The Hawaiian Usage Exception to the Common Law: An Inoculation Against the Effects of Western Influence

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I. INTRODUCTION .......................................................... 320

II. PLACING RACIAL DISCRIMINATION CLAIMS IN CONTEXT: THE “IMPRactical AND ANOMALous” APPLICATION OF EQUAL PROTECTION THEORY ........................................... 328

III. PAST AND FUTURE CHALLENGES TO KAMEHAMEHA SCHOOLS’ ADMISSIONS POLICY PREFERENCE FOR NATIVE HAWAIIANS ................................................................. 331

IV. BACK TO THE FUTURE: THE CONTINUING RELEVANCE OF NATIVE HAWAIIAN CUSTOM AND USAGE ................................................................. 335

A. Judicial Recognition of the Hawaiian Custom and Usage of Adoptions, Including the Distinct Rights of Keiki Hānai and Keiki Ho‘okama ................................................................. 336

B. Case-By-Case Analysis of Hawaiian Usage: The Tortured Resolution of Kaaoaopa’s Claim to Her Adoptive Mother’s Estate ................................................. 339

C. The Passage of Time and Evolving Language Practices Have Not Diminished the Continuing Relevance of Hawaiian Usage in This State ......................................................... 343

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‘A‘ole au he Hawai‘i a ‘a‘ole ho‘i i pa‘a pono ia‘u nā ‘ike o nā kūpuna Hawai‘i. No laila, e kala mai inā ua kome mai kahi hemahema a kūhihewa paha (e pili ana no ka ‘ike o nā Hawai‘i) i loko o kēia palapala. Inā he wahi hemahema a ‘ō‘ili mai ma loko o neiia palapala, na‘u ho‘okahi nō ia. A inā na‘e he mana‘o na‘auao, mahalo nui i ka‘u kumu, iā ‘Anākē ‘Olga Kalama i hala aku nei i ke ala ho‘i ‘ole mai, lāua ho‘i me ku‘u makuakāne, Michael L. Forman. Na lāua mai nō ia na‘auao.

‘O ka po‘e i kama‘āina ‘ole i ku‘u makuakāne, e mana‘o ho‘ohalahala wale mai auane‘i he Haole wale nō ia ehana nei ma ke kulanui. He Haole kūpono nō na‘e ia i ko‘u mana‘o, a ma ona lā e ‘ike ‘ia ai nā ‘ao‘ao maika‘i o ka po‘e ‘Amelika. He mau hana kāna i hana ai no ka pono o ka po‘e Hawai‘i e ia‘a me ka ho‘opoa‘a ‘ana i ka ‘Ōlelo Hawai‘i i mea e hiki ai iā ia ke noho i Luna Ho‘omalu no ke kōmike nāna i ‘āpono aku nei i ka papa nui a Laiana Wong i kākau ai no kona palapala lae‘ula ma ka māhele Kālai‘olelo o ke Kulanui o Hawai‘i. ‘O ia iho ka papa lae‘ula mua loa i kākau ‘ia ma ka ‘Ōlelo Hawai‘i wale nō a i kapa ‘ia “Kuhi aku, kuhi mai, kuhi hewa e: He mau loina kuhikuhi ‘ākena no ka ‘Ōlelo Hawai‘i” (‘Apelila 2006).
V. MALAMA PONO: HAWAIIAN CUSTOM AND USAGE AS
FURTHER CONTEXT TO SUPPORT PAUAHI'S INTENT .......... 345
A. The Reemergence of Core Values Obscured by the
Illusion of Progress ............................................. 347
B. Sacred Knowledge: Honoring the Kamehameha Line
for its Efforts to Preserve and Perpetuate Hawaiian
Culture ........................................................................... 349
VI. CONCLUSION .................................................. 353

I. INTRODUCTION

On behalf of the unanimous United States Supreme Court in Damon v. Territory of Hawaii, the esteemed Justice Oliver Wendell Holmes wrote the following statement about a claim based on Hawaiian custom and usage:

A right of this sort is somewhat different from those familiar to the common law, but it seems to be well known to Hawaii, and, if it is established, . . . [t]he plaintiff's claim is not to be approached as if it were something anomalous or monstrous, difficult to conceive and more difficult to admit.¹

In Branca v. Makuakane, the Supreme Court of the Territory of Hawaii similarly acknowledged that:

The New Englanders who early settled here did not come as a colony or take possession of these islands or bring their body of laws with them, though they exercised a potent influence upon the growth of law and government. The ancient laws of the Hawaiians were gradually displaced, modified and added to. The common law was not formally adopted until 1893 [sic] and then subject to judicial precedents and Hawaiian national usage.²

¹ 194 U.S. 154, 158 (1904) (reversing verdict for defendant and recognizing vested right to fishery abutting private property in action to quiet title brought within two year period required under provision of the Organic Act that confers exclusive fishing rights subject to vested rights); see also Carter v. Territory of Hawaii, 200 U.S. 255 (1906) (repeating the holding of Damon v. Territory of Hawaii, notwithstanding absence of any description of the fishery in royal land patent covering the abutting land).

² 13 Haw. 499, 504-05 (1901) (emphasis added) (vacating judgment for the defendants in a quiet title action concerning interpretation of a 1886 Hawaiian language deed, based on conclusion that the deed was clearly intended to convey fee simple title, and despite technical common law requirement to use the word "heirs" in order to accomplish such intent); see also O'Brien v. Walker, 35 Haw. 104, 131 n.18 (1939); Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co., 15 Haw. 675, 680-81 (1904); In re Guardianship of Parker, 14 Haw. 347, 350 (1902); Mossman v. Hawaiian Gov't, 10 Haw. 421, 434 (1896); In re Boundaries of Pulehuu, 4 Haw. 239, 241 (1879); Peck v. Bailey, 8 Haw. 658, 661 (1867); Keelikolani v. Robinson, 2 Haw. 514, 515-17, 518-20 (1862).
Although the Kingdom of Hawaii legislature actually adopted the statute referenced by the *Branca* court on November 25, 1892,\(^3\) history reveals that these islands were "governed until the year 1838, without other system than usage, and with a few trifling exceptions, without legal enactments."\(^4\)

The Kingdom of Hawaii subsequently preserved Hawaiian usage "in conjunction with the transition to a new system of land tenure,"\(^5\) as a "kind of vaccine" or inoculation against the catastrophic consequences of likely colonization.\(^6\) Accordingly, Hawaiian usage remained an important element of society in these islands "throughout the kingdom's legal history,"\(^7\) under the Republic of Hawaii,\(^8\) under the Territory of Hawaii (following the annexation of these islands to the United States in 1898),\(^9\) and continuing after formal admission into the Union in 1959 of the State of Hawai‘i.\(^{10}\)

The Hawai‘i Supreme Court has repeatedly recognized the ongoing applicability of Hawaiian usage in this jurisdiction.\(^{11}\) Moreover:

\(^3\) Pub. Access Shoreline Haw. v. Haw. County Planning Comm’n (*PASH/Kohanaiki*), 79 Hawai‘i 425, 447 & n.39, 903 P.2d 1246, 1268 & n.39 (1995); *see also* id. at 437 n.21, 903 P.2d at 1258 n.2 (citing Laws of Her Majesty Liliuokalani, Queen of the Hawaiian Islands, 1892, ch. LVII, § 5, 91 (King. Haw.)).

\(^4\) *Id.* at 437 n.21, 903 P.2d at 1258 n.21 (quoting 1 Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands 3 (1845-46)).

\(^5\) *Id.* at 446, 903 P.2d at 1267; *see also* id. at 437 n.21, 903 P.2d at 1258 n.21 (citing the Act of September 7, 1847, ch. I, § IV, 2 Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands (1847)); *id.* at 445 n.33, 903 P.2d at 1266 n.33 (citing the Act of April 27, 1846, pt. I, ch. VII, art. IV, § 7, reprinted in 2 Revised Laws of Hawaii 2123 (1925)).


\(^7\) *PASH/Kohanaiki*, 79 Hawai‘i at 446, 903 P.2d at 1267; *see also* id. at 437 n.21, 903 P.2d at 1258 n.21 (citing *The Civil Code of the Hawaiian Islands*, ch. III, §§ 14 & 823, at 7, 195 (1859)); *id.* at 449, 903 P.2d at 1270 (citing section 83 of the Organic Act, the Act of April 30, 1900, c. 339, 31 Stat. 141, 157, reprinted in 1 HAW. REV. STAT. 36, 74 (1985)).

\(^8\) *See, e.g.*, Mossman v. Hawaiian Gov’t, 10 Haw. 421, 434 (1896).

\(^9\) *PASH/Kohanaiki*, 79 Hawai‘i at 446, 903 P.2d at 1267. Although the Territorial legislature eventually deleted the term “national” from “Hawaiian national usage” in 1903, it nevertheless continued to recognize this long-standing, historical exception to the common law. *See* O’Brien v. Walker, 35 Haw. 104, 131 n.18 (1939).


\(^11\) *See* Ka Pa‘akai O Ka ‘Aina v. Land Use Comm’n, 94 Hawai‘i 31, 44, 48-49, 7 P.3d 1068, 1081-82, 1086-87 (2000); *In re* Water Use Permit Applications (*Waiāhole*), 94 Hawai‘i 97, 130, 135-37, 9 P.3d 409, 442, 447-49 (2000); *PASH/Kohanaiki*, 79 Hawai‘i at 438-47, 903 P.2d at
It is clear from the historical events that led to statehood that protecting the special rights and claims of the Native Hawaiian People was an integral part of the statehood package and was an essential underpinning for the support that the Native Hawaiians gave to statehood.

In other words, Hawai‘i would not have become a state if the people of Hawai‘i had not agreed by vote to the requirement that the revenues from the Ceded Lands be used, in part, for "the betterment of the conditions of native Hawaiians."

... It is significant that Congress reviewed this language [i.e., drafts of earlier statehood bills accepting any conditions of trust that Congress might put on the Public Lands transferred to the State of Hawai‘i] (and the rest of the 1950 Constitution, which also accepted responsibility for administering the Hawaiian Homes Commission Act, 1920) and stated explicitly in Section 1 of the 1959 Admission Act that Hawai‘i’s Constitution "is hereby found to be republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence, and is hereby accepted, ratified, and confirmed."12

The express reference to "the betterment of the conditions of native Hawaiians" appears in Section 5(f) of the Admission Act.13 Upon admission


It cannot be doubted, therefore, that the State and the Federal Government entered into a bilateral compact regarding the revenues from these lands and that an essential part of that compact was that the State would transfer part of the revenues from these lands to the Native Hawaiian people in order to resolve, in part, the claims that Native Hawaiians have regarding these lands. Congress required the State and its people to agree to use lands and revenues for the Native Hawaiian People because of its recognition of the claims of the Native Hawaiian people and the need to make progress in resolving these claims.

Id. at 305; see also Eric Steven O’Malley, Irreconcilable Rights and the Question of Hawaiian Statehood, 89 Geo. L.J. 501, 535 (2001) ("If OHA violates the Fourteenth Amendment’s Equal Protection Clause, does not the state constitution that led to its creation also violate Equal Protection?").

13 Admission Act, § 5(f). In Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999), the Court abrogated the “equal footing” aspect of its prior decision in Ward v. Race Horse, 163 U.S. 504 (1896), but reaffirmed the opinion to the extent it called for an inquiry into whether Congress intended for the prior rights of indigenous peoples to survive statehood. 526 U.S. at 176-85, 188-200, 201-02, 206-08 (distinguishing the Minnesota Admission Act’s silence with respect to Indian treaty rights based upon close examination of the historical context). Compare Mille Lacs Band of Chippewa Indians, 526 U.S. 172, with Race Horse, 163 U.S. at
of the State of Hawai‘i into the Union, the United States granted title to approximately 1.8 million acres that make up the “Ceded Lands Trust.” These lands are the subject of claims that both the federal and state governments recognize have not been relinquished by native Hawaiians.

Thus, important differences in Hawaii’s law and historical developments provide a crucial context for analyzing any claims involving the unique status of the Native Hawaiian people. For example, the relatively successful incorporation of diverse racial groups into the Kingdom of Hawaii’s 505 (observing that Wyoming’s admission act “contains no exception or reservation in favor of or for the benefit of Indians”); see also Race Horse, 163 U.S. at 514 (concluding that prior treaty rights were intended to be extinguished upon Wyoming’s admission to the Union). Nevertheless, in Race Horse, the Court acknowledged that:

Congress, during the existence of the Territory, had full authority in the exercise of its treaty making power to charge the Territory, or the land therein, with such contractual burdens as were deemed best, and that when they were imposed on a Territory it would be also within the power of Congress to continue them in the State, on its admission into the Union. Here the enabling act not only contains no expression of the intention of Congress to continue the burdens in question in the State, but, on the contrary, its intention not to do so is conveyed by the express terms of the act of admission.

Id. at 515 (emphasis added). The Hawai‘i Admission Act is clearly distinguishable.

Admission Act, §§ 5(b)-5(e); see also HAW. CONST. art. XVI, § 7 (“Any trust provisions which the Congress shall impose, upon the admission of this State, in respect of lands patented to the State by the United States or the proceeds and income therefrom, shall be complied with by appropriate legislation. Such legislation shall not diminish or limit the benefits of native Hawaiians under Section 4 of Article XII.”); id., art. XII, § 4 (providing that the public lands granted to the State under section 5(b) of the Admission Act “shall be held by the State as a public trust for native Hawaiians and the general public”).


See HCDCH, 117 Hawai‘i at 182-83, 177 P.3d at 890-91. The Hawai‘i Supreme Court held that the State of Hawai‘i has a fiduciary duty as trustee to “preserve the corpus of the public lands trust, specifically, the ceded lands, until such time as the unrelinquished claims of the native Hawaiians have been resolved.” Id. at 183, 177 P.3d at 893; see also id. at 187-89, 192, 177 P.3d at 897-99, 902. During deliberations concerning the proposed admission of Hawai‘i into the Union, Delegate Joseph R. Farrington (Hawaii) explained that Native Hawaiians “have something of a prior consideration as to the use of the receipts of the land,” and United States Senator Guy Cordon (Oregon) expressed his agreement that “the Hawaiians have not been wholly justly dealt with here . . . those lands are in no sense public lands as that term is understood in the United States.” VAN DYKE, supra note 12, at 304 n.163 (quoting HEARINGS ON H.R. 49, S. 156, AND S. 1782 BEFORE THE S. COMM. ON INTERIOR AND INSULAR AFFAIRS, 81ST CONG., 2D SESS. 354 (1950) (noting the legislative intent “to provide revenues for two separable beneficiaries,” i.e., the general public and Native Hawaiians)).
multicultural society, at least until the so-called "Bayonet Constitution of 1887," contrasts starkly with the treatment of minorities under the Republic of Hawai‘i and in the United States as a whole. These facts suggest a

17 SAMUEL M. KAMAKAU, RULING CHIEFS OF HAWAI‘I 411-12 (1991) ("The Hawaiian people welcome the stranger freely; rich and poor, high and low give what they can. The strangers call this love ignorance and think it good for nothing. The love upon which they depend is . . . based upon bargaining, good for nothing but rubbish blown upon the wind."); see also id. at 101 (praising haole efforts at establishing a democratic government); JONATHAN KAY KAMAKAWIWO‘OLE OSORIO, DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887, at 93 (2002) (describing the normalization of government service "as a bilingual, multiethnic activity into which Hawaiians sought to incorporate foreigners as well as their ideas"). A legislature that included no foreign representatives adopted denizen laws granting rights of citizenship to aliens, and Hawaiians repeatedly voted for non-Hawaiians based on their individual qualities. OSORIO, supra, at 63, 65, 68, 70, 73; see also KINGDOM OF HAWAI‘I CONST., art. 78 (1852) (extending suffrage rights to all male subjects over twenty years of age, "whether native or naturalized, and every denizen of the Kingdom" who paid taxes and resided in the Kingdom for one year immediately preceding the election) (emphasis added).

Although the 1864 Constitution removed the reference to "equal" rights under Article 1 of the 1852 Constitution, King Lota Kapu‘iwa (Kamehameha V) responded to Reverend J. Porter Green’s contention that reinstatement of this language would be necessary to "safeguard against the encroachments of the white against the native race," by asserting that "[t]he laws and not this amendment will protect the native race against the white. . . . and as the words convey no political rights, they are useless." OSORIO, supra, at 132-33. The changes reflected in the 1864 constitution made political power an issue of class, not race. Id. at 144; KINGDOM OF HAWAI‘I CONST., art. 62 (1864) (inserting property and literacy requirements for voting). Notwithstanding the apparent discriminatory character of such requirements from a modern perspective, it is important to remember that the United States Congress did not definitively prohibit voting qualifications based on literacy and property until the Voting Rights Act of 1965. See South Carolina v. Katzenbach, 383 U.S. 301 (1966).

18 The first time that democratic rights were determined by race in any Hawaiian constitution occurred when a group of predominantly white subjects (along with "a few members of part Hawaiian ancestry" with no identifiable Hawaiian names) forced the so-called Bayonet Constitution upon King Kālākaua in an 1887 coup d'etat. OSORIO, supra note 17, at 237, 244 (quoting 3 RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM 348 (1967)). Asian citizens of the Kingdom were subsequently disenfranchised as a result of this bloodless revolution. Id. at 243; see also KINGDOM OF HAWAI‘I CONST., art. 59 (1887) (limiting the franchise to Hawaiian, European and American males over twenty years of age, who owned at least $3000 worth of property or earned at least $600 the previous year, paid their taxes, resided in the Kingdom for at least three years, and were able to read either "Hawaiian, English or some other European language"). But see OSORIO, supra note 17, at 143 (stating that "it was race that determined political legitimacy"); id. at 144 ("Native voters and representatives began to insist that the real struggle for the nation was defined by race."). The overthrow of the kingdom ostensibly resulted from Queen Lili‘uokalani’s intention to promulgate an amended constitution limiting the vote to Hawaiian-born or naturalized citizens. Melody K. MacKenzie, Historical Background, in, NATIVE HAWAIIAN RIGHTS HANDBOOK, supra note 15, at 11.

19 The constitutional convention convened by the Provisional Government that led to the establishment of the Republic included “voting qualifications so stringent that few Hawaiians and no Asians could vote.” Chris K. Iijima, Race Over Rice: Binary Analytical Boxes and a
further basis for understanding Native Hawaiians’ ongoing claims for justice, which stem “from the racial and cultural subordination inherent in their colonization and the longstanding assault on their sovereignty.”

Native Hawaiians may indeed constitute a “discrete and insular minority” consistent with the doctrine discussed in greater detail by other symposium participants. However, in light of: (1) past, unsuccessful attempts to invoke the doctrine here in Hawai‘i; (2) similar failures with regard to at least one.


20 Ratification of the Thirteenth Amendment in 1865 represented progress away from the embarrassingly explicit adverse treatment of slaves in the United States constitution; however, the broken promises of the First and Second Reconstructions reveal that legal acceptance of discrimination continues to represent a substantial barrier to equal opportunity in America. Eric K. Yamamoto et al., Dismantling Civil Rights: Multiracial Resistance and Reconstruction, 31 CUMB. L. REV. 523, 531-54 (2001); see also Angela P. Harris, Equality Trouble: Sameness and Difference in Twentieth Century Race Law, 88 CAL. L. REV. 1923, 1943-44 (2000) (discussing the Chinese Exclusion Act of 1882); id. at 1947 (describing the federal naturalization act of 1790’s limitation to “free white persons”); see also Ozawa v. United States, 260 U.S. 178, 195 (1922) (denying citizenship petition filed by individual of Japanese descent residing in the Territory of Hawaii); United States v. Thind, 261 U.S. 204 (1923) (concluding that high-caste Hindu of full Indian blood was ineligible for naturalization). To add insult to injury, the United States Supreme Court repeatedly upheld laws prohibiting “aliens ineligible for citizenship” from owning property. See generally Keith Aoki, No Right To Own?: The Early Twentieth-Century “Alien Land Laws” as a Prelude to Internment, 40 B.C. L. REV. 37, 37-38 & nn.4-5 (1998); id. at 56-71 (explicating the lessons of the alien land laws).

Iijima, supra note 19, at 97; see also, Susan K. Serrano et al., Restorative Justice For Hawai‘i’s First People: Selected Amicus Curiae Briefs In Doe v. Kamehameha Schools, 14 ASIAN AM. L.J. 205,210-11 (2007) (discussing Amicus Brief of the Japanese American Citizens League of Hawai‘i-Honolulu Chapter, Centro Legal de la Raza, and the Equal Justice Society In Support Of Defendants-Appellees’ Petition For Rehearing En Banc, arguing that the court’s inquiry must incorporate the context of colonization and its resulting “devastation” of the native people).


23 United States District Court Judge Harold Fong decried the “absurdity” of claims by a group of property owners, including the Bishop Estate, that the group constituted “‘discrete and insular minorities’ who deserve special judicial protection because they lack access to the political system.” Small Landowners of Oahu v. City & County of Honolulu, 832 F. Supp. 1404, 1409 (D. Haw. 1993) (upholding city ordinance providing for lease-to-fee conversion of condominium units). Judge Fong explained that the “power of the Bishop Estate in Hawaii belies any claim that it lacks access to the political system.” Id. (emphasis added).

In addition, United States District Judge David Alan Ezra cited Carolene Products to support his ruling against a class of visually impaired persons who use guide dogs seeking exemption from a 120-day quarantine requirement, based on the state’s compelling interest in remaining rabies free. Crowder v. Kitagawa, 842 F. Supp. 1257, 1263 (D. Haw. 1993), rev’d and remanded, 81 F.3d 1480 (9th Cir. 1996) (instructing the trial court to determine whether
Indian tribe;24 (3) questions regarding the durability of the protections provided under this doctrine;25 and (4) perceptions concerning shifts in judicial politics,26 this article focuses instead upon the Hawaiian usage exception to the adoption of English and American common law.27

While the argument for special consideration for laws protecting indigenous cultures . . . is certainly plausible, it is by no means a certain winner. It would

plaintiffs' proposed modifications were reasonable under the Americans with Disabilities Act, and declining to address their constitutional claims).


25 See Gilman, supra note 22, at 240-41 (“[O]nce a group is protected, it remains a protected class until the courts are willing to say that it is no longer suspect.”). Compare Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”), with The Civil Rights Cases, 109 U.S. 3, 25 (1883) (invalidating 1875 Civil Rights Act a mere eight years after its enactment). In The Civil Rights Cases, the United States Supreme Court stated as follows:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.

Id. at 25.


27 HAW. REV. STAT. § 1-1 (1993); see also supra notes 1-11 and accompanying text. In PASH/Kohanaiki, the Hawai'i Supreme Court applied Hawaiian custom and usage to “conclude that the western concept of exclusivity is not universally applicable in Hawai'i.” 79 Hawai'i 425, 438-47, 903 P.2d 1246, 1259-68 (1995). Predictably strong reactions to this decision prompted restrictive responses by the State legislature and at least one county planning agency. Kapua D. Sproat, Comment, The Backlash Against PASH: Legislative Attempts to Restrict Native Hawaiian Rights, 20 U. HAw. L. REv. 321, 350 n.220, 369 (1998); David M. Forman & Stephen M. Knight, Native Hawaiian Cultural Practices Under Threat, 1 Hawai'i B.J. 1, 2-5 (1998). The court subsequently issued unpublished summary disposition orders in July 2008 that affirmed trespass convictions in two cases involving reams of evidence to support the defendants' respective claims based on Hawaiian usage, as introduced by highly experienced legal practitioner (and former Assistant as well as Acting Federal Public Defender) Hayden Aluli. State v. Fergerstrom, 88 Hawai'i 371, 966 P.2d 1097 (1998); State v. Keliikoa, 88 Hawai'i 371, 966 P.2d 1097 (1998). Approximately four months later, in State v. Hanapi, 89 Hawai'i 177, 970 P.2d 485 (1998), the court affirmed an unrepresented defendant's trespass conviction despite repeated interruptions by the trial court judge sustaining the prosecutor's objections to attempts by the defendant to introduce evidence supporting his claim of Hawaiian usage. The court's unexplained decision to publish an opinion under the latter circumstances, but not the former, raises the question whether expectations regarding the potential promise of relying on Hawaiian usage claims may need to be tempered based upon the political climate. See supra note 26.
seem to me to be safer to follow the [Wabol v. Villacrusis] route, that is, to
argue that a different . . . standard is applicable . . . .

The main focus of this article is an examination of how Doe v.
Kamehameha Schools/Bernice Pauahi Bishop Estate fits into the broader
context of Native Hawaiian law, history and society. Part II sets the stage for
this inquiry by identifying the contextual nature of the racial discrimination
analysis undertaken in Wabol v. Villacrusis, and highlighting the conclusion
that the United States Constitution was not intended to enforce homogeneity.
Part III introduces the admissions policy preference for Native Hawaiians at
Kamehameha Schools, using brief remarks by Judge Ezra about "ancient
Hawaiian law" and "the law of the kingdom" as a launching point for further
discussion. A cautionary tale is then presented in Part III with respect to the
inherent complexities of asserting and analyzing Hawaiian usage claims.

Drawing initially from a decision with indirect Hollywood connections, Part
IV scrutinizes the Hawaiian custom and usage of adoption and establishes its
roots in a succinct 1871 opinion by the Supreme Court of the Kingdom of
Hawaii. After emphasizing the importance of recognizing that Hawaiian
usage allegations must be analyzed on a case-by-case basis, this part concludes
by acknowledging the continued relevance of Hawaiian usage despite the
passage of time and evolving language practices.

In Part V, the ali‘i tradition of caring and providing for others supplies the
context for exploring potential implications of the Hawaiian usage exception
for Kamehameha Schools’ admissions policy preference. Building upon the
cautionsary tale woven in Part IV, the article briefly describes educational
developments in Hawai‘i, then identifies further judicial and scholarly support
for applying the Hawaiian usage exception. With this foundation in place, the
article returns full-circle to the humanitarian principles underlying the Wabol

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28 958 F.2d 1450 (9th Cir. 1992) (rejecting Equal Protection challenge to a “racial”
restriction on alienation of land in the Commonwealth of the Northern Marianas Islands).
29 Laughlin (2005), supra note 10, at 345-46.
30 295 F. Supp. 2d 1141 (D. Haw. 2003), aff’d in part and rev’d in part, 416 F.3d 1025 (9th
Cir. 2005), rev’d in part on reconsideration, 470 F.3d 827 (9th Cir. 2006) (en banc), cert.
31 Wabol, 958 F.2d at 1458-60; see also infra notes 36-42, 46, 49-50 and accompanying
text.
32 Vicki Viotti & Mike Gordon, Kamehameha Settlement Ok’d, HONOLULU ADVERTISER,
ln20a.html. Although Judge Ezra’s remarks were apparently transcribed by the court, the
author has not been able to verify the accuracy of his reported statements.
decision, as distinguished from the (at least unconsciously)\textsuperscript{33} racist attitudes that are sometimes couched in "color-blind" rhetoric.\textsuperscript{34}

Finally, the article closes in Part VI by suggesting that some of the "hardest questions about law and social justice"\textsuperscript{35} associated with Native Hawaiian claims (as well as counterarguments raised by their opponents) may best be addressed by looking to the Hawaiian usage exception as a means for protecting cultural values and resources.

II. PLACING RACIAL DISCRIMINATION CLAIMS IN CONTEXT: THE "IMPRactical AND ANOMALOUS" APPLICATION OF EQUAL PROTECTION THEORY

The racial discrimination claim in Wabol\textsuperscript{36} failed because "[i]n the territorial context, the definition of a basic and integral freedom must narrow to incorporate the shared beliefs of diverse cultures. Thus, the asserted constitutional guarantee against discrimination in the acquisition of long-term interests in land applies only if this guarantee is fundamental in this

\textsuperscript{33} See, e.g., Charles A. Lawrence III, Forbidden Conversations: On Race, Privacy, and Community (A Continuing Conversation With John Ely on Racism and Democracy), 114 YALE L.J. 1353, 1379-81 (2005) [hereinafter Lawrence, Forbidden Conversations]; see also Charles A. Lawrence III, The Id, The Ego, and Equal Protection: Reckoning With Unconscious Racism, 39 STAN. L. REV. 317 (1987). Professor Lawrence reports that Ely agreed with his argument that unconscious racism was also likely to distort legislative judgment upon reading an early draft of the article Lawrence eventually published in 1987. Lawrence, Forbidden Conversations, supra, at 1380 n.51.

\textsuperscript{34} See, e.g., Danielle Conway-Jones, The Perpetuation of Privilege and Anti-Affirmative Action Sentiment in Rice v. Cayetano, 3 ASIAN-PAC. L. & POL'Y J. 371, 372 n.3 (2002) ("Color-blindness is a convenient tool of the privileged. It lies dormant for some issues and alive for others."); Sanford Levinson, Why the Canon Should Be Expanded to Include the Insular Cases and the Saga of American Expansionism, 17 CONST. COMMENT. 241, 263 (2000) (calling for greater attention to the "sometimes unpleasant" lessons that can be learned by examining decisions that "serve as an important corrective against some of the more cheerleading views of constitutional history (and the Supreme Court) as necessarily progressive in its thrust"); see also Chris K. Iijima, Swimming from the Island of the Colorblind: Deserting an Ill-Conceived Constitutional Metaphor, 17 LOY. L.A. ENT. L. REV. 583, 590 n.43, 591 nn.52-54 (2004).


\textsuperscript{36} 958 F.2d 1450 (9th Cir. 1992). Under a Trusteeship Agreement entered into with the United Nations in 1947, the United States obligated itself to promote independence and self-government for the Northern Marianas islands' inhabitants, to protect against the loss of lands and resources, and to "protect the rights and fundamental freedoms of all elements of the population without discrimination." Id. at 1458 (emphasis added) (quoting Trusteeship Agreement for the Former Japanese Mandated Islands, art. VI, §§ 2-3, July 18, 1947, 61 Stat. 3301); see also id. at 1459 n.15 (observing that the non-native lessee did not argue violation of this non-discrimination provision).
In the course of resolving this question of first impression, the Wabol court observed that extension of fundamental rights to the territories does not mean that strict scrutiny automatically applies. Rather, judicial inquiries in this area must be undertaken with due regard for the "unique social and cultural conditions and values" of the place.

Thus, in Wabol, a "solid understanding of present conditions" revealed both the scarce and precious nature of land and the vital role it played in family identity. The relevant legal history further established that the political union between the Northern Marianas Islands and the United States could not have been accomplished without the challenged policy. Similar considerations arguably apply in Hawai‘i.

Although Hawai‘i is no longer a territory, the analysis in Wabol arguably retains relevance here due to the fact that these islands were listed on the United Nations’ list of non-self governing territories (from 1946 through 1959), along with the other Pacific Island territories:

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37 Id. at 1460 (second emphasis added); see also id. (distinguishing fundamental rights necessary under "an Anglo-American regime of ordered liberty" pursuant to the Equal Protection clause, from fundamental rights under the territory clause which are "the basis of all free government" in the "international sense") (quoting Duncan v. Louisiana, 391 U.S. 145, 149-50 n.14 (1968), and Northern Mariana Islands v. Atalig, 723 F.2d 682, 690 (9th Cir. 1984)).

38 Id. at 1460 n.19 ("It is the specific right of equality that must be considered... rather than the broad general guarantee of equal protection.").

39 Id. at 1460.

40 Id. at 1461 (internal brackets omitted).

41 Id.

42 Id. (stressing further that, "the preservation of local culture and land is more than mere desideratum—it is a solemn and binding undertaking memorialized in the Trusteeship Agreement"); see also id. at 1458 (summarizing the United States' obligations as trustee). Fifteen years after the lawsuit began, the matter was still pending before the trial court as of at least 2000. Wabol v. Villacrusis, 2000 N. Mar. I. LEXIS 17 (N. Mar. I. 2000) (vacating order dismissing the lawsuit for failure to prosecute).

43 See supra notes 12-16, 21 and accompanying text.


45 See, e.g., Barnard, supra note 44, at 33-34. David Barnard argues that the United States' obligations as trustee under international law were not fulfilled by virtue of the statehood plebiscite, which was deficient for two reasons: (1) it did not provide independence as an option; and (2) it allowed the majority settler population to vote. Id.; see also Anaya, supra note 44, at 334-36.
The Bill of Rights was not intended to interfere with the performance of our international obligations. Nor was it intended to operate as a *genocide pact for diverse native cultures*. . . . Its bold purpose was to *protect minority rights, not to enforce homogeneity*.

Of particular relevance to the Kamehameha Schools, therefore, is the emerging (if not already established) principle of customary international law which recognizes that

[i]ndigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

Consistent with such rights, Professors Robert Seto (Retired Judge, United States Court of Federal Claims) and Lynne Krohm observed more specifically that Ke Ali‘i Bernice Pauahi Bishop’s deep commitment to education stems from centuries of Native Hawaiian tradition and values, which regard knowledge as sacred.

Given that the restriction on alienation of land in *Wabol* represented an admittedly “paternalistic” attempt to protect local culture and values, it would be even more “impractical and anomalous” to rely upon Equal

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49 958 F.2d at 1461.

50 *Id.* at 1461-62 (considering “the particular local setting, the practical necessities, and the possible alternatives” pursuant to Reid v. Covert, 354 U.S. 1, 75 (1957) (Harlan, J., concurring)).
Protection as a basis for invalidating the act of self-determination that is reflected in Kamehameha Schools' admission policy.  

III. PAST AND FUTURE CHALLENGES TO KAMEHAMEHA SCHOOLS’ ADMISSIONS POLICY PREFERENCE FOR NATIVE HAWAIIANS

The approximately twelve decades-old admissions policy at Kamehameha Schools provides a "preference to Hawaiians of pure or part aboriginal blood." Non-Hawaiians only rarely have been admitted to these schools, including perhaps two in 1930, numerous children of faculty members between 1946-1966, Kalani Rosell in 2002 and, most recently, Brayden Mohica-Cummings in 2003. Reminiscent of the protests that took place following the 1930 admissions decisions, the more recent actions in 2002 and 2003 also generated substantial controversy within Native Hawaiian communities.

51 See supra Part II for a short introduction to the history behind this policy. For an explanation why “Native Hawaiians” is not a racial classification, see Jon M. Van Dyke, The Political Status of the Native Hawaiian People, 17 YALE L. & POL’Y REV. 95 (1998); see also Laughlin (2005), supra note 10, at 346 n.73 (stating “[t]here is, however, no reason why the two approaches could not be used together. One could argue that the Constitution does not apply, but that if it does, the [Morton v. Mancari, 417 U.S. 535 (1974), or ‘political status’] standard should as well”).

52 Will of Bernice Pauahi Bishop (Oct. 31, 1883), available at http://www.ksbe.edu/pauahi/will.php. Pauahi’s will directed her trustees to educate orphans and other indigents, giving preference to pure or part-Hawaiians, and also gave the trustees broad powers to develop Kamehameha Schools’ admissions policy. See, e.g., Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate, 295 F. Supp. 2d 1141, 1154-57 (D. Haw. 2003), aff’d in part and rev’d in part, 416 F.3d 1025 (9th Cir. 2005), rev’d in part on reconsideration, 470 F.3d 827 (9th Cir. 2006) (en banc), cert. dismissed, ___ U.S. ___, 127 S. Ct. 2160 (2007).


54 Suyama, supra note 53; Hiller, supra note 53.


57 Viotti, supra note 53.

58 Liptak, supra note 53.

59 Adam Liptak, School Set Aside for Hawaiians Ends Exclusion to Cries of Protest, N.Y. TIMES, July 27, 2002, http://query.nytimes.com/gst/fullpage.html?res=9C06EEDF163BF934 A157540C894C8B63&sec=&spon=&pagewanted=all (quoting University of Hawai‘i Professor Haunani-Kay Trask’s observation that “the pain was so palpable you could almost
Kamehameha Schools later rescinded Mohica-Cummings' invitation after discovering misleading and inaccurate documentation about his purported Native Hawaiian ancestry—i.e., by virtue of his mother (Kalena Santos) having been adopted and raised by Melvin Cummings, who is part-Hawaiian.59 The Honorable David Alan Ezra, at that time Chief Judge of the United States District Court for the District of Hawai‘i, granted a temporary injunction ordering Kamehameha Schools to admit Mohica-Cummings.60 Four months later, the parties entered into a voluntary settlement allowing the boy to matriculate.61 In an oral ruling approving the settlement, Chief Judge Ezra reportedly stated that “ancient Hawaiian law” supports the conclusion that Brayden’s mother is Hawaiian (and, therefore, so is her son).62 Emphasizing “the law of the kingdom” as reflected in a decision by the Supreme Court for smell people’s anger”); see also Rick Daysog, Angry Ohana Grills Trustees, HONOLULU STAR BULL., July 16, 2002, at A1, available at http://starbulletin.com/2002/07/16/news/story1.html; Rick Daysog, 7,000 Call on Trustees to Alter Policy, HONOLULU STAR BULL., July 26, 2002, at B1, available at http://starbulletin.com/2002/07/26/news/story5.html; Glendon, supra note 55, at 69-70 & nn.5-7 (citing Rosemarie Bernardo, 50 Protest Ezra Ruling at Kamehameha Gate, HONOLULU STAR BULL., Aug. 21, 2003, at A1, A12).


60 Mohica-Cummings v. Kamehameha Schools/Bernice Pauahi Bishop Estate, CV NO. 03-00441 DAE-BMK (D. Haw. 2003) (unpublished Order Granting Plaintiff’s Application for Temporary Restraining Order and Preliminary Injunction). Judge Ezra concluded that the evidence did not establish that Brayden’s mother committed “subterfuge,” nor that she intended to perpetuate the schools’ reliance on inaccurate information. Id. at 10-11. He added that Kamehameha Schools should have completed its investigation more than three weeks before Plaintiff was to matriculate, and that rescinding his acceptance two days before he was to board an airplane to attend the orientation was simply too late. Id. at 11; see also id. at 13 (observing that Plaintiff had already “missed almost three weeks” of public school “and likely lost the opportunity to participate in other activities because of his reliance on his admission to [Kamehameha Schools]”); id. at 16 (stressing the “unique factual circumstances” including the “overall disruption” to Plaintiff’s “emotional, academic, and social well-being”). Among other things, Judge Ezra cited the irreparable harm Mohica-Cummings would suffer if not admitted, since he had already missed three weeks of school at Kapa’a Middle School on Kaua‘i. Id. at 7, 13, 16.

61 Mohica-Cummings v. Kamehameha Schools/Bernice Pauahi Bishop Estate, CV NO. 03-00441 DAE-BMK (Stipulation to Dismiss) (D. Haw. 2003) (unpublished Stipulation and Order for Dismissal with Prejudice). Without admitting liability, Kamehameha Schools agreed to allow Brayden to continue attending its Kapālama campus, subject to generally applicable standards of conduct, and to remove from its website all references to the facts and circumstances of his application. Id. at 5.

the Territory of Hawaii one year before statehood, the distinguished judge invoked the terms *keiki hānai* and *keiki hoʻokama* in use at the time of Pauahi’s will. Chief Judge Ezra ultimately approved the settlement, at least in part because the school’s admissions policy faced further legal review in Doe v. Kamehameha Schools.

U.S. District Judge Alan Kay issued an order upholding Kamehameha Schools’ admissions policy less than three weeks before the Mohica-Cummings settlement. Judge Kay rejected claims by an anonymous, non-Native Hawaiian minor alleging that the decision to deny him admission to Kamehameha Schools because of his race violated 42 U.S.C. section 1981 (i.e., the Civil Rights Act of 1866). A three-judge panel of the United States Court of Appeals for the Ninth Circuit later reversed that decision by a 2-to-1 vote, but an 8-to-7 vote by an en banc panel held that the schools’ admissions policy preference for students of Native Hawaiian ancestry did not violate the Civil Rights Act of 1866. While a petition for certiorari was pending before the United States Supreme Court, the parties announced that they had reached a voluntary out-of-court settlement and subsequently terminated the proceedings on May 11, 2007.

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63 Viotti & Gordon, supra note 32 (presumably relying upon In re Farrington, 42 Haw. 640 (1958))
64 Id. Judge Ezra appears to have relied upon the following excerpt from In re Farrington: “The two types of children taken by foster parents were the *keiki hanai*, who were not truly adopted but merely reared in the home, and the *keiki hoʻokama*, the latter being regarded the same as actual children of the blood.” 42 Haw. 640, 650 (1958). This sentence follows a quote from In re Estate of Nakuapa (Nakuapa I), 3 Haw. 342 (1872), which is discussed in greater detail below. See infra Part IV.B.
65 See generally Stipulation to Dismiss, CV No. 03-00441 DAE-BMK.
66 Viotti & Gordon, supra note 32 (“U.S. District Judge David Ezra ruled that the settlement is in the best interest of the plaintiff, 12-year-old Brayden Mohica-Cummings, and does not interfere with the public interest because the legal review of the schools’ admission policy will continue through an appeal of a similar case.”); see also infra notes 67-71 and accompanying text (discussing the prior decision in, and subsequent appeals of, Doe v. Kamehameha Schools).
69 Kamehameha Schools/Bernice Pauahi Bishop Estate, 416 F.3d 1025 (9th Cir. 2005), rev’d in part on reconsideration, 470 F.3d 827 (9th Cir. 2006) (en banc), cert. dismissed, ___ U.S. ____, 127 S. Ct. 2160 (2007).
70 Kamehameha Schools/Bernice Pauahi Bishop Estate, 470 F.3d 827 (9th Cir. 2006) (en banc), cert. dismissed, ___ U.S. ____, 127 S. Ct. 2160 (2007).
No less than a day after this announcement, at least one effort commenced to solicit plaintiffs for a future lawsuit challenging Kamehameha Schools' admissions policy. Honolulu attorney David Rosen explained that his opposition to the policy stemmed from "concern about the misuse of race and origin in Hawaii" including claims for "entitlements' based on events that occurred during the time of our great-grandparents or their great-grandparents." Earlier, others asserted that they were "likely to file other suits, if necessary, until the U.S. Constitution's promise of Equal Protection of the laws is once again the law of the land in Hawaii."
Chief Judge Ezra acknowledged that Brayden Mohica-Cummings' challenge to Kamehameha Schools' admission policy did not raise issues relating to his mother's link to a Hawaiian family. The judge nevertheless brought tears of joy to Brayden's mother eyes by arguing that she is Hawaiian under kingdom law. Supporters of the Kamehameha Schools had a somewhat different reaction:

"How dare he?" asked Kaho'onei Panoke, vice president of the [Hawaiian political-action group] 'Ilio'ulaokalani Coalition. "It does not mean that the child inherits your bloodline. His incorrect definition is very, very disrespectful. . . . It tells me that he (Ezra) did not live among Native Hawaiians and if he did, he did not learn well."

The group's president, Vicky Holt Takamine, added that Bishop herself was the hanai sister of Queen Lili'uokalani.

"Neither of them claimed the genealogy of the other," she said.

Statements by other Hawaiians suggested that the issue may be more complex. For example:

Kawaikapuokalani Hewett, a kumu hula and hanai father of three grown children, said he believes hanai relationship is equivalent to blood.

"If that Hawaiian family stands up and says, 'This is my hanai daughter,' that's the beginning and the end for me" Hewett said. "If Hawaiians are not honoring our traditions, then are we Hawaiians?"

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75 See, e.g., LILIKALĀ KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES 321 (1992) ("History must be more than a simple telling of a story. Our ancestors recounted histories to learn valuable lessons from wise decisions or foolish mistakes made in the past, in order that the hewa or 'wrong' might never be repeated again.").

76 Viotti & Gordon, supra note 32; see also supra notes 61-69 and accompanying text.

77 Viotti & Gordon, supra note 32.

78 Id. Dr. Kekuni Blaisdell, a prominent Hawaiian sovereignty activist and Kamehameha Schools graduate, stated that Mohica-Cummings has no hānai claim but agreed that it would have been harmful to take Mohica-Cummings out of school out after he had already been accepted. Id. Although Blaisdell's biological daughter is also a graduate, he did not seek admission for his own Japanese-born hānai son because he lacked Hawaiian ancestry. Id.

79 Id. According to Patience Namaka Bacon, Hawaiian language expert and Bishop Museum cultural specialist (also, hānai daughter of the late Hawaiian scholar Mary Kawena Pukui—to whom Kamehameha Schools said that Hawaiian ancestry is required in response to her request that Pat be admitted), the term hānai means the adoption of an infant or very young child, whereas ho'okama refers to the adoption of an adult or older child no longer needing nurturing. Id.
Indeed, Hawaiian usage and customs continue to be an integral part of the law, history and society of these islands.80 However, the divergent views expressed immediately following Judge Ezra's oral ruling reveal the need for further inquiry and analysis.

A. Judicial Recognition of the Hawaiian Custom and Usage of Adoptions, Including the Distinct Rights of Keiki Hānai and Keiki Ho‘okama

Almost two decades prior to In re Farrington,81 the Supreme Court of the Territory of Hawaii decided the "Mamo Clark case,"82 which contained a more thorough discussion of the distinction between keiki hānai and keiki ho‘okama. Looking to Hawaiian dictionaries published in 1836, 1865 and 1887, the O'Brien v. Walker court explained that "e ho'okama" means to "adopt" while "keiki hanai" simply means "a foster child or a ward."83 The court then looked to Hawaiian customs and usage in an effort to ascertain the intent behind the term "lawful issue" in an 1896 deed of trust.84

The trust provided in pertinent part that, upon the death of the last of John A. Cummins' four surviving children, his estate and all its property would be distributed to the lawful issue of his children.85 Cummins died in January 1913; his last surviving child died in November 1937.86 The trustee for the estate then sought instructions whether to include Mamo Clark in the distribution of trust assets because she had been adopted (as an infant) by one of Cummins' daughters in December 1914.87

Absent any indication of Cummins' intent within the trust document itself,88 the court looked to the surrounding circumstances of his life beginning near "the close of the era of unwritten law ending in 1841 and therefore nurtured

80 See supra notes 1-16 and accompanying text.
82 Id. at 656 (discussing the "Mamo Clark case"). See O'Brien v. Walker, 35 Haw. 104 (1939), aff'd, 115 F.2d 956 (9th Cir. 1940) (recognizing an adopted child, Mamo Clark, as the "lawful issue" of the testator's daughter). Mamo Clark made her film debut as an actress in the 1935 film, Mutiny on the Bounty. Mamo Clark—Biography, http://movies.yahoo.com/movie/contributor/1800098197/bio.
83 O'Brien, 35 Haw. at 128-29 (emphasis added); see also id. at 119 (recognizing the distinction).
84 Id. at 116-32.
85 Id. at 106-07.
86 Id. at 107.
87 Id. at 105, 107. In his dissenting opinion, Chief Justice Coke argued that there had never before been an adoption in the Cummins family, and that his daughter did not adopt Mamo Clark until almost "twenty years after he had executed his deed and in fact not until after his death." Id. at 142, 145 (Coke, C.J., dissenting in part).
88 Id. at 127.
by a generation reverently familiar with the ancient Hawaiian customs and usage of adoptions as the law of the land." The court further acknowledged the genealogical traditions of these islands, noting Cummins’ background both as an ali‘i descendant as well as his service in both legislative and administrative positions under the monarchy, which led to a presumption of his awareness of decisions by the Supreme Court of the Kingdom of Hawai‘i recognizing the ancient Hawaiian custom and usage of adoptions.

Thus, the O’Brien court harmonized Cummins’ unstated intent with Hawaiian usage rather than applying “the reverse blood-preference presumption of the less familiar and more distantly removed common law of England.” According to custom, Mamo Clark became the “lawful issue” of Cummins’ daughter upon her lawful adoption (i.e., as keiki ho‘okama), and therefore entitled to a rightful share in the trust estate.

Indeed, keiki hānai and keiki ho‘okama did not enjoy the same legal protections under kingdom law. For example, keiki hānai did not have a right of inheritance pursuant to the first written laws of the kingdom. However,
**keiki ho'okama** did enjoy this right consistent with ancient Hawaiian usage and custom, as recognized by the Supreme Court of the Kingdom of Hawai‘i in *Kiaiaina v. Kahanu*. The substance of the court's concise opinion provided as follows:

Action to recover possession of a lot of land claimed by descent. Jury waived and cause heard by the full Court. Answer a general denial.

The evidence was that one Kahale died in 1849 seized of the land, under an award of the Land Commission, devising all his property to his widow, Kaumehameha. The defendant was adopted by Kahele and Kaumehameha in 1837, as their son and heir, and was always treated by them as such. Kaumehameha died intestate in 1850 or 1860, leaving as her kindred the defendant Loe, sister of her father, and the defendant Kaawalauole, son of a brother of her father. After Kahele's death the widow married Kahoinea, who survived her, and left issue the defendant Kiaiaina, by a subsequent wife. The defendant has held possession since Kaumehameha's death, but there was no direct evidence of the receipt of rents and profits.

It was decided by the Court in the case of Keahi, appellant, vs. Kaaoapoa, appellee, that an adoption of a child as heir, according to Hawaiian custom and usage, made prior to the written law, is valid under existing laws, and as we are of opinion that the defendant Kahanu was legally adopted in conformity to said custom and usage, he has rights of inheritance. And as it appears that he is now in possession of the property, he is entitled to judgment in this case.

Let judgment therefore be ordered for the defendant.

Thus, absent a will to the contrary, Kahanu prevailed over all other claimants as *keiki ho‘okama* to his mother pursuant to Hawaiian custom and usage.

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96 3 Haw. 368 (1871), cited with approval in O’Brien, 35 Haw. at 118 n.7.
97 Id. at 368 (emphasis added).
98 In addition to Kiaiaina (i.e., Kahanu’s stepsister) and her husband, these claimants included at least Loe (Kahanu’s great-aunt) and Kaawalauole (Kahanu’s second cousin), if not also Kahoinea (Kahanu’s stepfather). See id.
B. Case-By-Case Analysis of Hawaiian Usage: The Tortured Resolution of Kaaoaopa’s Claim to Her Adoptive Mother’s Estate

The Kiaiaina court’s invocation of “Keahi, appellant, vs. Kaaoaopa, appellee” presumably referred to the parties in In re Estate of Nakuapa (Nakuapa I).99 Although the decedent’s cousin Keahi eventually prevailed over the decedent’s adopted daughter Kaaoaopa in the latter dispute,100 both the Chief Justice101 and Second Associate Justice Widemann102 expressly acknowledged the existence of a Hawaiian custom and usage of adoption prior to the kingdom’s first written laws. For his part, First Associate Justice Hartwell acknowledged the “well known fact that agreements of this kind were once common among the natives of this kingdom,”103 but dissented based upon his belief that this practice had been repealed by implication as “inconsistent with the present Hawaiian statute of descents.”104

While sitting in probate, Chief Justice Allen rejected Kaaoaopa’s claim; however, on appeal, a jury subsequently determined she was keiki hānai to Nakuapa.105 Justice Widemann later joined the Chief Justice in setting aside

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99 3 Haw. 342 (1872).
100 Id. at 342. Making her appearance to contest a petition by Nakuapa’s cousin Keahi (who sought Letters of Administration for the estate), Kaaoaopa alleged that Nakuapa adopted her by verbal agreement before the law required such adoptions to be performed in writing.
101 Id. at 343 (adding that “it is necessary that the relation should be clearly defined by competent evidence in relation to the precise terms of the original contract”); id. at 347 (emphasizing that such intent must be “clearly defined in the contract, by which the child adopted might be an heir to the property of the adopter”).
102 Id. at 348 (stating that “[t]he adoption of a child as heir, clearly and definitely made according to Hawaiian custom and usages prior to the written law, I hold to be valid under existing laws”).
103 Id. at 349.
104 Id. at 351; see also id. at 354-55 (“I am compelled to deny the power of this Court to read this statute according to native ideas and usages which prevailed before the establishment of the present system of government, and which are inconsistent with the simple, unambiguous and consistent meaning of the entire wording of the statute.”). Justice Hartwell initially argued that absent a claim concerning a will, “adoption of an heir by ancient custom is not triable by jury” under the statute providing for jury trials in probate appeals. Id. at 349; see also O’Brien v. Walker, 35 Haw. 104, 138 (1939) (Coke, C.J., concurring in part and dissenting in part) (arguing that the majority failed “to distinguish between an estate of intestacy which is controlled by the statutes of descent and distribution and an estate created by a trust deed in which event the intent of the trustor, as expressed in the trust document, must prevail”) (emphasis added).
105 Nakuapa I, 3 Haw. at 342. The ali‘i Puhalahua adopted Kaaoaopa as his child in 1827 or 1828 prior to marrying his former servant Nakuapa (who later joined in the adoption). See Estate of Nakuapa (Nakuapa III), 3 Haw. 410, 414 (1873) (Widemann, J.). Kaaoaopa lived with her adoptive parents until they died. Id. Puhalahua died in 1866, leaving his entire estate to Nakuapa by will dated 1854. Id. at 414-15; In re Estate of Nakuapa (Nakuapa II), 3 Haw. 400, 402 (1872) (Hartwell, J., dissenting) (stating “[h]e died testate, devising his property to his widow, Nakuapa”). Although the evidence established that Nakuapa had conversed with her
the verdict and remanding for a new trial, explaining that the jury’s verdict was not responsive to the question whether Kaaoaopa was adopted as an heir (i.e., as a keiki ho'okama).106

As Judge Ezra correctly noted,107 the Kingdom’s highest court previously recognized adoption as “a sacred relation” to Hawaiians, “having all the rights, duties and obligations of a child of the blood.”108 However, the general custom more specifically distinguished between the rights afforded to keiki hanai and keiki ho'okama:

Some were mere foster children, taken to nurse and to exercise a parental care over, and for a temporary purpose; others were adopted as one’s own children to be cared for, to live with the adopter as such . . . .

. . . The Court is fully aware that children often lived under the charge of those acting in the relation of parents, so far as food and clothing were concerned, who were not entitled to inheritance.109

Thus, the precise nature and scope of Hawaiian custom and usage depends upon the particular circumstances of each case.110

attorney about making a will (without specifically naming Kaaoaopa as intended devisee), when he finally arrived at the house Nakuapa was too weak to act and died intestate in 1869. Nakuapa III, 3 Haw. at 414.

106 Nakuapa I, 3 Haw. at 348 (stating “the evidence as to the right of the keiki hanai to inherit, is somewhat conflicting, and the Court are [sic] uncertain what the intention of the jury was in rendering the verdict, by the terms used”); see also id. (Widemann, J., concurring) (“[A]s far as the verdict of the jury is clearly not responsive to this issue, a new trial should be granted.”).

107 Viotti & Gordon, supra note 32 (“Quoting from a 1958 state Supreme Court decision that in turn invoked ‘kingdom law,’ Ezra cited two kinds of Hawaiian adoption, which he called a ‘sacred relationship’: keiki hanai and keiki hookama.”) (emphasis added).

108 Nakuapa I, 3 Haw. at 347.

109 Id. at 343. A similar misinterpretation of Kingdom of Hawaii precedent—namely, Brunz v. Smith, 3 Haw. 783 (1877)—also took place in Pai 'Ohana v. United States, 875 F. Supp. 680 (D. Haw. 1995), aff'd, 76 F.3d 280 (9th Cir. 1996). See Forman & Knight, supra note 27, at 15 (“The federal court’s rationale not only merges—and thereby loses—the unique historical difference between occupancy and non-exclusive rights in land, but further distorts the context of the dispute in Brunz.”). See generally, id. at 13-17 (concluding that the federal courts should have certified the underlying question to the Hawai‘i Supreme Court for determination based upon the unique background principles of property law that apply in this state).

Writing for the majority in *Nakuapa I*, Chief Justice Allen noted the "great difficulty in adjudicating" cases involving the ancient Hawaiian custom and usage of adoptions "after the lapse of so many years." Accordingly, he looked for guidance to four prior opinions. First, an unpublished decision that resolved a June 1856 claim in favor of a child adopted pursuant to Hawaiian custom and usage. Then, three published decisions: *In re Estate of Hakau*, *Abenela v. Kailikole*, and *Estate of His Majesty Kamehameha IV*. These opinions were deemed to be particularly persuasive because:

Chief Justice Lee and Mr. Justice Robertson... were familiar with the people, and their experience on the Land Commission, and their examinations of cases touching native rights, enabled them to form very correct opinions on all questions involving Hawaiian usages and customs.

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111 *Nakuapa I*, 3 Haw. at 343.
112 See id. at 344 (recounting a court order that half of the decedent’s estate be given to his wife’s brother’s son, based upon evidence that the child lived with the couple following his adoption before a tax collector, and before the child left for the seminary).
113 1 Haw. 263 (1856), cited in *Nakuapa I*, 3 Haw. at 344. This is the first published case in Hawai‘i to examine the distinction between *keiki hānai* and *keiki ho‘okama* (although the opinion does not actually mention these two terms). Pursuant to “a statute regulating the descent of property, passed in 1850,” the court held that a putative male heir unrelated to the decedent does not inherit from the decedent’s estate absent evidence of a formal adoption or intent that the adopted child share in the deceased’s property. Id. at 263-64. However, the facts showed that the child was “merely connected in some way with her first husband” despite having lived with the decedent’s family “for a great length of time.” Id. at 264. The court nevertheless advised that if the putative heir had been legally adopted, “he would have been sole heir to her estate, upon her dying intestate.” Id.
114 2 Haw. 660, 661-62 (1863) (dismissing ejectment action brought by the purported hānai son of former landowners “in the absence of the necessary legal evidence of his having been adopted, as alleged”—i.e., that the plaintiff was a *keiki ho‘okama* under Hawaiian usage and custom), cited in *Nakuapa I*, 3 Haw. at 344-45. The *Abenela* court discredited claims relating to a purported written agreement between the plaintiff’s uncle and aunt—i.e., the former landowners, with whom he lived for several years—and the plaintiff’s father, which some witnesses claimed had been signed in the presence of a magistrate although it was not produced at trial. Id. (citing a statute enacted in 1846—i.e., before the transaction that took place sometime after the plaintiff’s uncle became ill in 1847, and later died in 1848—which rendered the agreement void, in any event, for failure to record the document with a Notary Public). In other words, the only evidence presented did not relate to claims based upon Hawaiian usage or custom. Curiously, however, there is no substantive discussion of the defendant's right of possession to the land in question beyond an observation that it "has been in the possession of the defendant for a number of years." Id. at 661 (emphasis added).
115 2 Haw. 715, 726 (1864) (acknowledging the right of Kamehameha III’s adopted son to inherit his private lands not otherwise devised, subject to dower—consistent with both the king’s will and the relevant statutory provision), cited in *Nakuapa I*, 3 Haw. at 345; see also id. at 718 (conceding the need to consider Hawaiian history and custom).
This question must be decided upon our own usages and customs, and written laws, and none other.\textsuperscript{116}

Following remand to the probate court (Justice Widemann presiding), the jury rendered a verdict against Kaaoaopa.\textsuperscript{117} On appeal in \textit{In re Estate of Nakuapa (Nakuapa II)}, Chief Justice Allen, Justice Hartwell, and Justice Widemann unanimously granted Kaaoaopa’s motion for a new trial because the probate court erroneously admitted an unverified statement by King Kamehameha that Kaaoaopa in fact had no claim as \textit{keiki hānai}, explaining that she did not have notice and an opportunity to present cross-interrogatories in connection with the statement taken from the King.\textsuperscript{118}

After a third trial, four years after Chief Justice Allen initially rejected Kaaoaopa’s claims in 1869, the same three justices ruled against Kaaoaopa in \textit{Estate of Nakuapa (Nakuapa III)}.\textsuperscript{119} Writing for the majority, Justice Widemann discredited testimony from two specific witnesses in support of Kaaoaopa’s claims,\textsuperscript{120} as well as other evidence submitted in her favor.\textsuperscript{121} In his concurring opinion, Justice Hartwell likewise discredited testimony concerning alleged references to Kaaoaopa by her adoptive parents as their “hooilina”—i.e., heir or devisee.\textsuperscript{122} Instead, Justice Hartwell chose to credit testimony admitted over Kaaoaopa’s “negative hearsay” objection, that “many persons connected by blood and marriage, or on intimate terms with the parties . . . had never been aware of the child’s adoption as heir, or that she was regarded by the adopters as their heir.”\textsuperscript{123} Finally, Chief Justice Allen concurred by simply reiterating his original decision as probate judge and stating his agreement with his colleagues’ description of the testimony.\textsuperscript{124}

\textsuperscript{116} \textit{Nakuapa I}, 3 Haw. at 345 (emphasis added).

\textsuperscript{117} \textit{In re Estate of Nakuapa (Nakuapa II)}, 3 Haw. 400, 400 (1872).

\textsuperscript{118} \textit{Id.} at 401, 402-03, 406.

\textsuperscript{119} 3 Haw. 410 (1873).

\textsuperscript{120} \textit{Id.} at 412-13 (“Kapu . . . states that both Puhalahua and Nakuapa, at the time of the adoption, declared that they adopted claimant as their heir. . . . Had the witness given this evidence at the first hearing, it would have carried great weight; its coming at this late day materially detracts from its weight.”). Justice Widemann observed that another witness’ vague recollections about the circumstances under which Kaaoaopa’s adoptive parents purportedly told him about the adoption conflicted with Kapu’s testimony. \textit{Id.} at 412 (dismissing Kukahiko’s testimony because Kapu presumably would have had the best recollection, despite having already concluded that Kapu’s testimony was unreliable).

\textsuperscript{121} \textit{Id.} (acknowledging that Kaaoaopa’s adoptive parents repeatedly referred to her as \textit{kaikamahine hānai}—i.e., adopted daughter—and that Nakuapa “frequently held out hopes of inheritance”; but declining to infer that it was a “foregone conclusion” Kaaoaopa would actually be given that right).

\textsuperscript{122} \textit{Id.} at 414 (Hartwell, J., concurring).

\textsuperscript{123} \textit{Id.} at 414-15.

\textsuperscript{124} \textit{Id.} at 416 (Allen, J., concurring) (“I see no reason, from any additional testimony introduced in the subsequent hearings, to change my opinion[]”).
Thus, after giving lip service to the difficulties that the justices’ own errors caused for Kaaoaopa, the Court ultimately chose to weigh the conflicting evidence against her (and in favor of other, seemingly-interested parties). Nakuapa I nevertheless provided an important foundation for the concise recognition of Hawaiian usage by these same three justices a mere four months later in Kiaiaina. The differing contexts provided in these decisions further highlight the necessity of analyzing claims involving Hawaiian custom and usage on a case-by-case basis.

C. The Passage of Time and Evolving Language Practices Have Not Diminished the Continuing Relevance of Hawaiian Usage in This State

Following annexation of these islands to the United States, an early attempt to undermine the Court’s prior recognition of Hawaiian usage (not long after annexation of these islands to the United States) did not prevent the

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125 In re Estate of Nukuapa (Nukuapa II), 3 Haw. 400, 406 (1872) ("The delay of another trial is to be regretted, since evidence in this class of cases daily becomes more difficult to find, as aged witnesses die.").

126 Id. at 403.

127 Cf. supra text accompanying notes 93-94; Kiaiaina v. Kahanu, 3 Haw. 368, 368 (1871).

128 See, e.g., In re Estate of Wilhelm, 13 Haw. 206, 209-11 (1900) (affirming lower court judgment that a legally adopted child is not entitled to inherit from his adoptive mother, after characterizing contrary language in Hakau, Abenela and Kamehameha IV as dicta, and further suggesting that Kiaiaina "simply followed the decision in [Nukuapa I]"). The court appears to have given undue weight to Justice Hartwell’s dissenting opinion in Nukuapa I based upon a misinterpretation of the court’s earlier decision in In re Estate of Maughan, 3 Haw. 262 (1871).

In re Estate of Wilhelm mistakenly characterizes the plurality opinion in Maughan as having decided the question of Hawaiian usage adversely to claims by legally adopted persons seeking recognition of their rights as heirs. Id. Justice Hartwell’s opinion in Maughan acknowledges that the putative heir did not make any allegations based on custom, then suggests that even “if alleged, it could have no force in the face of explicit statute provisions.” Id. at 268. Justice Hartwell’s colleagues apparently did not share this conclusion.

Justice Widemann’s concurrence in Maughan relies on the absence of any evidence concerning the adopter’s intentions beyond the written articles of adoption. Id. at 270 (rejecting claim of adopted child in favor of the decedent’s sister). Chief Justice Allen’s dissent in Maughan (albeit presented at the start of the opinion) counters that “adopted child” (i.e., keiki ho’okama) is legally synonymous with “child” under Hawaiian usage and custom, adding that neither the decedent nor the legislature could have intended that a child formally adopted as her own should be left “houseless and homeless” the moment her adoptive mother died. Id. at 264; see also O’Brien, 35 Haw. 104, 121-22 (1939) (“The statements were uncontradicted by the majority opinion which confined its decision to the written agreement before it and the recognition made in the dissenting opinion is in harmony with a later finding of the supreme court [presumably Kiaiaina] upon evidence before it.”).

Wilhelm further misstates the law by suggesting that the Supreme Court of the Kingdom of Hawaii subsequently affirmed Justice Hartwell’s views in Wei See v. Young Sheong, 3 Haw. 489 (1873). 13 Haw. at 208-09. In Wei See, the Chinese wife and mother of a Chinese man
Supreme Court of the Territory of Hawaii from later acknowledging the continuing vitality of Hawaiian custom and usage in *O'Brien*, *Estate of Farrington*. Indeed, modern decisions continue to affirm these Native Hawaiian traditions notwithstanding changes in language use over time. In *Leong v. Takasaki*, for example, the Hawai‘i Supreme Court observed as follows:

As adoption under the statute replaced ancient Hawaiian custom and usage, the term ho‘okama has fallen into disuse and the term hanai has since been used to refer to all types of adoption. Nevertheless the custom of giving children to grandparents, near relatives, and friends to raise whether legally or informally remains a strong one.

Moreover, in *Young v. State Farm Mutual Automobile Insurance Co.* the Hawai‘i Supreme Court later acknowledged the continuing vitality of Hawaiian custom and usage with respect to adoptions—more specifically, the distinction “between a person legally adopted, a ‘hookama’ and a person merely cared for, a ‘hanai.’” Indeed, the *Young* court expressly refused to water down this distinction under the circumstances presented in that case.

named Achu prevailed against his Hawaiian wife and adopted daughter based on the specific terms of a will devising only a portion of his estate to the latter family (including real estate already owned by his Hawaiian wife “in her own right”). *Id.* at 489-90, 493, 495. *See also Maughan*, 3 Haw. at 269 (“In the Ah Chu [sic] case, there was a will.”). An on-line search failed to uncover any published decision involving a person named “Ah Chu”; thus, it appears that the court in *Maughan* may have been referring to prior proceedings concerning the decedent referred to as “Achu” in the *Wei Sei* decision subsequently published in 1873.

*See supra* notes 81-93 and accompanying text.

*See supra* notes 63-64 and accompanying text, and notes 81, 107, 112.


*Id.* at 411, 520 P.2d at 766 (emphasis added). The court reversed an order granting summary judgment against plaintiff seeking damages for mental distress suffered when he observed defendant strike and kill plaintiff’s step-grandmother with defendant’s automobile. *See id.* at 399, 412, 520 P.2d at 760, 767 (concluding that the plaintiff should be permitted to prove his relationship with his step-grandmother despite the absence of a blood relationship).

*Id.* at 547, 544 P.2d at 42 (citing *O’Brien v. Walker*, 35 Haw. 104, 118-19 (1939)); *see also Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 10, 646 P.2d 745, 751 (1982) (citing *O’Brien* for the proposition that the Hawaiian usage exception under H.R.S. section 1-1 continues to protect “native understandings and practices which did not unreasonably interfere with the spirit of the common law”).

The relevant provision in Kekumu’s insurance policy covered him, his spouse and their respective relatives “while residents of his household.” *Young*, 67 Haw. at 546, 697 P.2d at 41. Homer’s mother claimed he was hänai to Kekumu, with whom she had lived in the house for eighteen years and regarded as her husband (just as Kekumu regarded her as his wife). *Id.* at
It may seem strange at first blush that a Hawaiian custom or usage of inheritance could have developed prior to the establishment of private property rights. However, history reveals that a limited right of inheritance existed subject to modification or dispossession by decree. As explained by Professor Lilikalā Kameʻeleihiwa, “one of the early examples of hereditary succession” can be traced back “about ten generations before Kamehameha.” In any event, Hawai‘i law expressly contemplates the development of customs and traditions prior to November 25, 1892. Thus, as of 1871, the Supreme Court of the Kingdom of Hawaii recognized a custom and usage of inheritance by lawfully adopted children (i.e., *keiki hoʻokama*).

Given the context discussed above, the views expressed by kumu hula Hewett and Judge Ezra are understandable but misplaced. Even if it were established that Brayden Mohica-Cummings possesses inheritance rights as the issue of his grandfather’s *keiki hoʻokama*, such facts would not necessarily confer rights upon him as an intended third-party beneficiary of Pauahi’s will.

V. MĀLAMA PONO: HAWAIIAN CUSTOM AND USAGE AS FURTHER CONTEXT TO SUPPORT PAUAHI’S INTENT

United States District Judge Alan C. Kay summarized the “exceptionally unique historical circumstances” that surround Kamehameha Schools’ admissions policy granting a preference to Native Hawaiians. In doing so, he revealed crucial context for the policy by determining that Bernice Pauahi

545-46, 697 P.2d at 41. When Homer moved in with Kekumu and his mother eight years before the accident, he was over thirty years of age but had already known the insured “for several years” before then. Id. at 545, 697 P.2d at 41.


137 Keelikolani v. Robinson, 2 Haw. 514, 515-17, 518-20 (1862); see also KAMEʻELEIHWA, supra note 75, at 51-64 (Chapter 3, “Kalaiʻaina: The Politics of Traditional Land Tenure”); id. at 95-135 (Chapter 5, “Inheritance Patterns Among Aliʻi Nui Prior to 1848”).

138 KAMEʻELEIHWA, supra note 75, at 53 (emphasis added).

139 See supra notes 1-5, 7-11 and accompanying text.

140 Kiaiaina v. Kahanu, 3 Haw. 368, 369 (1871); see also supra note 96 and accompanying text.

141 See supra note 79 and accompanying text.

142 See supra notes 62-64 and accompanying text.

Bishop's "bequest of her vast estate to the foundation of Kamehameha Schools further reflected the Ali'i [i.e., Native Hawaiians Chiefs' and Chieftesses'] tradition of providing and caring for others." In other words, as described by Professor Kame'Elehiwa, the "traditional duty" of Ali'i Nui "to mālama their people."

King Lunalilo (Kamehameha IV) and his wife Queen Emma founded the Queen's hospital in 1860 "to provide free medical care for diseased and dying Hawaiians" in the face of opposition from missionaries. Likewise, upon his death in 1871, the will of Kamehameha V provided for a trust to care for elderly Hawaiians. The dowager Queen Emma later died in 1884, leaving her property to The Queen's Hospital (now, Queen's Medical Center). Queen Lili'uokalani similarly entrusted her estate in 1909 "for the benefit of orphaned children in the Hawaiian islands, the preference to be given to Hawaiian children of pure or part aboriginal blood."

144 Id. at 1154 & n.12 (citing Makanani Decl. ¶ 13 and Benham Decl. ¶ 19). The declarations of R. Kawika Makanani and Dr. Maenette K.P. Benham, among others, are attached to Kamehameha Schools' Concise Statement of Material Facts filed on Sept. 29, 2003 ("Kamehameha Schools' CSMF"). Kawika Makanani is the Hawai'i/Pacific Collections librarian at Kamehameha Schools' Kapalama Campus, and a Ph.D. candidate in Educational Foundations at the University of Hawai'i at Mānoa. Makanani Decl. ¶¶ 6-7 (on file with author). Dr. Benham has since been appointed Dean of the newly-established Hawai'iiniuakea School of Hawaiian Knowledge. See First Dean Appointed for UH School of Hawaiian Knowledge, HONOLULU ADVERTISER, June 10, 2008, available at http://www.honoluluadvertiser.com/apps/pbcs.dll/article?AID=/20080610/BREAKING01/80610004/-1/LOCALNEWSFRONT. She received an ED.D. in Educational Administration from the University of Hawai'i at Mānoa (her "doctoral thesis addressed the impact of educational policies and practices on the lives of Native Hawaiians from ancient times (wa kahiko) to the 1970s"). Benham Decl. ¶¶ 6 & 10 (on file with author).


146 Id. at 312 (citing 2 RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM 69-72 (1953)).

147 Id. at 312 n.131 (citing the PACIFIC COMMERCIAL ADVERTISER, Aug. 30, 1860, regarding Calvinist arguments "that Hawaiians deserved to die because they were immoral, and that free medical care would make prostitution safe" as compared with the King and Queen's belief that medicine rather than religion would save their people).

148 Makanani Decl., supra note 144, ¶ 106.

149 Id.

150 See "Queen Lili'uokalani's Deed of Trust," available at http://www.onipaa.org/resources/deed_deed_1.pdf. Lili'uokalani further describes an organization for benevolent work called the Hoooolulauhi established by King Kalākaua in 1886, and managed in divisions administered by Queen Kapi'olani, Lili'uokalani, as well as Princess Likelike (with assistance from Princesses Po'oimaikalani and Kekaulike). LILIUOKALANI, HAWAII'S STORY BY HAWAI'I'S QUEEN 111-12 (Mutual Publishing LLC 1990) (1898). "The Liliuokalani Educational Society" for Hawaiian girls was also established in 1886. Id. at 113-14. In addition, Kalākaua carried on the custom of the chiefs to support the destitute and bury the dead, among other services provided by Hale Naua, or the Temple of Science. Id. at 114-15.
Consistent with the ali‘i trusts created before and after hers, Ke Ali‘i Bernice Pauahi Bishop left her property in trust for her people. As the great-granddaughter and last direct descendant of Kamehameha I, Pauahi bequeathed her vast estate to create and maintain schools “dedicated to the education and upbringing of Native Hawaiians.”

A. The Reemergence of Core Values Obscured by the Illusion of Progress

Upon graduating in 2007, Kalani Rosel\textsuperscript{153} credited Kamehameha Schools with instructing him in the Hawaiian values of respect and gratitude for people and the land, then extolled the “feeling of ohana, of family” where “[e]very teacher is like a parent or relative, and each student is like a brother or sister.”\textsuperscript{154} His experiences reflect the reemergence of an ancient Hawaiian custom and usage, described as follows:

Education in early Hawaiian society centered around the family and community, relations with nature, an understanding of mythology, language and cultural proficiency, and physical and spiritual wellness.

... The learning of Hawaiian values was an essential component of a young child’s life. George Kanahele lists 25 values that were important for the Native Hawaiian to learn and live by: aloha, ha‘aha‘a (humility), lokomaika‘i (generosity), hoʻokipa (hospitality), haipule or hoʻomana (spirituality), wiwo (obedience), laulima (cooperativeness), maʻemaʻe (cleanliness), ʻoluʻolu

\textsuperscript{151} Burgert v. Lokelani Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 (9th Cir. 2000); see also Richardson v. City & County of Honolulu, 124 F.3d 1150, 1154 (9th Cir. 1997) (describing the trust’s purpose “to erect and maintain schools for indigents and orphans who are native Hawaiians”).

\textsuperscript{152} Continuous exercise is not required to establish a Hawaiian custom or usage. See Pub. Access Shoreline Haw. v. Haw. County Planning Comm’n (PASH/Kohanaiki), 79 Hawai‘i 425, 442 n.26, 903 P.2d 1246, 1262 n.26 (1995) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 76-78 (Sharwood ed. 1874)). “Hawaiian culture operating through time does not conform to the usual understandings of ‘linear’ time in the West, or ‘cyclical’ time elsewhere, but renews itself in waves or pulsations that are ‘transformations.’” Robert J. Morris, Configuring the Bo(u)nds of Marriage: The Implications of Hawaiian Culture & Values for the Debate About Homogamy, 8 YALE J.L. & HUMAN. 105, 141 (1996).

\textsuperscript{153} See supra note 55 and accompanying text.

\textsuperscript{154} Kamehameha-Maui Grad is First Non-Hawaiian, HONOLULU STAR BULL., May 20, 2007, available at http://starbulletin.com/2007/05/20/news/story02.html. Perhaps the greatest cultural change initiated by the Western system was that it took learning and teaching away from the family. The family was the foundation of a child’s life and the source of stability for a community. The elimination of the family’s central role in society further eroded Native Hawaiians’ sense of being.

Benham Decl., supra note 144, ¶ 44(e) (citing M. BENHAM & R.J. HECK, CULTURE AND EDUCATIONAL POLICY IN HAWAI‘I: THE SILENCING OF NATIVE VOICES 113 (1998)).

The education of Native Hawaiian children was grounded in the value of *ʻohana* (family and extended family), the connection to and care of the land and the sea, the learning of language and living of cultural values that provided a clear and proud identity and connection to a rich heritage, and a commitment to community health and well-being.155

The informal approach of early Hawaiians to education began to evolve during the reign of King Kamehameha II (Liholiho) with the enactment of a law by the regent Ka'ahumanu in 1824, which required all of the Kingdom's subjects to learn to read and write.156 In the early 1840's, Kamehameha III (Kauikeaouli) enacted laws "providing for a national system of common schools to be supported by the government."157 "By 1853, the literacy rates rose to three-fourths of the native population."158

Toward the end of the nineteenth century, the literacy rate in the Kingdom of Hawaii was "greater than in any other country in the world except Scotland and New England."159 However:

By the close of the 1800s, attendance at Hawaiian language common schools had decreased while attendance at the English-language select schools grew. Because of social pressures, Native Hawaiian children did not speak their mother tongue and were further distanced from Hawaiian traditions. Gradually, the fragmented and often distorted knowledge of Hawaiian customs, combined with societal reminders that practicing Hawaiian culture identified one as lower class, produced shame, denial, and resentment about being Hawaiian. Consistent reinforcement of this low social status resulted in destructive social behavior.160

155 Benham Decl., *supra* note 144, ¶ 18, 29, 30 (numbering omitted, emphasis added).
157 *Id.* at 112; see also *id.* at 229-30, 347-49, 351-53.
158 Benham Decl., *supra* note 144, ¶ 38.
160 Benham Decl., *supra* note 144, ¶ 45 (emphasis added). "Hawaiian children were disciplined and scoffed at if they spoke the Hawaiian language on school grounds or engaged in Hawaiian traditions." *Id.* ¶ 41.
Judge Kay's description of "the effect of western influence on the Native Hawaiians" draws heavily upon the scholarly and historical authorities presented by Kamehameha Schools:

Western systems and values were also imposed on the Native Hawaiians. The implementation of a western-style school system focused on general world information and the development of basic math and literacy skills in an effort to westernize Native Hawaiian society. It did not account for the Native Hawaiian customary method of learning, nor for the unique Native Hawaiian culture and heritage. The use of the Hawaiian language as an instructional medium was banned in the schools from 1896 until 1986. The school system furthermore operated essentially as a dual-tracked system, with most Native Hawaiians receiving training suitable only for vocational and low paying jobs. Education thus operated to further marginalize Native Hawaiians.

The net result of these and other forces and changes brought to bear on the Native Hawaiian society has been summarized in the following manner: "By virtually every measure of well being, Native Hawaiians are among the most disadvantaged ethnic groups in the State of Hawai'i."

Kamehameha Schools is now working to "redress the under-representation of Native Hawaiians in contemporary society" as well as "preserve and perpetuate Native Hawaiian culture and identity."

B. Sacred Knowledge: Honoring the Kamehameha Line for its Efforts to Preserve and Perpetuate Hawaiian Culture

"Hawai‘i without Kamehameha, as it currently exists, would constitute blatant disregard for the testamentary wishes of a Princess who saw education


162 Kamehameha Schools/Bernice Pauahi Bishop Estate, 295 F. Supp. 2d at 1156 (citations omitted). In its zeal to produce industrious young men and women who could compete on western terms, the early leaders of Kamehameha Schools played a role in the marginalization of Native Hawaiian culture. For example, the first head of Kamehameha Schools (William B. Oleson), immediately forbade the use of Hawaiian on schools grounds in 1887. SCHÜTZ, supra note 159, at 351 (citing BENJAMIN O. WIST, A CENTURY OF PUBLIC EDUCATION IN HAWAII 112 (1940)). It was not until 1961 that Dorothy Kahananui implemented a three-year program of high school language study at Kamehameha Schools that would be accepted at the university level on par with other modern languages. Id. at 357-58 (citing HAROLD WINFIELD KENT, THE KAMEHAMEHA SCHOOLS, 1946-1962, at 31-32 (1976)). But see id. at 357 (regarding preliminary efforts to insert an appreciation for Native Hawaiian culture into the curriculum, shortly after the U.S. Congress recognized the deteriorating conditions of Native Hawaiians in enacting the Hawaiian Homes Commission Act).
as the salvation of her people." Ke Aliʻi Bernice Pauahi Bishop chose education as the vehicle to fulfill her traditional duty and responsibility to her people. This choice reflected her deep commitment to education based on centuries of Hawaiian tradition and values concerning the sacredness of knowledge.

Instead of relying on American and/or English common law principles concerning the interpretation of Pauahi’s charitable/eleemosynary trust, therefore, her intent should be interpreted in light of Hawaiian custom and usage. The Princess founded the Kamehameha Schools “not to honor herself, but to honor the ideals and achievements [that Kamehameha I] and his successors represented.” One of the primary achievements of the Kamehameha line includes the 1840 constitution, which “reflected an attempt to deal with chiefs and foreigners who sought to vest land rights without the required consent of the King.”

The accompanying development of private property rights reflected an effort to preserve the “political existence” of the Kingdom in the face of threats to its sovereignty by outside forces. We now face the challenge of addressing the unintended side effects of this attempt to inoculate the Native

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163 Glendon, supra note 55, at 98.
164 See & Krohm, supra note 48, at 397-404.
165 See, e.g., Samuel P. King & Randall W. Roth, Transformations: Hawaii’s Bishop Estate (Feb. 19, 2008) (unpublished manuscript, on file with author). [I]ncorporation would . . . neatly solve what is currently the charity’s most disturbing legal dilemma. As a trust, Bishop Estate/Kamehameha Schools is subject to the centuries-old cy pres doctrine, which forbids trustees to change or expand a trust’s charitable mission, unless the original mission becomes illegal, impossible, impracticable, or wasteful . . . . The charitable mission of a nonprofit corporation, however, is legally allowed to evolve with the times—as Bishop Estate/Kamehameha Schools has already been doing.

Today, in addition to maintaining Kamehameha Schools (as the princess instructed more than a century ago), the trustees provide many “extras,” such as scholarships to attend colleges and graduate schools, and special help to pre-school children and homeless families in native-Hawaiian communities. They also promote Hawaiian culture and provide culturally sensitive stewardship to 350,000 acres of non-income-producing trust land that native Hawaiians view as the sacred vestiges of the overthrown kingdom. Although the trust’s founder almost certainly would have approved, the cy pres doctrine makes it difficult to justify legally, much less to expand, these salutary activities.

Id. at 9-10; see also SAMUEL P. KING & RANDALL W. ROTH, BROKEN TRUST: GREED, MISMANAGEMENT & POLITICAL MANIPULATION AT AMERICA’S LARGEST CHARITABLE TRUST 164 (2006) (citing businessman Robert Midkiff for the proposition that “it would be in the trust’s best interests . . . to re-structure itself into a nonprofit corporation”).

166 Glendon, supra note 55, at 75 n.30 (quoting GEORGE HUE’EU SANFORD KANAHELE, PAUAHI: THE KAMEHAMEHA LEGACY x-xi (1986)).
168 See supra note 136.
Hawaiian people against the catastrophic consequences of likely coloniza-
tion.\(^{169}\) As explained by Professor Osorio:

> Despite an ongoing and historical experience with a Western legal system that continually denied the Kānaka Maoli the simple right to be kānaka, we Hawaiians continue to be manipulated by American laws and decisions whose ethics and values do not correspond with our own.\(^{170}\)

To counter this manipulation, Professor Brophy envisions the development of an “aloha jurisprudence” that arguably could provide a useful vehicle for recognizing the continuing importance of Hawaiian usage in this jurisdiction.\(^{171}\) “Courts and litigants are thus increasingly scrutinizing transactions of long ago. The Hawaiian courts are revisiting what caused land loss just as historians like Stuart Banner, Lilikalā Kameʻeleihiwa, and Robert Stauffer are revisiting the process as well.”\(^{172}\)

A recent article by University of Hawai‘i Professor Justin Levinson provides analogous support, by arguing that the greatest permanent potential for addressing bias in legal decision-making would be to embrace American cultural responsibility for the presence of negative racial stereotypes and coordinating efforts for change.\(^{173}\) Rather than upholding the constitutional principle of Equal Protection,\(^{174}\) distorted invocations of Justice Harlan’s desire for a “color-blind” society may thus be seen as “a reactionary call to return to the race relations of the nineteenth century.”\(^{175}\)

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169 See Banner, supra note 6, at 303.


172 Brophy, supra note 171, at 799.


174 See supra notes 73-74 and accompanying text.

Unlike *Plessy v. Ferguson*, the equal protection ideals reflected by Justice Harlan’s dissents in *The Insular Cases* have not yet been realized. This may be perhaps due to the apparent intellectual dishonesty that is revealed by Justice Harlan’s statements in the Chinese immigrant cases. Others have suggested that Justice Harlan “directly confronted” and expressed “outrage at the racist logic of the majority opinions” in *The Insular Cases* as a result of the transformative impact that the Civil and Spanish-American wars had upon his thinking. However, this claim is belied by the relatively muted nature of Justice Harlan’s words as a whole.

Thus, discrimination claims involving the admissions policy preference for Native Hawaiians at the Kamehameha Schools must be analyzed and under-

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179 Schepard, *supra* note 175, at 136. The racist rationale underlying the majority opinions is fairly evident. See, e.g., *Downes*, 182 U.S. at 280, 282 (extolling the “principles of natural justice inherent in the Anglo-Saxon character” but contending that “grave questions will arise from difference of race, habits, laws, and customs . . . that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race”); *id.* at 306 (expressing concern about bestowing citizenship “on those absolutely unfit to receive it”) (emphasis added); *Dorr*, 195 U.S. at 145, 148 (observing that “uncivilized parts of the archipelago were wholly unfit to exercise the right of trial by jury” and “people[d] by savages”) (emphasis added); see also *Mankichi*, 190 U.S. at 211-12 (upholding the omission of grand jury and unanimous verdict requirements because they were written by right-thinking people from Europe and America).
180 See, e.g., Schepard, *supra* note 175, at 138.
181 *Id.* at 140.
182 Justice Harlan’s strongest statement is his description of the majority’s interpretation of the Constitution as “utterly revolting” to the extent it constructively concludes that fundamental rights apply “except where Filipinos are concerned.” *Dorr*, 195 U.S. at 156 (Harlan, J., dissenting) (emphasis omitted). In addition, Justice Harlan argues that constitutional rights “are for the benefit of all, of whatever race or nativity.” *Id.* at 154; see also *Downes*, 182 U.S. at 381 (Harlan, J., dissenting) (responding that “Anglo-Saxons across the ocean had attempted, in defiance of law and justice, to trample upon the rights of Anglo-Saxons on this continent”); *Mankichi*, 190 U.S. at 234-36, 239-41 (Harlan, J., dissenting) (articulating the manifest injustice perpetuated against the territorial inhabitants by the colonial scheme).
stood in light of the unique historical and legal context of these Hawaiian Islands.

VI. CONCLUSION

Even assuming that the United States complied with its international obligations as trustee for the non-self governing Territory of Hawaii, the Hawai‘i Admission Act expressly incorporates the trust obligation to provide for “the betterment of the conditions of native Hawaiians.” This implicit recognition of the ongoing effects of the United States’ exercise in imperial power at the end of the nineteenth century justifies reliance upon the internationally recognized right of indigenous control over educational systems and cultural teaching methods.

By comparison, an audit of the State of Hawai‘i Department of Education’s Hawaiian Studies Program uncovered “huge gaps” and “mismanagement of funds” in public schools across the state, including the revelation that more than thirty percent of funds appropriated for salaries and supplies instead went “to fund things unrelated to the Hawaiian culture.” The audit also found “a lack of a cohesive plan,” as well as the use of a culturally-insensitive textbook that describes pre-contact Hawai‘i as a dark and sadistic place.

This state of affairs underscores Dr. Christopher Schmidt’s prescient warning that “intrusion into the decisionmaking of private school administrators unjustifiably limits their ability to offer potentially beneficial alternative approaches to education.” There is value, instead, in “[allowing] for experimentation . . . . and [recognizing] the fragility of human certainty on the hardest questions about law and social relations. Such questions call for a measure of judicial deference to those who directly confront the dilemmas of education in a racially fragmented society.”

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183 See supra note 44 and accompanying text.
184 See supra notes 12-13 and accompanying text.
185 See supra note 47.
187 Id. In numerous ways, elements of the United States’ more immediate history could also be described as “dark and sadistic” but children’s textbooks rarely (if ever) adopt that tone. Id.
189 Schmidt, supra note 35, at 567 (emphasis added). Schmidt cites Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate, 470 F.3d 827, 841 (9th Cir. 2006) (en banc), cert. dismissed, __ U.S. ___, 127 S. Ct. 2160 (2007), regarding “the importance of deferring to the judgment and expertise of the relevant decisionmakers” when considering affirmative action plans. Id. Schmidt also cites Grutter v. Bollinger, 539 U.S. 306, 328 (2003), and states the “Law School’s educational judgment that such diversity is essential to its educational mission
Indeed, the dire circumstances addressed by the Kamehameha Schools are intimately related to the "questions of considerable moment and difficulty" which have not yet been addressed by the United States Supreme Court.

Rather than hoping for the nation's highest court to finally give voice to long suppressed and neglected Native Hawaiian claims for justice, advocates should instead pursue a renewed focus upon the Hawaiian usage exception as a vehicle for perpetuating cultural values and resources.

is one to which we defer." *Id.* Schmidt nevertheless argues that Kamehameha Schools' mission would be better served by a policy admitting non-Native Hawaiians in its classrooms. *Id.* Notwithstanding Schmidt's apparent belief that "Native Hawaiian" is a racial classification, compelling arguments can be made that the designation should instead be treated as a political status. *See generally* Van Dyke, *supra* note 51.

190 Schmidt, *supra* note 35, at 557 (acknowledging the Kamehameha Schools as a "unique educational institution" whose "avowed educational mission is to remedy the severely disadvantaged position of Native Hawaiians and to protect Native Hawaiian culture").