

Indian law and policy are “extraordinarily complex, rich, controversial, and diverse.”¹²² “The centuries-old relationship between the United States and Indian nations is founded upon historic government-to-government dealings and a long-held recognition of Indians’ special legal status.”¹²³ The status of Indian tribes and nations is substantially similar to that of the Native Hawaiian Nation. Hence, it is important to consider, even though federal Indian law is fluid. Overarching principles evolved from treaties made between specific Indian tribes and the United States. These principles include: Indian aboriginal title, “the necessary preeminence of federal policy and action, the exclusion of state jurisdiction, the sovereign status of tribes, and the special trust relationship between Indian tribes and the United States.”¹²⁴

In order to assess the aforementioned principles emanating from federal Indian law, it is important to provide a brief introduction. This includes examining the law and current precedent regarding the federal government-to-government relationship and the special trust relationship between the United States and Indian tribes. Additionally, the common law regarding land transfers between the Indian tribes and the federal government, particularly the federal government’s holding of tribal land in trust, proves informative.

Around the 1600s, prevailing attitudes towards the Indians were informed by doctrines that were foundational to Spanish law in the Americas, such as that of Francisco de Victoria.¹²⁵ Victoria’s following principles justified colonization efforts:

LAW (Nell Jessup Newton et al. eds., 2012) [hereinafter COHEN’S HANDBOOK]; DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS, JR., MATTHEW L. M. FLETCHER & KRISTEN A. CARPENTER, CASES AND MATERIALS ON FEDERAL INDIAN LAW (7th ed. 2017) [hereinafter FEDERAL INDIAN LAW TEXTBOOK].

122. COHEN’S HANDBOOK, *supra* note 121, § 1.01, at 6.

123. *Id.*

124. *Id.* at 6-7; *see also* DEP’T OF THE INTERIOR, REPORT OF THE COMMISSION ON INDIAN TRUST ADMINISTRATION AND REFORM 17-21 (Dec. 10, 2013), https://www.doi.gov/sites/doi.gov/files/migrated/cobell/commission/upload/Report-of-the-Commission-on-Indian-Trust-Administration-and-Reform_FINAL_Approved-12-10-2013.pdf (section titled “The Trust Relationship in General”).

125. COHEN’S HANDBOOK, *supra* note 121, at § 1.02[1], at 10.

(1) that Indian peoples had both property rights and the power of a sovereign in their land; (2) that Indian lands could only be acquired with tribal consent or after a just war against them; and (3) that acquisition of Indian lands was solely a governmental matter, not to be left to individual colonists.¹²⁶

These principles were generally observed by other European nations coming to North America during that time.¹²⁷

It was not until 1790, almost two hundred years later, that Congress first enacted legislation defining substantive rights and duties regarding Indian affairs.¹²⁸ This came in the form of the Act of July 22, 1790.¹²⁹ This law, titled “An Act to regulate trade and intercourse with the Indian tribes,” provides essential elements of the federal Indian policy: “Federal regulation of trade with the Indians, prohibition of purchases of Indian lands except by governmental agents in official proceedings, and punishment of non-Indians committing crimes and trespasses against the Indians.”¹³⁰ Furthermore, the Act became the legislative mode for giving “practical and contemporaneous construction to the constitutional clause granting to Congress ‘the power to regulate commerce with the Indian tribes.’”¹³¹

This brief history obfuscates the coming decades, if not centuries, that favored obliterating the rights of Indians in furtherance of expansionist attitudes, Western ideals, and elitist legislation and actions against the indigenous, aboriginal inhabitants of the North American continent.¹³²

126. *Id.* at 12.

127. *See id.* at 12-17. This part of Cohen’s handbook reflects on the history of competing interests at the time, and also how the various nations used treaties and purchases of lands to work within the confines of being greatly outnumbered by the Indians inhabiting the continent. *Id.* It is notable that, as of a 2013 article, over 500 treaties signed between Native American Indians and the United States had been “‘broken, changed or nullified when it served the government’s interests.’” *See* Gale Courey Toensing, ‘Honor the Treaties’: UN Human Rights Chief’s Message, INDIAN COUNTRY TODAY (Aug. 24, 2013), <https://indiancountrymedianetwork.com/news/politics/honor-the-treaties-un-human-rights-chiefs-message/>.

128. COHEN’S HANDBOOK, *supra* note 121, § 1.03[2], at 35.

129. *Id.*

130. *Id.*

131. *Id.*

132. *See generally id.* at 3. Chapter 1, “History and Background of Federal Indian Policy,” is concerned with important periods of Federal Indian history: “Post-Contact and Pre-Constitutional Development (1492-1789)”; “The Formative Years (1789-1871)”; “Allotment and Assimilation (1871-1928)”; “Indian Reorganization (1928-1942)”; “Termination (1943-1961)”; and “Self-Determination and Self-Governance (1961-present)”.

Thus, assessment begins with a precedent set in 1810, in *Fletcher v. Peck*,¹³³ which, inter alia, involved a land dispute and complaint for breach of contract. The majority opinion, written by Chief Justice Marshall, employed the word “title” when referencing the “Indian right of ownership of land.”¹³⁴ He further asserted that “Indian people have all the rights of ownership except for the right to dispose of the land to any other European country.”¹³⁵ Chief Justice Marshall cited a number of sources that deployed elitist language when addressing doubt as to whether power extends to lands in which the Indian title has not been extinguished.¹³⁶ Perhaps the base assertion may have proven true. Nevertheless, this assertion evidenced the prevailing colonialist notion of the European races being far superior to that of the Indian.¹³⁷ The opinion contained language illustrative of this notion, which is shown by the following example: “What is the Indian title? It is a mere occupancy for the purpose of hunting. It is not like our tenures; they have no idea of a title to the soil itself. It is overrun by them, rather than inhabited. It is not a true and legal possession.”¹³⁸ Similarly, Marshall continued by stating that “[i]t is a right not to be *transferred* but *extinguished*. It is a right regulated by treaties, not by deeds of conveyance. It depends upon the law of nations, not upon municipal right.”¹³⁹

Subsequently, the cases that came next comprise what is commonly referred to as the Marshall Trilogy, a line of three holdings that form much of what is recognized, for good or for bad, as the foundation of federal

133. 10 U.S. (6 Cranch) 87 (1810). Subsequently, in *United States v. Kagama*, the trust relationship between the federal government and an Indian tribal entity was further explained and examined, noting:

These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. . . . From their very weakness and helplessness . . . and the treaties in which it has been promised, there arises the duty of protection, and with it the power.

118 U.S. 375, 383-84 (1886); *see also* *Bd. of Cty. Comm’rs v. Seber*, 318 U.S. 705, 715 (1943) (stating that exercising war and treaty powers by the United States often left the Indians an “uneducated, helpless and dependent people needing protection against the selfishness of others and their own improvidence”).

134. *Land Tenure History*, INDIAN LAND TENURE FOUND., <https://iltf.org/land-issues/history/> (last visited Feb. 3, 2019). *See also* *Fletcher*, 10 U.S. (6 Cranch) at 99-101.

135. *Id.*

136. *See Fletcher*, 10 U.S. (6 Cranch) at 121.

137. *Id.* (citing a variety of sources, including Vattel, Montesquieu, and Smith’s *Wealth of Nations*).

138. *Id.*

139. *Id.*

Indian law. These opinions were named as such because they were written by then-Chief Justice John Marshall.¹⁴⁰ The first case in the trilogy was *Johnson v. M'Intosh*,¹⁴¹ the second, *Cherokee Nation v. Georgia*,¹⁴² and finally, *Worcester v. Georgia*.¹⁴³

In the first case, *Johnson v. M'Intosh*, the Court held that Indian tribes could not convey land to private parties without the consent of the federal government.¹⁴⁴ This holding was a product of the discovery doctrine. This doctrine specifically pertained to European nations that entered “new” lands, such as the North American continent, and proclaimed domain over them. The doctrine affirmed the right to assert title to whichever “government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.”¹⁴⁵ Writing for the majority, Chief Justice Marshall further elaborated that under the discovery doctrine, Indians were “admitted to be the rightful occupants of the soil.”¹⁴⁶ Importantly, he explained that European discovery still allowed them “legal as well as just claim to retain possession of [the land], and to use it according to their own discretion”¹⁴⁷

Next, in *Cherokee Nation v. Georgia*, the case turned on a matter of lack of jurisdiction because the Cherokee Nation “was not a ‘foreign nation’ within the meaning of Article III, Section 2,” which iterates the grant of

140. See Gavin Clarkson & Jim Sebenius, *Leveraging Tribal Sovereignty for Economic Opportunity: A Strategic Negotiations Perspective*, 76 MO. L. REV. 1045, 1052 n.43 (2011) (citing Matthew L. M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 627-28 (2006) (noting the particular idea of a “guardian-ward relationship and the concept of Indian tribes as ‘domestic dependent nations’” was established in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831))).

141. 21 U.S. (8 Wheat.) 543 (1823).

142. 30 U.S. (5 Pet.) 1 (1831).

143. 31 U.S. (6 Pet.) 515 (1832); see also Clarkson & Sebenius, *supra* note 140 (providing a more in-depth analysis of the trilogy); Nathan Goetting, *The Marshall Trilogy and the Constitutional Dehumanization of American Indians*, 65 GUILD PRAC. 207, 211 (2008) (focusing on the dehumanization of the tribal Indian under the Constitution); Fletcher, *supra* note 140, at 628 (“identif[ying] the contours of American Indian law as they remain today in the modern era”).

144. See 21 U.S. (8 Wheat.) at 604-05.

145. See *id.* at 573. This was the seminal case to clarify and validate the discovery doctrine, holding that it was within the assertions of the doctrine for European nations to essentially seize title of these newly found lands for their respective governments, even though the Indians might be occupying said lands.

146. *Id.* at 574.

147. *Id.*

judicial power pursuant to the Constitution.¹⁴⁸ Here again, Chief Justice Marshall provided the prevailing view of the Court, stating, “[t]he Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government”¹⁴⁹ However, he also held that the tribe should, more correctly, be deemed a “domestic dependent nation[.]”¹⁵⁰ The Indians

occupy a territory to which [the government] assert[s] a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of *a ward to his guardian*.¹⁵¹

The express language is indicative of the role, or position, the United States likely felt compelled to fulfill with regards to American Indians while still relegating their position beneath the so-called mightier power of the federal government.¹⁵²

Further analysis of *Cherokee Nation*, however, shows that the Court was heavily divided on this issue and “reveal[s] the deep ideological divisions on the Court . . . over the critical issues of tribal sovereignty and self-determination.”¹⁵³ Notable from this case was Justice Johnson’s concurrence, which “tackle[d] the toughest philosophical issue for one who seeks to justify denial of the Cherokees’ independence.”¹⁵⁴ At the root of his concern was the fear that the Cherokee might actually be an organized people, contrary to colonizers’ characterization of them as uncivilized.¹⁵⁵ He admitted that their current government “must be classed among the most approved forms of civil government.”¹⁵⁶ Yet, he still prefaced his statement by originally grouping the Cherokee with “a people so low in the grade of

148. See FEDERAL INDIAN LAW TEXTBOOK, *supra* note 121, at 127; see also 30 U.S. (5 Pet.) at 10.

149. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

150. *Id.*

151. *Id.* (emphasis added).

152. *Id.* at 20 (“If it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future.”).

153. See FEDERAL INDIAN LAW TEXTBOOK, *supra* note 121, at 135.

154. *Id.*

155. See *Cherokee Nation*, 30 U.S. (5 Pet.) at 21-22.

156. *Id.* at 21.

organized society as our Indian tribes most generally are.”¹⁵⁷ However, the important point to extricate from this case is that Chief Justice Marshall denied the injunction (the main purpose of this case) filed on behalf of the Cherokee because he viewed them not as a foreign state, but as a domestic dependent nation.¹⁵⁸

Finally, in *Worcester v. Georgia*, the Supreme Court held that the state laws of Georgia would not extend into Indian Country because allowing this would be incompatible with treaties, the Constitution itself, and the laws that give effect to those treaties.¹⁵⁹ Many scholars and courts have debated the actual bases of the *Worcester* decision, noting that Chief Justice Marshall “elaborates on the tribe’s retained powers of ‘self-government.’”¹⁶⁰ It is sufficient to point out that Marshall “use[d] the opportunity to clarify that the limits on tribal sovereignty discussed in his *Cherokee Nation* opinion relate[d] to land conveyance rights, not to self-government.”¹⁶¹

Each of these cases, though acknowledged as racist in nature,¹⁶² espoused the prevailing view that Indians were “fierce savages” in a subservient position to the Westerners and in need of a trust relationship with the United States government so as to justify the unilateral taking of their ancestral lands.¹⁶³ Subsequent to the Cherokee Cases, then-President Jackson was able to remove the Cherokee Tribe to the Indian Territory out west, “an area that later became the state of Oklahoma.”¹⁶⁴ “The struggle between the Cherokees and Georgia was climaxed in 1838 by the forcible removal of more than 16,000 Cherokees over a Trail of Tears”¹⁶⁵

Though legislation and many common law cases followed these essential holdings, it was not until Congress passed the Indian Reorganization Act (IRA) of 1934 that the United States could “respon[d] to a report

157. *Id.*

158. *Id.* at 20.

159. *See* 31 U.S. (6 Pet.) 515, 561-63 (1832).

160. *See* FEDERAL INDIAN LAW TEXTBOOK, *supra* note 121, at 148.

161. *See id.* at 149.

162. *See* Clarkson & Sebenius, *supra* note 140, at 1052.

163. *See id.* at 1052 n.43.

164. *See* FEDERAL INDIAN LAW TEXTBOOK, *supra* note 121, at 150.

165. *Id.* (quoting RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT 65-67 (1975)). For a moving and detailed account of the forced removal of countless tribes of Indians, west of the Mississippi, see D’ARCY McNICKLE, THEY CAME HERE FIRST: THE EPIC OF THE AMERICAN INDIAN 199-200 (rev. ed. 1975).

documenting the failure of federal Indian policy.”¹⁶⁶ The IRA was the federal government’s attempt to reinforce tribal sovereignty, thereby allowing the tribes to adopt and promulgate constitutions providing for the reestablishment of governance structures.¹⁶⁷ Additionally, the U.S. Congress passed legislature¹⁶⁸ intended to “reverse the effects of previous policies established with the intention of destroying the governance structure of particular tribes, such as the Five Civilized Tribes in Oklahoma.”¹⁶⁹ After these acts passed, it was evident that “instead of destroying tribal sovereignty, the federal government was now encouraging it”¹⁷⁰ by allowing tribes to rebuild this sovereignty. As a result, “many tribes began to thrive economically,”¹⁷¹ and likely in socio-economic and political ways, as well.

Professors Clarkson and Sebenius noted that “[f]ederal Indian policies would oscillate through one more cycle in the next half-century” from providing protections, to removing protections, and so forth.¹⁷² An unlikely ally was found in President Richard M. Nixon, “arguably the most ardent supporter of Indian sovereignty,”¹⁷³ when his groundbreaking actions called for a “new federal policy of ‘self-determination’ for Indian nations.”¹⁷⁴ During the time period just after President Nixon’s statement was issued, the federal government generally changed its stance on federal Indian law. Previously, the accepted policy was the discovery doctrine, discussed above, which justified the desires of Westerners to homestead on lands occupied by Indian tribes because the lands were “discovered” by a prior “civilized nation” in the name of God, irrespective of the indigenous, aboriginal peoples living in those areas since time immemorial.¹⁷⁵ “To

166. Indian Reorganization Act (Wheeler-Howard Act), Pub. L. No. 73-383, 48 Stat. 984 (codified at 25 U.S.C. §§ 5101-5129); *see also* Clarkson & Sebenius, *supra* note 140, at 1053-54.

167. Clarkson & Sebenius, *supra* note 140, at 1054.

168. *Id.*

169. *Id.*

170. *See id.* (citing Gavin Clarkson, *Tribal Bonds: Statutory Shackles and Regulatory Restraints on Tribal Economic Development*, 85 N.C. L. REV. 1009, 1027 (2007)).

171. *See id.*

172. *Id.* at 1055.

173. *Id.* (citing Richard Nixon, Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. DOC. NO. 91-363 (1970)); *see also* FEDERAL INDIAN LAW TEXTBOOK, *supra* note 121, at 249-51 (edited version of the same document).

174. *Id.*

175. *See* COHEN’S HANDBOOK, *supra* note 121, § 1.02[1], at 13-14.

satisfy western expansion goals, the Indian lands usually were not taken by force but were instead ceded to the United States by treaty in return for, among other things, the establishment of a trust relationship.”¹⁷⁶

But in 1974, the Supreme Court of the United States decided *Morton v. Mancari*,¹⁷⁷ acknowledged as “one of the most important Indian cases of the modern era.”¹⁷⁸ Essentially, this case set precedent for upholding a hiring preference of “members of quasi-sovereign tribal entities,”¹⁷⁹ as opposed to a “racial group,” meaning Indians were thereby viewed as “political rather than racial in nature.”¹⁸⁰ This designation removed Indians from a strict scrutiny analysis under the equal protection clause of the Fourteenth Amendment, and instead required the political classification be analyzed in the context of rational basis review.¹⁸¹ The Court also extended the *Mancari* holding to other areas of Indian policy, “as long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians” and the stated policy “is reasonable and rationally designed to further Indian self-government.”¹⁸² The precedent set by *Morton v. Mancari* will become of greater substantive value to the Native Hawaiian Nation, discussed in Part V of this Article.

Another area of importance to the Native Hawaiian Nation is the mode by which Indian tribes may transfer property interests of ancestral lands held in fee-simple into a trust held by the Secretary of the Department of the Interior. This is done pursuant to the application process administered through the Bureau of Indian Affairs (BIA).¹⁸³ A joint DOI/BIA brochure lays out the sixteen steps Indian tribes or Indian persons must take in order to apply for a fee-to-trust transfer of property.¹⁸⁴ Three main points have

176. See Clarkson & Sebenius, *supra* note 140, at 1051.

177. 417 U.S. 535 (1974).

178. Clarkson & Sebenius, *supra* note 140, at 1056.

179. *Mancari*, 417 U.S. at 554.

180. *Id.* at 553 n.24.

181. *Id.* at 553-55.

182. *Id.* at 555; see also Gavin Clarkson, *Not Because They Are Brown, but Because of Ea: Rice v. Cayetano*, 24 HARV. J.L. & PUB. POL’Y 921 (2001). Subsequent litigation upheld the *Mancari* holding. See e.g., *Fisher v. Dist. Court of Rosebud Cty.*, 424 U.S. 382 (1976); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *United States v. Antelope*, 430 U.S. 641 (1977); FEDERAL INDIAN LAW TEXTBOOK, *supra* note 121, at 263.

183. See BUREAU OF INDIAN AFFAIRS, U.S. DEP’T OF THE INTERIOR, UNDERSTANDING THE FEE-TO-TRUST PROCESS FOR DISCRETIONARY ACQUISITIONS (2015), https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/pdf/Fee-to-Trust_Process_for_Discretionary_Acquisitions.pdf (brochure).

184. *Id.*

been extricated from the “Frequently-asked-Questions” section. To begin, the second point in the pamphlet identifies those eligible to apply for a fee-to-trust land acquisition as “Indian tribes and individual Indian people who meet the requirements established by federal statutes and further defined in federal regulations.”¹⁸⁵

The third point in the pamphlet addresses the process for submission of the application: “All applications for a fee-to-trust acquisition must be in writing and specifically request that the Secretary of the Interior take land into trust for the benefit of the applicant. If you are an eligible Indian Tribe, the request may be in the form of a Tribal Resolution.”¹⁸⁶ Most pertinent to the focus of this Article, the sixth point in the pamphlet discusses which of the “laws, regulations, and standards apply to the fee-to-trust acquisition”:

Most acquisitions are authorized under 25 USC § 465, Section 5 Indian Reorganization Act (1934) and reviewed under 25 CFR § 151. However, the Department of the Interior must comply with all federal laws, including compliance with NEPA [National Environmental Policy Act], 602 DM 2 Hazardous Substances Determinations, National Historical Preservation Act (NHPA) and U.S. Department of Justice Title Standards.¹⁸⁷

As this process seems firmly established for Indians, it may be desirable for the Native Hawaiian Nation to have it readily available for members of their governing entity.

However, a 2009 landmark case that stunned the nation stirs up much of the controversy surrounding fee-to-trust acquisitions across Indian Country.¹⁸⁸ In *Carcieri v. Salazar*, Associate Justice Clarence Thomas, writing for the majority, held that the authority of the Secretary of the Interior was limited in taking lands into trust under the provision of the Indian Reorganization Act (IRA).¹⁸⁹ Only Indian tribes under federal

185. *Id.* Point two also states, “See 25 Code of Federal Regulations (CFR) § 151.2 [Definitions Section]; 25 United States Code (USC) § 479 and § 2201 [Definitions Section].” *Id.*

186. *Id.* Point three also states, “See 25 CFR § 151.9” [Requests for approval of acquisitions], which is current as of March 2, 2017. *Id.*

187. *Id.* Point six also states, “See 25 CFR § 151.13” [Title Review]. *Id.*

188. A post at the Turtle Talk blog provides insight as to some of the immediate reaction. Bryan Newland, *Initial Reaction to Carcieri Opinion*, TURTLE TALK (Feb. 24, 2009), <https://turtletalk.wordpress.com/2009/02/24/initial-reaction-to-carcieri-opinion/>.

189. 555 U.S. 379, 382-83 (2009); see Indian Reorganization Act (Wheeler-Howard Act), Pub. L. No. 73-383, 48 Stat. 984 (codified at 25 U.S.C. §§ 5101-5129). *Carcieri* specifically addressed the Narragansett tribe of Rhode Island, placed under formal

jurisdiction when the IRA was enacted in 1934 could utilize the process.¹⁹⁰ The dispute originally began between the Narragansett Tribe of Indians and the county governments in Rhode Island over whether the Tribe was required to comply with county building codes on a thirty-one-acre parcel purchased adjacent to the tribal reservation's 1800 acres.¹⁹¹ Subsequent to this dispute, the Narragansett deemed the parcel a “dependent Indian community” and thus “Indian country”—but that argument failed.¹⁹² As an alternative measure, the Narragansett requested the Secretary of the Interior accept the parcel of land into trust, and on March 6, 1998, “the Secretary notified [the county government] of his acceptance of the Tribe’s land into trust,” after which this litigation ensued.¹⁹³

Ultimately, the case turned on the definition of the word “now.”¹⁹⁴ Justice Thomas equated the “ordinary meaning” of the word “now” with the “natural reading of the word within the context of the IRA.”¹⁹⁵ He further held that the phrase “now under Federal jurisdiction” was specific to the origination date, and not to when the DOI/BIA agreed to put the thirty-one-acre parcel into trust for the Narragansett tribe.¹⁹⁶ At odds with this opinion were the many tribes not formally recognized through the federal government-to-government relationship at the time the IRA was enacted, but had requests pending as to DOI trusteeship of their land holdings, or part(s) thereof. This bred concern about these tribes and whether they would be able to establish and definitively prove they were “under federal jurisdiction” in 1934.¹⁹⁷

guardianship in 1709, due to the decimation of a substantial portion of its tribal membership. *Carcieri*, 555 U.S. at 383-84.

190. *Carcieri*, 555 U.S. at 384-86.

191. *See id.* at 385.

192. *Id.*; *see also* 18 U.S.C. § 1151 (2012) (“Indian country defined”).

193. *See Carcieri*, 555 U.S. at 385.

194. *See id.* at 388-89.

195. *Id.*

196. *Id.* at 389-91.

197. Shortly after the opinion was issued, much scholarship was written on the practical considerations in light of the abrogation of the DOI protections of many Indian tribes affected by the holding. Many were concerned with what could happen next. *See, e.g.*, Melanie Riccobene Jarboe, Note, *Collective Rights to Indigenous Land in Carcieri v. Salazar*, 30 B.C. THIRD WORLD L. J. 395 (2010); Sarah Washburn, Comment, *Distinguishing Carcieri v. Salazar: Why the Supreme Court Got It Wrong and How Congress and Courts Should Respond to Preserve Tribal and Federal Interests in the IRA’s Trust-Land Provisions*, 85 WASH. L. REV. 603 (2010); Scott A. Taylor, *Taxation in Indian Country After Carcieri v. Salazar*, 36 WM. MITCHELL L. REV. 590 (2010); *see also* William Wood, *Indians*,

A vast majority of the cases involving Indian tribes have been qualified based on the explicit federal government-to-government relationship. In some cases, the minimal “federally recognized” status of the tribe was used to satisfy the criteria asserting self-determination and self-governance.¹⁹⁸ With the *Carcieri* holding, Indian tribes not officially recognized by the federal government in 1934 were suddenly forced into a holding pattern unsure to what extent they, and their very existence, would be affected.¹⁹⁹

Notwithstanding *Carcieri*, the fee-to-trust acquisitions process established by the Indian Reorganization Act of 1934 still seems the most logical and necessary application for the Native Hawaiian Nation to seek. Applied to the instant matter, the Nation would likely be afforded strong foundational support to request access to the “ceded” lands. These lands have been held in trust for the betterment of Native Hawaiians and the people of Hawai‘i for roughly the last sixty years.²⁰⁰ However, more than a few might argue the ‘Āina has been held in trust for the Hawaiian people since the enactment of the 1840 Kingdom of Hawai‘i Constitution.²⁰¹ While opponents of indigenous and aboriginal rights might argue *Carcieri* would obliterate said rights, in 2014, an important show of support for individual Indians and Indian tribes was made by DOI leadership in order to affirm even the possibility of placing lands into trusteeship subsequent to the 2009 *Carcieri* decision.

Tribes, and (Federal) Jurisdiction, 65 KAN. L. REV. 415 (2016) (discussing, more recently, “under Federal jurisdiction” language extricated from *Carcieri*).

198. See generally 25 C.F.R. § 151.2(c)(2) (2001) (“Individual Indian means . . . [a]ny person who is a descendent of such a member and said descendant was, on June 1, 1934, physically residing on a *federally recognized* Indian reservation . . .” (emphasis added)).

199. Many of the more recent fee-to-trust acquisitions were thrust into the spotlight as litigation sprouted forth from state and county governments that likely wanted to take part in any taxes that could be levied on tribes whose lands were taken into trust, despite the tribe not being federally recognized in 1934. See, e.g., *Confederated Tribes of Grand Ronde Cmty. v. Jewell*, 830 F.3d 552 (D.C. Cir. 2016) (affirming lower court’s holding based on the definitions of “recognized” and “under Federal jurisdiction” rather than the *Carcieri* analysis of “now”); *Poarch Band of Creek Indians v. Hildreth*, 656 F. App’x 934 (11th Cir. 2016) (per curiam) (unpublished) (affirming temporary injunction for tax assessment payments during pendency of claim against *Carcieri*-type litigation); *Upstate Citizens for Equal., Inc. v. United States*, 841 F.3d 556, 559 (2nd Cir. 2016) (acknowledging a long line of lawsuits seeking to prevent the Oneida Indian Nation of New York from “assert[ing] tribal jurisdiction over a portion of its indigenous homeland”).

200. See Admission Act of Mar. 18, 1959, Pub. L. No. 86-3, § 5(f), 73 Stat. 4, 6 (establishing the public trust lands of Hawai‘i and providing for, inter alia, the “betterment of the conditions of native Hawaiians”).

201. See NATIVE HAWAIIAN LAW TREATISE, *supra* note 1, at 11.

In direct response to *Carcieri*, the Solicitor for the Department of the Interior, Hilary C. Tompkins, issued a memorandum (“M-opinion”) providing insight and context to the opinion.²⁰² Over the course of the memorandum, Solicitor Tompkins painstakingly goes through the *Carcieri* decision,²⁰³ as well as discusses the genesis of the IRA,²⁰⁴ the legislative history of the Act,²⁰⁵ and, inter alia, the definition of “under federal jurisdiction,” which was not explicitly addressed in *Carcieri*.²⁰⁶ She furthers the analysis, considering all aspects surrounding *Carcieri*, and determines the phrase “under federal jurisdiction” requires a two-part inquiry.²⁰⁷

The first question is to examine whether there is a sufficient showing in the tribe’s history, at or before 1934, that it was under federal jurisdiction, *i.e.*, whether the United States had, in 1934 or at some point in the tribe’s history prior to 1934, taken an action or series of actions . . . sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government.²⁰⁸

After answering the first question in the affirmative, “the second question is to ascertain whether the tribe’s jurisdictional status remained intact in 1934.”²⁰⁹ For tribes unable to easily demonstrate this status, Solicitor Tompkins suggested that “[i]n some instances, it will be necessary to explore the universe of actions or evidence that might be relevant to such a determination or to ascertain generally whether certain acts are, alone or in conjunction with others, sufficient indicia of the tribe having retained its jurisdictional status in 1934.”²¹⁰ In essence, this two-part inquiry seems to preserve some semblance of the discretion imbued in the DOI Secretary,

202. See The Meaning of “Under Federal Jurisdiction” for Purposes of the Indian Reorganization Act, Op. Solicitor Dep’t Interior, No. M-37029 (Mar. 12, 2014), <https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37029.pdf>.

203. *Id.* at 1-4.

204. *Id.* at 6 (restating that the “‘overriding purpose’ of the IRA was to ‘establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically’” (quoting *Morton v. Mancari*, 417 U.S. 535, 542 (1974))).

205. *Id.* at 9-12.

206. *Id.* at 16-19.

207. *Id.* at 19.

208. *Id.*

209. *Id.*

210. *Id.*

allowing an acceptable means of navigating *Carcieri*, especially when final decisions on these inquiries would most likely be coming from that office.

Solicitor Tompkins continues on in her memorandum, providing an analysis of “recognition” versus “under federal jurisdiction.”²¹¹ With respect to “recognition,” she points out that the concept only “evolved into the modern notion of ‘federal recognition’ or ‘federal acknowledgement’ in the 1970s.”²¹² “In 1978, the Department [of the Interior] promulgated regulations establishing procedures pursuant to which tribal entities could demonstrate their status as Indian tribes.”²¹³ However, previous to the adoption of those regulations there had not been a formal process in place, nor a method that expressly recognized an Indian tribe.²¹⁴ Indeed, “determinations were made on a case-by-case basis using standards that were developed in the decades after the IRA’s enactment.”²¹⁵

Nevertheless, Solicitor Tompkins’ overriding opinion in the memorandum held “the IRA does not require that the agency determine whether a tribe was a ‘recognized Indian tribe’ in 1934; a tribe need only be ‘recognized’ at the time the statute is applied (e.g., at the time the Secretary decides to take land into trust).”²¹⁶ She goes on to state that “[b]y regulation, therefore, the Department only acquires land in trust for tribes that are federally recognized at the time of acquisition,”²¹⁷ perhaps effectively silencing those opposing voices that seek to completely eviscerate the ability of Indian tribes to place their lands into trust for the many generations to come. She concluded her memorandum, stating, “[t]he Department will continue to take land into trust on behalf of tribes under the test set forth herein to advance Congress’ stated goals of the IRA to ‘provid[e] land for Indians.’”²¹⁸ If the Native Hawaiian Nation is able to tap

211. *Id.* at 23-26.

212. *Id.* at 24.

213. *Id.* (citing 25 C.F.R. pt. 83).

214. *Id.*

215. *Id.*

216. *Id.* at 25 n.160 (illustrating the context and spirit of the M-opinion generally) (“The misguided interpretation that a tribe must demonstrate recognition in 1934 could lead to an absurd result whereby a tribe that subsequently was terminated by the United States could petition to have land taken into trust on its behalf, but tribes recognized after 1934 could not.”).

217. *Id.* (citing the Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791 (codified at 25 U.S.C. § 479a-1)).

218. *Id.* at 26 (citing 25 U.S.C. § 465).

into the “ceded” lands, it would likely be through circumventing *Carcieri* and applying Solicitor Tompkins’ M-Opinion.²¹⁹

IV. Landmark Cases and Legislation Affecting the Native Hawaiian Nation

Before evaluating and applying the federal Indian law framework to the present matter, it is important to take another in-depth view of a line of relevant cases regarding Native Hawaiian law, many that were briefly mentioned earlier in this Article.²²⁰

The first case is *Ahuna v. Department of Hawaiian Home Lands*,²²¹ one of the earliest cases to establish the trust relationship between Native Hawaiians and the state government.²²² Originally a class-action lawsuit, the remaining appellee, Wallace Beck, was qualified under the Hawaiian Homes Commission Act (HHCA) and entitled “to lease Hawaiian home lands for agricultural purposes at Panaewa,” located in Hilo on Hawai‘i Island.²²³ The lower court held that the Department of Hawaiian Home Lands (DHHL) was required to provide Beck with “a lease to a lot situate[d] as close to Lot 91 as possible, or show cause why the same should not be issued.”²²⁴

The main issue in this case was the reluctance of the DHHL to lease Lot 92 to Beck because it was zoned as industrial and could be used for general leasing purposes. Importantly, “lease revenues contributed significantly to the [DHHL’s] budget.”²²⁵ Therefore, the *Ahuna* case focused on the fiduciary duty the DHHL owed to its beneficiaries, namely Beck, and the agency’s breach of this duty by failing to comply with the lower court’s holding of the lease of an adjacent, or near-adjacent, ten-acre lot.²²⁶

219. Just prior to Tompkins’ departure from the Department of the Interior in early 2017, along with the rest of President Obama’s administration, the Solicitor left a final M-opinion that one could only hope will have lasting effects in the current political climate of the Trump administration. See Reaffirmation of the United States’ Unique Trust Relationship with Indian Tribes and Related Indian Law Principles, Op. Solicitor Dep’t Interior, No. M-37045 (Jan. 18, 2017), <https://www.doi.gov/sites/doi.gov/files/uploads/m-37045.pdf>.

220. See *supra* notes 80-81.

221. 640 P.2d 1161 (Haw. 1982).

222. See *id.* at 1169; see also *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (employing verbiage as to the relevant fiduciary duties of the federal government “charg[ing] itself with moral obligations of the highest responsibility and trust”).

223. *Ahuna*, 640 P.2d at 1163. Beck qualified as native Hawaiian, having at least 50% Hawaiian blood quantum.

224. *Id.* at 1164.

225. *Id.*

226. *Id.* at 1167.

Similar to many other HHCA beneficiaries of the surrounding area, Beck was promised that his HHL lease would comprise a total of ten acres for him to farm.²²⁷ In holding that the DHHL has a required duty, Chief Justice William S. Richardson noted the established trust relationship, as held in *Cherokee Nation v. Georgia*, where the use of “ward” implied trusteeship.²²⁸ He also held that *In re Ainoa* established the genesis and purpose of the Hawaiian Homes Commission Act as envisioned by Territory Senator John Henry Wise, and further highlighted by former Secretary of the Interior Franklin Knight Lane’s sentiments: “the natives of the islands [Native Hawaiians] who are our wards... and for whom in a sense we are trustees.”²²⁹

In 1993, subsequent to the establishment of this trust relationship, the Congress of the United States issued a joint resolution recognizing, and apologizing for, the overthrow of the constitutional monarchy embodied within the Kingdom of Hawai‘i.²³⁰ In the Apology Resolution, “Congress said that the Hawaiian people ‘never directly relinquished their claims to their inherent sovereignty as a people’ and listed among the wrongs done to them ‘the deprivation of the rights of Native Hawaiians to self-determination.’”²³¹ Professor Van Dyke further notes, “The right to self-determination is the most basic of human rights under federal and international law, and efforts to facilitate the exercise of this right are mandated by fundamental principles of human rights and human decency.”²³² Professor Melody K. MacKenzie concludes, “The Apology Resolution contains strong findings, establishes a foundation for reconciliation, and calls for a reconciliation process.”²³³ However, it does not “require any particular restorative action or even set forth a process for reconciliation.”²³⁴

While ostensibly impactful in recognizing the substantial past harm committed against Native Hawaiians, no substantive framework or procedure was established by the U.S. Congress to address valid claims of

227. *Id.* at 1163.

228. *Id.* at 1167 (citing *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831)).

229. *Id.* (quoting H.R. REP. 66-839, at 4 (1920)); see *In re Ainoa*, 591 P.2d 607 (Haw. 1979).

230. See Apology Resolution, *supra* note 89.

231. See VAN DYKE, *supra* note 1, at 297.

232. *Id.*

233. NATIVE HAWAIIAN LAW TREATISE, *supra* note 1, at 41.

234. *Id.*

redress, recognition, or reconciliation for the people.²³⁵ This glaring void of an actionable plan moving a Native Hawaiian governing entity forward minimized, if not wholly discounted, the judicial weight of the Apology Resolution and made for a quick disposal for the U.S. Supreme Court majority in *Rice v. Cayetano*.²³⁶

Subsequent to the Apology Resolution, in *Day v. Apoliona*,²³⁷ HHCA-eligible Native Hawaiians, pursuant to section 201(a) of the Hawaiian Homes Commission Act,²³⁸ brought litigation against the trustees for the Office of Hawaiian Affairs questioning their actions and alleging a breach of fiduciary duty to the beneficiaries of the public trust funds.²³⁹ The Court of Appeals for the Ninth Circuit affirmed the lower court's decision, holding that it was up to the OHA trustees as to how to disperse and expend funds.²⁴⁰ Funding programs and efforts such as lobbying support for the Akaka Bill,²⁴¹ the Native Hawaiian Legal Corporation,²⁴² Na Pua No'eau Education Program,²⁴³ and Alu Like, Inc.,²⁴⁴ that benefitted Native Hawaiians of fifty percent or more Hawaiian ancestry, as well as those of less than fifty percent Hawaiian ancestry, did not amount to a violation of the requirements as set forth in the Hawai'i state constitution or the Admissions Act section 5(f).²⁴⁵ The OHA trustees had discretion over

235. See generally Apology Resolution, *supra* note 89.

236. See 528 U.S. 495, 505 (2000). Justice Anthony Kennedy's mere mention of the "Apology Resolution" was negligible, at best, when he wrote, "Congress passed a Joint Resolution recounting the events in some detail and offering an apology to the native Hawaiian people." *Id.*

237. 616 F.3d 918 (9th Cir. 2010).

238. Hawaiian Homes Commission Act of 1920, 67 Pub. L. No. 34, 42 Stat. 108 (1921).

239. *Day*, 616 F.3d at 921.

240. See *id.* at 929.

241. OHA money was used to lobby and support the "Akaka Bill" in Congress, which was legislation introduced by Daniel Kahikina Akaka and proposed as the Native Hawaiian Government Reorganization Act of 2007, one of the previous iterations of the instant federally recognized Native Hawaiian Nation. See *id.* at 922.

242. The Native Hawaiian Legal Corporation (NHLC) entered into contracts with the OHA to provide legal services not restricted only to "native Hawaiians." See *id.*

243. Na Pua No'eau Education Program was a "Hawaiian Culture-based Education Resource Center within the University of Hawai'i . . . provid[ing] educational enrichment program activities to Hawaiian children and their families." *Id.* at 922-23.

244. Alu Like, Inc. is a non-profit organization that "strives to help Hawaiians achieve social and economic self-sufficiency by providing early childhood education, services to the elderly, employment preparation and training, library and genealogy services, specialized services for at-risk youth and information and referral services." *Id.* at 923.

245. See *id.* at 925-26.

funding.²⁴⁶ Therefore, *Day v. Apoliona* actually broadened the beneficiary definition and status of Native Hawaiians.

Finally, the holding in *Rice v. Cayetano*²⁴⁷ effectively obliterates any semblance of context or reasoning behind Native Hawaiian programs, subjugating long held “precedent” beyond reasonable judicial consideration. The State of Hawai‘i argued in *Rice* that *Morton v. Mancari* should be applied, limiting voting for the Office of Hawaiian Affairs trustees to strictly Native Hawaiian voters.²⁴⁸ The State likely believed this argument would carry the day because the Court should have held Native Hawaiian protections were in place due to the “political classification” of the group, and not the “racial categorization” of these peoples, as seen in *Morton*.²⁴⁹

Writing for the majority, Justice Anthony Kennedy, however, distinguished *Mancari* from *Rice*, stating, “[a]lthough the classification had a racial component, the [*Mancari*] Court found it important that the preference was ‘not directed towards a “racial” group consisting of “Indians,”’ but rather ‘only to members of “federally recognized” tribes.’”²⁵⁰ The *Mancari* Court therefore held “‘the preference [was] political rather than racial in nature.’”²⁵¹ In negating this application to the instant case, the Court essentially refused to equate the position of Native Hawaiians with American Indians, stating “[it] would be required to accept some beginning premises not yet established in our case law.”²⁵² Justice Kennedy went on to state the following:

[I]t would be necessary to conclude that Congress, in reciting the purposes for the transfer of lands to the State—and in other enactments such as the Hawaiian Homes Commission Act and the Joint Resolution of 1993—has determined that native Hawaiians have a status like that of Indians in organized tribes These propositions would raise questions of considerable moment and difficulty.²⁵³

246. *See id.*

247. *See* 528 U.S. 495 (2000).

248. *See id.* at 518.

249. *See id.* at 519-20.

250. *Id.* (citing *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974)).

251. *Id.* (citing *Morton*, 417 U.S. at 554).

252. *Id.* at 518.

253. *Id.* Though not explicitly answered in the opinion, Justice Kennedy’s statement at the end of the quote begs the counter-question: difficulty for whom? Perhaps rhetorical in

The majority held that, pursuant to the Fifteenth Amendment to the United States Constitution,²⁵⁴ Native Hawaiians were relegated to a racial classification, and not a political group of people.²⁵⁵

[T]he elections for OHA trustee are elections of the State, not of a separate quasi sovereign, and they are elections to which the Fifteenth Amendment applies. To extend *Mancari* to this context would be to permit a State, by racial classification, to fence out whole classes of its citizens from decisionmaking in critical state affairs. The Fifteenth Amendment forbids this result.²⁵⁶

The Court, however, declined to rule on the Fourteenth Amendment claim.²⁵⁷

These holdings offer pause to the Native Hawaiian community and likely evidence the questionable tone of support for Native Hawaiian rights. It is apparent that the holding in *Rice* was a substantial setback to the Hawaiian people; however, the crux of this specific decision seemed to turn on the lack of a formal federal government-to-government relationship and recognition between Native Hawaiians and the United States. Thus, in light of the DOI rule and the anticipated reestablishment of the Native Hawaiian Nation, there might be future litigation challenging the current voting rights of the citizenry of Hawai'i, with the purpose of limiting these rights once again to the established beneficiaries of OHA—members of the Native Hawaiian Nation. Once the Native Hawaiian Nation can mobilize itself, perhaps best accomplished through education and grassroots efforts, then cases like *Rice v. Cayetano* can be addressed and righted in the eyes of the law.²⁵⁸

nature, the statement is challenging to navigate with respect to discerning his reasoning in a logical and appropriate manner.

254. See U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

255. *Rice*, 528 U.S. at 522-24.

256. *Id.* at 522.

257. *Id.*

258. It is unclear whether *Rice v. Cayetano* would be struck down by the current U.S. Supreme Court due to its conservative majority and the recent contentious appointment of Justice Brett M. Kavanaugh to the high court.

V. Federal Indian Model and Legislation Benefitting Native Hawaiians

The Native Hawaiian Nation should emulate the federal Indian model of established rights and federal recognition as it moves forward. Thus, the Native Hawaiian Nation would make an informed decision by viewing case precedent and litigation stemming from what was widely recognized as the Era of Self-Determination, from around 1961 to present day.²⁵⁹ Scholar David Getches specifically acknowledges President Richard Nixon as one of the most vocal champions for Indians, wherein he explicitly rejected termination²⁶⁰ and instead opted for self-determination.²⁶¹ During this renewed era of reform, Indian tribes benefitted substantially from social, political, and legal activism of Indian leaders and those who advocated on their behalf.²⁶² Over the course of several years, almost four hundred Indian treaties, legislative statutes, and common law court decisions specifically mandated the federal government's obligation towards Indian education alone.²⁶³

Indeed, Congress enacted a substantial amount of legislation that flowed relatively freely during this time-period, "result[ing] in an unprecedented volume of Indian legislation."²⁶⁴ Most of the legislation "was favorable to Indian interests, [with] all of it enacted at the behest of tribes or at least with their participation."²⁶⁵ For example, some highlights of specific legislation benefitting Indian tribes across the spectrum of socio-economic and political considerations include, but are not limited to: the Indian Child Welfare Act of 1978,²⁶⁶ providing "a comprehensive scheme for the adjudication of child custody cases involving Indian children that defers heavily to tribal governments",²⁶⁷ the American Indian Religious Freedom Act of 1978,²⁶⁸ perhaps existing more "as a policy statement on traditional Indian religions . . . [rather than] providing protection to Indian religious

259. FEDERAL INDIAN LAW TEXTBOOK, *supra* note 121, at 247-77.

260. Termination "was originally designed as an effort . . . to detribalize the American Indian," but had the opposite effect of harnessing Indian leadership across the country and "demonstrating the vital necessity of united action and organizational structures." *See id.* at 247.

261. *Id.* at 248-49.

262. *Id.* at 252-54.

263. *Id.* at 253.

264. *Id.* at 252.

265. *Id.*

266. Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-1963 (2012)).

267. *See* FEDERAL INDIAN LAW TEXTBOOK, *supra* note 121, at 252.

268. Pub. L. No. 95-341, 92 Stat. 469 (codified at 42 U.S.C. § 1996 (2012)).

practices and beliefs”;²⁶⁹ the American Indian Agricultural Resource Management Act of 1993,²⁷⁰ embodying “the federal government’s trust duty to protect, conserve, utilize, and manage Indian agricultural lands and related renewable resources with the active participation of the tribal landowner”;²⁷¹ and among many others, the Indian Mineral Development Act of 1982,²⁷² authorizing Indian tribes to “enter into any joint venture, operating, production sharing, service, managerial, lease or other agreement, . . . [for the] extraction, processing, or other development of, oil, gas, uranium, coal, geothermal, or other energy or nonenergy mineral resources.”²⁷³

Similarly, over many years, the Native Hawaiian community has been afforded extensive and rather comprehensive legislation by the U.S. Congress and the Hawaii state legislative body.²⁷⁴ For example, some of the purposes and benefits established for Native Hawaiians in these federal acts

269. See FEDERAL INDIAN LAW TEXTBOOK, *supra* note 121, at 252. Note that this Act also lists “Native Hawaiians” with regard to indigenous peoples’ protected religious freedoms. Pub. L. No. 95-341, § 1, 92 Stat. at 469 (codified at 42 U.S.C. § 1996 (2012)).

270. Pub. L. No. 103-177, 107 Stat. 2011 (codified at 25 U.S.C. §§ 3701-3745 (2012)).

271. S. REP. NO. 112-166, at 9 n.53 (2012).

272. Pub. L. No. 97-382, 96 Stat. 1938 (codified at 25 U.S.C. §§ 2101-2108 (2012)).

273. *Id.* § 2102(a), 96 Stat. at 1938. Additional legislation identifies subsequent support of Native Americans, addressing societal benefits such as:

Self-governance: The Indian Self-Determination Act of 1988 (ISDA); the Indian Self-Determination Contract Reform Act of 1994; and the Tribal Self-Governance Act of 1994.

Law and Order on tribal lands (reservations): The Indian Civil Rights Act (ICRA) of 1986; the Indian Law Enforcement Reform Act of 1990; the Indian Tribal Justice Act of 1993; and the Tribal Law and Order Act of 2010.

Economic development: The Indian Financing Act of 1974; the Indian Tribal Regulatory Reform and Business Development Act of 1999; the Indian Tribal Economic Development and Contract Encouragement Act of 2000; the Native American Business Development, Trade Promotion, and Tourism Act of 2000; the Indian Arts and Crafts Enforcement Act of 2000; and the Indian Gaming Regulatory Act (IGRA).

Cultural protections: The Native American Graves Protection and Repatriation Act of 1990 (NAGPRA); and the Native American Languages Act.

Social protections: The Indian Child Protection and Family Violence Act; the Indian Alcoholism and Substance Abuse Prevention and Treatment Act; and the Indian Health Care Act.

See FEDERAL INDIAN LAW TEXTBOOK, *supra* note 121, at 253-56; see, e.g., COHEN’S HANDBOOK, *supra* note 121, § 11.01[1] at 830 (explaining ICWA); *id.* § 12.02, at 876 (explaining the Indian Gaming Regulatory Act); *id.* § 17.01, at 1106 (explaining federal legislation over tribal natural resources); *id.* § 19.06, at 1257 (explaining federal legislation to protect tribal water rights); *id.* § 22.02[1], at 1386 (explaining the Indian Self-Determination and Education Assistance Act).

274. See generally Mo’olelo Manuscript, *supra* note 29, at 582-672.

are shown through the following legislation: the Native Hawaiian Education Act²⁷⁵ (subsequently amended and added to the “No Child Left Behind Act”), “authoriz[ing] and develop[ing] innovative educational programs to assist Native Hawaiians”;²⁷⁶ Native Hawaiian Health Care Act of 1988,²⁷⁷ authorizing the Secretary for Health and Human Services to “make a grant to . . . Papa Ola Lokahi [the Native Hawaiian Health Board] for the purpose of coordinating, implementing and updating a Native Hawaiian comprehensive health care master plan designed [for] . . . health promotion and disease prevention services and to maintain and improve the health status of Native Hawaiians”;²⁷⁸ Hawaiian Home Lands Recovery Act,²⁷⁹ “[a]uthoriz[ing] and establish[ing] procedures for, the Secretary of the Interior to settle native Hawaiian land claims against the Federal Government, including land replacement and loss of use compensation”;²⁸⁰ Hawaii Water Resources Act of 2000,²⁸¹ “[a]uthoriz[ing] and direct[ing] the Secretary of the Interior to study and report to specified congressional committees on irrigation and other agricultural water delivery systems and opportunities for recycling, reclamation, and reuse of water and wastewater in Hawai‘i for agricultural and nonagricultural purposes”;²⁸² Ala Kahakai National Historic Trail Act,²⁸³ “amend[ing] the National Trails System Act to designate the Ala Kahakai National Historic Trail in Hawaii,”²⁸⁴ the trail circumscribing Hawai‘i Island and a part of the ancient trail system known as the Ala Loa (“the long trail”);²⁸⁵ and, among others, a 1980 Act that established the Kalaupapa National Historical Park in Hawai‘i²⁸⁶ “to

275. Pub. L. No. 103-382, 108 Stat. 3518 (1994) (codified as reenacted at 20 U.S.C.A. §§ 7511-7517 (Westlaw through Pub. L. No. 115-231)).

276. 20 U.S.C. § 7513(1).

277. Pub. L. No. 100-579, 102 Stat. 2916 (codified as amended at 42 U.S.C. § 11701 (2012)).

278. *Id.* § 110703, 102 Stat. at 2916.

279. Pub. L. No. 104-42, Title II, 109 Stat. 357 (1995).

280. *Summary: H.R.402 — 104th Congress (1995-1996)*, CONGRESS.GOV, <https://www.congress.gov/bill/104th-congress/house-bill/402/summary/35> (last visited Oct. 23, 2018).

281. Pub. L. No. 106-566, 114 Stat. 2818 (codified as amended at 43 U.S.C.A. § 2214 (Westlaw through Pub. L. No. 115-231)).

282. *Summary: S.1694 — 106th Congress (1999-2000)*, CONGRESS.GOV, <https://www.congress.gov/bill/106th-congress/senate-bill/1694/summary/36> (last visited Oct. 23, 2018).

283. Pub. L. No. 106-509, 114 Stat. 2361 (codified at 16 U.S.C. § 1244 (2012)).

284. *Summary: S.700 — 106th Congress (1999-2000)*, CONGRESS.GOV, <https://www.congress.gov/bill/106th-congress/senate-bill/700/summary/35> (last visited Oct. 23, 2018).

285. 114 Stat. at 2361.

286. Act of Dec. 22, 1980, Pub. L. No. 96-565, 94 Stat. 3321 (codified at 16 U.S.C. § 410jj (2012)).

preserve and interpret the Kalaupapa settlement for the education and inspiration of present and future generations.”²⁸⁷ Native Hawaiians also worked hard with Native American Indians and Alaska Natives to pass the Native American Graves Protection and Repatriation Act,²⁸⁸ which “provide[s] for the protection of Native American [Alaska Natives, and Native Hawaiians] graves, and for other purposes.”²⁸⁹

The purpose of presenting an abbreviated listing of federal legislation explicitly pertaining to Native Hawaiians is to provide substantive evidence that representatives in Washington, D.C., have historically embraced the desired political status of Hawaiians—that of a formally recognized government-to-government relationship.²⁹⁰ Indeed, the breadth of legislation advanced in recognition and understanding of Native Hawaiians likely illustrates the notion that the United States was fully embracing the Apology Resolution. Moreover, the legislation comprised serious attempts at correcting the atrocities committed against Native Hawaiians when their beloved Queen Lili‘uokalani was overthrown in 1893.

With all of this information, the elements of *Mancari* and the DOI Solicitor M-37029 memorandum can be applied to the instant situation of the Native Hawaiian Nation.

*VI. Application of Mancari and M-37029, and Actionable Next Steps
for the Native Hawaiian Nation*

The precedential holding from *Morton v. Mancari* essentially states that it was not discriminatory for the Bureau of Indian Affairs to advance the hiring preference of Indian employees.²⁹¹ Justice Harry Blackmun provided background as to preferential federal hiring policies afforded to Indians from at least 1834.²⁹² Justice Blackmun set forth three goals for the preferential hiring policy pursuant to the Indian Reorganization Act of

287. *Id.* § 410jj-1, 94 Stat. at 3321.

288. Pub. L. No. 101-601, 104 Stat. 3048 (1990) (codified at 25 U.S.C. §§ 3001-3013 (2012)).

289. *Id.* pmb1., 104 Stat. at 3048.

290. *See, e.g.*, 20 U.S.C.A. § 7512 (Westlaw through Pub. L. No. 115-231) (“Findings”). These findings expressly lay out the 2015 Congress’ prevailing view of the history of Native Hawaiians as a “distinct and unique indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago” *Id.* § 7512(1).

291. *See* 417 U.S. 535, 554 (1974).

292. *Id.* at 541-42.

1934, also known as the Wheeler-Howard Act:²⁹³ “to give Indians a greater participation in their own self-government; to further the government’s trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life.”²⁹⁴

Furthermore, Justice Blackmun went on to write that “[r]esolution of the instant issue turn[ed] on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a ‘guardian-ward’ status, to legislate on behalf of federally recognized Indian tribes.”²⁹⁵ He continues with his assessment, writing:

Indeed, it is not even a ‘racial’ preference. Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA [Bureau of Indian Affairs] more responsive to the needs of its constituent groups The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.²⁹⁶

Thus, a “quasi-sovereign tribal entity” became a political classification of people when the BIA policy allowed identification of its workforce from a specific pool of qualified, Indian candidates.²⁹⁷

Considering the historical plight of the Native Hawaiians, it must be noted once again that the trust relationship for Indians was almost always pursuant to a federal government-to-government recognition of an Indian tribe, resulting in 573 federally recognized tribes.²⁹⁸ Similarly, the Native Hawaiian Nation is on the cusp of a federally recognized, government-to-government relationship with the United States, pursuant to the federal DOI Rule. It seems evident that *Mancari* could be applied to the instant situation when looking to the three purposes iterated by Justice Blackmun and replacing Indians with Native Hawaiians: 1) “to give [Native Hawaiians] a

293. *See id.* at 537; *see* Indian Reorganization Act (Wheeler-Howard Act), Pub. L. No. 73-383, 48 Stat. 984 (codified at 25 U.S.C. §§ 5101-5129).

294. *See Mancari*, 417 U.S. at 541-42.

295. *See id.* at 551.

296. *See id.* at 554.

297. *See id.* at 553 n.24.

298. For the most recent statistics of federally recognized Indian tribes, *see About Us*, BUREAU OF INDIAN AFF., <https://www.bia.gov/WhatWeDo/index.htm> (last visited Mar. 2, 2019).

greater participation in their own self-government”; 2) “to further the [federal] government’s trust obligation toward the [Native Hawaiian Nation]”; and 3) “to reduce the negative effect of having non-[Native Hawaiians] administer matters that affect [the life of the Native Hawaiian Nation]”.

In light of the totality of the information presented, establishment of the Native Hawaiian Nation through the federal DOI Rule would likely satisfy all three of these points, albeit pursuant to the Indian Reorganization Act of 1934. Furthermore, the long held, unique trust relationship between Native Hawaiians and the United States could be established through any number of means as presented in this Article.²⁹⁹ Extensive references have already been made to the acts of Congress promulgated in order to benefit Native Hawaiians, such as the Native Hawaiian Education Act, the Native Hawaiian Healthcare Act, and the Hawaiian Home Lands Recovery Act.³⁰⁰ These acts would certainly build upon the foundation set from the initial trust relationship tracing back to at least the Hawaiian Homes Commission Act of 1920, which established the trust relationship between Native Hawaiians and the United States federal government.³⁰¹ Thus, the Native Hawaiian Nation should be protected as a federally recognized governing entity of Native Hawaiians, a political classification of people.

VII. Access to “Ceded” Lands and the Future of the Native Hawaiian Nation

The final discussion point of this Article concerns the ability of the Native Hawaiian Nation to access “ceded” lands in order to place them in trust with the Secretary of the Department of the Interior, a substantial concern of this Article. In *Carcieri v. Salazar*, Justice Thomas’s entire holding is based on the acceptable definition of “now under federal jurisdiction,” pursuant to the enactment of the Indian Reorganization Act of 1934.³⁰² Acknowledging that the Narragansett tribe of Rhode Island was not

299. The original trust relationship was established in *Ahuna v. Department of Hawaiian Home Lands*, 640 P.2d 1161 (Haw. 1982). The trust relationship was also established in subsequent legislation benefitting Native Hawaiians. *See supra* notes 264-70.

300. *See supra* notes 275-89.

301. Hawaiian Homes Commission Act of 1920, 67 Pub. L. No. 34, 42 Stat. 108 (1921). Some might also hold that the various treaties signed between the Kingdom of Hawai‘i and foreign powers, or more specifically the United States, might be relevant in establishing the trust relationship. However, the treaties would still recognize Hawai‘i as a sovereign nation; one not relying on the relationship it maintains with the United States, *per se*.

302. *See* 555 U.S. 379, 395 (2009).

under federal jurisdiction of the United States in 1934, the majority reversed the First Circuit Court of Appeals decision allowing the Secretary of the Department of the Interior to take into trust the thirty-one-acre parcel for the tribe.³⁰³

There are a number of obstacles likely standing in the way of the Native Hawaiian Nation regarding access to “ceded” lands that once were the Crown and government lands of the Kingdom of Hawai‘i. The lands ceded to the United States when Hawai‘i was annexed in 1898 were a result of the unilateral decision made by the United States federal government. As noted previously, annexation was fiercely contested and strongly opposed by Native Hawaiians;³⁰⁴ however, the lands were effectively confiscated when the Republic of Hawai‘i changed over to the Territory of Hawai‘i via annexation.³⁰⁵

The Native Hawaiian Nation has but a few options to access the “ceded” lands that now are a part of the Hawai‘i Public Land Trust. Primarily composed of agricultural and conservation land, the small number of commercial properties currently leased to various business entities will likely be retained by the state (including the substantial portions of rents and moneys stemming from their lease agreements).³⁰⁶ It is highly unlikely these commercial properties would be made available for transfer to the Native Hawaiian Nation because of the substantial revenue these properties generate for the State of Hawai‘i.

However, the Native Hawaiian Nation should attempt to access the conservation and agricultural lands, or some portions thereof. Many of these conservation sites also contain sacred sites of Hawai‘i.³⁰⁷ As a cultural

303. *See id.* at 382-83.

304. *See VAN DYKE, supra* note 1, at 200 n.1 (suggesting “[c]omprehensive discussions of the facts and issues raised by the U.S. annexation of Hawai‘i” in a number of works) (citing TOM COFFMAN, *NATION WITHIN: THE STORY OF AMERICA’S ANNEXATION OF THE NATION OF HAWAII* (1998); RICH BUDNICK, *STOLEN KINGDOM: AN AMERICAN CONSPIRACY* (1992); and THOMAS J. OSBORNE, *ANNEXATION HAWAII: FIGHTING AMERICAN IMPERIALISM* (1998) (originally published as *Empire Can Wait* in 1981)).

305. Upon the Republic of Hawai‘i’s annexation to the United States in 1898, approximately 1.8 million acres of land were transferred from the Republic to the United States federal government. *NATIVE HAWAIIAN LAW TREATISE, supra* note 1, at 79.

306. The Hawai‘i State legislature defined the pro rata share at 20% pursuant to Act Relating to the Office of Hawaiian Affairs, No. 273, 1980 Haw. Sess. Laws 525 (codified at HAWAII REV. STAT. § 10-13.5). *See VAN DYKE, supra* note 1, at 260 n.46.

307. Many sacred and historic sites of Hawai‘i are located within federal parks and land reserves. For more information about many of these lands zoned as conservation lands and summarily taken by the federal government from annexation onwards, see PANA O‘AHU: SACRED STONES, SACRED LAND (Jan Becket & Joseph Singer eds., 1999) (providing

matter, and in reclamation of their cultural legacies, these lands should be removed from state and federal government control and revert to Native Hawaiians to oversee, manage, and maintain. These lands could be used as a limited source of funding to aid in running the Nation, such as through entrance and maintenance fees. Additionally, the traditional and customary practices of their ancestors could be taught and nurtured on sacred ground through the historic Hawaiian way—from Kūpuna to Keiki.³⁰⁸

Similarly, Native Hawaiians should be able to access the agricultural lands currently held by the state and local governments so they can return to the ʻĀina itself: planting fruit trees and vegetable bushes, raising livestock, and planting kalo (“taro”) and other life-sustaining crops that would enable Hawaiians to return to subsistence living. Native Hawaiians are already cultivating plots of land across the many islands, so it is not unrealistic to think that in partnership more of the lāhui could return to their ancestral ways.³⁰⁹

Not incidentally, if *Carciari* were applied to the instant situation, the Native Hawaiian Nation would likely be unable to put any lands into trust with the DOI Secretary. Not only do the Native Hawaiian Nation and its members fall outside the purview of the Indian Reorganization Act of 1934, there currently is no applicable act that could be exercised. The current Supreme Court would likely look to the plain meaning of the text of the Indian Reorganization Act and quickly find it inapplicable to the Native Hawaiian Nation because the expressed inclusion of Native Hawaiians is absent from the legislation.

However, the Native Hawaiian Nation might be able to rely on and cite Department of the Interior Solicitor Hilary C. Tompkins’ M-37029

photographic and moʻolelo (stories) as background to historic heiau (temples) of Oʻahu). See also *Six Sacred Sites of Hawaii*, SMITHSONIAN.COM (Nov. 16, 2011), <http://www.smithsonianmag.com/travel/six-sacred-sites-of-hawaii-272451/> (noting that all the featured sacred sites are situated within national parks and under the stewardship of the National Parks Service).

308. Essentially, meaning from “Elder to Child.” In generations past, it was a traditional practice to hānai (loosely translated as give for “adoption”) your child to their Kūpunakāne and Kūpunawahine (Grandfather and Grandmother), so they could be raised in ʻolelo Hawaiʻi (speaking Hawaiian) and other common practices of the ʻOhana (family).

309. One example is MAʻO Organic Farms, located in Waiʻanae Valley on the Island of Oʻahu. The company states its purpose is “to restore our ancestral abundance—to empower our community, especially our youth, with catalytic educational and entrepreneurial opportunities that is rooted in our ancestral knowledge and that will nurture a sustainable, resilient and just 21st century Hawaiʻi.” *Our Values*, MAʻO ORGANIC FARMS, http://www.maoorganicfarms.org/our_values (last visited Oct. 23, 2018).

memorandum-opinion issued in 2014.³¹⁰ If the points in her argument were laid out, perhaps the Native Hawaiian Nation would prevail; thus, said points are presented here and briefly assessed.

First, was there a sufficient showing in the Hawaiian Nation's history at or before 1934 proving it was under United States federal jurisdiction? Yes. For example, the HHCA legislation enacted to benefit Native Hawaiians passed both houses of Congress in 1921, approximately thirteen years before the Indian Reorganization Act of 1934, and is still in effect to this day.³¹¹ Second, did the nation's jurisdictional status remain intact in 1934? As stated, the HHCA has been in effect from 1921 until today. Therefore, it could be surmised that the jurisdictional status of the Hawaiian people remained intact in 1934 and continues today. It should also be cited that substantial provisions were written into the Hawai'i State Constitution at the time of admission to the United States in 1959.³¹² Also, broad-sweeping amendments proposed at the 1978 Constitutional Convention proved to be of great benefit to Native Hawaiians, duly voted on by Hawai'i state citizens, ratified, and added to the Constitution.³¹³

The consistent deference and provisions reserved for Native Hawaiians should persuade the DOI Secretary to take into trust any lands the Native Hawaiian Nation requests. Pursuant to the last part of Solicitor Tompkins' memorandum-opinion, if (when) the Native Hawaiian Nation is formally recognized through a federal government-to-government relationship with the United States, whether it be 2019 or 2020, then the DOI Secretary should approve the request for trusteeship of the 'Āina.

310. The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act, Op. Solicitor Dep't Interior, No. M-37029 (Mar. 12, 2014), <https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37029.pdf>.

311. See generally NATIVE HAWAIIAN LAW TREATISE, *supra* note 1, at 30-31; VAN DYKE, *supra* note 1, at 237-53.

312. See Admission Act of Mar. 18, 1959, Pub. L. No. 86-3, 73 Stat. 4 (1959) (specifying § 5(f) as addressing the "betterment of the conditions of native Hawaiians"). At the time, however, moneys were allocated only to public schools and not to specifically benefit Native Hawaiians. See VAN DYKE, *supra* note 1, at 259.

313. See, e.g., HAWAI'I CONST. art. XII, § 5 (creating the Office of Hawaiian Affairs); *id.* art. XII, § 6 (providing a pro rata share of moneys from the Public Lands to be given to the OHA and used explicitly for the betterment of Native Hawaiians); *id.* art. XII, § 1 (clarifying funding for the DHHL); *id.* art. XV, § 4 (stating that Hawaiian should be one of the official languages of the state, along with English); see also VAN DYKE, *supra* note 1, at 259.

VIII. Are These Options Realistic?

In whatever way the position of the Native Hawaiian Nation is viewed, the entity can set legal precedent if: 1) a sympathetic United States Supreme Court is in place; 2) the history and plight of the Native Hawaiian people are explained to and understood by United States citizens and the media; and 3) the nation can argue thoughtfully and persuasively as to where the Native Hawaiian people have been, how far they have come, and the overwhelming need to access land to thrive once more. To that end, the latter two components are likely the most realistic to achieve. It is the former that provides more than pause to the nation, considering the recent confirmation of Justice Brett M. Kavanaugh to the highest bench in the country.

Conservatives view Justice Kavanaugh as “an originalist in the mold of Justice Clarence Thomas and former Justice Antonin Scalia.”³¹⁴ His appointment to the Court will likely solidify the 5-4 conservative majority.³¹⁵ Nevertheless, at age fifty-three it is likely Justice Kavanaugh will serve the citizens of the United States for many years to come. Therefore, even if the Native Hawaiian Nation were somehow able to outlast the current political administration in the White House, it would have to rely on the other two points to further the cause and fight for necessary recognition, restitution, and reparations. This could be accomplished through greater publicity as to the plight of Native Hawaiians through social media outlets like Facebook, Twitter, and Instagram. This can also be done through initiatives that educate the entire lāhui regardless of age, background, or circumstance.³¹⁶

In a sense, the Native Hawaiian Nation would then have to maximize and harness any emotional output from the courts due to the volatility of the

314. See Matthew Nussbaum, *Brett Kavanaugh: Who Is He? Bio, Facts, Background and Political Views*, POLITICO (July 9, 2018), <https://www.politico.com/story/2018/07/09/brett-kavanaugh-who-is-he-bio-facts-background-and-political-views-703346>.

315. See Robert Costa, Robert Barnes & Felicia Sonmez, *Brett Kavanaugh Is Nominated by Trump to Succeed Supreme Court Justice Anthony M. Kennedy*, WASH. POST (July 9, 2018), https://www.washingtonpost.com/politics/trump-supreme-court-pick/2018/07/09/afa8ae36-83a0-11e8-8f6c-46cb43e3f306_story.html?noredirect=on&utm_term=.350a3d343dc2.

316. The Native Hawaiian Nation will likely be comprised of a true cross-section of presently-known Hawai'i, in addition to those kanaka maoli (Hawaiians) that currently reside on the continent and across the globe. With this in mind, it is imperative that the lāhui come together, accepting each individual as they are, and recognizing how they will be able to contribute to, and receive from, the collective Native Hawaiian Nation.

current political landscape and the uncertainty of the coming years as the Native Hawaiian governing entity mobilizes. Perhaps a “wait-and-see” attitude could be employed for the remaining two years of the current administration, but it would be during this period that the lāhui should ramp up mobilization efforts. By these means, when the time is ripe to request a full and complete government-to-government relationship from the DOI Secretary, and the relationship is subsequently established, the Native Hawaiian Nation will be wholly prepared and ready.

As Professor Van Dyke wrote, “The Crown Lands do appear to be appropriate to serve as the core land base for the restored Native Hawaiian nation, along with the Hawaiian Home Lands, Kaho‘olawe [Island], and perhaps other lands as well, including possibly some now held in the Ali‘i Trusts.”³¹⁷ He continues, “Although their ultimate destiny must be decided by the Native Hawaiian People, these lands have a unique linkage to the history, culture, and spiritual values of Native Hawaiians and would be a logical choice to form the core of the land base needed by the sovereign Native Hawaiian Nation.”³¹⁸

Though Professor Van Dyke did not specifically analyze the instant position of the Native Hawaiian Nation applied within the federal DOI Rule, and juxtaposed through the lens of a federal Indian law framework, perhaps the natural assumption to make is that the State of Hawai‘i and the nation could share these lands. However, while it is unlikely that the State of Hawai‘i would willingly part with the roughly 1.4 million acres of land that make up the Public Land Trust, it is the contention of this Article that these lands, or some portion to start, must immediately transfer to the nation as its land base.³¹⁹ Coupled with the groundswell movement and inspiration

317. See VAN DYKE, *supra* note 1, at 382.

318. *Id.* at 383. Van Dyke cites U.S. District Court Judge Samuel Pailthorpe King, who endorsed this arguably progressive view in 1994:

In the course of rewriting history and correcting past wrongs, as a start it would not be unjust for the state of Hawai‘i to transfer whatever is left of the crown lands, one half to the trustees of the Bernice Pauahi Bishop Estate for the education of the children of Hawai‘i, and one-half to the Queen’s Hospital for its health programs. Settlement for the rest of the crown lands could follow in due course. *Or better yet, all of these lands could be transferred to the Office of Hawaiian Affairs to form the beginnings of a land base for the benefit of all Hawaiians.*

Id. at n. 26 (quoting Samuel P. King, *History of Crown Lands May Determine Their Future*, HONOLULU STAR-BULL., Dec. 23, 1994, at A-13).

319. While Professor Van Dyke felt that Hawaiian Home Lands, the Island of Kaho‘olawe, and some of the lands held in Ali‘i Trusts should be accessed by the Native

of the Native Hawaiian Nation, anything could happen in light of mounting battles being fought by other indigenous nations of the world committed to regaining their indigenous rights, with unfettered access to, and protection of, their ancestral homelands.³²⁰

Conclusion

Professor Melody Kapilialoha MacKenzie ends the first chapter of her *Native Hawaiian Law Treatise* with a short paragraph written by esteemed Native Hawaiian scholar Jonathan Kay Kamakawiwo‘ole Osorio, who eloquently wrote of the Native Hawaiian community’s “continued assertion of cultural and political sovereignty”:³²¹

In the end, nationhood is identity. A nation’s constitutions, laws, and elections are never more than symbols of the will of the people to think, worship, and behave as a people. We have lived long enough with the laws and rituals of others and, despite that, have survived. What might we do in a society where custom, law, and leadership reflect our own desires and aspirations? What old and new forms might we rediscover, what meaningful relationships might we recreate between humans and the earth, between the world of nature and the world of gods . . . ?³²²

Hawaiian people, this author would absolutely not consider taking any lands from the Ali‘i Trusts. However, most of the lands in the Public Land Trust are “ceded” lands, and should be up for transfer to the Nation.

320. See, e.g., Colleen Curry, *Fighting for Their Lives, Indigenous People Rise Up Around the World*, GLOBAL CITIZEN (Mar. 10, 2017), <https://www.globalcitizen.org/en/content/fighting-for-their-lives-indigenous-people-rise-up/> (detailing the indigenous women’s fight for ancestral homelands, access to water, food, and justice around the globe). Kū Kia‘i Mauna Kea (Protectors of Mauna Kea), Dakota Access Pipeline (Water Protectors of the Standing Rock Sioux Tribe), and other grassroots initiatives are fighting for indigenous lands both within the court system and outside of it, many organizing through social media and word-of-mouth initiatives. See generally MAUNA KEA, <http://www.mauna-a-wakea.info> (last visited Jan. 8, 2019) (relaying information to individuals interested about the struggle of kanaka maoli against building of the Thirty-Meter Telescope, and how they might lend support); STAND WITH STANDING ROCK, <http://standwithstandingrock.net/> (last visited Jan. 2, 2019) (educating visitors to the website about the ongoing fight against the Dakota Access Pipeline).

321. NATIVE HAWAIIAN LAW TREATISE, *supra* note 1, at 46.

322. *Id.* (citing JONATHAN KAY KAMAKAWIWO‘OLE OSORIO, *DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887*, at 260 (2002)).

As aboriginal peoples of the Hawaiian Archipelago, acknowledged from time immemorial to time everlasting, Native Hawaiians will continue the journey of exercising their individual and collective cultural identity, self-determination, and self-governance by the will of the reestablished Native Hawaiian Nation. Indeed, Professor Osorio's words may well be prophetic as Native Hawaiians continue to stand on the shoulders of their ancestors—always looking forward, with deep and abiding appreciation for those who came before.³²³

323. This Article is lovingly dedicated to my parents: my mother, Marjorie Tam Opulauoho, who passed away on August 31, 2014, and my father, Leslie Aukai Opulauoho, who passed away on September 26, 2018. A guiding light and inspiration to many, they truly embodied the aspirational values of hard work, dedication, and perseverance. Their physical presence is greatly missed every day. Me ka mahalo nui . . . a hui hou e malama pono.