CHANGING TIDES

A POLITICAL AND LEGAL HISTORY OF THE OFFICE OF HAWAIIAN AFFAIRS

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ABSTRACT

The 1978 Constitutional Convention brought about significant changes to the social, political, and legal landscape in Hawai‘i. One of the highlights of the Con-Con was the approval and establishment of the Office of Hawaiian Affairs, a semi-autonomous entity of the State tasked with bettering the conditions of Hawaii’s indigenous people. The Office of Hawaiian Affairs was envisioned as a receptacle for reconciliatory efforts between Native Hawaiians, the State, and the federal government for historical injustices. The Office of Hawaiian Affairs was also created as a vehicle for Native Hawaiian self-determination.

Despite these admirable goals, the history of the Office of Hawaiian Affairs has been controversial. From its inception, it was decried as unconstitutional because it, according to critics, categorically divided American citizens based on their race. Its initiatives have come under harsh scrutiny from within and without the Hawaiian community, particularly given the relatively bleak social, economic, political, and health indicators for Native Hawaiians. Yet, the core purpose of the Office of Hawaiian Affairs remains: providing a vehicle for self-determination and eventual sovereignty. “Changing Tides: A Political and Legal History of the Office of Hawaiian Affairs,” examines the creation, challenges, and successes of the Office of Hawaiian Affairs during the past thirty-five years of its existence to demonstrate how the agency is uniquely poised to mediate greater forms of sovereignty and self-determination among Kānaka Maoli. Interspersed throughout this dissertation are analyses of key legal cases involving the Office of Hawaiian Affairs that have molded the arduous path toward reconciliation among the Hawaiian community, and between the federal and state governments.
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INTRODUCTION

“If a big wave comes in, large and unfamiliar fishes will come from the dark ocean, and when they see the small fishes of the shallows they will eat them up. The white man’s ships have arrived with clever men from the big countries; they know our people are few in number and our country is small. They will devour us.”

Hawaiian Scholar David Malo, 1837

“We Hawaiians are small fishes of the shallows, and though the shallows be ours, nevertheless the big waves of discovery of and migration to our land have had serious impact upon our people over the years. . . . [A]s a people, in Hawai‘i we Hawaiians are the least educated, and the poorest of the poor. We are the unhealthiest and we cannot afford to live in our own land. We are over-represented in our prisons and under-represented in positions of leadership within our community. And our families suffer from lack of leadership within.”

Thomas K. Kaulukukui, Jr., 2007

Ingenuity and a deep connection with the land, water, and sky brought Polynesian voyagers on double-hull canoes thousands of miles across the Pacific to the Hawaiian Islands. For hundreds of years, the people “lived in a highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion.”

The people of these islands never had a word to describe themselves—they were simply Kānaka Maoli, people of the ‘āina (land).

Identity for Kānaka Maoli was derived from the Kumulipo, the cosmic genealogy of life. The “essential lesson” of the Kumulipo “is that every aspect of the Hawaiian conception of the world is related by birth, and as such, all parts of the Hawaiian word are one indivisible lineage.” We are our ancestors. We are the ‘āina. As Professor Haunani-Kay Trask articulated, “genealogy is paramount. Who we are is determined by our connection to our lands and to our families. Therefore, our bloodlines and birthplace tell our identity.” Accordingly, from a Native Hawaiian perspective, identity is intricately interwoven with and based upon a connection with the land. Indeed, as Professor Lilikalā Kameʻeleihiwa suggests: “if someone were to ask a Hawaiian, ‘Who are you?’, he or she could only meaningfully answer by referring to his or her beginnings, to his or her genealogy and lineage.”

Healani Sonoda states that “[f]or Hawaiians,
land is familial, the source of material, cultural, and spiritual existence and political power.”

This native conception of self and identity, however, was not cultivated through history. Over time, colonial action and a project of Americanization dispossessed Kānaka Maoli from their ʻāina and contemporaneously tore their identity. For Kānaka Maoli, western contact brought significant social, cultural, economic, and political changes—changes that would not be addressed until the later years of the twentieth century when Kānaka Maoli regained an understanding of their history.

For over two centuries, Native Hawaiians have had to cope with the harsh effects of colonization. For well over a century, Hawaii’s indigenous people have endured the pain of losing their sovereignty, the suppression of their culture and language, and the arduous (and often frustrating) journey toward reconciliation. Malo’s prophecy, as Kaulukukui observed, is becoming more and more a reality as Kānaka Maoli, in their homelands, continue to have the highest rates of serious illness, prison incarceration, and homelessness, the lowest rates of higher education attainment and family income, and limited self-governance over their land, culture, and politics.

To counter the effects of colonization and to address the conditions facing Native Hawaiians, the people of Hawai‘i undertook a bold initiative and created the Office of Hawaiian Affairs in 1978. The history of the agency, which has been mired in political and legal battles, is one of control and one that illuminates the efforts and backsliding of the State and federal governments to address the longstanding justice struggles of Kānaka Maoli. It is the story of governments that shirk their basic responsibilities to indigenous communities and that are unwilling to live up to their propounded democratic ideals, thereby delegitimizing their status within the international community. Woven through this history is a resilient and resourceful people that, after being shackled (figuratively and literally), have grown impatient with the status quo. To better contextualize this intriguing history, one must first understand the trauma and violence done to Native Hawaiians. Professor Haunani-Kay Trask aptly observed that “so much of what passes for Hawaiian history [is] nothing more than a series of political myths created by foreigners and designed to disparage our people.”

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Western “Discovery” and Governance

In January 1778, unfamiliar apparitions—“trees moving about on the sea”—appeared on the horizon and landed on Kaua‘i. The floating “trees” with its tall masts and billowing sails was the ship of English-Captain James Cook. While the ship was docked near the pristine shores of Kaua‘i, one Hawaiian priest declared, “That can be nothing else than the heiau of Lono, the tower of Keolewa, and the place of sacrifice at the altar.” Kānaka Maoli believed that Cook was a god. Cook and his men were fed and given women in exchange for some of their goods. Cook failed to recognize or acknowledge the highly sophisticated system of communal land tenure and unique language, culture and religion of Kānaka Maoli. A year later, Cook would arrive in Maui. Many chiefs came aboard Cook’s vessel to trade. One of those chiefs was Kamehameha Pai‘ea, whom one of Cook’s sailor described as having “as savage a looking face as I ever saw.”

Kamehameha was a skilled warrior. It was said that he could lift his enemies over his head and could dodge a flurry of spears that were hurled at him. Priests had prophesized that Kamehameha would conquer the islands. For that, he was also referred to as Ka‘iwakiloumoku, the ‘iwa bird that will swoop down and snatch the islands. The signs were correct.

Kamehameha began his political and military campaign, and eventually seized Hawai‘i Island, Maui, Moloka‘i, Lāna‘i, and O‘ahu by 1795. His use of western weaponry and the skills of western advisors John Young and Isaac Davis contributed to his military conquest. By 1810, Kamehameha had secured a peaceful treaty of annexation with the ruler of Kaua‘i, and had successfully united the Hawaiian Islands under one sovereign. The Kingdom of Hawai‘i was born. His reign was a time of peace and a time when equal rights for all was established in Hawai‘i: “In his royal edict, Ke Kānawai Māmalahoe (Law of the Splintered Paddle), the first law of the Kingdom of Hawai‘i, Kamehameha galvanized the supremacy of the law, protected people from physical harm, and enshrined equal rights for all.” While Kamehameha protected his land, people, and culture from foreigners, he understood the growing influence that they were having on his kingdom and staved off pressure to capitulate. In the decades following Kamehameha’s death, however, western (particularly American) influences devastated the Kānaka Maoli physically, spiritually, culturally, economically, and politically.
In 1820, Calvinist missionaries who had traveled thousands of miles from New England arrived in Hawai‘i. They found a kingdom ruled by Liholiho (Kamehameha II), Kamehameha’s son, and Ka‘ahumanu, Kamehameha’s wife. Given the major port that Hawai‘i had become in foreign trade and whaling and all the diseases that accompanied these foreigners, the missionaries found a land plagued with the death of thousands of Kānaka Maoli. The circumstances allowed the missionaries to indoctrinate the rulers to believe that the Christian God had punished the Kānaka Maoli for their apparent “pagan” and “savage” practices. Ka‘ahumanu, who held the title of kuhina nui or prime minister, was the first convert. She had earlier conspired to break the ancient and traditional order by eating a meal with Liholiho. By her one act of defiance, a void was created that left many Kānaka Maoli uncertain about the future. This void would be filled with the rise of Christianity in the islands.

After Liholiho’s untimely death in London, his younger brother, Kauikeaouli, became ruler and Kamehameha III. At that time, the population of Kānaka Maoli was decimated from estimates of one million at the time of Cook’s arrival to only 150,000. Kauikeaouli was heavily influenced by the regents of his court as he was eleven years old at the time of his elevation as sovereign.

Over time, French, English, and American colonizers began to pressure Kauikeaouli to westernize Hawai‘i’s system of land tenure. Indeed, the restlessness of the West was best evidenced by the 1843 takeover of the kingdom by British Captain George Paulet after he received allegations that British subjects’ “legal rights” in land were being violated by the kingdom government. Ultimately, British Admiral Richard Thomas received word of the Paulet Affair, sailed to Hawai‘i, and restored the kingdom. It was then that Kauikeaouli famously remarked, “Ua mau ke ea o ka ‘āina i ka pono” or “the sovereignty of the land is perpetuated in righteousness.”

In response to the growing presence and power of the Western colonizers, Kauikeaouli sought guidance from his New England missionary advisors, particularly William Richards. Such counsel led to the westernized system of government. As Sally Engle Merry concluded, “The Hawaiians appropriated the New England legal system in order to be civilized, and the New England missionaries appropriated Hawaiians as dark savages against which they saw themselves as the light.” The kingdom became sophisticated in western practices. Indeed,
between the 1820s and 1887, the kingdom signed treaties with foreign governments, and signed international accords with twenty other nations, including several with the United States. The kingdom was also a member of the Universal Postal Union.

Perhaps the greatest political shift during Kauikeaouli’s reign came with the 1848 Māhele, which abolished the traditional system of land tenure and created three categories of land ownership: the monarch, the government, and the chiefs. The monarch, Kauikeaouli, divided the lands of the kingdom between himself and the chiefs. Government Lands were separated from the sovereign’s Crown Lands. Over time, the Crown Lands passed to successive sovereigns and the Government Lands remained those of the kingdom. In the end, because of their unfamiliarity with western notions of land tenure, the maka‘āinana (the commoners) were left with less than one-percent of the total land awarded in fee simple under the Kuleana Act, and with only 8,421 claims awarded by the Land Commission. As Professor J. Kēhaulani Kauanui noted, “the ultimate effect of the Māhele was to create and introduce private ownership of land and commodification of labor and to accelerate the dislocation of Natives.” Commoners were effectively dispossessed. Foreigners were finally given the opportunity to purchase land. And they did. As the Kānaka Maoli commented, “hana ‘i’o ka haole” or “foreigners gather land in earnest.”

The growing influence of foreigners created an uneasiness in the kingdom. The number of Kānaka Maoli continued to plummet due to foreign diseases. Through a succession of kings, the power of the monarchy spiraled out of control. Western style constitutions were adopted that restricted the powers of the sovereign. Economic interests, particularly whaling and the sugar industry, became the new king. Laborers from all over the world, mostly China and Japan, were brought to Hawai‘i to work the vast acreage of sugar cane fields. The Kānaka Maoli were quickly becoming strangers in their own lands.

Talks of annexation to the United States permeated the meeting rooms and hallways of lavish offices, as the United States pushed across the Pacific on its mission to fulfill the Monroe Doctrine—the American policy of westward expansion. In 1887, a group of powerful western plantation owners forced—at the threat of violence—King David La‘amea Kalákaua to sign a new Constitution, which limited the sovereign’s veto power, replaced the Kanaka Maoli nobility in the upper house of the legislature with wealthy western landowners, disenfranchised women
and non-literate Kanaka Maoli men under the age of forty-seven, and eliminated funding for education abroad for Kānaka Maoli. At the same time, the “Bayonet Constitution” allowed American or European taxpayers, regardless of citizenship, who were literate in a western language to vote. The result was a shift in political power from the Kānaka Maoli and sovereign to American annexationists.

*The Overthrow and Project of Americanization*

In January 1893, Kalākaua’s successor, his sister Liliʻuokalani, proposed a new constitution that would restore the power of the monarch and enfranchise the Hawaiian people. That proposal agitated a group of American businessmen (most of whom descended from the original missionaries), who called themselves the Hawaiian League and saw the Queen’s proposal as a revolutionary act. A few days later, with the approval and support of United States Minister John L. Stevens, American military forces were deployed ashore and with gatling guns pointed straight at the palace threatened violent action if the Queen did not renounce her throne. To avoid violence and bloodshed, the Queen conceded the throne to the United States President.

The Hawaiian League succeeded in forcibly overthrowing the kingdom and, thereafter, established their Provisional Government. President Grover Cleveland condemned the actions of the Hawaiian League: “A substantial wrong has thus been done which a due regard for our national character as well as the rights of the injured people requires we should endeavor to repair.” The Provisional Government, which later coined itself the “Republic of Hawaii” after President Cleveland refused to annex Hawai‘i, seized the Crown Lands and merged them with the Government Lands.

In an effort to Americanize Hawaiians (and other non-English speakers), the Republic passed laws banning use of the Hawaiian language in schools. The loss of the Hawaiian language tied directly to the loss of land, and further severed Hawaiians from their culture and identity. Indeed,

As a result of these actions, Hawaiians became a conquered people, our lands and culture subordinated to another nation. Made to feel and survive as inferiors when our sovereignty as a nation was forcibly ended, we were rendered politically and economically powerless by the turn of the century. Cultural imperialism had taken hold with conversion to Christianity in the 19th century, but it continued
with the closing of all Hawaiian language schools and the elevation of English as the only official language in 1896.26

With Republican William McKinley in the White House, efforts to restore Hawaiian sovereignty fell on deaf ears and pro-annexationists made their move toward annexing Hawai‘i. The Senate refused to ratify a formal treaty of annexation, due in large part to the 21,000-signature petition that was presented. That petition, referred to as the Kū‘ē Petitions, were gathered in a weeks-long campaign and represented more than half of the Native Hawaiian adult population at the time. Those Native Hawaiians spoke in a unified voice: “We the undersigned, native Hawaiian citizens . . . who are members of the Hawaiian Patriotic League of the Hawaiian Islands, and others who are in sympathy with the said league, earnestly protest against the annexation of the said Hawaiian Islands to the United States of America in any form or shape.”27 The voices of the Native Hawaiians did not fall to the wayside in the Senate where the proposed treaty was rejected.

But, the pro-annexationists were not done. Despite the admirable resistance effort, Hawai‘i was subsequently “annexed” in 1898 through a joint resolution—a less stringent, but nevertheless defective means of ratifying a treaty. Upon annexation, the Republic “ceded” the combined Crown and Government Lands to the United States. With the passage of the Organic Act in 1900, Hawai‘i was now a territory of the United States. During the Territorial period, the small group of white businessmen who controlled almost half of the Hawaiian land produced a concentration of wealth and power more extreme than anywhere else in America.28 The American indoctrination permeated Hawai‘i’s classrooms, where, in 1906, the Territorial government instituted a plan, titled “Programme for Patriotic Exercises in the Public Schools, Adopted by the Department of Public Instruction,” to “denationalize” students.29 As Dr. D. Keanu Sai asserted, “the purpose of the [Programme] was to obliterate any memory of the national character of the Hawaiian Kingdom the children may have and replace it, through indoctrination, with American patriotism and the English language.”30

In 1921, with years of returning lands to Native Americans as precedent and with a strong Native Hawaiian presence in Territorial Delegate (Prince) Jonah Kalaniana‘ole Kūhiō and Territorial Senator John H. Wise as representatives advocating for rights of the indigenous people, the United States Congress agreed to give back a small portion of land only to those
individuals of “any descendent of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.” As articulated by others, the passage of this law—the Hawaiian Homes Commission Act—was inherently flawed because it was “rooted in racism and shot through with paternalism.”

With the Hawaiian Homes Commission Act, the *American government* defined Native Hawaiians based upon blood quantum, and thereby determined who could occupy the land. The Native Hawaiians had no say. They could not, as their epistemology suggested, descend from the ‘āina by grant of the Kumulipo. On the contrary, to be entitled to land, a Native Hawaiian needed to have fifty percent of his or her blood be of Hawaiian ancestry. This law tore at the very fabric of Native Hawaiian culture and existence. In addition, all Native Hawaiians would not own their land, they would simply lease it from the government. In other words, Native Hawaiians became wards of the government by having to pay rent for the lands for a limited time, instead of being given lands in fee simple. Hawaiians were bound by and to the American government. Clearly, the passage of the Hawaiian Homes Commission Act was a deliberate and calculated attempt to appease some Native Hawaiians and to eventually lead to the ultimate displacement of Kānaka Maoli from the land.

As time went on, and with a surge in political participation from various minority groups, the white-Republican oligarchy in Hawai‘i fell in the Democratic Revolution of 1954. The Democrats, a majority of whom were Asian settlers to these islands, promised land-reform through land taxes and land use laws that would benefit the working class and the Native Hawaiian people. This political movement, however, “ultimately promoted land development and real estate deals that benefited the Asian and white settlers who came to comprise the political power structure in Hawai‘i, thus ushering in a new era of Asian settler political ascendancy.” Asian settlers who fought for American democratic principles, reneged on their promises to Native Hawaiians, and in many ways continued the Americanization and suppression of Hawai‘i’s indigenous peoples. Professor Trask discussed the way in which power was concentrated to effectively preclude Hawaiian control of lands and entitlements. For example, she pointed to how Senator Daniel K. Inouye had a “twenty-five-year lock on all federal funding for Hawai‘i, which, following Democratic Party procedure, has gone only to Inouye favorites, none of whom support Hawaiian control of Hawaiian lands and entitlements.”
In 1959, and after a concerted effort by the Territorial politicians, President Dwight D. Eisenhower declared Hawai'i a State. Upon admission, the Ceded Lands held by the federal government (those Crown and Government Lands from the Republic) were transferred to the State to be held in trust. This Ceded Lands trust, also referred to as the Public Lands trust, was defined by section 5(b) of the Admissions Act and provided that the revenue gained from said trust could be used for one or more of five purposes: (1) support of public schools and other public institutions; (2) the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Act; (3) the development of farm and home ownership on a widespread basis as possible; (4) the making of public improvement; and (5) the provisions of lands for the public use. The State of Hawai‘i interpreted that to mean it needed only to support at least one of the five purposes; the primary purpose it chose to support was education. The State failed to use funds or take any meaningful action to better the conditions of the native Hawaiians. With the exception of participation in Hawaiian civic clubs and the romanticized performances in the burgeoning tourism industry, Native Hawaiian culture, language, and political participation was rapidly declining. America had successfully pushed Native Hawaiians to the periphery in their own homelands.

Roadmap

It is within this context of a native people displaced by western principles and ideologies, and forced to assimilate into an American State that this dissertation, “Changing Tides: A Political and Legal History of the Office of Hawaiian Affairs,” begins. In 1978, to counter the growing stratification of Hawaiians from the rest of society, the people of the State of Hawai‘i ratified a constitutional amendment that created the Office of Hawaiian Affairs. The purpose of the Office of Hawaiian Affairs was to serve as a vehicle for reparatory action between the State and the Hawaiian people for the injustices of the past. The agency was specifically tasked with expending public trust funds for the benefit of Hawaiians and was intended as a means of facilitating the reconstruction of a Hawaiian governing entity. Unraveling the intent of the Office of Hawaiian Affairs and its subsequent efforts toward Native Hawaiian self-determination, illuminates the crucial role that the semi-autonomous entity plays and will continue to play in reestablishing a Hawaiian governing entity. Examining the Office of
Hawaiian Affairs as an institution and its various initiatives, this dissertation critiques, among other issues, the role that the Office of Hawaiian Affairs has and will continue to play in the efforts toward self-determination for Native Hawaiians.

The first chapter details the dramatic cultural, spiritual, and most importantly, political renaissance that occurred in the 1960s and 1970s and provided a foundation for the modern sovereignty movement in Hawai‘i. With Hawaiian families in the streets and on the beaches, Kānaka Maoli rallied together to hold the State government accountable for their gross mismanagement of the Hawaiian Home Lands trust, which was transferred in part to the State as a condition of Statehood. Native Hawaiians regained an understanding of their past, internalized the philosophy of aloha ʻāina (respect for the land), and began to challenge the militarization of the islands, specifically by protesting the bombing of the island of Kahoʻolawe, off the southern coast of Maui.

The elevation of a Hawaiian political consciousness led to gatherings of Hawaiians—the likes of which were likely not organized since the opposition to annexation failed at the turn of the twentieth century—to discuss sovereignty and to resolve the injustices against the Kānaka Maoli. Chapter two begins by analyzing the first major step taken by the State toward encouraging self-control and self-determination of lands and assets by Native Hawaiians with the 1978 Constitutional Convention. The 1978 Con-Con, dubbed the “People’s Convention,” brought about earthshaking changes to Hawai‘i, including the expansion of the rights of Hawaiians. In the words of one legislator, “[t]he injustice perpetrated on the Hawaiian people a century ago has been a cancer that insidiously all too silently has been destroying the fabric of our community.” Consequently, a highlight of the 1978 Con-Con was the successful passage of an amendment to the Hawai‘i State Constitution that, as previously described, established the Office of Hawaiian Affairs, a semi-autonomous agency later approved by Hawai‘i voters to administer the Ceded Lands Trust revenues for the betterment of the native Hawaiians. Delegates of the 1978 Con-Con expressly envisioned the Office of Hawaiian Affairs as a “receptacle for any funds, land or other resources earmarked for or belonging to native Hawaiians.” The Convention viewed the creation of the Office of Hawaiian Affairs “of utmost importance” because it “provide[d] for accountability, self-determination, [and] methods for self-sufficiency through assets and a land base.” Indeed, the Con-Con delegates and subsequently
the people of Hawaii determined that the Office of Hawaiian Affairs would have the obligation of bettering the conditions of all native Hawaiians, not just those of fifty percent Hawaiian ancestry. In other words, while the federal government required the State to ensure the betterment of fifty-percent Hawaiians, the State required the Office of Hawaiian Affairs to support the interests of all Hawaiians; the State expanded who constituted a Hawaiian for purposes of receiving benefits from the Office of Hawaiian Affairs, and it did so without setting a funding mechanism for the agency. The agency was envisioned as an independent body that was elected by Native Hawaiians for Native Hawaiians that, when combined with the Department of Hawaiian Homelands, would be the unifying voice of Kānaka Maoli. Yet, for all the success that the Con-Con achieved in advancing the rights of Hawaiians, the delegates ultimately regretted leaving the implementation of the details of the Office of Hawaiian Affairs to the State Legislature. As discussed further in chapter two, the Legislature (particularly the State Senate) retreated on the Con-Con delegates’ vision and purpose of the agency. Relying on an outdated, racist, and paternalistic view of Hawaiian history, the Legislature narrowed the powers of the Office of Hawaiian Affairs and left outstanding the largest issue: how revenues from the Ceded Lands trust would be distributed.

Nevertheless, legislation was passed and the first crop of trustees were sworn in. Chapter three examines the first decade of the Office of Hawaiian Affairs’ existence, with an emphasis on its struggle to gain legitimacy within the Native Hawaiian community and the public at large, its involvement in the Native Hawaiians Study Commission in the face of a Reagan Administration clawing back on programs that benefit minorities, its successful initiatives and programs, and its legal challenge to force the State to pay its promised obligations. The first decade highlighted how the direction of the Office of Hawaiian Affairs was shaped by the opinions and perspectives of the trustees themselves. Thus, the goals of the agency were directly informed by the trustees that were elected.

In chapter four, an examination of the Office of Hawaiian Affairs’ second decade—characterized by the emotion-filled hundredth year observation of the illegal overthrow of the kingdom, the renewed push for sovereignty and Native Hawaiian self-determination, and the constant infighting and jockeying for power amongst the trustees—reveals an entity still trying to find its place and role in the community.
Perhaps the quintessential moment that defined the Office of Hawaiian Affairs came in 2000, when the Supreme Court of the United States issued its decision in *Rice v. Cayetano*. The *Rice* decision, as discussed in chapter five, was a direct attack on the agency and a capitulation to a conservative ideology that attacked programs that afford special treatment to minorities. The harm from the decision, however, came from its perpetuation of outdated and romanticized notions of Hawaiian history. The *Rice* opinion represented a pivotal moment in the history of the organization inasmuch as it affirmed the course of the agency for the rest of its existence.

As a direct result of the *Rice* decision and its progeny, the Office of Hawaiian Affairs began focusing its efforts and funding on Hawaiian governance issues. For the agency, and throughout its third decade, tremendous financial support was directed toward efforts of Hawai‘i’s congressional delegation to reorganize a Hawaiian governing entity under the auspices of federal recognition—the method by which the American government, under American law, recognizes the sovereignty of indigenous peoples. As discussed in chapter six of this dissertation, that effort took the form of supporting legislation often referred to as the Akaka Bill. Some vocal members of the Hawaiian community vehemently opposed the efforts of federal recognition as a ploy to usurp the inherent sovereignty that was never relinquished after the overthrow. Pro-American conservatives launched vicious attacks against the Office of Hawaiian Affairs and characterized its support of the Akaka Bill as engendering racial separatism in paradise to the detriment of individuals of other ancestries. Another tranche of lawsuits was filed against the Office of Hawaiian Affairs in an attempt to stop the agency’s use of Ceded Lands trust funds on efforts like the Akaka Bill. These lawsuits, *Day v. Apoliona* and *Kealoha v. Machado*, were asserted by native Hawaiians of fifty percent or more Hawaiian ancestry and highlighted the divisiveness of the American construct of blood quantum within the Native Hawaiian community, but also enshrined in case law the ability of the Office of Hawaiian Affairs to expend section 5(f) trust funds to support any program that, at the very least, bettered the condition of native Hawaiians. Despite these setbacks and challenges, the Office of Hawaiian Affairs was able to make significant gains in terms of acquiring land and building its financial portfolio during its third decade.

Given the failure of the Akaka Bill, chapter seven explores the Office of Hawaiian Affairs’ more recent quest for self-determination, identity, and land reclamation through
mechanisms of the State. At the heart of this chapter is an assessment of several Office of Hawaiian Affairs’ lawsuits that illuminate the promises and, more importantly, the retrenchment of the State government in reconciling with the Native Hawaiian community. One former Hawai‘i Governor stated: “what’s right and just for the Hawaiian people is really what’s best for the State of Hawaii. What the Hawaiians seek is simple justice, and we’re happy to be a part of it.”40 But, the State’s actions have been to the contrary.

The final chapter of this dissertation proposes what steps should be taken to move the entity and the Native Hawaiian community forward. As has become clear, the Office of Hawaiian Affairs, as a State agency, has been increasingly confined by American laws despite its efforts to take meaningful action to advance the cause of Hawaiian self-determination. It has been shrouded in controversy for its increasing secrecy and lack of transparency, and has been at the center of a debate surrounding the future of Hawaiian governance. Indeed, some Native Hawaiians support an initiative toward seeking reconciliation with the federal government through the process of federal recognition, which has recently been buttressed by the actions of the Obama Administration. Other Native Hawaiians criticize federal recognition efforts and instead argue for an international solution. This disagreement of the future of governance for Native Hawaiians is often packed with passion and strong emotions, including a feeling of frustration from all at the lack of resolution for well over a century. This dissertation suggests, however, that the Office of Hawaiian Affairs is the most well-positioned entity (financially and logistically) to serve as a neutral facilitator to mediate a resolution. Only when meaningful healing is accomplished within the Native Hawaiian community can Native Hawaiians push forward with reconciliation with the federal and State governments. Like the tides that shift across the sandy shores of these islands, so too must the Office of Hawaiian Affairs pivot and focus on unifying the Native Hawaiian community.

The terms “Kānaka Maoli,” “Hawaiian,” and “Native Hawaiian” are used interchangeably throughout this dissertation to refer to the indigenous people of Hawai‘i regardless of blood quantum. As Kame‘eleihiwa recognized, “As we Hawaiians begin to decolonize our minds, we realize that we must redefine every aspect of our lives—including the English we write—in order to regain the mana of self-determination lost in the American colonization of Hawai‘i. The correct spelling of Hawaiian words and the selective capitalization of certain terms of our choosing, such as ‘Native’, are signs of our incipient sovereignty. We will make the rules that govern spelling of our words. They are, after all, our words.” See Lilikala Kame‘eleihiwa, Native Land and Foreign Desires: Pehea la e Pono Ai? 342 (Bishop Museum Press 1992). The term “native Hawaiian”—with a lowercase “n”—is used throughout this dissertation to refer to those individuals of not less than one-half part Hawaiian blood, as defined in the Hawaiian Homes Commission Act.

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7 Kame‘eleihiwa, supra note 5, at 2.


9 Kame‘eleihiwa, supra note 5, at 2.


11 Trask, supra note 8, at 129.


13 Id.

14 Id.

15 Id. at 93, 100.

16 Id. at 95.

17 Id. at 97.


19 Kamakau, supra note 12, at 219-28; Kame‘eleihiwa, supra note 5, at 67-94.


21 Kame‘eleihiwa, supra note 5, at 15.

22 Id. at 295.


25 Letter from President Grover Cleveland to the United States Senate and House of Representatives (December 18, 1893).

26 Trask, supra note 8, at 21.
27 Petition Against Annexation to His Excellency William McKinley, President, and the Senate, of the United States of America (November 19, 1897).
28 MERRY, supra note 20, at 137.
30 Id. at 19.
33 CANDACE FUJIKANE & JONATHAN Y. OKAMURA, ASIAN SETTLER COLONIALISM: FROM LOCAL GOVERNANCE TO THE HABITS OF EVERYDAY LIFE IN HAWAI‘I 5-6 (Univ. Haw. Press 2008).
34 TRASK, supra note 8, at 51.
38 Id.
39 Id. at 646.
40 Derek Ferrar, Thousands Gather to Support Hawaiian Justice, KA WAI OLA O OHA, October 2003, at 1, 9.
CHAPTER 1

*A Wave of Discontent: Hawaiian Resistance in the Seventies*

As the sun set one cool day in early 1976, a group of Hawaiians reveled at the excitement of what they were about to do: confront the power of the American military in order to protect Kaho‘olawe, an island that the United States (with the acquiescence of the State of Hawai‘i) had ravaged with bombs. As one individual put it, “I watched our people preparing themselves as if going to war.”

Plans were drawn by the Protect Kaho‘olawe Association (later known as the Protect Kaho‘olawe ‘Ohana) to launch another fleet of boats to land on the island and create a human barrier to the barrage of the American military. No one knew what would happen that next day: would they be stopped at sea as they approached? Would they be arrested and detained? Would they be killed? It did not matter. The tides were changing and the struggles of the Kānaka Maoli for their land and culture were no longer acceptable.

The members of the Protect Kaho‘olawe Association, like those of many other grassroots organizations, were riding the crest of a turbulent wave—the rise in the social and political consciousness of the Kānaka Maoli and their allies. This tumultuous period leading to the creation of the Office of Hawaiian Affairs, commonly referred to as the Hawaiian Renaissance,

was a time when there was a reawakening in Hawaiian culture and an emergence of a people impatient for economic, social, and cultural justice for Hawaii’s first peoples. It was a time of learning, challenging authority, and unifying the Hawaiian people.

*Nānā I Ke Kumu: Cultural Revival*

For decades, the project of Americanization inculcated the Hawaiian Islands. Territorial laws forbade the use of Hawaiian language in the schools. School children were indoctrinated with a sanitized and western view of Hawaiian political history. Hawaiians were made to feel inferior in their homelands, driving some to even take coarse rags to their skin to “remove themselves” of their tanned color. The colonizers were on the verge of obliterating a culture and a people. Yet, glimmers of resistance within the Kānaka Maoli remained. Individuals like Mary Kawena Puku‘i, Papa Auwae, ‘Iolani Luahine held steadfast to the stories and traditions of
their culture. They refused to let their identities and that of their ancestors vanish. In 1964, a book by John Dominis Holt spurred a renewed interest in regaining a Hawaiian identity. In his groundbreaking book, *On Being Hawaiian*, Holt writes, “[W]e want to run our own show—at long last—as an ethnic and political conglomerate on our own terms.” And that is what happened.

Over the course of the seventies, there was a surge in the use of and appreciation for the Hawaiian language, ‘ōlelo Hawai‘i. Once considered a “dying” language on the verge of extinction, the Hawaiian language flourished in the seventies. The University of Hawai‘i saw an increase in interest in the language such that the one language teacher increased to more than a dozen Hawaiian language teachers. Private and public high schools began teaching Hawaiian language courses. In 1972, the ‘Ahahui ‘Ōlelo Hawai‘i was formed and conducted a weekly talk on the radio entirely in ‘ōlelo Hawai‘i. With the flourishing language came an interest in other traditional arts.

The traditional form of dance, *hula*, found its revival during this time. Once described by a Christian bishop as an “unnamable lewdness” and one of the causes of the rapid decline of the Kānaka Maoli, traditional hula was no longer an expression that was hidden to the public eye. Dissatisfied with the “haolefication of the hula,” traditional practitioners Joseph K. Ilalaole, Pua Ha‘aheo, Lokalia Montgomery, ‘Iolani Luahine, Kaui Zuttermeister, and Edith Kanaka‘ole trained young students, who in turn became master teachers, kumu hula, and began teaching scores of young people. The spike in participation of various troupes in the Merrie Monarch Hula Festival and the King Kamehameha Celebration Hula Competition evinced this resurgence in interest and appreciation of this traditional art form.

In 1971, the Hawaiian Music Foundation was established to perpetuate Hawaiian music. The Foundation sponsored kīho‘alu (slack key), steel guitar, and falsetto contests. Talented Kānaka Maoli musicians such as the Cazimero Brothers, Gabby Pahinui, Olomana, and the Sons of Hawai‘i were as familiar to Hawaii’s populace as nationally recognized musicians, such as The Village People, which predominated the radio waves across the country. Eddie Kamae, famous entertainer and member of the Sons of Hawai‘i, stated, “Young Hawaiian musicians are coming out of the woodwork in droves.” The sound of the Renaissance reflected a cultural and spiritual reawakening of, for, and by the Kānaka Maoli.
Perhaps the quintessential symbol of the cultural revival of the Kānaka Maoli in the seventies was the successful transpacific voyage of the Hōkūleʻa, a traditionally designed double hull canoe. The Polynesian Voyaging Society, under the vigilant eye of master navigators Mau Piailug and Nainoa Thompson, canoe designer Wright Bowman, and cultural consultant Herb Kane, revived the all-but-lost ancient navigational arts and skills. Reaching its destination of Tahiti from Hawaiʻi in 1976 without the use of modern navigational equipment seemed to be an unprecedented feat; Kane stated, “The building of the canoe and its trip are stimulating a cultural revival where Hawaiians are learning what their ancestors were capable of accomplishing. The voyage has confirmed Polynesian intelligence, resourcefulness and self-esteem.”

The Hōkūleʻa was a symbol of pride for the Kānaka Maoli inasmuch as it showed their intellectual prowess in the past and in the twentieth century.

The Kānaka Maoli were experiencing their renaissance. For Dr. George S. Kanahele, “a renaissance encompasses more than the creation of works of art and literature. It also includes a revival of interest in the past, in the pursuit of knowledge, and in the future. In short, it deals with the revitalization of the human spirit in all aspects of endeavor.”

With the surge in cultural awareness that occurred during the sixties and seventies, the Kānaka Maoli began to find their political voice. Building upon the resistance movements in the United States and around the world, and following the post-Vietnam mentality of challenging authority, the Kānaka Maoli were ready to engage in the fight for justice to elevate the socio-economic status of Native Hawaiians. Several key events and efforts emerged during the seventies that led to the resurgence in a Hawaiian political agenda, and, ultimately, the creation of the Office of Hawaiian Affairs. Throughout the seventies the Kānaka Maoli and their allies were successful in raising awareness and holding both the State and the Federal governments accountable for their actions and inactions with regard to the decades-old justice struggles of the Kānaka Maoli.

Accountability in the State Department of Hawaiian Homelands

In the predominantly Kanaka Maoli community of Waimānalo, nestled on the eastern part of the island of Oʻahu, a young Raymond Pae Galdeira would, with his organization, thrust the issue of Hawaiian economic justice to the fore of public attention in Hawaiʻi. Galdeira was
one of thirteen children who lived on Hawaiian Homestead land that was awarded to his mother, Margaret Kalalau, in 1950.\textsuperscript{10}

The lease award was the result of the 1921 Hawaiian Homes Commission Act, which was passed by the federal government and which provided land to “any descendent of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.”\textsuperscript{11} In 1920, hearings were held about the conditions of Hawaii’s indigenous peoples, in which Congress learned that Hawaiians were a “dying race” with the number of “full-blooded Hawaiians” dropping from 142,500 in 1826 to 22,500 in 1919.\textsuperscript{12} In his statement to a congressional committee, Territorial Senator John H. Wise defined what it meant to be Hawaiian and emphasized the connection to the ‘āina: “The Hawaiian people are a farming people and fishermen, out-of-door people, and when they were frozen out of their lands and driven into the cities they had to live in the cheapest places, tenements. That is one of the reasons why the Hawaiian people are dying. Now, the only way to save them, I contend, is to take them back to the lands and give them the mode of living that their ancestors were accustomed to and in that way rehabilitate them.”\textsuperscript{13}

Following the failed attempt to pass their “Rehabilitation Bill” the first time, Delegate (Prince) Jonah Kūhiō Kalanianaʻole attested, “Though the Bill itself died with the passing of the last Congress on March 4, I am able to state to you that many of its provisions met no opposition and that the much discussed sections opening the way for the Hawaiians to return to the land were looked upon favorably by the members of both Houses of Congress . . . . Yes, the Bill is dead; but it failed at the last movement in the Senate owing to the congestions of business at the short session of Congress.”\textsuperscript{14} Characterizing the first attempt as a failure on procedural grounds, Kūhiō did little to mention the substantive objections to the bill that echoed through Congress.

The notion of rehabilitating Hawaiians resonated with some federal legislators.\textsuperscript{15} Others, questioning the constitutionality of race-based legislation, found comfort in analogizing the Hawaiians with Native Americans of the continent.\textsuperscript{16} American Secretary of the Interior Franklin K. Lane analogized Hawaiians to Native Americans when he articulated, “the natives of the [Hawaiian] islands . . . are our wards . . . and for whom in a sense we are trustees.”\textsuperscript{17} The result, in 1921, was the enactment of the Hawaiian Homes Commission Act, which authorized the United States to lease certain lands, the former Government and Crown lands of the
Hawaiian Kingdom, as homestead plots, to the native Hawaiian for a nominal fee. Kuhiō’s and Wise’s goal of putting Hawaiians (at least some) back on the land was achieved.

As the law was intended and like many other homestead families in Waimānalo, Galdeira and his siblings grew up farming the land and tending to animals. Although they lived on homestead land, money was always an issue. To subsidize his parents’ income, at the age of nine, Galdeira started his first job as a newspaper boy. He and his brothers would catch the bus after school to Waikīkī to sell newspapers on the street. The children would also pick guavas and shine shoes to earn additional money for the family. Strapped with assisting in the family’s growing financial hardships, Galdeira dropped out of school and entered into the National Guard, where he worked as security detail for the missiles at Bellows Air Force Base into the early sixties—a time of heightened threats of a Russian and Cuban missile attack on American soil.

Shortly thereafter, President Lyndon B. Johnson instituted his War on Poverty. Part of his program was the creation of the Office of Economic Opportunity. Galdeira participated in the State Pilot Outreach Program and mentored teenage girls from schools around O‘ahu, who were potential or at risk of dropping out of school for various reasons, including pregnancy. It did not take long before boys became a part of the program. Galdeira organized work study opportunities so that these teens could make money, have outings, and obtain necessary lessons so that they could earn a high school diploma—the key, he thought, for success in the constantly changing Hawai‘i. Galdeira eventually founded the Waimānalo Teen Project, a spin-off of the work study opportunities, with the goal of keeping local teens active and out of trouble after school and on weekends.

One stormy night, a few teenagers asked if Galdeira could give them a ride home. Galdeira agreed, but to his shock was directed to Waimānalo Beach Park, which had grown to become a sort of “tent city” of Kānaka Maoli. With the winds gusting and the spray of ocean water and rain pelting their skin, Galdeira and the teens jumped out of the car and assisted a mother who, while holding and trying to protect her newborn, was struggling to keep the tarp covering her family’s home from blowing away. Galdeira was beside himself when he saw these Native Hawaiian teens and their families struggling to keep their tents from collapsing. Galdeira was upset: “why were Hawaiian families living at the beach and not in a home on
Galdeira made a phone call to the local paper to shed light on a situation that many were talking about, but about which no one was willing to take any action. Galdeira spoke with his mother-in-law, Elizabeth K. Tuttle, a volunteer with the Legal Aid Society, about the situation. Tuttle, a well-educated native Hawaiian, shared information with Galdeira about the Hawaiian Homes Commission Act and the failure of the State and federal governments to uphold their obligations to native Hawaiians. Galdeira decided to organize.

With the support of other Waimānalo residents, including Tuttle, and his wife, Luana, Galdeira gathered Kānaka Maoli from all over the State together in Waimānalo with the Legal Aid Society to discuss issues of concern with the Hawaiian Homes Commission and the Department of Hawaiian Homelands, including leasing policies and allegations of nepotism and favoritism in the awarding process. “The Hawaiians” was formed. In a call to arms, Galdeira, as Chairman of The Hawaiians, wrote:

“We, the people of Hawai‘i, have journeyed a long and dark road together. A road which began a long time ago . . . a road which grew smaller, rougher and painful to us. It was only our spirit and love for our homeland, for our great mother Hawai‘i, that lightened the darkness like a flickering candle. There is great truth in the old proverb that says, “It is better to light one candle than to curse the darkness.” Let us stop cursing the darkness of extinction, disunity and poverty. Let us each light a candle of unity to light our way. Let us each light a candle of love to help our homeland and our people.”

Their goal was to “gain ‘justice’ for the Hawaiians, to improve their social and economic position, and to restore racial pride.” Their first objective was to meet with Governor John A. Burns—not an easy feat when you are “a nobody” in the government’s eyes—and list their grievances with the State Department of Hawaiian Homelands.

On October 13, 1970, Galdeira sent a letter to Governor Burns advising him that The Hawaiians would be holding a rally at the State Capitol rotunda on October 25, 1970 in order to “demonstrate that we Hawaiians are united in our drive to get more land through the Hawaiian Homes Act and to help encourage our people to participate and strengthen our cause.” Galdeira continued, “In order for us to hear your views on our concerns dealing with the Hawaiian Homes land problems, we would greatly appreciate it if you could be with us at the rally and share our concerns.” He attached a sheet to his letter with three questions that The Hawaiians wanted responses to from the Governor:
1. What are your views on the Hawaiian Homes Commission Act?

2. There are approximately 2,000 families on the waiting list. Some waiting as long as 42 years because Hawaiian Homes Commission does not have enough funds to develop the land. What immediate action do you propose?

3. The following was taken from the Hawaiian Homes Commission Act, Section 204, Number 3.
   “The department shall not lease, use, nor dispose of more than twenty-thousand (20,000) acres of the area of Hawaiian home lands, for settlement by native Hawaiians, in any calendar five-year period.”
   a. Do you plan to carry out this portion of the Hawaiian Homes Commission act? Do you plan to release 20,000 acres as soon as possible if elected?
   b. Why has Section 204, Number 3, of the Hawaiian Homes Commission Act NOT been carried out in the recent years?

After persistent calls to the Governor for a meeting and a promise that The Hawaiians would picket the Governor’s office for an hour were met with no response, Galdeira led the demonstration at the State Capitol rotunda during one of the busiest tourist events of the year, Aloha Week. Hundreds of demonstrators—Hawaiians, part-Hawaiians, and many more non-Hawaiians—from all around the State showed up. As promised, they demanded a meeting with Governor Burns. Embarrassed by the demonstration during such a highly publicized tourist event, Governor Burns begrudgingly granted the meeting—not before a heated exchange with Galdeira. Galdeira recalled:

We tried to meet with Governor Burns, but he wouldn’t give us the time of day. I called his office daily, and all I did was talk to one of the girls in the office. She said, “Sorry, the Governor is busy.” Until finally we were against the wall and we decided to picket the capitol.

So for the first time many of us went on the picket line, a lot of old folks also. And it was kind of a weird experience for us. We had about a hundred people on that short notice – one day – and we started about nine o’clock – walking around the rotunda. The timing was right, because they had an Aloha Week Program at the rotunda and all the tourist buses were coming in. The guys with the Aloha Week pageant – the king and all his aliis – they wouldn’t put on their program if we told them not to.

They didn’t want to cross the line but we said, “No, we’re not after you guys. We want to talk to the Governor.” And we wanted some entertainment while we were walking, so they went on with their program. At that particular program the Governor had to speak. So he came down – finally came down – and
he went up and he made his speech. And we were still demonstrating with signs and stuff.

Finally he came over to me and he said, “What the fock you doing?” So I look at him.

At first I had respect because he was the Governor – but I said, “Hey, fock you man, because we trying to reach you and you were giving us this kind of run around.”

He said, “Bullshit,” you know, and he was going in a rage. Yeah, he was really high. So we went at it for about five minutes, and finally he said, “Okay, I want to meet with you at two o’clock.” This was about twelve-thirty.

I said, “Eh, B.S. man. If we meet, you meet with everybody carrying the signs.”

He said, “Well, where the hell I going put ‘em?”

I said, “You the Governor, you find a way.” So he finally took us up in his conference room.

He had his good strategies too. As we walk in the door he stands by the door, and he shakes everybody’s hand. And the old folks – they just melt! They kind of feel bad that we had the demonstration. Finally, we’re in the room and he says, “Alright what the hell’s you guys problem?”

I’m waiting for the other guys to kinda’ take the lead. Everybody just waiting back, and I started to come out. And all of a sudden people started to express themselves. He played his game kinda’ well because he had Pinky Thompson, who was his administrative aide. He’s asking Pinky, “Is this right?”

“Yes, that’s right.”

“Is this right?”

“Yes, that’s right.”

He says, “Oh, we’ve got a bad program. How are we going to make some changes?”

Governor Burns and his special assistant, Pinky Thompson, fielded questions and provided assurances that the Burns Administration would do everything in their power to address the dilapidating Department of Hawaiian Homelands. In a subsequent written response to The Hawaiians, Governor Burns stated: “I would like to see every qualified applicant off the list and on a homestead. I would like to see the Commission and the department actively supporting our Hawaiian people in search for solutions to all their problems, not just housing. I would like to see these programs become a valuable tool in the revitalization of the Hawaiian culture and an increase of appreciation of what it means to be Hawaiian by Hawaiians and non-Hawaiians alike.”

This meeting was the first of numerous open talks the Governor had with The Hawaiians and their issues with the Hawaiian Home Commission. It eventually led to Burns requesting that
The Hawaiians submit names of candidates to fill the upcoming vacancies on the Commission. Galdeira would later remark: “I see a lot of hope for Hawaiian people in the future, simply because they know what’s happening and they won’t run away from their problems. We have to go political – that’s the only way things can happen.”

The Hawaiians would tackle several other issues to assist the struggling communities in Hawai‘i, including organizing the People’s Market, which was the first farmers market on O‘ahu. The People’s Market was a bold initiative in economic and agricultural self-sufficiency because it assisted farmers in supplying produce to consumers, thereby bypassing retail sales. This open market idea allowed farmers to reap more of the profit for their families and pass on lower costs to the consumer.

Through his work with the Legal Aid Society, Galdeira was pivotal in the establishment of the Community Client Counseling Program and the Hawaiian Coalition for Native Claims, which later became the Native Hawaiian Legal Corporation, a legal advocacy group that actively fights to protect Native Hawaiian traditional and customary rights and interests.

But, by far, The Hawaiians’ most significant contribution came with demanding reform of the Department of Hawaiian Homelands.

Galdeira and The Hawaiians assisted Kanaka Maoli rancher Sonny Kaniho in organizing a protest against the policies of the Department of Hawaiian Homelands at the historic Parker Ranch in Kamuela on Hawai‘i Island. The Department of Hawaiian Homelands had leased land to Parker Ranch, but the lease had expired in the 1940’s. Parker Ranch represented all that was corrupt with the Department and the larger systemic vestiges associated with the oligarchical government in place following the overthrow.

The land, with sweeping views of the Pacific Ocean, was still being used rent free by Parker Ranch for cattle grazing, while native Hawaiians were waiting years on the waiting list for homestead land and families struggled to keep their tent homes firmly pegged in the sand. Kaniho and The Hawaiians would occupy a portion of Parker Ranch. Kaniho had made his plight known to the Department and to Acting Governor George Ariyoshi’s Office: “On or about the 18th of May an Hawaiian delegation led by Pae Galdeira (State President of the Hawaiians) will accompany me to Waimea to complete fencing off that section of Pauahi which I have claimed for my people. I know the gates are locked and chained. I know the [sic] Parker Ranch has contracted security personnel. I know the police are expecting our delegation. But we have no fears.”
On May 18, 1974, the group made their way up to Puakō to the residence of future Office of Hawaiian Affairs Trustee Chair Robert Lindsey. The group then proceeded to Kaniho’s home for a gathering and marching orders on how the protest would proceed. The group then made their way to Parker Ranch, in the portion of land known as Pauahi, to begin their protest. Among the participants in the protest was future Office of Hawaiian Affairs Trustee Moanikeʻala Akaka, photojournalist Ian Lind, The Hawaiians’ chaplain Mary-Mae Onea, Renwick “Joe” Tassil, Loren Akaka, Joe Kekekia, Delores Kahue, Chris Yuen, Dixon Enos, Francis Kauhane, Andrew Akau, Mark Atkinson, and Anita Hill. Another individual that joined the protest was Jim Letherer, who had marched a decade earlier alongside Martin Luther King, Jr., from Selma to Montgomery to protest the abhorrent treatment of African American voters. When Kaniho arrived, officials from the Department of Hawaiian Homelands were waiting in the distance. Their original plan to fence off the area was scrapped and, instead, Galdeira instructed everyone about the rationale for the protest.

With the sun blazing overhead and the Hawaiian flag billowing in the winds, the group lifted the gate of Parker Ranch off of its hinge (so as to not damage any property) and the protestors entered the property. Kaniho provided the protestors with a guided tour of the property. Mary-Mae Onea then led the group in prayer. The participants then waited patiently for the authorities to arrive. To no one’s surprise, County police officer, and future member of the Hawaii County Council, Leningrad Elarionoff (also a cousin of Kaniho) warned each participant that they were trespassing. Ian Lind stated, “The message was simple: leave now or face arrest.” Officer Elarionoff took names and information of all those involved. After completing their tour, the gate was put back in its original position, Galdeira thanked those involved for their support, and the tour ended with a prayer. This was the first protest by Hawaiians (literally, The Hawaiians) and for Hawaiian interests to their lawful claims, since the Kūʻē Petitions at the turn of the century.

The protestors were subsequently served penal summons for trespassing and ordered to appear in district court on June 4, 1974. The State government condemned the Parker Ranch protestors. Indeed, despite Kaniho’s prior notification of his planned protest and the involvement of The Hawaiians, the Honolulu Star-Bulletin ran an article a few days later in which the Director and Deputy Director of the Department of Hawaiian Homelands were
“puzzled” by The Hawaiians protest. Acting Governor George Ariyoshi, prejudging Kaniho’s actions before the court had an opportunity to adjudge the veracity of Kaniho’s argument, wrote, “On May 18, 1974, when you and your group ‘toured the land’ without permission, you disregarded the rights of Parker Ranch to use and occupy the land without interference. To my knowledge, Parker Ranch has not disregarded any of your rights.” Ariyoshi was wrong.

With the assistance of young attorneys with the Legal Aid Society of Hawai‘i, particularly attorney Robert “Gil” Johnston, Kaniho and The Hawaiians prevailed in court. Kaniho and Johnston had done their homework in advance of the protest. Only Johnston and Kaniho knew that the exact place where the gate was removed was in fact an easement and right of way to a smaller kuleana property that was not leased by Parker Ranch. On August 13, 1974, in the small country courtroom of Judge Norman Olds, the charges were thrown out. The court determined that Parker Ranch had no case of trespass as the land did not belong to it.

The Hawaiians assisted Kānaka Maoli and non-Kānaka Maoli farmers in Kalama Valley on O‘ahu, who were facing eviction because of the development by the Bishop Estate and Kaiser-Aetna. The groups were described as “natural allies” because “The Hawaiians pointed to the failure of the homestead program, while tenants in Kalama were living proof of that failure. It was public knowledge that several families in the Valley had been on the Hawaiian Homes waiting list for decades.”

Although the Kalama Valley residents failed to save their homes and way of living, the efforts of The Hawaiians eventually led to the appointment of one of their own, Georgiana Padeken, as director of the Department of Hawaiian Homelands, which was a turning point in the Department’s history. Using lobbying, advocacy, mass protests, and non-violent civil disobedience, The Hawaiians successfully influenced reforms in the Department of Hawaiian Homelands, and awakened Kānaka Maoli to the possibilities with a unified voice.

Federal Accountability and Reparations

Another entity borne of the resurgence in claiming a Hawaiian identity was Alu Like. Alu Like took a “systematic approach” to addressing the issues facing the Kānaka Maoli community. It first registered as many Kānaka Maoli onto its roster and then conducted vast surveys to identify the greatest needs of the people. Alu Like organized conferences on each
island to identify problems and discuss and prioritize solutions. Based upon these surveys and conferences, Alu Like created a Native Hawaiian Program and an Employment and Training Program for the Kānaka Maoli. Funding for these programs came from the federal government’s Office of Native American Programs. Alu Like, however, was criticized for its “moderating influence upon the community.” As Professor Davianna McGregor acknowledged, “[Alu Like’s] program drew leading members of the Hawaiian political organizations into its staff and tended to shy away from political controversy which might jeopardize federal funding, despite the fact that it had been political pressure which had initially influenced the federal government to set up funds for Native American peoples.”

While Alu Like sought to use federal assistance to address discrete issues facing the Kānaka Maoli community, the Aboriginal Lands of Hawaiian Ancestry (ALOHA) sought carte blanche reparations from the federal government. ALOHA was formed in 1972 by Louisa K. Rice, who was heavily influenced by Lili‘uokalani’s autobiography, *Hawaii’s Story by Hawaii’s Queen,* and the Alaska Native Claims Settlement Act of 1971, which provided Alaska Natives, through Alaska Native corporations, with title to approximately forty million acres of land, a nearly one billion dollar cash settlement in exchange for their extinguishment of all claims and the revocation of any existing Native reserves. Based upon the unprecedented Alaska Native Claims Settlement Act, ALOHA sought to push the federal government for reparations with Native Hawaiians. ALOHA organized a telethon in 1973 from ‘Iolani Palace and raised $150,000. In 1974, ALOHA submitted a resolution through Hawaii’s congressional representatives (Spark M. Matsunaga and Patsy T. Mink) demanding one billion dollars in settlement for claims stemming from the United States’ involvement in the illegal overthrow of the Kingdom of Hawai‘i. House Resolution 15666, titled the “Hawaiian Native Claims Settlement Act,” was authored by former Secretary of the Interior Stewart Udall and sought the creation of the “Hawaiian Native Corporation,” which would receive and administer the one billion dollar settlement funds. The bill required the Secretary of the Interior to prepare and maintain a roll of Hawaiian Natives. House Resolution 15666 died on June 27, 1974 without a hearing in the House Committee on Interior and Insular Affairs.

A year later, ALOHA pushed the congressional delegation to again introduce similar legislation to seek federal reparations for the illegal overthrow. ALOHA’s president aptly
articulated ALOHA’s goals: “The mission of ALOHA is to get legislation to justly and fairly compensate the Hawaiian native for what the United States of America took from them.”

Public hearings were eventually held on ALOHA’s reparations bill, but passage proved elusive.

Due to the efforts of ALOHA and Hawaii’s congressional delegation, particularly United States Senator Daniel K. Inouye, Congress eventually passed a law that established a “Native Hawaiians Study Commission” to make a recommendation as to whether the federal government should provide reparations for the Hawaiian community. Inouye, a highly decorated war hero, had a fair understanding of the federal government’s involvement in the overthrow of the Kingdom of Hawai‘i, and spearheaded the effort to establish the Commission to address the needs and concerns of the Hawaiian people—a people for whom Inouye had much respect. Indeed, Inouye’s first act as a legislator in the territorial government was to propose moving the Legislature out of ʻIolani Palace, the home of the last Hawaiian monarchs, and “into a tent” because it was “sacrilege” to hold meetings in the Queen’s throne room.

The subsequent work of the Native Hawaiians Study Commission is discussed further in Chapter 3.

While ALOHA sought to hold the federal government accountable for reparations, others demanded specific changes to the militarization of the islands. At the top of their priorities was to demand that the United States Navy halt the aerial and surface bombardment of live and inert ordnances on the island of Kaho‘olawe. The bombing of the forty-five square acre island off the southwestern coast of Maui began in 1940, prior to the Japanese attack on Pearl Harbor and America’s entrance into the Second World War. On February 20, 1953, President Dwight D. Eisenhower signed Executive Order 10436, which seized Kaho‘olawe because it “appear[ed] necessary and in the public interest that the Island . . . [that the island] be taken and reserved for the use of the United States for naval purposes[.]” The island was thereafter placed under the jurisdiction of the Navy.

After a Navy aircraft carrier nearly shot down a private tour plan and an unexploded bomb was found on property owned by Maui Mayor Elmer Carvalho, protests against the bombing ensued. Mayor Carvalho and the organization Life of the Land filed a lawsuit seeking an injunction against the government to halt the bombing for a failure to file an environmental impact statement (EIS) consistent with the mandates of law. The federal
government hurriedly put together an EIS in 1972, the lawsuit was dismissed, and the island that was once sacred to the Kānaka Maoli was once again bombarded with heavy artillery.\textsuperscript{104}

Kahoʻolawe, also known as Kohe mālamalama o Kanaloa, was a place of spiritual and cultural significance to the Kānaka Maoli, as it served as the stronghold for the priesthood that worshiped Kanaloa, one of the four principle gods in the Hawaiian cosmology. It was a place that was inhabited by the ancient people in communities along the coastline and served as an important training center for budding navigators.\textsuperscript{105}

Equipped with the phrase “E hō mai i nā lima eia hoi he hana ka kākou” or “allow the hands to come forth for here is work to be done,” members of the Protect Kahoʻolawe Association could no longer sit idle as another culturally significant site was demolished at the hands of the American government.\textsuperscript{106} As such, the Protect Kahoʻolawe Association decided to “[i]nitiate and participate in five symbolic landings on Kahoʻolawe. Five landings were chosen to represent the five fingers of limahana (the working hand). When we have completed the five landings, we will have attained our goals and objectives, and become laulima (many hands working together).”\textsuperscript{107} Its goals was threefold:

1) To ensure through Aloha ‘Āina, the proper use of Hawaiʻi’s natural resources (her peoples, her lands, her waters, and all which comes so willingly from the ‘āina).
2) To perpetuate the historical, cultural, spiritual and social significance of Kahoʻolawe.
3) To instill a strong sense of pride in hoʻoHawaiʻi (being and acting Hawaiʻi) through knowledge and practice.

On January 3, 1976, nine individuals made the first landing. Within hours of landfall, seven of the nine members (George Helm, Ellen Miles, Karla Villalba, Kimo Aluli, Ian Lind, and Hawaiian Coalition for Native Claims members Gail Prejean and Stephen Morse) were detained by the United States Coast Guard.\textsuperscript{108} Dr. Emmett Aluli, an extern practicing rural medicine on Molokaʻi, and Walter Ritte, Jr., former Kamehameha Schools and University of Hawaiʻi basketball standout, were able to hide in the thickets of a kiawe tree, while the others were arrested.\textsuperscript{109} With U.S. Marine helicopters zooming overhead, both Ritte and Aluli would hold out on the island for two days before turning themselves over to the federal government.\textsuperscript{110} But those two days transformed both Ritte and Aluli and set the stage for the completion of the landings.\textsuperscript{111}
On January 12, 1976, Ritte, his wife Loretta, and his sister Scarlet, joined Dr. Aluli for the second access. The Rittes would spend five days on the island before being detained. Scarlet recalled the morning after their arrival:

We woke before the sun anxious to see what the sunlight would show us. It was even more unbelievable than I expected – Kahoolawe was beautiful. Green grass, trees, bold valleys. The first question: Why? Well, we packed up as fast as we could and started walking. As we [passed] signs of life, I couldn’t stop thinking – how could they bomb? I mean, talk about stupidity. Little ants and worms crawling around. Flowers so fragile, but just as beautiful as a rose. . . . We kept walking until the meadows stopped, and the red dirt crept up to us. “So these are the areas of devastation,” I thought. “My God . . . Nothing!” As I walked through the pieces of bombs, and the crevices of erosion caused by them, I felt sadness, but even more anger, pure anger.112

Loretta writes of the creatures inhabiting the “target island”: “Our soothing companions of the night, the crickets, are the first sounds of life on this beloved island. I am amazed, for there are ants – so black and red. And look . . . flies, honey bees and yellow jackets, a little green worm, and could that be a butterfly . . . it is, and one that I have never seen before.”113 Scarlet would write: “Kahoolawe is now a part of our family. She belongs to each one of us. We love her, and we will guide her future, for now it lies in our hands.”114 Dr. Aluli would leave the island to attend to his physician responsibilities. The Rittes were eventually arrested. As it was their second trespassing charge, Ritte and Aluli also faced federal criminal charges.115

In a change in strategy, Protect Kahoʻolawe Association leader George Jarrett Helm, Jr., wrote to the Navy requesting access to Kahoʻolawe to perform religious healing ceremonies to cleanse the island of its “evil” and to symbolically accept responsibility of stewardship.116 To the surprise of the Protect Kahoʻolawe Association, the Navy allowed the third landing. Although agents from the Federal Bureau of Investigation warned Ritte that “federal authorities would take great offense” if he went back to Kahoʻolawe, on February 13, 1976, sixty-five participants, including Ritte, gathered for and then participated in the third landing.117 Among the participants in this third access were several kūpuna, including revered cultural practitioner Emma DeFries.118 On the island, DeFries and other individuals participated in the ceremonies of mōhai aloha (love offering) and hoʻokupu (gift-giving).119
Helm was the political and spiritual leader of the Protect Kaho‘olawe Association. He garnered support from Hawaiians long dissociated with the efforts to reconcile the historical injustices. Helm played the important role of mediator between Ritte and Aluli, whose personalities often clashed. He used his knowledge of political history and his alluring falsetto voice to convince the public across the State of the importance of stopping the bombing of Kaho‘olawe. By January 1977, the Protect Kahoolawe ‘Ohana (PKO)—renamed after one kupuna stated, “You’re not an association, you are ‘ohana (family)”—was highly successful in garnering public support. Two-thirds of Hawaii’s population wanted the bombing stopped and the island returned to the people of Hawai‘i. The State’s Historic Preservation Office conducted an archaeological survey of the island and uncovered twenty-nine sites deemed eligible for the National Register of Historic Places. Yet the bombing continued.

The reprehensible actions of the Navy demanded further action. It would be eleven months after the third access, on January 30, 1977, when members of the PKO proceeded with their fourth landing. Ritte and PKO-leader Helm were joined by Richard Sawyer, Francis Kauhane (who had earlier protested alongside Galdeira and Kaniho at Parker Ranch), and Charles Warrington, Jr. Helm reflected on the rationale for the fourth landing: “Call me a radical for I refuse to remain idle. I will not have the foreigner prostitute the soul of my being, and I will not make a whore out of my soul (my culture).” Helm continued, “The occupation of the military reservation is not so much a defiance as it is a responsibility to express our legitimate concern for the land of the Hawaiian . . . We are against warfare but more so against imperialism.” The plan was for Ritte and Sawyer to stay indefinitely. As such, Helm, Kauhane, and Warrington hiked for a day across the island and turned themselves over to the Coast Guard.

Helm returned to Honolulu and, because the bombing continued while his colleagues remained, decided to change his strategy and work within the political system for action. Helm and other members of the PKO met with legislators and used the local media to their advantage. Nevertheless, the Navy still refused to acknowledge Ritte’s and Sawyer’s presence on the island. Helm led a delegation of the PKO to the State Capitol on February 10, 1977 for a rally.
The next day, in an unprecedented move, State Representatives Henry Ha‘alilio Peters and Jan Yuen convinced their colleagues to allow Helm to address the Legislature. Helm pleaded:

We are motivated to pursue the action of protecting whatever is left of our culture and very basically, it is simple. The culture exists only if the life of the land is perpetuated in righteousness; that belongs to my ancestors. You folks are using this to get paid, to build your homes, to give your kids an education, to bring kids over here and listen to you give a political rhetoric. I came here to ask; to help some people’s lives. . . . Please kokua; do something—some reaction. Every county made a resolution . . . Bills have been passed and when something like this is happening, nothing is being done. All I’m asking for is a reaction, positive or negative, but please support us if you can, and we are talking about Aloha ‘Aina ‘Ohana and if you cannot understand it, go do your homework.131

The legislators got the point and quickly introduced and passed a resolution to have the bombing stopped.132 That same day, federal Judge Samuel W. King, son of Hawaii’s former Republican Governor and Republican candidate for Governor who was trounced by Jack Burns in 1970, denied two preliminary injunctions that sought halting of the bombing. Helm would not give up.

Helm and Kauhane along with members of the newly established Council of Hawaiian Organizations, including Galdeira, traveled to Washington, D.C., to appeal to President Jimmy Carter and Hawaii’s congressional delegation.133 Unfortunately, Carter was vacationing in Georgia and most of Hawaii’s congressional delegation had returned to Hawai‘i to meet with the Navy and tour Kaho‘olawe.134 The delegation’s tour, characterized by one reporter as “Kahoolawe Whitewash,” was conducted at the worst areas of the island to attempt to illustrate that the soil was useless and was highlighted with a demonstration in which “‘F4 jets dropped 27 Mark 76’s—dummy bombs with an explosive device the size of a 12-gauge shotgun shell’ rather than the usual live 500-pound bombs.”135 After being handed enlarged photos of the naval commanders, the delegation apparently left satisfied with the Navy’s conduct.

When Helm returned to Hawai‘i, spiritual signs pointed toward a cataclysmic event occurring: Helm had a dream that Ritte and Sawyer were in danger and needed help; kahuna Morrnah Simeona told Helm that a large wave would wash over Kaho‘olawe and that he needed to rescue Ritte and Sawyer; kahuna Emma DeFries foretold of an upheaval and warned Helm against going. Helm nevertheless decided to rescue his companions.
Helm, Kimo Mitchell, and Billy Mitchell headed out in a boat from Maui to Kaho‘olawae. When a Coast Guard helicopter appeared to be approaching their boat from a distance, someone said, “Hit it,” and the three men jumped into the frigid waters on two surfboards and an inner tube and made their way to the island. The trio searched for Ritte and Sawyer, but were unsuccessful. Ritte and Sawyer had left their base camp in search of food and water, and had been picked up by a Coast Guard helicopter. After searching the island without success and after their pickup boat failed to arrive, Helm, Kimo, and Billy headed into the ocean to make a break for Molokini, an island off the coast of Maui. Billy turned back and made his way back to Kaho‘olawae. Billy saw Helm and Kimo struggling in the surf near Molokini. George Helm and Kimo Mitchell were never seen again. Their deaths, however, fueled a sense of urgency and increased the efforts of the PKO and the communal sentiment toward stopping the bombing.

The PKO completed their fifth landing, and accomplished their goal of limahana. In another lawsuit initiated by Aluli and the PKO against the Navy, Federal Judge Richard Wong ruled that the federal government failed to properly conduct an EIS, and violated the National Environmental Policy Act and an executive order that mandated the preservation of historic sites, and therefore was obligated to halt bombing. It was a legal victory for the Hawaiian people that ultimately led to a 1980 consent decree limiting naval training on the island, mandating ordnance cleanup on one-third of the island, and allowing PKO to have access to the island.

The momentum, fervor, and publicity created by the acts of The Hawaiians, ALOHA, Alu Like and the PKO, to name a few, catalyzed a fundamental shift in the Kānaka Maoli journey for justice. Hawaiians were not only being arrested for civil disobedience, they were risking and, in the case of George Helm and Kimo Mitchell, losing their lives. It would be her work with the PKO, however, that would inspire one woman to push forth with a bold alternative. For as she stood on the shores of Maui – gazing through the flames of the fire at the distant island of Kaho‘olawae and watching as her comrades prepared for another access against the American military’s bombings – Adelaide “Frenchy” DeSoto thought to herself, “there must be a better way to do this.”

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The initial Hawaiian Renaissance occurred during the reign of Kalakaua after he revived traditional forms of art, such as the ‘oli and hula.

Interview with Raymond Pae Galdeira, in Henderson, Nevada (May 7, 2015).


GEORGE S. KANAHELE, HAWAIIAN RENAISSANCE 17-18 (Project WAIAHA 1982).

Id. at 14-15.

Id. at 13-14.


KANAHELE, supra note 5, at 11.

Galdeira Interview, supra note 3.

Hawaiian Homes Commission Act, 67 Pub. L. 34, 42 Stat. 108 (1921) (defining “native Hawaiian” as “any descendent of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778”).


Id. at 4.


Id. at 113-16.

Rehabilitation of Native Hawaiians, supra note 12, at 4.

Galdeira Interview, supra note 3.

Id.

Id.

Id.

Id.

Id.

Id.

Id.


Galdeira Interview, supra note 3.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.


Galdeira Interview, *supra* note 3.

Letter from Pae Galdeira to Governor John A. Burns, retrieved from the Hawai‘i State Archives (October 13, 1970) (on file with author).

Id.

Id.

Galdeira Interview, *supra* note 3.

Id.

Id.

Id.

Id.

Id.

TOM COFFMAN, TEN YEARS OF COMMUNITY ACTION 18 (Honolulu Community Action Program 1975).

Galdeira Interview, *supra* note 3.

Id.


Galdeira Interview, *supra* note 3.


Galdeira Interview, *supra* note 3.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Letter from Sonny A. Kaniho to Governor George Ariyoshi, retrieved from the Hawai‘i State Archives (May 14, 1971) (on file with author).

Galdeira Interview, *supra* note 3; see also LIND, SONNY KANIHO: HOMESTEADER, LEADER, HAWAIAN (Council for Native Hawaiian Advancement 2009).

Galdeira Interview, *supra* note 3; see also LIND, *supra* note 61.

Galdeira Interview, *supra* note 3.

Id.

See LIND, *supra* note 61.

Galdeira Interview, *supra* note 3.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

See LIND, *supra* note 61.

Galdeira Interview, *supra* note 3.

Letter from Governor George R. Ariyoshi to Sonny Kaniho, retrieved from the Hawai‘i State Archives (June 24, 1974) (on file with author).

Interview with Robert Gil Johnston, in Honolulu, Hawai‘i (June 16, 2015).


Coffman, *supra* note 4, at 299.


Dwight D. Eisenhower, Executive Order No. 10436, Reserving Kahoolawe Island, Territory of Hawaii, for the Use of the United States for Naval Purposes and Placing it Under the Jurisdiction of the Secretary of the Navy (Feb. 20, 1953).


Id. at 3.

Id. at 17.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.


Id. at 22-23.

Id. at 23.

Id. at 60.

Id. at 23.

Id.

Id. at 55.

Id. at 72.

Id. at 22-23.

Id. at 24.

Id.

Id. at 69-70.

Id. at 25.

Galdeira Interview, *supra* note 3.

Id.

MORALES, *supra* note 120, at 25.

Id. at 30.

Id. at 30-31.

Id. at 30.

Id. at 31.

Id.

Id.

Id.

Congress eventually passed a law that established the Kahoolawe Island Conveyance Commission to recommend the return of the island to the State. In an unprecedented move, the 1994 Department of Defense Appropriations Act transferred Kahoolawe to the State and appropriated $400 million to clean and restore the island.

Sanburn, *supra* note 1, at 12; *Coffman, supra* note 4, at 309.
CHAPTER 2

“Political Apex”: Creation of the Office of Hawaiian Affairs

Frenchy DeSoto worked her way from being a janitor to a sergeant at arms of the State Senate. She had a “husky, cigarette voice, which she used to great advantage, gliding seamlessly from perfect English to pidgin to a partial but expressive grasp of Hawaiian.”\(^1\) She was committed to bettering the lives of Kānaka Maoli. DeSoto’s endless commitment to the Kānaka Maoli, her grit, and her tenacity, was likely a result of her own fractured past: “My full-Hawaiian mother never raised me. . . . [M]y German father killed himself when I was 6. The court took us away from our mother. I was raised from foster home to foster home, and I ran away from every single one of them. There must have been 17 or 16[.]”\(^2\) DeSoto continued, “when I speak of starving people, it’s not an intellectual exercise . . . . When I speak of the pain of children, it’s not another exercise of brain-wave patterns.”\(^3\) It was for DeSoto a reality. DeSoto volunteered with her children’s schools in her home district of Wai’anae and became intrigued and involved in community affairs.\(^4\) But, it was on the shores of Makena, Maui in 1976 that DeSoto, a member of the PKO, found herself pondering the future of the Kanaka Maoli justice struggles: “I watched our people preparing themselves as if going to war, and it hit me that there must be a better way to do this. I remember going to the island and listening to the kupuna plead through tears for some righteousness to be done to the Hawaiian people, so that we are not on our knees begging to eternity.”\(^5\)

DeSoto returned from the pilgrimage to Kaho‘olawe and, representing the PKO, participated in a gathering of Hawaiians in Wai‘anae called the Pūwalu Sessions. Sponsored by Alu Like and the Council of Hawaiian Organizations (formed in 1973 of various Hawaiian political organizations to coordinate and support each other’s efforts), the Pūwalu were the first post-annexation forums devoted solely to a discussion of Hawaiian issues amongst members of the Native Hawaiian community. “Pūwalu” means unity and cooperation, and as its name suggests, dozens of individuals attended the meetings in order to unite the Hawaiian people in a spirit of cooperation. In the first session, the participants, which included representatives from twenty-eight different organizations, prioritized five goals: first, begin the journey toward self-
determination by establishing political credibility and influence; second, establish a land base; third, ensure an educational system relevant to the needs and concerns of the Kānaka Maoli; fourth, achieve economic self-sufficiency; and fifth, strengthen “the spirit of ‘ohana and puwalu” amongst the Hawaiian people.

Pūwalu participants discussed the alternatives for seeking justice and reconciliation for the historical injustices against the Kānaka Maoli. At the outset of the third Pūwalu Session, Supreme Court of Hawai‘i Chief Justice William S. Richardson, the first Kānaka Maoli to hold the State’s highest judicial post, urged the use of the courts to advocate for justice: “Our courts have recognized that Hawaii’s land laws are unique in that they are based, in part, upon ancient Hawaiian tradition, custom and usage. This means that in some cases . . . we can look to the practices of our ancestors as guidance to establish present day law.”6 Indeed, it was Richardson, former Lieutenant Governor under Jack Burns, who had led Hawaii’s highest court in issuing watershed decisions that recognized Hawaiian practices and understandings in court,7 defined the shoreline to ensure that the public had access to the ocean and the upper reaches of the waves,8 and mandated that the waters in streams were held in trust for all of the public and did not belong to individuals.9 Richardson (and his successors) would later pen various rulings that significantly expanded the rights of Hawaii’s indigenous peoples.

DeSoto remarked, “Justice Richardson and I had a sad conversation[.]. It hurt him so much to see the Hawaiian people coming to court with no resources. We weren’t able to sustain the onslaught by those with money who were quiet-titling the land. They were stealing. We had to do something.”10 Fortified by her intimate involvement in the Pūwalu Sessions and the struggles against the federal government on Kaho‘olawe, DeSoto set herself on a course to change the political tides of the Kānaka Maoli.

DeSoto developed a keen interest in one of the foremost developments from the Pūwalu Sessions—a legislative package that included a draft bill to reestablish a governing entity for the Kānaka Maoli. In 1977, Hawai‘i State Representative (and future Speaker of the House) Henry Ha‘alilio Peters introduced that Pūwalu bill as House Bill 1469.11 The bill recognized a private, non-profit entity called Hō‘āla Kānāwai, meaning “law of revival,” as the recipient of a portion of the Ceded Lands Trust lands and funds to be expended to benefit Hawaiians. In the act granting the Territory of Hawaii’s admission to the United States, Congress set forth specific
terms by which the State could enter, one of which narrowly defined the purposes for which the State could use the Ceded Lands—those lands that included the Crown and Government Lands of the Kingdom of Hawaiʻi that were illegally taken by the Provisional Government in the 1893 overthrow and then improperly “ceded” to the United States when Hawaiʻi was annexed in 1898.\(^\text{12}\) Section 5(f) of the Admissions Act provided that the Ceded Lands and the income derived therefrom:

[S]hall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible[,] for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for other object shall constitute a breach of trust for which suit may be brought by the United States.

Accordingly, Hōʻāla Kānāwai was intended to recognize a private entity that, consistent with the mandate of section 5(f) of the Admissions Act, could accumulate land and funds “for the betterment of the conditions of Native Hawaiians[.]” Hōʻāla Kānāwai ultimately was referred to the House Committee on Water, Land Use, Development and Hawaiian Homes, and then to the Committee on Finance. But, after constitutional scholars “determined that the state [could not] create a private (that is, independent) agency using public funds[,]” Hōʻāla Kānāwai died in committee.\(^\text{13}\) Although Hōʻāla Kānāwai failed to gain traction in the State legislature in 1977, the concept would find itself resurrected in the 1978 State Constitutional Convention, due in large part to DeSoto and the ambitious crop of delegates itching to make their marks on the trajectory of Hawaiian history.

**The People’s Convention**

From Statehood to the 1978 Convention, Hawaiʻi had seen two iterations of its constitution with one constitutional convention in 1968. The 1968 Con-Con, however, had done nothing to better the conditions of Hawaii’s indigenous people. Indeed, 1968 Con-Con Delegate James Bacon had introduced a proposal requiring the State to “preserve and enhance Hawaiian
His proposal was shot down, but not before he was forced to defend it by saying that the proposal was “not a laughing matter.”

The 1978 Con-Con was fundamentally different. With a campaign by the League of Women Voters and Common Cause Hawaii, and the support of the local media, the 1978 Convention was framed as a “grass-roots” convention. Public office holders were discouraged from running as delegates, and it worked. Compared to the 1968 Con-Con, where one-third of the delegates were legislators and most of the rest were closely associated with the political elite, the 1978 Con-Con aptly represented a body dubbed the “People’s Convention”: only seven of the 102 delegates had held political office; there were thirty women compared with seven women ten years earlier, and almost half of the delegates were under thirty-four years old.

Several Native Hawaiians took a chance at running to be a delegate. Pae Galdeira rode through Waimānālo in his “jalopy,” which was painted with “VOTE PAE FOR CON CON.” Although he was assisting six candidates in their quest for election to the Con-Con, at the last minute, another Native Hawaiian, John D. Waihe’e, III, threw his name in the hat for a seat at the convention. Waihe’e—a recent graduate of the University of Hawai‘i Law School whose first two cases were defending Walter Ritte against a charge that he illegally hunted on another’s property and defending Charles Warrington, Jr., who along with Ritte, Francis Kauhane, and Richard Sawyer were charged with trespassing on Kaho‘olawe—had participated in the Pūwalu Sessions and had been active in a group called Goals for Hawaii, where he worked on land use matters. While Galdeira did not get elected, Waihe’e won the contest for a coveted seat as a delegate and joined 101 others for the Con-Con.

Almost immediately, three groups formed when the convention began: those that were in favor of preserving the status quo; those characterized as “independent” for pushing their liberal political agenda, which included a push for initiative, referendum, and recall (“IRR”); and a small group aligned with Waihe’e. Waihe’e’s faction opposed IRR because of the potential that the majority could dictate the course of the political and legal system to the disadvantage of the poor and disenfranchised. Waihe’e’s faction had their own agenda for changes to environmental laws and Hawaiian rights.

The first order of business was to organize and select leadership, particularly a President for the Convention, who would wield the important task of selecting chairpersons for the various
committees. Jeremy Harris, a delegate from Kaua‘i (and future Mayor of the City and County of Honolulu) and one of the leaders of the independent group, called Waihe‘e and informed him that if he aligned with the independent faction, Waihe‘e would be elected president.\textsuperscript{25} In part because of the diverse views of the independent faction, and their unreliability in voting as one block in the future, Waihe‘e refused and instead aligned himself and his group with the status quo faction.\textsuperscript{26} In so doing, Waihe‘e supported status quo delegate William Paty as the compromise candidate for convention President.\textsuperscript{27} Paty, a plantation manager of Waialua Sugar Company, described the Con-Con as: “taking a hundred and two people, most of them with no real legislative background, except the very few that were elected, and say, Hey, we want you to look at the State Constitution, get yourself organized, develop the rules, develop committees, get the hearings going, and come up with recommendations all in terms of sixty actually working days.”\textsuperscript{28}

Waihe‘e, the power broker, was then asked what he wanted.\textsuperscript{29} The young attorney responded that he did not want anything for himself, but wanted to be at the table when Paty doled out committee chairmanships to the delegates.\textsuperscript{30} With his seat at the table, Waihe‘e shaped the tenor of the Con-Con. Waihe‘e requested and was granted a new Hawaiian Affairs Committee.\textsuperscript{31} Per Waihe‘e’s request, his friends and law school classmates Anthony Chang and Carol Fukunaga were given chairmanships of the Environment, Agriculture, Conservation and Land Committee and the Committee on the Executive, respectively.\textsuperscript{32} Waihe‘e also singled out Con-Con delegate Frenchy DeSoto, from the Kanaka Maoli enclave of Wai‘anae, to be selected as the chair of the newly established Hawaiian Affairs Committee. His request was granted.

The scope of the Hawaiian Affairs Committee was to consider proposals related to: (1) the protection and perpetuation of ancient Hawaiian rights, traditions, heritage, and archaeological sites; (2) the implementation of native Hawaiian culture and language; (3) the preservation of native Hawaiian vegetation and crops; (4) the recognition of problem areas common to native Hawaiians to provide for the betterment of native Hawaiian conditions; and (5) the Hawaiian Homes Commission Act.\textsuperscript{33} The work of the Committee was supported by Committee staffers Steve Kuna and Martin Wilson and attorneys Sherry Broder and Jon Van Dyke.\textsuperscript{34} Volunteers Walter Ritte (Kaho‘olawe protector), Randy Kalahiki, Francis Kauhane (member of The Hawaiians arrested at Parker Ranch and on Kaho‘olawe), Mililani Trask, Kali
Watson, Alu Like Director Winona Rubin, and Georgiana Padeken also contributed significantly to the work of the Committee.\textsuperscript{35} The composition of the staff was what Waihe‘e considered DeSoto’s “genius”: “she hired all the young activists into her group. . . and forced them to get off of . . . talking about stuff and actually writing down specific proposals . . . actually working on provisions.”\textsuperscript{36}

Although there was a cultural and political renaissance that led up to the Con-Con, the affairs of the Kānaka Maoli were not something of a hot-button issue for the convention. For example, the Legislative Reference Bureau provided a briefing report for Hawaiian Affairs Committee members about issues facing Hawaiians, which included a primary focus on the Hawaiian Homes Commission Act and how nothing much could be done as it was established by federal law.\textsuperscript{37} The report suggested no new ideas on how to advance its declared scope.\textsuperscript{38}

Staffer Martin Wilson commented, “There were no battalions of brains coming to Frenchy’s aide during Con Con. The State didn’t help, the UH Law School didn’t help, Bishop Street didn’t help. For Frenchy, it was just a handful of people. Georgiana was a social worker. Mrs. Rubin was an educator. Very few people rushed to the aide of the Hawaiians.”\textsuperscript{39} Even though the State agency tasked with providing support to the delegates had no new suggestions, the Hawaiian Affairs Committee and the convention delegates had their own plans. DeSoto and Waihe‘e had a “deal”: anything that DeSoto could get out of Committee, Waihe‘e would find the votes and pass it out of the Con-Con.\textsuperscript{40}

While several proposals were put forth that dealt with Hawaiian Affairs, three delegate proposals would serve as the basis for the eventual establishment of the Office of Hawaiian Affairs. Delegate Gil Silva of District 1, which encompassed the southern portion of Hawai‘i Island, put forth Proposal 405, which proposed amending the constitution to add a new section titled, “Commission on Hawaiian Affairs.” Proposal 405 suggested adding the following language to the Constitution:

There shall be established a commission on Hawaiian affairs. The commission shall have, but is not limited to, the following functions:

1. The coordination of all governmental affairs directly pertaining to the Hawaiian people, their culture, history and lands, except as executed by other sections of this article.
2. Establish facilities to protect and preserve the Hawaiian people, their culture, history and lands.
The Commission shall consist of twenty-eight members. Persons of full or part-Hawaiian ancestry in each of the twenty-seven representative districts shall meet as provided by law and submit a list of ____ persons to the governor from which the governor shall appoint one commissioner from each of the twenty-seven lists, without the advice and consent of the senate. The chairperson of the Hawaiian homes commission shall serve as an ex-officio, nonvoting member. The legislature shall implement the purpose of this section.\footnote{11}

Proposal 405, therefore, sought distribution of power and authority to a large representative body appointed solely by the Governor based upon a list of individuals selected by all Hawaiian within a particular district.

Proposals 674 and 676, introduced by Chair Desoto, revisited the Hō’ala Kānāwai concept and provided:

Public Trust

Section 4. The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XIV, Section 8 of the State Constitution, excluding therefrom lands defined as “available lands” by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for all descendants of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778, hereinafter native Hawaiians, and the general public.

Establishment of Board of Trustees

Section 5. There shall be a board elected by qualified voters who are descendants of the races inhabiting the Hawaiian Islands previous to 1778, hereinafter Hawaiians. The board members shall be Hawaiian.

Powers of Board of Trustees

Section 6. The board shall manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals, and income derived from the portion of the trust referred to in Section 4 for native Hawaiians; formulate policy relating to affairs of native-Hawaiians and Hawaiians; and exercise control over real and personal property set aside by state, federal, or private sources for native-Hawaiians and Hawaiians.

. . . .

Compliance with Trust

Section 8. Any trust provisions which the Congress shall impose, upon the admission of this State, in respect of the 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 give priority in the management and disposition of lands, proceeds and income to native Hawaiians as defined in
the Hawaiian Homes Commission Act, 1920, as amended. And so long as the management and disposition of such lands shall not diminish or limit the benefits of native Hawaiians, such lands may be used for the support of the public schools and other public education, for the development of farm and home ownership on as widespread a basis as possible. For the making of public improvements, and the provision of lands for public use.42

A public hearing was held on the evening of August 9, 1978, in the State Capitol to consider, among many others, Proposals 405, 674, and 676. Numerous individuals provided testimony. Among the testifiers were PKO members Ritte, Aluli, and Warrington, and Department of Hawaiian Homeland protestors Kaniho, Moanike‘ala Akaka, and Renwick “Joe” Tassil.43 Aside from obtaining formal testimony at hearings, Chair DeSoto would meet once a week with various individuals. In her own words, she would “tell them what the committee was doing and try to get advice from them. It was real ‘ohana system. When my staff and I worked late, people would come over with food and gather to pray, because what we were embarking on had never been done before. And it was what we call sometimes, kaumaha. They felt it was a burden that one person should not carry. We supported each other.”44

Waihe‘e recalled the moment when the idea took form: “Aunty Frenchy called a meeting of the Con-Con’s Hawaiian Affairs Committee, so that all these interest groups could come together and thrash it out. Nobody left the room. There was prayer, there was yelling, and whatever else you needed to have. At the end, a consensus emerged. It was Aunty Frenchy – maybe they were terrified by her, maybe they were persuaded by her; I don’t know.”45

The Hawaiian Affairs Committee consolidated and revised Proposals 405, 674, and 676 into its own Committee Proposal 13, titled “Relating to Hawaiian Affairs.”46 Committee Proposal 13 suggested several substantive revisions.47 The Committee first proposed adding a new section to the Constitution clarifying the Public Trust:

The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XIV, Section 8 of the State Constitution, excluding therefrom lands defined as “available lands” by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for those native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended or may be amended, and the general public.48

In this provision, the Hawaiian Affairs Committee—after reviewing the history behind the trust in the Admissions Act—specifically sought to clarify the trust corpus and to name the two
beneficiaries of such corpus: native Hawaiians (those of one-half blood of Hawaiian ancestry) and the general public.\textsuperscript{49}

The Committee also merged ideas from DeSoto’s and Silva’s proposals to suggest a new entity, an Office of Hawaiian Affairs. The proposed language to the Constitution read:

There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are native Hawaiians, in accordance with law. The board members shall be native Hawaiians. There shall be not less than 9 members of the board of trustees; provided that each of the following Islands have at least one representative: Oahu, Kauai, Maui, Molokai and Hawaii. The Board shall select a chairman from its members.\textsuperscript{50}

In its report, the Committee stated that it added the new Section 5, pertaining to the establishment of the Office of Hawaiian Affairs and the Board of Trustees, “to provide a receptacle for any funds, land or other resources earmarked for or belonging to native Hawaiians, and to create a body that could formulate policy relating to all native Hawaiians and make decisions on the allocation of those assets belonging to native Hawaiians.”\textsuperscript{51} The Committee envisioned that the Office of Hawaiian Affairs “[would] be able to receive and administer any reparations money, which [would] probably be awarded to all native Hawaiians regardless of blood quantum.”\textsuperscript{52} The report continued:

Your Committee is unanimously and strongly of the opinion that \textit{people to whom assets belong should have control over them}. After much deliberation and attention to testimony from all parts of the State, your Committee concluded that a board of trustees chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles. In order to insure accountability, it was felt that the board should be composed of elected members. This amendment provides for direct participation in the selection process of the board of trustees by all native Hawaiians. The committee determined that such participation will avoid the much-justified criticism which has been directed at the Hawaiian homes commission for, among other things, its inability to respond adequately to the needs of native Hawaiians of one-half blood. The election of the board will enhance representative governance and decision-making accountability and, as a result, strengthen the fiduciary relationship between the board member, as trustee, and the native Hawaiian, as beneficiary. The cost for electing the board of trustees would be nominal, provided it is held at the same time as the state general elections.
Finally, the committee agreed that the board should be elected by all the beneficiaries. Certainly they would best protect their own rights. Such a practice is in line with the basic principles of a democratic society.

The committee intends that the Office of Hawaiian Affairs will be independent from the executive branch and all other branches of government although it will assume the status of a state agency.53

The Committee also outlined what it believed to be the authority of the Board of Trustees:

The board shall exercise power in accordance with law, to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals, and income derived from whatever sources for native Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in Section 4 for those native Hawaiians as defined in the Hawaiian Homes Commission Act, 1920, as amended or may be amended; formulate policy relating to affairs of native Hawaiians, and exercise control over real and personal property set aside by state, federal, or private sources and transferred to said Board for Native Hawaiians. The board shall have the power to exercise control over the Office of Hawaiian Affairs through its executive officer, the administrator of the Office of Hawaiian Affairs, who shall be appointed by the board.

The Committee envisioned the trustees of the Office of Hawaiian Affairs to have the power “to contract, to accept gifts, grants and other types of financial assistance and agree to the terms thereof, to hold or accept legal title to any real or personal property and to qualify under federal statutes for advantageous loans or grants . . . . These powers also include the power to accept the transfer of reparations moneys and land.”54 The Committee expressly stated that it intended that the Office of Hawaiian Affairs “would be able to accept title to the Hawaiian home lands in the event that said lands are transferred to it for administrative or any other purposes.”55 Thus, the Committee crafted the language of Section 6 broadly to provide the option of consolidation if the State and the federal government agreed. The Committee noted: “the consolidation of the two trusts under the control and management of a single board would facilitate the attainment of the objective of the trusts: to provide for the betterment of the conditions of native Hawaiians.”56 A potential merger of the Office of Hawaiian Affairs and the Department of Hawaiian Homelands would, as the Committee indicated, “avoid duplication and waste of administrative expenditures.”57
Not all Hawaiians were satisfied with the Committee’s proposal. Mililani Trask, a staff member of the Hawaiian Affairs Committee who was recruited by Alu Like, stated: “I opposed the committee’s decision[.]” Trask stated that the concept of Hōʻāla Kānāwai—forming a corporation and then going to the state for a share of Native Hawaiian assets—was “co-opted by a group of Hawaiians who were tightly associated with the Democratic Party.” Trask contended that DeSoto’s committee concluded: “(1) Hawaiians were not ready for self-governance; (2) the community initiative [Hōʻāla Kānāwai] was a substantial threat, a challenge to the state; and (3) Hawaiians needed a two-step approach[,]” creating a state agency and then seeking sovereignty. Clearly dissatisfied, Trask left the Committee and the Con-Con.

On Saturday, September 2, 1978, the Committee of the Whole, which included all the delegates, debated in the Territorial Building an “administrative amendment” proposed by DeSoto to Committee Proposal 13. The Amendment sought to clarify the distinction between “native Hawaiians,” as defined by the Hawaiian Homes Commission Act, and “Hawaiians,” or any “descendant of the races inhabiting the Hawaiian Islands, previous to 1778.” The room in the Territorial Building, which was across the street from ‘Iolani Palace and neighboring Aliʻiolani Hale—the once intended palace of the Kamehameha dynasty turned infamous building where the Massie case was tried—was filled with hundreds of Hawaiians who had traveled from all islands to lend their support at the crucial Committee of the Whole meeting. Given the pro-Hawaiian mood, the diligence of the Committee’s proposals, and DeSoto’s soaring oratory, there was little opposition from convention delegates. For Desoto, she believed she was able to reach consensus by “taking my naau and throwing in on the table and saying, ‘I got nothing to hide, bruh. This is me.’ And basically convincing people this is the right thing to do.” During the debate, several delegates echoed these sentiments and expounded on the intent and significance of the Proposal. Delegate Kekoa D. Kaʻapu explained that the intent of the Proposal was “to set the framework by which resources can be managed and benefits achieved through setting the frame by which those who are to receive and enjoy these benefits might in some democratic manner govern the disposition of these resources and settle on policies among themselves through the process of election and through the process of scrutiny by those to whom they are responsible.” Delegate C. Randall Peterson stated, “I think it’s time that native Hawaiians have
more impact on their own future, and the transfer to Hawaiians of the responsibilities of self-government is only right and proper.”

However, foreshadowing significant legal issues, the only serious objection to the Proposal at the time came from Delegate Akira Sakima, who questioned whether it was unconstitutional for a public agency to be elected by and to benefit only one race. Sidestepping the issue, Waiheʻe responded that the Proposal was simply establishing a trust for a specific class of beneficiaries and delegating the running of the trust to the beneficiaries, “which is a normal setup.”

Delegate H. William Burgess, foretelling his own future opposition, had concerns that State lands were going to be given to the entity. Delegate Waiheʻe, however, clarified that under the language of the Proposal, only a portion of revenues received from the “available lands” in the 5(f) trust would be given to the entity. Despite these reservations, the Committee of the Whole voted to approve Committee Proposal 13 with DeSoto’s amendment.

The Committee of the Whole subsequently issued its report, which indicated that delegates were “impressed by the concept” of the Office of Hawaiian Affairs. The report further noted that delegates saw the creation of the Office of Hawaiian Affairs as a means to effectuate the betterment of the condition and welfare of the Hawaiians, to “unite Hawaiians as a people[,]” to ensure that “Hawaiians have more impact on their future[,]” and to provide it “maximum independence.” The Committee of the Whole specifically lauded what it believed was the independent nature of the entity: “The most important aspect of this model is the power to govern itself.” Finally, and in an apparent effort to answer Delegate Sakima’s question on the legislation’s constitutionality, the Committee stated:

If one looks to the precedent of other native peoples, one finds that they have traditionally enjoyed self-determination and self-government. They have power to make their own substantive rules in internal matters. Although no longer possessed of the full attributes of sovereignty, they remain a separate people with the power of regulation over their internal and social problems. . . . In conclusion, these provisions are constitutional due to the unique legal status of Hawaiians. (See Santa Clara Pueblo, et al. v. Julia Martinez, et al., 46 L.W. 4412 (5/16/78); Morton v. Mancari, 417 U.S. 535 (1974)).

The Committee of the Whole, at the advice of legal counsel, took an interesting position. Much like the 1920 Hawaiian Homes Commission Act, Native Hawaiians were analogized to Native Americans to fit their circumstance within the auspices of the American legal system and
Constitution. This would be a position that fundamentally defined the Office of Hawaiian Affairs’ role in future efforts toward self-determination.

To pressure the Con-Con delegates into resolving the issues for Hawaii’s indigenous peoples, The Hawaiians staged a protest at Hilo International Airport on Labor Day, September 4, 1978. Sixty-five demonstrators adorned in maile lei and carrying ceremonial ti leaves were arrested after they tried to sit down on the runway to protest inequitities against Native Hawaiians. The demonstrators denounced the rent-free use of the State-owned lands that the airport sat upon because those airport lands were set aside for Hawaiian homesteading.

With the mounting pressure, on Thursday, September 7, 1978, Committee Proposal 13, as amended, came up for its Second Reading. After another non-substantive amendment was carried, Delegate DeSoto stated:

Mr. President, it is with humble heart that I rise to thank the people in this Convention for supporting these issues that will have a long and lasting impact for the native Hawaiian. I know that we should have a speech prepared that would go down in history, but I am part of the maka‘ainana. I love my staff and the members of my committee, and I ask that all of you here help me and help us carry the message to the public so that they, in a very short time, can understand what it is we’re proposing, so that come November they will vote to support the Hawaiian package.

We have waited years. Our people have struggled. Our people have broken hearts and broken spirits. Many of our opio strike out and strike back at administrative bureaucracies. I want to be able to stand in front of them and tell them that indeed the system works and that they should participate in it. Our battles are not all won, and we don’t expect them to be won. But come November, all of the opio who have come today to witness what goes on will stand up to testify. Only history will show whether what we have done is right or whether, as Brother Burgess says, we may be doing wrong. The system can work. The system can work if you are willing to spill your na‘au. The system is foreign and is such that it costs Hawaiians the spilling of the naau and blood. I would, rather than go through the political system, fight six guys hand to hand. But I tell the opio now, just like the kupuna told me, it is there for us. We must now spread the word to our people that violence, hatred is a thing of the past. We just lokahi. I tell everyone here that I am, on behalf of my people—not my people in the sense that I am queen and they are only people, but in the sense that I am their servant, and it has been an experience that I shall never forget till the day I die, that the great spirits have allowed me to be a servant to my people. I would like to say, to all of you, aloha, mahalo nui.
With a simple voice vote, DeSoto and her youthful colleagues did it. The ideas borne of the Pūwalu Sessions and the cultural and political renaissance of the seventies was approved by the delegates for vote by the people, and it was mainly the result of the efforts of Hawaiians themselves. Hawaiian Affairs Committee Staffer Wilson stated, “Nobody really worked against OHA or the idea of OHA, but they didn’t go out of their way to help it, either. This was Hawaiian. The Hawaiians did it.”74 The clear intent of the Con-Con delegates and, thus, still the intent behind the creation of the agency, was to create an *independent* body that would be able to maximize self-determination for Native Hawaiians by Native Hawaiians.

The Hawaiian Affairs Proposal left gaping holes in the organization and structure of the proposed Office of Hawaiian Affairs. During the debates surrounding its passage many delegates expressed concerns with these gaps. For example, Delegate Uyehara was concerned that there were no established term limits in the proposed language,75 Delegate Goodenow questioned the mechanism for determining how someone could prove they were of Hawaiian ancestry.76 The response from the proponents of the Proposal was that the State Legislature—who had previously been, at most, lukewarm to the justice struggles of the Kānaka Maoli—would have the authority to fill in the gaps of the constitutional mandate. It was a move many delegates would regret, including DeSoto, who would later call the delegation of power to the Legislature a “horrendous mistake.”77

Committee Proposal 13 joined four other proposed amendments affecting Native Hawaiians on the ballot put before the electorate in the State. The four other proposed amendments: provided protections for traditional fishing, hunting, gathering and access rights; prohibited the use of adverse possession to acquire land larger than five acres; recognized the importance of the Native Hawaiian culture and included the Hawaiian language as an official language of the State; and strengthened the troubled Department of Hawaiian Homelands by providing greater flexibility for funding administrative costs.78 Even with the groundswell in awareness and participation, the five amendments, referred to as the “Hawaiian Affairs Package,” was barely approved by the public. To the dismay of many, the Hawaiian Affairs Package was approved by the narrowest margin of any of the thirty-four constitutional amendments put before the public. It received more “no” votes than any other amendment. It was, as one journalist put it, “an unsettling reminder of the reality of being a minority in your
own homeland.” Nevertheless, the ratification of the Hawaiian Affairs Package was still a victory. It was now the supreme law of Hawai‘i that the amorphous “Office of Hawaiian Affairs” undertake the daunting task of bettering the conditions of all Hawaiians. The provisions were subsequently codified in Article XII of the State Constitution.

State Legislature Backpedaling

The victory of the narrow ratification of the Hawaiian Affairs Package was quickly dampened by the State Legislature’s implementing statutes that upended the purpose of the Convention delegates in establishing the Office of Hawaiian Affairs. The Legislature had two years to fulfill the constitutional mandate and create the office before an election could be held in 1980. The Legislature went right to work. In early 1979, weeks after the constitutional amendments were ratified, Representative (and future Speaker of the House) Richard A. Kawakami of Kaua‘i introduced House Bill 890.

On February 22, 1979, the House Committee on Water, Land Use, Development and Hawaiian Affairs, which was chaired by Representative Kawakami, jointly held a hearing on House Bill 890 with the House Committee on Judiciary and House Committee on Public Employment and Government Operations. Several individuals submitted testimony in support of the proposed bill. Among those that submitted testimony was Con-Con Hawaiian Affairs Committee Chair Frenchy DeSoto, who wrote: “With an ‘umbrella’ function, the Office of Hawaiian Affairs . . . could receive and manage the available resources, implement some programs, contract other entities to operate other programs, and be accountable for making maximum use of human and material resources to address the needs of Hawaiians with the expected positive spin-offs for all the people of Hawaii Nei.” In her testimony, DeSoto sought to clarify the intent of the Con-Con delegates in passing the amendment and to comment on some of the provisions in the bill in relation to the intent of the Con-Con delegates. DeSoto also wanted to highlight that the intent of the Office of Hawaiian Affairs was “not to create another bureaucracy nor to block the commendable efforts of many groups who are doing their best to resolve some of the problems facing us.”

Others who testified at that first hearing foreshadowed major issues that would continue to haunt the Office of Hawaiian Affairs throughout its existence, including issues of blood
quantum, elections of trustees, and federal recognition. Kamuela Price of the group Hou Hawaiians testified about the need for the Office of Hawaiian Affairs to protect native Hawaiians at the expense of all other Hawaiians. Price and the Hou Hawaiians, relying upon the paternalistic and racist construct of blood quantum, made their position clear that they believed the mandate of the Con-Con was to use the Office of Hawaiian Affairs’ share of ceded land trust revenues only for those individuals with one-half part Hawaiian blood. He bolstered his point by providing a letter to his organization from Senator Inouye, in which Inouye stated, “I have shared your concern that entitlement to share in any claim against the Federal government bear some relationship to the degree of Hawaiian ancestry which can be legitimately claimed by the recipient. While it is understandable that many want to consider all with Hawaiian blood as brothers and equals, it does threaten to dilute the justification where that inheritance is a very minor portion of the individuals total hereditary make-up.” Attorney Mitsuo Uyehara—who was an original founder of Hōʻāla Kānāwai—took the same position, but added that the concept of the Office of Hawaiian Affairs was unconstitutional as it provided preferential treatment for one race.

Georgiana Padeken, the director of the Department of Hawaiian Home Lands who was recommended by Galdeira and The Hawaiians to Governor Burns, and who assisted the Hawaiian Affairs Committee at the Con-Con, offered comments on specific clarifications that needed to be made. Her largest concern was ensuring that the Legislature clarified how the elections would be conducted and how the electorate would be certified. Attorney Nolan Chock of the Native Hawaiian Legal Corporation espoused the need for a political entity for Hawaiians so that that entity could approach the federal government and obtain political recognition as an indigenous governing body.

The House Committees amended House Bill 890 to include provisions consistent with the intent of the Con-Con delegates. Some of the highlights of the House amendments included ensuring a qualified and strong administrator for the agency by equating the salary of the Office of Hawaiian Affairs’ Administrator with other State cabinet-level directors, and ensuring the independence of the Office by proposing that the Office of Hawaiian Affairs be tied to the governor’s office “for administrative purposes only.” The Committees also suggested a sum of $150,000 to fund the Office of Hawaiian Affairs for the first eight months and a sum of $170,000
to be dispersed to the Lieutenant Governor’s office to conduct the special election of the first crop of trustees in 1980.

On the thirty-fifth day of the legislative session, Con-Con delegate turned Representative Carol Fukunaga moved that House Bill 890 House Draft 1 pass out of the House and cross-over to the Senate for their consideration. Representative Kīnaʻu Boyd Kamaliʻi—a Native Hawaiian Republican who represented the district encompassing the tourist hub of Waikīkī—rose and spoke in favor of the bill, arguing that the creation of the Office of Hawaiian Affairs “will someday be called the ‘Great Mahele’ of this century. I fully realize this office represents a degree of control and self determination for native Hawaiians to create their own future.”92 Representative Kamaliʻi, however, noted her reservation that the bill established election procedures without understanding or developing what and how programs will be managed.93 Nevertheless, the bill was voted on and, with forty-nine “ayes” (with two representatives excused), passed Third Reading in the House and was transferred to the Senate for its consideration.94

While the House had passed a bill with relative ease, the bill faced an uphill battle in the Senate. The bill was given a triple committee referral, in which it needed to pass through three separate committees that needed to schedule their own hearings and make their own decisions, including amendments. The first hurdle in the Senate was the Committee on Housing and Hawaiian Homes. After hearing testimony, the Senate Housing and Hawaiian Affairs Committee proposed several amendments, including, amending the definition of “native Hawaiian” and “Hawaiian” to refer to those individuals whose ancestors were born in Hawaiʻi and whose descendants continue to reside in Hawaiʻi.95 This amendment was based on the testimony of respected historian Abraham Piʻianaia and Alu Like Executive Director Winona Rubin, who sought to address concerns that the Hawaiians were seafarers that apparently migrated between the Hawaiian archipelago and other Polynesian islands, and thus, some non-residents could claim to fall under the definition of native Hawaiian.96 Such language, however, would suggest that those Hawaiians who moved to the continental United States would not be beneficiaries of the Ceded Land Trust revenues. The Committee also noted the intent of the Con-Con to make the Office of Hawaiian Affairs as autonomous as possible.97 While it recognized the broad power of the Administrator (as the only permanent employee of the agency
as trustees would be paid a stipend for their service), the Committee stated that “[t]he administrator and his staff will have to be creative, both in their policy-recommending and implementing capacities.”\textsuperscript{98} In addition, the Committee felt “very strongly” that the administrator “should not be paid comparable to that of a director” because the administrator would “not have the responsibility, duties and supervision of personnel to warrant such a salary.”\textsuperscript{99} For the Committee, the vision of the Office of Hawaiian Affairs as a “clearinghouse” for all Hawaiian issues did not warrant the staff and personnel as the State’s Department of Agriculture or the Department of the Attorney General. Clearly, the Senate was not about to provide the Office of Hawaiian Affairs with sufficient resources it needed to fulfill its mandate of bettering the conditions of Hawaiians and native Hawaiians.

While the changes made to House Bill 890 in the Senate Committee on Housing and Hawaiian Homes further clarified the scope of the powers as between the board of trustees and the administrator, it would be the Senate Judiciary Committee that would explicitly ignore the intent of the Con-Con delegates and significantly weaken the power of the Office of Hawaiian Affairs. On March 23, 1979, the Senate Judiciary Committee held its hearing on House Bill 890. Following the hearing, the Judiciary Committee submitted its report, which began by “decipher[ing]” what it called the “cryptic language” of section 4 of article XII of the Constitution, wherein the delegates of the Con-Con sought to clarify the Public Trust.\textsuperscript{100} Although it did not need to do so as the Con-Con delegates’ intent was documented in its various reports, the Committee set forth what the newly amended Constitution required and argued that there were “at least two ways of interpreting the ‘public trust’ required by the Admission Act.”\textsuperscript{101} Under one interpretation, all the income from public lands could be used toward any of the five expressed purposes in the Admission Act. Under the other interpretation, which is the interpretation held by the Con-Con delegates and enumerated in section 4 of article XII of the Constitution, the income from public lands had to be used for both the general public and the betterment of the conditions of native Hawaiians.\textsuperscript{102}

The Committee then articulated what it believed to be the “legal confines of the Office of Hawaiian Affairs.”\textsuperscript{103} It began with a recitation of the preamble of the Constitution, which has no binding legal authority but talks about the “Rights of Man,” and stated that all persons are deemed under the Constitution to be “equal in their inherent and inalienable rights” in “the
enjoyment of life, liberty and the pursuit of happiness.” The Committee then invoked what many have called a jaded view of Hawai‘i’s community: “Your Committee notes that inherent in our commitment to those rights is our duty to seek with incessant endeavor a society in which race, sex and all other antitheses to merit would disappear. We are therefore committed to the ultimate ‘melting pot,’ to the interdependence of all peoples, and to social, economic, cultural and educational mobility based on merit.” The “melting pot” model for Hawai‘i was first articulated in Romanzo C. Adams’ 1933 book, The Peoples of Hawaii. Adams observed the high interracial marriage rate, and concluded that Hawai‘i was a “racial melting pot[.]” Noting the “equality” of economic, political, and educational opportunity among the “races,” Adams argued that Hawai‘i would become a place of “one people.” Years later, Jonathan Y. Okamura would challenge the “melting pot” ideology, arguing that ethnicity, not race, was the defining factor in Hawai‘i. For Okamura, the “melting pot” ideology ignored the subjugation of Kānaka Maoli, Filipinos, and Samoans to allow the narratives of the Whites, Japanese, and Chinese to be elevated as the dominant narrative. As discussed in more detail later, it would be proponents of the “melting pot” theory whose narrative of Hawaii’s political and legal history would ultimately become inscribed in case law and change the dynamics of the Office of Hawaiian Affairs.

Given its reliance on the “melting pot” theory, it is not surprising that the Senate Judiciary Committee then wholeheartedly disregarded the intent of the 1978 delegates as expressed through the various Con-Con committee reports. The Judiciary Committee’s report brazenly concluded: “unlike legislative committee reports which reflect the will of the legislators, the committee reports of the Constitutional Convention do not reflect ‘the will of the electorate’ and cannot be given similar weight.” Therefore, the Committee believed that it was not bound by the intent of the delegates in implementing the constitutional mandate that was ratified by the people. As an example, the Committee asserted that although the Con-Con committee reports suggest that the Office of Hawaiian Affairs be an independent entity akin to the University of Hawai‘i, the language of the relevant constitutional provision did not contain language similar to that of article X, section 6 of the Hawai‘i Constitution, which stated that the University of Hawai‘i board of regents had the power to formulate policy “except that the board shall have exclusive jurisdiction over the internal organization and management of the
Absent such language, the Judiciary Committee concluded that the board of trustees did not have exclusive jurisdiction over their own affairs, and that the State had plenary powers over it. 112

Foreseeing future legal challenges, the Senate Judiciary Committee then sought to make clear that the revenues from the Ceded Land “must be utilized only to benefit ‘native Hawaiians,’” those of one-half part Hawaiian ancestry. 113 However, the Committee did note that other appropriations made by the Legislature could be used for the betterment of all Hawaiians, regardless of blood quantum. 114

The Committee then addressed its amendments to the organization of the Office of Hawaiian Affairs and administration of the trust. 115 It first addressed a provision requiring that the administrator be a Hawaiian. In a paternalist jab and an attempt to justify the refusal to allow such “racial preference,” the Committee cited with approval the following language from the United States Supreme Court case Board of County Commissioners v. Seber:

In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic. 116

Yet, the Committee did leave open the option of the Office of Hawaiian Affairs creating job opportunities for Hawaiians, but only “to help an isolated Hawaiian community” to “take their place as independent, qualified members of the modern body politic.” 117 The Committee then expressly did not define what the “pro rata portion” of the Ceded Lands revenues was and instead concluded that funds to the Office of Hawaiian Affairs would be channeled through the normal process of legislative appropriation, effectively giving the Legislature control of the purse strings of the Office of Hawaiian Affairs. 118 The Committee contended that legislative appropriation was appropriate because it provided “flexibility as changing circumstances may well dictate the need to adjust to fluctuating need, merit and availability of funds.” 119 Again, the Senate further stripped the Office of Hawaiian Affairs of its intended independent nature. In terms of salary of the administrator, the Judiciary Committee concluded that $15,000, which was far less than was received by other cabinet-level directors, was an appropriate amount for an
annual salary. The Committee also set the compensation for trustees at $50 per day for each day’s actual attendance at meetings.

Invoking the “one-man, one vote” mantra from the United States Supreme Court’s decision in *Baker v. Carr*, 369 U.S. 186 (1962), the Senate Judiciary Committee then amended the bill to require that all nine seats for trustee of the Office of Hawaiian Affairs be required to run at large on a single non-partisan election ballot. The first five seats would be allocated to the candidates with residences in each of the five major islands: O‘ahu, Kaua‘i, Maui, Moloka‘i, and Hawai‘i. The remaining four seats would then be awarded to the top four candidates, regardless of residency. This, according to the Committee, would ensure that “the vote of any citizen is approximately equal in weight to any other citizen.”

Finally, in another shot to the intent of the Con-Con delegates, the Committee rejected the notion of combining the Department of Hawaiian Home Lands and the Office of Hawaiian Affairs and provided amendments pertaining to lawsuits and liabilities. In relevant part, the Committee amended the bill to allow for suits to be brought against the board of trustees by any individual beneficiary of the public trust for a breach of their fiduciary duty.

Following the amendments in the Senate Judiciary Committee, the Senate Ways and Means Committee had its turn at providing additional amendments. The chair of the Ways and Means Committee is often referred to as the second most powerful person in the Senate, second only to the Senate President. At the time, freshman Senator (and future Governor) Benjamin J. Cayetano chaired the powerful committee. He (and other freshman Senators) formed a political alliance with Richard “Dickie” Wong and, for his allegiance, was rewarded with the prime committee chairmanship. Cayetano’s committee made several additional amendments to the bill, including: clarifying that one member of the board must be from Maui or Lāna‘i and that one member must be from Kaua‘i or Ni‘ihau; increasing the annual salary of the administrator to $20,000; and providing that a candidate need only fifteen signatures of registered Hawaiian voters to fulfill the nomination requirement.

Cayetano subsequently moved for the Senate to adopt his committee’s draft of House Bill 890; the motion was seconded by Senator (and future Congressman and Governor) Neil Abercrombie. With the exception of one dissenter, who argued that “this is one of those patently bad bills that will someday be taken to the United States Supreme Court and then adjudged
unconstitutional” as it violated the Fourteenth Amendment of the United States Constitution by treating one class of individuals different than everyone else, the entire Senate approved Cayetano’s draft.131

As there were considerable differences between the House and the Senate versions of House Bill 890, a conference committee was formed to hammer out a compromise bill that would be acceptable to both House and Senate members. The conferees for the House were Representatives Kawakami, Fukunaga, Holt, Stanley, D. Yamada, and Anderson. The Senate conferees were Senators Young, Carpenter, Cayetano, O’Connor, Yim, and Soares.

In its report, the Conference Committee noted its intent in passing the bill: “The hope of this bill lies in the vehicle it presents to the long neglected Hawaiian people by way of imaginative affirmative action programs to better their condition.”132 Invoking the dominant rhetoric of special treatment and “imaginative affirmative action,” the Conference Committee provided numerous amendments, including: elevating the annual salary of the administrator from $20,000 to $30,000; mandating that the board of trustees submit an annual budget to the Legislature and subjecting the Office of Hawaiian Affairs to annual government audits; increasing the number of Hawaiians that need to sign nomination papers from fifteen to twenty-five; and increasing the funds provided to the Office of Hawaiian Affairs to $125,000 for the first fiscal year.133 The conferees also agreed on defining the pro rata portion of the ceded lands revenue that would be given to the Office of Hawaiian Affairs at a measly four percent.

Like most other legislation that passed, political jockeying and backroom agreements permeated passage of the Office of Hawaiian Affairs’ implementing legislation. For example, the firm House position going into conference on the issue of the administrator’s salary was that such individual would be compensated at the rate of cabinet-level directors of the State.134 It was the amount agreed upon by both the House and Senate conferees during the conference process.135 However, the Senate conferees undercut their agreement by insisting on a last minute “miscommunication.”136 The Senate conferees insisted that the House conferees had agreed to the conference draft, which gave the administrator an annual salary of $30,000.137 Representative Holt expressed his displeasure with such gamesmanship by the State Senate: “[P]laying politics with something as important as this is very disturbing and really bugs the hell out of me. The Senate conferees, I believe, changed their position after the conference because
of pressure from fellow colleagues who would not buy the higher salary level. I sincerely feel that the Senate did not act in good faith and purposely claimed miscommunication at the last minute so the House would not have time to confer on this matter before the deadline.\textsuperscript{138}

During the debate following the recommendation to adopt the Conference Committee’s draft of the implementing legislation, several legislators expressed their frustration with the end result. Citing how the draft’s reporting requirements turned the autonomous intent of the constitutional amendments on their head and that placing liability with the trustees themselves is counter to general trust functions, Representative Kamali‘i professed, “This version of the Office of Hawaiian Affairs is an insult, both to the Hawaiians it would pretend to serve and to all of the people of Hawai‘i.”\textsuperscript{139} Representative Fukunaga echoed Kamali‘i’s argument, and also asserted that the conference draft failed to address the percentage of funds that would be allocated from the Ceded Lands to be given to the Office of Hawaiian Affairs.\textsuperscript{140} Fukunaga urged her colleagues to reject the bill and use the interim to further study the issues so that they could draft “more careful legislation[.]”\textsuperscript{141}

Other legislators, however, saw the need to resolve the issue now and patch the gaps latter. Citing what he believed was a political attempt to further prolong conciliatory efforts for Hawaiians, Representative Holt stated,

[W]hen Hawaiians are given the opportunity to move ahead, people oppose any such move because they can’t have each and every one of their concerns addressed completely. I would surely hate to see the Hawaiian community come up with nothing, which would happen if we vote down this bill. . . . Let’s not be foolish and play politics with Hawaiians anymore. This bill before us is a monumental piece of legislation which will finally provide the Hawaiians with something to hang their hats on.\textsuperscript{142}

In the end, according to Waihe‘e, “not a single member of the legislature who had been a delegate at the Constitutional Convention voted for the OHA bill, because it had been sold out.”\textsuperscript{143} The Legislature had “failed” on three levels to pass legislation in keeping with the spirit of the Con-Con: first, the legislation did not provide an adequate mechanism for funding; second, the Legislature tasked the Office of Hawaiian Affairs with addressing everything for Native Hawaiians, without providing it sufficient resources; and third, the Legislature failed to follow through on providing the Office of Hawaiian Affairs with a strong executive. Regardless of its flawed basis and with the consent of the State Attorney General and the Director of Finance, on
June 7, 1979, Governor George Ariyoshi signed the conference draft of House Bill 890 into law as Act 196.

**Strong-Arming a Compromise**

During the next legislative session in 1980, the issue of a permanent funding mechanism for the Office of Hawaiian Affairs would be reinserted into the debate and ultimately authorized, but not without a political circus and even death threats against lawmakers. As with the implementing legislation, House Bill 1853, which set the amount of funds to be given to the Office of Hawaiian Affairs from the Ceded Lands trust at twenty percent, breezed through three House committees. When it made its way to the floor of the House for its Third Reading before moving to the Senate, House Bill 1853 faced no opposition. The only concerns raised during the debate was the adequacy of the twenty percent figure, considering the history of the Ceded Lands and the ʻĀnaha ʻA′ānaha. Representative Richard “Ike” Sutton, a Pearl Harbor survivor and former federal judge, stated: “I feel that making it only 20% is poor, that it’s a very inadequate amount considering that ʻĀnaha ʻA′ānaha really, in truth, are the owners thereof, and that we should have increased it.” House Republican Leader Kamaliʻi expressed her displeasure with the simple arithmetic method of obtaining the twenty percent quantification (dividing the revenues into fifths as there were five purposes set forth in section 5(f) of the Admissions Act) and instead insisted on a thirty percent share for native Hawaiians, which was consistent with the congressional approval of thirty percent of sugarcane leases and water revenue that would go the Hawaiian Homestead program. Kamaliʻi expressed what she saw as the unwillingness of legislators to give the Hawaiians any more than they were required to do, “I am not here to argue that native Hawaiians should receive a pro rata share of 100%. I am not politically naïve[.] . . . The entire state rejoiced in the renewed pride and identity of Hawaiians, as long as we were talking about music, dance and the arts. When that same pride assumes new dimensions of confidence and political expression, I detect fear.” Although she supported the bill, she still expressed her frustration, “Hawaiians gave freely of their love and trust. All we’re asking is for the same in return, and to set the pro rata at 20% instead of 30% is to ask Hawaiians to accept less than what is legally their right. We are, by this bill, only adding another wrong to the too-long list of injustices done against Hawaiians.” Despite the fervent oratory, the bill passed
Third Reading unanimously by all present representatives and, thereafter, crossed-over to the Senate for their consideration.

The Senate’s Housing and Hawaiian Homes Committee took up the bill and amended it to require that money be made available to the Office of Hawaiian Affairs on a quarterly basis “to ensure a regular flow.”149 However, staunch in their position from last session, the Senate Ways and Means Committee would not budge on its demand that the Office of Hawaiian Affairs come back to the Legislature every session to justify appropriations, even despite passionate testimony from individuals, like DeSoto, who lambasted the Committee with a recitation of the historical injustices faced by Kānaka Maoli.150 Nevertheless, Chairman Cayetano’s Committee believed that “a dollar amount assignment of proceeds from the public trust is more appropriate at this time in light of the yet unclear role and nature of activities of the Office of Hawaiian Affairs[,]” and thus amended the bill to provide a one million dollar appropriation to the Office of Hawaiian Affairs.151 Cayetano was personally against providing the Office of Hawaiian Affairs with twenty percent and expressed his sense of distrust: “My personal view, shared by the majority of my committee and Judiciary chairman O’Connor, was that setting the pro rata share at 20 percent was like giving OHA a blank check. There would be little accountability. OHA, after all, was still a State agency.”152 Cayetano believed that the Office of Hawaiian Affairs needed to annually justify its appropriations, and that the twenty present figure was simply “logic of convenience.”153 After listening to DeSoto’s pleas, Chairman Cayetano invoked the rhetoric of an individual oblivious of the privileges afforded by the theft of Hawaiian sovereignty and land less than a century earlier, “Frenchy, take a look at the faces of the members of this committee. None of our ancestors had anything to do with the historic injustice you just talked about.”154 While the Senate retreated back to its position, the battle was far from over.

As there were significant differences between the House and Senate versions, a conference committee was created to negotiate a final compromised version of the bill. During the conference process, which was now open to the public, Majority Leader Henry Peters took the lead on the bigger ticket items on behalf of the House. Peters personally saw to it that the House version of the twenty percent pro rata portion of the Ceded Lands revenues would prevail. But, Peters was, as Cayetano stated, not as “well prepared as he should have been to negotiate
the budget and related bills." He would constantly turn to his staff for assistance when asked questions by Senate members about the House’s position. As such, there were no concessions from the Senators. About a week prior to the last day of the legislative session, which is mandated by the constitution, Majority Leader Peters and the House changed their strategy. Peters would withhold House approval of three critical bills unless the Senate agreed to the twenty percent revenue provision in House Bill 1853. The three bills that were “held hostage” were the Supplemental Capital Improvement Bill, which included the pork barreled projects of multiple legislators, the Pensioners’ Bonus Bill, and a work-training bill for unemployed individuals. With these important bills held in abeyance, pressure began to mount from Hawaiians and retirees who demanded that the wrinkles get ironed out on House Bill 1853. Intimidation and threats of violence inched their way into the mix: Senators Anson Chong and Neil Abercrombie reported threats of intimidation; and Chairman Cayetano reported a death threat in which a hunter claimed he would “nail” Cayetano as he drove home on the freeway. Cayetano, as lead Senate negotiator, nevertheless held to the Senate’s position.

On the last day of the legislative session, there was no movement on House Bill 1853, and thus, no movement on the “hostage” bills. In an unusual move, Governor Ariyoshi used his executive authority and granted a one-day extension of the legislative session. Ariyoshi would subsequently grant five more one-day extensions. During one of the conference committee meetings, Speaker of the House James Wakatsuki called various Senate conferees out of the meeting to discuss the bills. “Give them [the Hawaiians] the 20 percent, otherwise they’ll just comeback again and again[,]” Speaker Wakatsuki implored Senator O’Connor, chair of the Senate Judiciary Committee. With the pleas from Wakatsuki, the mounting pressure from labor unions that began running ads on the Pensioners’ Bonus Bill, and the calls from legislators to have their pork barrel projects passed during this crucial election year, multiple senators began to rethink their hardline position. Cayetano, the last (and critical) holdout, finally capitulated to Peters’ demand, and the conference committee reported out House Bill 1853 with the pivotal twenty percent revenue language.

Given their political strong-arming, the House members ultimately succeeded in getting the Senate to bow out and agree to the twenty percent figure. The Conference Committee also agreed to appropriate $100,000 from the general state funds to the Office of Hawaiian Affairs.
Lauding the efforts of Peters, Republican Representative Sutton stated that Peters was “truly a representative of the Hawaiian people” who had “done the initial research which started the Constitutional Convention into their significant thing of having this amendment.”

Representative Kamaliʻi extolled the significance of the legislation and its reparatory reach: “This office is a step towards social justice for Hawaiians, not another welfare or rehabilitation program.”

Representative Holt celebrated the work of the two legislative bodies: “Hawaiians and non-Hawaiians alike will always remember the Tenth State Legislature as one that did not shirk its responsibility to our Hawaiian community.”

The Conference Committee draft passed (with the exception of one excused representative) unanimously out of the House.

On the other end of the State Capitol building—which was designed by famed architect John Carl Warnecke (of Kennedy Eternal Flame fame) to represent the volcanic masses emerging from the ocean—the Senate, with the exception of Republican Senator Anderson who hailed the House’s tactics, took a far less celebratory tone. Senators Ajifu and Kawasaki opposed the bill. Despite the clear intent of the Con-Con delegates to make the Office of Hawaiian Affairs an autonomous agency, Senator Ajifu believed that legislators were “relinquishing [their] responsibilities” by agreeing to the twenty percent pro rata figure. Instead, Ajifu expressed a need for State oversight, stating that he believed that the Legislature “should appropriate funds for OHA like any other agency and review the appropriations and programs as we have done with all other agencies.”

Reiterating his opposition from the 1979 session, Senator Kawasaki expressed his concerns about the constitutionality of all of the bills related to the Office of Hawaiian Affairs. Senator Abercrombie, a sociologist with a PhD in American Studies from the University of Hawaiʻi, described his concern with the constitutionality of the bill, but ultimately voted to accept the House’s position because this bill was the only vehicle “that we have that can fund this office and maintain the agreements that were arrived at in the course of the negotiations over not only the budget, but the various and sundry bills associated with the ultimate passage of legislation this session.”

Invoking the image of a defeated Greek army, Senator Abercrombie called the passage of the Office of Hawaiian Affairs’ funding mechanism a “Pyrrhic victory . . . a skirmish in a very large battle.” Abercrombie prophetically cautioned: “I regret to say that I expect that the moment this passes
into statute, there will be a suit and that the business of the Office of Hawaiian Affairs is, as a result, going to be tied up in court for God-knows how many years.”

Over the objections, and despite the political brinksmanship and the often tense (and sometimes violent) tones that were evident throughout the process, the State Legislature finalized the parameters for the Office of Hawaiian Affairs before its election. On June 16, 1980, Governor Ariyoshi signed the strong-armed compromise bill into law as Act 273. The Office of Hawaiian Affairs had its statutory framework upon which the elected trustees would navigate. This statutory framework has been and still can be changed by the Legislature. A Legislature sympathetic to the Native Hawaiian cause could increase the percentage of ceded lands revenue afforded to the Office of Hawaiian Affairs. As evidenced by the House’s strong-arming tactics, sympathetic advocates can force substantial changes if there is the political will to do so.

With the State’s actions in delineating (at times begrudgingly) the parameters of the Office of Hawaiian Affairs, the first task was to have an election for the first members of the board. Con-Con staffers, including Steve Kuna, Wilson, and Rubin, organized and opened an office called Volunteers of the Office of Hawaiian Affairs. The task of the Volunteers was to put together the 1980 election of the first nine trustees. Through the assistance of Rubin’s Alu Like and the influence of Senator Inouye, the Volunteers were able to expedite a federal grant of $50,000 to publicize the election. The Volunteers worked with Hawaiian organizations, including civic clubs, canoe clubs, and churches, to maximize Hawaiian registration and participation in the seminal election.

With over one hundred candidates registered to run, a “pre-election” was held at the historic ‘Iolani Palace. As the Hawaiian flag flew over the Palace—the first time it had done so since the overthrow in 1893—every candidate was allowed an opportunity to speak. “It was a glorious day . . . There was so much excitement and hope in the air[,]” recalled Con-Con staffer Wilson.

On the same day that Republican Ronald Reagan secured the presidency of the United States and began his march to reclaim the United States as the “shining city upon a hill,” nine individuals were elected to serve as the inaugural class of trustees of the Office of Hawaiian Affairs to better the conditions of Hawaiians. Over 54,000 Hawaiians went to the polls on
November 4, 1980 to elect their own leaders. Among the first crop of trustees were Con-Con Chairwoman DeSoto, Kaho‘olawe activist Ritte, Wai‘anae teacher Peter Apo, retired Kamehameha Schools teacher and personnel officer with the U.S. Army Roy Benham, businessman Rodney Burgess, retired U.S. Marshall Thomas Kaulukukui, developer Joseph Kealoha, and University of Hawai‘i at Hilo Professor Mālama Solomon.

Some have described the creation of the Office of Hawaiian Affairs as the “political apex” of the Hawaiian Renaissance and the “centerpiece of Hawaiian politics.” John Dominis Holt, the seminal figure that helped to launch the political and cultural renaissance of the seventies stated, “Many, many Hawaiians made OHA a reality. It belongs to all Hawaiians. The creation of OHA is a major victory for the majority of Hawaiians. It belongs to all because we are the lo‘i and the kalo in which and upon which OHA grows.” Others like Mililani Trask, however, have stated, “The purpose of OHA was to achieve assimilation of the native culture and to guarantee state control of native trust lands in perpetuity.” The first ten years of the Office of Hawaiian Affairs would be defined by the fledgling entity’s struggle for legitimacy from within the Hawaiian community and from the public at-large.

3 Id.
4 Id.
6 Id.
10 Sanburn, supra note 5, at 13.
13 Haunani-Kay Trask, From a Native Daughter: Colonialism and Sovereignty in Hawai‘i (Univ. Haw. Press 1999).
16 Interview with John D. Waihe‘e, III, in Honolulu, Hawai‘i (April 16, 2015).
18 Interview with Raymond Pae Galdeira, in Henderson, Nevada (May 7, 2015).
19 Waihe‘e Interview, supra note 16.
20 Id.
21 Id.
22 Id.
23 Id.
24 Id.
25 Id.
26 Id.
27 Id.
29 Waihe‘e Interview, supra note 16.
30 Id.
31 Id.
32 Id.
34 Waihe‘e Interview, supra note 16; Interview with Sherry Broder, in Honolulu, Hawai‘i (April 13, 2015).
35 COFFMAN, supra note 1, at 308-09; see also Waihe‘e Interview, supra note 16.
36 Id.
37 COFFMAN, supra note 1, at 308-09.
38 Id.
39 Sanburn, supra note 5, at 13.
40 Waihe‘e Interview, supra note 16.
41 Delegate Proposal No. 405, Constitutional Convention, retrieved from the Hawai‘i State Archives (1978) (on file with author).
42 Delegate Proposal No. 674, Constitutional Convention, retrieved from the Hawai‘i State Archives (1978) (on file with author); Delegate Proposal No. 676, Constitutional Convention, retrieved from the Hawai‘i State Archives (1978) (on file with author).
44 Sanburn, supra note 5, at 13.
Office of Hawaiian Affairs, Former Gov. Waihee ponders OHA’s 25 Years, undated article (on file with author).


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See DAVID E. STANNARD, HONOR KILLING: RACE, RAPE, AND CLARENCE’S DARROW’S SPECTACULAR LAST CASE (Penguin Books 2006)

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Id. at 459 (emphasis added).

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Id. (emphasis added).

Id.

Id.

Waihe‘e Interview, supra note 16.


Id.


Sanburn, supra note 5, at 13.


Id. at 461.

Sanburn, supra note 5, at 14.


Sanburn, supra note 5, at 13.

Testimony of Adelaine “Frenchy” DeSoto on HB 890, retrieved from the Hawai‘i State Archives (February 22, 1979) (on file with author).
Testimony of Kamuela Price and the Hou Hawaiians on HB 890, retrieved from the Hawai‘i State Archives (February 22, 1979) (on file with author).

Testimony of Mitsuo Uyehara on HB 890, retrieved from the Hawai‘i State Archives (February 22, 1979) (on file with author).

Testimony of Georgiana Padeken on HB 890, retrieved from the Hawai‘i State Archives (February 22, 1979) (on file with author).

Testimony of Nolan Chock on HB 890, retrieved from the Hawai‘i State Archives (February 22, 1979) (on file with author).


Id. at 1342.

Id. at 1343-44.


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Id. (emphasis added).

See Office of Hawaiian Affairs, supra note 45.


1980 Hawai‘i Senate Journal, at 1381.

Cayetano, supra note 128, at 183.

1980 Hawai‘i Senate Journal, at 1479.

Cayetano, supra note 128, at 183.

Id. at 184.

Id. at 185.

Id. at 184.

Id. at 183.

Id.

Id.

Id. at 184.
160 *Id.* at 185.
161 *Id.* at 187.
162 *Id.*
163 *Id.* at 188.
165 *Id.*
166 *Id.* at 1017.
168 *Id.*
169 *Id.*
170 *Id.*
171 *Id.*
172 *Id.* at 881-82.
173 *Id.* at 882.
175 *Id.*
176 *Id.*
177 *Id.*
178 *Id.*
181 *OHA is Born*, KA WAI OLA O OHA, Summer 1981, at 1.
CHAPTER 3

Struggle for Legitimacy: The Early Years of the Office of Hawaiian Affairs

On November 6, 1980, two days after the historic election, the initial nine trustees of the Office of Hawaiian Affairs held their first informal meeting and selected DeSoto as the interim chairperson and Joseph Kealoha as the interim vice chair. At this first meeting, which was held in the State Capitol Auditorium and attended by dozens of community members, the trustees discussed, among other things: funding, the organization of potential committees, and their special investiture ceremony at ‘Iolani Palace.1 Although the trustees committed to unity among themselves and with other stakeholders, they were immediately faced with the reality of governance. The Office of Hawaiian Affairs had nine trustees, but the trustees had no staff, no physical office, and no mechanism to tap the $1.2 million set aside by the State Legislature. Kaua‘i Trustee Moses Keale expressed the stark reality of the situation: “We were all trying to figure out how to manage this beast called OHA. We didn’t know how to get the money. We were using our own money to fly interisland, and we never got reimbursed. Here we were, nine trustees using our own money because we didn’t know how to go get the funds. Who do you ask? The governor? We didn’t know.”2

To make matters worse, the Office of Hawaiian Affairs was faced with criticism from within the Native Hawaiian community, even before the election of the trustees. One of the first entities to object to the concept of the Office of Hawaiian Affairs was the PKO—the organization dedicated to halting the bombing of Kaho‘olawe and the same organization that found early support from newly elected trustees Ritte and DeSoto. PKO concluded that the Office of Hawaiian Affairs could possibly erode the rights of native Hawaiians because its major source of revenue would come from funds allocated specifically for native Hawaiians—those of at least one-half part Hawaiian—but it was mandated to better the conditions of all Native Hawaiians.3

On November 26, 1980, the trustees had their first official meeting, and duly elected DeSoto as their chairperson and Kealoha as their vice-chairperson. The trustees also established six standing committees: Budget, Economic Development, Education, Health and Human
Resources, and Land and Natural Resources. Trustee Benham recalled, “[W]e also included community members in our committees for input. One problem we had was in getting neighbor island participation. We had no money. All we got was per diem payments for attending meetings—so we started holding plenty meetings.” In addition, the trustees hired their first employee, Wilson, who had served on the Hawaiian Affairs Committee at the 1978 Con-Con and had helped with the Volunteers to organize the election of the trustees, to serve as an executive secretary. The very next day, November 27, 1980, with their hands raised and their eyes forward, the nine trustees were sworn in by a teary-eyed Chief Justice William S. Richardson, who described the significance of the occasion.

Two weeks later, the trustees secured a 900 square foot office space in Kawaihaʻo Plaza. Trustee Rod Burgess stated: “We started with a blank piece of paper, a statute a couple of paragraphs long. Then we had one employee, an office with no furniture . . . and the phone ringing off the hook with expectations of the people. We were deluged with calls, hundreds of calls, everybody needing help and expecting us to help them.”

On January 17, 1981, eighty-eight years after the illegal overthrow of the Hawaiian Kingdom, the Office of Hawaiian Affairs was officially dedicated and the trustees ceremonially inaugurated. In the shadow of ʻIolani Palace, the ever present vestige of the sovereign kingdom, the trustees made their way, escorted by the Royal Guard, to the Palace steps. The trustees, with the guidance of Chief Justice Richardson, swore their Oath of Reaffirmation:

We, the Trustees of the Office of Hawaiian Affairs hereby reaffirm our commitment to the Hawaiian people. In doing so, we humbly accept the responsibility given us by Nā Poʻe O Hawaiʻi Nei. We will remember and honor God, our Kupuna, Nā ʻAina, Nā Kahakai, Nā Moana, Nā [Ea] and all the natural elements which sustain and nourish our people. We hereby commit ourselves to work earnestly with our fellow Trustees in your behalf, to listen with an open mind, to speak with an honest heart and to carry out our responsibilities with wisdom, humility and strength.

John Dominis Holt, the father of the Hawaiian Renaissance, provided the keynote address and stated, “OHA comes to us at a propitious time. A time when we can use many, many skills to correct economic, social, psychological, political and philosophical ills. What the alii could not accomplish—the alleviation of poverty, despair, ignorance and confusion—has been left for the rest of us to do. . . . I hope we can all enjoy the fact that as OHA makes us strong and brings
justice where it is needed and provides comfort and hope to native Hawaiians, that our gains will be gains also for all the community of Hawaii." Attendees of this special investiture were treated to hula and ‘oli, and a traditional meal of kalo (taro), breadfruit, and fish. Trustees and other guests presented special ho‘okupu or offerings in honor of Queen Lili‘uokalani. Again, however, the pomp and celebration was quickly quelled by the reality of differing ideas, goals, and actions of various trustees. The constant struggle and balance for legitimacy both within and without the Native Hawaiian community would come to define the first decade of the Office of Hawaiian Affairs’ existence. For as Trustee DeSoto foretold, the board would “struggle like a baby who cries for life.”

Growing Pains

From its first meeting, it was clear that the trustees brought with them different ideas and visions for the future of the Office of Hawaiian Affairs. Moloka‘i Trustee Walter Ritte obtained the most votes during the election, and used that to advocate for an ambitious cultural program. Hawai‘i Island Trustee Mālama Solomon wanted to assemble a legal team to begin court battles on Hawaiian claims against both the state and federal governments. Trustee Benham wanted to set up a Hawaiian bank. Squabbles erupted over the where the Office of Hawaiian Affairs should set up its headquarters, with some advocating for the Linekona School on Thomas Square and others looking at an old mansion in Nu‘uanu. In terms of how the Office of Hawaiian Affairs could best serve the Hawaiian community, Ritte envisioned the Office of Hawaiian Affairs answering the calls of any Hawaiian seeking assistance. This “parachuting” model—as one trustee characterized it—was criticized as only addressing narrow problems. Other trustees suggested a broad-based organization that could address large systemic problems instead of latching to the plights of individual native Hawaiians. Trustee Benham wanted the trustees to be policy makers who leave the committee work to paid staff. Benham along with Trustees Kealoha and Keale wanted to operate the Office of Hawaiian Affairs like a social service agency. One trustee would criticize fellow trustees for shying away from certain hot button issues that he believed the Office of Hawaiian Affairs needed to address. Trustee Thomas Kaulukukui wanted to ensure that the agency worked collaboratively with other existing Hawaiian-serving entities to
maximize the potential for results. As Trustee Rod Burgess put it, “Nobody had a clear vision of what our agency was or where it was headed.” That led to passion-filled meetings.

The trustees initially used ho’oponopono, the traditional Hawaiian method of resolving disputes by allowing participants to speak their minds and find compromise, but that often took too long. The trustees hired unemployed kupuna “Papa Kala” Nali’i’elua to lead them in prayer, which some asserted provided much needed spiritual stability for the trustees during the often-tense meetings.

Perhaps the most important debate the trustees engaged in was the general framework of the Office of Hawaiian Affairs, specifically whether it would be a delivering agency or a non-delivering agency. As a delivering agency, the Office of Hawaiian Affairs would hire staff that would manage, for example, loans, scholarships, legal aid, or educational programming. As a non-delivering agency, the Office of Hawaiian Affairs would contract out these projects and minimize staff. Complications in the debate arose as members of the public demanded concrete and immediate results from the Office of Hawaiian Affairs. Staffer Wilson characterized the community’s expectations of the trustees, “You got the money, now how about moving it around[.]” To add to the confusion, the organization of the agency itself changed several times within the first few years of the entity’s existence. Initially, the trustees organized as a delivering agency, with trustees overseeing one of six “implementation” sections and directly providing services themselves under each section. That model was subsequently replaced in 1983 with a model in which eight divisions, each with its own officer, were created. The division officers reported to the Administrator who then reported to the trustees. This framework remained largely unchanged through the course of the Office of Hawaiian Affairs’ history.

The local media often criticized these discussions amongst the trustees and even took to challenging the trustees’ position on certain issues. One columnist, part-Hawaiian Samuel Crowningburg-Amalu, chastised the trustees’ “divisiveness” and noted that the entire concept of the Office of Hawaiian Affairs “tends to be divisive, guaranteed only to treat the Hawaiian as if he were some retarded creature unable to handle his own affairs or to conduct his own life and life style.” Crowningburg-Amalu continued, “OHA is a separatist movement and is being used now to drive a wedge between the Hawaiian people and the other races in this multiracial community. . . . OHA is at the forefront of this movement, heading heedlessly into the crucible
of destruction that such a movement cannot possibly escape.”

When one trustee called for special consideration for Native Hawaiians because of past injustices against them (nothing different than what every other indigenous community across the country sought), the Honolulu Advertiser published a column that faulted the Hawaiian people for their low socio-economic condition: “It is easy to applaud this sentiment until OHA begins assigning blame to others for what happened to the Hawaiians.” Yet another article was critical of the “lack of leadership” at the Office of Hawaiian Affairs given some of the accusations hurled by trustees against one another. Perhaps it was out of a need to follow every move of the newly elected agency, or perhaps it was to undermine an underlying fear that the Office of Hawaiian Affairs may one day gain significant political and financial clout. In truth, the debates amongst the trustees were nothing more than what any new organization encounters, and the positions they took were reflective of a people reawakened to the severe injustices of the past. Indeed, Office of Hawaiian Affairs Executive Director T.C. Yim stated, “This board works very hard. They have a complicated job that is very difficult to explain. Of course, people don’t understand what OHA is doing. It’s a problem common in government. This is a damn good board. They get a lot done.”

Not all of the criticism, however, was unwarranted. The trustees, in the early years, stubbornly held fast to a view that the Office of Hawaiian Affairs was the only legitimate voice of the Hawaiian people, despite the many organizations that worked for years, and even decades to better the conditions of Native Hawaiians. Winona Rubin, the director of Alu Like (the organization that garnered earmarked federal funds to implement social and economic programs for Hawaiians), offered the trustees databases and mailing lists so as to not duplicate efforts. The trustees refused. A year later, Rubin again offered assistance and suggested a meeting between Alu Like, the Department of Hawaiian Homelands, and the Office of Hawaiian Affairs to share resources and collaborate on various initiatives. Again, the trustees refused. When asked to join a broader group of Hawaiian based organizations, which included all of the Hawaiian royal trust entities, the Department of Hawaiian Homelands, Alu Like, and the Bishop Museum, the trustees refused at first, but then agreed to send their administrator to the meetings. Rubin commented, “[the trustees] were having problems with the idea of dealing with us on an equal footing, rather
than as the umbrella entity over all of these other agencies.”  

Adding to the difficulties in the early years of the entity was a large exodus from the Board. In 1982, Trustees Apo, Benham, DeSoto, and Solomon gave up their seats and instead ran for positions in the State Legislature. For them, the State Legislature provided a better forum to advance the interests of Native Hawaiians. Benham and DeSoto were unsuccessful in their bids. Solomon was elected as a State Senator representing Hawai‘i Island, and Apo was elected to the State House of Representatives. Replacing these four trustees were: attorney Hayden Burgess (also known as Poka Laenui), realtor Pi‘ilani Desha of Hawai‘i Island, businessman and former professional football player Rockne Freitas, and Alu Like employee Gard Kealoha.

To add to the turnover in leaders, the trustees themselves became engulfed in problems. Trustee Rod Burgess made headlines after being arrested for nude swimming and separately being charged in a fight with police. His cousin, Trustee Laenui, received attention for refusing to publically take his oath of office because, as he argued, he was not a citizen of the United States. Perhaps the trustee that received the most media attention in the early years was Ritte, the former-PKO member that aggressively pushed a Native Hawaiian cultural agenda. Ritte gained additional notoriety when he was arrested for and subsequently convicted of felony gun possession for hunting activities. The State Attorney General quickly moved to have Ritte removed as trustee. Some, like Kaho‘olawe activist Steven Morse, saw the criminal action as a conspiracy to have the vocal and passionate Ritte removed from his post: “Implications as to why the government went to such pain to convict Walter should be obvious. He was a political threat, a thorn in its side, one who challenged the part line . . . Walter’s conviction was neither fair nor just. It was merely a convenient excuse for the government to get him out of its hair . . . a political power play to silence him and render him ineffective as a leader of Hawaiian people.” Trustee Gard Kealoha, who had had several disputes with Ritte, was a vocal supporter of removing Ritte from office. After receiving opinions from the attorney general’s office and enduring heated meetings and debates regarding the Ritte matter, six trustees issued a statement siding with the attorney general’s opinion that Ritte should be removed. Only after Ritte failed in his effort to get a court-ordered injunction to preclude his removal did he resign; for him, “The outcome was predictable.” Ritte’s convictions were ultimately overturned on appeal. But the
damage was done: Ritte’s reputation (recall that Ritte was the highest vote-getter in the inaugural election) was unjustifiably tarnished and he lost his seat.

But, what these “growing pains” highlighted was the significant power and influence possessed by the trustees. Each trustee’s opinions and perspectives could be advocated for support. The limitations on how the agency could allocate their funds were nearly non-existent. The Office of Hawaiian Affairs’ priorities and projects reflected the objectives and desires of the trustees. The Office of Hawaiian Affairs’ flexibility was on full display during its first decade.

Native Hawaiians Study Commission and the Rise of the Right

At the same time that the Office of Hawaiian Affairs and its trustees faced criticism from within the Hawaiian community and the local media, it was also faced with a new and much more conservative regime in the White House. In Washington, D.C., Ronald Reagan, the newly elected President of the United States stated: “I think that there are some things, however, that may not be as useful as they once were, or that may even be distorted in practice, such as some affirmative action programs becoming quota systems. And I’m old enough to remember when quotas existed in the U.S. for the purpose of discrimination. And I don’t want to see that happen again.” His statement foreshowed his opposition to the advancement of the Native Hawaiians and other minority groups.

Following the 1980 election and during the final months of the Carter Administration, Congress passed and President Carter signed into law Public Law 96-565, which created a Native Hawaiians Study Commission (“Commission”). Borne of the multiple failed efforts by Hawaii’s congressional delegation, at the insistence of ALOHA, to seek federal reparations for the illegal overthrow of the Hawaiian Kingdom, the Commission was tasked with gathering information on the socioeconomic and cultural condition of Native Hawaiians and assessing the historical relationship between the federal, state, and local governments in regard to Native Hawaiians, and to determine what duties, if any, were due Native Hawaiians because of America’s involvement in the illegal overthrow of the kingdom. President Carter appointed nine commissioners, but his commission was quickly dissolved when Reagan assumed the presidency. President Reagan took office and almost immediately sent letters to all of Carter’s appointees, effectively terminating the Commission. President Reagan, a star in conservative
circles, later remarked, “Government is no longer the strong draft horse of minority progress. I ask you if it is not the time to hitch up a fresh horse to finish the task.”

Reagan’s conservative values found its way to the shores of Hawai‘i and to Hawaii’s indigenous people.

Seizing on President Reagan’s initial dismantling of the Commission and on an opportunity to make bold strides to advance the conditions of Hawaiians, the Office of Hawaiian Affairs created an Ad Hoc Committee on Reparations to “focus the Commission’s work on reparations for Hawaiians” and “to maximize full participation of the Hawaiian community in the Commission’s work.” The Office of Hawaiian Affairs set out to apply political pressure on the Reagan Administration by recruiting support for reestablishing the Commission and appointing members. Among the supporters was Governor Ariyoshi, who urged President Reagan to “seriously consider the retention” of the Commission and to appoint new members.

Support also poured in from Hawaii’s congressional delegation, the State Legislature, Hawaii’s four county mayors, the United Japanese Society, the Association of Hawaiian Civic Clubs, the Oahu Canoe Racing Association, the Hawaiian Businessmen’s Association, and the Democratic Party of Hawaii. Appealing to the themes of Reagan’s presidential campaign, Ariyoshi wrote, “we have been the beacon of hope for immigrant families who fled from oppressive governments abroad, we have provided unequaled opportunities for those who strove to succeed and, above all, we have sought to rectify the injustice and wrong done to our citizens and fought to maintain a just and free society.”

Ariyoshi continued, “[L]et history prove, once and for all, whether our native Hawaiian people indeed suffered at the hands of the federal government.”

State House Republican Leader Kīna‘u Boyd Kamali‘i, who had previously made impassioned speeches about the compromises made in the 1979 and 1980 legislative sessions that created the Office of Hawaiian Affairs, pleaded with and lobbied President Reagan to keep the Commission. As Kamali‘i was a passionate advocate and as she had served as chairperson of Reagan’s presidential campaign in Hawai‘i, Kamali‘i’s plea did not fall on deaf ears.

Ultimately, on March 19, 1981, President Reagan decided not to dismantle the Commission. As Governor Ariyoshi wrote, “The President’s decision to retain the Study Commission affords us the opportunity to evaluate the circumstances and determine the factual basis of our country’s involvement in the overthrow of the Hawaiian monarchy. This will be the first opportunity to address the grievances of the native Hawaiians in a positive and constructive
Reagan thereafter appointed his own commissioners. By legal mandate, only three commissioners could be residents of Hawai‘i. Reagan selected three part-Hawaiian commissioners, including: Republican Leader Kamali‘i, whom he also appointed as chair of the Commission; Winona Beamer, a cultural expert and educator; and H. Rodger Betts, an attorney who had served on the staff of former Republican Senator Hiram L. Fong and served as minority counsel for the Antitrust and Monopoly Subcommittee of the Senate Judiciary Committee.

Reagan also selected six commissioners who all served within his current administration. Carl A. Anderson was an official with the Department of Health and Human Services. Texan Carol E. Dinkins was an assistant attorney general for land and natural resources with the Department of Justice. James C. Handley was a specialist assistant secretary in the Department of Agriculture. Texan Diane K. Morales was deputy assistant secretary of Territorial and International Affairs within the Department of Interior. Glenn R. Schleede was executive associate director of the Office of Management and Budget. Stephen P. Shipley, who was also tapped to serve as vice-chair of the Commission, was the executive assistant to the Secretary of Interior. The six mainland commissioners knew little to nothing about Hawaiian history, the current status and condition of native Hawaiians, and the often tenuous political relationship between the Hawaiian people and the federal government. Senator Inouye observed that the mid-level executive branch appointees were selected because they “weren’t going to come up with something their superiors wouldn’t like[.]” With little knowledge from a supermajority of the commissioners, a lack of funding, and an abbreviated time frame of six months to conduct its work, Reagan’s Commission was set up for failure.

Despite such shortcomings, the Office of Hawaiian Affairs took a proactive role in the work of the Commission, and provided support where it could. From late-December of 1981 through early-January of 1982, the Office of Hawaiian Affairs conducted nineteen informational meetings throughout the State to inform the community about the purpose of the Commission, to encourage Hawaiians to participate and testify at the Commission’s hearings, and to gain support of the Office of Hawaiian Affairs’ position that the cause of all of the problems of the condition of native Hawaiians stemmed from the illegal overthrow of the Hawaiian Kingdom. The Office of Hawaiian Affairs collaborated with other Hawaiian-serving entities, such as Alu Like, the Department of Hawaiian Home Lands, and the Council of Hawaiian Organizations, to create
a questionnaire in which Hawaiians were asked questions such as: “Do you feel that the United States government should formally acknowledge its role in the overthrow of the Hawaiian monarchy?” and “Do you feel that some form of reparations/restitution is due the Hawaiian people?” The Office of Hawaiian Affairs also contracted with the Native Hawaiian Legal Corporation (“NHLC”) to provide it with a legal brief examining the factors that lead up to the federal government’s involvement in the overthrow of the Hawaiian Kingdom and to work with it to develop a position paper that would provide concrete recommendations and strategies to assist Hawaiians in preparing testimony for inclusion in the Commission’s final report to Congress. The Office of Hawaiian Affairs expended considerable money to commission six research papers on issues of health, religion, claims and reparations, language, psychological impact of the overthrow, and a historical overview. In addition, the Office of Hawaiian Affairs developed a presentation on the facts of the overthrow for use in community meetings, and made its staff and trustees available for addressing any organization or group with questions or concerns about the work of the Commission.

The Commission held its hearings across the State. The Hawaiian community showed up in force to make their case. A significant portion of those that participated supported the Office of Hawaiian Affairs’ position that the root of the ills of Native Hawaiians was the illegal overthrow of the kingdom, which was supported by the federal government. The Office of Hawaiian Affairs organized the community for each hearing and, across the State, facilitated passionate testimony to the Commission. On Hawai‘i Island, for example, Bill Kalei stated, “I spent 22 years as an American fighting man for Uncle Sam. Now I want to see America uphold the principles of freedom and justice that I fought for.” On Kaua‘i, La France Kapaka testified about her grandmother living during the overthrow and how she would like to see the process of redress begin before her grandmother passes on. On Maui, over four hundred people attended the hearing with individuals speaking ‘ōlelo Hawai‘i. At the hearing in Wai‘anae, teary-eyed students—taught by former-Trustee Peter Apo about the overthrow—spoke eloquently about the condition of the Hawaiian people and the need for reparations. The attending Commissioners (Commissioners Schleede and Anderson were not present at the public hearings) listened and learned from the testimony. Commissioner Morales stated, “Basically what we’re doing here right now for this study commission is simply to hear and learn everything and all we can.
We’re on a fact finding mission.” Commissioner and Vice Chair Shipley said, “I’m purposely keeping my mind open.”

Despite the efforts and considerable resources of the Office of Hawaiian Affairs, the facts as supported by the unbiased research of primary documents, and the outpouring of community agreement that the United States illegally overthrew the Hawaiian Kingdom, the voices of the Hawaiian people were ignored by the majority of the Commission. Instead, the six non-resident members of the Commission issued its draft report in September 1982 and relied heavily upon the work of American scholar Ralph S. Kuykendall. The Commission majority favorably cited Kuykendall’s three-volume history of Hawai‘i, which was commissioned in 1922 by the Historical Commission of the Territory of Hawai‘i to produce a pro-American textbook for schools. Kuykendall’s history did not use any Hawaiian language sources and instead relied entirely on missionary and other colonial translations and historical accounts. In addition, due to the limited resources available to the Commission, the majority report chose to rely upon secondary sources and historians within the government (such as historians from the United States Navy), rather than review primary sources. As such, the majority report was methodologically and historically flawed.

Community displeasure with the draft findings was immediately sparked. NHLC attorney Melody MacKenzie stated that the report showed a “startling bias and lack of objectivity” inasmuch as the report “makes statements which lack supporting authority and, in many instances, the report is argumentative rather than impartial.” In a letter to the Commission, Hawai‘i Congressman Cecil “Cec” Heftel aptly summarized the sentiment of the community:

I do not believe it is the job of the Commission to write history which merely substantiates a point of view held by those who emerged victorious from the events in Hawaii in the 1890s. There is certainly another point of view, that of the native Hawaiians, which has not been given sufficient weight in this draft.

The draft indicates by its use of selective history that political unrest in the Hawaii of the [1890s] made some sort of intervention necessary, and that the United States was the logical power to make that intervention. This suggests an enormous conceit on the part of the participants in the events of that time. It also suggest that the injustices of history are inexorable, that small kingdoms are fated to be swallowed up by stronger powers, and that what happened to the Hawaiian people has happened countless times in the past. If we accept this as factual, we
are accepting the concept that might makes right, and if we believe that we are denying the nobility that mankind aspires to. The events that led to the loss of independence in Hawaii were not predestined. They were the actions of a group of men who were not, perhaps, altogether altruistic and certainly not overly sympathetic to the situation of the Hawaiians. Those who accept the inevitability of the seizure of Hawaii by the United States are those who are prepared to accept injustice as the norm. It is not the standard by which great men or great nations are measured.

Recognizing the injustices of a century ago must also recognize that for decades the injustices have been compounded by a litany of lies and evasions. We must not now add to the problems of the Hawaiian’s situation by continuing with misinformation or falsehoods. If it is impossible for a politically-appointed commission to reach an unbiased conclusion regarding Hawaiian claims, perhaps that should be so stated. If the sympathies of political bodies, the American public and its elected officials, are all against the claims and counter to the aspirations of the Hawaiians, then it should be made known. As cruel as the events of the 1890s appear to Hawaiians, they are no more cruel [than] the long history of deception which followed. 71

The Hawaiian Commissioners themselves were not satisfied with the majority draft and sought assistance. In March 1983, prior to the issuance of the majority’s final report, the Office of Hawaiian Affairs paid for constitutional law Professor Jon Van Dyke and MacKenzie to attend Commission hearings in Washington, D.C., to provide legal advice and support to the minority members of the Commission; prior to that, all Commissioners were advised by Justice Department attorneys. 72 The local attorneys, however, were not allowed to speak until after the meeting, and “returned home bewildered by the procedural gamesmanship with which the mainland commissioners controlled the meetings.” 73 Commissioners Kamali‘i, Beamer, and Betts traveled across the State to inform the community about the Commission recommendations and the recommendations that the minority members formulated.

In the end, the Commission majority concluded that the federal government did not owe any compensation to Native Hawaiians because the United States did not extinguish aboriginal title to land. The majority also concluded that although Americans had participated in the overthrow, they did not do so as agents of the government, and therefore, the federal government bore no responsibility for the overthrow of the Hawaiian Kingdom. Accordingly, the Commission majority concluded that the federal government had neither an ethical, moral, or legal obligation to offer reparations to Hawaiians for the loss of their land and sovereignty, nor an obligation to apologize to Hawaiians for the overthrow. 74 It was a sign of the conservative
backlash against the Hawaiians and the idea that “things should not just be handed over to them on a silver platter.” However, the Commission minority report, which was drafted in substantial part by Office of Hawaiian Affairs staff members, recommended that Congress acknowledge the illegal action of the federal government in the overthrow of the kingdom, provide compensation to the Hawaiian people, and include Hawaiians in all programs that benefit other indigenous peoples throughout the United States. It was clear that the minority commissioners, and by implication the Office of Hawaiian Affairs itself, believed that Native Hawaiians were entitled to a comprehensive compensation package—a benefit that Congress bestowed upon Alaska Natives a decade earlier.

The work of the Commission majority was a sham. The Commission majority have been aptly characterized as a “group of Washington insiders whose sympathies lay less with the plight of the Hawaiians than with the Reagan administration’s cost-cutting agenda and its notable lack of compassion for minorities.” Indeed, it comes as no surprise that one commissioner was associated with a group that opposed Native Americans in court and another represented the federal government in litigation against Alaska Natives. The experience for Commissioner Kamali‘i was so unpleasant that she, the former Republican Leader in the State House, abandoned the Republican Party as it had abandoned Hawai‘i’s indigenous people.

In what would be its first significant test against the conservative political establishment in the nation’s capital, the Office of Hawaiian Affairs failed to get the concessions and reparations they sought for the Hawaiian people. It did, however, catalyze the need for continued education among the community about the illegality of the overthrow of the kingdom and placed the Office of Hawaiian Affairs at the fore of Hawaiian issues.

**Advocating for Hawaiians**

Although the Office of Hawaiian Affairs was straddled with bureaucratic obstacles and challenges from conservative America, the trustees wielded their newfound status and went on the offense in its first decade. Indeed, the mission of the Office of Hawaiian Affairs was to “strengthen and maintain the Hawaiian people and their culture as powerful and vital components of society.” To fulfill its mission, the Office of Hawaiian Affairs set out to perpetuate the Hawaiian culture, educate the community, ensure the economic vitality of Native
Hawaiians, preserve cultural and historic sites, and institute legal battles to protect the interests of the Hawaiian community.

On the cultural front, the Office of Hawaiian Affairs published two drafts of a Cultural Plan—a groundbreaking guide that identified areas of Hawaiian cultural life for restoration and perpetuation, such as traditional land use, historic preservation, performing and visual arts, language and literature, sports and celebrations, healing arts, religion and ceremony, and government and private agencies. The Cultural Plan included actions that could be taken to ensure the vibrancy and continuation of the Hawaiian culture, such as re-establishing special zones for traditional Hawaiian use, planting, harvesting, gathering, fishing and hunting. In addition, the Office of Hawaiian Affairs, in collaboration with the State, sponsored “Ho‘olako: The Year of the Hawaiian” to celebrate throughout 1987 the Hawaiian culture and community. Trustee Kaulukukui spearheaded the celebration. As one individual put it, “The articulation of Hawaiian issues, the widespread discussions of sovereignty, the liveliness and seriousness of the music, dance and arts demonstrations, the avalanche of general publicity . . . these things really made a difference. For non-Hawaiians, wanna-be Hawaiians and for Hawaiians who were just rediscovering themselves and their heritage, Ho‘olako brought sharp awareness and some understanding of the issues facing Hawaiians today.”

The year culminated with an Office of Hawaiian Affairs-sponsored gathering of approximately fifty-thousand attendees at the Aloha Stadium for a day of hula, mele, and a demonstration of unity among Hawaiians and non-Hawaiians alike.

The Office of Hawaiian Affairs also made bold strides in establishing an inventory of historic Native Hawaiian sites and then adopting policies to protect those sites. The trustees worked with various stakeholders to implement various Memoranda of Agreements and Understandings that addressed the protection, planning, and management of Hawaiian cultural and archaeological resources. In one instance, after the Office of Hawaiian Affairs successfully sued to be consulted as a concurring party representing Native Hawaiian interests in and responsibility for native sites and burials affected by the Interstate H-3 Project on O‘ahu, the trustees were able to convince the State and federal governments to, among other things, implement archaeological resource impact mitigation actions, identify and properly treat historic
properties, require pre-construction meetings and scheduled project personnel meetings, and require adequate archaeological monitoring of construction work.\textsuperscript{85}

Aside from its work with the Native Hawaiian Study Commission, the Office of Hawaiian Affairs engaged in other ambitious educational programs. For example, it co-sponsored a symposium on kalo cultivation, and it provided a thirty-thousand dollar grant to the Bernice Pauahi Bishop Museum to fund the publication of renowned Hawaiian Scholar Mary Kawena Puku‘i’s book, ‘\textit{Ōlelo No‘eau: Hawaiian Proverbs and Poetical Sayings}, which is often hailed as seminal to understanding the brilliance and poetics of the Hawaiian people.\textsuperscript{86} The Office of Hawaiian Affairs’ Health and Resource Committee also established several pilot projects to study cancer, hypertension, and alcoholism—three diseases that disproportionately impacted those of Hawaiian ancestry.

To ensure the economic vitality within the Native Hawaiian community, the Office of Hawaiian Affairs published a Hawaiian business directory and pursued federal funds for small businesses. The Office of Hawaiian Affairs engaged in pilot projects to provide “gap loans” to Native Hawaiian small business owners. In one instance, the Office of Hawaiian Affairs provided a six-thousand dollar loan to a Kona fisherman so that he could purchase a fishing boat. The fisherman, Maka Ho‘okala, had been denied a small business loan by the State’s Department of Planning and Economic Development because Ho‘okala did not have sufficient property to secure his loan. The Economic Development Department reached out to the Office of Hawaiian Affairs for assistance. The trustees agreed to provide assistance and Ho‘okala’s business blossomed. Ho‘okala’s loan, and the other loans in the pilot project served as the catalyst for the creation of the Native Hawaiian Revolving Loan Fund, which the Office of Hawaiian Affairs established to handle its loans to Hawaiian businesses.\textsuperscript{87}

Setting itself for the international stage, the Office of Hawaiian Affairs passed a resolution urging action by the United States to aid foreign countries. As an example, on July 26, 1985, the Office of Hawaiian Affairs urged President Reagan to do everything in his powers to end apartheid in South Africa.\textsuperscript{88} The Office of Hawaiian Affairs clearly perceived its role as a voice of the Hawaiian people and it took affirmative steps to establish itself as a force in local, national, and international politics.
On the legal front, the Office of Hawaiian Affairs made several moves during its first decade to ensure the betterment of conditions of Hawaiians. It partnered with the Native Hawaiian Legal Corporation and funded the Native Hawaiian Land Title Project, which aided hundreds of Hawaiians in securing title to their ancestral lands. In addition, the Office of Hawaiian Affairs spent $3,000 to file an amicus brief in support of the Kamehameha Schools Bishop Estate’s challenge to Hawaii’s Land Reform Act, which was a lease-to-fee conversion law “designed to force landowners to sell lands to their lessees for the ostensible purpose of redistributing land from wealthy landowners to poor tenants.” Consequently, the Bishop Estate, established by Princess Bernice Pauahi Bishop from lands inherited from her royal lineage, fell under the law and was forced to sell its land. Bishop Estate’s land was its primary asset used to gain revenue to support its mission of providing education for indigent Hawaiian children. This led to a situation where “some of Hawaii’s most privileged people [were] seeking land redistribution from the least.” The Office of Hawaiian Affairs, thus, showed its willingness to stand hand-in-hand to support other Native Hawaiian organizations.

Perhaps the most newsworthy of the Office of Hawaiian Affairs’ legal forays in the eighties was the battle over its share of revenues from the Ceded Lands trust, as expressly provided for in the State Constitution and Hawai‘i Revised Statutes chapter 10. Since its inception, the trustees had made efforts to negotiate with the State for its adequate share of the Ceded Lands revenues. While the State provided approximately $1.2 million to $1.5 million annually from the Ceded Lands trust, that amount was insufficient to cover administrative costs and to provide adequate services to Hawaiians. Trustee Keale stated, “The law said we get 20 percent from all income, period, but the department chiefs within the Ariyoshi administration had different ideas. So we had this jockeying back and forth.”

On September 7, 1983, the Office of Hawaiian Affairs initiated its first lawsuit against the State to recover ceded lands revenue. As constitutional law professor and advisor Jon Van Dyke put it, “There was a lot of frustration, a feeling that the state was not responsive to OHA’s concerns and claims, a sense the administration was nickel-and-diming OHA constantly.” In this first lawsuit, spearheaded by Trustees Ritte, Burgess and Laenui, the Board challenged the State Attorney General, Chairman of the State Department of Land and Natural Resources, and the Director of the State Department of Finance, and sought a declaration from the court that the
Office of Hawaiian Affairs was entitled to receive an undivided twenty percent interest in the land conveyed to the State in settlement for the Molokaʻi Ranch, Inc.’s illegal mining of sand from Papohaku Beach in Kaluakoi, Molokaʻi. The lawsuit made headlines as the State vigorously objected to providing the Office of Hawaiian Affairs with a share of the settlement insomuch as it believed that the sand mining occurred prior to the 1978 Con-Con creating the Office of Hawaiian Affairs.  

The trustees again made considerable efforts to resolve the matter with the Ariyoshi Administration. Nevertheless, Transportation Director Ricky Higashionnna threw the trustees out of his office and promised that the Office of Hawaiian Affairs would receive nothing from his department. Governor Ariyoshi supported his director’s actions and, likely because of the financial implications of the dispute on the State coffers, suggested that the trustees initiate a second lawsuit to resolve the revenue issue. Trustee Burgess expressed his surprise with the Governor’s response: “This was the same governor who had promised an ‘open door policy’ and here he was, on the first big issue we raised, and his open door becomes a closed-door policy. The suit was the only avenue he gave us.”

On March 8, 1984, the trustees initiated a second lawsuit against the initial defendants plus the Director of the State Department of Transportation and the Aloha Tower Development Corporation. The trustees again sought a declaration from the court that the Office of Hawaiian Affairs was entitled to twenty percent of the State’s income and proceeds from lands surrounding State harbors, land on Sand Island, land beneath the Honolulu International Airport, and land on which the Aloha Tower development was located. Again, the media covered the lawsuit, and almost immediately, the political gamesmanship began. Governor Ariyoshi, drumming up public support against the lawsuit, warned that the lawsuit would negatively affect the State’s revenue bonds and stated, “we need to recognize the needs of all the people in our community.” State Representative and then-House Speaker Henry Peters—who had a few years earlier strong-armed the twenty percent figure for the Office of Hawaiian Affairs—met with seven of the trustees and urged them to withdraw the second lawsuit. Politically, those in power were not yet ready to concede to the Office of Hawaiian Affairs. Instead of taking the easier route of agreeing with the Democratic political establishment and dismissing the lawsuit, the trustees went full speed ahead and refused to back down. In a statement, Office of Hawaiian Affairs...
Affairs Vice Chairman Burgess lamented, “The suit has been filed with great reluctance and only after two and one-half years of futile attempts to negotiate a fair and reasonable settlement with the state administration.” Because the Department of Transportation refused to discuss the issue, the trustees were left with no alternatives but to file suit.

After the State filed its responsive pleadings, it immediately moved for dismissal of the complaint on the grounds that it stated no claim upon which relief could be granted because of the State’s sovereign immunity from suit and because the plaintiffs, the trustees, had no standing to sue the State. The State circuit court consolidated the cases for purposes of a hearing on the State’s motion to dismiss. Aside from arguing that sovereign immunity precluded the suit, in a stunning shift in position, the State Deputy Attorney General took the unprecedented position that the Office of Hawaiian Affairs was unconstitutional under the equal protection clause of the Constitution. This equal protection argument was made despite a 1980 Attorney General Opinion that expressly determined—after reviewing the 1978 Con-Con committee reports, the legislative history of Hawai’i Revised Statutes chapter 10, historical materials, case law regarding the equal protection clause of both the State and Federal constitutions, and the special treatment accorded to aboriginal peoples—that constitutional provisions establishing the Office of Hawaiian Affairs were “not constitutionally infirm.” After the hearing, the circuit court denied the State’s motions to dismiss to both cases, but did allow the State to seek appellate review of its orders. The State appealed. On appeal to the Hawai’i Supreme Court, the State again argued that the doctrine of sovereign immunity barred the trustees’ suit because “a government agency . . . cannot sue other government agencies for a money judgment.”

The Hawai’i Supreme Court, however, disposed of both cases by concluding that it was the political branches of government and not the courts that were best suited to decide the issue. The Court essentially ruled that there were too many ambiguities within Hawai’i Revised Statutes chapter 10 for it to decide the issues. As to the Moloka’i mining case, the Court specifically held that nothing in Hawai’i Revised Statutes section 10-3, which describes the Ceded Land trust, served as a basis for ruling that damages received from a settlement of the Ceded Land disputes was “funds derived from the public land trust.” As to the airport and Aloha Tower dispute, the Court read ambiguity into the law by suggesting that a literal interpretation of the law “would be at odds with legislative commitments relative to such
revenues[.]” such as another statutory provision that required all moneys received by the Transportation Department from airport rents be placed into an airport revenue fund, which “shall” be expended for state airports. The Court ignored clearly established precedent that the starting point for legislative interpretation was the language of the statute itself. Section 13.5 of Hawai‘i Revised Statutes chapter 10 was clear: “[t]wenty percent of all funds derived from the public land trust . . . shall be expended by the Office of Hawaiian Affairs.” In addition, Hawai‘i Revised Statutes section 10-3 clearly provided that “the public land trust shall be all proceeds and income from the sale, lease, or other disposition” of ceded lands. The mining settlement could reasonably be defined as an “other disposition” under a simple statutory interpretation analysis—something that is wholly within the purview of the courts. Instead, the Court created its own ambiguity in the statutes and used that “ambiguity” to conclude that it could not address the issue.

The Court bowed out of what had the potential to be a dramatic game changer for the Office of Hawaiian Affairs and Hawaiian community. The Court deferred to the legislature, and therefore, missed an opportunity to assert its power as a co-equal branch of government and to reconcile with Hawaiians for the injustices of the past. For many, the result was a disappointment. The Office of Hawaiian Affairs expended a considerable amount of financial resources and political capital only to have their lawsuit dismissed. But, lessons were learned and new strategies coalesced. The Office of Hawaiian Affairs matured through this litigation and found its voice as an unyielding force to be reckoned with.

The early years of the Office of Hawaiian Affairs were, put simply, a struggle for legitimacy. But, these early years highlighted the significant power wielded by individual trustees to shape and forge the path of the agency. They also demonstrated the flexibility of the entity itself in accommodating the perspectives of the individual trustees. These early years further highlighted the agency’s ability to reach out into the community to cause and affect political change. Hawaiian Scholar George Kanahele wrote that the Office of Hawaiian Affairs was “still in swaddling clothes, learning how to crawl through the thickets of institutionalized power, especially the current legislature. But it has not done too badly, all things considered. . . . It has its detractors, even among Hawaiians, but it has many, many more proponents—like the
53,000 Hawaiians who registered to vote in the . . . election of OHA Trustees. That is not an insignificant figure, and one of OHA’s goals is to harness that electoral power as it tries to fulfill its mandate to the Hawaiian people and the community at large.”

Indeed, despite the setbacks, the political jockeying, and the trustee attrition rate, the Office of Hawaiian Affairs firmly established itself as a major player in the political scene. Then-Lieutenant Governor John Waihe‘e described the Office of Hawaiian Affairs’ infancy:

Right from the start, OHA had to compete in the real world, to get out there and pitch. That’s tough . . . but what we wanted, what we dreamed about in ‘78 was to be in this situation. We dreamed about being able to stand up on our two feet and carry on[.]”

With the educational campaign about the illegal overthrow of the Kingdom of Hawai‘i and the passionate hearings before the Native Hawaiians Study Commission, the Office of Hawaiian Affairs’ next chapter would be tackling the issue of sovereignty during the centennial of the overthrow and, with the commitment of America’s first Hawaiian governor, attempting to finally resolve the elusive ceded lands revenue dispute.

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3 Burris, supra note 1, at A3.
4 *Who Are the Trustees*, KA WAI OLA O OHA, Summer 1981, at 3.
7 Part Two, supra note 2, at 11.
8 Letter from OHA Administrator Edwin P. Auld to Governor George Ariyoshi, retrieved from the Hawai‘i State Archives (April 6, 1981) (on file with author).
9 Part Two, supra note 2, at 11.
12 *Id.* at A1.
13 *Id.*
14 *Id.*
16 Part Two, supra note 2, at 11.
18 Part Two, supra note 2, at 11.
20 Id.
22 Id.
25 Id.
26 Part Two, supra note 2, at 11.
27 OHA Still Struggling, supra note 24, at A4.
28 Office of Elections, 1982 Election Results, retrieved from the Hawai‘i State Archives (1982).
29 OHA Still Struggling, supra note 24, at A4.
31 The Fate of Walter Ritte, Ka Wai Ola O OHA, June 1991, at 14 (hereinafter “Ritte”).
33 OHA Still Struggling, supra note 24, at A4.
34 Ritte, supra note 31, at 14.
35 Id.
38 Id.
39 Id.
40 An Editorial on Reparations, Ka Wai Ola OHA, Summer 1981, at 7.
41 Committee Reports: Ad Hoc Committee on Reparations, Ka Wai Ola O OHA, Summer 1981, at 5 (hereinafter “Ad Hoc Committee”).
42 Letter from Governor George Ariyoshi to President Ronald Reagan, retrieved from the Hawai‘i State Archives (March 17, 1981) (on file with author) (hereinafter “Ariyoshi Letter”).
43 Ad Hoc Committee, supra note 41, at 5.
44 Ariyoshi Letter, supra note 42.
45 Id.
46 Crossroads, supra note 37.
Letter from Governor George Ariyoshi to Richard S. Williamson, Assistant to the President for Intergovernmental Affairs, retrieved from the Hawai‘i State Archives (March 19, 1981) (on file with author).


Toni Yardley, Talking Story with the Native Hawaiian Study Commissioners, KA WAI OLA O OHA, Winter 1982, at 3 (hereinafter “Talking Story”).

88 Years Later, supra note 49, at 1, 4.


Id.

Survey to Aid Native Hawaiian Study Commission, KA WAI OLA O OHA, Spring 1982, at 1.


OHA’s Current Activities With the NHSC, KA WAI OLA O OHA, Spring 1982, at 1.

Study Commission Split: Two Reports to Congress, KA WAI OLA O OHA, Spring 1983, at 1.


Id.

Id.


Id.


Letter from Representative Cecil “Cec” Heftel to the Native Hawaiians Study Commission, at 1-3, retrieved at the Hawai‘i State Archives (November 22, 1982) (on file with author).

Reagan Administration, supra note 69, at 13.

Id.

Majority Report, supra note 66, at 28.


Reagan Administration, supra note 69, at 13.

Id.

Id.

MASTER PLAN, supra note 19.

OHA CULTURE PLAN, supra note 15.
81 Id.
82 Curt Sanburn, Reaching the Community-Part 4, KA WAI OLA O OHA, August 1991, at 14.
86 Part Two, supra note 2, at 13-14.
87 Id. at 13.
88 Office of Hawaiian Affairs Resolution 85-04, retrieved from the Hawai‘i State Archives (July 26, 1985).
89 OHA Takes Major Step to Help Hawaiians with Land Titles, KA WAI OLA O OHA, Summer 1981, at 7.
90 OHA to File Supreme Court Brief in Support of Bishop Estate, KA WAI OLA O OHA, Winter 1984, at 1.
93 Asian Settler Colonialism, supra note 90, at 28.
96 OHA v. State, supra note 93, at 11.
98 Interview with John D. Waihe‘e, III, in Honolulu, Hawai‘i (April 16, 2015).
99 Id.
100 OHA v. State, supra note 93, at 12.
101 Yamasaki, 69 Hawai‘i at 167, 737 P.2d at 454.
103 Id.
105 Yamasaki, 69 Hawai‘i at 167, 737 P.2d at 454.
106 Id.
107 Id.
109 Yamasaki, 69 Hawai‘i at 167, 737 P.2d at 454.
110 Id.
111 Id.
113 *Id.*
114 *Id.*
115 *Id.*
116 **George S. Kanahele, Hawaiian Renaissance** 33 (Project WAIAHA 1982).
117 *Part Two, supra* note 2, at 11.
CHAPTER 4

Reconciliation at a Crossroads: Office of Hawaiian Affairs in the Nineties

In the late eighties, the Office of Hawaiian Affairs, consistent with the recommendations set forth in the Native Hawaiians Study Commission’s minority report, pushed a federal reparations package seeking: recognition from the United States of its moral and legal obligation to Native Hawaiians for its role in the overthrow, return of ceded lands and Hawaiian homelands, and $1 billion in reparation payments.\(^1\) The reparations bill envisioned seven purposes for the use of the $1 billion settlement: encouraging economic development and self-sufficiency for Hawaiians, promoting social welfare, providing programming for education, health, and cultural preservation, providing employment training and placement, and acquiring and developing land and resources for the benefit of Hawaiians.\(^2\)

On August 21, 1988, at a Senate Select Committee on Indian Affairs hearing on the federal reparations package in Hawai‘i, nearly twenty Hawaiian leaders testified that the discussion of reparations should be expanded to include discussions of sovereignty.\(^3\) Under pressure from the Hawaiian community, Senator Daniel Inouye publicly acknowledged, for the first time, that Hawaiians had a right to sovereignty: “if native American Indians have sovereignty, it is difficult to argue that Hawaiians do not. Hawaiian sovereignty is a legitimate issue that must be considered by the Select Committee on Indian Affairs and by the Congress[.]”\(^4\) The tides were again changing as the debates of reparations evolved into a discussion about sovereignty. As Professor Trask wrote, “the reparations game had been surpassed by a historic evolution in Hawaiian consciousness.”\(^5\)

The Office of Hawaiian Affairs would continue to struggle to navigate its way through the tumultuous political environment in the nineties. While still providing funding to assist Native Hawaiians in various aspects of life, the emphasis for the Office of Hawaiian Affairs began to shift toward the return of the political sovereignty and the attainment of a land base for the Hawaiian people. In particular, the Office of Hawaiian Affairs was faced with a rekindled understanding of the political and legal events leading to and following the overthrow of the Hawaiian Kingdom, and a growing sentiment among the Hawaiian community that the Office of
Hawaiian Affairs was not the answer to resolving the century-long struggle for Hawaiian sovereignty. The mid-nineties also brought a new Governor who had strong—and sometimes hostile—views toward the Office of Hawaiian Affairs’ entitlement to ceded lands revenues.

_Ceded Lands Litigation and Settlement Negotiations_

In 1986, Con-Con delegate and Lieutenant Governor John Waihe’e was elected Governor of the State of Hawai‘i. As a Kanaka Maoli politician whose career was built on helping Hawaii’s indigenous people, Waihe’e was resolute to end the controversial ceded lands dispute. Regardless of his sympathies for the cause of Native Hawaiians, the non-settlement of the ceded lands issue with the Office of Hawaiian Affairs was affecting the State’s bond rating. When bonding companies would rate State bonds, there was always a disclaimer that there were outstanding claims (i.e. claims to a portion of the ceded land revenues) on State revenues. The State, therefore, was given a clear and practical reason to take action to ensure a settlement. Put simply, while it was nice to make amends with Native Hawaiians, the driving force behind any settlement was the removal of the disclaimer from the State bonds. The bond disclaimer, in turn, provided the Office of Hawaiian Affairs with a powerful bargaining chip with the State.

Trustees Frenchy DeSoto, who made her way back onto the board in 1986, and Rod Burgess led the negotiations on behalf of the Office of Hawaiian Affairs, and former legislator Norma Wong was the chief negotiator for the State. The negotiators would craft a deal that the Governor would then present to the Legislature. The negotiations, which occurred at more than sixty meetings in forty-months, were complex. It was, some commented, stew and rice in the late hours of the night that sustained the parties during settlement discussions. The major issues of negotiation included determinations of: (1) what was ceded lands; (2) what consisted of the twenty percent of the ceded land revenues as defined in Hawai‘i Revised Statutes section 13.5; and (3) whether “proprietary” revenues from ceded lands would be subject to the twenty percent figure. From the start, “Sovereign/Government revenues” would not be considered revenues for purposes of Hawai‘i Revised Statutes section 13.5. For example, the Office of Hawaiian Affairs would not collect twenty percent of taxes. But what about the University of Hawaii’s tuition revenues or revenues collected from state hospitals? These questions were all resolved in favor of the State when the State agreed that the Office of Hawaiian Affairs could
take a twenty percent cut in the duty free revenue at the airport. At first, the Office of Hawaiian Affairs’ position was that it was entitled to twenty percent of all duty free revenue at all airports across the State. The Waihe‘e Administration took the position that the revenues had to have a nexus to the ceded lands. For example, the Office of Hawaiian Affairs would take a twenty percent cut of landing fees if the runway was on ceded lands. While the trustees wanted more money, they had never negotiated a settlement for anything. Up until that time, Kānaka Maoli had fought for various things and either got it or did not get it. Kānaka Maoli, up until that time, never had to actually sit down and work out a political settlement.

In the end, the trustees demanded a non-severability clause in the settlement, which would vitiate the entire deal if any provision in the agreement was inoperable or illegal. The trustees were worried that the State would find a way to negate the gem of the agreement, the duty free provision of the agreement. For the trustees, they were bargaining away a lot of other types of revenues for the duty free provision, and did not want to be stuck with a bad deal: they had agreed to a package and they wanted that comprehensive package to remain intact.

On February 8, 1990, the Office of Hawaiian Affairs and the Waihe‘e Administration struck a deal that set the framework for resolving the ceded lands dispute. The settlement framework was ultimately approved by the State Legislature and signed into law by Governor Waihe‘e as Act 304 on July 3, 1990. Act 304 amended chapter 10 of the Hawaii Revised Statutes to define “revenue” for purposes of to include all:

proceeds, fees, charges, rents, or other income . . . derived from any . . . activity[] that is situated upon and results from the actual use of . . . the public land trust . . . but excluding any income, proceeds, fees, charges or other moneys derived through the exercise of sovereign functions and powers. . .

Act 304, thus, divided the Ceded Land revenues into either “sovereign” revenue or “proprietary” revenue. “Sovereign” revenue was defined as those revenues that belonged to the State, which included, among other things, income and general excise taxes, fines for violations of State laws, and federal funding. “Proprietary” revenue included income generated from the use or disposition of the Ceded Land trust, such as rental payments, lease payments, and licenses for use of Ceded Lands. Section 8 of Act 304 provided a mechanism by which the State and the Office of Hawaiian Affairs were to determine the amounts owed to the Office of Hawaiian Affairs.
Affairs from June 16, 1980 (the date that the Office of Hawaiian Affairs was established) to June 30, 1991.28

On April 16, 1993, the Legislature appropriated approximately $130 million in payment to the Office of Hawaiian Affairs pursuant to Act 304.29 The Office of Hawaiian Affairs, however, refused Waihe’e’s demand for a global settlement. Indeed, the April 28, 1993 Memorandum of Understanding entered between the Office of Hawaiian Affairs and the State (through the Office of State Planning) provided: “the amount specified in section 1 hereof does not include several matters regarding revenue which [the Office of Hawaiian Affairs] has asserted is due [it] and which [the State] has not accepted and agreed to.”30 As a result, the State, on June 4, 1993, cut two checks to the Office of Hawaiian Affairs totaling $129,584,488.85.31

But, the State and the Office of Hawaiian Affairs still had unsettled settlement issues. On January 14, 1994, after receiving little movement to resolve the remaining issues between them, the Office of Hawaiian Affairs filed a lawsuit against the State seeking an accounting, restitution or damages for the failure of the State to fully compensate the Office of Hawaiian Affairs for its share of revenues.32 The Office of Hawaiian Affairs specifically sought its pro rata share of State revenues from duty free receipts at the Honolulu International Airport, receipts from the Hilo Hospital for patient services, receipts from the Hawaii Housing Authority and the Housing Finance and Development Corporation for projects on trust lands, and interest earned on withheld revenues.33 The Office of Hawaiian Affairs subsequently moved for summary judgment on each of its claims, and the State filed a motion to dismiss the case.34

In July 1996, State Circuit Court Judge Daniel Heely, who was well respected for “his intellect and sincerity[,]”35 orally denied the State’s motion to dismiss the lawsuit and, importantly, granted the Office of Hawaiian Affairs’ motion for partial summary judgment on all its claims. Heely’s subsequent written ruling, dated October 24, 1996, relied upon the federal government’s 1993 Apology Resolution and Hawaii’s “Aloha Spirit Law,” which codified in Hawai’i Revised Statutes section 5-7.5 the teachings of Pilahi Paki by using “aloha” as an acronym for various words that describe character traits that express “the charm, warmth and sincerity of Hawaii’s people.” Judge Heely held that “[t]he court cannot conceive of a more appropriate situation in which to attempt to apply the concepts set forth in the Aloha Spirit law, then ruling on issues that are directly related to the betterment of the native Hawaiian people.”36
Judge Heely concluded that the Office of Hawaiian Affairs was entitled to the revenues that it sought. Many Native Hawaiians hailed the Heely decision as “historic” as it was the first affirmation by a State court that the Office of Hawaiian Affairs was entitled to one fifth of the revenues from ceded lands.37

But, the Heely decision and particularly its affirmation of the Office of Hawaiian Affairs’ position that it was entitled to twenty percent of the duty free revenue did not sit well with everyone. Invoking the rhetoric of the melting pot ideology, then-Governor Ben Cayetano stated, “I disagreed with his ruling[.]. . . We’re in the middle of the worst recession in State history, cutting social programs to balance the budget, arguing with the unions over pay raises and civil-servant reform—and now this[.]”38 In other words, for Cayetano, the time was still not ripe for the Hawaiians to receive the justice they had been seeking. Discontent with the revenues going to the Office of Hawaiian Affairs emerged from the State Department of Transportation early on. For at the time, the Transportation Department was a unique agency in that it was funded almost entirely by user fees, i.e., the tenants and airlines.39 The Transportation Department received federal funding, but did not receive appropriation from the State’s coffers. As such, it always considered itself independent. The Office of Hawaiian Affairs was the first outsider to take money from Transportation Department. The Transportation Department and the airlines resented the Office of Hawaiian Affairs’ position that it was entitled to twenty percent of all revenues collected from the duty free shops at the airport. It was, for State and federal bureaucrats, a direct affront by the Office of Hawaiian Affairs to the way that things were done and akin to the Office of Hawaiian Affairs improperly taking their money.40

With Cayetano, the staunch opponent of the twenty percent figure while Chairman of the Senate Ways and Means Committee, at the helm of the State, the Transportation Department in early 1995 invited the Inspector General of the federal Department of Transportation to Hawai‘i to review the taking of duty free funds and determine the legitimacy of such revenues to the Office of Hawaiian Affairs.41 The Inspector General submitted a report in September 1996 that concluded that the State’s payments to the Office of Hawaiian Affairs for its pro rata share of airport revenues were an illegitimate “diversion of airport revenue” in violation of federal law.42 The Inspector General argued that the Federal Aviation Administration Authorization Act of 1994 (“FAA Act”) prohibited the “use of airport revenues for general economic development,
marketing, and promotional activities unrelated to airports or airport systems,”  and concluded that the State’s payment violated the FAA Act. The threat and potential outcome was that the federal government would withhold money from the State until the State complied, i.e., stopped paying the Office of Hawaiian Affairs airport revenues and repaying all monies already paid. At the time, the federal contribution to the airport was roughly $14 million. As Waihe’e would later remark, the amount in jeopardy was “relatively small.”

In September 1996, Governor Cayetano and the Airlines Committee of Hawaii, which represented various air carriers in Hawai’i, denounced the Heely decision, arguing that airport landing fees would more than triple to satisfy payments to the Office of Hawaiian Affairs. The Airlines Committee of Hawaii asserted that the Heely decision would have significant ramifications for the State, including:

Higher landing fees and a reduction in the number of flights to Hawaii would necessarily result in increased transportation costs for international, domestic and interisland passengers and cargo. Fewer visitors to the islands would result in dire consequences for any economy so dependent on tourism. Hotel occupancy would be adversely impacted. The budding convention business would likely suffer. Sales and retail industries would lose important tourist dollars. . . . In addition, given the potential impact upon the State’s finances, it is foreseeable that the State may be forced to curtail funding for important public services. . . . In addition to these direct impacts, the circuit court’s ruling would have a much larger “domino” effect on Hawaii’s economy.

In a November 11, 1996 letter to the State Transportation Department, Cayetano’s Attorney General Margery Bronster disagreed with the Inspector General’s report:

Following Act 304’s passage, the question of payment of these expenses out of the airport special fund as an operating expense of the airport was submitted to, discussed with, and agreed to by the State and the airline users of the airport system. As such, we view the subject payment of $28.2 million in airport special fund moneys to OHA pursuant to Act 304 as an operating cost of the State’s airports within the meaning of 49 U.S.C.A. [section] 47107(b)(1).

The State appealed the Heely decision to the Hawai’i Supreme Court on November 22, 1996. During the pendency of the Heely appeal, several key events pertaining to the dispute over the duty free revenue occurred. Because of the federal concerns regarding the legality of Act 304, and contemplating a loss of funds to the Office of Hawaiian Affairs, the State passed legislation that set a fixed payment amount of $15.1 million annually for two years to ensure that
the Office of Hawaiian Affairs collected funds. The legislation, codified as Hawai‘i Revised Statutes section 10-13.3, provided:

Notwithstanding the definition of revenue contained in this chapter the provisions of section 10-13.5, and notwithstanding any claimed invalidity of Act 304, Session Laws of Hawaii 1990, the income and proceeds from the pro rata portion of the public land trust under article XII, section 6 of the state constitution for expenditure by the office of Hawaiian affairs for the betterment of the conditions of native Hawaiians for each of fiscal year 1997-1998 and fiscal year 1998-1999 shall be $15,100,000.

Given the implications of the Heely decision and the uncertainty of an appeal, Governor Cayetano made the first settlement offer to the Office of Hawaiian Affairs in 1996. Cayetano offered $151 million in cash and the transfer of twenty percent of all ceded lands (with one-hundred percent of their associated revenue) to the Office of Hawaiian Affairs in exchange for a full release of all claims against the State. Cayetano met with his former colleague and friend Clayton Hee, who was now chairman of the Board of Trustees. Cayetano told Hee: “Clay, if it helps, we’ll throw in all of the ceded lands on Molokai. Just imagine—combined with the homestead land, OHA can have its own county.” Hee replied, “If the offer is right, then we will cut the umbilical cord and stand on our own feet[.]” While Chairman Hee liked the proposal, and had certain parcels in mind that should be included in the proposal, he had trouble convincing his fellow trustees, who rejected the proposal.

On April 25, 1997, the Federal Aviation Administration, in response to a letter sent by State Representative Ed Case, issued a memorandum that concurred with the Inspector General’s report. In the FAA Memorandum, the FAA agreed that the State’s payment of duty free revenues to the Office of Hawaiian Affairs was not a payment of operating costs, but rather an “unlawful diversion” of airport revenues. The FAA demanded that the State funds already paid to the Office of Hawaiian Affairs (in the amount of $28.2 million plus interest) be reimbursed to the airport, and that the State Transportation Department halt any further payments to the Office of Hawaiian Affairs.

On August 19, 1997, and in a dramatic shift in legal position, Attorney General Bronster announced that the State would not contest the FAA’s position on airport revenue payments to the Office of Hawaiian Affairs. In her editorial “Don’t Litigate On OHA,” Attorney General Bronster contended that legislation by Senator Inouye that would forgive the State of owing any
money to the federal government was the best path forward inasmuch as the legislation “stops a state practice that if continued could have had dire consequences for the future of federal funding for Hawai‘i.”

Bronster concluded by recognizing the value of the federal deal to the State, but wholly ignored the value to the Hawaiian beneficiaries for whom the State also had a trust obligation: “The forgiveness of past payments to OHA in an amount close to $30 million coupled with the clarification of the law have significant value to the State.”

Without the input or consent of the Office of Hawaiian Affairs (whom the attorney general theoretically represented because the Office of Hawaiian Affairs was a State agency), the Cayetano Administration let the FAA Memorandum stand unchallenged. The Office of Hawaiian Affairs had no legal representation of their interests with regard to the FAA Memorandum.

The dispute was clearly causing tensions between Governor Cayetano and the Hawaiian community, between the State and the Office of Hawaiian Affairs, and between the State and the federal government. While the Heely decision was still pending in the Hawai‘i Supreme Court, in October 1997, Senator Inouye and Hawaii’s congressional delegation successfully advocated for and got passed through Congress the “Forgiveness Act.” Under the Forgiveness Act, Congress acknowledged: “[c]ontrary to the prohibition against diverted airport revenues from airport purposes . . . certain payments from airport revenues may have been made for the betterment of Native Hawaiians . . . based upon the claims related to lands ceded to the United States[.]” In addition, Congress also waived repayment of past diversions from airport revenues: “[M]onies paid for claims related to ceded lands and diverted from airport revenues and received prior to April 1, 1996, by any entity for the betterment of [] Native Hawaiians . . . shall not be subject to repayment.”

As an additional carrot to Native Hawaiians, Congress included the following provision: “Nothing in this Act shall be construed to affect any existing Federal statutes, enactments, or trust obligations created thereunder, or any statute of the several States that define the obligations of such States to . . . Native Hawaiians . . . in connections with ceded lands, except to make clear that airport revenues may not be used to satisfy such obligations.” It was a savings clause for the Office of Hawaiian Affairs to receive their share of the payment for the airport revenues. As Senator Inouye remarked to the Office of Hawaiian Affairs, “The airports continue to sit on ceded lands. The State’s obligation to compensate OHA
for use of the land . . . should also continue. The only difference would now be the source the
State draws upon to satisfy the obligation."66

Settlement negotiations continued with Trustee Frenchy DeSoto assuming chairmanship
of the Board after Hee stepped down.67

On December 10, 1997, the attorney general sent the Hawai‘i Supreme Court a copy of
the Forgiveness Act as supplemental authority that should have a bearing on the court’s
decision.68 Despite the savings clause in the Forgiveness Act, the State argued that the
Forgiveness Act extinguished its duty to pay monies from airport revenues.69

On March 31, 1999, after several unsuccessful attempts, Governor Cayetano offered a
“global” settlement of the ceded lands issue.70 The Administration’s offer of $251.3 million and
approximately 365,000 acres of ceded land (twenty percent of the ceded lands) in exchange for
the Office of Hawaiian Affairs’ release of all claims to ceded lands revenue was rebuffed by
the trustees on April 1, 1999.71 That day, the trustees counter-offered with a release of all claims to
Ceded Land revenues in exchange for $309.5 million from the State. Without a response from
the Governor, the trustees sent another and final counteroffer of $304.6 million and any ceded
lands with a revenue stream of $7.4 million. The trustees made no mention of a “global”
settlement of all claims, which was a deal breaker for Cayetano.72 The Governor did not respond
to the trustees’ final offer. After failing again to receive a response from the Governor, the
trustees, on April 27, 1999, voted to end negotiations with the Administration. In voting to end
negotiations, Trustee Mililani Trask—the former leader of Ka Lāhui Hawai‘i, one of the
strongest and most organized Hawaiian sovereignty groups, who received the most votes in the
1998 election—expressed her frustration with the Cayetano Administration’s tactics:

…[T]he state has offered $251 million dollars. If we were to take that and put it
in the bank we’d have $551 million dollars and if we look at the rate of indexing,
in a very short time it would be $1.2 billion dollars. . . . We are not here for the
purpose of trying to cut a deal so that we can get $1.2 billion dollars in the bank
within several months. The issue of compromise has been raised and I am on the
negotiating team and I’m very regretful that we have not been able to bring
forward a solution for our people and for this Board. But I’m asking you to take a
look at what the record is. We have not heard from the state since March 31st.
Two offers were sent to them that were compromise offers and we have yet to
receive even the decency of a response from the Governor. I can compromise in a
negotiation but I cannot compromise my integrity and I cannot comprise the
fiduciary obligations that I have. And I cannot tolerate being at this point and
having waited for months and having worked for months for a settlement I cannot tolerate now . . . the only response we have from the Governor is a threat that there will not be a fair settlement from [the] Heely [decision] unless we waive our right to sue and all of our people’s claims to the entire ceded lands trust. 73

Trustee Colette Machado aptly summed up the majority’s sentiment: “The bottom line remains that if we had to accept any offer that the state is willing to pay OHA, the $304 million dollars, it is contingent on us barring claims that we may be entitled to. That is not something that the state would be willing to remove. Therefore, we have no choice, absolutely no choice, but to vote against continuing the negotiation settlement discussions.” 74 Trustees S. Haunani Apoliona, DeSoto and Louis Hao agreed with Trustees Trask and Machado and voted to end negotiations with the State. 75 Trustees Hee, Hannah Springer, and Rowena Akana voted against the motion to end settlement talks. 76 Trustee Hee, however, regretted the majority’s position and stated that the trustees should have taken the State’s final offer as a “bird in the hand.” 77

Governor Cayetano also instructed his negotiators to end settlement discussions: “No sense fooling around anymore. . . . They seem so terrified of a global settlement they just don’t mention it—as if we never brought it up. From now on, we’ll leave it up to the courts or the Legislature to resolve the issue.” 78 Although the legislature was taking steps to try to provide alternative funding for the uncertainty of Act 304, Governor Cayetano refused these efforts:

[T]he [T]rustees of the Office of Hawaiian Affairs have discontinued our earlier settlement efforts and asked me to veto this bill. I understand further that the [T]rustees prefer that the differences between the State and OHA presently pending before the Hawaii Supreme Court . . . be decided by the Court. I must assume that the [T]rustees are aware that federal legislation precludes the State’s airports system from paying for the use of public trust lands with airport revenue, and that without the $16,060,000 appropriation this bill would make, there will be no non-airport revenue appropriation to pay for the airport system’s use. 79

The State immediately cut its annual payment to the Office of Hawaiian Affairs by approximately $6 million. Yet, as Governor Cayetano indicated, it would be the Hawai’i Supreme Court that would have the final word.

Nearly five years after Judge Heely made his watershed decision, the Hawai’i Supreme Court finally issued its ruling in Office of Hawaiian Affairs v. State (“OHA I”), 96 Hawai’i 388, 31 P.3d 901 (2001). In what appeared to be a victory for the Office of Hawaiian Affairs, the Hawai’i Supreme Court first concluded that the plain language of Act 304 and the language of
the agreement between the State and duty free concessionaires required the State to pay a portion of the duty-free revenues to the Office of Hawaiian Affairs.\textsuperscript{80} The Court, however, then considered whether Act 304 conflicted with the federal Forgiveness Act, which, again, prohibited payments to the Office of Hawaiian Affairs from airport revenues. The Office of Hawaiian Affairs, through its attorney and future-Associate Justice of the Hawai‘i Supreme Court James E. Duffy, Jr., argued that a “savings clause” in the Forgiveness Act “dictated that the State pay the past due amount from a different funding source.”\textsuperscript{81} The “savings clause” provided: Nothing in this Act shall be construed to affect any existing . . . statute of the several States that defined the obligations of such states to native Hawaiians in connection with ceded lands, except to make clear that airport revenues may not be used to satisfy such obligations.”\textsuperscript{82}

Writing for a unanimous Court, Chief Justice Ronald T.Y. Moon rejected the Office of Hawaiian Affairs’ argument and held that “the savings clause provides that state statutes shall not be interfered with, except where those statutes provide for payment of airport revenues to satisfy the State’s obligations. Because Act 304 obligates the State to pay airport revenues to OHA in this case, the savings clause cannot ‘save’ Act 304.”\textsuperscript{83} The Hawai‘i Supreme Court overruled the Heely decision and invalidated Act 304. Because Act 304 contained a non-severability clause—which invalidates the entire settlement if any provision conflicted with federal law—Act 304 was struck down in its entirety.\textsuperscript{84} While the non-severability clause was specifically required by the Office of Hawaiian Affairs to ensure that the State did not renege on its promise to provide revenue from duty free concessionaires, it came to undermine the Office of Hawaiian Affairs’ entire efforts at settling the dispute. Because of the non-severability clause, the prior version of state law on the Office of Hawaiian Affairs’ entitlement—which ironically was deemed to have no discoverable or manageable standards in \textit{Yamasaki}—was reinstated. As with \textit{Yamasaki}, the Supreme Court then held that the case presented a political question for the political branches to resolve.\textsuperscript{85} Then State-Senator Colleen Hanabusa stated, “It’s a real blow to the Hawaiian people. They must feel we stabbed them in the back again.”\textsuperscript{86} Given that the decision was handed-down the day after the infamous terrorist attacks of September 11, 2001, Trustee Machado, who chaired the Ad Hoc Committee on Entitlements and Negotiations, stated: “We’re not even getting into the recovery stage from the (terrorist attacks) and the courts are
terrorizing Hawaiians again. They want to make Hawaiian issues so insignificant compared to what’s at stake for all Americans.”

Unlike Yamasaki, and although the Office of Hawaiian Affairs was handed a blow to their efforts toward resolving the dispute over revenues from ceded lands, the Moon Court made some profound concessions. Indeed, the Court reaffirmed the State’s firmly established constitutional “obligation” to native Hawaiians. It continued, “it is incumbent upon the legislature to enact legislation that gives effect to the right of native Hawaiians to benefit from the ceded lands trust.” In a cautionary tone, the Court promised, “Although this court cannot and will not judicially legislate a means to give effect to the constitutional rights of native Hawaiians, we will not hesitate to declare unconstitutional those enactments that do not comport with the mandates of the constitution.”

Although it struck down Act 304, the Court then boldly challenged the legislature to clean up the mess: “we trust that the legislature will re-examine the State’s constitutional obligation to native Hawaiians and the purpose of [Hawai‘i Revised Statutes section] 10-13.5 and enact legislation that most effectively and responsibly meets those obligations.”

The Court’s insistence to the Legislature, however, did not stop the Cayetano Administration from immediately stopping all trust land revenue payments to the Office of Hawaiian Affairs. It would not be until February 11, 2003, when newly elected Republican Governor Linda Lingle made good on her campaign promise and reversed course from the hostile Cayetano Administration and issued an executive order restoring revenue payments to the Office of Hawaiian Affairs. Governor Lingle recognized:

[T]here is no good reason not to resume the practice followed prior to the enactment of Act 304 providing twenty per cent of receipts derived from the public land trusts . . .
[T]here is likewise no good reason for other state agencies not to also resume the practice of [the Department of Land and Natural Resources] and again provide twenty per cent of funds derived from public land trust land to OHA[.]

The Legislature would soon act to appropriate funds for back payment to the Office of Hawaiian Affairs for the revenue discontinued following the OHA I decision. The hostility appeared to simmer.

But the fight for the Office of Hawaiian Affairs was not over. On July 21, 2003, the Office of Hawaiian Affairs and the Board of Trustees again filed suit against the State in Office
of Hawaiian Affairs v. State (“OHA II”), 110 Hawai‘i 338, 133 P.3d 767 (2006). This time, the Office of Hawaiian Affairs contended, in relevant part, that “the Forgiveness Act would not have become law if the State had properly challenged the FAA Memorandum and thus there would not have been a federal law in conflict with Act 304” and argued that the State breached its trust duties by refusing to challenge the FAA Memorandum. On September 15, 2003, the State filed a motion to dismiss the lawsuit, arguing that the circuit court did not have subject matter jurisdiction over the case and that the Office of Hawaiian Affairs’ claims were barred by a lack of justiciability, sovereign immunity, statute of limitations, res judicata, and collateral attack. At the hearing on the motion to dismiss, Circuit Court Judge Gary Chang stated:

[T]he court is still of the mind that there has been no legislation since OHA I was handed down, and in order for [the Office of Hawaiian Affairs] to successfully prosecute any claim [it] may have against the State for breach of fiduciary duty, there has to be a measure of damages, and that’s where the court is struggling, is to find the measure of damages.

I don’t know how [the Office of Hawaiian Affairs] can successfully prosecute [its] claim without relying on [Act 304], and so I think we are in the realm of non-justiciability, because the fight over what revenues would have formed the basis for the percentage to be taken out and awarded to [the Office of Hawaiian Affairs] still remains unclear[.]

The court requested additional briefing because it needed “further education on some of these issues[.]” After a further hearing on the State’s motion to dismiss, the court ruled:

Turning finally to the question of justiciability and the political question. That’s where this court believes the crux of the fight is on this matter. I think that there is no question that the Supreme Court in OHA I made a determination that the dispute should go back to the legislature for redefinition of what constitutes revenues under chapter 10, and without that guidance the court could not address the question of damages or the judicially manageable standard by which OHA’s share can be determined.

This court is of the mind that this is a different cause of action in one sense, and that is, by analogy, the court views this case in the nature of a case like a legal malpractice case, where you have a case within a case.

But be that as it may, permeating everything that has been asserted in connection with this—the case at bar, it seems to always go back to the Legislature can ultimately provide the remedy.

Even if at the legislature the OHA is faced with the comment by the legislature that oh, you lost OHA II, or the case at bar, it still comes down to a legislative determination, and the court simply could not get that out of its mind, notwithstanding the quality of briefing that OHA submitted.
So the court does conclude that we still have at the crux of the case at bar a political question, one that seeks to collaterally attack the ruling and the holding of *OHA I*. We are still left with the judicially unmanageable standards or the lack of a judicially manageable standard for determining damages, notwithstanding the fine analogy of a legal malpractice case.

Again, even in that analogy, there was still some discussion about the necessity to go back to the Legislature to clarify exactly what sums would be available to the litigations or to OHA. So we still come back to the political arena as being the arena in which this debate should take place. So for these and any other good causes shown in the record, the court will respectfully grant the motion to dismiss.\(^7\)

The court entered its judgment in favor of the State and the Office of Hawaiian Affairs appealed the decision to the Hawai‘i Supreme Court on June 8, 2004. On appeal, Chief Justice Moon again wrote the opinion of the Court and first concluded that Act 304, by its plain language, did not constitute a contract between the Office of Hawaiian Affairs and the State.\(^8\)

As to the claim that the State breached its fiduciary obligations to the Office of Hawaiian Affairs by failing to object to the FAA Memorandum, the Court held that the Office of Hawaiian Affairs could have brought a breach of trust claim against the State under Hawai‘i Revised Statutes chapter 673, which governed the State’s sovereign immunity for breach of trust claims.\(^9\)

“Article XII, [section] 4 imposes a fiduciary duty on Hawaii’s officials to hold ceded lands in accordance with the [section] 5(f) trust provisions[,]” said the Court.\(^10\) The Court further acknowledged that the State owes a duty of impartiality and duty to communicate to the Office of Hawaiian Affairs and its beneficiaries.\(^11\) Therefore, the Court found that the Office of Hawaiian Affairs had indeed stated a claim for breach of fiduciary duty by alleging that the State did not inform the Office of Hawaiian Affairs of its no opposition to the FAA Memorandum, which stripped the trust beneficiaries of their right to ceded land revenues.\(^12\)

The Court determined, however, that—in this particular case—the Office of Hawaiian Affairs failed to provide proper notice of any such claims.\(^13\) Surprisingly, the Court also rejected the assertion that the two-year statute of limitations for claims of breach of trust did not apply to the Office of Hawaiian Affairs by concluding in essence that the Office of Hawaiian Affairs was not a state entity inasmuch as it sued the State in its corporate capacity.\(^14\) These two procedural rulings thwarted the Office of Hawaiian Affairs’ otherwise valid claims.
Despite another upsetting outcome against the Office of Hawaiian Affairs regarding the trust revenues issue, the Hawai‘i Supreme Court again offered some favorable legal conclusions in favor of the Office of Hawaiian Affairs. The Court quoted Hawaii’s senior senator, Dan Inouye: “the removal of the Airport Revenue Fund for use by the State of Hawai‘i as a source of compensating [the Office of Hawaiian Affairs] for use of ceded lands upon which the airports sit, should not equate to a like reduction in the State’s obligation to OHA under state law.” As in OHA I, the Court again reiterated its mandate that the Legislature take action to resolve the ceded lands revenue issue: “it is incumbent upon the legislature to enact legislation that gives effect to the right of native Hawaiians to benefit from the ceded land trust.”

The entire fiasco was, as Governor Waihe‘e would later describe it, a “rape” of the Ceded Lands issue insomuch as the State’s decision-making was done in the backrooms of power without legal representation or consideration for the interest of the State-created Office of Hawaiian Affairs, while the State purported to be moving toward reconciliation with the Kānaka Maoli. Paralleling the ceded lands debate and attempts to resolve the issue has been the Office of Hawaiian Affairs’ involvement in discussions of sovereignty for Hawaiians.

_Sovereignty and Ka Lāhui Hawai‘i_

Because of an increase in awareness of the historical events surrounding the overthrow and annexation—in part due to the educational efforts promoted by the Office of Hawaiian Affairs, such as the Minority Report of the Native Hawaiians Study Commission, and other community organizations—a growing sentiment among Hawaiians to openly discuss sovereignty issues also emerged in the nineties.

Attorney Hayden Burgess (Poka Laenui), who had been elected to a seat as trustee in 1982, used his position in the Office of Hawaiian Affairs to “internationaliz[e] the issue of Hawaiian sovereignty.” Indeed, it was Laenui who caused an uproar at his investiture, when he refused to publically take the oath of office to uphold and defend the laws of the United States, including its Constitution. It was also Laenui that educated his fellow trustees about sovereignty for Hawaiians and about sovereignty issues across the world. Laenui had been involved in the World Council of Indigenous Peoples and the International Working Group for Indigenous Affairs, and served as the president of the Pacific Asia Council of Indigenous Peoples. From these international organizations, Laenui learned that “the struggle for self-
determination was a commonality that bound almost all indigenous peoples around the world; and that colonizers, whether they were American or French or what have you, essentially follow the same footprint, stepping over indigenous peoples.”

As Trustee Rod Burgess acknowledged: “[Laenui] got [the trustees] thinking that our task was not a lonely exercise in futility. [Laenui] showed us that there were other native peoples in the same boat [and] that there was a course of action we could realistically pursue.”

The Office of Hawaiian Affairs held meetings with New Zealand’s Maori leaders that impressed Trustee Burgess: “In a lot of ways, the Maori people were more advanced than we Hawaiians were, particularly in terms of land claims and native rights. There is a real co-existence of two distinct cultures in New Zealand, Maori and western. The Maori is acknowledged, his rights to the land are acknowledged, and every village and town had its own marae or meeting house, each with its beautiful carvings.”

The Office of Hawaiian Affairs also joined Indigenous Peoples International, which consisted of government agencies from across the world—including the United States, Canada, and Australia—that deal with indigenous populations.

Trustee Moses Keale extolled the education on sovereignty: “being exposed to the Indian nations and the South Pacific Commission broadened my perspective on what sovereignty is all about. Before, in my limited view, I thought sovereignty was treason. But now, sovereignty is how one defines it. Basically, it’s the right of a people to exist.”

The Office of Hawaiian Affairs also co-sponsored a conference on Native Hawaiian rights, where the issue of sovereignty was hotly discussed. More than three-hundred people attended the conference, which had to be extended another day to accommodate more speakers. The agency was, thus, structured in a way to allow the exploration of various options for forms of Native Hawaiian governance, including independence. Indeed, some, like Trustee Laenui, believed that “OHA itself would never be the independent government or entity, but it could bring us closer to that independence.” Others, however, believed that the Office of Hawaiian Affairs could never appropriately advocate for Hawaiian sovereignty. Perhaps the most outspoken and visible critics of the Office of Hawaiian Affairs in the late-eighties and nineties came from Ka Lāhui Hawai‘i, a self-described “Native initiative” that was often unnecessarily vilified for their effort to seek a nation-within-a-nation relationship with the federal government.
Ka Lāhui, officially organized on March 15, 1987, was formed “by and for native Hawaiians, without the interference of State or Federal agencies.”

It traced its organizational roots to Hoʻāla Kānāwai, which was the organization that the Office of Hawaiian Affairs was partially modeled after during the 1978 Con-Con. In the seventies, Mililani Trask became involved with Hoʻāla Kānāwai, which was looking at the concept of sovereignty and how it could be applied to the Native Hawaiian context. Hoʻāla Kānāwai became a statewide nonprofit corporation that proposed legislation in 1977 that created a Hawaiian corporation that was modeled after the Alaskan Native village corporations (State House Bill 1469). House Bill 1469 received favorable reception from the community, but had not been enacted.

In 1978, Trask was approached by Alu Like to be a researcher for the Con-Con’s Hawaiian Affairs Committee, where the Hoʻāla Kānāwai proposal was before the Committee. Trask performed legal research to support the Hoʻāla Kānāwai concept. Yet, after a closed-door meeting of the convention’s “mainstream power-brokers[.]” Trask was told that the Hoʻāla Kānāwai concept was “scrapped.” As Trask recalled:

Unfortunately, the entire effort was co-opted by a group of Hawaiians who were tightly associated with the Democratic Party. Frenchy Desoto was in charge of the Hawaiian effort at the Con-Con.[] Her committee looked at the research and concluded that (1) Hawaiians were not ready for self-governance; (2) the community initiative was a substantial threat, a challenge to the state; and (3) Hawaiians needed a two-step approach. The committee considered the US government’s Bureau of Indian Affairs, which has oversight of the Native American Indians. They decided the first step was the creation of a State of Hawaii-type Bureau of Indian Affairs. They created the Office of Hawaiian Affairs, which emerged after the ’78 Con-Con. All of the people affiliated with the Con-Con plan got Democratic Party support. Henry Peters . . . and John Waiheʻe . . . supported the bill. They said, “Let’s create the ‘Office of Hawaiian Affairs’ and make it a quasi-sovereign entity so it could be part state, part nation. That way we don’t have to create a separate nation.”

. . .

I opposed the committee’s decision, left the Con-Con, and continued to work with Hoʻāla Kānāwai. It was then that we decided we really needed to work with a larger group—it couldn’t be just Hoʻāla Kānāwai, a few Hawaiian Homesteaders, but we had to broaden the effort. There were many other organizations looking at this concept of sovereignty: grassroots groups and Hawaiian Civic Clubs were looking at self-governance, Hawaiian Homesteaders were discussing sovereignty, Native Americans were coming to Hawaii to talk about sovereignty, other Hawaiians were going to the United Nations. We decided that we would have a
hālāwai, a gathering, and it was decided that a new group should form so that Hoʻāla Kānāwai could remain intact.  

The new entity created was the Native Hawaiian Land Task Force, which was the precursor to Ka Lāhui.

Ka Lāhui was borne of a 1987 constitutional convention of two hundred and fifty delegates from across the islands. Interestingly, Office of Hawaiian Affairs Trustees Moanikeʻala Akaka, Louis Hao, and Clarence Ching participated in the creation of Ka Lāhui. Ka Lāhui’s constitution envisioned a tripartite government structure, tailored to incorporate the traditional and cultural beliefs and practices of Hawaiians.

At the core of Ka Lāhui’s criticism of the Office of Hawaiian Affairs was the assertion that the Office of Hawaiian Affairs could never be an independent governing body because it was bound by state and federal laws. As Trask, Ka Lāhui’s kiaʻāina (governor), put it, “what [the Office of Hawaiian Affairs is] practicing is wardship for the state. Wardship is not sovereignty. A ‘quasi-sovereign’ state agency is not a sovereign nation state. It simply is not.” Trask compared the Office of Hawaiian Affairs to the federal Bureau of Indian Affairs, which was historically plagued with ineffectiveness at serving the indigenous population.

Ka Lāhui proposed a multi-step approach toward achieving sovereignty. The first step was to advocate for a much-more nationalist nation-within-a-nation model for Hawaiian sovereignty. Under the nation-within-a-nation model, a government-to-government relationship between Ka Lāhui and the federal government would have been established. Ka Lāhui would have limited sovereignty over its internal affairs and control of a specified territory. While Ka Lāhui would have some sovereign authority, it would still be subject to the laws of the United States and the state in which the territory co-exists. After a nation-within-a-nation relationship was established, Ka Lāhui would then pursue Hawai’i being placed back on the United Nation’s list of non-self-governing territories, which could lead to a separation from the United States. While some criticized Ka Lāhui’s approach, it was, as Ka Lāhui put it, “an expedient, rational, and legal means for Hawaiians to be self-governing. Once this is achieved, the sovereign nation can relate ‘Nation to Nation’ with the United States and would be in a position of standing and authority to effectively advance and resolve Hawaiian claims to native trusts and other entitlements.”
The jockeying for power between Ka Lāhui and the Office of Hawaiian Affairs was headlined in several newspaper articles. In one article, Trustee Rod Burgess stated, “We don’t want 30 organizations running to Congress. . . . We want OHA to be the voice of the Hawaiian people in the quest for existing federal entitlements.” In an apparent shot at the Office of Hawaiian Affairs, Trask stated, “What we’re saying is it’s time to break out of the plantation mentality where everyone believed Hawaiians needed lunas. We have more than sufficient expertise and talent to get a handle on our own assets.” Trask continued, “Lahui Hawaii is the first democratically constituted political entity exclusively created by native people[.]” In another article, retired-appellate judge and future Office of Hawaiian Affairs Trustee Walter Heen predicted some form of a sovereign government for Hawaiians, but called Ka Lāhui’s campaign “a view less strident” than other calls for sovereignty because, according to Heen, an independent nation “will not emerge.” Trask openly criticized the trustees for their travel costs and denounced a bill passed that increased the trustees’ individual annual income.

While some trustees expressed an openness and willingness for Ka Lāhui and the Office of Hawaiian Affairs to work together, others expressed concern with Ka Lāhui’s approach. For example, Trustee DeSoto relegated Ka Lāhui to a mere political party: “Ka Lahui has been very effective at keeping on top of issues, more so than we have. They’re very good at communicating their position to their constituency. I think that Ka Lahui was a response to a need in our community. Most Hawaiians aren’t trusting of government. If OHA is perceived to be a part of government, then you can’t trust it, and a lot of people think that way. Ka Lahui, taking advantage of that, could be a very effective political party.” In 1989, the tension between Ka Lāhui and the Office of Hawaiian Affairs reached a point where Trustee Moanikeʻala Akaka, who was also a delegate for Ka Lāhui, was asked by her Ka Lāhui caucus to step down.

Professor Haunani-Kay Trask argued that the criticism of Ka Lāhui was based on a fear of an organized Hawaiian body politic that would regain control of lands and assets in Hawai‘i: “Predictably, all politicians, including the governor, the U.S. senators, and the trustees of the Office of Hawaiian Affairs, are in opposition to the Native initiative. As in the rest of the Pacific, so in Hawai‘i: the forces arrayed against sovereignty support non-Native control of
Native lands and assets.”

Trustee Kaulukukui, however, acknowledged that Ka Lāhui’s influence and pressure forced the Office of Hawaiian Affairs to take a position on sovereignty.

On September 2, 1989, the Office of Hawaiian Affairs boldly pronounced: “The United States must return the public lands obtained at the time of annexation that were retained by the U.S. following Hawaii statehood in 1959. This land should be returned to a Native Hawaiian self-governing entity, and held in trust and managed for the benefit of Native Hawaiians.”

This—a Blueprint for Native Hawaiian Entitlements—was the Office of Hawaiian Affairs’ first officially sanctioned step toward sovereignty and was, as self-described, “the first comprehensive plan for achieving self-determination and self-governance for Hawaiians” (despite Ka Lāhui having held two constitutional conventions and establishing founding documents). The Office of Hawaiian Affairs envisioned itself as the entity that would control the process of sovereignty, all trust resources, and all federal programs. In contrast to Ka Lāhui’s ultimate nation to nation model, the Office of Hawaiian Affairs sought to continue the trust relationships with the State and federal governments, as codified in Hawaii’s Admission Act, indefinitely. Indeed, one of the goals of the Blueprint was to “reaffirm and enforce the trust relationships of the federal and State governments with Native Hawaiians.”

This did not sit well with other Hawaiian organizations.

At hearings on the Blueprint, individuals and organizations testified overwhelmingly against the Office of Hawaiian Affairs’ plan. Ka Lāhui criticized the Blueprint: “Instead of helping the State, OHA trustees should support Ka Lahui’s efforts in gaining recognition as a sovereign entity. There may be an appropriate role for OHA in the sovereignty movement, but it is not to be the sovereign entity. The sovereign entity cannot be created of the State, by the State, for the State. The sovereign entity must be created of Hawaiians, by Hawaiians, for Hawaiians.”

In 1991—the same year that the Office of Hawaiian Affairs moved to its new headquarters at 711 Kapiolani Boulevard—and in response to the growing calls for a serious discussion on sovereignty, the Legislature passed and the Governor signed Act 301, which created the Sovereignty Advisory Council (“SAC”) to develop a plan to discuss and study Hawaiian sovereignty. The Council, made up of thirteen Hawaiian groups, including Ka Lāhui and the Office of Hawaiian Affairs, was appropriated $50,000.00 to accomplish their
plan. The work of SAC culminated with the issuance of a Preliminary Report in 1992. Consistent with the proposals of Ka Lāhui, the Preliminary Report noted that participants envisioned two types of sovereignty relationships developing over time: (1) a nation-within-a-nation vision, and (2) an independent nation vision. As to the nation-within-a-nation vision, SAC noted:

Under such a vision, the relationship between the State of Hawai‘i, the United States of America and the Hawaiian nation, along with the accompanying land base, would have to be worked out. One scenario would be the transfer of the assets and administration of the Hawaiian Homes program to the nation, giving that nation expanded powers including exclusive taxing authority, revenue raising opportunities, police and judicial powers, etc. A second scenario would be recognition by the U.S. Government and the State of Hawaii. A third scenario would be that this nation would be exclusively under the United States of America with the State completely out of the picture.

The land base for this nation within a nation may include one or all of the following: DHHL lands, portions of the ceded lands transferred to OHA, portions or all of the ceded lands, certain ahupuaa or districts of Hawai‘i, or certain islands of Hawai‘i.

As to the independent nation scenario, SAC discussed several possible visions:

1) A weighted voting system within an electoral process for public officials such that the native vote in total would note [sic] be less than 50% of the total votes cast;

2) A bicameral legislative body in which the native Hawaiian voters would have exclusive rights to select the members of one body;

3) The creation of a Council of Customs, Protocol and ‘Aina controlled by the native Hawaiians in which certain matters are fully within the control of this council.

Hui Naauao, a conglomeration of more than forty groups, was created in 1991 through SAC and given $1 million in federal funding to support sovereignty education.

Despite the concerns raised by Ka Lāhui and other Hawaiians, and the admirable and good faith efforts to discuss sovereignty, the Office of Hawaiian Affairs assembled a reparations package in 1992 for consideration by Congress; that package again firmly placed the Office of Hawaiian Affairs at the helm of reparations discussions. It was the Office of Hawaiian Affairs’ move toward continuing the debate with the federal government, but also a move that further isolated other Hawaiian organizations.
The calls for sovereignty and the various voices of the movement came to a head in January 1993, when thousands of Kānaka Maoli and non-Hawaiians participated in a week-long remembrance and commemoration of the hundredth-year of the overthrow. Called the ‘Onipa’a Centennial Observance, in honor of Queen Lili‘uokalani’s motto, the events represented a watershed moment in the fight for reconciliation. The protests and events shed light and awareness both locally and nationally on the issue of the United States’ involvement in the overthrow of the Hawaiian Kingdom.\textsuperscript{150} The Office of Hawaiian Affairs committed $150,000 to the observation, which the State matched.\textsuperscript{151}

The tone for the events was set when, at the opening ceremony, Governor Waihe‘e ordered the lowering of the American flag at all state facilities encircling ‘Iolani Palace, the home of Hawaii’s last reigning monarchs.\textsuperscript{152} It was the first time in one-hundred years that only the Hawaiian flag would soar above the State’s seat of power. It was a courageous move that was chastised by some—including Senator Inouye, who wrote Waihe‘e the next day that it was a mistake to lower the American flag and urged its raising—but hailed as a sign of a changing political landscape in Hawai‘i.\textsuperscript{153} The changing landscape would evince itself more clearly on January 17, 1993—exactly a hundred years after the overthrow—when thousands of Hawaiians marched through the capitol district in Honolulu to demand sovereignty. The march, organized by Ka Lāhui, symbolized the growing unity of the Hawaiian people. Professor Kame‘eleihiwa noted how the organized march “changed the Hawaiian political scene forever.”\textsuperscript{154} She continued, “It was the first time in 100 years that thousands of Hawaiians had marched for the return of sovereignty—that is, for independent political control over some of their ancestral lands.”\textsuperscript{155} The ‘Onipa’a observance, as scholar Stephanie Joy Di Alto concluded, “signified the perseverance of Native Hawaiians” and “indicated that [Native Hawaiians] would not fade quietly away as expected but rather would continue to demand an acknowledgement and confirmation of the historic record, an apology from the United States government, and the return of their political sovereignty in one form or another.”\textsuperscript{156}

Governor Waihe‘e expressed his sentiment about the ‘Onipa’a observance:

Not since the overthrow have Native Hawaiians been closer to reinstating sovereignty than today. There are cynics who scoff at that assessment, who say it will never happen unless other seemingly difficult conditions are resolved first—because Hawaiians themselves are too divided, because the State is too intrusive, because other groups in Hawaii will not allow it . . . .
I, obviously, do not agree with these naysayers. I believe in the spirit and determination of the Hawaiian people, and I believe in the collective wisdom and aloha of all the people of Hawaii. I believe in the rightness of our cause and the system of justice in this country which, having failed Native Hawaiians 100 years ago, has the ability and obligation to right those wrongs.\textsuperscript{157}

As part of the ‘Onipa’a observance, and in an effort to heal wounds for their complicity in the overthrow, the United Church of Christ apologized to Hawaiians.\textsuperscript{158} The United Church of Christ’s apology inspired Asian American churches to offer separate apologies and to approve a reparations package to Hawaiians that included land and money because “we as Asians have benefited socially and economically from the illegal overthrow” and “many Asian Americans have benefitted while disregarding the destruction of Native Hawaiian culture and the struggles of Na Kanaka Maoli.”\textsuperscript{159} A sense of unity enveloped the ‘Onipa’a observation.

But that unity would be tested when Ka Lāhui introduced legislation (House Bill 1053) in the 1993 State legislative session that sought to have all trust lands released to its control. At the same time, the Office of Hawaiian Affairs introduced its own legislation (Senate Bill 1028) that sought to create another entity to advise the State on sovereignty issues. At a hearing on February 14, 1993, hundreds of Ka Lāhui members lambasted Senate Bill 1028 as a means of undercutting Ka Lāhui’s efforts. It was, as numerous testifiers decried, “an attempt by OHA to steal the sovereignty movement from Ka Lāhui Hawai‘i.”\textsuperscript{160} Professor Kame‘elehiwa asserted that the purpose of Senate Bill 1028 was to “obscure the fact that Ka Lāhui Hawai‘i had already drafted a constitution and had repeatedly invited all other Hawaiians to participate in constitutional conventions to help mold that document according to their needs and desires.”\textsuperscript{161} In the end, the Joint Committee on Hawaiian Affairs silenced Ka Lāhui and voted unanimously to kill its bill. Hawaiians who participated in the process were, as Ward Churchill and Sharon Venne noted, “shocked at this decision, realizing that the so-called democratic process was a fraud, and that in fact business was proceeding as usual for the Democratic Party boys’ club.”\textsuperscript{162} Before finalizing the Office of Hawaiian Affairs’ bill, House Hawaiian Affairs Committee Chair Tom Okamura invited Ka Lāhui representatives to participate in closed doors meetings with only representatives from the Office of Hawaiian Affairs to craft a compromise bill.\textsuperscript{163} Ka Lāhui rejected the gesture as it effectively silenced all other voices in the sovereignty debate.\textsuperscript{164}
Without Ka Lāhui’s input, the Office of Hawaiian Affairs’ bill, Senate Bill 1028, was passed unanimously and became law as Act 359.

Act 359 created the Hawaiian Sovereignty Advisory Commission (“HSAC”) to advise the State Legislature on special elections to apportion voting districts, establish eligibility requirements, establish special election dates, and elect delegates. The purpose of Act 359 was to “acknowledge and recognize the unique status the native Hawaiian people bear to the State of Hawai‘i and to the United States and to facilitate the efforts of native Hawaiians to be governed by an indigenous sovereign nation of their own choosing.” The Legislature proposed a referendum to the Hawaiians: “shall a Hawaiian convention be convened to propose an organic document for the governance of a Hawaiian sovereign nation.”

On the heels of enacting Act 359 came the convening of the People’s International Tribunal. Dr. Kekuni Blaisdell, the longtime leader in the fight for federal reparations with ALOHA, convened the Tribunal to challenge the federal government for their alleged violations of morality and international law. Over seven days of hearings, 142 individuals or organizations testified before a panel of nine distinguished international and indigenous judges. In the end, the Tribunal indicted the United States finding that it had violated international law by, among other reasons, illegally overthrowing the Hawaiian government, which denied Hawaiians their sovereignty. The Tribunal recommended the recognition of Hawaiian sovereignty.

As the discussions of sovereignty became more robust, several local, national, and international groups began to support the efforts of Hawaiians. The National Congress of American Indians, the Alaska Federal of Natives, the Japanese American Citizens League, the Hawaii Democratic Party, the International Indian Treaty Council, the International Work Group for Indigenous Affairs, and the Working Group of Indigenous Peoples all supported some form of sovereignty for Hawaiians.

The pressure for federal action on Hawaiian reparations and/or reconciliation could no longer be ignored; Hawaiians were clearly anxious for action; individuals and groups were beginning to understand the struggle, appreciate the efforts, and apologize for their actions. With its growing support, the sovereignty movement and the commemoration of the hundredth year of the overthrow was highlighted on November 23, 1993, when President William J. Clinton signed
Public Law 103-150, commonly referred to as the Apology Resolution. After recounting American involvement in the illegal overthrow of the Kingdom of Hawai‘i and recognizing that the Hawaiians “never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States,” the American government apologized to Native Hawaiians “for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination.” The American government further expressed its “commitment to acknowledge the ramifications of the overthrow” in order to provide a “foundation for reconciliation between the United States and the Native Hawaiian people.” Finally, Congress urged the President to “support reconciliation efforts” between the United States and Hawaiians. The Apology Resolution expressed the “special relationship” that existed between Native Hawaiians and the federal government.

In 1994, the Legislature amended Act 359 and replaced the HSAC with the Hawaiian Sovereignty Elections Council (“HSEC”) to conduct a plebiscite to determine the form of a sovereign Hawaiian nation. The new law required approval by a “majority of qualified voters” in order to “provide for a fair and impartial process to resolve the issues relating to form, structure, and status of a Hawaiian nation.” The Legislature’s actions effectively postponed the vote on sovereignty. After amended legislation was enacted, nine-hundred thousand dollars were allocated from state funds (and matched by the Office of Hawaiian Affairs) to hold a “Native Hawaiian Vote.” The vote on the question, “[s]hould the Hawaiian people elect delegates to propose a Native Hawaiian government,” was held in 1996. Prior to the Native Hawaiian Vote, Ka Lāhui’s governor Trask invited a delegation from the Unrepresented Nations and Peoples Organization (“UNPO”) to Hawai‘i. The UNPO delegation called for the cancellation of the vote because it concluded that the plebiscite did not comport with international standards for a “free and informed choice.” Ka Lāhui also filed an unsuccessful legal challenge to stop the vote. A second lawsuit, filed by non-Hawaiian rancher Harold “Freddy” Rice,” alleged that the Native Hawaiian Vote discriminated against non-Hawaiians. Although his lawsuit was also ultimately dismissed, Rice would later bring challenges to the Office of Hawaiian Affairs election process that altered the status of Hawaiians.
Despite the vocal and widespread opposition, the Native Hawaiian Vote occurred and 30,423 ballots were counted.\(^{185}\) Of those votes counted, 73.28\% voted in favor of electing delegates to propose a government.\(^{186}\) The delegates eventually held a convention in 1999 and drafted two models for a Hawaiian nation within the United States.\(^{187}\) However, continued opposition from some Hawaiian groups to the process and a lack of funding from the State and the Office of Hawaiian Affairs effectively halted the process of establishing a sovereign Hawaiian government.\(^{188}\)

Although considerable efforts created momentum for establishing a sovereign Hawaiian entity in the nineties, such efforts were ultimately stymied at the hands of the State by hijacking the process and failing to adequately support the effort. The push for sovereignty would eventually be stonewalled by a decision of the United States Supreme Court. That decision, *Rice v. Cayetano*, which is discussed further in the next chapter, changed the legal and political landscape in Hawai‘i and steered the course of the Office of Hawaiian Affairs firmly toward federal recognition, and against any other type of model.

*Like Fighting Cocks*

Whether it was a non-committal State government or the rising voices of various Hawaiian organizations, the struggles for resolution to the ceded lands and sovereignty issues were affected in large part by factors outside the control of the trustees of the Office of Hawaiian Affairs. This is not to minimize, however, the deep rifts and tensions caused by the board members themselves that affected the image and policies of the Office of Hawaiian Affairs in the nineties.

Like any organization, disagreement and dissent are natural parts of conducting business. Yet, the board members of the Office of Hawaiian Affairs earned reputations for “fussing and fighting,” which, many accused, kept the agency from accomplishing its mission.\(^{189}\) Trustee Billie Beamer, a former director of the Department of Hawaiian Homelands, described her fellow Office of Hawaiian Affairs trustees with three words: “[l]ike fighting cocks.”\(^{190}\) Trustee Beamer added, “[i]f you look at their performance, the behavioral patterns of trustees throughout its existence, it has always been one in which there has been a lot of friction, confrontation,
fisticuffs and four-letter words—the demeanor leaving much to be desired[.] That, to me, is the primary reason for the public disappointment and disdain.”191

The beginning of the nineties brought with it a scandal involving Office of Hawaiian Affairs Chair Moses Keale. In late 1990, a private development group, the Uhaele Group, worked with Keale to try to obtain an exclusive agreement with the Office of Hawaiian Affairs for the Uhaele Group to represent them in all dealings with the State and federal governments after the Office of Hawaiian Affairs received a settlement from the State for the ceded lands dispute.192 The plan was for the Uhaele Group to develop, among other things, a multi-story, triple tower building that was to become the flagship building of the Office of Hawaiian Affairs.193 On December 14, 1990—and without authority from the Board—Chair Keale signed a contract with the Uhaele Group.194 The contract provided all decision-making and investment power to Uhaele for eight years, plus an additional twenty percent of the development profits.195 In February 1991, one of the mainland financiers of the Uhaele Group began suspecting fraudulent behavior on the part of Keale.196 After the Board was informed of the Uhaele contract, and confirmed that they did not authorize such a contract, Keale stated that his signature was forged on the contract.197 By April 1991, however, growing demands in the Hawaiian community were made for Keale’s resignation as chair of the Office of Hawaiian Affairs.198 The mainstream local newspapers eventually ran the story of Keale’s alleged involvement in the Uhaele incident.199 Keale resigned as chairman the next day.200

Following the 1990 election, five new individuals were sworn-in as trustees of the Office of Hawaiian Affairs. Among the newly-elected crop was former State-legislator Clayton Hee. Since his election, Hee had been one of the polarizing figures of the Office of Hawaiian Affairs. On February 4, 1992, one of the headlines in the local paper read, “OHA Trustees Oust Vice Chairwoman.”201 Trustee Rowena Akana, who had been elected in 1990 and selected as vice-chair of the Board of Trustees, was handed a vote of no confidence by her colleagues in a closed-door session on January 31, 1992.202 Office of Hawaiian Affairs Chairman Hee—who assumed the chairmanship of the Board following Keale’s resignation—cited “internal conflicts” as the reasons for her removal.203 Akana publically took Hee to task, alleging that she was removed for challenging Hee’s actions: “He’s calling a one-man show here.”204 She alleged that Hee kept other trustees in the dark about the ceded lands revenue negotiations with the Administration and
that he unnecessarily reduced the number of committees, which caused the need to shuffle titles and positions, to lower costs without finding other ways of cutting costs.\textsuperscript{205} Newspapers reported, however, that underlying Akana’s demotion was a dispute between Akana and the Office of Hawaiian Affairs’ administrator Richard Paglinawan over the jurisdiction of SAC—the legislatively created council that advised on a path toward sovereignty.\textsuperscript{206} Akana, who was chairperson of SAC, maintained that the Office of Hawaiian Affairs was a member on equal footing as the rest of the members, which included other Hawaiian organizations such as Ka Lāhui Hawai‘i.\textsuperscript{207} Akana’s position, however, was contrary to Paglinawan’s and the Board majority’s position that the Office of Hawaiian Affairs was the lead organization of SAC.\textsuperscript{208} Ka Lāhui’s Mililani Trask pulled her organization out of SAC after the public spat: “[Akana] was the first trustee in a long time to say let’s start with the community and find out what’s going on. But because she wasn’t supportive of OHA’s exclusive jurisdiction they’re being punitive with her.”\textsuperscript{209}

The removal stood despite legal action taken by Akana. But, the actions and conduct were not without consequence. Chairman Hee became the target of two death threats and a 10,000-signature petition calling for his resignation.\textsuperscript{210} A group, Concerned Hawaiians for OHA, was formed to challenge Hee and bring additional attention to the internal dispute.\textsuperscript{211} Kawehi Kanui, leader of the Concerned Hawaiians for OHA, chastised Hee’s demeanor: “We can talk ‘till we’re blue in the face, but nothing happens. It’s just his whole attitude that he’s God’s gift.”\textsuperscript{212} Hee denied the accusations and insisted that he conducted himself consistent with the view of the majority of the Board that elected him as Chair.\textsuperscript{213} By April 1992, Concerned Citizens of OHA protested at a Board meeting, bearing signs that read, “End Dictatorship Organize OHA,” “Look what Hee Did!,” and “Hee is history.”\textsuperscript{214} At one point during the confrontational Board meeting, and after he warned that he would cancel the meeting if the demonstrators continued to interrupt, Hee recessed the meeting and left the room with two other trustees.\textsuperscript{215} To add to the spectacle and to appease the protestors, Trustee Akana then assumed Hee’s seat and called for a vote to reorganize the Board.\textsuperscript{216} This internal struggle was on full public view. Kanui, of Concerned Hawaiians for OHA, stated, “When are they going to meet the needs of the people? We’re saying do it now and don’t squander our money. . . . It’s not the concept of OHA that messed up, it’s the people. . . . I really feel sad for them because of their
arrogant attitude[.]) State Representative Annelle Amaral aptly described the situation, stating that the “work of the Hawaiian people has been reduced to an ego problem and battle of wills.”

The rift between trustees would carry on in public for several more years. In 1994, for example, when asked a “simple” question by Akana about Hee’s plans for health, education and housing programs for Hawaiians, Hee responded, “I’m sorry I’m not as simple as you.” Newly elected Trustee Beamer seized the opportunity to put her colleagues in their place: “This is exactly what disturbed me. I hope every member of this board will maintain a certain standard of decorum.” But Beamer would not be immune from the backlash for failing to comport with the Board majority and its chair, Clayton Hee. In 1997, after Beamer filed a scathing report about then-Office of Hawaiian Affairs administrator Dante Carpenter, pro-Carpenter trustees failed to show up for Beamer’s committee meetings, thereby stonewalling passage of items as the quorum was not met. Any item that could be passed out of Beamer’s committee was not put on the agenda for consideration by the full board. With no recourse but to resign from her chairmanship, Beamer was further punished when the Board established a rule limiting use of postage to committee chairs. Beamer was effectively cut off from her constituents. Beamer stated, “I realize that there are political cultures in all entities, but this culture here is one in which if you are not part of the majority party, like the state Legislature, you’re in shackles[.]”

In 1998, Trustee Beamer passed away unexpectedly. Her death silenced a voice of accountability; she once said, “We need to consult more with our beneficiaries. Even though we are elected, we are not a legislative body, we are a trust. And we must keep that trust with our people.” Her death also left a vacancy on the Board that could tip the scale of what faction held a majority. The jockeying for power and the selection of the critical fifth vote between the two factions ended with no decision by the Board. Because the trustees failed to come to a consensus on filling the vacancy, by law, the decision went to Governor Ben Cayetano. Fortunately, Governor Cayetano filled the vacancy with highly respected kupuna Gladys Ainoa Brandt.

But, these struggles for power and the Office of Hawaiian Affairs’ actions on sovereignty simply reaffirm the broad authority of the trustees themselves, and, in turn, the agency to affect
meaningful change for the Native Hawaiian community so long as there is a will to move forward together by the trustees. Regardless of the bickering and the looming issues of sovereignty and the ceded lands disputes, the Office of Hawaiian Affairs was also successful in defending their expenditure of trust funds. Indeed, the tensions between the Office of Hawaiian Affairs and the Hawaiian community came to the fore in the legal arena when Dr. Nui Loa Price, Kamuela Price, and a group called the Hou Hawaiians (who had made their intention known at the first hearings on the Office of Hawaiian Affairs implementing legislation) filed suit against the trustees for allegations of “commingling, managing, administering, and expending” section 5(f) trust funds in violation of Hawaii’s Admission Act. This lawsuit, further discussed in chapter six, set the stage for additional litigation challenging the Office of Hawaiian Affairs’ expenditure of trust funds.

The nineties ushered in obstacles for the Office of Hawaiian Affairs on many fronts. Criticism from within the organization, from the Hawaiian community, and from the general public plagued the agency and hampered its mission of bettering the condition of Hawaii’s indigenous people. But, the politicking and disagreements in the nineties paled in comparison to what the Supreme Court of the United States had in store for the Office of Hawaiian Affairs in 2000.

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11 Id.
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14 Waihe‘e Interview, supra note 6.
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48 OHA I, 96 Hawai‘i at 392, 31 P.3d at 905.
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Id.

Id.

Id.

Id.


Id.


Id.

Id.


Id.

Id.

Id.

Id.


Id.


Id.


Id.

Id.

Id.

Id.

Id.

CHAPTER 5

_Rice v. Cayetano: The Decision that Changed the Office of Hawaiian Affairs_

“This is a case of ballot-box discrimination plain and simple. . . . There is no question what Hawaii is attempting to do here is discrimination on the basis of race[,]” decried Theodore Olson.¹ John G. Roberts, Jr. argued, “The petitioner was not permitted to vote . . . because he is not a beneficiary of the trust[.]”² Justice Anthony Kennedy shot back, “[y]ou begin by saying, now, this is not [about] race, it’s [about] a trust . . . [but] of course it has to do with Hawaiian ethnicity.”³ Attorney Edwin S. Kneedler argued that Hawaiians are a “distinct people determined to maintain their culture, their language, and their ties to the land[.]”⁴ “There are a lot of groups in this country like that[,]”⁵ quipped Justice Antonin Scalia.

On October 6, 1999, inside the ornate courtroom of the United States Supreme Court, the justices peppered lawyers on the constitutionality of the state law that mandated that only those of Hawaiian-descent could vote in the elections for trustees of the Office of Hawaiian Affairs. Office of Hawaiian Affairs’ Chairperson Rowena Akana described the tone of the arguments: “For me it was a very, very sad event because I think the justices, at least some of them, appear to be very ignorant about who we were as a people and were looking very narrowly in this case as a 15th-amendment issue that everyone should be allowed to vote.”⁶ For some, the writing was on the wall.

The vigorous debates about sovereignty and ceded lands were momentarily sidelined as Hawaiians collectively faced a new hurdle: a decision by the United States Supreme Court—the nation’s highest court—on the future of the Office of Hawaiian Affairs.

_Controversy and Characters_

In March 1996, Harold “Freddy” Rice—who had earlier fought to halt the Hawaiian Vote—sought to register to vote for trustees of the Office of Hawaiian Affairs in the upcoming election.⁷ The registration form contained a declaration that required the application to attest that: “I am also Hawaiian and desire to register to vote in OHA elections.”⁸ Rice crossed out the phrase “am also Hawaiian and” and marked “yes” on the application.⁹ As Rice was not of
Hawaiian ancestry, his application to register to vote in the Office of Hawaiian Affairs’ election was denied.\textsuperscript{10} Rice, whose great-great grandparents were part of the initial Christian missionary families that came to Hawai‘i and struck it rich and whose great-grandfather helped to orchestrate the institution of the Bayonet Constitution and the overthrow of the Hawaiian Kingdom, filed a lawsuit against then-Governor Ben Cayetano.\textsuperscript{11} In his lawsuit, Rice alleged that the Office of Hawaiian Affairs election violated the Fourteenth and Fifteenth Amendments of the United States Constitution because it premised his right to vote on race.\textsuperscript{12} The Fourteenth Amendment provided, in relevant part: “No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.” The Fifteenth Amendment, one of the Civil War amendments, provided “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.”

Rice believed that by filing the lawsuit he was “helping” Native Hawaiians, whom he saw as “taking advantage of the welfare system by choosing not to work.”\textsuperscript{13} The same attitude was reflected in Rice’s counsel, John W. Goemans, who had moved to Hawai‘i prior to statehood in 1959 and who supported the elimination of federal funding for programs benefitting Kānaka Maoli because of his “commitment to the civil rights laws of this country and to the Constitution.”\textsuperscript{14}

Both Rice and Governor Cayetano—who had an established reputation of animosity toward Native Hawaiians—moved separately for summary judgment in their respective favors on the claim that the Office of Hawaiian Affairs’ voting scheme violated the federal constitution. The Governor argued that “Native Hawaiian” was a political classification that the government could treat as analogous to the status of Indian tribes. Rice argued that Article XII, section 5 of the Hawai‘i State Constitution, which established the Office of Hawaiian Affairs, and Hawai‘i Revised Statutes section 10-13D, which specified that persons entitled to vote must be Native Hawaiian, were unconstitutional because Native Hawaiians “are a racial rather than a political group.”\textsuperscript{15} Rice expressly rejected the notion that Native Hawaiians were akin to a recognized Indian tribe and, thus, should be afforded special status under federal law. The distinction of whether “Hawaiian” was a racial classification or a political classification was important in establishing which test the court would apply to determine the constitutionality of the law.
Under this Fourteenth Amendment equal protections analysis, on one end of the spectrum, a racial classification is reviewed under a strict scrutiny standard, which requires that the government show a “compelling governmental interest” in enacting the law and that the law enacted was “necessary” to further that interest. On the other end of the spectrum, a political classification is reviewed under the less stringent “rational basis test,” which requires the government to provide a rational connection between enacting the law and the legislative objective. It is generally acknowledged that government action is almost always validated under a rational basis review and almost always invalidated under the strict scrutiny standard. Naturally, because the Governor argued that “Hawaiian” was a political classification, it asserted that the law should be reviewed under the less strenuous rational basis test.

In his May 6, 1997 decision, federal District Court Judge David A. Ezra—a Reagan appointee—rejected Rice’s arguments. Judge Ezra, conjuring the language of Federal Indian Law, concluded that there was a “guardian-ward” relationship between the United States and the Native Hawaiian people, which resembled that of Native Americans throughout the country. He alluded to several federal laws, including the Apology Resolution, the Hawaiian Homes Commission Act, Section 5(b) of the Hawai‘i Admission Act, and recognized the “unique obligation” of the federal government to Kānaka Maoli. As such, Judge Ezra upheld the Office of Hawaiian Affairs’ voting requirement:

. . . the State of Hawai‘i created OHA as a means to fulfill the obligation taken over from the federal government as part of the Admission Act. The State of Hawai‘i did not create the trust relationship with Native Hawaiians, nor did it enact the initial legislation singling Native Hawaiians out for special treatment. Rather, the State of Hawai‘i merely enacted a reasonable method to satisfy its obligation to utilize a portion of the proceeds from the § 5(b) lands for the betterment of Native Hawaiians. This is clearly consistent with and pursuant to Congress’ mandate and intent.

Dissatisfied, Rice appealed Judge Ezra’s decision. On appeal, the Ninth Circuit Court of Appeals affirmed Judge Ezra’s ruling, holding that Hawai‘i “may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be,” even if the Hawai‘i Constitution and implementing statutes contain a racial classification on its face.
Rice filed a petition for a writ of certiorari to the Supreme Court of the United States. In a surprise to most observers, the Court granted the writ and, thus, allowed Rice to appeal the Ninth Circuit’s decision. Rice, a rancher from Hawai‘i, had brought his case to the largest legal stage. But, Rice’s fight was not solely his own.

The Rice case, as Professor Eric K. Yamamoto noted, “connected many seemingly unrelated individuals and groups in a complex web of conservative attorneys, think tanks, advocacy organizations, judges, and politicians.” Rice was joined on appeal by a slew of “staunchly conservative organizations,” including, the Campaign for a Color Blind America, Americans Against Discrimination and Preferences, the United States Justice Foundation, and the New York Civil Rights Coalition. These organizations, which by name suggest pro-civil rights agendas, were vehemently opposed to affirmative action programs and outright belligerent to minority causes and rights. Edward Blum of the Campaign for a Color Blind America ignored the century-long subjugation of Kānaka Maoli and instead tried to frame the case as a direct challenge to other minority groups by insisting that he was “appalled that African Americans and Hispanics in Hawaii are being turned away from the OHA voting polls because of their skin color.” Blum, who has chased and created cases challenging affirmative action programs around the country, saw his role “to facilitate and fund” these various lawsuits challenging affirmative action programs. In his comments, and as discussed in detail below, Blum conveniently forgot to mention that Rice was a wealthy white voter whose family assisted in the theft of Hawaiian sovereignty. Blum’s ability to bring funds to litigation has since been responsible for two recent decisions by the United States Supreme Court that struck down a portion of the Voting Rights Act in Shelby County v. Holder and reviewed affirmative action policies in college admissions in Fisher v. University of Texas. Blum’s biases were on full display in an amicus brief (friend of the court brief) filed on behalf of his organization, the Campaign for a Color Blind America, and Americans Against Discrimination and Preferences, and the United States Justice Foundation. In that brief, the organizations cited authoritatively to the work of Romanzo C. Adams, the twentieth century historian who, as discussed earlier, created the “melting pot” ideology, which has since been heavily criticized by contemporary scholars.
Another of Rice’s supporters who submitted an amicus brief on behalf of The Center for Equal Opportunity, the New York Civil Rights Coalition and Abigail Thernstrom, was conservative attorney Robert Bork. Bork gained national attention in the 1970s when, as acting attorney general under President Richard Nixon, he fired Watergate Special Prosecutor Archibald Cox for requesting Nixon’s cover-up tapes and then again in 1987 when his appointment by President Ronald Reagan to serve on the Supreme Court was rejected because of his extremist ideology. United States Senator Edward M. Kennedy characterized Bork’s view of America as “a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens’ doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists could be censored at the whim of government, and the doors of the federal courts would be shut on the fingers of millions of citizens for whom the judiciary is—and is often the only—protector of the individual rights that are the heart of our democracy.”

Consistent with his past criticism of minority views, Bork ignored the history of colonization against Hawaiians and instead trumpeted the conservative rallying cry that affirmative action programs and entities, such as the Office of Hawaiian Affairs, were unconstitutional. Instead of recognizing the unique situation in Hawai‘i and the clear reconciliatory purpose that the Office of Hawaiian Affairs was intended to address, Bork implicitly invoked a post-racial society in which everyone was equal: “The entire [Office of Hawaiian Affairs] scheme is infused with explicit racial quotas, exclusions, and classifications to a degree this Court has rarely encountered in the last half-century.”

Arguing on behalf of Rice was veteran-Supreme Court advocate Theodore “Ted” Olson. Olson, a 1965 graduate of the University of California at Berkeley, had conservative roots that began with his work as an Assistant Attorney General in the Reagan Administration. He is also a supporter of the conservative Federalist Society, which boasts members that are ardent opponents of affirmative action programs, gay and lesbian rights, immigration rights, and abortion rights. Following his stint in government, Olson made a career practicing in appellate courts and representing clients that advocated for the elimination of affirmative action programs. In 1996, for example, Olson represented the Virginia Military Institute in a challenge by a female applicant to its male-only admissions policy, and also assisted the Center for Individual Rights in supporting a challenge to an affirmative action program at the University of Texas Law
School. Olson would later be appointed United States Solicitor General under President George W. Bush after Olson successfully defended Bush in the landmark *Bush v. Gore* decision in which the conservative majority of Court handed Bush the American presidency in 2000.

On the other end of the legal battle was a diverse group of supporters of the Office of Hawaiian Affairs’ voting procedures. The Office of Hawaiian Affairs, whose leaders at the time included Trustee Mililani Trask, gained support from Ka Lāhui Hawai‘i and from the Kamehameha Schools—a wealthy private school established from a descendant of Kamehameha to serve as a school for Hawaiian children. Support for the Office of Hawaiian Affairs also rolled in from the National Congress of American Indians, Hawaii’s congressional delegation and even from the federal government, which was asked to participate in the oral arguments before the Court.

The Governor was tasked with picking “the best constitutional lawyer [his team] could find to represent the State” because he knew that the odds were stacked against the Office of Hawaiian Affairs. His initial selection of constitutional law expert Lawrence Tribe was rebuffed because of Tribe’s prior commitments. The task was left to Cayetano’s new attorney general, Earl Anzai, to find a suitable advocate. After discussions with Anzai, Cayetano selected a “top-notch advocate,” who was also a more conservative attorney and could possibly rein in on the conservative justices of the Court. Tasked with defending the State’s position, and thus, the Office of Hawaiian Affairs, was John G. Roberts, Jr., an attorney with the Washington, D.C. law firm of Hogan & Hartson LLP. Roberts’ career, which eventually led to his selection as Chief Justice of the Court by George W. Bush, traced the trajectory of the conservative movement in America. Yet, although he clerked for conservative justice William H. Rehnquist and worked in the Reagan and George H.W. Bush Justice Departments, Roberts advocated for Kānaka Maoli. Constitutional and International Law scholars and long-time duo Sherry Broder and Jon Van Dyke briefed the Court on behalf of the Office of Hawaiian Affairs.

Given the legal fire-power brought to the Court, the case was hailed as the “best briefed” case of the term. Despite the voluminous briefing and the seemingly supportive opinions of two lower courts, the Court’s decision stymied the Office of Hawaiian Affairs’ path of reconciliation for Hawaiians.
The Supreme Court announced its decision on February 23, 2000. The tally was seven in favor of Rice and two in favor of Cayetano. Writing for a five-member majority of the Court, Justice Anthony Kennedy overturned the decision of the Ninth Circuit Court. Kennedy was joined by Chief Justice William Rehnquist and Associate Justices Sandra Day O’Connor, Antonin Scalia and Clarence Thomas. Rehnquist, who was initially selected as an associate justice by President Richard Nixon, was elevated to the position of Chief Justice by President Reagan. Reagan’s stacking of conservative voices on the Court continued with his appointment of the first female justice—Arizona jurist and legislator O’Connor, Scalia, and Bork’s replacement selection, Kennedy. The fifth member of the conservative majority was Thomas, the former Chairman of the Equal Employment Opportunity Commission that was appointed by President George H.W. Bush to fill the vacancy left by the retirement of liberal firebrand Thurgood Marshall. Thomas’ former position in the EEOC was one of the positions filled by Reagan to ensure an anti-affirmative action regime in federal enforcement. Thomas had adamantly opposed all racial preference programs and saw affirmative action as “social engineering.”

The conservative majority of the Rehnquist Court continued the march of conservative jurisprudence in the 1990s and 2000s following the shifting legal landscape under Chief Justices Earl Warren and Warren Burger. The Rehnquist Court has been criticized for its hostility particularly toward Native American interests, which have been a radical departure from Courts of the past:

In the last ten terms, Indian tribal interests have lost seventy-seven percent of all their cases before the Rehnquist Court; they lost only thirty-six percent of their cases before the Burger Court. Tribal interests have not won a single case before the Supreme Court involving state jurisdiction over non-Indians, and they have lost seventy-three percent of the cases involving tribal jurisdiction over nonmembers. It is difficult to find another class of cases or type of litigant that has fared worse before the Supreme Court.

The conservative majority’s judicial activism has led Dean Aviam Soifer to characterize one of their decisions as “courting anarchy.” In this matter, the right-leaning Court concluded that the voting requirement for the Office of Hawaiian Affairs under Hawai‘i law violated the Fifteenth Amendment inasmuch as it was based entirely on a racial preference.
While the outcome was not unexpected given the composition of the Court and their prior decisions, serious harm came from the Court’s skewed and selective narrative of Hawaiian history. The Court’s piece-meal narrative was, in their own words, their way to “recount events” in Hawaiian history relevant to the case. Yet, like the mainland commissioners of the Native Hawaiians Study Commission before them, the Court relied heavily upon the biased writings of non-native scholars Ralph Kuykendall and Lawrence Fuchs. Again, the work of Kuykendall was particularly troubling given that it was commissioned by the Territory to legitimize American rule of the islands, and was written in a way that portrayed Kānaka Maoli as individuals that supported or, at least, acquiesced to the changing political landscape.

Ignoring Hawaiians’ own creation story, the Court began with a patronizing tale of an island people whose life was “not altogether idyllic” and who simply found “beauty and pleasure in their island existence.” Despite noting that the Native Hawaiian people had “well-established traditions and customs[,]” the Court was quick to point out that Native Hawaiians practiced a “polytheistic religion.” The Court could have simply stated that Native Hawaiians developed their own religion; instead it chose to highlight the difference between the Native Hawaiians’ polytheistic religious belief and the Euro-centric and monotheistic religious view (Christianity) of the majority justices. In what way was noting that Native Hawaiians had a polytheistic religion relevant to deciding the case? It was not. Thus, the reference was a subtle, yet implicit, swipe at the lack of Christianity, and therefore morality, of the Native Hawaiians. Moreover, instead of characterizing the New England missionaries as cultural and religious intruders, the Court found that those missionary families (which includes Rice’s ancestors) were simply attempting to “teach Hawaiians to abandon religious beliefs and customs that were contrary to Christian teachings and practices.”

Significantly, the Court’s narrative implied Native Hawaiian acquiescence to the significant political changes that occurred in the kingdom from the institution of the Bayonet Constitution in 1887 through the annexation of Hawai‘i. The Court noted “[t]ensions” between the “anti-Western, pro-native bloc” and the “Western business interests and property owners[.]” The Court specifically alluded to tensions in response to “an attempt by the then monarch, Queen Lili‘uokalani, to promulgate a new constitution restoring monarchical control over the House of Nobles and limiting the franchise to Hawaiian subjects.”
simplified and mischaracterized the efforts of Liliʻuokalani and Kānaka Maoli. In essence, the Court accused Kānaka Maoli of attempting an illegal overthrow of the government and ignored American business interests’ involvement in kingdom governance. While Liliʻuokalani did seek to promulgate a new constitution, she did so in response to the calls of the Hawaiian people, who had been effectively written out of society with the foreign-imposed Bayonet Constitution in 1887. Whereas the kingdom’s 1852 Constitution provided universal suffrage to all regardless of race, the Bayonet Constitution specifically disenfranchised “Asians,” created an income requirement that effectively removed Kānaka Maoli as eligible voters, and enfranchised white foreigners without any requirement that they renounce their former allegiance or naturalize as subjects of the kingdom. Put simply, the Bayonet Constitution, which received its name because of the threat of violence that the white instigators promised if then-monarch Kalākaua refused to sign, provided “grossly disproportionate political power” to white business interests.

It was all a part of the “Anglo-Saxonizing Machine” that the missionary descendants viewed as supreme: “We declare to [Kānaka Maoli] that the Anglicized civilization is settled in this country and is inevitably to prevail. Their only good prospect is heartily to fall in line with it, earnestly to study and diligently to practice all that is pure, just, true, lovely, and of good report in these thoughts, customs and habits of the haole.”

Conspirator Lorrin A. Thurston understood the illegality of his actions and attempted to justify their treasonous acts by alluding to images of the American Revolution: “Unquestionably, the [Bayonet] constitution was not in accordance with law; neither was the Declaration of Independence from Great Britain. Both were revolutionary documents, which had to be forcibly effected and forcibly maintained.”

This “tension” was erased from the Rice majority’s opinion.

The Court noted that a Committee of Safety with the “active assistance” of American minister to Hawaiʻi, John Stevens, and American armed forces “replaced the monarchy with a provisional government,” and that Queen Liliʻuokalani “could not resume her former place,” which led to the establishment of the Republic of Hawaiʻi. Again, the Court simplified history and wholly ignored that “replac[ing]” the monarchy involved direct threats of violence to the Native Hawaiian people. Indeed, the characterization of American involvement in the overthrow as “active assistance” downplayed the landing of American marines and Liliʻuokalani’s formal protests to President Grover Cleveland and the American Congress. The Court ignored the
American investigation and July 1893 Blount Report that found that the “United States diplomatic and military representatives had abused their authority and were responsible for the change in government.” The Court ignored the subsequent effort by members of the Senate Foreign Relation Committee to discredit the findings of the Blount Report by cobbling together pro-annexationist testimony in Hawai‘i into a subsequent report. That subsequent Morgan Report, made at the request of Foreign Relations Chairman, racial segregationist and Ku Klux Klan leader John Tyler Morgan, attempted to exonerate American involvement in the overthrow. While it may have swayed some uninformed and pro-annexationist leaders at the time, the Morgan Report has been sternly criticized for its slanted and imperialist agenda. Yet, instead of recounting these American investigations, Justice Kennedy’s opinion simply ignored them.

The Court failed to mention the overwhelming resistance to American annexation by Lili‘uokalani and Kānaka Maoli. Following the overthrow, Lili‘uokalani made several trips to the United States to seek assistance in reinstating her government. While the Court mentioned a “Joint Resolution” that annexed Hawai‘i to the United States in 1898, it failed to justify how such a “Joint Resolution” could annex another sovereign entity and have binding effect like a treaty, as required by the United States Constitution. The Court wholly ignored the 21,000 Kanaka Maoli signatures (which represented well over half of the adult Hawaiians at the time) obtained on a petition protesting an annexation treaty that was sent to the United States Senate and ultimately led to the proposed-treaty’s defeat.

The Court’s biases were also on full display through its description and characterization of Plaintiff Freddy Rice. First, in a very different way that a citizen of California is a Californian, the Court characterized Rice as a “citizen of Hawaii and thus himself a Hawaiian in a well-accepted sense of the term.” The characterization of Rice as “Hawaiian” trivialized what it meant to be “Hawaiian” as most Hawai‘i citizens recognize that “Hawaiian” refers to a person of Native Hawaiian blood. It was, as Professor Chris Iijima noted, “misinformed, biased, and plainly wrong.” Second, the Court described Rice as a “descendant of pre-annexation residents of the islands.” It failed to account for the role played by the Rice family in the subjugation of Kānaka Maoli throughout the nineteenth century. For example, it was Rice’s great-great grandparents William Harrison Rice and Mary Sophia Hyde Rice who voyaged to
Hawai‘i to preach their religious values—values that needed to be taken to the “savage” indigenous people in much the same way that Mary’s father brought Christian values to the Seneca Indian tribe. After arriving in Hawai‘i, William ended up doing well by amassing land and money from the growing sugar industry on Kaua‘i. William, who supervised the creation of the first irrigation ditch in Hawai‘i, was also responsible for diverting the natural flow of water from native farmers to ensure the sustainability of the sugar plantation. That diversion, when repeated throughout the Hawaiian Islands, effectively cut-off native farmers from water and all but ensured the demise of their crops, ensured a reliance on a western economic structure, and eviscerated the Hawaiian culture and way of life. When combined with the results of western land tenure in the Māhele, William’s diversion of water in favor of plantations closed the door on native control of their land and resources.

William’s children immersed themselves in the fabric of western control in Hawai‘i. William’s daughters, Maria and Anna, married white-missionary descendants that went on to form companies like AMFAC and Castle & Cooke—two of the “Big Five” companies that controlled the Hawaiian economy for decades, in what some have characterized as the most consolidated system of power throughout the United States. William’s son (and Freddy Rice’s great-grandfather), William Hyde Rice, continued the family business and amassed a large portion of land on Kaua‘i (at one point being one of the top ten lands owners on the island). William Hyde eventually entered politics and became a member of the kingdom’s House of Representatives. Despite his role as a politician for the kingdom, William Hyde was instrumental in drafting the Bayonet Constitution of 1887, which, forced upon Kalākaua, stripped the monarch of substantial power and disenfranchised native voters in favor of white control. Clearly, generations of the Rice Family played key roles implementing and enforcing laws and practices that benefitted white-Americans at the expense of Kānaka Maoli. The Rice Court, however, conveniently left this context out of its decision.

These glaring omissions are likely the result of a majority on the Court who had clear political and historical biases. Indeed, the Court’s bias was epitomized in the last few paragraphs of its historical background, in which the Court noted two “important matters[.]” First, the Court concluded that the introduction of western diseases was “no doubt” a “cause of the despair, disenchantment, and despondency . . . in descendants of the early Hawaiian people.” In other
words, disregard America’s involvement in the overthrow and subjugation of the Hawaiian political body, disregard America’s suppression of Hawaiian language, culture, and history, disregard the theft of Hawaiian land and resources, and instead accept that the current socio-economic struggles was the result of a people that could not survive that Darwinian notion of survival of the fittest. Second, the Court concluded its re-telling of Hawaiian history by highlighting the influx of immigrants to the islands. Justice Kennedy highlighted the following immigrant groups that were brought to Hawai‘i: “Chinese, Portuguese, Japanese, and Filipinos[.]” At no time did the Court refer to Americans and other Western individuals as “immigrants.” In the eyes of the Court, Americans—including Freddy Rice’s missionary ancestors—were “settlers” not “immigrants”; Americans were, as Professor Iijma interpreted the Court’s specific terminology, the “rightful and natural heir to the land of Hawaii” and not just another ethnic group coming to the islands for work. It is then not surprising that the Court concluded: “Each of these ethnic and national groups has had its own history in Hawaii, its own struggles with societal and official discrimination, its own successes, and its own role in creating the present society of the islands.” The Court’s message was clear: if these other minorities could pick themselves up by their bootstraps, so too could the Kānaka Maoli.

As if the Court’s stinging mischaracterization of nineteenth and early twentieth century Hawaiian history were not enough, it then made a decision regarding the Office of Hawaiian Affairs without adequately analyzing the agency’s intent, its creation, and its role in the Hawaiian community. Surprisingly, the Court failed to mention the reconciliatory purpose for which the Office of Hawaiian Affairs was created and conveniently left out from its opinion the fact that the Office of Hawaiian Affairs (and its constitutional foundation) was voted for and approved by a majority of citizens of the multi-ethnic State of Hawai‘i in 1978.

When it pleased the Court, it found certain congressional and jurisprudential “historical conclusions . . . persuasive[.]” For example, the Court ignored the congressional mandate in the Admissions Act that the State hold lands in trust for the native Hawaiians. As the dissenting opinion of Justices John Paul Stevens and Ruth Bader Ginsburg noted, “it is a painful irony indeed to conclude that native Hawaiians are not entitled to special benefits designed to restore a measure of native self-governance because they currently lack any vestigial native government—a possibility of which history and the actions of this Nation have deprived them.” In another
example of the Court’s selective nature, while quick to cite to legislative history from the
enactment of the Hawaiian Homes Commission Act that declared Kānaka Maoli as “wards,” the
Court all but ignored the federal Apology Resolution that set forth congressional and presidential
apologies for the actions of Americans with the overthrow of the kingdom and called for
reconciliatory efforts between Kānaka Maoli and the United States. The Court failed to
recognize that an American law clearly stated that Kānaka Maoli “never directly relinquished
their claims to their inherent sovereignty as a people or over their national lands to the United
States, either through their monarchy or through a plebiscite or referendum[.].”

It, therefore, is not surprising that conservative justice, Antonin Scalia, had the following colloquy with Rice’s
attorney, Ted Olson, about the significance (or lack thereof) of the Apology Resolution:

Scalia: You mean you’re contradicting the congressional resolution that said
we’re guilty? Do we have to accept that . . . resolution as an accurate
description of history?

Olson: Of course, and this Court . . .

Scalia: Can’t Congress make history? [Laughter in the audience]

Olson: Congress does make history, but Congress, of course, can’t change
history. I’m . . . not accepting everything that’s in the so-called
Apology Resolution.

For some, like Scalia and his conservative colleagues, Congress’ recitation of Hawaiian history
was not binding and the Court could, on its own, (re)write history.

Given its tailored view of Hawai‘i political and legal history, it was clear the direction
that the Court was headed. It concluded that the voting scheme for the Office of Hawaiian
Affairs, although argued as being based on ancestry, was intended to serve as a racial
classification: “The State, in enacting the legislation before us, has used ancestry as a racial
definition and for a racial purpose.”

The Court then made the bold pronouncement that
reflected the conservative mantra of picking oneself up by the bootstraps: “One of the principal
reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a
person to be judged by ancestry instead of by his or her own merit and essential qualities.”

The Court had the audacity to then cite the following quote about racial equality from a 1943
decision, Hirabayashi v. United States, in which an earlier Court held that the internment and
curfews of Japanese Americans by the American government during World War II was
constitutionally firm: “Distinctions between citizens solely because of their ancestry, are by their
very nature odious to a free people whose institutions are founded upon the doctrine of equality.”

The Court then “reject[ed]” all of the State’s arguments. First, it sidestepped the defense that the exclusion of non-Hawaiians from voting was permissible under case law that allowed differential treatment of Indian tribes. The Court limited its decision by concluding that the Fifteenth Amendment was applicable because the election of trustees for the Office of Hawaiian Affairs “are elections of the State, not of a separate quasi sovereign[.]” The Court ignored the connection found by the federal district court judge and the three-panel members of the Ninth Circuit that the case Morton v. Mancari was analogous to the instant case. In Mancari, a unanimous Court upheld a federal Bureau of Indian Affairs policy that favored hiring Native Americans because such “special treatment can be tied rationally to the fulfillment of Congress’ unique obligation towards the Indians[.]” The Mancari Court determined that hiring preferences, like those at issue in Mancari, ensured Native Americans are given greater participation in their own self-governance, furthered the federal government’s trust obligations to the Native American tribes, and reduced the negative effect of having non-Native Americans administer matters that affected Native American tribal life. It specifically held that the BIA hiring policy at issue in that case was not a “racial preference,” but was “an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsible to the needs of its constituent groups.” The Court in Rice narrowed the decision in Mancari by concluding that that preferential hiring policy, while having a racial component, was specifically directed towards members of “federally-recognized” tribes. Accordingly, while the history of colonization of Native Americans is very much similar to that of Kānaka Maoli, the Court in Rice refused to hold the State to the same constitutional standard and instead asserted that the State would “extend the limited exception of Mancari to a new and larger dimension.” The State, according to the Court, was “fenc[ing] out whole classes of its citizens from decisionmaking [sic] in critical state affairs.” Noticeably, the Court sidestepped the main issue in the case of whether Hawaii’s indigenous people had a political status akin to that of Native Americans. According to the Court, “[i]t is a matter of some dispute . . . whether Congress may treat the native Hawaiians as it does the Indian tribes.” Instead of navigating
“that difficult terrain,” Kennedy chose to decide the issue based on the State’s lack of authority to enact a voting scheme like that at issue in the case.

Second, the Court then trumped the State’s argument that this case was similar to a line of decisions where the Court held that the principle of “one man, one vote” did not apply in certain circumstances. The Court held, however, “[t]he Fifteenth Amendment has independent meaning and force. A State may not deny or abridge the right to vote on account of race, and this law does so.”

Finally, the Court rejected the State’s defense that the voting restriction does no more than ensure an alignment of interests between the fiduciaries and the beneficiaries of the trust because it was, according to the Court, not clear “that the voting classification is symmetric with the beneficiaries of the programs OHA administers” (i.e., even though the Office of Hawaiian Affairs’ funds from section 5(f) of the Admissions Act were earmarked for the benefit of “native Hawaiians,” the State permits both “native Hawaiians” and “Hawaiians” to vote for trustees). More importantly, the Court added, the State’s argument failed because it rested on the “demeaning” premise that citizens of a particular race are somehow more qualified than others to vote on certain matters.

Justice Kennedy concluded with a stinging rebuke of Hawaiians and a paternalistic and patriotic message:

When the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations; and their dismay may be shared by many members of the larger community. As the State of Hawaii attempts to address these realities, it must, as always, seek the political consensus that begins with a sense of shared purpose. One of the necessary beginning points is this principle: The Constitution of the United States, too, has become the heritage of all the citizens of Hawaii.

In a concurring opinion, liberal Justice Stephen Breyer (with whom Justice David Souter agreed) joined the result of the majority’s decisions, but specifically took aim at the Office of Hawaiian Affairs’ electorate and the “trust” that was established. The concurring opinion continued with a barrage of attacks against the Office of Hawaiian Affairs. Justice Breyer concluded that the State’s effort to justify its voting rules through analogy to a trust for an Indian tribe should be rejected because there was no “trust” to native Hawaiians established. He specifically concluded that the State Constitution’s use of the word “trust” when referring to the
1.2 million acres of ceded lands bore little resemblance to a trust for native Hawaiians because section 5(f) of the Admissions Act made clear that the ceded lands were to benefit all people of Hawai‘i and not just native Hawaiians. To Justice Breyer, the Office of Hawaiian Affairs’ electorate did not sufficiently resemble an Indian tribe. To Justice Breyer, the Office of Hawaiian Affairs was nothing more than “a special purpose department of Hawaii’s state government.”

Although he did not need to address the issue, Justice Breyer focused on blood quantum and how the State’s definition of “Hawaiian” was so “broad” that it “goes well beyond any reasonable limit.” Professor J. Kēhaulani Kauanui concluded that the Court, thus, “relied on the logics of dilution to undermine inclusive conceptualizations of Nativeness.” In other words, for some on the Court, there needed to be a clean delineation by blood quantum of those who qualified for benefits and those that did not. Indeed, during oral arguments in this case, Justices Kennedy and Scalia pressed the federal government’s attorney about whether it was okay to allow someone with “148th,” “196th,” “195th Hawaiian blood” to participate in the Office of Hawaiian Affairs’ elections, thereby suggesting the arbitrariness of ancestry. Justice Breyer, a Clinton appointee who is usually a consistent liberal vote, noted: “It seems to me . . . that everyone who has one Hawaiian ancestor at least gets to vote, and more than half of those people are not native Hawaiians. They just have a distant ancestor.” Citing the remoteness of an ancestor, Justice Breyer asked “How do we extend that to people 10 generations later, who had 10 generations ago one Indian ancestor? I mean that might apply to everybody in the room. We have no idea.” In his concurring opinion, Justice Breyer declared the connection to one Native Hawaiian ancestor as meaningless: “There must . . . be . . . some limit on what is reasonable, at the least when a State (which is not itself a tribe) creates the definition. And to define that membership in terms of 1 possible ancestor out of 500, thereby creating a vast and unknowable body of potential members—leaving some combination of luck and interest to determine which potential members become actual voters—goes well beyond any reasonable limit.” In much the same way that opponents of the one thirty-second blood quantum quota in the Hawaiian Homes Commission Act debates argued that such dilution of blood made a Hawaiian individual “to all intents and purposes a white person[,]” Justice Breyer’s line of questioning and decision implied that dilution of blood quantum disqualifies individuals from
being members of a sovereign indigenous body. The Court reaffirmed the early twentieth
century doctrine and again tied indigeneity, and thus sovereignty, to blood quantum, which has
enabled “white American economic, political, and social domination” to endure.\textsuperscript{101}

While American blood logic emerged within this lawsuit through Justice Breyer’s
concurrence, so too did the argument of native Hawaiians who, from the inception of the Office
of Hawaiian Affairs, have challenged the agency’s expenditure of section 5(f) trust funds for
both native Hawaiians and Hawaiians, broadly. In an amicus brief to the Court, the Hou
Hawaiians (a self-described tribal body of native Hawaiians, as defined by the Hawaiian Homes
Commission Act) criticized the Office of Hawaiian Affairs’ expenditures and compared
Hawaiians to dogs:
Suppose wolves were an endangered species and Congress had given the state of
Virginia 1.4 million acres of land in trust to provide habitat and funding to
preserve them. If Virginia installed the American Kennel Club as trustees of this
land and they, in turn, proposed that the definition of wolf be changed to include
all breeds of domestic dogs, it would be a clear breach of trust. OHA is doing the
same thing. OHA wants a person who is one-half Filipino, one-quarter Japanese,
one-eighth Caucasian, one-sixteenth Chinese and one-sixteenth Hawaiian to be
given the same benefits as a person who is one-half Hawaiian. How can such a
person make a claim to participate as an equal beneficiary with a person who is
one-half Hawaiian?\textsuperscript{102}

The Hou Hawaiians’ analogy conjures images of a pack of ravaging dogs fighting over
scraps. The Hou Hawaiians read the section 5(f) purpose literally and were unfortunately
ingratiated with the American blood logic and the notion that they were more worthy of
resources than those of less than fifty percent Hawaiian blood. Even on the stage of the highest
court in America, where the stakes were at its highest, native Hawaiians themselves put to the
fore their issues with the Office of Hawaiian Affairs. It was a sign of additional trouble for the
Office of Hawaiian Affairs moving forward.

The harm from the Rice majority and concurring decisions, much like that of the
successive generations of the Rice Family, comes from a legitimization of American superiority
over indigenous peoples. The Rice Court, as Professor Yamamoto concluded, “turned a blind
eye to history.”\textsuperscript{103} As Justice Stevens, in his scathing dissent, wrote: “The Court’s holding today
rests largely on the repetition of glittering generalities that have little, if any, application to the
compelling history of the State of Hawaii.”\textsuperscript{104} One scholar argued that “[i]f there is a textbook
case in which majoritarian perspectives and racial norms masquerade as neutral narrative, it is the *Rice* decision."  

Even more troubling, with the same stroke of a pen, the Court put civil rights jurisprudence toe-to-toe with indigenous law and, pandering to the tenuous arguments of an alleged “color-blind” Plaintiff, legitimized the continued subordination of Kānaka Maoli and failed to live up to the principle of “Equal Justice Under Law,” as emblazoned across the western façade of the Supreme Court building in Washington, D.C. The Court (un)succesfully stuffed the issue of the Office of Hawaiian Affairs’ narrowly tailored voting scheme into a box of affirmative action and civil rights. As Dean Danielle Conway wrote, “What does affirmative action have in common with Native Hawaiian sovereignty? Absolutely nothing, except in the manner that America responds to Peoples of Color.”

Following the decision, Rice boldly professed, “I’m proud to be part of Hawaii’s history . . . It was good for Hawaiians, and certainly good for the state. Got everybody thinking. Hawaiians took advantage of being able to play the part of victim and get entitlements based on race. They stepped over the line. The *Rice* decision made everyone step back.” Rice and the Court’s decision indeed made Hawaiians “step back.” Yet, Attorney Roberts saw the decision as a victory: “The good news is that the majority’s opinion was very narrowly written and expressly did not call into question the Office of Hawaiian Affairs, the public trust for the benefit of Hawaiians and native Hawaiians, but only the particular voting mechanism by which the trustees are selected.” The gains of the Hawaiian movement and the efforts of the Office of Hawaiian Affairs were suddenly hurled into the air. Erased from the collective memory was the fact that the Office of Hawaiian Affairs was created as a vehicle to reconcile the harm caused by a century of atrocity committed against the Hawaiians by those like Freddy Rice and his selfish ancestors.

**Aftermath**

Following the issuance of the *Rice* decision, Democratic Senator Dan Inouye issued a statement to the Office of Hawaiian Affairs and to Governor Cayetano (but not to the media) that demanded the trustees resign: “I believe that the Governor has authority under a separate State of Hawaii statute to appoint interim trustees so that the important work of the Office of Hawaiian
Affairs need not be interrupted.” Cayetano followed Senator Inouye’s analysis, issued his own press release, and demanded the trustees’ resignations. Cayetano, at first, refused calls to reappoint the then-elected trustees. Some criticized the move as another attempt by Hawaii’s Democratic Party to “facilitate the control of OHA by the state and away from the electoral process.” Others saw a personal vendetta against Trustee Mililani Trask, who had been a longtime critic of Cayetano and who in 1999 became embroiled in a public dispute with Senator Inouye and the Japanese America Citizens League over comments she made. “It’s obvious. He’s ticked off at the board and he wants to get rid of them,” said former-State Representative and Office of Hawaiian Affairs Trustee Kīnaʻu Kamaliʻi. Trustee Trask called for civil disobedience throughout the State’s ceded lands, including at airports and harbors, educational facilities and atop Mauna Kea. Office of Hawaiian Affairs attorney, Jon Van Dyke saw no reason to believe that the Court’s Rice decision nullified the seats of the nine trustees. The State Senate held public meetings across the State about the Rice decision. The move to replace the trustees was not well received by the Native Hawaiian community. At one hearing, Art Frank, a Hawaiian from Waiʻanae, passionately stated, “The Hawaiians have been screwed, blued and tattooed for years, when is it going to stop?” Frank expressly criticized Cayetano, “OHA stands for Office of Hawaiian Affairs, not Office of Philippine Affairs[.]” Georgette Meyers testified, “I’m so angry I could scream. . . . We will fight this and believe me, we will win.” Professor Kameʻelehiwa stated, “We elect political leaders, we have the absolute right to do so and we prefer elected leaders to ones appointed by the governor[.]”

Native Hawaiian frustration against Cayetano and his administration was at its peak. One artist expressed his frustration with the Rice decision and Cayetano’s subsequent actions taken in its aftermath. In his graphic work, titled “Benocide,” artist Kēwaikaliko likened the settler colonial mindset of Cayetano, specifically his hostility and legal assaults on Kānaka Maoli, to a modern lynching. The work portrayed a caricature of Cayetano lynching the shadow of a Hawaiian man on a tree made of money overlooking the tourist hub of Waikīkī and Diamond Head. Instead of looking at his Hawaiian victim, Cayetano is pictured looking, as if seeking approval, from a white man dressed in an aloha shirt with a swastika design who is gleefully waving a Hawaiian flag—the flag that served as the symbol of the Kingdom of Hawaiʻi prior to its illegal overthrow. As Dean Itsuji Saranillo wrote, “[t]his is a subtle but apt illustration of the
performative role that Cayetano as a ‘Filipino American’ must play in order to maintain his political position. . . . Cayetano, as a member of a subordinate group in a political position of power, affirms the colonial order that makes his position possible.”

To deepen the imagery, Kēwaikaliko positions Cayetano above the skull of a bearded man, presumably annexationist Sanford B. Dole, as if Cayetano has taken the place of the colonial oppressors. Kēwaikaliko’s work was a vivid reminder of the ways in which the State has failed in its responsibilities to Hawaiians; more importantly, “Benocide” forced viewers “to see the often uncomfortable and harsh realities of colonialism in Hawai‘i.”

A week after the controversial Rice decision was handed down, on March 2, 2000, Governor Cayetano and Office of Hawaiian Affairs Chairman Clayton Hee announced an agreement that the State and the agency would ask the Hawai‘i Supreme Court to clarify, under Hawai‘i law, the status of the trustees and to determine whether the governor had the authority to appoint replacement trustees. The announcement came after a tense week when Cayetano initially announced that he would not consider appointing the then-trustees to the position, and only after Chairman Hee had a discussion with his friend and assured him that the Office of Hawaiian Affairs would respond to the State on some decisions made by the trustees, such as creating a retirement program for trustees.

On March 30, 2000, the parties asked the Hawai‘i Supreme Court to answer the following question: “Did the United States Supreme Court’s recent opinion and judgment in Rice v. Cayetano, create a ‘vacancy’ that ‘occurs through any cause other than expiration of the term of office’ under Hawaii Revised Statutes [section] 13D-5 as to those OHA trustees who were elected in 1996 and/or 1998?” Cayetano’s position was that the elections of the trustees were invalidated by Rice, and therefore the positions of trustees were vacant, thereby giving Cayetano the authority to appoint replacements. The Office of Hawaiian Affairs’ position was that Rice only invalidated the voting process, but there had been no express judicial determination that the elections of the current trustees were invalid or that the results were void. Thus, the Office of Hawaiian Affairs believed that the trustees could “continue to serve legitimately through and until the termination of their current term of office.” Indeed, Rice and Cayetano stipulated (and did not subsequently challenge) that “[j]udgment in [the United States Supreme Court] be entered declaring only that denying . . . Rice the right to vote in elections of trustees for the
Office of Hawaiian Affairs because he is not ‘Hawaiian’ violated the Fifteenth Amendment... No further issues or claims remain in this case to be decided or resolved.”

Nevertheless, and even though it did not legally have to do it, the Office of Hawaiian Affairs agreed with Cayetano that their “difference of opinion” created a controversy that needed to be resolved by the Hawai‘i Supreme Court. In an August 28, 2000 opinion, the Hawai‘i Supreme Court reviewed election cases from across the United States and noted that requiring a reelection when a law creating the election was invalidated was a “extraordinary and destabilizing [] remedy.” It then concluded that the trustees were “de facto officers” inasmuch as they were elected pursuant to a law that was subsequently found to be unconstitutional in Rice. Despite the trustees not being fully vested with the authority to serve, the Hawai‘i Supreme Court concluded that the State or some other challenger must take further action through a unique quo warranto process to allow the parties to present their arguments before a trial court as to the authority of a person to serve in public office.

In a concurring opinion, Cayetano-appointee Simeon R. Acoba, Jr. agreed with the majority that a quo warranto lawsuit was the appropriate proceeding for “fashioning an orderly transition” in the composition of the Board of Trustees. Justice Acoba, however, analyzed the Rice decision and concluded, “it is well established that a law which is unconstitutional is a nullity” and, therefore, although one may “sympathize” with the current trustees, their selection was “permanently impaired.” Justice Acoba then stated that the court should “formalize what should be a self-evident proposition”—that a quo warranto proceeding would ultimately be appealed back to the Hawai‘i Supreme Court for a determination of whether the trustees had authority to hold office. In an apparent criticism of the Office of Hawaiian Affairs’ litigation tactics, Justice Acoba stated that the parties should have argued for a decision on the quo warranto issue to enable the trustees to get an immediate decision on the issue as opposed to “fending off what may be inevitable and inescapable” further litigation.

Justice Acoba’s words foretold the position taken by his former law partner Cayetano, who on September 7, 2000, told the trustees that he would consider reappointing all of them for the interim so that there could be an election of all trustees in the 2000 election, but warned that he would not reappoint the trustees whose terms expired in 2002, including Mililani Trask, if he was forced to file a quo warranto proceeding. Closed-door negotiations between Office of
Hawaiian Affairs lawyers and the State Attorney General’s Office failed as Cayetano’s lawyers refused to budge from the position that the trustees resign. As Trustee Rowena Akana recalled: “There were no options offered to us by the governor’s office. None.”

Cayetano’s threat and relentlessness to his position worked. That evening, Trustee Frenchy DeSoto—the “mother” of the Office of Hawaiian Affairs—resigned: “I don’t think I can fight the media or this governor[.]” DeSoto added, “I’m 72 years old and I’m tired. I don’t think I’m quitting. I’d rather resign than get dumped[.]” The next morning, the remaining trustees followed and submitted their resignations. The local media characterized the resignations as “a sign of solidarity on an often factious board[.]” The trustees themselves saw the resignations as a “way to cure the pain and suffering” that they continued to endure from the Cayetano Administration’s belligerence towards them. The resignations were a way to show their beneficiaries that the trust (and the work of the agency) was more important to the trustees than their own positions. Trustee Akana, however, criticized the actions of the Governor: “We have not been accused of malfeasance, not been accused of misappropriation of funds, not been accused of any criminal acts. But they prosecute and persecute us to the point we must vacate the seats we won in a certified election in order to preserve a trust that we care about[.]”

The decision to resign came days before federal Judge Helen Gillmor struck down the State constitutional requirement that trustees “shall be Hawaiians.” In that case, Arakaki v. Hawai‘i, thirteen individuals of “English, Japanese, Irish, Okinawan, Portuguese, Chinese, Filipino, German, Spanish, Scottish, and Hawaiian” descent filed suit against the State arguing that they wished to choose a pool of trustee candidates that were not limited by race. One of those plaintiffs, Thurston Twigg-Smith, was the grandson of Lorrin A. Thurston—the individual that spearheaded the overthrow of the Hawaiian Kingdom in 1893. As in Rice, the plaintiffs argued that the requirements that the trustees be Hawaiian violated, among other laws, the equal protection clause of the Fourteenth Amendment and the Fifteenth Amendment. In her decision, and consistent with the Court’s ruling in Rice, Judge Gillmor concluded that the requirement that trustees be “Hawaiian” violated the Fifteenth Amendment. On appeal, that ruling was affirmed: “a candidate restriction which directly and expressly excludes all non-Hawaiians from qualifying for the office of OHA trustee, compels the conclusion that the candidate restriction abridges the right to vote and is thus prohibited by the Fifteenth Amendment.” Judge
Gilmore’s decision also took the extraordinary step of concluding that the requirement that trustees be “Hawaiian” violated the Fourteenth Amendment—a decision that the Rice Court punted. Relying upon excerpts from Rice, Judge Gilmore analyzed the State constitutional provision under the strict scrutiny standard and concluded that the law violated the Fourteenth Amendment:

If the Court were to reach the question and find that the State owed a trust obligation to Hawaiians or that the State has a compelling interest in remedying past wrongs to Hawaiians, this Court does not accept the proposition that non-Hawaiians are unable to adequately serve that obligation as trustees. As Defendants argue, the belief that persons of one race are unable to adequately represent the broad spectrum of political viewpoints is an “untenable premise.” This Court agrees. The assertion that non-Hawaiians are incapable of fulfilling the obligations of the public office of OHA trustee is equally untenable. Because the State has non-discriminatory alternatives available to satisfy its objectives, the requirement that OHA trustees be Hawaiian will not survive strict scrutiny.

Even though she did not need to reach the issue and could have chosen to narrowly decide the case, Judge Gilmore delivered another harsh blow to the Office of Hawaiian Affairs. Fortunately, the appellate court overturned Gilmore’s decision on the Fourteenth Amendment by finding that the plaintiffs lacked standing to sue the trustees for Fourteenth Amendment violations. Standing is a threshold requirement to enable a court to have jurisdiction to decide a matter; the inquiry of whether a party has standing focuses on the injury to the plaintiff. The appellate court clarified that the Fourteenth Amendment challenge pertained to the appointment (not election) of trustees and then reversed Gilmore’s decision because the plaintiffs failed to put forth evidence that demonstrated and “injury traceable to the restriction on appointments to Hawaiians.”

Rice opened the floodgates to litigation against the Office of Hawaiian Affairs. It emboldened an already hostile State government and epitomized the struggle of the Office of Hawaiian Affairs to reconcile issues for Kānaka Maoli with the State and the federal governments. As explored in the following chapters, Rice and its progeny set the course for the Office of Hawaiian Affairs in the twenty-first century.

2 Id. at *24.

3 Id. at *29.

4 Id. at *45.

5 Id.


8 Id.

9 Id.

10 Id.


12 *Rice*, 963 F. Supp. at 1548-49.


14 Id.


16 Id.

17 Id.

18 Id. at 1555.

19 *Rice v. Cayetano*, 146 F.3d 1075 (9th Cir. 1998).

20 Yamanoto and Betts, supra note 13, at 555.


22 Omandam, supra note 6, at A1, A8.


24 Id.


Yamamoto and Betts, supra note 13, at 557.


Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

Benjamin J. Cayetano, Ben: A Memoir, From Street Kid to Governor 442 (Watermark Publishing 2009).

Id. at 442-43.

Id.

Id.


Id.

See Chapter 2 (discussing “melting pot” ideology).

Rice, 528 U.S. at 500.

Id.

Id. at 501.

Id. at 504.

Id.

Lili‘uokalani, Hawaii’s Story by Hawaii’s Queen 226-36 (Lothrop, Lee & Shepard Co. 1898).

Haw. Kingdom Const. (1852).

Yamamoto and Betts, supra note 13, at 560 (citation omitted).

S.E. Bishop, Anglo-Saxonizing Machines, THE FRIEND, August 1887, at 63.


Rice, 528 U.S. at 505.


Susan Lawrence Davis, Authentic History: Ku Klux Klan, 1865-1877 45 (New York 1924).

Lili‘uokalani, supra note 47, at 313-40.
57 Rice, 528 U.S. at 499.
59 Rice, 528 U.S. at 510.
61 Id.
63 Id.
66 Haunani-Kay Trask, From a Native Daughter: Colonialism and Sovereignty in Hawai‘i 14 (Univ. of Haw. Press 1998).
67 Rice, 528 U.S. at 506.
68 Id.
69 Id.
70 Id.
71 Iijima, supra note 58, at 103.
72 Rice, 528 U.S. at 506.
73 Id. at 501.
74 Id. at 535 (Stevens, J., dissenting) (emphasis added).
76 Rice, 528 U.S. at 515.
77 Id. at 517.
78 Id. (citing Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).
79 Id.
81 Id. at 541-42.
82 Id. at 553-54.
83 Rice, 528 U.S. at 519.
84 Id. at 520.
85 Id. at 522.
86 Id. at 518-19.
87 Id. at 522.
88 Id. It is, again, important to highlight that the term “native Hawaiian” refers to individuals of not less than one-half part Hawaiian ancestry, as defined in the Hawaiian Homes Commission Act, whereas the term “Native Hawaiian” refers to all individuals of Hawaiian descent regardless of blood quantum.
89 Id.
90 Id. at 524.
91 Id. at 525 (Breyer, J., concurring).
92 Id.
93 Id. at 526.
94 Id.
96 Transcript of Oral Argument, supra note 1, at *51.
97 Id. at *36.
98 Id. at *44.
99 Rice, 528 U.S. at 501.
100 Kauanui, supra note 95, at 118 (citing U.S. Senate 1920, Statement of Hawai’i Attorney General Harry Irwin).
104 Rice, 528 U.S. at 527-28 (Stevens, J., dissenting).
105 Iijima, supra note 58, at 98.
107 Yamamoto and Betts, supra note 13, at 546 (citation omitted).
110 Id. at 296.
112 Pat Omandam, Court Guidance Sought on OHA, HONOLULU STAR-BULLETIN, March 2, 2000, at A1, A8.
114 Id.
115 Id.
116 Omandam, supra note 112, at A1, A8.
117 Dean Itsuji Saranillo, Colonial Amnesia: Rethinking Filipino “American” Settler Empowerment in the U.S. Colony of Hawai‘i, in ASIAN SETTLER COLONIALISM: FROM LOCAL
GOVERNANCE TO THE HABITS OF EVERYDAY LIFE IN HAWAIʻI 270 (Fujikane and Okamura, eds., Univ. Haw. Press, 2008).

118 Id.
119 Omandam, supra note 112, at A1, A8.
120 Id.
121 Office of Hawaiian Affairs v. Cayetano, 94 Hawaiʻi 1, 2, 6 P.3d 799, 800 (2000).
122 Id. at 5, 6 P.3d at 803.
123 Id.
124 Id.
125 Id. at 4, 6 P.3d at 802.
126 Id. at 5, 6 P.3d at 803.
127 Id. at 6, 6 P.3d at 804.
128 Id. at 7, 6 P.3d at 805.
129 Id. at 8, 6 P.3d at 806.
130 Id. at 9, 6 P.3d at 807 (Acoba, J., concurring).
131 Id. at 11, 6 P.3d at 809.
132 Id.
133 Id.
135 Id.
136 Id.
137 Id.
138 Id.
139 Id.
140 Id.
141 Id.
143 Id. at **26-33.
144 Arakaki v. Hawaiʻi, 314 F.3d 1091, 1095 (9th Cir. 2002).
146 Arakaki, 314 F.3d at 1098.
147 Id.
148 Id.
What was the next move? On the heels of the *Rice* decision, Hawaiian Senator Daniel K. Akaka and the rest of Hawai‘i’s congressional delegation formed a Task Force on Native Hawaiian issues. The Task Force’s immediate goal was to clarify the relationship between Hawaiians and the federal government.\(^1\) For the *Rice* decision had created, as Professor Melody K. MacKenzie noted, a “sense of urgency” for Kānaka Maoli.\(^2\) The Task Force’s solution was federal legislation—an idea that the trustees vigorously latched onto in an attempt to save their agency.

While the Office of Hawaiian Affairs was able to accomplish a lot, including the purchase of wide swaths of land, its third decade was another decade characterized by political maneuvering and legal challenges. Even with an internal leadership battle among the trustees, the Office of Hawaiian Affairs’ third decade brought a time of preparation for the rebuilding of Hawaiian governance.\(^3\) Indeed, for over a decade, from 2000 through 2012, the Office of Hawaiian Affairs championed federal legislation to grant Hawaiians self-determination to enable the establishment of a government-to-government relationship between the federal government and Native Hawaiians. The Office of Hawaiian Affairs’ motives, efforts, and support of federal recognition were questioned and criticized throughout the entire period. While emphasis of the third decade and beyond focused on achieving recognition of Native Hawaiians as an indigenous sovereign group, the Office of Hawaiian Affairs continued its mission of ensuring the betterment of the conditions of Hawaiians.

*Federal Recognition and the Akaka Bill*

On July 20, 2000, following the work of his Task Force, Senator Akaka introduced “A bill to express the policy of the United State regarding the United States’ relationship with Native Hawaiians, and for other purposes[,]” which proposed to recognize Hawaiians as indigenous people that have a right to self-determination under federal Indian law.\(^4\) Specifically in response to *Rice*, Senator Akaka’s bill, later referred to as the Native Hawaiian Government
Reorganization Act or the Akaka Bill, sought to clarify the political status of Native Hawaiians with the federal government, establish a process to create a Hawaiian governing entity that would be federally recognized, and protect various Hawaiian-serving programs from constitutional challenges. Federal recognition, for some, meant the conveyance of a special status to a Native Hawaiian government that could come with a broad array of federal protections and benefits. Federal recognition implies a level of self-determination for Native Hawaiians. The Akaka Bill, which has gone through various iterations and has been introduced in every Congress for well over a decade, represented an admirable effort by Hawaii’s congressional delegation to facilitate and codify in American law self-governance and self-determination for Hawaii’s indigenous people. Through the Akaka Bill, as Office of Hawaiian Affairs Chairperson Haunani Apoliona expressed, “the Native Hawaiian people seek the restoration of their government, because they know and have witnessed how the Federal policy of self-determination and self-governance has not only had a dramatic impact on the ability of Native communities to take their rightful place in the American family of governments, but also how that policy has enabled Native people to grow and thrive.”

There is ample legal support for congressional authority to legislate the Akaka Bill on behalf of Native Hawaiians, including from the Indian Commerce Clause and the Treaty Clause in the United States Constitution. The United States Supreme Court has noted, “the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as ‘plenary and exclusive,’” further defining Indian tribes as, “distinct, independent political communities, retaining their original natural rights’ in matters of local self-government.” Congress has firmly exercised this authority over Native Hawaiians through passage of the Hawaiian Homes Commission Act, the Admissions Act, and more than 150 other federal laws to address the conditions of Native Hawaiians, including through the Native American Grave Protection and Repatriation Act, Native Hawaiian Education Act, and the Native Hawaiian Health Care Improvement Act. Furthermore, one judge noted, “[t]he authority of Congress under the United States Constitution to legislate in matters affecting the aboriginal or indigenous peoples of the United States includes the authority to legislate in matters affecting the native peoples of Alaska and Hawaii.”
The path of federal recognition for Native Hawaiians is akin to the process that now-recognized Indian tribes have gone through to “reestablish” government-to-government relationships with the United States. Since 1970, it has been the “policy”—though not the practice—of the United States to recognize and support America’s indigenous people’s rights to self-determination and self-governance. The outcome of the federal recognition process is a nation-within-a-nation model in which the Indian tribe is provided some forms of independence, but is in all other respects still part of the United States.

The experience of other indigenous peoples with federal recognition provides ample evidence of both the successes and pitfalls of such a process. For some Native Americans, federal recognition has brought more control to the community and has been a means to better themselves through the availability of services and an affirmation of their existence: “Now people are going to believe we exist. . . . To be told you are unrecognized stabs you right in the heart.”11 For others, being federally recognized has, among other things, brought with it uncertainty in how a tribal government will enforce its laws and, more importantly, has brought with it an abdication of some powers to the federal government.12 Opponents of federal recognition in Indian Country often cite the harm and violence of recognition politics, in which, on the one hand, the process defines who is “deserving” of rights and citizenship, but, on the other hand, expressly defines who is not “deserving” of rights and citizenship. As scholar David Maile noted, “It’s something that is sutured and stitched into histories of settler colonization.”13

In Hawai‘i, criticism of federal recognition of Native Hawaiians through the Akaka Bill were launched generally by two groups of opponents: (1) pro-American (and sometimes racist) conservatives who believed that creating an entity solely for Native Hawaiians was a violation of American constitutional principles, such as the Fourteenth Amendment; and (2) pro-Hawaiian nationals who argued that federal recognition will strip the Kānaka Maoli of their inherent right to sovereignty under international law.

To better understand the criticism of the Akaka Bill and, in turn, the criticism of the Office of Hawaiian Affairs for its unyielding support of the measure, it is important to reconcile some of the differences in various versions of the bill and explore why some of those changes were made. For example, one of the main criticisms of the Akaka Bill is that it forecloses any recourse against the United States or through an international forum. The first draft of the Akaka
Bill, S. 2899, reflected the concerns of the Hawaiian people. One of the principle reasons for the wide-support was the express disclaimer about claims against the federal government and international recourse. Indeed, after public hearings in Hawai‘i, and in response to those Kānaka Maoli pursuing international claims, the bill was redrafted to command that “Nothing in this Act [was] intended to serve as a settlement of any claims against the United States, or to affect the rights of the Native Hawaiian people under international law.”14 At the time, one commentator wrote that the opposition to the Akaka Bill from Hawaiian nationalists was “based only on principle” as the disclaimer clearly set forth a protection of an international recourse.15 Over time, and in an effort to capitulate to the demands of the George W. Bush Administration and some Senate Republicans, the Akaka Bill became watered down. The express disclaimers stating that the rights of Kānaka Maoli would not be foreclosed in the international arenas were eliminated and replaced with provisions that mandated federal oversight and waiver of any claims against the federal government. Because of the elimination of the protective disclaimers, some Native Hawaiians vigorously opposed the Akaka Bill. Professor Kauanui concluded, “Because of the limits on independent national sovereignty under the proposed plan for federal recognition, dozens of Hawaiian sovereignty groups have persistently and consistently rejected the application of U.S. federal Indian law that would recognize a Hawaiian domestic dependent nation—as ward to guardian—under the plenary power of Congress.”16 Other amendments made to appease Washington lawmakers included banning gambling activities, precluding the United States from taking any Native Hawaiian lands into trust, and removing the need for additional consultation of the Native Hawaiian governing body by the United States military.

Hawaiian support for the Akaka Bill declined as the congressional delegation continued to modify language to appease Washington conservatives. In 2005, an organization of various groups and individuals was formed under the name Hui Pū. The goal of Hui Pū was to organize to defeat the Akaka Bill because it was “a barrier to Hawai‘i nationals’ inherent right to self-determination under international law.”17 Members of Hui Pū attended a meeting of the Office of Hawaiian Affairs and demanded that the trustees spend money to educate the community about the opposition to the Akaka Bill, particularly given that the Office of Hawaiian Affairs had spent millions on an advertising campaign and paid approximately $650,000 to the lobbying group Patton Boggs from May 2003.18 Hui Pū members criticized the lack of hearings in
Hawai‘i on the Akaka Bill and questioned the rationale for getting congressional approval on an issue of self-determination for an indigenous people.\textsuperscript{19} The members also staged a twenty-four hour sit-in at the Office of Hawaiian Affairs headquarter and demanded that the trustees rescind their support of the Akaka Bill.\textsuperscript{20}

The protests and media blitzes organized by Hui Pū brought attention to the Hawaiian opposition of the Akaka Bill. They provided, in some instances, salient reasons for opposing certain versions of the Akaka Bill and held trustees accountable for their actions. Again, one such salient reason was that certain versions of the Akaka Bill would have foreclosed the pursuit of international solutions for Hawaiians. These legitimate concerns were ignored and often vilified by Akaka Bill supporters. For example, some Office of Hawaiian Affairs trustees, like former State court judge Boyd Mossman, were dismissive of pro-nationalist Hawaiians’ objections to federal recognition through the Akaka Bill: “I am aware of those who rely on the United Nations and want only complete independence from the United States as well as those arguing equal rights who want an end to Hawaiian benefits, and I do not address these groups. They will not be interested in these words, and so I address those who must wonder what recognition, nationhood, ceded lands settlement and equal rights for all [would mean].”\textsuperscript{21} Trustee Mossman fueled the flame of division within the community with a rallying cry in support of universal support for federal recognition:

If we fail, if we lose in the courts, if we cannot convince Congress of the potential elimination of an entire people who politically once ruled themselves, if we cannot convince the Hawaiians themselves and bring them together in a united effort, then you will have seen the last of the Hawaiians as we know them today. . . . We will no longer be identified as the descendants of a once-proud nation with a unique history, language and identity. \textit{We will melt into history and become a memory only.}\textsuperscript{22}

What Trustee Mossman’s actions and comments show is not only a silencing of the pro-nationalist Hawaiian voices, like those of Hui Pū, by the actions of the Office of Hawaiian Affairs in spending funds to support the Akaka Bill without equally supporting educational efforts on an international level, but also a skewed characterization of pro-nationalist as opposed to Hawaiian rights for not agreeing with federal recognition, when a pro-nationalist’s position under international law also supports Hawaiian rights. As Native Hawaiian attorney E.A. Ho‘oipo Kalaena‘auao Pa Nakea concluded, “The problem now is, our voices are not being
heard in Washington, and the resources and all the money is going into funding pro-Akaka efforts at the price of our potential rights to independence.”23 The divisiveness within the Hawaiian community was no doubt fueled by actions and conduct of the Office of Hawaiian Affairs, particularly the funding priorities of the trustees.

But Hui Pū was not immune from mudslinging inasmuch as its members took actions that set back the cause of all Native Hawaiians to achieve justice. Hui Pū’s sometimes aggressiveness often silenced dissenting views and sensationalized the differing views of Hawaiians themselves on the tough issue of self-determination. At one event, Hui Pū members brazenly interrupted a panel discussion on federal recognition and distributed handouts that mocked the efforts of Senator Akaka and the Office of Hawaiian Affairs. In one handout, Hui Pū pit Senator Akaka against Queen Lili‘uokalani in essence asking Hawaiians to take a stand with either Hawaii’s last monarch or with an American Senator who from Hui Pū’s perspective, was selling out the Native Hawaiian people. In another handout, Hui Pū caricatured Office of Hawaiian Affairs Trustee Oswald Stender as “Oz”—the fictional character from the classic book and subsequent movie that coordinated efforts behind a curtain. It was a personal shot at a respected kūpuna who was simply doing what he thought was in the best interest of the beneficiaries for whom he was elected to serve. Over time, Hui Pū fizzled in supporters.

Opposition to the Akaka Bill (and Office of Hawaiian Affairs) also came from pro-American conservatives, both Hawaiian and non-Hawaiian, who view the “special treatment” of Native Hawaiians as unconstitutional and inconsistent with the ideal of equality. One commentator vilified those lawmakers that supported the passage of the Akaka Bill: “. . . the legislation is an important symptom of Democrats’ constitutional flippancy and itch for social engineering. ‘One nation, indivisible’? Not for the House majority or the Senate committee that has approved Akaka’s mockery of the Pledge of Allegiance.”24 But, at the helm of these assaults was attorney H. William Burgess, the former delegate of the 1978 Con-Con who opposed the creation of the Office of Hawaiian Affairs. Conjuring the imagery of the Jim Crow-esque system in South Africa, Burgess suggested that the Akaka Bill would create “apartheid” in Hawai‘i.25 Burgess was a member of the Grassroot Institute of Hawaii—an organization staunchly opposed to the Akaka Bill that would, through the guise of promoting democratic principles, unnecessarily incite fear through propaganda and misinformation.
The Grassroot Institute took out a nearly full-page ad in the local paper, during the annual celebration of Kamehameha’s legacy, that criticized the Akaka Bill: “The Akaka bill would divide the people of Hawai‘i forever and undo the unification which made Kamehameha not only the greatest of the Hawaiian chiefs, but one of the great men of world history.” But, that advertisement palled in comparison to the advertisement that was published in the Hawai‘i Reporter, which showed the lengths that pro-American conservative opponents would go to defeat the Akaka Bill and which sparked controversy because of the way it criticized the Office of Hawaiian Affairs’ effort to create a list of Hawaiians for purposes of furthering the process set forth in the Akaka Bill. The Office of Hawaiian Affairs’ campaign, titled Kau Inoa or “Place Your Name,” sought to gather a list of Native Hawaiians who would be interested in reorganizing a Hawaiian governing entity. It was the successor campaign of another enrollment effort, called Operation ‘Ohana, that was started in 1989 by Office of Hawaiian Affairs Trustee Thomas Kaulukukui after he visited the Bureau of Indian Affairs and asked how best to achieve sovereignty (in the form of tribal sovereignty) for the Native Hawaiian people. Kau Inoa was also the predecessor campaign to additional efforts to gather names and contact information of Native Hawaiians.

On January 21, 2008, the Hawai‘i Reporter—co-founded by Grassroot Institute co-founder Malia Zimmerman—published a political advertisement, entitled “Cow Inoa.” The advertisement, while some argued was an expression of free speech, crossed the line and nearly wandered into the dark abyss of racist hate speech. Fundamentally, the advertisement did violence to the Hawaiian language itself. By replacing the word “Kau” with “Cow,” the creator appropriated the Hawaiian language, which harkened to the days when the language was banned from use in Hawai‘i schools.

The published advertisement mirrored the style and layout of Kau Inoa advertisements that the Office of Hawaiian Affairs had previously published. Depicted in half of the advertisement was an image of a cow named “Haunani Moo”—an apparent shot at Office of Hawaiian Affairs Chairperson Haunani Apoliona. The selection of a cow brought forth issues of stereotypes of Hawaiians, such as a large appearance and heavy body weight. The other half of the advertisement contained the following language:

For years, you’ve taken our milk and our beef. Now it’s time for some payback. We cows have been in Hawai‘i since the first volcanoes peeked their heads out of
the Pacific Ocean. As native cows, we deeply resent all the cows that came to Hawaii after us. We were grazing in the fields of the Hawaiian Islands since time began. And in the spirit of aloha, we don’t wish to share our grass with imported cows. Sure, we’ve been freely mating with these new cow arrivals for centuries. And sure, there are only a handful of purebred native cows left. And yes, the standard of living for all cows is better than in the old days thanks to the new cows; especially since we can do all our shopping at Costcow. But at the risk of being hypocritical, on behalf of all cows in Hawai‘i, I demand the right to send these Johnny-come-lately cows back where they came from. That’s why all cows—even halfbreeds, quarterbreeds and one drop breeds—must put their hoof prints on the list of eligible bovines to get Hawai‘i’s pastures divided between native cows and newcoming cows. As natives, we’ll get to graze on both pastures, while the cows that stole our land will be limited to a shrinking supply of grass that the Office of Cow Affairs will keep purchasing from under their hoofs, by the authority of the Acowcow Bill.

The advertisement’s relegation of a process of nation-building for past injustices (by a country that has admitted guilt for those injustices) to a herd of cows grazing is a testament to the lengths and pettiness that opponents would go to distort the facts and incite reactions from Kānaka Maoli. First, there is no doubt that this advertisement was addressed at the Office of Hawaiian Affairs’ (Office of Cow Affairs) efforts to support the Akaka Bill (Acowcow Bill). Second, ignoring the fact that Native Hawaiians were the indigenous people of this land with “inherent sovereignty[,]” the advertisement simplified the issue and pitted what Native Hawaiians were doing against everyone else in Hawai‘i: “we don’t wish to share our grass with imported cows.” Third, it glorified the involvement of settlers in Hawai‘i by stating, “the standard of living for all cows is better than in the old days thank to the new cows” as if Kānaka Maoli were not satisfied with their situation prior to western influence. Fourth, the advertisement injected the issue of blood-quantum and drew a line that one could never be part of an indigenous group if that individual had just “one drop” of Hawaiian blood.

The advertisement was yet another representation that racism against Hawai‘i’s indigenous people still thrived in Hawai‘i. While characterized as satirical and humorous by pro-American conservatives, the advertisement was blatantly racist. In depicting Native Hawaiians as animals, the creator and publisher dehumanized them. That process of dehumanization has been a stain on the fabric of American society from its inception when, for example, African-Americans were treated as chattel and caricatured as animals.
Nevertheless, the advertisement did not go unchecked. Dr. Trisha Kēhaulani Watson criticized the advertisement, “We are not a herd, but a nation—a nation of beautiful and wronged people who are entitled to justice. We are entitled to determine our own future. We are entitled to live and celebrate our culture. We are entitled to the land we have stewarded for thousands of years.” Chairperson Apoliona demanded that the “cartoon [] be pulled and the secret author publically identified.” In a response to Chairperson Apoliona’s demand, the Hawai‘i Reporter published a piece by Eric Seabury, who concluded:

In our Nation, EVERYBODY, regardless of where you came from, regardless of the color of your skin, the ethnicity you have or the religious beliefs you hold, has the opportunity to do anything he wants. He has the ability to educate himself and have the profession he wants, he has the ability to marry the person he wants to spend his life with and raise their children in the manner they see fit, they have the ability to live wherever they want and educate their children in the school of their choice and they also have the ability to worship God in the manner that is appropriate for them. In our American society, we have the ability to realize any dream we wish to acquire.

Seabury invoked the conservative mantra of picking oneself up by his or her bootstrap and demonstrated a lack of appreciation and understanding of the history of Native Hawaiians. Particularly troubling was Seabury’s idyllic America, which apparently only included men and failed to realize that marriage equality was not truly achieved until 2015 when the Supreme Court struck down laws banning gay marriage. The opposition was out in full force and took advantage of their connections with the media to disperse not just misleading and/or false information, but also hurtful and stereotypical representations of Kānaka Maoli.

Leading the opposition’s charge against the Akaka Bill in the Senate was Arizona Senator Jon Kyl, the chairman of the Senate Republican Policy Committee. In the summer of 2005, Kyl released a thirteen-page report, titled “Why Congress Must Reject Race-Based Government for Native Hawaiians.” In the Kyl Report, the Republican senator argued that the Akaka Bill created a race-based government that promoted “racial division and ethnic separatism.” The Kyl Report further advised Republican Senators, “Congress should not be in the business of creating governments for racial groups that are living in an integrated, largely assimilated society. . . . If Congress can create a government based on blood alone, then the Constitution’s commitment to equality under the law means very little.” Kyl’s efforts were supported in concept and in funding by the Grassroot Institute.
congressional record several documents titled “Hawai‘i Divided Against Itself Cannot Stand,” which was written by Washington attorney Bruce Fein, who was under contract with the Grassroot Institute.\(^{38}\)

Despite the opposition from Republican leaders, Chairperson Apoliona remained optimistic: “This is a time for courageous hearts and strong spirits, and we will forge on.”\(^{39}\) To bolster support of the Akaka Bill, Hawaii’s congressional leaders enlisted the help of Republican Governor Linda Lingle and her Administration to curry favor with Republican lawmakers. Lingle—a rare Republican leader in a State dominated by the Hawai‘i Democratic Party and a rising star of the national Republican Party—specifically met with those undecided Republican senators to rally support. Governor Lingle shot back at the lobbying efforts of Senator Kyl for his “false” statements: “I’m disappointed because we’ve worked with him a lot, we’ve talked with him a lot; he simply has a different opinion on this issue. . . His opinion is wrong, his facts are wrong and now it’s up to us to make clear where he’s mistaken, to make it clear to his colleagues.”\(^{40}\) By June of 2005, many supporters, including Office of Hawaiian Affairs Administrator Clyde Nāmu‘o, were confident that the Akaka Bill had the necessary fifty-one votes to become law.\(^{41}\)

On July 14, 2005, United States Assistant Attorney General William Moschella sent a letter to Senator John McCain, chairman of the Senate Indian Affairs Committee, informing him that the Justice Department had four concerns with the Akaka Bill, including concerns with limitations periods, military matters, criminal jurisdiction, and gaming.\(^{42}\) The letter was welcomed by Akaka Bill supporters as it was the first time that the Bush Administration commented on the proposed legislation and because it did not express a position on the constitutionality of the bill. “It is an extraordinary letter and an extremely positive development,” said State Attorney General Mark Bennett.\(^{43}\) Chairperson Apoliona commented: “What is not said, says a lot.”\(^{44}\) As previously mentioned, amendments were proposed to the bill to allay the concerns of the Bush Administration, but which alienated pro-nationalist Hawaiians.

The media blitz in Hawai‘i ramped up as the vote neared. The Grassroot Institute conducted a poll which allegedly showed that forty-one percent of those surveyed would not support a Native Hawaiian government “where Hawaiians would not be subject to all the same laws, regulations and taxes as other Hawai‘i residents.”\(^{45}\) In response to the Grassroot Institute
poll, the Office of Hawaiian Affairs hired Ward Research to conduct a poll, which concluded with a margin of error of 4.9 percent that eighty-four percent of those responding believed that Native Hawaiians should receive federal recognition as indigenous people.46 A televised forum was conducted in which State Attorney General Bennett and Office of Hawaiian Affairs attorney and former-Hawai‘i Supreme Court Justice Robert G. Klein defended the Akaka Bill and Grassroot Institute lawyer Bruce Fein and Hui Pū spokesman Kaleikoa Kaeo argued for its demise.47

With the Bush Administration’s concerns seemingly addressed and Republican support trickling in, the stage was set for a vote by the United States Senate on September 6, 2005. Before the vote could be taken, however, Hurricane Katrina decimated the Gulf Coast and the work of Congress came to a halt so legislators could address the emergency situation. The vote was postponed indefinitely.48 The postponement allowed Senator Akaka time to negotiate with federal and state officials and to propose an amendment that addressed the Bush Administration’s reservations.

For the first time, the Justice Department raised constitutional concerns with the Akaka Bill:

The administration appreciates the work of the Hawai‘i delegation to address some of the concerns raised by the Justice Department but there are substantial, unresolved constitutional concerns regarding whether Congress may treat Native Hawaiians as it does the Indian tribes, and whether Congress may establish and recognize a Native Hawaiian governing entity. . . . As the Supreme Court has stated, whether Native Hawaiians are eligible for tribal status is “a matter of some dispute” and “of considerable moment and difficulty.”49

It was yet again another setback to the Akaka Bill. Office of Hawaiian Affairs Trustee Rowena Akana described the amendments and the Administration’s tactics: “What the Bush administration has done is taken the lifeblood out of the bill. . . . Now, they’re attacking constitutionality when we thought long ago that was solved. . . . It seems like we’re just going around and around with this.”50 After lobbying efforts with Senate Majority Leader Bill Frist to schedule a vote on the Akaka Bill proved unfruitful and after a shameful vote by the United States Commission on Civil Rights to recommend that Congress not pass the legislation, Senator Akaka took to the Senate chambers on May 8, 2006, and vowed to take the Senate floor every day until a vote on the bill was called. After three days, Senator Akaka announced that Majority
Leader Frist would petition for a cloture to force a vote on the bill following the Senate’s May recess. A cloture was a procedure under the Senate’s rules to halt a filibuster and bring pending legislation for a vote by Senators; cloture required a vote by three-fifths of the Senate, or sixty Senators to break a filibuster. As was apparent, opposition and stalling always came in the Senate, despite the seniority and stature of Hawaii’s senators. Indeed, the House of Representatives, under the guidance of Representatives Neil Abercrombie, Patsy Mink, and Ed Case, previously voted to pass other versions of the Akaka Bill.

As the cloture debate and vote neared, the Akaka Bill received additional national attention. In an editorial, the New York Times summarized the plight of Native Hawaiians:

“[f]or Native Hawaiians, the last two centuries have been a struggle against extinction” and “[t]he wrongs done to Native Hawaiians are a wound that never healed.” The editorial went on to characterize the criticism that the Akaka Bill would create a “balkanized banana republic” as “misplaced”:

The bill’s central aim is protecting money and resources—inooculating programs for Native Hawaiians from race-based legal challenges. It is based on the entirely defensible conviction that Native Hawaiians—who make up 20 percent of the state’s population but are disproportionatley poor, sick, homeless and incarcerated—have a distinct identity and deserve the same rights as tribal governments on the mainland.

But would the national attention, the Office of Hawaiian Affairs’ efforts, and the support of other organizations like the Council for Native Hawaiian Advancement, the National Congress of American Indians, the Alaska Federation of Natives, and the American Bar Association be enough to convince the Senate to invoke cloture?

Debate in the Senate was limited to three hours. The debate and vote came during a week when Senate Republican leadership brought various measures that appealed to the party’s conservative bloc, including a constitutional amendment to ban gay marriage and a bill to repeal the estate tax. One reporter recognized, “[a]lthough both measures failed to gain enough votes, the objective was to stir up the conservative Republican base to turn out to vote this year and divert attention from less flattering issues such as the Iraq war and rising gasoline prices.” In other words, it appeared to have been a calculated strategy by Senate Republicans to rally their base in support of conservative causes. During the debate—ignoring the special treatment that had been given to Native Hawaiians for over a century and the federal government’s
commitment to reconciliation through the Apology Resolution—Senate Republicans took to the
floor to lament their opposition to the Akaka Bill. Republican Senator Lamar Alexander of
Tennessee expressed his dissatisfaction with the Akaka Bill: “This bill would, for the first time in
history, create a new, separate and independent race-based government within our borders. . . . It
is about sovereignty. It is about land and money. It is about race. . . . It is reverse of what it
means to be an American.”55 Invoking the Rice march of “color-blind” justice and again
refusing to accept that Native Hawaiians should be treated similarly to Native Americans and
Alaska Natives, Republican Senator Jeff Sessions of Alabama stated: “It’s not too much to say
the legislation could create a crack in the American ideal of equal rights and color-blind justice.
. . . It is a step we must not take.”56 Respected local columnist Lee Cataluna expressed
frustration with the campaign of misinformation and the fear-mongering:

For six years, money, effort and political maneuvering have gone toward turning
the hearts of those who refuse to see the history of the overthrow as fact and the
current situation of Native Hawaiians as unfair and untenable. . . . It was
heartbreaking and rage-making to hear some of the made-up arguments being
tossed around like truth—like how Hawaiians can’t be tribal Indians. Well, no
kidding! Oh, but talking crazy is an effective distraction technique.57

The bill’s chief sponsor, Senator Akaka, took the floor and reminded his colleagues of the
intent of the Akaka Bill: “At the heart of it, this bill is about fairness[.] . . . What this bill really
does is provide a structured process to finally address longstanding issues resulting from a dark
period in Hawaiian history—the overthrow of the Kingdom of Hawaii.”58 Rebuking the notion
that the legislation would divide people in Hawai`i, Senator Inouye said, “If anything, this will
unite the people of Hawai`i[.] . . . It’s time we reach out and correct the wrong that was
committed in 1893.”59 Hawai`i-born Senator Barack Obama spoke of the need to reconcile:
“This gives us an opportunity, I think, not to look backward, but to help all Hawaiians move
forward.”60

The Senate Democrats in attendance, including New York Senator Hillary Clinton, voted
unanimously in favor of the motion to invoke cloture. Future Republican presidential candidate
McCain crossed-over the aisle and supported bringing the Akaka Bill up for a vote. He was
joined by Senator Kyl. Arizona’s senators, however, merely supported the cloture vote to end
debate to bring the bill to a final up-or-down vote consistent with a promise McCain had made as
Chairman of the Senate Indian Affairs Committee. McCain added: “I would like the record to
reflect clearly, though, that I am unequivocally opposed to this bill and that I will not support its passage should cloture be invoked.” Alaska’s Republican Senators Ted Stevens and Lisa Murkowski, both loyal friends of Inouye and Akaka, joined McCain, Kyl, and eight other Republicans to invoke cloture. Senator Stevens recalled how previous congressional representatives’ fears of the unique treatment of Alaska Natives was unjustified and never panned out: “Time has proven them wrong. This bill will fulfill our federal obligation to these native Hawaiian people.”

But it was not enough. “On this vote the yeas are 56, the nays are 41. Three-fifths of the Senators duly chosen and sworn not having voted in the affirmative, the motion is rejected.” Democratic Senators Chuck Schumer and John D. Rockefeller, IV, were not present to vote. Republican Senator Lindsey Graham, a co-sponsor of the Akaka Bill, failed to make it back to the chamber in time to cast his vote. Some saw Graham’s absence as a “sign of the pressure that was being put on Republicans by party leadership and the White House not to support the bill.” In the end, the cloture vote was four votes short of the necessary amount to bring the Akaka Bill to a final up-or-down vote by the Senate. Office of Hawaiian Affairs Administrator Nāmu’o viewed the vote as an “[o]bvious[]” setback. Attempting to shield the failed cloture vote, Senator Akaka remained ever-optimistic: “The bill still stands except that we cannot bring the bill to the floor.” Senator Inouye was apparently not as optimistic: “It’s over. It is unrealistic to pursue this.”

Clearly frustrated, Inouye criticized another last-minute letter released by the Bush Administration on the eve of the vote. On June 7, 2006, Assistant Attorney General Moschella, citing the U.S. Civil Rights Commission’s report opposing the Akaka Bill, sent a letter to Senate Republican Leader Bill Frist concluding that the Akaka Bill was “further subdividing the American people into discrete subgroups accorded varying degrees of privilege. As the President has said, ‘we must . . . honor the great American traditions of the melting pot, which has made us one nation out of many peoples.’ This bill would reverse that great American tradition and divide people by their race.” Inouye called the Justice Department’s letter “grossly disingenuous” as the Administration’s concerns were all addressed in the current version of the bill. He argued that the Republican leadership used the letter as a statement of the Bush Administration’s position to shore up those last few votes from undecided
This defeat of the Akaka Bill was, as one columnist aptly wrote, “the most brutal yet, with purposeful misinformation fueling attacks of righteous indignation.”

But, the vote not to invoke cloture on that particular version of the Akaka Bill may have been in the interest of Native Hawaiians as that version had significant flaws that undermined Hawaiian self-determination. Indeed, how was it that America could profess to provide an indigenous community with “self-determination” yet limit what they could and could not do on their own lands? How was it that the federal government could demand an indigenous group give up their right to oversight of the American military in that indigenous group’s homeland? How was it that after a century of occupation and Americanization could the United States demand that Hawaiians waive claims for past injuries and foreclose international remedies? How was it that the Office of Hawaiian Affairs was okay with this?

The Office of Hawaiian Affairs’ position of supporting legislation that undermined self-determination for Hawaiians was jarring, but not unsurprising. The “something is better than nothing” approach was appealing to some, particularly after six years of legislative maneuvering and millions spent to get the government to anti-up. Nevertheless, and despite what should have and/or could have been done in 2006, the Akaka Bill was not destined to become law. Indeed, while it could have been approved by a narrow majority in the Senate, there was little chance that the Akaka Bill would have received President Bush’s signature given his Justice Department’s concerns, and an even slimmer chance that the Akaka Bill had a supermajority of votes in the Senate to override a presidential veto.

Despite the setback, Senator Akaka would continue to introduce his signature legislation. The Akaka Bill, however, did not get the same amount of attention from lawmakers as it did in 2006. In 2008—no doubt because of the dissatisfaction with the Bush Administration’s policies and actions—Illinois Senator Barack Obama and his “blue wave” took over the Presidency and Congress. After the election results settled and with the defection of Republican Arlen Spector to the Democratic Party in April 2009, the Senate Democrats had the required sixty votes needed to overcome a filibuster and to move forward with their agenda. Although the time was ripe (filibuster proof Senate and clear presidential support), there was little movement to bring the Akaka Bill up for a vote as other issues, such as universal health care, captured the attention of lawmakers. Then, on August 25, 2009, Massachusetts Senator Ted Kennedy passed away. A
special election resulted in a filling of the vacancy by Republican Scott Brown. The Senate Democrats lost their super-majority and their opportunity to move legislation, like the Akaka Bill, to final votes. Putting aside the likely unified Democratic votes, the Akaka Bill also still had Republican allies, like Alaska’s Lisa Murkowski. But, Akaka took the risk of putting forth an amended version of the bill that Governor Lingle refused to support. By 2010, however, the political atmosphere had become so partisan that a new election brought in a wave of Republican senators and representatives. Nāmu'o stated that the 2010 version of the bill was a compromise: “It may not be perfect. It at least is closer to the self-determination concept that we would support, that we would want to see. And I think there is still time to tweak the language in future congresses if we need to. I think, again, because the window of opportunity seems so short, I think getting it passed is the primary objective.” The Akaka Bill never again made it to the Senate floor.

The 2011 version of the Akaka Bill, the final one introduced by Akaka, was his swan song. It was co-sponsored by Senators Inouye and Alaskan Senators Murkowski and Mark Begich. It sailed through The Senate Committee on Indian Affairs, which was then chaired by Akaka in December 2012, but never received a vote by either the Senate or the Republican-controlled House of Representatives before the adjournment of Congress in 2013. As Senator Akaka had previously announced his intention to retire, the Akaka Bill was dead. The federal government, again, failed to live up to its promises to the Native Hawaiian community as set forth in the Apology Resolution.

**Blood Wars: native Hawaiian Challenges to the Office of Hawaiian Affairs**

The Office of Hawaiian Affairs’ funding for initiatives such as the Akaka Bill came under heavy scrutiny by many. Such scrutiny was not unexpected given the amount of money poured into the lobbying effort for federal recognition. Over the course of a decade, the Office of Hawaiian Affairs reportedly spent millions on efforts toward federal recognition, including paying a lobbyist $3.2 million. The toughest criticism on the trustees’ use of funds has often come from some in the native Hawaiian community, who—from the inception of the Office of Hawaiian Affairs—argued that the section 5(f) trust funds should be used exclusively to benefit native Hawaiians, or those of fifty percent or more blood quantum. Starting in the early 1990s,
in a series of interrelated cases, federal courts addressed the issue of the Office of Hawaiian Affairs’ use of section 5(f) trust funds. The following lawsuits against the Office of Hawaiian Affairs and the trustees illuminated the concrete tension within the Hawaiian community about the notion of blood quantum.

In *Price v. Akaka*, the plaintiffs appealed the dismissal of their lawsuit against the trustees for failure to state a claim upon which relief can be granted. In the underlying case, the plaintiffs—Dr. Nui Loa Price, Kamuela Price, and the Hou Hawaiians—alleged that the trustees violated the Hawai‘i Admission Act by managing income derived from the Ceded Lands trust in an allegedly improper manner. The Hou Hawaiians was the organization that made clear to the State Legislature that it believed the mandate of the 1978 Con-Con was to use the Office of Hawaiian Affairs’ share of ceded land trust revenues only for those individuals with one-half part Hawaiian blood. Akin to the arguments raised before the Legislature, the plaintiffs argued that the trustees violated the Admissions Act insomuch as they “commingled OHA’s share of [section 5(f) funds] with other OHA funds; that they have expended none of it for the benefit of native Hawaiians; and that they have used it instead for purposes other than those listed in [section] 5(f).” In that particular case, the trustees used section 5(f) funds to mail out and distribute ballots on a proposed “Single Definition Referendum” to native Hawaiians and Native Hawaiians, concerning whether the definition of “native Hawaiian” in the Hawaiian Homes Commission Act should be amended to include all people of Hawaiian ancestry and not just those with fifty-percent or more Hawaiian blood. The trustees “believed that adoption of a single definition would better the condition of native Hawaiians, in that the blood quantum requirement had long been recognized as the single most divisive issue in the Hawaiian community.” The district court determined that it lacked jurisdiction and that the lawsuit failed to state a claim upon which relief could be granted. On appeal, the Ninth Circuit reversed the conclusion of the district court, and held that the plaintiffs stated a claim against the trustees: “[t]he fact that the trustees may, consistently with [section] 5(f), spend the income for purposes other than to benefit native Hawaiians does not deprive [the plaintiffs] of standing to bring [their] claim.” The Ninth Circuit noted that allowing the plaintiffs to enforce section 5(f) was “consistent with the common law of trusts, in which one whose status as a beneficiary depends
upon the discretion of the trustee nevertheless may sue to compel the trustee to abide by the terms of the trust.”

On remand, the district court concluded that the trustees were not entitled to qualified immunity as to the claim that the trustees managed, administered, and expended section 5(f) funds for the Referendum in violation of the Admissions Act. The case again made its way to the Ninth Circuit, where the appellate court held: “we are unaware of any law indicating that elimination of the blood quantum requirement would not be for the ‘betterment of the conditions of native Hawaiians’—one of the five stated purposes of the land trust established by the Admission Act.” In so deciding, the Ninth Circuit relied upon the opinion of the Hawai‘i district court in Ho‘ohuli v. Ariyoshi, which concluded that evidence demonstrated “that the rationale for defining ‘native Hawaiian’ . . . had become outmoded” and that “defining ‘Hawaiian’ to include all people of aboriginal blood could help alleviate divisiveness in the Hawaiian community resulting from blood quantum restrictions[.]” The Ninth Circuit also favorably cited the conclusion of Hawai‘i circuit court judge Marie Milks, who found that “there was no evidence that the Single Definition Referendum would not be for the betterment of conditions of native Hawaiians and that such Referendum is ‘one of many ways to achieve the betterment of the conditions of native Hawaiians even though all Hawaiians would benefit.’”

The Ninth Circuit also concluded that the “OHA trustees reasonably believed that a referendum to determine Hawaiian opinion on the proper definition of ‘native Hawaiian’ was for the ‘betterment of the conditions of native Hawaiians’ as presently defined.” The Ninth Circuit appeared to provide the trustees with broad discretion as trustees to expend beneficiary funds in the way the trustees sought. Such a decision would not be inconsistent with general principles of trust law. Therefore, while the Admission Act was silent as to how trustees were to use the trust funds for the betterment of the conditions of native Hawaiians, the law of trusts provided trustees with broad discretion: “When a trustee has discretion with respect to the exercise of a power, its exercise is subject to supervision by a court only to prevent abuse of discretion.” Even when the trust has mandatory provisions, “the trustee often has some discretionary authority and the responsibility in important matters of detail and implementation.” Thus, Office of Hawaiian Affairs trustees arguably had broad discretion in making determinations as to the use of funds. The decision was also an implicit recognition of the unique relationship that the Office of
Hawaiian Affairs had to Native Hawaiians. It would take a subsequent lawsuit for the issue to be clarified.

In 2005, five native Hawaiian men—Virgil Day, Mel Ho‘omanawanui, Josiah L. Ho‘ohuli, Patrick L. Kahaiuloa, and former Trustee Samuel L. Kealoha, Jr.—filed suit against the then-trustees of the Office of Hawaiian Affairs. Similar to the Price line of cases, in Day v. Apoliona, the plaintiffs argued that the trustees violated their trust obligation when they expended funds to programs and initiatives, like the Akaka Bill, that benefit all Hawaiians in violation of the Admission Act’s section 5(f) trust fund provision. The federal district court was not swayed by Day’s arguments and dismissed the plaintiffs’ claims. On appeal, the Ninth Circuit reversed the trial court’s decision barring plaintiffs’ claims. The Ninth Circuit held that the native Hawaiian plaintiffs have “an individual right to have the trust terms complied with, and therefore can sue under [section] 1983 for violation of that right.” On remand, in a thirty-five page opinion issued on June 20, 2008, District Court Judge Susan Oki Mollway ruled in favor of the Office of Hawaiian Affairs trustees. In granting summary judgment, Judge Mollway narrowly framed the issue in the case as whether section 5(f) of the Admission Act permitted the use of the Ceded Land trust funds for purposes other than to benefit only native Hawaiians. The operative question, stated another way, was whether the Office of Hawaiian Affairs’ expenditure of funds to programs that do not limit their services to the betterment of the conditions of only native Hawaiians was valid.

Plaintiffs argued that their rights under the Admission Act and the Equal Protection Clause of the Fourteenth Amendment were violated. They specifically asserted that the trustees breached their trust obligations when funds were expended to support, among other organizations and initiatives, the Akaka Bill. Day contended that Article XII, section 6 of the Hawai‘i Constitution, which provided that the Office of Hawaiian Affairs “shall exercise powers . . . to manage and administer the proceeds . . . including all income and proceeds from that prorata portion of the trust referred to in Section 4 of this article for native Hawaiians[,]” expressly precluded the entity from using trust funds to benefit all Hawaiians.

On the other side, the trustees argued that their use of section 5(f) trust funds was not limited to the betterment of the conditions of only native Hawaiians. The trustees asserted that both federal and State laws allow them to use trust funds for the betterment of the conditions of
all Hawaiians, regardless of blood quantum. They also argued that under the plain language of the Admissions Act, the section 5(f) funds could be used “for one or more” of the five trust purposes. The trustees cited favorably to the earlier Price line of cases for the proposition that the use of trust funds for the benefit of Native Hawaiians was allowable “even if all Hawaiians would benefit.”

In her ruling, Judge Mollway granted summary judgment in favor of the Office of Hawaiian Affairs. Judge Mollway concluded that the trustees’ power to allocate trust funds was discretionary and that the Office of Hawaiian Affairs does not abuse its discretion in funding passage of federal recognition. The court provided guidelines as to the merits of Day’s claims:

Although we do not address the merits of Day’s claims, we note for the sake of example and clarity that the common law of trusts offers guidance on two of the issues that Day’s claims present: (1) how a court should determine whether activities funded by the trust funds are “for the betterment” of Native Hawaiians, and (2) whether trust funds can be spent in a way that serves Native Hawaiians, but also, incidentally, benefits other individuals. One treatise suggests: To the extent to which the trustee has discretion, the court will not control his exercise of it as long as he does not exceed the limits of the discretion conferred upon him . . . Even where the trustee has discretion, however, the court will not permit him to abuse the discretion. This ordinarily means that so long as he acts not only in good faith and from proper motives, but also within the bounds of a reasonable judgment, the court will not interfere; but the court will interfere when he acts outside the bounds of a reasonable judgment.

Therefore, Day’s assertion that the expenditure of trust funds on the Akaka Bill would not benefit native Hawaiians was meritless.

Again, the Akaka Bill sought to clarify the “special political and legal relationship” between the federal government and Native Hawaiians, which include native Hawaiians. The Akaka Bill would have provided formal federal recognition of Native Hawaiians as the indigenous people of Hawai’i entitled to a legal status similar to that of Native Americans and Alaska Natives. Native Hawaiians would be, therefore, federally recognized as a “political group,” which would immunize Hawaiian programs, like the Hawaiian Homes Commission Act from “racial preference” reverse discrimination challenges. In supporting the Akaka Bill, the trustees were clearly advocating for the rights of native Hawaiians and were reasonably expending funds to protect Native Hawaiian programs.
In her decision, Judge Mollway provided additional examples of ways in which Day’s “cramped [and] exclusionary” interpretation of section 5(f) could lead to “ridiculous results.”

In one illustrative example, Judge Mollway considered whether Day would challenge a program in which the Office of Hawaiian Affairs offered to pay all medical expenses, including prenatal care for a Native Hawaiian mother who would give birth to a native Hawaiian child. Would Day object to the benefits flowing to the Hawaiian mother? Judge Mollway rejected Day’s position.

Day appealed the decision and on appeal, the Ninth Circuit first clarified the legal standard for analyzing claims for breach of fiduciary duties under section 5(f):

Section 5(f) of the Admission Act establishes a public trust and the purposes for which it may be used and then provides an express and narrow enforcement mechanism, specifying that use for any other object shall constitute a breach of trust. To establish a breach of trust under that section, therefore, plaintiffs must prove that trust funds were used for a purpose not enumerated in section 5(f).

Generally, a trustee’s power is discretionary except to the extent its exercise is directed by the terms of the trust or compelled by the trustee’s fiduciary duties. Because section 5(f) establishes broad purposes and does not direct specific expenditures, section 5(f) trustees have discretion (i.e., are to use fiduciary judgment) to determine whether a particular use of trust funds serves one or more of the trust purposes.

When a trustee has discretion with respect to the exercise of a power, its exercise is subject to supervision by a court only to prevent abuse of discretion. In the context of the narrow federal inquiry into whether an expenditure is a use for a trust purpose, an abuse of discretion occurs when a trustee has acted unreasonably—that is, beyond the bounds of a reasonable judgment.

Absent express standards, courts apply a general standard of reasonableness, taking account of other terms and purposes of the trust. Under this standard, although the trustees must reasonably act in pursuit of trust purposes and no others, they are not required to ensure that a given expenditure will provide only collateral benefits to nonbeneficiaries or purposes not listed in the trust. The trustees need only ensure that each expenditure is one that would . . . be accepted as reasonable by persons of prudence.

The Ninth Circuit applied the foregoing legal standard to the Office of Hawaiian Affairs’ expenditure of funds in support of, among other initiatives, the Akaka Bill:

The trustees had discretion to use section 5(f) funds to lobby for enactment of the Akaka Bill. Although it is possible that the processes the Akaka Bill
envisions could dilute some benefits that native Hawaiians currently enjoy to the exclusion of other Hawaiians, a trustee could reasonably conclude that the bill’s benefits to the conditions of native Hawaiians outweigh any drawback and therefore choose to use trust proceeds to support it. As the district court concluded, [e]ven if the Akaka Bill is intended to benefit Hawaiians in general, the OHA trustees would not be unreasonable or arbitrary in viewing the Akaka Bill as also benefitting native Hawaiians.105

The Ninth Circuit, thus, concluded that “there [was] no triable issue as to whether the OHA trustees had discretion to use [section] 5(f) funds for the challenged expenditures. Each was within the trustees’ broad discretion to serve the trust purposes.”106

In a press release, Chairperson Apoliona expressed her gratification at the ruling: “The ruling is good for OHA and our beneficiaries and gives us continued faith in our important mission of serving all Native Hawaiians.”107 The Office of Hawaiian Affairs’ chief executive, Nāmu‘o, was also elated with the decision: “This ruling makes it clear that OHA Trustees have broad discretion when it comes to using funds from the Public Land Trust.”108 But, the battle was not over. As the federal courts did not address state law claims, Day and his posse filed suit in State court.

Nevertheless, the Hawai‘i Supreme Court’s decision in Kealoha v. Machado, which relied upon an interpretation of state law, was not to the contrary.109 There, as in Day, the same five-man team argued that the trustees could not expend section 5(f) funds on programs that provide benefits to Native Hawaiians.110 The trustees argued that they had broad discretion in determining which expenditures benefit native Hawaiians, even if those expenditures also benefit Native Hawaiians.111 In an unanimous opinion, Chief Justice Mark E. Recktenwald analyzed the language of Hawai‘i Revised Statutes section 10-3, which required that certain trust funds “be held and used solely . . . for the betterment of the conditions of native Hawaiians[,]” and held that “the legislative history and treatment of chapter 10 indicate that lawmakers did not view the term ‘solely’ to be significant in describing OHA’s expenditures of the pro rata portion of the public land trust.”112

The Hawai‘i Supreme Court then analyzed the plaintiffs’ argument that the trustees had a common law duty of loyalty to administer the trust solely in the interest of native Hawaiians.113 Based on its review of general principles of trust law, the Hawai‘i Supreme Court set forth the following standards: first, a breach of the trustees’ duty to administer the trust solely in the
interest of the beneficiaries occurs when the trustees’ decision conflicts with the purpose of bettering the conditions of native Hawaiians or is made for the purpose of benefiting a non-beneficiary rather than the trust; and second, the trustees are given broad discretion on how to expend trust fund to better the conditions of native Hawaiians.\textsuperscript{114} Based on these principles, Chief Justice Recktenwald concluded that the complaint did not state a viable claim because it did not allege that the trustees’ decisions to fund various organizations were made for any purpose other than benefiting native Hawaiians, did not allege that the expenditures conflicted with or were adverse to the interests of native Hawaiians, and did not allege that the expenditures were in furtherance of programs that do not benefit native Hawaiians.\textsuperscript{115} In addition, the Hawai‘i Supreme Court expressly rejected the suggestion that the trustees must “administer said trust in the sole interest of the beneficiaries, except for collateral benefits to nonbeneficiaries, so long as the primary benefits of any action is [sic] enjoyed by beneficiaries, and the collateral benefits do not detract from nor reduce the benefits enjoyed by the beneficiaries.”\textsuperscript{116}

Despite the Office of Hawaiian Affairs’ victories, \textit{Day v. Apoliona} and \textit{Kealoha v. Machado} revealed deep-seeded tensions within the Hawaiian community. Samuel Kealoha, a plaintiff in the case, sparked a flame of divisiveness: “We are tired of our kupuna, being denied and ignored by this crooked system . . . despite the fact that there are many in the community who have given up the fight and joined the unholy alliance of the ‘ala mihi’ American, who whine that \textit{Day v. Apoliona} is a frivolous lawsuit.”\textsuperscript{117} Trustee Rowena Akana fueled the fire, “There is no need to be selfish. Their self-serving attitude will only end up dividing Hawaiians . . . How small-minded can these people be? . . . Virgil Day and the other 50 percent Hawaiians need to wake up and realize that they are only being used to divide us.”\textsuperscript{118} Words of anger and divisiveness surrounded these cases. But, these cases firmly placed the Office of Hawaiian Affairs in the middle of a nearly century-long debate and illuminated the divisiveness and problems of blood quantum laws for Hawai‘i’s indigenous people.

For Native Hawaiians, the issue of blood quantum arose under the guise of a federal statute that sought to return lands to the decimated Hawaiian population.\textsuperscript{119} On the national level, hearings were held about the conditions of Hawai‘i’s indigenous peoples and Congress learned that Hawaiians were a “dying race.”\textsuperscript{120} To alleviate this plight, Hawai‘i’s territorial delegation analogized Kānaka Maoli to Native Americans and sought to return some land
through passage of the Hawaiian Homes Commission Act. The goal of putting Hawaiians back on the land was achieved, however, by attaching a blood quantum requirement in order to be a beneficiary. As aptly articulated by others, like attorney Lesley Karen Friedman, the Hawaiian Homes Commission Act was inherently flawed because it was “rooted in racism and shot through with paternalism.” Professor Kauanui asserted, “Blood quantum is a manifestation of settler colonialism that works to deracinate—to pull out by the roots—and displace indigenous peoples.”

The politics and maneuvering surrounding enactment of the Hawaiian Homes Commission Act bore signs of inherent racism. First, in order to achieve passage of the bill, the proposed Hawaiian Homes Commission Act was portrayed as an Anti-Asian law that would prevent individuals of Asian descent from acquiring lands in the United States and from being more successful than indigenous Hawaiians. Second, the Hawaiian Homes Commission Act, originally intended for indigenous Hawaiians of 1/32 part Hawaiian blood, was amended to be one-half part Hawaiian blood. On this issue of part Hawaiians, A.G.M. Robertson, one of the individuals who overthrew the Hawaiian Kingdom and a Chief Justice of the Supreme Court in the Territory of Hawai‘i, argued that, “the part-Hawaiian . . . are a virile, prolific, and enterprising lot of people. They have large families and they raise them—they bring them up. These part Hawaiians have had the advantage, since annexation especially, of the American viewpoint and the advantage of a pretty good public school system, and they are an educated people. They are not in the same class with the pure bloods.” Paternalism was reflected in the Hawaiian Homes Commission Act because native Hawaiians become wards of the government by having to pay rent for the lands, instead of being given lands fee simple. This was the same scheme implemented against Native Americans by the federal government through the Dawes Act.

Day and his native Hawaiian allies simply regress to the mentality of early twentieth century pro-American annexationists. Their reliance on the Hawaiian Homes Commission Act, which is adopted as a condition of statehood by the State, and then reinforced through various federal laws, calls into question their own motives. Indeed, the harsh result of the Hawaiian Homes Commission Act is a system in which the diminution of individuals of “not less the one-half” blood through interracial procreation ultimately leads to a lack of beneficiaries and the
subsequent returning of lands to the government, thereby severing Hawaiians from their land. For while this law was established with the stated intention of rehabilitation, the reality is that eventually there will be no more native Hawaiians to rehabilitate.

As the lawsuits have made clear, the internal dissonance among Hawaii’s indigenous people threatens the cause of self-determination, threatens governmental programs for Native Hawaiians, and threatens the fabric of these islands. It specifically requires the use of funds and resources to defend against these lawsuits and unnecessarily portrays native Hawaiians as greedy. It is unfortunate that blood quantum continues to be used as a way to divide the community. As Trustee Frenchy DeSoto stated, “The blood quantum issue is intentionally divisive. . . . It was a devious plot, but it has survived for decades.” It is unfortunate that these plaintiffs cannot see the community in which they live, where in their homelands, Native Hawaiians suffer the same fate as most colonized indigenous peoples—the highest rates of serious illnesses, prison incarceration and homelessness, the lowest rates of higher education attainment, family income and limited self-governance over land, culture and politics.

But, the effects of colonization in Hawaii transcend blood quantum debates. To counter the harsh effects of colonization, the Office of Hawaiian Affairs made considerable efforts in its third decade to enrich and sustain a better future for all Native Hawaiians.

*Enriching the Lāhui*

Consistent with their constitutionally mandated requirement, and as they have done in the past, the trustees spent considerable resources to better the conditions of Native Hawaiians. Setting aside its support of federal recognition, the Office of Hawaiian Affairs doubled-down in their support for Hawaiian programs and initiatives. From 2000-2010, the Office of Hawaiian Affairs infused over $134 million into programs that affected land, culture, advocacy for Hawaiian rights, economic development, education, human services, housing, governance, health, and policy.

One of the core areas of support for the Office of Hawaiian Affairs has been in the area of education. Over the years, the Office of Hawaiian Affairs has provided financial support, educational opportunities, and advocacy for support of Native Hawaiian education. It has provided support through direct scholarships with its Higher Education Scholarship Program,
sponsorship of an annual ‘Aha ‘Ōpio Alaka‘i Program, which trained students about leadership and governance, and direct grants to Hawaiian-serving educational organizations, such as ‘Aha Pūnana Leo (language immersion), Nā Pua No‘eau (program for gifted and talented children), and Nā Lei Na‘auao (consortium of Hawaiian public charter schools that implement Hawaiian models of education), to name a few. The Office of Hawaiian Affairs provided educational opportunities from the youngest children, through those wishing to pursue law degrees, to those wanting a change in career. The Office of Hawaiian Affairs even supported educational programs for kūpuna, through its Kūpuna Program, which sponsored workshops and annual convocations of elders to “learn with and from each other through respect, reflection, prayer, music, dance, laughter and tears.”

On the economic development front, the Office of Hawaiian Affairs sustained previous initiatives, like the Native Hawaiian Revolving Loan Fund, and embarked on groundbreaking partnerships to increase economic independence and business sustainability for Hawaiians. The Office of Hawaiian Affairs administered the Native Hawaiian Revolving Loan Fund, which was created in 1988 and funded by the federal Administration for Native Americans. The goals of the Native Hawaiian Revolving Loan Fund were to increase the availability and effectiveness of training and technical assistance, administer a business loan program to encourage Native Hawaiian-owned businesses, and develop a self-sustaining revolving loan fund. The Native Hawaiian Revolving Loan Fund helped individuals, like Kawehi Inaba and Nathan Reyes, who used seed money from the fund to create thriving businesses. Inaba used the money to turn her passion for flying into a successful flight tour company, and Reyes, who had been rejected by various commercial lenders, used the money to jumpstart his automotive repair company. Since its inception, the Native Hawaiian Revolving Loan Fund disbursed well-over 400 loans, totaling over $18 million. The Office of Hawaiian Affairs also used its Consumer Micro-Loan Program, which provided consumer loans to Native Hawaiians experiencing temporary financial hardships or wishing to enhance their career opportunities, to better the conditions of Hawaiians. In addition, the agency provided millions of dollars in funding to various organizations through its Community-Based Economic Development Grants, formally known as its ‘Ili‘ili Grants Program. In fiscal year 2005 alone, the Office of Hawaiian Affairs provided $350,000 in grants to twelve community based organizations, including among others, the
Council for Native Hawaiian Advancement, Hawai‘i Alliance for Community Based Economic Development, Ke Kula Niʻihau o Kekaha, North Kohala Community Resource Center, Waiʻanae Coast Coalition, and the Waimānalo Hawaiian Homes Association. These grants, ranging upwards of $50,000 each, were used for business plans, feasibility studies, business development and marketing, project management, training, and technical assistance.

The Office of Hawaiian Affairs also committed funds and resources to better the conditions of Hawaiians in the areas of health, human services, and housing. It specifically awarded millions of dollars in grants and contracts to serve the Hawaiian community in the areas of oral health, Alzheimer’s care, asthma education, nutrition, fitness, mental illness, primary health care, cancer treatment, elderly programs, traditional Hawaiian healing, and support for increasing physicians. In the area of human services, the Office of Hawaiian Affairs supported various initiatives and programs that touched the lives of individuals who were homeless, incarcerated, elderly, in foster care, special needs, or struggling with domestic violence and/or substance abuse issues.

In terms of housing, the Office of Hawaiian Affairs focused on providing home ownership opportunities and funding mechanisms for Native Hawaiians.

During this third decade, the trustees allocated significant funds and resources to advocating for the rights of Hawaiians at all levels of government through consultations, legislative advocacy, and grants. The Office of Hawaiian Affairs provided consultation for various federal and state projects, including with the Navy on the Pacific Missile Range Facility and with NASA on the development of the Keck Interferometer atop Mauna Kea. In fiscal year 2005, the Office of Hawaiian Affairs staff consulted on 26 Army permits, 117 Environmental Assessments, 28 Environmental Impact Assessments, 38 Cultural Impact Assessments, 17 Conservation District Use Applications, 89 Native American Graves Protection and Repatriation Act reviews, 14 Shoreline Setback Permit reviews, and 31 Water Use Permit Applications. The Office of Hawaiian Affairs also tracked state and federal legislation that affected Native Hawaiians and provided assistance to other state agencies on issues pertaining to Native Hawaiians. The agency protected ancestral remains, ‘iwi kūpuna, and burial sites in dozens of cases. It initiated and supported a project called the Kuleana Escheat Project, which defended title to kuleana lands for which there were no surviving heirs. One of the major
beneficiaries of the Office of Hawaiian Affairs’ financial support in the area of preserving Hawaiian rights was the Native Hawaiian Legal Corporation, an entity that grew out of the partnership between Legal Aid and The Hawaiians in the 1970s. Native Hawaiian Legal Corporation was and still is influential in advocating for Native Hawaiian traditional and customary gathering rights, respect of ‘iwi kūpuna, and protection of sacred Hawaiian sites.

Perhaps the boldest move from the Office of Hawaiian Affairs in the third decade came with its rapid accumulation of various parcels of land. Adding to the three one-acre properties acquired in 1988 and 1998, in 2006, through a partnership with the Federal Forest Legacy Program, the Office of Hawaiian Affairs purchased 25,856 acres of lush forestland called Wao Kele o Puna for $300,000. That same year, the Office of Hawaiian Affairs also purchased the 1,875 acre-Waimea Valley on the island of Oahu for $3.9 million. Both purchases were part of the trustees’ efforts to mālama ‘āina, or care for the land, which Chairperson Apoliona stated, “goes to the piko of who we are as a people.”

The Office of Hawaiian Affairs’ real estate portfolio would increase significantly in 2012 with the acquisition of 30.72 acres of land in Kaka‘ako, 511 acres in central O‘ahu known as the Galbraith Estate, and a new 183,000 square feet headquarter at the Gentry Pacific Design Center. With these acquisitions, the Office of Hawaiian Affairs was recognized as the thirteenth-largest landowner in Hawai‘i.

The rapid acquisition of real estate, while beneficial to establish a native land base, was sharply criticized by some, including the State Auditor. The Auditor argued that “OHA trustees have not established a land acquisition and management infrastructure to adequately support this increased activity.” The Auditor also noted that the “[r]apid expansion of OHA’s real estate portfolio and high staff turnover have contributed to inconsistent land acquisition and management practices.” In her report, the Auditor specifically targeted the handling of the acquisition of the Galbraith Estate. Staff apparently used an unapproved proposed real estate allocation model and failed to provide estimates for the costs of water infrastructure and soil remediation, despite knowing of such necessities on the property. The Auditor also found that staff failed to adequately report and maintain documentation of the agencies real estate operations, which were contrary to land management best practices.

The State Auditor did not stop at criticizing the Office of Hawaiian Affairs’ land management practices, she also dug into the entity’s grant management and oversight practices.
The Auditor determined that the Office of Hawaiian Affairs’ administration “has not developed procedures and guidelines for its program that satisfy applicable laws and Board of Trustees policies. The lack of formal procedures has led to inadequate and inconsistent grant monitoring that cannot ensure that OHA has the information necessary to determine whether grants are achieving their intended results.”153 There were, according to the Auditor, also inadequate checks and balances. For example, one grantee extended a $24,334 grant for four additional months, without prior approval.154 However, the Office of Hawaiian Affairs’ administration allowed final payment and closing of the grant.155 Similarly, the Office of Hawaiian Affairs permitted a $47,269 grant recipient to “reallocate unexpended grant funds to another non-grant-related project without appropriate approvals.”156 The trustees considered the Auditor’s recommendations for addressing some of the agency’s shortfalls, and concluded that it would “adopt them as necessary.”157 Despite these criticisms, it is undisputed that over the course of its third decade, the trustees of Office of Hawaiian Affairs continued to pour millions into programs and initiatives to, as they believed, better the conditions of Native Hawaiians.

6 Testimony of S. Haunani Apoliona on behalf of the Office of Hawaiian Affairs, Hearing on S. 1011 (August 6, 2009) before Committee on Indian Affairs of the United States Senate, at 13.
7 U.S. Const. art. I, § 8, cl. 3; U.S. Const. art. II, § 2, cl. 2.
10 Doe v. Kamehameha Schools Bernice Pauahi Bishop Estate, 470 F.3d 827, 850 (9th Cir. 2006) (Fletcher, J. concurrence); Rice v. Cayetano, 528 U.S. 495, 534 (2000) (Stevens, J. dissent) (citing 42 U.S.C. § 11701(17)).
12 Id.
13 Will Caron, Building an Indigenous Coalition for Radical Resistance to Colonialism, HAWAI'I INDEPENDENT, April 7, 2015, available at http://hawaiindependent.net/story/building-an-
indigenous-coalition-for-radical-resistance-to-colonialism (last accessed October 25, 2015); see also AMY E. DEN OUDEN & JEAN M. O’BRIEN, RECOGNITION, SOVEREIGNTY STRUGGLES, AND INDIGENOUS RIGHTS IN THE UNITED STATES 2 (Univ. S.C. Press 2013) (“... [I]ndigenous struggles for recognition in the twentieth and early twenty-first centuries are deeply rooted in history. They have entailed complex confrontations and engagements with U.S. federal and state laws and policies, and they are struggles that remind us of the destructive power of the racial stereotypes and popular myths about Indians that persist today and that have obscured not only how native nations and communities see themselves but also what they have surmounted to sustain themselves as peoples”).

18 Gordon Y.K. Pang, Opponents Ask OHA’s Aid to Derail Akaka Bill, HONOLULU ADVERTISER, July 8, 2005, at B6.
19 Id.
20 Curtis Lum and James Gonser, Group Urges OHA to Drop Support, HONOLULU ADVERTISER, October 7, 2005, at B1, B5.
22 Id.
30 Haunani Apoliona, OHA Has a “Cow” Over Political Cartoon, HAWAI’I REPORTER, January 24, 2008.
33 Pang, supra note 26, at A1, A13.


Pang, supra note 26, at A1, A13.


Dennis Camire, Emotions Run High During Akaka Bill Debate, HONOLULU ADVERTISER, June 7, 2006, at B1, B4.


Camire, supra note 55, at B1, B4.


Dennis Camire, Akaka Bill Fails to Move to Senate Floor Debate, HONOLULU ADVERTISER, June 8, 2006, at A1, A10.

Letter from Assistant Attorney General William E. Moschella of the U.S. Department of Justice Office of Legislative Affairs to the Honorable Bill Frist, Senate Majority Leader (June 7, 2006), at 1 (brackets omitted) (on file with author).

Kua and Kakesako, *supra* note 64, at A15.

*Id.*


*Price v. Akaka* (“*Price I*”), 928 F.2d 824, 825-26 (9th Cir. 1990).

*Id.*

Testimony of Kamuela Price and the Hou Hawaiians on HB 890, retrieved from the Hawai’i State Archives (February 22, 1979) (on file with author).

*Price I*, 928 F.2d at 826.

*Price v. Akaka* (“*Price II*”), 3 F.3d 1220, 1222 (9th Cir. 1993).

*Id.* at 1222 (quotation marks omitted).

*Price I*, 928 F.2d at 826.

*Id.*

*Id.* at 827.

*Price II*, 3 F.3d at 1223.

*Id.* at 1225.

*Id.* at 1226 (citing *Hoohuli v. Ariyoshi*, 631 F. Supp. 1153, 1161 (D. Haw. 1986)).

*Id.* at 1226 (quoting *Kepoo v. Burgess*, No. 88-2987-09 (Haw. 1st Cir. 1988)).

*Id.*

Restatement (Third) of Trusts, § 87 (2007).

*Id.* at § 87 cmt. a.


*Id.*

*Day v. Apoliona*, 496 F.3d 1027 (9th Cir. 2007).

*Id.* at 1039.


*Id.* at *13.

Haw. State Const., art. XII, § 6.

Admission Act § 5(f).

*Price II*, 3 F.3d at 226.

*Day*, 496 F.3d at 1034 n.10 (citing Austin W. Scott & William F. Fratcher, 3 *The Law of Trusts* § 187 (4th ed. 2001)).


*Id.*

*Id.*

*Day*, Civ. No. 05-00649 SOM/BMK, at *19.
Day v. Apoliona ("Day II"), 616 F.3d 918, 926-27 (9th Cir. 2010) (citations and quotation marks omitted).

Press Release, Office of Hawaiian Affairs, OHA Applauds 9th Circuit Court Decision (July 28, 2010), at 1 (on file with author).


Id. (defining native Hawaiian as “any descendent of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778”).


Id. at 107-08 (noting that congressional leaders and judges had unfavorable and racist views of Asians).


Office of Hawaiian Affairs, Annual Reports 2001-2010 (on file with author).


Id. at 20.

Id. at 13.

Id. at 13, 21.

2006 Annual Report, supra note 128, at 35.


Id.


Id. at 21.

Id. at 22.

Id. at 22-23.

See supra note 127.


Id. at 8.


Id. at 28.

Id.

Id. at 14.

Id. at 15.

Id.

Id. at 21.

Id. at 24.

Id.

Id.

Id. at 58.
CHAPTER 7

Broken Promises: The State’s Reconciliation Efforts and Backsliding

In 2010, the Office of Hawaiian Affairs set out to implement its latest Strategic Plan, which focused on six priorities: (1) preserving, practicing, and perpetuating the Hawaiian culture to strengthen Native Hawaiian identity; (2) participating in and benefiting from stewardship initiatives to maintain a connection to the past and the land base; (3) achieving self-governance to restore pono (righteousness) and ea (governance); (4) assisting in greater economic self-sufficiency; (5) promoting and supporting educational opportunities for Hawaiians; and (6) supporting healthcare initiatives to improve the quality and longevity of life for Native Hawaiians. The Office of Hawaiian Affairs, thus, continued with its mission to: “mālama (protect) Hawaii’s people and environmental resources and OHA’s assets, toward ensuring the perpetuation of the culture, the enhancement of lifestyle and the protection of entitlements of Native Hawaiians.”

In an effort to implement its Strategic Plan, the trustees supported several endeavors. These endeavors have come to epitomize the current struggles for Native Hawaiians, particularly as they relate to the State of Hawai‘i. Indeed, the State would continue to play a key role in the efforts toward justice for the Native Hawaiian community, but its efforts would often be overshadowed by retrenchment and backsliding. Indeed, although the Hawai‘i Supreme Court issued a landmark decision that held the State to its verbal commitments to reconciliation, the political branches reneged on their promises to ensure a final settlement of the ceded lands dispute and to end the alienation of ceded lands. In addition, while the Office of Hawaiian Affairs’ major efforts toward self-determination for Hawaiians failed before Congress, there were still other avenues that the trustees supported to push for a separate Native Hawaiian governing entity. The Office of Hawaiian Affairs began to shift focus toward another process of recognition that heavily involved the State and resources from the Office of Hawaiian Affairs. But that process again came with heavy criticism from both within and outside of the Native Hawaiian community.
Ceded Lands Déjà Vu

The debate over the revenues that the Office of Hawaiian Affairs was entitled lasted several decades. Following the surge in State legislation and the passage of the Apology Resolution, the Office of Hawaiian Affairs battled the State to halt the sale or transfer of ceded lands to third-parties to maximize the potential land base for a reorganized Hawaiian governing entity. The legal battle slowly made its way through the legal process and culminated in a series of decisions from the Hawai‘i Supreme Court and the Supreme Court of the United States. The Office of Hawaiian Affairs’ lawsuit regarding the alienation of ceded lands serves as a reminder of the ways in which the judicial branch of government can hold its political branches accountable for commitments made toward reconciliation for past injustices, and also serves as another example of the unwillingness of the political branches of government to support their words with action.

In 1987, the Housing Finance and Development Corporation (“HFCD”)—an entity created by the State of Hawai‘i to remedy the critical housing shortage facing the community—examined parcels around the State and selected two sites for future development of housing projects. The two sites, Leiali‘i in West Maui and La‘i‘opua in North Kona on Hawai‘i Island, were both on Ceded Lands. After obtaining the necessary approvals, the HFDC began a residential housing development project at Leiali‘i. Pursuant to State law, specifically Hawai‘i Revised Statutes section 10-13.6, and consistent with the determination of its share of ceded land revenues, the Office of Hawaiian Affairs was to be compensated twenty percent of the fair market value of both parcels. Following passage of the Apology Resolution (acknowledging that “the indigenous Hawaiian people never relinquished their claims . . . over their national lands to the United States”), attorney William Meheula recommended, and the Office of Hawaiian Affairs agreed and demanded, “that a disclaimer be included as part of any acceptance of funds from the sale so as to preserve any native Hawaiian claims to ownership of the ceded lands[.]” In October 1994, the State balked at putting in such a disclaimer because “to do so would place a cloud on title, rendering title insurance unavailable to buyers in the [Leiali‘i] project.” The State Department of Land and Natural Resources thereafter transferred the land to HFDC for $1.00, and sent the Office of Hawaiian Affairs a check for $5,573,604.40 as its twenty
percent share of the fair market value of the land.\textsuperscript{9} The Office of Hawaiian Affairs refused to accept the check, and, along with several Native Hawaiian individuals, filed suit in State court seeking to halt the sale of all ceded lands because the “alienation of the land to a third-party would erode the ceded lands trust and the entitlements of the native Hawaiian people.”\textsuperscript{10} As Native Hawaiian rights attorney Melody K. MacKenzie asserted, “Those lands may be part of some major settlement, so to lease them now or dispose of them will definitely affect what’s available for a settlement in the future[.\textsuperscript{11}]” Then-Chairman Clayton Hee provided the rationale for filing suit against the State: “What is being disputed is whether the state had the legal right to dispose of ceded lands at no compensation to the public land trust. . . . This is the first case where the Office of Hawaiian Affairs has taken a proactive step to prevent the state from reducing the inventory of public lands.”\textsuperscript{12}

The trial court heard evidence regarding the transfer of the land, the importance of the land to the Hawaiian community, analogies to Native American property rights, and evidence from the State that it was authorized to sell ceded lands from the public land trust.\textsuperscript{13} Judge Sabrina S. McKenna—future justice of the Hawai‘i Supreme Court—issued an opinion on December 5, 2002, concluding that the Office of Hawaiian Affairs’ claims were barred by various legal doctrines and that the “State had the express authority to alienate ceded lands from the public lands trust.”\textsuperscript{14} The Office of Hawaiian Affairs appealed.

Writing for a unanimous court, Chief Justice Ronald T.Y. Moon—the nation’s first Korean-American Chief Justice—reversed the trial court’s decision by relying upon its reading of State laws and the Apology Resolution. The court first reviewed the language of the Apology Resolution, in which Congress and the President determined:

Whereas the Republican of Hawaii also ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii, without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government;

. . . .

Whereas the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum;

. . . .

Whereas the Native Hawaiian people are determined to preserve, develop and transmit to future generations their ancestral territory, and their cultural identity
in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions.\textsuperscript{15}

Although it contained a statement that “Nothing in [it] is intended to serve as a settlement of any claims against the United States,” in the Apology Resolution, the political branches (Congress and the President) undoubtedly expressed a “commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people.”\textsuperscript{16} Hence, under a plain reading, the standard used to interpret legislative intent, the Apology Resolution was, as others have recognized, “more than a policy statement.”\textsuperscript{17} While it expressly did not constitute a settlement, it evidenced a federal intent to reconcile with the Hawaiian community.

Chief Justice Moon latched onto that concept and held that although the Apology Resolution did not, on its face, constitute a settlement of claims, it did serve as a “foundation (or starting point) for reconciliation,” which he then noted included “the future settlement of the plaintiffs’ unrelinquished claims.”\textsuperscript{18} With that one sentence, the Hawai‘i Supreme Court took a step where no other court had gone before; it recognized that the words of the Apology Resolution created a direct acknowledgment and acceptance by the United State of a commitment to reconciliation with Native Hawaiians. The Hawai‘i Supreme Court, therefore, halted the sale or transfer of ceded lands to third parties “until the claims of the native Hawaiians to the ceded lands have been resolved.”\textsuperscript{19} The pronouncement by a unanimous court was a victory for the Hawaiian community; there was an official stop to the alienation of ceded lands and, more importantly, a judicial recognition that Native Hawaiians had outstanding claims that needed to be dealt with by the State.

But, the brilliance of the decision was that it firmly situated its rationale upon federal law and on independent State law grounds. Specifically, the Hawai‘i Supreme Court relied upon Acts 354, 359, 329 and 340 to conclude that the State has made commitments to reconcile with Native Hawaiians that need to be adhered to.\textsuperscript{20} In Act 354, the State recognized that “many native Hawaiians feel there is a valid claim for reparations[,]” acknowledged that “the actions by the United States were illegal and immoral,” and “pledge[d] its continued support to the native Hawaiian community by taking steps to promote the restoration of the rights and dignity of
native Hawaiians.” In Act 359, the State recognized in 1993 that “the indigenous people of Hawaii were denied . . . their lands,” and committed to “facilitate the efforts of native Hawaiians to be governed by an indigenous sovereign nation of their own choosing.” In 1997, the Legislature passed Act 329, in which the State recognized “that the lasting reconciliation so desired by all people of Hawai‘i is possible only if it fairly acknowledges the past while moving into Hawaii’s future. . . . [O]ver the last few decades, the people of Hawaii through amendments to their state constitution, the acts of their legislature, and other means, have moved substantially toward this permanent reconciliation.” The State also recognized its continued commitment “toward a comprehensive, just, and lasting resolution” with the Native Hawaiian community.

Finally, upon return of the island of Kaho‘olawe to the State from bombing activities by the federal government, the State committed in Act 340 to “transfer management and control of the island and its waters to the sovereign native Hawaiian entity upon its recognition by the United States and the State of Hawai‘i.”

For the Moon Court, taking these various State laws together evidenced a commitment by the State to reconciliation with Native Hawaiians; it was a commitment that the court took seriously to enforce. For the Hawai‘i Supreme Court, the issue of ceded lands was fundamental to reconciliation between the State and the Native Hawaiian community because of the importance of land to Hawaiians:

Aina, or land, is of crucial importance to the Native Hawaiian People—to their culture, their religion, their economic self-sufficiency and their sense of personal and community well-being. Aina is a living and vital part of the Native Hawaiian cosmology, and is irreplaceable. The natural elements—land, air, water, ocean—are interconnected and interdependent. To Native Hawaiians, land is not a commodity; it is the foundation of their cultural and spiritual identity as Hawaiians. The aina is part of their ohana, and they are for it as they do for other members of their families. For them, the land and the natural environment is alive, respected, treasured, praised, and even worshiped.

The Moon Court also enshrined in precedent the Hawaiian cultural importance of land to Hawaiians and their identity by quoting testimony of respected kumu hula, Olive Kanahele:

The land itself is the deity, Pele. The land itself was made from fire and it comes from out of the earth. And, you know, I can give you a little genealogy of the Pele family. The Pele family comes from—the mythological genealogy of the Pele family is that the mother is Haumea, she is the Mother Earth, she is the earth and all of these children are born from different parts of her. Pele is born from the
natural channel of a female, she comes from the womb. And so her responsibility is to go back into the womb of the mother and—and bring out all of these things that we can land, that we call magma and lava and eventually will become land. One of the—one of the most amazing literary work that we have is the kumulipo. The kumulipo spans generations of people. And the first era of the kumulipo, the very first line of the kumulipo talks about the making of the earth. And why does it have to be earth, you ask me? It has to be earth because as man we need—we need land to live on. That is—that is our foundation. And for the native Hawaiian, more than the family, land is their foundation. Land is their identity.27

Given the State and federal governments’ commitments to true reconciliation with the Hawaiian community and the clear harm that would come to Native Hawaiians by the sale or transfer of the land, Chief Justice Moon determined that the State could no longer alienate the ceded lands: “we believe, and therefore, hold that the Apology Resolution and related state legislation . . . give rise to the State’s fiduciary duty 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.”28 The decision was a victory for the Office of Hawaiian Affairs and the Hawaiian community.

Celebration for the watershed decision, however, was quickly quelled when Governor Linda Lingle and her administration appealed the decision to the United States Supreme Court. The Office of Hawaiian Affairs requested that Lingle withdraw the appeal, but the Administration refused.29 Lingle’s attorney general, Mark Bennett, argued that the State should have unfettered discretion to sell or transfer ceded lands.30 In an opinion by Associate Justice Samuel Alito, the Supreme Court struck down the Hawai‘i Supreme Court’s decision to the extent that it relied upon the Apology Resolution.31 Based upon its opinion that joint resolutions signed by Congress and the President were not the same as other laws enacted with approval of both chambers of Congress and the President, the Supreme Court made it clear that the Apology Resolution did not provide a basis for Native Hawaiian claim to the ceded lands.32 Interestingly, the Supreme Court also concluded that it did not have jurisdiction to rule on the State law bases for the moratorium on the sale of ceded lands, and remanded the case to the Hawai‘i Supreme Court.33 But before the Hawai‘i Supreme Court could affirm its holding on solely a State law rationale, the Office of Hawaiian Affairs, the State, and most of the individual Native Hawaiian plaintiffs reached a settlement agreement through passage of Senate Bill 1677, which required the vote of two-thirds of both chambers of the Legislature and the signature of the Governor to
alienate ceded lands.\textsuperscript{34} In a joint statement, Attorney General Bennett and Office of Hawaiian Affairs Chairwoman Apoliona stated: “There is no question that OHA and the state had significant differences with regard to this lawsuit. This settlement resolves those differences in a way we believe is beneficial to all citizens of Hawai‘i. We can now concentrate on working together on matters we all believe are crucially important to Hawai‘i . . . . We look forward to doing so.”\textsuperscript{35} One plaintiff, Professor Jonathan K. Osorio, refused to settle the lawsuit because he believed, accurately so, that the Hawai‘i Supreme Court could reaffirm its moratorium solely on State law grounds and without reference to the Apology Resolution.

The Hawai‘i Supreme Court’s reconsideration of their decision in regards to Osorio was dismissed on procedural grounds because the political branches had reached a settlement in which the Leiali‘i parcels would not be sold, and therefore, the claims for a moratorium were no longer ripe for adjudication.\textsuperscript{36} It was clear that the political settlement reached usurped the Hawai‘i Supreme Court’s opportunity to affirm the moratorium solely under Acts 354, 359, 329 and 340. Instead, in regards to the alienation of ceded lands, the Hawaiian community was left to the mercy of State legislators. The settlement, which the Office of Hawaiian Affairs agreed to, while politically expedient, harmed the Native Hawaiian interest in ceded lands. The Moon decision represented a paradigm shift in the push for justice and reconciliation for Native Hawaiians as it broadcasted unified support from Hawai‘i’s highest court that it would hold the State to its reconciliation commitments. The Office of Hawaiian Affairs ignored the Hawai‘i Supreme Court’s opinion and simply gave up after its fifteen-year legal battle. As Osorio stated, “I hope they understand how much they have betrayed not just the interests of the (Hawaiian) nation but their own interests, because they are not willing to fight.”\textsuperscript{37} The Office of Hawaiian Affairs unfortunately underestimated the true reconciliatory power that the Hawai‘i Supreme Court asserted and would have likely asserted again.

Shortly after the issue of alienation of ceded lands was resolved, the Office of Hawaiian Affairs negotiated with the State and Governor Neil Abercrombie a global settlement of the Ceded Lands revenue issue that had been thrown into flux during the Cayetano and Lingle Administrations. On April 11, 2012, the Office of Hawaiian Affairs and the State announced a settlement of claims to Ceded Land revenues from November 7, 1978 (the date the Office of Hawaiian Affairs was ratified by Hawai‘i’s voters) until June 30, 2012. The crown jewel of the
settlement agreement was the transfer from the State to the Office of Hawaiian Affairs of several parcels of land in the growing and bustling district of Kaka‘ako. The land was valued at approximately $200 million. But, in order to obtain legislative support for the settlement, the Office of Hawaiian Affairs was forced to take the position that it did not want, at the time, the right to develop the land in Kaka‘ako for residential use. Indeed, an amendment to grant the Office of Hawaiian Affairs such authority in the settlement bill was being proposed at the same time that had the possibility to derail the entire settlement.\(^{38}\) Despite this, the Office of Hawaiian Affairs took the position that once it became a landowner and conducted its “appropriate due diligence,” it could be in a better position to request such entitlements.\(^{39}\)

The settlement was premised on the belief that, in order to maximize income from the land, the Office of Hawaiian Affairs could later come back to the Legislature to seek authority to develop residential buildings. In 2014, the Office of Hawaiian Affairs came back to the Legislature to seek approval for residential development. In testimony before a legislative committee, the Office of Hawaiian Affairs testified:

> Based on OHA’s diligent planning for Kaka‘ako Makai to date, the time is now ripe for entitlement legislation. We have been exploring all options for our Kaka‘ako Makai properties to maximize our revenue-generating opportunities to best serve our beneficiaries. Thriving development on our Kaka‘ako lands, and the income generated to OHA, will allow us to better address our statutory responsibility to improve the conditions of Native Hawaiians. The significantly enhanced revenue stream will help us achieve our strategic priorities in culture, land and water, economic self-sufficiency, education, health, and Hawaiian self-governance.\(^{40}\)

The Office of Hawaiian Affairs, thus, requested that the Legislature “remove the residential-development restriction on certain parcels that are a subset of the parcels currently owned by OHA, so that we can reasonably balance the interests of Native Hawaiians and the general public to do something that will make us all proud.”\(^{41}\)

Some criticized the Office of Hawaiian Affairs. Sharon Moriwaki, president of a community group called Kakaako United, slammed the Office of Hawaiian Affairs’ move: “OHA accepted the [Kaka‘ako] parcels as settlement knowing of the prohibitions against residential development and should not now use the ‘highest and best use’ argument to violate the trust of the community and the spirit and intent of the prohibition[.]”\(^{42}\) Stuart H. Coleman of the Surfrider Foundation rallied opposition by arguing that because “Kakaako Waterfront Park
was one of the last areas of open space and park with public access to the shoreline along the urban Honolulu coastline[,]” the Office of Hawaiian Affairs would “limit access and create a high-rise wall blocking the view plane [of] many others.”

The Surfrider Foundation’s testimony lacked credibility as the proposed development would in no way block access to the shoreline, as the Kaka‘ako Waterfront Park would remain. The Office of Hawaiian Affairs made the point clearest: “We understand better than any other developer the impacts of irresponsible development. Native Hawaiians have been victims of, and suffered most from, the consequences of reckless development.”

Surfer Dean Nikaido agreed: “From what I have seen, it is OHA that has fought for fair access to public trust resources like water, beaches and shorelines, and fought to conserve our lands to practice traditional and customary rights.”

In the end, and despite efforts by the Office of Hawaiian Affairs and their allies, the Legislature rejected the plea to develop parcels of property in the growing neighborhood of Kaka‘ako. The Legislature’s rejection of the exemption was curious given the dozens of towers rising in the Kaka‘ako neighborhood by developers of luxury residential developments. Hawaiians were again left to fend for themselves as the State again reneged on its promises of reconciliation. For many, the actions of legislators in rejecting the development bill signaled an unwillingness to provide Native Hawaiians with the self-determination that the Moon Court had clearly upheld.

Facilitating Reorganization

Although the Akaka Bill failed in Congress, a new path for the establishment of a Hawaiian governing entity was underway in Hawai‘i. In 2011, the State Legislature passed Act 195, which created a Native Hawaiian Roll Commission—tied administratively to the Office of Hawaiian Affairs—whose responsibilities included facilitating reconciliation by preparing a roll of “qualified Native Hawaiians.” Governor Neil Abercrombie—the former State Senator who characterized the Ceded Land revenue issue as a Phryric victory—choked up after signing the bill: “This bill is the first step in seeing to it that we have a Native Hawaiian governing entity. It’s not only the first step, it is a practical manifestation of all that has gone on before.” Indeed, it was an effort, as investigative journalist Ian Lind wrote, to “rekindle momentum for Hawaiian
The roll commission’s chair, former Governor John Waihe‘e, was more blunt, stating that the “valiant effort of [Senator] Akaka was . . . yesterday’s news.” Waihe‘e continued, “Act 195 was really a stroke of genius[.]”

The list that the roll commission compiled would then be published. Under Act 195, the government simply required the publication of the list of individuals: “The publication of the roll of qualified Native Hawaiians . . . [was] intended to facilitate the process under which qualified Native Hawaiians may independently commence the organization of a convention of qualified Native Hawaiians, established for the purpose of organizing themselves.” Act 195 required that an individual on the roll be “a descendant of the aboriginal peoples who, prior to 1778, occupied and exercised sovereignty in the Hawaiian islands,” and who has “maintained a significant cultural, social, or civic connection to the Native Hawaiian community and wishes to participate in the organization of the Native Hawaiian governing entity[.]”

In practice, Act 195 simply required the roll commission to collect and compile a list of individuals sharing common characteristics. Although the legislators envisioned it, Act 195 did not mandate conduct or set eligibility requirements for an election. The roll commission’s responsibility was no different than what the government, through agencies like the United States Census Bureau or the Bureau of Labor Statistics, already did—collect information that can be then sorted according to certain characteristics. Courts across the country have upheld the collection of demographic data pertaining to race. These courts have been clear that the mere collection of data is distinguishable from using such information to classify individuals and treat them different from others.

The language of Act 195 that references an intent to “facilitate” a process and serve as a “basis” for qualified Native Hawaiians to reorganize was merely aspirational and in no way a binding commitment to sanction a specific process that would lead to the establishment of a Hawaiian governing entity. Pursuant to Act 195, once the roll was published, Native Hawaiians themselves could then use (or not use) that roll in whatever way they deemed necessary. Once the roll commission completed its publication, it could seek dissolution from the Governor. Theoretically, other than compiling and verifying the roll, the State and the Office of Hawaiian Affairs would not participate in the details of creating or reorganizing a Hawaiian governing entity.
The first registrant with the roll commission was Senator Daniel Akaka, who stated: “Native Hawaiians are on a long and difficult journey to regain control of our collective future, and transmit our culture, knowledge and values to future generations. Signing this petition affirms that as a state, we recognize the rights of Native Hawaiians, as the indigenous people of Hawai‘i, to perpetuate the culture of our island home. It is time to holomua, to move forward together, and to express our commitment to the future of Hawai‘i and her indigenous people.”

Despite his stirring oratory, the roll commission’s campaign to register Native Hawaiians, called Kana‘iolowalu, was unsuccessful at the beginning. The Commission spent over $1.8 million to register fewer than 10,000 Native Hawaiians. Within two years, the roll commission registered only 17,225 people out of an approximately 527,077 Native Hawaiians throughout the United States. It was, as Lind wrote, “[p]retty meager pickings, indeed[.]” But, Kana‘iolowalu attracted a wide-breadth of supporters, including instrumental Ka Lāhui leader, Dr. Lilikalā Kame‘eleihiwa, who argued:

I am a grandmother now and I am tired of waiting for a Native Hawaiian government. I want a government now that is not OHA the state agency. I want a Native Hawaiian government that can negotiate for land for my grandchildren, and land for the 45% of Native Hawaiians who have had to leave Hawai‘i to escape the great economic hardship here, so that finally they can come home. Maoris in New Zealand have land for their people. Why can’t Native Hawaiians have land that we control for our own people?

I want a Native Hawaiian government that can run its own Hawaiian Board of Education and school system where all Native Hawaiian children can learn to speak Hawaiian and practice Hawaiian culture. I want us to have our own hospitals and doctors where Hawaiian medicinal plants and lomilomi are available as a matter of course. I want us to have access to water and land where we can grow the healthy food of our ancestors.

Yet, Kameʻeleihiwa’s support was not enough. Partially due to confusion and/or a paralysis from previous efforts by the Office of Hawaiian Affairs to enroll Native Hawaiians, the roll commission was not successful. For others, its lack of success was also attributable to the roll commission being an arm of the State that has done tremendous violence to Native Hawaiians and the cause of self-determination. As Professor Noe Goodyear Kaʻōpua argued, “[S]ettler state-sponsored programs have never solved the problems that the occupier’s presence created in the first place: houselessness, pollution, diminished local food production, substance abuse, and the overall devaluation of ʻŌiwi ways of living. . . . [Y]ou are asking us to submit to a
process initiated by that very state. In so doing, the new governing entity would enter any negotiation for a land base from a weakened position right from the get go.”

As a runaround to the lack of support, in 2013, former-Office of Hawaiian Affairs Chairperson Clayton Hee, who now served as the powerful chairman of the State Senate’s Judiciary Committee, fashioned a last-minute solution. In an interesting political maneuver, Hee “gutted and replaced” a bill regarding service of process, with a bill that mandated that the roll would include anyone that had registered in the Office of Hawaiian Affairs’ prior enrollment efforts, such as Kau Inoa, or anyone that met the ancestry requirements of Kamehameha Schools. Hee’s move, while met with little opposition at the time—likely due to its belated nature—was signed into law by Governor Abercrombie as Act 77. The Office of Hawaiian Affairs strongly supported the move. Act 77 allowed for the transfer of names and information from the various enrollment processes, which exponentially grew the size of the roll.

With a ballooning roll, upwards of 130,000, the Office of Hawaiian Affairs announced that it would expend funds and act as a “neutral” facilitator to empower Native Hawaiians to participate in building a governing entity. Flanked by diverse Native Hawaiian voices, the trustees and new-Chief Executive Officer Dr. Kamana‘opono Crabbe announced their intent to support a process of reorganization. Dr. Crabbe stated, “We will come together to create a nation where all Native Hawaiians have an opportunity to thrive. I have every confidence that we will succeed.” Bumpy Kanahele, a self-proclaimed head of state for the Nation of Hawai‘i and ardent critic of the Office of Hawaiian Affairs, expressed his optimism: “I’m so proud of OHA for supporting an effort that moves us forward . . . [I]f you are kānalua (doubtful) about signing up [for the roll], then find out more information or contact me. I can give you the perspective of why I’m involved.” Former-Trustee Walter Ritte expressed hope, but skepticism: “The call to come together is a great call and I hope it is a true call. But only time is going to tell us that.” Ritte continued, “I’m hoping OHA is going to be able to bridge the gap and connect with their community. What I really like about what happened today is OHA now is willing to accept and celebrate the diversity within the community instead of trying to say who’s right and who’s wrong.” The press conference and gathering of diverse perspectives ended with the singing of Ka Na‘i Aupuni, a song of unity in honor of Kamehameha, Hawai‘i’s first sovereign ruler:
As Office of Hawaiian Affairs Chairperson Collette Machado made clear that day: “Hawaiians are now moving forward and we stand united.”

The momentum for reorganizing in an unimpeded way was building. Although the Office of Hawaiian Affairs and the State, through the roll commission, built momentum for Native Hawaiian self-governance, it was understood that the ultimate decision of what form such reorganization would take was up to Native Hawaiians themselves to organize. The process necessarily needed an infusion of funds. On October 16, 2014, the trustees specifically authorized the use of section 5(f) trust funds to support a “neutral, private third-party entity” to manage a “non-state [delegate] election, independent and separate from state elections”, convention and referendum process “for the purpose of determining a structure for a governing entity, and submit that structure to the will of the Native Hawaiian people.”

One private organization heeded the call and took it upon itself to organize the convention. That entity, Na‘i Aupuni, would serve as the backbone of the latest efforts to organize Native Hawaiians. In its Bylaws, Na‘i Aupuni described its creation:
By Action Item dated March 6, 2014, the Office of Hawaiian Affairs (OHA) authorized and approved the use of the Funds to enable Native Hawaiians to participate in a process through which a structure for a governing entity may be determined by the collective will of the Native Hawaiian people by transmitting the Funds to an entity that is independent of OHA and any apparatus of the State of Hawai‘i. OHA initially invited nine Ali‘i trusts, Royal societies and Civic organizations to discuss the development of this independent body. From that group of nine, the following three organizations, each represented by two individuals, continued the discussion: King Lunalilo Trust & Home (James Kuhio Asam and Michelle Nalei Akina), ‘Ahahui Ka‘ahumanu (Pauline Nakoolani Namuo and Geraldine Abbey Miyamoto) and Hale O Nā Ali‘i O Hawai‘i (Naomi Kealoha Ballesteros and Selena Lehua Schuelke). Eventually, the three organizations and the six individuals decided that the purpose of the entity would be best served if the six individuals in their individual capacity and not as representatives of any organization should form and lead the independent entity by serving as directors of the Na‘i Aupuni.

Na‘i Aupuni stated: “Hawaiians have been frustrated by federal, state and/or local governments exercising decision-making authority over issues that are of grave concern to them. These issues involve ceded lands, Hawaiian Home Lands, water rights, gathering rights, [the Thirty-Meter Telescope] and even OHA and the Hawaiian Roll Commission. A Hawaiian government formed by a majority or near majority of adult Hawaiians who reside in Hawai‘i will be a government that has standing to represent all Hawaiians who reside in Hawai‘i and thus will be in a position to secure the authority to make decisions to address these kinds of issues.”

Na‘i Aupuni sought funding from the Office of Hawaiian Affairs to conduct its own election of delegates, a convention, and a possible ratification vote. The Office of Hawaiian Affairs thereafter provided Na‘i Aupuni with $2,595,000.00 of section 5(f) trust funds as a grant for Na‘i Aupuni to coordinate Na‘i Aupuni’s election efforts. The terms of the Grant Agreement were clear that the Office of Hawaiian Affairs would not “directly or indirectly control or affect the decisions of [Na‘i Aupuni].” The Office of Hawaiian Affairs thereby provided Na‘i Aupuni with a “no strings attached” grant for Na‘i Aupuni to conduct its own independent election of delegates for Hawaiian people to consider whether, and if so, what form, a Hawaiian governing entity should be reorganized. “This is an encouraging sign for our efforts to empower Native Hawaiians to determine their own future though a process that is open to all of them,” exclaimed new-Office of Hawaiian Affairs Chairman Robert K. Lindsey, Jr. Na‘i Aupuni decided to use the roll as a basis for its election because it believed that it was too expensive and time-
consuming to have to create a new list of Native Hawaiians. The roll also provided the most comprehensive list of individuals as it included the lists compiled by the Office of Hawaiian Affairs in its various registration efforts, all of which did not require specific attestations to the “unrelinquished sovereignty of the Native Hawaiian people.” With the framework in place, and a contract with an election vendor, Na‘i Aupuni commenced the election process in the summer of 2015.

Native Hawaiians criticized the Office of Hawaiian Affairs’ support of Na‘i Aupuni. The unity that was initially sought was falling apart. Former Trustee Ritte stated, “I am totally opposed to this idea of giving [five] individuals the reigns and letting them steer our canoe. I’ve never seen these people involved in the efforts over the years to build our nation. Somehow, before we strike this deal, we need to clean this up, because we can’t build our nation in the sand. We need a solid foundation, but this is not the foundation that we were told would represent us.”

Former Hui Pū leader Andre Perez expressed his frustration: “I find it disturbing that we’re considering giving Na‘i Aupuni $2.8 million when we don’t even know who they are . . . Who is Na‘i Aupuni? Who are those [five] individuals? Can somebody tell me?”

But, at the heart of Perez’s concern was that Na‘i Aupuni relied on data and information collected through the roll commission’s Kana‘iolowalu campaign: “We have to remember that this process started with the State of Hawai‘i, not the Hawaiian people.”

One Native Hawaiian, Dr. Trisha Kēhaulani Watson-Sproat, lambasted the process: “What is happening to Hawaiians has not been free and informed. The overwhelming number of people enrolled into the Na‘i Aupuni delegate list were done so via legislation, not voluntary enrollment. No one elected the Na‘i Aupuni board, and they have no accountability to the Hawaiian people at all. . . . This is a matter of principle and what are some very serious procedural violations.”

Dr. Watson-Sproat also noted what she believed were “some very serious violations of the UN Declaration of the Rights of Indigenous Peoples.”

Dr. Goodyear Ka‘ōpua characterized Na‘i Aupuni not as nation-building, but as “bureaucracy-building.” The process, according to Goodyear Ka‘ōpua, mirrored that of recognition processes in Indian Country where the goal of the federal government was assimilation in order to divest the native people from their claims to lands.

Indeed, it is clear from other examples across the globe that, as scholar Glen Coulthard recognized, “when delegated exchanges of recognition occur in real world contexts of
domination the terms of accommodation usually end up being determined by and in the interests of the hegemonic partner in the relationship.”

The trustees heard the voices of discontent, but ignored them and proceeded with providing Na‘i Aupuni the funding to begin the process of reorganizing a Hawaiian governing entity. Na‘i Aupuni used the roll to seek delegates for an ‘aha (convention) in which the governing documents could be drafted and proposed for an eventual ratification vote. Na‘i Aupuni’s independent process called for an ‘aha of forty delegates representing various geographic locations, including several delegate seats for Native Hawaiians that live in the continental United States. The announcement of candidates for delegates was made in October 2015. Among the names of candidates to be a delegate in the ‘aha were politicians, like Office of Hawaiian Affairs Trustee Rowena Akana and State Senator Brickwood Galuteria, community activists and educators, and even former Office of Hawaiian Affairs Trustees Dante Carpenter. The list of delegate candidates represented, as Na‘i Aupuni President J. Kūhiō Asam indicated, “a good cross-section of the Native Hawaiian community.” Some favored federal recognition for Native Hawaiians. Others, like ‘aha delegate candidate Professor Williamson Chang of the William S. Richardson School of Law, believed that the Kingdom of Hawai‘i still existed and that the State and federal governments had no jurisdiction in the islands. One delegate candidate, Ka‘iulani Milham, recognized that the Kana‘iolowalu campaign and Na‘i Aupuni process alienated Hawaiians from the nation-building process, but concluded that she needed to bring light to those silenced voices. As Milham put it, “Like it or not, decisions are going to be made that affect all of our lāhui, I want to be there for that.”

Clearly, the views on the entire process (Kana‘iolowalu and Na‘i Aupuni) and the Office of Hawaiian Affairs’ apparent $6.8 million involvement were diverse. But, the process nevertheless moved forward.

Resurrecting Rice

On August 13, 2015, Keli‘i Akina and several other individuals (including two non-Hawaiians and three Native Hawaiians) filed a lawsuit against the State of Hawai‘i, Governor David Ige, the trustees of the Office of Hawaiian Affairs, Commissioners of the roll commission, and Na‘i Aupuni to halt the process of reorganizing a Hawaiian governing entity. Akina, a
Kamehameha Schools graduate and president emeritus of Youth for Christ Hawaii, was President of the Grassroot Institute—the same entity that fought vigorously against passage of the Akaka Bill a decade earlier.96

Two former Bush Administration officials, Christopher Coates and Robert D. Popper, were Akina’s attorneys. Coates was the former Voting Section Chief within the Civil Rights Division of the Department of Justice who testified during a Republican-led probe into the Division’s handling of the New Black Panther Party case.97 Coates, a Clinton-appointee who apparently “had an ideological conversion after an African-American woman was chosen over him as deputy section chief[,]”98 signed off on an investigation and lawsuit against members of the New Black Panther Party after being informed that these individuals were intimidating white voters at a polling place in 2008.99 The charges were pursued through the final days of the Bush Administration, but the Obama Administration changed course and dropped the cases. Coates claimed that his Division was opposed to protecting the civil rights of whites.100 But, the Justice Department announced that after a “thorough review,” the “facts and the law did not support pursuing the claims against three of the defendants.”101 Coates eventually left the Justice Department and was hired by South Carolina to file a lawsuit against the Obama Justice Department for stopping the state from implementing a voter identification law that “the state’s own statistics showed would have a disparate impact on non-white voters.”102

Akina’s other attorney, Robert D. Popper, was a former Bush operative in the Justice Department. After becoming a lawyer, Popper became a lobbyist for the national Tax Limitation Committee and, as an attorney, was involved in various initiatives that limited the rights of voters, including developing standards for redistricting and challenging the legality of minority districts.103 Popper, along with a law professor, developed the “Polsby-Popper Compactness Test,” which measured districts for purposes of gerrymandering based upon geographic dispersion.104 Popper’s test has been used by many conservative proponents, but has been harshly criticized as biased against minorities.105 Some of the representative cases of Popper’s legal career prior to entering the Justice Department included arguing that a largely Hispanic voting district was unconstitutional and losing a case in which he asserted that the City of Houston’s districting plan amounted to unconstitutional racial gerrymandering.106 The Center for Equal Opportunity—an entity that supported Freddy Rice in his pursuits against the Office of
Hawaiian Affairs—hailed Popper as an attorney who “successfully represented individuals and organizations in challenging race-based voting districts.”

Popper is now lead attorney for Judicial Watch—the entity that is funding the *Akina* lawsuit and is described as a “constitutionally conservative, nonpartisan educational foundation that promotes transparency, accountability and integrity in government, politics and the law.”

Harkening back to the comments made at the initiation of the *Rice* decision, Judicial Watch President Tom Fitton stated,

> Who would believe that in this day and age U.S. citizens are being denied access to the right to vote explicitly because of their race and their points of view. . . . Using a race-based enrollment list to help radicals in Hawaii tear the State apart and break away from the United States of America is a violation of the U.S. Constitution and basic federal voting rights law. And that Hawaiian officials would prevent you from voting if you don’t sign up for their racial apartheid theories is an affront to the First Amendment. Our clients who are being denied their core constitutional rights believe courts can’t shut down this racist scheme soon enough.

The litigation expanded as native Hawaiians Virgil Day, Mel Ho‘omanawanui, Josiah L. Ho‘ohuli, Patrick L. Kahawaiola‘a, and Samuel L. Kealoha, Jr., sought court approval to intervene in the lawsuit to, again, perpetuate their fundamental misunderstanding that they should be the sole beneficiaries of funding from the Office of Hawaiian Affairs.

The plaintiffs asserted various claims in *Akina*. The main thrust of their lawsuit was that the roll commission’s list of registered and eligible voters and Na‘i Aupuni’s process of creating a Hawaiian governing entity violated the U.S. Constitution and the Voting Rights Act. Specifically, and as in *Rice*, the non-Hawaiian plaintiffs asserted that Act 195, which detailed a process for creating the roll, violated the Fifteenth Amendment, the equal protections clause of the Fourteenth Amendment, and the Voting Rights Act inasmuch as it denied them the right to vote on account of race. Akina believed that by filing the lawsuit, he was giving voice to the “silent majority” of Native Hawaiians who do not want to participate in, as Akina called it, “this racially divisive, government sponsored process.” In an editorial, Akina argued that he and the “silent majority” had three problems with Na‘i Aupuni’s election process. First, he argued that many Hawaiians were unconstitutionally placed on the roll without their consent through Act 77. Second, participation in the roll required an attestation of the “unrelinquished sovereignty” of Native Hawaiians, which Akina refused to make. Finally, Akina believed that
the process for Native Hawaiian self-determination should also be determined by non-Hawaiians. He specifically invoked the “Aloha Spirit” and the words of Martin Luther King, Jr., during the Civil Rights struggle of African Americans, to try to make his point.\textsuperscript{115} But, Akina and his illusory “silent majority” misapprehended the process and damaged the cause of self-determination for Native Hawaiians. Each of Akina’s arguments in his editorial were reflected in his lawsuit.

When asked why he challenged Act 195 and the independent election and convention process of Na’i Aupuni, Akina responded that his “major concern” was “when a small group of people uses government resources to represent Hawaiians as one entity” given the diversity of views within the Hawaiian community.\textsuperscript{116} Akina continued, “I believe that there is a silent majority of Native Hawaiians who are very glad for our relationship with the United States, and at the same time very proud of our cultural heritage as Hawaiians.”\textsuperscript{117} Akina criticized the push for a new governing entity for Native Hawaiians, arguing that Hawaiians “have a government already . . . and that government is the government of the United States[.].”\textsuperscript{118} Akina argued, The biggest problem is that the vast resources that the Office of Hawaiian Affairs and other Hawaiian agencies have had to serve the Native Hawaiian people have not gone to solve the problems of homelessness or education, low job opportunity or health. Instead, tens of millions of dollars have been spent over the last 20 years in the pursuit of a political campaign for sovereignty when that money would have better been spent directly serving the needs of Native Hawaiians. My goal is to see that priority of serving Native Hawaiians is restored, and that it is done so in a way that it doesn’t divide the population of the state on the basis of race.\textsuperscript{119}

For Akina, “OHA could be a valuable organization for the sake of preserving the aloha spirit in Hawaii and for seeing that the needs of Native Hawaiians are met. But in order to be valuable, OHA needs to quit wasting funds on political sovereignty and instead serve the real needs of Native Hawaiians. Additionally OHA needs to do that in a way that does not divide people on the basis of race, but unite all people in the state of Hawaii.”\textsuperscript{120} As discussed below, aside from being factually unsound, Akina’s arguments fail under American law and jurisprudence.

First, in regard to the claim that Act 77’s placement of individuals on the roll compelled speech in violation of the First Amendment, there is nothing in the law indicating any forced statements that are necessary to be on the roll. To the contrary, Act 195, Hawai‘i Revised Statutes section 10H-3(a)(4), clearly provided that the names on the roll were verified as Native
Hawaiians. Put another way, all the roll evidenced was a list of individuals that have been verified as being of Hawaiian ancestry. Na‘i Aupuni itself decided to use the roll as the list of its eligible voters to determine what path, if any, should be taken for Native Hawaiian self-governance. Whether the Hawaiians who object to their names being placed on the roll vote in Na‘i Aupuni’s election is their decision. No one is forcing them to vote. Moreover, these individuals have always had the option of removing themselves from the roll. In the Akina case, two of the Native Hawaiian plaintiffs listed on the roll were specifically informed by the roll Commission of their option to remove themselves from the roll. They, however, maintained that their “speech” was being compelled.

Second, Plaintiffs Akina and Keali‘i Makekau—a self-described “10th Trustee” of the Office of Hawaiian Affairs as he attends all board meetings—argued that the registration process through the roll commission violated their First Amendment rights because “[r]equiring” them to attest to Declaration One—“I affirm the unrelinquished sovereignty of the Native Hawaiian people, and my intent to participate in the process of self-governance”—in order to register for the roll discriminated against those, like them, who do not agree with that statement. However, neither Na‘i Aupuni, Act 195, nor all of the processes to register for the roll require attestation of Declaration One. Indeed, any Native Hawaiian can register for the Office of Hawaiian Affairs’ Registry, one of the lists incorporated into the roll through Act 77, without making any attestations regarding sovereignty. Furthermore, it was the practice of the roll to certify individuals even if they did not agree with Declaration One. Na‘i Aupuni made it clear on several occasions that attestation of Declaration One was not a prerequisite to participate in its private election process.

Finally, at the heart of the lawsuit was the claim that the Office of Hawaiian Affairs’ funding of Na‘i Aupuni’s election caused Na‘i Aupuni to now perform a state function that was subject to the strictures of the constitution. Akina, thus, argued that the election of delegates to discuss the possible reorganization of a Hawaiian governing entity was a State election that, pursuant to Rice v. Cayetano, violated the Fifteenth Amendment inasmuch as it discriminated on the basis of race. Yet, as the courts held in Day v. Apoliona and Kealoha v. Machado, the trustees have broad discretion to use section 5(f) trust funds, which is precisely what the Office of Hawaiian Affairs did here in providing funding to Na‘i Aupuni. Moreover, the Plaintiffs’
assertion that the Na‘i Aupuni election was a public election was contrary to the facts, which clearly established that Na‘i Aupuni was an independent organization that made its own decisions without any control by any state actors such as the Office of Hawaiian Affairs or the State.

Assuming, however, that a court would reach the issue of whether Na‘i Aupuni’s election violated the Fourteenth Amendment’s equal protection clause—i.e., find that Na‘i Aupuni was a state actor—there is ample legal authority that suggests that Na‘i Aupuni’s election would be upheld as subject to the less-stringent rational basis test set forth in Morton v. Mancari. In other words, the situation of Native Hawaiians, whether one agrees with the analogy or not, can be analogized to that of Native Americans and Alaska Natives to uphold the validity of Na‘i Aupuni’s conduct. Under an equal protection challenge to Na‘i Aupuni’s election process, Na‘i Aupuni must show that its allowance of only Hawaiians as the electorate “can be tied rationally to the fulfillment of Congress’ unique obligation toward” the Hawaiian people.126 The Mancari Court paternalistically explained and contextualized why, in the case of native peoples, the constitutional standard to uphold the law is less demanding:

Resolution of the instant issue turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a ‘guardian-ward’ status, to legislate on behalf of federally recognized Indian tribes. The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Article I, [section] 8, [clause] 3, provides Congress with the power to ‘regulate Commerce . . . with the Indian Tribes,’ and thus, to this extent, singles Indians out as a proper subject for separate legislation. . . . The Court has described the origin and nature of the special relationship:

. . . [T]he United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others . . . . Of necessity the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic.

Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the [Bureau of Indian Affairs], single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial
discrimination, an entire Title of the United States Code would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.

It is in this historical and legal context that the constitutional validity of the Indian preference is to be determined. . . . Contrary to the characterization made by appellees, this preference does not constitute ‘racial discrimination.’ Indeed, it is not even a ‘racial’ preference. . . .

On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment. This unique legal status is of long standing, and its sources are diverse. As long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians, such legislative judgments will not be disturbed.\textsuperscript{127}

Similar to that of Native Americans and Alaska Natives, and despite the failed efforts to obtain federal recognition through the Akaka Bill, both the federal and state governments have already recognized the unique and special relationship they have with Native Hawaiians. Indeed, federal law already states that “Congress does not extend services to Native Hawaiians because of their race, but because of their \textit{unique status as the indigenous people} of a once sovereign nation as to whom the United States has established a trust relationship.”\textsuperscript{128} More than 150 other federal laws recognize Native Hawaiians as akin to Native Americans.\textsuperscript{129} Some federal laws specifically single out Native Hawaiians for special treatment not given to Native Americans.\textsuperscript{130}

Moreover, through both Democratic and Republican Administrations, this “special relationship” between Native Hawaiians and the federal government has been reaffirmed. In 2004, for example, Congress enacted and President George W. Bush signed a law that created the Office for Native Hawaiian Relations within the U.S. Department of Interior, which duties included, among other things, to “effectuate and implement the \textit{special legal relationship} between the native Hawaiian people and the United States” and to “\textit{continue} the process of reconciliation with the Native Hawaiian people[.]”\textsuperscript{131} On the State side, numerous laws have indicated the special treatment of Native Hawaiians, particularly found in the State Constitution, and a need to “facilitate the efforts of native Hawaiians to be governed by an indigenous sovereign nation of their own choosing.”\textsuperscript{132}

As it is clear that both the federal government and the State have recognized their unique relationship with the Native Hawaiian community, a core issue before the court in \textit{Akina} is
whether the federal and State governments have the authority to treat Native Hawaiians in a special manner. There is, as discussed below, ample support in American law through the Mancari decision to uphold the special treatment of actions affecting Native Hawaiians. The analysis, however, necessarily rests upon the conclusion that Native Hawaiians constitute “Indians” or “tribes” under the Indian Commerce Clause of the United States Constitution, subject to the “assumption of a ‘guardian-ward’ status[.]”

First, Native Hawaiians would, even under a strict constructionist view of the Constitution, be defined as “Indians” for purposes of federal law. Clearly, under the terms of the United States Declaration of Independence, the term “Indian” referred to the aboriginal “inhabitants of our Frontiers.” In addition, Native Hawaiians would also, under a strict constructionist view of the Constitution, be defined as a “tribe.” To be clear, at the time of the founding of the country, “tribe” meant a “distinct body of people as divided by family or fortune, or any other characteristic.” Second, Mancari was premised on the creation of a guardian-ward relationship between Native Americans and the federal government. Here, and whether one agrees with it or not, there is no contention that American law has created a “guardian-ward” relationship between the Hawaiian people and the government. Indeed, the Hawaiian Homes Commission Act was premised on the very notion that the “natives of the islands” were America’s “wards.” Third, Mancari was also premised on an attempt to correct injustices from the past, such as violent and forcible dispossession of land, and the paternalistic notion of “protect[ing]” Native Americans. Here, again, there is no doubt that sovereignty in the islands was forcible taken and lands systematically stolen from Native Hawaiians, and that the federal and State governments are trying to “protect” Native Hawaiian interests by treating them specially. Fourth, the United States Supreme Court has already recognized the broad power that Congress has to recognize and interact with indigenous communities:

\[\ldots\] in respect of distinctly Indian communities the question whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts.

Finally, a federal district court has already acknowledged that the Mancari principles apply to Native Hawaiians and that any argument to the contrary is “meritless.” Within the context of native Hawaiian beneficiaries, the Hawai‘i Supreme Court also noted the comparison to Native
Americans: “we are dealing with relationships between the government and aboriginal people. Reason thus dictates that we draw the analogy between native Hawaiian homesteaders and other native Americans.”

Because Mancari is applicable in the context of dealing with governmental treatment of Native Hawaiians, any special treatment is subject to a rational basis test. Relevant to the Akina lawsuit, the court should conclude that Act 195 and the Na‘i Aupuni process are rationally tied to the furtherance of both federal and state policies of reconciliation. Indeed, the Ninth Circuit has already recognized that legislation related to “Indian land, tribal status, self-government or culture passes Mancari’s rational relationship test.” In addition, the federal court could go further and, like the Moon Court, reaffirm the federal and state commitments to reconciliation. If Act 195 and the Na‘i Aupuni process are viewed in light of the reconciliatory purposes for which they were proposed, the court would be hard-pressed to find them in violation of any constitutional principles.

The Office of Hawaiian Affairs’ recent endeavors highlight the State’s efforts and backsliding in addressing the justice issues facing the Native Hawaiian community. But, how does the agency move forward with the growing divisions within the Hawaiian community?

4 Id.
5 Id.
6 Id.
7 Id.
8 Id.
9 Id. at 187-88, 177 P.3d at 897-98.
10 Id. at 188, 177 P.3d at 898.
12 Id.
13 HCDCH, 117 Hawai‘i at 188, 177 P.3d at 898.
14 Id. at 189, 177 P.3d at 899.
16 Id.
18 HCDCH, 117 Hawai‘i at 192, 177 P.3d at 902.
19 Id. at 218, 177 P.3d at 928.
20 Id. at 193-94, 177 P.3d at 903-04.
22 Id. at 1010.
23 Id. at 956.
24 Id. at 956.
26 HCDCH, 117 Hawai‘i at 214, 177 P.3d at 924.
27 Id. at 215, 177 P.3d at 925 (ellipses omitted).
28 Id. at 195, 177 P.3d at 905.
32 Id.
33 Id.
39 Id.
40 Id.
41 Id.
Testimony of the Office of Hawaiian Affairs before the House Committee on Finance on SB 3122 SD2 HD2 (April 1, 2014).


Lind, supra note 48.

Id.


Id.

Akina v. State, Case No. 1:15-cv-00322-JMS-BMK, Dkt. 79-5 (Bylaws of Na‘i Aupuni).

Na‘i Aupuni Advertisement, MIDWEEK, at 10 (September 9, 2015).

Akina, Case No. 1:15-cv-00322-JMS-BMK, Dkt. 79-6 (Grant Agreement).

Id.

Id.


Akina, Case No. 1:15-cv-00322-JMS-BMK, Dkt. 79-1.

Id. at Dkt. 83-1.

Caron, supra note 78.

Id.

Id.

Trisha K. Watson-Sproat, Post, FACEBOOK (October 2, 2015) (on file with author).

Id.

Goodyear Kaʻōpua, supra note 62.

Id.


Id.

Id.


Aha May Fail, supra note 89.

Id.

Id.


Id.


Reilly, supra note 97.

Reilly, supra note 97.


Id.

Id.

Id.

Id.

Id.


Id.

Akina, Case No. 1:15-cv-00322-JMS-BMK, Dkt. 69.

Id. at Dkt. 1.


Id.

Id.

Id.

Id.

Coleman, supra note 96.

Id.

Id.

Id.

Id.

Id.


Akina, Case No. 1:15-cv-00322-JMS-BMK, Dkt. 1, ¶ 101.

Id. at Dkt. 83, at 18.

Id.

Id.


Id. at 551-55 (citations omitted, emphases added).


133 Mancari, 417 U.S. at 551-52 (citing U.S. Const. art. I, § 8, cl. 3).
134 Declaration of Independence paragraph 29 (1776).
135 THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1789).
137 Mancari, 417 U.S. at 551-55 (citations omitted, emphases added).
138 Id. at 552.
141 Ahuna v. Dep’t of Hawaiian Home Lands, 64 Haw. 327, 339, 640 P.2d 1161, 1169 (1982).
142 Williams v. Babbitt, 115 F.3d 657, 664 (9th Cir. 1997).
CHAPTER 8

Changing Tides: A Framework for Moving Forward

The tides are changing. The struggle for Hawaiian justice over the years has been one of peaceful protest. Indeed, at a recent event, chants and rallying cries filled the air as roughly ten-thousand people marched along the tourist-laden streets of Waikīkī to rally support against the various hot-button issues affecting Kānaka Maoli.\(^1\) However, a nefarious rumbling toward violence is unfortunately making its way into the fray. In one instance, Hawaiian activists associated with an entity calling themselves the “Kingdom of Hawai‘i” took over the ‘Iolani Palace grounds and assaulted a palace employee by shoving her into a cement pillar while she tried to allow an attorney onto the grounds.\(^2\) In a separate incident, and in retaliation for the United States providing arms to Taiwan, Chinese authorities allegedly suggested to then-Secretary of State Hillary Clinton that China would challenge American sovereignty over the Hawaiian Islands and would arm Hawaiian independence activists.\(^3\) In yet another situation, and in response to efforts by the State to arrest protestors of a $1.4 billion multi-national project to place a thirty-meter telescope atop the summit of the sacred Mauna Kea, a man calling himself the King of Hawai‘i threatened to send armed “royal marshals” to defend the protestors.\(^4\) According to a letter to the Governor from the “King,” “The Royal Marshals are professionals holding the authority and power issued by me to carry side arms and other weapons to enforce the laws of the Kingdom of Hawai‘i[.]”\(^5\)

While acts of violence are certainly not condoned, the growing impatience toward resolution is telling. As has been made clear through this dissertation, the State shows glimmers of willingness to assist Native Hawaiians, but ultimately capitulates to political and economic pressures. The federal government makes bold statements of apology and reconciliation, but more than twenty years later has failed to live up to those promises.

At the crossroads of these concurrent failed efforts is the Office of Hawaiian Affairs. It is seen by some as a harbinger of hope and others as a roadblock in the path toward justice. This final chapter looks at the federal government’s most recent reconciliation efforts and analyzes how such efforts epitomize bold steps toward social healing. Yet, while the federal government
is finally making concrete efforts toward acting upon its statements of reconciliation, the Office of Hawaiian Affairs must reevaluate the current situation as its existence is under constant attack and its opposition both within and outside of the Hawaiian community continues to grow. A new generation of Native Hawaiians are maturing in an age familiar with the detailed facts of the overthrow and annexation of the Kingdom of Hawai‘i, and are not afraid to challenge the establishment and their seeming unwillingness to back down from pursuing one avenue of reconciliation. So, how does the Office of Hawaiian Affairs, which has amassed considerable financial assets, power, and detractors, move forward to fulfill its mandate of bettering the conditions of Hawaiians? How does the Office of Hawaiian Affairs legitimately move forward at all? This chapter suggests a new path—one that acknowledges and celebrates all voices and provides resources to meaningfully open all options for Native Hawaiian self-governance.

*Exploring All Options and Legitimizing the Process*

From the Office of Hawaiian Affairs’ inception, lines were drawn within the Hawaiian community and within the community at large. The Office of Hawaiian Affairs, for some Native Hawaiians, could never be trusted because it was a creature and product of the State. The Office of Hawaiian Affairs, for some conservatives, could never be legitimate because its purpose—to confer “special” treatment upon Native Hawaiians—was contrary to their interpretation of the American principles of justice and equality. Indeed, the history of the Office of Hawaiian Affairs itself has been mired in controversy and has been a history of control and broken promises by the federal government, the State, and the agency itself.

As has been made clear, the agency has, over the years, been constantly battling in court and in the political arena to ensure its legitimacy and survival. On significant issues like ceded lands and sovereignty, the State and federal governments have waffled between grand statements of apology to asserting their authority to renege on their own commitments to facilitating closure with the Native Hawaiian people. In internal issues, the Office of Hawaiian Affairs has been plagued—no doubt because of the resources, the serious nature of the issues being addressed, and the personalities of those in charge—with power struggles among the trustees and between the Board of Trustees and the agency’s administrative arm. The stature of the Office of Hawaiian Affairs has, for a large and vocal segment of the Native Hawaiian community,
deteriorated over the years. The amount of distrust has increased as, according to some, more decisions are made in the backrooms of power. Through its pursuits, the agency and its leadership have been quick to dismiss dissenting opinions. For example, after retiring as a trustee, Trustee Oswald Stender made clear his position: “The overthrow was illegal and Hawaiians suffered because of it . . . [b]ut restoring the kingdom doesn’t do it. At least for me and many Hawaiians, we need to move on where we are today and move forward and not keep crying in our beer.” Put simply, Native Hawaiians are fractured.

As an example, the Office of Hawaiian Affairs has been, for some within the Native Hawaiian community, an entity that has ignored the voice of those who believe that the Kingdom of Hawai‘i still exists and that the State and federal governments are illegally occupying the islands. These sentiments are based upon criticism of the dominant narrative of American control and jurisdiction over the islands. This “American narrative” favorably tracks the pro-annexationist plans for incorporation. The narrative of American control first ignores President Grover Cleveland’s call to restore the Hawaiian monarchy and the failed proposed treaty of annexation. Instead, the narrative begins with President William McKinley signing a joint resolution of Congress, referred to as the Newlands Resolution, under which the United States “accepted” the Republic of Hawai‘i’s alleged will to “cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in of the Hawaiian Islands[.]” Under the Newlands Resolution, the United States declared that the “Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America.”

Significantly, the Newlands Resolution also extinguished all existing treaties of the Hawaiian Islands with foreign nations. In 1900, pursuant to the Organic Act, the United States established the Territory of Hawai‘i whose jurisdiction extended over the Hawaiian Islands. The United States also declared that all persons who were citizens of the Republic of Hawai‘i as of August 12, 1898, were now citizens of the United States and the Territory of Hawai‘i, and that the federal Constitution and laws, subject to certain exceptions, extended to the Territory. The United States Supreme Court recognized that, under the Organic Act, the Hawaiian Islands were legally
incorporated into the United States, and that the federal Constitution was formally extended to the islands.  

American domination of the islands was reaffirmed on March 18, 1959, when Congress enacted the Hawai’i Admission Act, providing the Territory with a path to statehood. The Admission Act provided that the State of Hawai’i “shall consist of all the islands, together with their appurtenant reefs and territorial waters, included in the Territory of Hawaii on the date of enactment of this Act, except the atoll known as Palmyra Island, together with its appurtenant reefs and territorial waters . . . .” The Admission Act also provided that the constitution of the State of Hawai’i “shall always be republican in form and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence.” The Admission Act further set forth certain conditions for statehood, including the requirement that an election would be held in Hawai’i that would pose, among others, the following question to voters: “Shall Hawaii immediately be admitted into the Union as a State?” Under the Admission Act, if the President found that all conditions for statehood had been met, then he was directed to issue a proclamation announcing the results of the election. Finally, under the Admission Act: “Upon the issuance of said proclamation by the President, the State of Hawaii shall be deemed admitted into the Union as provided in section 1 of this Act.”

After an election among Hawai’i voters, including military members and Hawai’i’s various immigrant populations, the Office of the Secretary of Hawai’i certified that all propositions were adopted with overwhelming majorities. In response to Proposition 1—“Shall Hawaii immediately be admitted into the Union as a State?”—approximately ninety-four percent of voters voted: “Yes.”

On August 21, 1959, President Dwight D. Eisenhower issued a proclamation:

I, DWIGHT D. EISENHOWER, President of the United States of America, do hereby declare and proclaim that the procedural requirements imposed by the Congress on the State of Hawaii to entitle that State to admission into the Union have been complied with in all respects and that admission of the State of Hawaii into the Union on equal footing with the other States of the Union is now accomplished.

With that, according to the American narrative, the Territory of Hawai’i became the fiftieth state, with the Ceded Lands being transferred from the federal government to the State. After achieving statehood, Hawai’i was removed from the United Nations’ list of non-self-
governing territories, which some have recognized as an act of international recognition that the
State of Hawai‘i was a lawful government. 24

Critics of the American narrative cite various international law principles and theories to
bolster their contentions of sovereignty. Given the current political and legal climate, the Office
of Hawaiian Affairs has not looked favorably or seriously into these various critiques of the
American narrative of control. That concern, however, was partially allayed with the action of
Office of Hawaiian Affairs Ka Pouhana Dr. Crabbe, who, on May 5, 2014, sent, without the
authorization of the trustees, a letter to United States Secretary of State John F. Kerry. 25 One of
Crabbe’s staff members attended a presentation by two scholars, Dr. David Keanu Sai and
Professor Williamson Chang, who concluded that “the Federal and State of Hawai‘i governments
are illegal regimes that stem from an illegal and prolonged occupation by the United States as a
result of the illegal overthrow of the Hawaiian government.” 26 The scholars specifically referred
to executive agreements between President Grover Cleveland and Queen Lili‘uokalani in 1893
for the proposition that the United States is bound to restore the Kingdom of Hawai‘i. 27 Based
upon the presentation, in his letter to Secretary Kerry, Dr. Crabbe, requested responses to several
questions, including whether “the Hawaiian Kingdom, as a sovereign independent State,
continue[s] to exist as a subject of international law?” 28 Before it could reach Kerry’s desk, the
Office of Hawaiian Affairs trustees rescinded it, but not before the letter made headlines across
the State. 29 The letter sparked a renewed interest in and acceptance of the arguments of Dr. Sai
and Professor Chang. Because the letter was rescinded, Secretary Kerry never responded to the
inquiry.

However, whether one agrees with it or not, it is likely that the United States, through
Secretary Kerry, would have concluded that under current federal and State law, the Kingdom of
Hawai‘i does not continue to exist as a sovereign independent nation. It should come as no
surprise that the United States would have used the opportunity to assert American authority and
dominion over the islands. Indeed, to conclude otherwise would undermine American military
and economic interests as the United States shifts its focus to the Pacific and Asian arena. The
government’s position would likely have been based upon American jurisprudence, under which
the determination of sovereignty over territory is a political question that must be decided by the
American political branches, i.e., Congress and the President. In 1890, for example, the United States Supreme Court reaffirmed this principle:

> Who is the sovereign . . . of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances.\textsuperscript{30}

Because courts have held that the question of the continuing existence of sovereignty is purely political, both federal and State courts have punted, without question, on the determination of the continued existence of the Kingdom of Hawaiʻi to the actions of the political branches. For example, in 2011, the District Court for the District of Columbia rejected the arguments made by Sai—who had influenced the issuance of the Crabbe letter—concerning the continuing existence of the Kingdom of Hawaiʻi. In that case, \textit{Sai v. Clinton}, Sai sued then-Secretary of State Hillary Clinton, seeking relief from the federal government’s alleged violation of the “Liliuokalani Assignment,” which, he asserted, required the federal government to return control of the Hawaiian Islands to the Kingdom of Hawaiʻi and entitled him to a judicial declaration that the annexation of the Hawaiian Islands by the United States was unconstitutional.\textsuperscript{31} The U.S. District Court for the District of Columbia held that the status of Hawaiʻi as part of the United States is a non-justiciable political question and dismissed the suit.\textsuperscript{32} In so dismissing, and without reviewing any of the evidence presented, the court reaffirmed the political decision of annexation and statehood by the American government: “Hawaii has been \textit{firmly established} as part of the United States[.].”\textsuperscript{33} The court continued, “[t]he passage of time and the significance of the issue of sovereignty present an unusual need for unquestioning adherence to a \textit{political decision already made}.“\textsuperscript{34} The decision in \textit{Sai v. Clinton} was affirmed on appeal by the United States Court of Appeals for the District of Columbia Circuit, with that court simply noting that “[t]he merits of the parties’ positions are so clear as to warrant summary action.”\textsuperscript{35}

In 2014, the U.S. District Court for the District of Hawaiʻi similarly dismissed a lawsuit raising questions about the continuity of the Kingdom of Hawaiʻi. In that matter, the defendant claimed ownership of a parcel of land and sought to dismiss claims against him because the claims concerned lands belonging to the Kingdom of Hawaiʻi. The defendant cited to Dr. Sai’s
materials for the proposition that “the Hawaiian Kingdom continues to exist and is under a prolonged and illegal occupation by the United States[.]” The court held that it lacked jurisdiction to rule on this political question:

[Defendant’s] claims raise nonjusticiable political questions because they involve matters that have been constitutionally committed to Congress. Under Article IV, Section 3 of the Constitution, “new States may be admitted by the Congress into this Union.” By an act of Congress, Hawaii was admitted to the Union in 1959. This court, therefore, lacks jurisdiction to decide any issue regarding the legality of Hawaii’s statehood including the lawfulness of events leading to statehood. Thus, as to [Defendant’s] claim challenging the lawfulness of the overthrow of the Kingdom of Hawaii in 1893, the Intermediate Court of Appeals for the State of Hawaii aptly stated, “Whatever may be said regarding the lawfulness of the Provisional Government in 1893, the Republic of Hawaii in 1894, and the Territory of Hawaii in 1898, the State of Hawaii is now a lawful government.”

Adjudication of Plaintiff’s claims would essentially place this court in the shoes of Congress. Thus, this court lacks jurisdiction over said claims.

Hawai‘i State courts have treated the issue of sovereignty similar to their federal counterparts. In State v. Kaulia, for example, Kaulia, who was charged with assault, moved for dismissal on the basis that the court lacked jurisdiction over his prosecution inasmuch as the Kingdom of Hawai‘i still existed. At the hearing on the motion, the trial court confirmed its denial of Kaulia’s request for a hearing to call Dr. Sai to establish the existence of the Kingdom of Hawai‘i. Kaulia’s motion was denied and he was convicted. On appeal, Kaulia again argued that the State lacked subject-matter jurisdiction because of the existence of the Kingdom of Hawai‘i. The Hawai‘i Supreme Court, however, rejected Kaulia’s argument, concluding: “[W]hatever may be said regarding the lawfulness of its origins, the State of Hawai‘i is now[] a lawful government. Individuals claiming to be citizens of the Kingdom and not of the State are not exempt from application of the State’s laws.” Importantly, the court also affirmed the trial court’s preclusion of Dr. Sai from testifying as a witness regarding the continuity of the Kingdom of Hawai‘i—effectively silencing any such arguments in State courts.

Thus far, the arguments asserted by Dr. Sai and Professor Chang regarding the continuity of the Kingdom of Hawai‘i have been, regardless of ones beliefs, undoubtedly rejected in both State and federal courts given the “political” nature of the issue. Dr. Crabbe’s letter to Secretary Kerry would have likely yielded the same conclusion, except it would have come from a political
branch of government and, therefore, would have come as a striking blow to the pro-nationalist Hawaiians’ position in the eyes of the federal government. The Kerry Letter controversy revealed not just a divide between views within the community on issues of sovereignty, it also unveiled the division between some on the Board of Trustees and the Administration tasked with carrying out the Board’s policies as the trustees moved swiftly to rescind the Kerry Letter. Although the Kerry Letter was rescinded, the action of reaching out to obtain a response on issues of sovereignty was a welcomed peace offering by Dr. Crabbe (and, in effect, the Office of Hawaiian Affairs) to the voices of those Native Hawaiians that believe in the continued existence of a sovereign kingdom. It was, arguably, a step toward reconciliation within the Native Hawaiian community.

The debacle further illuminated other serious questions regarding international law that are being asked within the Native Hawaiian community—questions that the Office of Hawaiian Affairs should seek to answer on behalf of its beneficiaries. The effect of international law on the actions of the United States has been debated over the years and have, for the most part, remained unanswered by the international community. There are, however, legitimate concerns and questions that Native Hawaiians deserve answers to. For example, the Native Hawaiian community should have a full understanding of the validity (or not) of the Statehood plebiscite under international law and standards at the time. As another example, the Native Hawaiian community, the federal government, and the State government should fully engage in dialogue with the international community about the effect of international law on claims of indigenous peoples, through mechanisms like the 2007 United Nation Declaration on the Rights of Indigenous Peoples. Until these concerns, among others, are fully explored and vetted, it is difficult to assess the effectiveness of any process of unification of the Native Hawaiian people. It is these questions that have impassioned some Native Hawaiians to balk at any of the Office of Hawaiian Affairs’ attempts at reconciliation.

Social Healing at a Crossroad

On June 23, 2014, in the packed auditorium of the Hawai‘i State Capitol, a delegation from the United States Departments of Interior and Justice listened to hours of testimony regarding whether the federal government should reestablish a government-to-government
relationship with the Native Hawaiian community, pursuant to an Advanced Notice of Proposed Rulemaking that was issued three-days prior. The proposed rule-making was a process initiated by the Obama Administration to try to reconcile with Native Hawaiians. The first individual to testify was Office of Hawaiian Affairs Trustee Colette Machado. After a brief introductory remark praising the federal government’s efforts, Machado was rudely interrupted by jeers from audience members who appeared to have no intention of letting her complete her testimony. Trustee Machado fired back: “Be respectful. Come on now. I’ve been waiting all morning from 8:00. Let’s not get into one pissing match right now. Okay? Let’s have some aloha over here.”

Day after day, testifier after testifier, as hearings were held across the State, a vocal segment of the Native Hawaiian community testified before the federal representatives requesting that the federal government extricate itself from any process to reorganize a Native Hawaiian government as a government already existed or because there were serious questions of international law left unanswered. The divisions within the Native Hawaiian community were on full display.

Despite the vocal opposition to the federal rule-making process in summer 2014, on September 29, 2015, the Department of Interior announced proposed rules that would seek to reestablish a government-to-government relationship with the United States. The rule was clear that the process or reorganizing, however, would come from the Native Hawaiian community themselves and not the State or the federal government: “Any government reorganization would occur through a fair and inclusive community-driven process. The Federal Government’s only role is deciding whether to reestablish a formal government-to-government relationship with a reorganized Native Hawaiian government.”

Office of Hawaiian Affairs Chief Executive Officer Dr. Crabbe stated that this was a “momentous day for our Native Hawaiian community. It is clear the Department of the Interior agrees it will be the Native Hawaiian community—and not the federal government—that would decide whether to organize a Native Hawaiian government, and whether that government would seek to pursue a relationship with the United States.”

Echoing that sentiment, Robin Danner, former leader of Akaka Bill-proponent Council for Native Hawaiian Advancement, stated, “It’s the news of a lifetime . . . The federal government is recognizing that it is our kuleana (responsibility) for the Native Hawaiian people to decide, not the federal government, not the state government. There’s a doorway open to us if
we want to have that relationship.” But, the dissidents still made their voices heard. Keli’i Akina of the Grassroots Institute sharply criticized the proposed rules: “This is yet another attempt by the Department of the Interior to do an end run around Congress by assuming powers it simply does not have. . . . The Congress has clearly indicated that they—and not the [Department of Interior]—have the power to recognize a Native Hawaiian government. On multiple occasions, they considered and decided not to pass the Akaka Bill, demonstrating that the constitutional concerns in the creation of a race-based government were real and unavoidable.”

These proposed rules represented a watershed moment in the federal-Native Hawaiian relationship. If, and when finalized, it would potentially put some teeth to the unfulfilled promises of reconciliation as firmly codified in the 1993 Apology Resolution. But, do the rules provide for true and meaningful social healing between the Native Hawaiian community and the federal government.

Professor Eric K. Yamamoto developed a “praxis approach” to the healing of communal injustices that has appeal to policy makers and oppressed communities and that may illuminate the federal government’s current actions and its potential for social healing with Native Hawaiians. Yamamoto’s framework, titled “Social Healing Through Justice,” merges theories of law, theology, social psychology, political theory, human rights, economics, and indigenous practices. As Yamamoto asserts, each disciplines’ theoretical approach to healing separately offer their benefits and their shortcomings:

[L]aw speaks of equality and dreams of truly “egalitarian” relations—a law-inspired leveling of social and economic hierarchies. Yet law also acknowledges that claims to reparations, with recent exceptions, have fallen short in the courts.

Theologians highlight the “spiritual” rush of reconciliation—the reunification of people according to religious tenets of acknowledgment and atonement. Yet religious conflict often seems to spur rather than quell conflict.

Psychology aims for individual patient catharsis—the entering of places of pain and its deep emotional release. But healing for social groups—people harmed because of their group status, for instance Holocaust survivors—is more complicated. Serious damage to an entire community—collective trauma—poses myriad challenges to social healing, including the transmission of psychological harms to following generations. So social psychology works toward
transformations in group consciousness and behavior in an effort to address present-day and future generational wounds.

Political theorists speak of “reconstituting community”—reshaping the polity by breaking old barriers and reincorporating people at the margins. Mainstream communitarian theories support reconciliation initiatives. But realist critiques about the benefits and limitations speak to the growing yet uncertain political significance of social healing undertakings.

Human rights advocates seek to change “legal consciousness” and institutional behavior about what is right and just—generating “cultural performances” through claims to reparative justice. These claims implicate governmental redress and democratic legitimacy. But human rights norms are largely unenforceable absent collective political will.

Engaging economics, democracy studies and human rights, economists embrace the reparative concept of “economic justice”—“capacity-building” for those injured by injustice to remove social structural impediments to societal advancement. Yet economic reparations are often quickly sacrificed on the altar of government fiscal restraints.

Indigenous healing practitioners, Native Hawaiians for example, search for pono—communally making right, or righteous, the broken relationship. But practical indigenous healing initiatives often tend to be experienced as incomplete or misguided.

But through his research, Yamamoto identified six common principles among the various theories:

(1) mutual engagement by those responsible in some fashion and a convergence of their interests in social healing; (2) equality and fair treatment and at least a partial leveling of one group’s power over the other; (3) reparative measures addressing both the individual and the communal (or societal); (4) economic capacity-building and financial assistance for those harmed in ways that foster autonomy and self-determination; (5) a blend of words and actions that encompass acknowledgments of harms and causes, acceptance of responsibility and reconstruction of relationships in order to fully repair the damage; and (6) anticipation and handling of the risks of backlash and incompleteness.

These principles serve as the bases for the Social Healing Through Justice framework and inform the “conceptual meaning and practical operation of the framework’s four points of inquiry”: recognition, responsibility, reconstruction, and reparation.
The recognition prong of the framework examines, among other things, the way individuals continue to suffer “pain, fear, shame and anger” and the way institutions “embody discriminatory policies that deny fair access to resources or promote aggression.” The responsibility prong of the framework involves an “assessment of power over others” and analyzes the “acceptance of responsibility of repairing the damage . . . imposed on others through power abuses.” Reconstruction, the third prong, seeks to “build new production relationships” that bring about “genuine healing and a sense of justice restored” through apologies, forgiveness, and/or the reallocation of “political economic power.” The final prong of the framework, reparation, includes an assessment of tangible actions made—whether through monetary restitution, financial, legal or educational support, rehabilitation, to name a few—to heal the damage done and recognized.

In 2009, Yamamoto and Ashley Kaiao Obrey published an article critiquing the Native Hawaiian-Federal Government reconciliation efforts. In the article, the authors concluded that in the case of Native Hawaiians, the federal government satisfied the first two “R’s”, recognition and responsibility, through passage of the Apology Resolution and a 1999 Joint Reconciliation Report by the federal Departments of Justice and Interior that recommended recognizing some form of self-governance akin to Native Americans. The authors concluded, however, that the federal government failed to live up to the reconstruction and reparation prongs in failing to pass laws or take action that would “build a new productive relationship” between the Native Hawaiian community and the federal government. The Akaka Bill has since stalled, but the Obama Administration has, as mentioned above, proposed administrative rules that set a potentially broader path toward United States acknowledgment of a form of self-determination meaningful and acceptable to Native Hawaiians.

To be clear, the proposed administrative rules set forth the “procedure and criteria for reestablishing a formal government-to-government relationship between the United States and the Native Hawaiian community[].” To establish such a relationship, the Native Hawaiian Governing Entity must submit a “request” to the Interior Secretary and that “request” must be granted by the Secretary. The request must include: a narrative of how the governing documents of the Native Hawaiian Governing Entity was drafted, how the decision was made as to who would ratify the governing documents, how the Native Hawaiian community ratified the
governing documents, and how and when elections were conducted for government offices; a copy of the ratified documents; a resolution of the governing body certifying a request being made to the Interior Secretary to reestablish a formal government-to-government relationship; and a certification that the submission is at the request of the governing body. The request must describe “how the process ensured that the document was based on meaningful input from representative segments of the Native Hawaiian community and reflects the will of the Native Hawaiian community.” In addition, in order to grant the request, the proposed rule requires the number of Native Hawaiian votes cast in favor of the governing documents to exceed half of the total number of ballots sent out on the ratification of those documents. The request must also prove that the number of native Hawaiian votes—those by individuals of fifty percent or more blood quantum—in favor of the governing documents exceeded half the amount of ballots sent to native Hawaiian voters. The proposed rule also sets as a floor that the minimum number of Native Hawaiians and native Hawaiians that need to vote to ratify the governing documents is 30,000 and 9,000 respectively. Implicit in these minimum voter requirements is the federal government’s requirement that, at the very least, 60,000 Native Hawaiians and 18,000 native Hawaiians must participate in the process. If all these criteria are met, the United States will form a relationship with only “one sovereign” Native Hawaiian Governing Entity and that recognition will take effect upon publication in the Federal Register. The proposed rule states that the Native Hawaiian Governing Entity will “have the same government-to-government relationship . . . as the government-to-government relationship between the United States and a federally recognized tribe in the continental United States, and the same inherent sovereign governmental authorities.” It also provided the following:

(b) The Native Hawaiian Governing Entity will be subject to Congress’s plenary authority.

(c) Absent Federal law to the contrary, any member of the Native Hawaiian Governing Entity will be eligible for current Federal Native Hawaiian programs, services, and benefits.

(d) The Native Hawaiian Governing Entity, its political subdivisions (if any), and its members will not be eligible for Federal Indian programs, services, and benefits unless Congress expressly and specifically has declared the Native Hawaiian community . . . to be eligible.
Towards the end of the proposed rules, the Department of Interior mandated: “Reestablishment of the formal government-to-government relationship will not affect the title, jurisdiction, or status of Federal lands and property in Hawaii.”

So, does the federal government’s proposed rule pass muster? Specifically, does the proposed rule provide the reconstruction and reparation necessary to engender true social healing?

The proposed rule, like the Akaka Bill, represents a sea change in the relationship between Native Hawaiians and the federal government inasmuch as the Obama Administration is setting a clear path for potentially validating some form of a governing body of Native Hawaiians that would have self-governing authority. This path is historic inasmuch as it has not been before opened to Native Hawaiians, let alone to any other indigenous peoples. It is arguably the type of reconstructive action that, under the Social Healing Through Justice framework, could lead to social healing because the proposed rule could arguably lead to a “new productive relationship” between the Native Hawaiian people and the federal government.

But, the proposed rule falls short of ensuring true social healing. While certainly a laudable step toward social healing, the proposed rule does not, under the Social Healing Through Justice framework, go far enough to meaningfully reconcile with the Native Hawaiian community. Fundamentally, the proposed rule is promulgated by the Administration and not by Congress and therefore leaves greater uncertainty in its validity with a change in regime. Simply put, the rule could be undone by a subsequent President who may disagree with the policy or by a Congress that feels that President Obama may have been overstepping his executive authority in promulgating such a rule. Furthermore, the proposed rule is premised on the Native Hawaiian people themselves coming up with tremendous funds to conduct an election, convention, and ratification vote that requires at least the participation of 60,000 individuals. There are no provisions for funding or additional resources being provided to assist in the actual formation of a Native Hawaiian Governing Entity. Hence, there are some inherent flaws in the proposed rule itself. As explained below, the proposed rule alone does not bring about meaningful social healing because it: first, does not “structur[e] everyone’s ‘power to’ participate fully and freely rather than to enable one’s ‘power over’ others” thereby failing the third R—reconstruction; and second, does not provide any reparations.
First, although the proposed rule provides a “doorway” toward federal recognition, the proposed rule still structures American “power over” Native Hawaiians in a guardian-ward relationship. As an example, while the federal government appeared to call for a neutral process and set a framework to open a “doorway” for Hawaiian self-governance, it did so under the auspices of federal Indian law, control, and oversight. The Interior Department made little effort to reconcile the issue of Hawaiian sovereignty; it simply stated in response to a comment about the “occupation” of Hawai‘i that: “The Department is bound by Congressional enactments concerning the status of Hawaii. Under those enactments and under the United States Constitution, Hawaii is a State of the United States of America.”

It regurgitated, as discussed above, the American narrative of Hawaiian legal history, ignored the findings of the Apology Resolution, and thereby silenced a large segment of the Native Hawaiian community that firmly believe that the annexation and referendum on statehood were contrary to the law. Also, while Native Hawaiians would have the same “status” as other Native American tribes, the proposed rule makes clear that they would not be afforded the same protections as Native Americans, such as through the ability to decide for itself whether it will allow gaming on its lands. Instead, the proposed rules expressly state that Native Hawaiians would not receive the same benefits as an Indian tribe, and implicitly would, therefore, not benefit from the Indian Gaming Regulatory Act, which regulates gaming activities by federally recognized tribes on Indian lands. Furthermore, the Department of Interior stated that “because the State of Hawaii prohibits gambling, the Native Hawaiian Governing Entity would not be permitted to conduct gaming in Hawaii,” emphasizing the control that the State and State law would continue to have over any proposed Native Hawaiian Governing Entity. In practice, this means that the Native Hawaiian Governing Entity would have to fight for its own benefits and programs and would not be able to partake in the resources (albeit grossly inadequate) available to Native Americans. It also clearly places the American government in a position of power over the Native Hawaiians who must request and lobby every year for federal resources. In a similar vein, the proposed rule makes clear that Native Hawaiians and the Native Hawaiian Governing Entity would, like that of federally recognized tribes, still be under the “plenary” authority of Congress, thereby severely limiting self-governance and holding Native Hawaiians hostage to the whims of political elections and partisanship.
Second, and more importantly, while the form of a Native Hawaiian governing entity was certainly left for the Native Hawaiian community itself to decide, the proposed rule did not clarify how that established relationship works in practical terms and what reparations would be provided, if at all. What the proposed rule does state, however, is that federal lands in Hawai‘i were off the table for a Native Hawaiian Governing Entity: “Reestablishment of the formal government-to-government relationship will not affect the title, jurisdiction, or status of Federal lands and property in Hawaii.”75 In other words, the Interior Department could recognize a Native Hawaiian Governing Entity, but it would not—at least for the initial recognition process—attempt to repair any of the historic injustices by providing land for the Native Hawaiians. It has been asserted that, after receiving recognition, the Native Hawaiian Governing Entity would be able to negotiate with the State and the federal government for lands and funds. But, such statements are noticeably absent from the proposed rule. Put simply, there is no indication of what happens after the reestablishment of the government-to-government relationship. Will there be reparations via land, funding, educational and employment opportunities, etc., available for Native Hawaiians? It is not clear. Therefore, while the proposed rule promotes quasi-reconstruction it is incomplete as to reparations to effectuate meaningful social healing.

The harm in failing to meaningfully reconcile with Native Hawaiians, under the Social Healing Through Justice framework, also poses significant problems for the United States itself in the international arena. Mary L. Dudziak, in her book Cold War Civil Rights: Race and the Image of American Democracy, discussed historically how the United States’ domestic problems with race during a time when American foreign policy focused on the containment of communism, was seen by developing countries after World War II as contradictory to its promotion of democratic principles.76 The same principles apply today in the context of America’s self-interest in resolving claims with Native Hawaiians. Indeed, American moral authority and its reputation has been severely curtailed in recent years because of American imperialist actions across the globe, particularly in the Middle East. After the attacks on September 11, 2001, the United States launched a pre-emptive war in Iraq that destabilized the region. In its “war on terrorism,” the federal government has detained many and committed human rights violations. In the Abu Ghraib prison in Iraq, the United States Army and Central
Intelligence Agency physically and sexually abused detainees. This conduct led the independent pan-Arab newspaper *Al-Quds al-Arabi* to write: “What the U.S. forces did and are doing in Iraq confirms to us what we have always warned of, namely, that the aim of this invasion and occupation was primarily to humiliate the Arabs and Muslims and was never for changing the Iraqi dictatorship or establishing a model of democracy, justice, and human rights.” In Guantanamo Bay, “enemy combatants” were brutally tortured in contravention of the Geneva Convention signed by the United States. On the home front, the federal government passed laws, like the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) that limited civil and legal rights by grossly expanding the ability of the government to use electronic surveillance on both citizens and non-citizens. The United States’ conduct reflects poorly in the international community, so curing some of its past injustices may provide greater moral authority. Therefore, the United States has a significant international interest in embracing reconciliation efforts with those that it has oppressed—including, among others, Native Hawaiians, Native Americans, and African Americans.

*Hoʻokuʻikahi: Rebuilding Trust*

The constant through the Office of Hawaiian Affairs’ tumultuous history has been a silent majority of Native Hawaiians living paycheck to paycheck, while trying to provide educational opportunities and healthcare for their children, who want to be able to afford to live in their one hānau, place of birth. Given the federal government’s recent efforts, the increased dialogue regarding potential international recourse and solutions, and this silent majority, how does the Office of Hawaiian Affairs move forward? The answer lies in returning to its creation at the People’s Convention in 1978. Indeed, the creation of the Office of Hawaiian Affairs was intended to facilitate the creation of a sovereign body representative of the indigenous people of Hawai‘i, but was crafted with limited knowledge and scholarship about the political relationship between the Native Hawaiian people and the federal and State governments. Based upon these premises, the Office of Hawaiian Affairs should first use its resources to research and educate Native Hawaiians about the intricacies of these complicated political relationships. Second, the Office of Hawaiian Affairs needs to commit to a process of reconciliation that is inclusive of
various positions taken by Native Hawaiians. Third, the Office of Hawaiian Affairs needs to engage in a calculated initiative to mend the wounds of division among the Native Hawaiian people. That process of hoʻokuʻikahi (reconciliation) must engage the Office of Hawaiian Affairs detractors, and lead to a result that positions the Native Hawaiian community to best advocate on a national and/or international stage. Only when meaningful healing is accomplished within the Native Hawaiian community can Native Hawaiians push forward with reconciliation with the federal and State governments.

It is fundamental to recognize that any proposal for moving forward needs to involve buy in by both the State and federal governments or the international community. As scholar Ross Poole wrote, “[f]or better or worse (or both) the fate of indigenous people is inextricably bound up with that of non-indigenous people and vice versa. The resolution of tensions at the heart of this awkward symbiosis must lie in some form of co-existence.” Even pro-nationalist Kanaka Maoli scholar Jonathan Osorio recognized: “[I]f the [Naʻi Aupuni] convention were to create a government independent from the United States, I have to wonder how will it sell that to the nearly one million residents in the Hawaiian islands who are not Hawaiians, and have not been able to participate in any of this.”

The Social Healing Through Justice framework, while providing a workable guide for achieving true and meaningful reconciliation between the Native Hawaiian community and the colonizing governments, is useful to frame the discussions of reconciliation that needs to occur or is currently occurring within the Native Hawaiian community—a community that numbers over 500,000 individuals and is in need of unification. Consistent with the first and second points of inquiry under the Social Healing Through Justice framework, recognition and responsibility, the Office of Hawaiian Affairs and its leaders must acknowledge the role they have played in this entire process. There are many Native Hawaiians that continue to suffer “pain . . . and anger” for the ways in which the Office of Hawaiian Affairs has implemented and funded policies that have silenced many and have, for the most part, denied “fair access to resources.” The millions of dollars that the Office of Hawaiian Affairs has spent on federal recognition compared to thousands spent on other alternatives provides an apt example. Clearly, the leadership and employees of the Office of Hawaiian Affairs are aware of the dissenting voices, but have chosen to ignore them to pursue what they believe is the best policy for Native
Hawaiians to move forward. The entity and its leaders must recognize the damage of its policies (even though they are being promulgated to benefit the Native Hawaiian community broadly) and must take responsibility for the wounds caused by the action. Indeed, “[o]nly by understanding the extent of a group’s agency, constrained by context, can a rough evaluation be made of the extension of its responsibility for harm to others.” 84 By taking responsibility for the decisions made, the Office of Hawaiian Affairs takes a step toward reconciling with all its Native Hawaiian beneficiaries.

The Office of Hawaiian Affairs has already undertaken a “reconstruction” initiative through its support of the independent process of Na‘i Aupuni. In funding the Na‘i Aupuni process, the Office of Hawaiian Affairs is affirming (although not stated explicitly) a commitment to open dialogue among all Native Hawaiians, regardless of perspective on the issue of sovereignty. In doing so, the Office of Hawaiian Affairs is building “a new production relationship[,]” as suggested by the Social Healing Through Justice framework. In financially supporting the Na‘i Aupuni process, the Office of Hawaiian Affairs is attempting to reallocate its political and economic power back to the Native Hawaiian people to decide the future of Hawaiian self-governance. The Office of Hawaiian Affairs supports Na‘i Aupuni, whose process is structured in a manner in which all Native Hawaiians have the “power to” participate fully and freely, as opposed to a process where the Office of Hawaiian Affairs has “power over” Native Hawaiians. Therefore, the Office of Hawaiian Affairs’ support of Na‘i Aupuni entails the reconstruction envisioned by the Social Healing Through Justice framework.

Finally, the Office of Hawaiian Affairs can and should undertake a comprehensive reparatory initiative to heal the wounds within the Native Hawaiian community. Combined with the Na‘i Aupuni process, the Office of Hawaiian Affairs should commit considerable resources to educational campaigns on various issues of a self-governing body. But that educational effort should be framed as how beneficiaries view the future for Native Hawaiians. Assessing and discussing priorities for self-governance can help to facilitate what “form” of government would best bring those demands to fruition. For example, does the Hawaiian community want citizens of a Hawaiian governing entity to be provided free healthcare? Does the Hawaiian community want educational alternatives? Does the Hawaiian community want greater access to language schools? Does the Hawaiian community want its own legal and justice system?
Hawaiian community want the ability to make all its own decisions, such as determining for itself whether gaming should be allowed or whether it can have sole authority to do with its lands as it pleases? Does the Hawaiian community want a government that provides housing for its people? What does education, housing, healthcare, economic development look like under a Hawaiian governing entity?

Although the Office of Hawaiian Affairs cannot stop the Na‘i Aupuni process, which is a community-driven effort to address the issues, it can certainly engage a comprehensive educational campaign that will force debate about the various issues facing the Hawaiian community, chief among them being the issue of sovereignty. The agency should commit resources to scholarly publications, media presentations, or school curricula on Hawaiian sovereignty issues as “[p]ublic education serves to commemorate, to impart lessons learned, and to generate a new justice narrative about a democracy’s commitment to civil and human rights.” Taking these steps may ensure sufficient reparations to engender true and meaningful reconciliation, within the Native Hawaiian community.

At the same time, Native Hawaiian opponents of the Office of Hawaiian Affairs’ policies should also recognize the significant steps taken by the agency to try, within its legal authority, to better the conditions of all Native Hawaiians and to acknowledge the tumultuous history of the agency. All Native Hawaiians should be cognizant that the Office of Hawaiian Affairs was ratified by the people of Hawai‘i in 1978 by the narrowest of margins. In addition, it should be recognized that given the Rice decision, every two years, there is a constant threat that unsupportive individuals may be elected by the entire State to run the agency or that a renewed Constitutional Convention could wipe the agency out of existence, thereby transferring all of its considerable assets back to the State. While one could have assumed that no one would ever have challenged Hawaiian programs in the 1970’s, the reality shifted as time progressed. Changing attitudes and societal values caused changes to perceptions, even in Hawai‘i, of the uniqueness of the Native Hawaiian situation.

Put simply, the Social Healing Through Justice framework suggests that the Office of Hawaiian Affairs must serve as a neutral facilitator. The Office of Hawaiian Affairs, despite its obvious link as an apparatus of the State, is the only entity with the capability and funding flexibility to bridge the divide between those Native Hawaiians that would like independence,
those that would like federal recognition, and those that would like nothing done. The agency and the elected trustees should embrace that powerful position and strive to serve as a vehicle of unity for the Native Hawaiian people. As has been made clear through a review of its history, the trustees of the Office of Hawaiian Affairs have vast discretion to guide the direction and focus of the agency.

There is no doubt that the Office of Hawaiian Affairs has, in the face of adversity, been resilient and that it served as a catalyst for the growth of Native Hawaiian consciousness and, at times, unity. It took one-hundred years for the federal government to even recognize its actions in the overthrow and the subsequent effects that that has had on the Native Hawaiian community. To believe that a thirty-five year old agency that has faced a barrage of attacks from the State and federal governments can alone fix a century-long history of colonization and dispossession is a pipedream. Yet what has been accomplished by the Office of Hawaiian Affairs and the Native Hawaiian community, in general, in the past thirty-plus years to counter the century-long suppression and Americanization of the Native Hawaiian people is a true testament to the tenacity of the Native Hawaiians. Because of tremendous efforts by many, including the Office of Hawaiian Affairs, each new generation of Native Hawaiians is growing up in a world where the history of Native Hawaiian subjugation for over a century is learned in beginning history courses.

The tides are changing. Recently, the Polynesian Voyaging Society launched its Mālama Hōnua voyage. Harkening back to the triumphant voyage of the Hōkūle‘a in 1976, which helped ignite the Hawaiian cultural renaissance, the Voyaging Society set off to undertake another bold initiative: circumnavigating the globe using traditional navigation skills. The global voyage, in which young navigators would take the literal and figurative reigns from the master navigators, represented a changing time for the entity and a rekindled hope for the future of navigation and for cultural preservation. The voyage would take the famous Hōkūle‘a to French Polynesia, Sāmoa, Cooks Islands, Tonga, Aotearoa, Australia, Indonesia, Madagascar, Mozambique, South Africa, Brazil, Portugal, Italy, the East Coast of the United States, Panama, Costa Rica, Galapagos, Rapa Nui, back to Hawai‘i. Just as the voyagers set out to accomplish a historic feat, so too must the Office of Hawaiian Affairs. The time is now for a fresh start to moving forward as a unified community.
From the struggles against the Department of Hawaiian Homelands and the fight to recover Kahoʻolawe in the 1970s to the politics and lawsuits that have hampered the betterment of Native Hawaiians, the journey for justice has been arduous. The history of the Office of Hawaiian Affairs has illuminated this journey and contextualized one attempt at bettering the conditions of Hawaii’s indigenous people. But, the journey is not yet over for the Office of Hawaiian Affairs or the Native Hawaiians. To end, the words of Hawaiian activist Pae Galdeira are apropos:

We, the people of Hawai‘i, have journeyed a long and dark road together. A road which began a long time ago . . . a road which grew smaller, rougher and painful to us. It was only our spirit and love for our homeland, for our great mother Hawai‘i, that lightened the darkness like a flickering candle. There is great truth in the old proverb that says, “It is better to light one candle than to curse the darkness.” Let us stop cursing the darkness of extinction, disunity and poverty. Let us each light a candle of unity to light our way. Let us each light a candle of love to help our homeland and our people.87

5 Id.
6 Testimony of Kaleikoa Kaeo at Office of Hawaiian Affairs Board Meeting (May 19, 2014).
10 Id.
11 Id.

Id. at §§ 4-5.

Hawaii v. Mankichi, 190 U.S. 197, 210-11 (1903).


Id. at § 2.

Id. at § 3.

Id. at § 7(b).

Id. at § 7(c).

Id.


Letter from Kamana’opono Crabbe to Secretary of State John Kerry (May 5, 2014) (on file with author).

Id.

Id.

Id.


Jones v. United States, 137 U.S. 202, 212 (1890).


Id. at 6-8.

Id. at 7.

Id.


Id. at **7-8 (internal citations, quotation marks, brackets, and ellipsis omitted; emphasis added).


Id. at 482, 291 P.3d at 380.

Id.

Id. at 486-87, 291 P.3d at 384-85.

Id. at 487, 291 P.3d at 385 (internal citations, quotation marks, and ellipsis omitted; emphasis added).

Id. (internal citations, quotation marks, and ellipsis omitted; emphasis added).


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Id. at 59132.


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_Office of Hawaiian Affairs v. Cayetano_, 94 Hawai‘i 1, 1071, 2 P.3d 884, 897 (2008).


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