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I. INTRODUCTION

Native Hawaiians, descendants of the inhabitants of the Hawaiian Islands before the arrival of European explorers, consider themselves an indigenous people, yet they are not afforded the same federal recognition as, for example, the Cherokee or Alaska natives. Federal recognition allows indigenous peoples to exercise sovereignty through a separate governmental entity within the United States, such as the Cherokee Nation in Oklahoma. Currently, Native Hawaiians are organizing a separate government by convening to write organic governing documents for a Native Hawaiian nation.

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1 “Native Hawaiians” as used in this paper, “means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.” 100th Anniversary of the Overthrow of the Hawaiian Kingdom, S.J. Res. 19, 103d Cong., Pub. L. No. 103-150, 107 Stat. 1510, 1513 (1993) [hereinafter Apology Resolution]. This definition is borrowed from the joint resolution passed by the U.S. Congress “to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii.” Id. at 1510.

2 See Le’a Malia Kanehe, Recent Development, The Akaka Bill: The Native Hawaiians’ Race For Federal Recognition, 23 U. HAW. L. REV. 857, 859-60 (2001). “The United States recognizes native peoples’ right to self-determination through federal recognition. Since 1978, twenty-one groups have successfully become federally recognized nations through either procedures under the Bureau of Indian Affairs, Department of Interior, or congressional action. Currently, more than 550 federally recognized Native American nations exist in the contiguous United States and Alaska. Also since the 1970s, under fifty federal statutes, “Native Americans” have been considered to include American Indians, Alaska Natives and Native Hawaiians. Within that class, Native Hawaiians are the only group that has not been extended federal recognition.” Id.

3 Id.

4 The Cherokee Nation of Oklahoma has a constitution and a Cherokee Nation Code Annotated. See CHEROKEE NATION CODE ANN. (Equity 1986). In the Foreword to the Code, Wilma P. Mankiller, Principal Chief of the Cherokee Nation of Oklahoma, explains the importance to the Cherokee people of their ability to organize their own government:

This embodiment of the legislative acts of the Cherokee Nation of Oklahoma is the first of its kind since the adoption of the Constitution of the Cherokee Nation of Oklahoma on October 2, 1975. It represents the continual endeavor of the Cherokee people to govern themselves and maintain their cultural identity while at the same time adjusting to the social and economic demands of the day. The power of the Cherokee people to enact a Constitution and Code and govern themselves by them are the fundamental attributes of their sovereignty.

It is my sincere hope that this publication will allow more people to know and understand our purpose and what it means to be free to govern ourselves.

Id. Foreword at ix (emphasis added).
The Akaka Bill, now pending before Congress, would create a mechanism whereby the United States could extend federal recognition to a NHN, acknowledging its legitimacy as a quasi-sovereign legal entity. Also, Section 8 of the Akaka Bill authorizes the United States and the State of Hawai‘i to negotiate the transfer of land and assets to a NHN.

This article seeks to persuade federal lawmakers that Congress should pass the Akaka Bill, and also to convince Native Hawaiians that if they want self-government over their own territory, the Akaka Bill is the best method to achieve it. Considering the amounts of land and wealth involved, the integrity of the state and federal constitutions, and the need to resolve the claims for sovereignty of Native Hawaiians, it is imperative that lawmakers understand the myriad of issues surrounding the Akaka Bill and federal recognition. The

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5 Vicki Viotti, *OHA Unveils Nationhood Plan, HON. ADVERTISER*, May 2, 2003, at B1. “The Office of Hawaiian Affairs yesterday added more fuel to the drive toward sovereignty by unveiling a nationhood timetable that calls for a council to convene in late November and draw up documents for a native Hawaiian government.” *Id.*

6 This article uses “the Akaka Bill” to refer to Senate Bill 344, introduced into the 108th Congress by Hawai‘i Senator Daniel Akaka. S. 344, 108th Cong. (Feb. 11, 2003). An Office of Hawaiian Affairs (OHA) press release states S. 344 was known previously as “the Akaka Bill,” but should now be known as “the Native Hawaiian Recognition Bill.” *See Press Release, Office of Hawaiian Affairs Public Information Office, OHA Board Unanimously Supports the Intent of S. 344 Seeking Federal Recognition of Native Hawaiians (Feb. 14, 2003), at http://www.oha.org/pdf/OHA_in_WDC.pdf (last visited June 5, 2003).* This article, however, continues to refer to S. 344 as the Akaka Bill in order to be consistent with general perceptions and previous literature. *See Kanehe, supra note 2.* *See also* R. Hokulei Lindsey, *Comment, Akaka Bill: Native Hawaiians, Legal Realities, and Politics as Usual*, 24 U. HAW. L. REV. 693 (2002).

7 *See S. 344, 108th Cong. § 3(b) (2003).* “Purpose - It is the intent of Congress that the purpose of this Act is to provide a process for the recognition by the United States of a Native Hawaiian governing entity for purposes of continuing a government-to-government relationship.” *Id.*

8 Quasi-sovereign is a term applied to indigenous governments within U.S. borders. *See Rice v. Cayetano*, 528 U.S. 495, 518 (2000) “The decisions of this Court, interpreting the effect of treaties and congressional enactments on the subject, have held that various tribes retained some elements of quasi-sovereign authority, even after cession of their lands to the United States.” *Id.* *See also* Morton v. Mancari, 417 U.S. 535, 554 (1974) (stating “[t]he preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.”).

9 *See S. 344, 108th Cong. § 8(b) (2003).* “Negotiations—Upon the Federal recognition of the Native Hawaiian governing entity by the United States, the United States is authorized to negotiate and enter into an agreement with the State of Hawaii and the Native Hawaiian governing entity regarding the transfer of lands, resources, and assets dedicated to Native Hawaiian use to the Native Hawaiian governing entity. Nothing in this Act is intended to serve as a settlement of any claims against the United States.” *Id.*
Akaka Bill must build the foundation for stable government, rather than
digging complicated legal pitfalls. This article informs the reader about
federal recognition of a NHN in order to establish its feasibility, and to aid
lawmakers in their decisions by identifying and offering solutions to potential
problems. This article argues from a conviction that the United States has a
duty to effect reconciliation between itself and Native Hawaiians, and that
federal recognition of a NHN is the most viable path to that end.

Already, the United States has acknowledged its duty to the Native
Hawaiian people, and codified it into law. In 1993, the U.S. Congress passed
a joint resolution\(^{10}\) “[t]o acknowledge the 100th anniversary of the January 17,
1893 overthrow of the Kingdom of Hawai`i, and to offer an apology to Native
Hawaiians on behalf of the United States for the overthrow of the Kingdom of
Hawai`i.”\(^{11}\) The “Apology Resolution” recounts the events surrounding the
overthrow in considerable detail, including the direct participation of U.S.
military forces.\(^{12}\) The United States admits in the Apology Resolution that
without its assistance, the overthrow of the Kingdom of Hawai`i would have
failed;\(^{13}\) that the overthrow was illegal;\(^{14}\) that the United States took title to 1.8
million acres of land belonging to the Kingdom of Hawai`i without the
consent of or compensation to Native Hawaiians;\(^{15}\) and that Native Hawaiians

\(^{10}\) A joint resolution, passed by a simple majority in both houses of Congress and
signed by the President, is a binding public law. For example, through a joint resolution, the
United States annexed the Hawaiian Islands. Joint Resolution to Provide for Annexing the
Hawaiian Islands to the United States, 30 Stat. 750 (July 7, 1898).

\(^{11}\) Apology Resolution, supra note 1, at 1510.

\(^{12}\) Id. at 1510. “Whereas, in pursuance of the conspiracy to overthrow the
Government of Hawaii, the United States Minister and the naval representatives of the United
States caused armed naval forces of the United States to invade the sovereign Hawaiian nation
on January 16, 1893, and to position themselves near the Hawaiian Government buildings and
the Iolani Palace to intimidate Queen Liliuokalani and her Government[.]” Id.

\(^{13}\) Id. at 1511. “Whereas, without the active support and intervention by the United
States diplomatic and military representatives, the insurrection against the Government of
Queen Liliuokalani would have failed for lack of popular support and insufficient arms[,]” Id.

\(^{14}\) Id. at 1512. “Whereas, although the Provisional Government was able to obscure
the role of the United States in the illegal overthrow of the Hawaiian monarchy, it was unable
to rally the support from two-thirds of the Senate needed to ratify a treaty of annexation[,]”
Id.

\(^{15}\) Id. “Whereas the Republic 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 Congress, through the Newlands Resolution, ratified the cession, annexed
Hawaii as part of the United States, and vested title to the lands in Hawaii in the United
States[,]” Id.
have never relinquished their claims to their national lands or to their right to sovereignty.\textsuperscript{16} Congress stated the Apology Resolution:

\begin{quote}
[E]xpresses its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for \textit{reconciliation} between the United States and the Native Hawaiian people[.]\textsuperscript{17}
\end{quote}

Reconciliation is a term of art that signifies the need for the dominant party, in this case the United States, to work towards a compromise and solution to remedy the injured party, the Native Hawaiians, in a manner acceptable to both parties.\textsuperscript{18} This article contends federal recognition of a Native Hawaiian nation is the appropriate path to reconciliation because it would allow Native Hawaiians to recover what they lost upon annexation, their own government over their own land, in accordance with U.S. law. The Akaka Bill is an excellent vehicle for federal recognition of a Native Hawaiian nation, in large part because it establishes the legal authority to transfer land and assets to a NHN.\textsuperscript{19} Critics of this position abound among both Native Hawaiian advocates, and opponents of Native Hawaiian claims. Some Native

\begin{footnotes}
\begin{enumerate}
\item[16] \textit{Id.} “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[.]” \textit{Id.}
\item[17] \textit{Id.} § 1(4), at 1513 (emphasis added).
\item[18] \textit{See} \textit{BLACK’S LAW DICTIONARY} 1272 (6th ed. 1991) (defining reconciliation as “[t]he renewal of amicable relations between two persons who had been at enmity or variance; usually implying forgiveness of injuries on one or both sides”). \textit{See also} William Bradford, \textit{“With a Very Great Blame on Our Hearts”: Reparations, Reconciliation, and an American Indian Plea for Peace with Justice}, 27 \textit{AM. INDIAN L. REV.} 1, 134-37 (2003).
\item[19] \textit{See} S. 344, 108th Cong. § 8(b) (2003).
\end{enumerate}
\end{footnotes}
Hawaiians view the Akaka Bill as a renunciation of their claims and instead seek a completely independent sovereign nation. At the opposite extreme, some argue that Native Hawaiians are no different from other Americans and have no foundation for their claims. This article rejects both arguments at the outset. It appears that most Native Hawaiians do not wish to create an independent nation, one of the chief reasons being Native Hawaiians enjoy their American citizenship. Rejecting that Native Hawaiians merit separate


These bills violate our inherent right to self-determination . . . and place us under U.S. federal Indian law, creating a process whereby we are a puppet government that has to be acceptable to the Secretary of the Interior and approved by the State of Hawai‘i. It is worse than what we have now. This legislation exists for the purpose of having kanaka maoli [Native Hawaiians] go on record as formally relinquishing our rights to our sovereignty and our lands.

Id.

21 Id. Charles Lehuakona Isaacs, Jr., a Hawaiian activist and co-producer of www.stopakaka.org states, “I’d rather use the ’93 Apology Resolution, that apologizes for the U.S. complicity in the illegal overthrow, as a path for looking at potential models of independence.” Id.


23 Information distributed about federal recognition by the Office of Hawaiian Affairs (OHA), a state agency, and Ka Lahui Hawai‘i (Ka Lahui), an independent sovereignty organization, stress that federal recognition will not affect Native Hawaiians’ U.S. citizenship. See PONO KĀKOU: HAWAIIAN RECOGNITION NOW, Getting to Know the Issues: Frequently Asked Questions About the Akaka Bill, in NATIVE HAWAIIANS: A QUEST FOR SELF-DETERMINATION, at http://www.oha.org/pdf/orientation-kit.pdf (last visited June 9, 2003). “[I]f the Akaka Bill is enacted and Native Hawaiians choose to reorganize a government, its members would retain their United States citizenship in addition to their Native Hawaiian nation citizenship. All of the rights, programs, and services guaranteed or provided to U.S. citizens would still be provided to Native Hawaiians[.]” Id. at 8. See also Ka Lahui Hawai’i, Commonly Asked Questions About Ka Lahui Hawai’i, at http://www.cwis.org/fwdp/Oceania/hawiques.txt (last visited June 9, 2003) [hereinafter Ka Lahui]. “Ka Lahui citizenship will not change your U.S. or state citizenship, or affect your job, social security, retirement or pension from the U.S. or the state. All citizens of Hawai‘i are now under two constitutions: the U.S. Constitution and the State Constitution. If you enroll as a citizen of Ka Lahui you will fall under an additional constitution, that of Ka Lahui Hawai‘i.” Id.
special treatment under U.S. law, however, denies Native Hawaiians the same legal opportunity afforded the Cherokee, the Alaska natives, the Mashantucket Pequot, the Oneida, the Jicarilla Apache, or any of more than 550 federally recognized indigenous governments.

This article walks through the legal process of federal recognition of a Native Hawaiian nation via the Akaka Bill, and considers the transfer of land and assets to a NHN. Part II examines the origin and development of the legal parameters of federal recognition, and explores how the Akaka Bill would extend such recognition to a NHN. Part II then details how federal recognition would provide the legal underpinnings for the establishment of a land base for a NHN consisting of some parts of the ceded lands. The term ceded lands refers to approximately 1.8 million acres of Kingdom of Hawai‘i land ceded to the United States upon annexation. Ceded lands form the basis of Native Hawaiian claims against the state and federal governments.

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28 See The Jicarilla Apache Nation, http://www.jicarillaonline.com/tribalgovernment.htm (last visited June 12, 2003). “The tribal government was established in 1937 with its own constitution and by-laws. The Nation is setup as a three branch government with the legislative being a elected president, a vice-president, and eight council members.” Id.
29 See Kanehe, supra note 2, at 859-60.
30 See Office of the Legislative Auditor, Final Report on the Public Land Trust, Rep. No. 86-17, at 7 (Haw. 1986) [hereinafter Final Report]. “Technically speaking, ‘ceded lands’ are lands that were ceded to the United States by the Republic of Hawai‘i under the joint resolution of Annexation of Hawai‘i approved July 7, 1898 (30 Stat. 750) and those that have been acquired in exchange for the lands so ceded.” Id. at 2.
because the United States acquired the ceded lands at annexation without paying compensation to Native Hawaiians. Control of land is essential to a NHN because Native Hawaiians depend upon a relationship with the land (ʻāina) for their sense of cultural and spiritual wholeness.

Part III opens by discussing competing arguments regarding the constitutionality of federal recognition of a Native Hawaiian nation, concluding it is both constitutional and an effective way for Native Hawaiians to exercise sovereignty. The constitutionality of a NHN, however, is a separate issue from that of state programs dedicated to Native Hawaiians, such as the Office of Hawaiian Affairs (OHA) and the Department of Hawaiian Homelands (DHHL). Currently, both programs face a constitutional challenge alleging they constitute impermissible racial discrimination by the State of Hawai‘i. Similar programs administered by a NHN, however, would not face such challenges because a NHN would not be a state actor; it would be a separate, quasi-sovereign entity.

Ultimately, Native Hawaiians seek return of Government and Crown Lands (ceded lands) from both the state and federal governments. How such lands would be cared for and managed, who would have jurisdiction over them, and what rights Native Hawaiians could exercise upon them are crucial aspects of Native Hawaiian self-governance and sovereignty.

Id. 32

See Apology Resolution, supra note 1, at 1512. “Whereas the Republic 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[,]” Id.

33 Fundamentally, Native Hawaiians practice mālama ʻāina—caring for the land—and view the ʻāina, or land, as a partner in the production of life-sustaining materials. For a more detailed discussion of the importance of land in the Native Hawaiian culture and belief system, and the practice of mālama ʻāina, see Lilikalā Kame‘eleihiwa, Native Land and Foreign Desires: Pehea Lā e Pono ai? How Shall We Live in Harmony? 25-40 (1992). “The Hawaiian does not desire to conquer his elder female sibling, the ʻĀina, but to take care of her, to cultivate her properly, and to make her beautiful with neat gardens and careful husbandry.” Id. at 25.


35 See Rice v. Cayetano, 528 U.S. 495, 521 (2000). In Rice, the Supreme Court emphasized the difference between OHA and a quasi-sovereign indigenous government: If a non-Indian lacks a right to vote in tribal elections, it is for the reason that such elections are the internal affair of a quasi-sovereign. The OHA elections, by contrast, are the affair of the State of Hawaii. OHA is a state agency, established by the State Constitution, responsible for the administration of state laws and obligations.

Id.
Next, Part III outlines the possible contours of a Native Hawaiian nation, using as a model the provisions of the Akaka Bill and the governments of other indigenous peoples. This inquiry focuses on who would belong to a NHN, what kind of authority it would have, and how it would hold its land and assets. Part III then examines the possible sources from which a NHN could expect to receive land and assets. This article recommends that Section 8 of the Akaka Bill be used to transfer the island of Kaho`olawe in its entirety to a NHN. Assets held by OHA should also be transferred to a NHN, as well as a portion of ceded lands proportional to the amount dedicated to OHA by the State of Hawai`i in its constitution. In an effort to assist this process, this article identifies the location of ceded lands to the extent currently possible. Finally, this article suggests compensation should be paid to a NHN by state and federal governments for ceded lands those governments retain. The result of these actions would be a de facto quasi-sovereign NHN, possessing its own land base with solid financial standing. Such a NHN would be completely separate, politically and financially, from the State of Hawai`i, and able in this context to carry on its own government-to-government relationship with the United States.\(^{36}\)

II. BACKGROUND

A. The Legal Framework of Federal Recognition

Early in its history, the United States recognized the right of indigenous peoples within its borders to exercise sovereignty through separate governments.\(^{37}\) In three decisions written from 1823 to 1832, now known as the Marshall Trilogy,\(^{38}\) Supreme Court Chief Justice John Marshall established the beginnings of a system wherein indigenous governments function similarly to “states,” distinctively independent from other state governments, yet still subject to the plenary authority of the federal

\(^{36}\) See S. 344, 108th Cong. § 3(b) (2003) The purpose of the Akaka Bill is “to provide a process for the recognition by the United States of a Native Hawaiian governing entity for the purposes of continuing a government-to-government relationship.” Id.


\(^{38}\) Worcester v. Georgia, 31 U.S. 515 (1832); Cherokee Nation v. Georgia, 30 U.S. 1 (1831); and Johnson v. M`Intosh, 21 U.S. 543 (1823).
government. Today, the legacy of the Marshall Trilogy is that the United States has extended federal recognition to the governments of some 550 indigenous peoples. Congress decides which indigenous governments merit federal recognition, drawing its authority from the Constitution’s grant of power “[t]o regulate Commerce with foreign nations, and among the several States, and with the Indian tribes.” Federal recognition constructs a government-to-government relationship between the governments of indigenous peoples and the United States. The nature and boundaries of individual indigenous authorities are determined through negotiations with related state and federal governments on a case-by-case basis.

Federal recognition works via a fundamental change in the United States’ perception of the members of indigenous governments; they are no longer regarded as a racial class, but instead acquire a special political status. In Morton v. Mancari, the Supreme Court upheld a hiring preference for Indians within the federal Bureau of Indian Affairs (BIA) because:

The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.

Laws affecting members of “Indian Tribes” are not subject to the strict scrutiny standard of judicial review applied to racial classifications. Under Mancari such laws are reviewed using the more easily satisfied rational basis standard:

39 Worcester v. Georgia, 31 U.S. at 561 (1832). “The Cherokee nation, then is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves or in conformity with treaties and with the acts of Congress.” Id.
40 See Kanehe, supra note 2, at 859, 878.
41 U.S. CONST. art. I, § 8, cl. 3. See also Kahanu & Van Dyke, supra note 37, at 428 n.5 (noting how the Commerce Clause “equates the status of Indian tribes to that of states and foreign nations.”).
42 See Kanehe, supra note 2, at 859.
43 See Kahanu & Van Dyke, supra note 37, at 430-37 (describing “the varieties of native sovereign nations”).
45 Id. at 554.
As long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation towards the Indians, such legislative judgments will not be disturbed.\footnote{Mancari, 417 U.S. at 555.}

In \cite{Rice v. Cayetano}, the State of Hawai‘i sought to extend the holding of \cite{Mancari} to defend a provision in its state Constitution\footnote{See HAW. CONST. art. XII, § 5.} mandating that voters in elections for trustees of its Office of Hawaiian Affairs include only “Native Hawaiians”\footnote{Rice v. Cayetano, 528 U.S. 495 (2000).} and “Hawaiians.”\footnote{See HAW. REV. STAT. art. XII, § 5.} The state argued restricted elections are permissible “to afford Hawaiians a measure of self-governance” in fulfilling the special trust relationship that exists between Native Hawaiians and the state and federal governments.\footnote{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 and Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law. The board members shall be Hawaiians. There shall be not less than nine members of the board of trustees; provided that each of the following Islands have one representative: Oahu, Kauai, Maui, Molokai and Hawaii. The board shall select a chairperson from its members. Id.} The Supreme Court disagreed, holding the Fifteenth Amendment prohibits the State of Hawai‘i from restricting elections to a state agency, such as OHA, on account of race or ancestry.\footnote{Id. at 515 (citing HAW. REV. STAT. § 10-2 which defines “Native Hawaiians” as “any descendant of not less than one-half of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.”).} The Court emphasized OHA is a state agency and \textit{a fortiori} OHA elections are state elections, which do not constitute elections of a federally recognized indigenous government.\footnote{Id. at 516 (citing HAW. REV. STAT. § 10-2 which defines “Hawaiian” as “any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii.”).} In contrast, the Court pointed out that elections held by indigenous governments restricting the vote to members of
that government are not the action of a state bound by the Fifteenth Amendment, but rather “the internal affair of a quasi-sovereign.”

The only way a Native Hawaiian nation could become a quasi-sovereign is through the Akaka Bill, or similar legislation, because Department of Interior (DOI) regulations administering the federal recognition process apply only to indigenous people located in the continental United States. In Kahawaiolaa v. Norton, Native Hawaiians sued the Secretary of the Interior, challenging their exclusion as an equal protection violation of the Fifth Amendment because Native Hawaiians were being treated differently than other indigenous peoples. In considering this challenge, the District Court of Hawai`i held that the issue raised was a nonjusticiable political question reserved for Congress to resolve, specifically citing to the Akaka Bill.

It is important to realize that passage of the Akaka Bill would not immediately extend federal recognition; rather, it details the process whereby elected officers of a Native Hawaiian nation would submit organic governing documents to the Secretary of the Interior (Secretary) for approval. The Secretary, then, must certify that the documents define the contours of a NHN in compliance with applicable federal law, including provisions detailing

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55 Id. at 520.
56 Kanehe, supra note 2, at 862.
The DOI regulations providing for petition to the Secretary of the Interior (Secretary) for federal recognition are available only to those American Indian groups indigenous to the continental United States. Thus, although Native Hawaiians are indigenous to an area now constituting part of the United States, they are geographically excluded from the DOI’s federal recognition petition procedures because Hawai`i is not part of the continental United States.

57 Id. at *7-8. “Again, it would appear that the course of action to achieve a government-to-government relationship between Native Hawaiians and the federal government would be to pursue the pending Akaka Bill.” Id. at *8.
membership criteria, the holding of assets, the exercise of authority, how to conduct negotiations with state and federal governments, and the security of members’ civil rights.\textsuperscript{60} The Akaka Bill provides that the documentation goes back and forth between a NHN and the Secretary until certified, after which the United States would extend federal recognition to a NHN.\textsuperscript{61}

B. \textit{Land Base of a Native Hawaiian Nation Consisting of Ceded Lands}

1. \textit{Initial provisions for a land base}

A Native Hawaiian nation would not be a nation without a land base. Federal recognition is the first step toward establishing a land base for a NHN, because it would receive partial control of the island and waters of Kaho`olawe.\textsuperscript{62} Potentially more significant than the acquisition of Kaho`olawe, Section 8 of the Akaka Bill provides:

\begin{quote}
Upon the Federal recognition of the Native Hawaiian governing entity by the United States, the United States is authorized to negotiate and enter into an agreement with the State of Hawaii and the Native Hawaiian governing entity regarding the transfer of lands, resources, and assets dedicated to Native Hawaiian use to the Native Hawaiian governing entity.\textsuperscript{63}
\end{quote}

The Senate Committee Report on the Akaka Bill, written by the Committee on Indian Affairs, states that lands referred to include the ceded lands:

\begin{quote}
\textsuperscript{60} \textit{Id.} § 6(b)(2)(A) (2003).
\textsuperscript{61} \textit{Id.} § 6(b)(2)(C) (2003).
\textsuperscript{62} \textit{HAW. REV. STAT.} § 6K-9 (2002).
\textsuperscript{63} S. 344, 108th Cong. § 8(b) (2003).
\end{quote}
It is the Committee’s intent that the reference to “lands, resources and assets dedicated to Native Hawaiian use” include, but not be limited to lands set aside under the Hawaiian Homes Commission Act and ceded lands as defined in section 2. The Committee believes that if an inventory of the ceded lands is required to facilitate negotiations addressing ceded lands, then such an inventory should be conducted.64

Section 2 of the Akaka Bill defines ceded lands as follows:

The term ‘ceded lands’ means those lands which were ceded to the United States by the Republic of Hawaii under the Joint Resolution to provide for annexing the Hawaiian Islands to the United States of July 7, 1898 (30 Stat. 750), and which were later transferred to the State of Hawaii in the Act entitled ‘An Act to provide for the admission of the State of Hawaii into the Union’ approved March 18, 1959 (Public Law 86-3; 73 Stat. 4).65

The language of the Akaka Bill and the explanatory notes in the Senate Committee Report declare Section 8 is to be used as the mechanism to transfer part of the ceded lands to a Native Hawaiian nation. Such a transfer would satisfy the strong desire among Native Hawaiians for the return of ceded lands.66 The amount of ceded lands to be transferred must be negotiated between the state and federal governments and a NHN, as authorized by Section 8.67 The next section provides a brief history of the ceded lands in order to explain the merits of Native Hawaiian claims to them, and to facilitate the transfer of some amount of ceded lands to a NHN.

66 S. 344, 108th Cong. §1(9) (2003). “Throughout the years, Native Hawaiians have repeatedly sought access to the Ceded Lands Trust and its resources and revenues in order to establish and maintain native settlements and distinct native communities throughout the State.” Id. See also § 1(10) (2003). “The Hawaiian Home Lands and the Ceded Lands provide an important foundation for the ability of the Native Hawaiian community to maintain the practice of Native Hawaiian culture, language, and tradition, and for the survival of the Native Hawaiian people.” Id.
67 Id. § 8(b) (2003).
2. **History of the ceded lands**

The origin of the ceded lands may be traced to the Māhele of 1848 when the monarch Kauikeouli (Kamehameha III) decreed the official start of private ownership of land. In so doing, Kauikeouli retained some 1 million acres as private lands and 1.5 million acres as government lands. The king’s private lands became known as the crown lands in 1865 after the legislature declared them the inalienable property of the office of the monarch, not the property of any individual person. After the illegal overthrow of Queen Liliʻuokalani in 1893, the Republic of Hawaiʻi expropriated about 1.8 million acres of former crown and government lands, and ceded all of it to the United States upon annexation in 1898. In 1908, the Supreme Court of Hawaiʻi took judicial notice that title to the crown lands vested in the United States, declining to question the validity of the transfer of title from the Republic of Hawaiʻi. In 1910, Queen Liliʻuokalani sued the United States for compensation for the taking of the crown lands. The Court of Claims held that since the crown lands had belonged to the office of the monarch, and not the individual person of the monarch, when that office ceased to exist, the Queen had no further claim to the lands.

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69 See KAMEʻELEIHIWA, supra note 33, at 9. Māhele means “to divide” or “to share.” Id. See generally id. at 201-25 (discussing the circumstances surrounding Kauikeouli’s decision to decree the Māhele).

70 See Miyahara, supra note 68, at 111.

71 Id. at 112-13.

72 Id. at 112 n.70 (citing Liliuokalani v. United States, 45 Ct. Cl. 418 (1910) which held that the crown lands belonged to the office and not the individual).

73 Id. at 101

74 Territory of Hawaii v. Kapiolani Estate, 18 Haw. 640, 644 (1908) “The validity of the declaration in the constitution of the Republic of Hawaii [which ceded the crown Lands to the United States], under which the present title is derived, does not present a judicial question.” Id.

75 Liliuokalani v. United States, 45 Ct. Cl. 418, 424 (1910). The Queen argued her case by asserting that she had a life estate in the crown lands, a property right that the Republic of Hawaii deprived her of without due process of law when it declared the crown lands to be part of the public domain, which were later ceded to the United States. Id. at 418. The Court of Claims rejected her argument without questioning the validity of the cession to the United States. Id. at 428-29.

76 Id at 428. “It seems to the court that the crown lands acquired their unusual status through a desire of the King to firmly establish his Government by commendable concessions to his chiefs and people out of the public domain. The reservations made were to the Crown and not the King as an individual. The crown lands were the resourceful methods of income to sustain, in part at least, the dignity of the office to which they were inseparably attached.
In 1921, Congress enacted the Hawaiian Homes Commission Act (HHCA) to set aside some 200,000 acres of ceded lands to lease as homesteads to Native Hawaiians of at least 50% blood quantum. In 1959, when Hawai’i became a state, the United States transferred about 1.4 million acres of ceded lands (including the HHCA lands) to the State of Hawai’i via the Admission Act. The United States retained about 400,000 acres. The Admission Act contains a trust provision restricting the state’s use of the ceded lands to five purposes, one being to benefit Native Hawaiians as defined in the HHCA. In addition, the Admission Act required the State of Hawai’i to take over responsibility for the HHCA, resulting in the state’s establishment of the Department of Hawaiian Homelands (DHHL) to administer the HHCA and its 200,000 acres. The state placed revenues from the other 1.2 million acres of ceded lands in its general funds, spending the money mainly on education.

In 1978, the State of Hawai‘i clarified the Admission Act trust in an amendment to its Constitution, Article XII, § 4, which reads:

PUBLIC TRUST. The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI,
Section 7, 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 native Hawaiians and the general public.\textsuperscript{84}

The Article XII, § 4 public trust governs roughly 1.2 million acres of ceded lands.\textsuperscript{85} New amendments to the Constitution also established the Office of Hawaiian Affairs (OHA)\textsuperscript{86} to serve “Native Hawaiians” having 50% blood quantum from races inhabiting the islands in 1778, and “Hawaiians” as descendants of the peoples inhabiting the islands in 1778.\textsuperscript{87} The amendments provided that OHA would be funded from a “pro rata” portion of revenues from the Article XII, § 4 public trust.\textsuperscript{88} Statutes implementing the funding set OHA’s share at 20%.\textsuperscript{89} Since its inception, OHA has engaged in protracted litigation over determining the proper amount of revenue payments due to it from ceded lands.\textsuperscript{90} There is no comprehensive inventory of the 1.2 million acres of land in the Article XII, § 4 public trust,\textsuperscript{91} therefore it is impossible to accurately determine how much revenue the lands produce, and how much

\textsuperscript{84} HAW. CONST. art. XII, § 4.

\textsuperscript{85} These lands are the 1.4 million acres the state received upon admission minus the 200,000 acres of HHCA lands. \textit{See} Rice v. Cayetano, 528 U.S. 495, 507-08 (2000).

\textsuperscript{86} HAW. CONST. art. XII, § 5.

\textsuperscript{87} HAW. REV. STAT. § 10-2 (2003).

\textsuperscript{88} HAW. CONST. art. XII, § 6.

\textsuperscript{89} HAW. REV. STAT. § 10-13.5 (2003). “Use of public land trust proceeds. Twenty percent of all revenue derived from the public land trust shall be expended by the office for the betterment of the conditions of native Hawaiians.” \textit{Id}.

\textsuperscript{90} For a detailed history of this litigation, see OHA v. State, 96 Haw. 388, 389-94 (2001).


Thousands of acres of ceded lands have been sold by the State of Hawaii since statehood. Although it is estimated that the ceded lands now comprise around 1.2 million acres, the actual acreage and metes and bounds of the Public Lands Trust is unclear. Through Act 329 of 1997, the Hawaii Legislature ordered that a comprehensive inventory be conducted of all lands comprising the public lands trust by the end of 1998. Extensions of this deadline have been granted, but this inventory has yet to be completed. \textit{Id}. at 43-44.
should go to OHA. When disputes have arisen, the state has consistently resorted to settlements where it simply pays OHA a fixed sum.

In 2001, the Hawai`i Supreme Court “resolved” a dispute between OHA and the state over revenues connected to use of the ceded lands beneath the Honolulu International Airport in OHA v. State of Hawaii. OHA sought “its pro rata share of revenues received by the State based on Waikiki Duty free receipts (in connection with the lease on ceded lands at the Honolulu International Airport)” dating back to 1980. The court first found that OHA was entitled to the revenues under existing legislation. The court then held, however, that because the existing legislation conflicted with federal regulations, a nonseverability clause in the legislation rendered it invalid in its entirety, thus ending Article XII, § 4 public trust payments to OHA until further legislative action. In February 2003, Governor Linda Lingle issued executive orders paying $2.8 million dollars to OHA and instructing state departments to resume ceded lands payments to OHA. In April 2003, the governor signed into law a bill appropriating an additional $9.5 million to OHA.


__93__ See, e.g., OHA v. State, 96 Haw. at 392. In 1993 the state paid OHA approximately $130 million dollars as a partial settlement for previous years. Id. In 1997, the Hawai`i state legislature fixed the ceded lands payments to OHA at $15.1 million each year for the fiscal years 1997-98 and 1998-99. Id. at 392.


__95__ Id. at 392. The lawsuit also sought pro rata shares from Hilo Hospital receipts, receipts from HHA & HFDC projects on ceded lands, and interest on withheld revenues. Id.

__96__ Id. at 395-96.

Accordingly, under HRS § 10-2, as amended by Act 304, OHA is entitled to twenty percent of the rent paid for its lease or use of that portion of the Airport premises situated on ceded land, irrespective of whether that rent is calculated at a flat rate or is based on DFS [Duty Free Store] receipts, including those from the WDF. Id.

__97__ Id. at 397-99.


__99__ See H.B. 1307, 22d Leg. (Haw. 2003) (appropriating over $9.5 million to OHA trust fund from various state funds, including general revenues, state parking revolving fund,
In a related development, in 2002, circuit court Judge Sabrina McKenna ruled on a suit brought by OHA in 1994 to enjoin the state from selling any ceded lands until the resolution of Native Hawaiian claims. The state’s plan to develop ceded lands at Leali`i in Maui and La`i`opua in the Big Island to be sold to private owners spurred individual Native Hawaiian plaintiffs and OHA to initiate the lawsuit. The state acted in these instances to meet a housing shortage in Maui and the Big Island. The lawsuit halted development (after the state had invested $31 million in the Leali`i project alone) because title insurance companies refused to insure it, fearing a cloud on title.

The root of the Native Hawaiian claims at issue was the validity of the title received by the United States when it acquired the ceded lands from the Republic of Hawai`i. The Apology Resolution states the facts:

Whereas, although the Provisional Government was able to obscure the role of the United States in the illegal overthrow of the Hawaiian monarchy, it was unable to rally the support from two-thirds of the Senate needed to ratify a treaty of annexation; . . . Whereas the Republic 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 Congress, through the Newlands Resolution, ratified the cession, annexed Hawaii as part of the agricultural park special fund, state educational facilities improvement special fund, foreign-trade zones special fund, natural energy laboratory of Hawai`i authority special fund, Hawai`i community development revolving fund, boating special fund, special land and development fund, state parks special fund, harbor special fund, beach restoration special fund, and water resource management fund). See also Omandam, Lingle Signs Bill, supra note 98. “Gov. Linda Lingle signed into law yesterday a $9.5 million emergency appropriations bill that fulfills a campaign promise to pay the Office of Hawaiian Affairs undisputed revenue from state public lands.” Id.

100 OHA v. HCDCH, Civ. No. 94-0-4207, slip op. at 55, 58, supra note 91.
101 Id. at 1.
102 Id. at 48.
103 Id. at 55.
104 Individual Plaintiffs’ Closing Argument at 21, OHA v. HCDCH, Civil No. 94-4207 (1st Cir. Dec. 5, 2002). “The United States, in the Newlands Resolution [which provided for the annexation of the Hawaiian Islands to the United States], purported to obtain title to the ceded lands by cession from the Republic of Hawaii. . . . Thus, an important inquiry is whether the United States received good title to the ceded lands from the Republic of Hawaii.” Id.
United States, and vested title to the lands in Hawaii in the United States.\textsuperscript{105}

Congress acknowledged the United States took possession of the ceded lands after the illegal overthrow “without the consent of or compensation to the Native Hawaiian people.”\textsuperscript{106} OHA argued the Republic of Hawai`i could not have transferred good title on the ceded lands to the United States: “A maxim of international law, and also American property law and Hawai`i case law, is ‘Nemo dat quod non habet: no man can give another better title than he himself has.’”\textsuperscript{107}

Judge McKenna stated that the Apology Resolution “is binding upon this court,”\textsuperscript{108} and even though it does not “itself create a claim, right, or cause of action, it confirms the factual foundation for claims that previously had been asserted.”\textsuperscript{109} Judge McKenna, however, declined to address the issue of the quality of title to ceded lands received by the United States.\textsuperscript{110} Rather, Judge McKenna ruled the political question doctrine barred consideration of OHA’s claims, specifically reaffirming the nearly century-old holding of \textit{Territory v. Kapiolani}.\textsuperscript{111} Judge McKenna held the State of Hawai`i has the authority to sell the ceded lands, noting the plain language of the Admission Act provides authority for such sales;\textsuperscript{112} and the 1978 amendments creating OHA and the Article XII, § 4 public trust acknowledge and sustain that authority.\textsuperscript{113}

Judge McKenna could not have ruled any other way without overruling the precedent set in \textit{Territory v. Kapiolani}, and without violating the existing legislative framework. The judiciary is not the forum to address the issue of Native Hawaiian demands for federal recognition, or claims to the ceded lands. Likewise, the State of Hawai`i is able to enact only limited measures to address the condition of Native Hawaiians. Final responsibility and sole authority to resolve Native Hawaiian claims, and achieve

\begin{footnotes}
\footnotetext{105}{Apology Resolution, \textit{supra} note 1, at 1512.}
\footnotetext{106}{Id.}
\footnotetext{107}{Individual Plaintiffs’ Closing Argument at 21, OHA v. HCDCH, Civil No. 94-4207 (1st Cir. Dec. 5, 2002).}
\footnotetext{108}{OHA v. HCDCH, Civ. No. 94-0-4207, slip op. at 26-27, \textit{supra} note 91.}
\footnotetext{109}{Id. at 28.}
\footnotetext{110}{Id. at 78.}
\footnotetext{111}{Id. at 77. “The Hawaii Supreme Court has held [in \textit{Territory v. Kapiolani}, 18 Haw. 640, 645-46 (1908)], however, that the issue of whether the Territory of Hawaii received good title to ceded lands is a non-justiciable political question.” \textit{Id.}}
\footnotetext{112}{Id. at 83-84.}
\footnotetext{113}{Id. at 87.}
\end{footnotes}
Reconciliation between Native Hawaiians and the United States, resides in the United States Congress.

III. Analysis

A. Federal Recognition of the Native Hawaiian Government is Constitutional

1. Congress has the power to treat Native Hawaiians the same as “Indian Tribes”

Native Hawaiians’ desire for a separate government with a land base drawn from ceded lands may only be accommodated through legislation such as the Akaka Bill. 114 Put simply, under the provisions of the Akaka Bill, the federal government would treat Native Hawaiians similarly to indigenous peoples in the continental United States. 115 There is, however, a question as to whether the Constitution grants Congress the power to extend federal recognition to a Native Hawaiian nation. 116 This is an extremely controversial issue with strong opinions on both sides. This section reviews the competing arguments, and concludes that federal recognition of a NHN is constitutional.

Opponents of federal recognition argue Native Hawaiians do not fit within the meaning of the term “Indian Tribes” as used in the Constitution, 117 because Native Hawaiians have not maintained sufficient polity to justify designation as a quasi-sovereign political entity such as a tribe. 118 According

114 See supra Part II.A.
115 See supra Part II.A.
116 Rice v. Cayetano, 528 U.S. 495, 518. “It is a matter of some dispute, for instance, whether Congress may treat the native Hawaiians as it does the Indian tribes.” Id.
117 See U.S. CONST. art. I, § 8, cl. 3. “The Congress shall have Power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.” Id.
118 See Patrick Hanifin, Rice is Right, 3 ASIAN-PAC. L. & POL’Y J. 283, 295 (2002), at http://www.hawaii.edu/aplpj/pdfs/v3-12-Hanifin.pdf. “Expanding the definition of an ‘Indian tribe’ to a group of individuals having a certain racial ancestry would destroy the crucial constitutional distinction between an Indian tribe and a racial group . . . Reading the constitutional term ‘Indian Tribe’ to mean any ‘indigenous’ group that has a ‘special
to this argument, Native Hawaiians are indistinct from other Americans living in the Hawaiian Islands and federal recognition would merely amount to impermissible racial discrimination. Opponents further insist that in spite of Congress’ authority to recognize “Indian Tribes,” it simply does not extend to creating a tribe where none exists, and dismiss OHA as evidence of an existing Native Hawaiian government because OHA is a state agency. Finally, opponents warn federal recognition would breed resentment and sow the seeds of racial discord and violence. These warnings, however, do not account for discontent in the Native Hawaiian community if nothing is done, or if Native Hawaiian benefits are further eroded.

Proponents of federal recognition also emphasize, “Hawaiians are not Indians.” They point, however, to the framers’ understanding of who belonged to “Indian Tribes” and argue the term includes all indigenous peoples who governed land prior to its acquisition by the United States. This is persuasive considering the term “Indian” was originally a European mistake used to describe indigenous peoples who should be known instead by names such as Cherokee, Jicarilla Apache, or Mashantucket Pequot. Further support for the view that the framers thought of Native Hawaiians as “Indian Tribes” (as the term is used in the Constitution) is found in the logs of Captain Cook, a contemporary of the framers, who repeatedly referred to the indigenous people he encountered in the Hawaiian Islands as “Indians.”

relationship,' as evidenced by special legislation for that group, collapses ‘Indian tribe’ into a racial classification after all.” Id.

See Sullivan, supra note 22, at 324. These are the modern Hawaiians, a vastly different people from their ancient progenitors. Two centuries of enormous, almost cataclysmic change imposed from within and without have altered their conditions, outlooks, attitudes, and values. Although some traditional practices and beliefs have been retained, even these have been modified. In general, today’s Hawaiians have little familiarity with the ancient culture.


Id. at 326. “The Akaka Bill is not structured to meet the standard of strict scrutiny applicable to race-conscious governmental decision-making.” Id.

See id. at 321-22. See also Hanifin, supra note 118, at 293-294.


See Hanifin, supra note 118, at 306-07.


Id. at 24

Id. at 25 n.46.
Proponents also insist OHA is evidence of a political entity constituted by Native Hawaiians, even though it is a state agency. \footnote{128 See Rice v. Cayetano, 528 U.S. 495, 520. “The State contends that ‘one of the very purposes of OHA—and the challenged voting provision—is to afford Hawaiians a measure of self-governance’ . . . .” \textit{Id.}} OHA was created to afford Native Hawaiians with a measure of self-governance. \footnote{129 \textit{Id.}} The Hawai`i state legislature intended OHA to operate independent of other branches of government; essentially, as distinct from the state as possible without federal recognition. \footnote{130 \textit{Id.} at 521 (discussing the reasons given by the delegates of the 1978 constitutional convention for creating OHA).} In addition, Native Hawaiians are active in autonomous sovereignty organizations, such as Ka Lahui Hawai`i, which has written a constitution and held elections for officers. \footnote{131 See Ka Lahui, supra note 23, \textit{How was Ka Lahui Hawai`i Created?} and \textit{What has Ka Lahui Done Since it was Created in 1987?}} OHA and Ka Lahui Hawai`i should be regarded as evidence of the best efforts of Native Hawaiians to exercise self-government consistent with existing law.

Congress, when voting on the Akaka Bill, will make the final decision whether Native Hawaiians may be treated as “Indian Tribes.” \footnote{132 See United States v. Sandoval, 231 U.S. 28, 46 (1913). “[I]n respect of distinctly Indian communities the questions 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 the courts.” \textit{Id.} But see Sullivan, supra note 22, at 321-22 (citing the same text but drawing the conclusion that Native Hawaiians do not merit federal recognition under the term “Indian Tribes”).} The Akaka Bill grew out of Congressional recognition that Native Hawaiians are an indigenous people who merit the same treatment as other indigenous people in...
the United States. In the Apology Resolution, Congress acknowledged: “the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands.” Furthermore, the Native Hawaiian Education Act found “Congress does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous people of a once sovereign nation as to whom the United States has established a trust relationship” and “the political status of Native Hawaiians is comparable to that of American Indians and Alaska Natives.” The equation of Native Hawaiians with Alaska natives is important because in the 1934 Indian Reorganization Act, Congress decreed that “[f]or the purposes of said sections [regarding membership in “Indian Tribes”], Eskimos and other aboriginal peoples of Alaska shall be considered Indians,” despite the fact that Eskimos are “linguistically, culturally, and ancestrally distinct from other American ‘Indians’.” Therefore, if Congress included Alaska natives within the meaning of the term “Indian Tribes,” and explicitly stated Native Hawaiians have a political status comparable to Alaska natives, extending federal recognition to a NHN through the Akaka Bill would be a rational decision supported by well-developed legal history, within Congressional authority, and constitutional.

2. The constitutionality of state programs currently dedicated to Native Hawaiians is a separate issue

Federal recognition of a Native Hawaiian nation is constitutional, but it does not automatically follow that all state programs dedicated to Native Hawaiians are constitutional. Rice decided only the very narrow issue of restricting the right to vote in OHA elections on Fifteenth Amendment

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133 Kanehe, supra note 2, at 860. “Also since the 1970s, under fifty federal statutes, “Native Americans” have been considered to include American Indians, Alaska Natives, and Native Hawaiians.” Id. at 859-60.

134 Apology Resolution, supra note 1, at 1512.


138 See Rice v. Cayetano, 528 U.S. 495, 518. “Even were we to take the substantial step of finding authority in Congress, delegated to the State, to treat Hawaiians or native Hawaiians as tribes, Congress may not authorize a State to create a voting scheme of this sort.” Id.
grounds. Rice, however, made clear OHA is a state agency bound by the Fifteenth Amendment; logic dictates OHA is bound by the Fourteenth Amendment as well. The DHHL is also a state agency. Since OHA and the DHHL define their beneficiaries in terms of race and ancestry, review by the judiciary must utilize the strict scrutiny standard enunciated by the Supreme Court in Adarand Constructors, Inc. v. Pena:

[W]e hold today that all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling government interests.

OHA would not meet this burden, even if granting Native Hawaiians autonomy is found to be a “compelling government interest,” because the dedication to that interest of a state agency funded by 20% of the revenues of 1.2 million acres of state land cannot be conceived of as “narrowly tailored measures.”

This conclusion is shared by plaintiffs in lawsuits commenced in the wake of the Rice decision challenging Native Hawaiian programs. In Arakaki v. Cayetano, the district court held, and the Ninth Circuit affirmed, restricting candidacy for OHA trustees to Native Hawaiians violates the Fifteenth Amendment. The Ninth Circuit, however, vacated the district court’s finding that the candidacy restriction violates the Fourteenth Amendment as well, because the Ninth Circuit ruled plaintiffs lacked standing to bring such a

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139 Id. at 521-22. “The validity of the voting restriction is the only question before us. As the court of appeals did, we assume the validity of the underlying administrative structure and trusts, without intimating any opinion on that point.” Id.
140 Id. at 522. “OHA is a state agency, established by the State Constitution, responsible for the administration of state laws and obligations.” Id. at 520.
141 Murakami, supra note 77, at 49.
143 Id. at 227.
144 Id. at 239 (Scalia, J., concurring). “Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or debtor race. That concept is alien to the Constitution’s focus upon the individual.” Id.
claim. In the subsequent and currently pending Arakaki lawsuit, however, the district court granted plaintiffs standing as taxpayers to challenge the constitutionality of OHA and the DHHL on Fourteenth Amendment grounds. In the second Arakaki,

Plaintiffs argue that the use of taxpayer revenue to benefit only native Hawaiians is an impermissible type of race discrimination. Plaintiffs rest their argument primarily on Rice.

. . .

Plaintiffs argue that the benefits from OHA and HHC/DHHL are . . . available only to those of Hawaiian ancestry. Pursuant to Rice, Plaintiffs contend that the restriction of benefits to those of Hawaiian ancestry violates the Equal Protection Clause of the Fourteenth Amendment.

Presumably, if plaintiffs prevail, both OHA and the DHHL would be invalidated, and the state would have to reapportion the two agencies’ assets without bias in favor of Native Hawaiians.

The DHHL, however, is more likely than OHA to survive constitutional challenge. Congress passed the HHCA eighty years ago to encourage homesteading by Native Hawaiians, arguably a compelling government interest. The program is narrowly tailored to provide homestead leases only to Native Hawaiians of 50% blood quantum. The federal

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146 Arakaki v Cayetano, 314 F.3d at 1098.
148 Id. at 1177.
149 See Murakami, supra note 77, at 43.
150 Id. at 50.

The HHC may award homestead leases for residential, agricultural, pastoral, and aquacultural lots to individual beneficiaries for 99 years for $1.00 per year. Under section 209, lessees may designate one of the specified relatives listed in the section as a successor to the leasehold upon the lessee’s death. The lessee may change the designation at any time. If the lessee fails to designate a successor, the DHHL may offer the leasehold to a qualified spouse or one of the children. To be a qualified successor, a spouse or child of the decedent must be at least one-quarter Hawaiian. Otherwise, the eligible relative must be at least one-half Hawaiian.

To preserve trust assets, the HHCA does not allow homesteaders to alienate their land. It also prohibits a lessee from subletting the interest in the leasehold. Accordingly, title to the land may not be encumbered absent commission consent. Nevertheless, after an initial seven-year grace period, the lessee is liable for all taxes assessed on the parcel.
government made the adoption of the HHCA by the State of Hawai`i a condition of statehood in the Admission Act, \(^{151}\) further evidence of Congress’ belief the program serves a compelling government interest. The state created the DHHL to administer the provisions of the HHCA. \(^{152}\) On these facts, the DHHL could survive under even the strict scrutiny standard of judicial review.

As explained in a previous section, federal recognition allows the United States to treat membership in a quasi-sovereign as a political classification rather than a racial one. \(^{153}\) Therefore, government action singling members out for special treatment is reviewed under the rational basis standard. \(^{154}\) Yet even if the United States recognizes a Native Hawaiian nation, OHA may not stand up to constitutional challenge. The Supreme Court in *Rice* ruled there is a limit on how far the special political status of members of indigenous governments, recognized in *Mancari*, extends to protect state and federal government programs that, but for *Mancari*, would be impermissible racial discrimination. \(^{155}\) As an example, the Supreme Court stated *Mancari* would not save a state election restricted to members of an indigenous government:

> It does not follow from *Mancari*, however, that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens. \(^{156}\)

OHA takes a large amount of revenue made from state land and uses it exclusively to benefit Native Hawaiians and Hawaiians. This is significantly more state involvement than the federal hiring preference upheld in *Mancari* and the reviewing court may decide, as with voting restrictions in state elections, that Congress may not authorize a state to use a scheme such as OHA.

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\(^{151}\) *Id.* at 49. In addition, the federal government maintains some responsibility for oversight of the HHCA. “This oversight responsibility requires, for example, that the U.S. Secretary of Interior approve any land exchanges involving Hawaiian Home Lands.” *Id.*

\(^{152}\) *Id.*

\(^{153}\) See supra Part II.A.

\(^{154}\) See Morton v. Mancari, 417 U.S. 535, 554-55. “As long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation towards the Indians, such legislative judgments will not be disturbed.” *Id.* at 555.

\(^{155}\) See *Rice* v. Cayetano, 528 U.S.495, 520. “Hawaii would extend the limited exception of *Mancari* to a new and larger dimension.” *Id.*

\(^{156}\) *Id.*
B. The Model of a Native Hawaiian Nation According to the Akaka Bill and Other Indigenous Governments

The threat to OHA underscores the importance of the need for a Native Hawaiian nation if Native Hawaiians are to exercise self-government. This section provides details on the establishment of a NHN and its operation, should it receive federal recognition. In part, this attempts to satisfy federal lawmakers who desire more solid information about a NHN before lending their support to the Akaka Bill.157

Passage of the Akaka Bill would not immediately recognize a NHN as quasi-sovereign. Rather, it would begin the process whereby the Secretary of the Interior examines a Native Hawaiian nation to determine if it is eligible for federal recognition.158 The first step would be the creation of two new offices within the Department of the Interior.159 The U.S. Office for Native Hawaiian Relations would serve as an intermediary between Native Hawaiians and the federal government.160 The Hawaiian Interagency Coordinating Group would track federal actions affecting Native Hawaiians, and ensure the federal government engages in appropriate consultation with Native Hawaiians when necessary.161 Presumably, if the Akaka Bill passes but a NHN does not receive federal recognition, these two offices would still remain within the Department of the Interior.

A Native Hawaiian nation must meet certain conditions of the Secretary of the Interior to qualify for federal recognition.162 Native Hawaiians must first organize a NHN by drafting organic governing documents and electing officers.163 Ka Lahui Hawai‘i has already done


Several Republican lawmakers question whether sovereign Hawaiians would have to abide by the same state and local zoning, health, environmental and other regulations as their neighbors. Interior Secretary Gale Norton raised similar questions in September and urged Native Hawaiians to define what a sovereign government would look like and how it would function, a signal that the administration wants more information before taking a stance.

Id. at A10.

158 S. 344, 108th Cong. § 6(b) (2003).

159 Id. §§ 4-5.

160 See id. § 4(b).

161 See id. § 5(d).

162 See id. § 6(b)(2)(A).

163 Id. § 6(b)(1).
A NHN must then submit its organic governing documents to the Secretary of the Interior, who must be able to certify that the documents: establish criteria for citizenship; were adopted by a majority vote of citizens; provide for the exercise of governmental authority by a NHN; provide for a NHN to negotiate with the state and federal governments; provide for an asset-holding structure that protects the interests of its citizens; protect the civil rights of its citizens; and are consistent with applicable federal law and the special trust relationship between Native Hawaiians and the United States. Determining how a NHN could meet these requirements will draw a picture of its initial contours.

1. **Citizenship in a NHN**

Who is eligible for citizenship in a Native Hawaiian nation? The Akaka Bill provides only that the organic governing documents must “establish the criteria for citizenship in the Native Hawaiian governing entity.” Generally, indigenous governments are left to their own discretion in determining membership. The Native Hawaiians involved in organizing a NHN would decide who is eligible to be a citizen.

Justice Breyer, writing a separate concurring opinion in *Rice*, stated “[o]f course, a Native American tribe has broad authority to define its membership” and cited to *Santa Clara Pueblo v. Martinez*, where the Court refused to interfere with a Pueblo membership requirement based on extreme gender discrimination. Children from mixed marriages between Pueblo females and nonmembers were denied membership, while those born of Pueblo males and nonmembers were admitted. In *Martinez*, the Court cautioned that “the judiciary should not rush to create causes of action that

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164 Ka Lahui, supra note 23, How was Ka Lahui Hawai`i Created? and What Has Ka Lahui Done Since it was Created in 1987? See also supra text accompanying note 131.


166 *Id.* § 6(b)(2)(A)(i).

167 Mark Neath, Comment, *American Indian Gaming Enterprises and Tribal Membership: Race, Exclusivity, and a Perilous Future*, 2 U. CHI. L. SCH. ROUNDTABLE 689, 690 (1995). “Indian tribes, as semi-sovereign ‘domestic, dependent nations,’ have the authority to set their own membership requirements, which are usually outlined in tribal constitutions.” *Id.*


170 *Id.* at 51-52.

171 *Id.* at 51.
would intrude on these delicate matters.”

Justice Breyer, however, objected to the breadth of the State of Hawai‘i’s inclusion within OHA of “Hawaiians” defined as any part indigenous blood quantum (as distinct from “Native Hawaiians” of 50% blood quantum):

“There must, however, 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. It was not a tribe, but rather the State of Hawaii, that created this definition; and, as I have pointed out, it is not like any actual membership classification created by any actual tribe.”

Yet both OHA and Ka Lahui Hawai‘i have endorsed the definition of “Native Hawaiian” rejected by Justice Breyer. Congress adopted the same definition in the Apology Resolution:

“As used in this Joint Resolution, the term “Native Hawaiian” means any individual who is a descendent of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.”

OHA uses testimony from parents and grandparents as an aid in determining who is Native Hawaiian, and keeps a roll of registered Native Hawaiians.
The OHA definition of “Native Hawaiian” includes some 200,000 people in the State of Hawai‘i and possibly some 200,000 more in the continental United States.\footnote{See Native Hawaiian Data Book, supra note 174, at 41-42.}

The Cherokee Nation of Oklahoma uses a similar definition in their citizenship requirement:

[T]he Cherokee Nation developed a new constitution in 1975, one that established no minimum blood quantum for tribal membership. The new constitution requires only that one be able to trace descent along Cherokee lines. For those unable to trace ancestry, the constitution establishes a “Registration Committee to consider the qualifications and to determine the eligibility of those applying to have their names entered in the Cherokee Register.” This generous, inclusive conception of tribal identity has expanded the Cherokee Nation’s population from fewer than ten thousand in 1970 to 156,000 (mainly mixed-bloods) in 1994 and has given the Cherokee a new degree of political power in Oklahoma . . . .\footnote{Neath, supra note 167, at 705-06. See also Cherokee Nation Okla. Const. art. III, § 1 (1975), in Cherokee Nation Code Ann. at 4 (Equity 1986), available at http://www.yvwiusdinmvnohii.net/Cherokee/Constitution.htm# member (last visited June 9, 2003). “All members of the Cherokee Nation must be citizens as proven by references to the Dawes Commission Rolls, including the Delaware Cherokees of Article II of the Delaware Agreement dated the 8th day of May, 1867, and the Shawnee Cherokees as of Article III of the Shawnee Agreement dated the 9th day of June, 1869, and/or their descendants.” Id. Thus, the Cherokee allows citizenship based on ancestry dating back to 1867. OHA and Ka Lahui would allow citizenship based on ancestry dating back to 1778.}

Imitating this model, a NHN could also include those unable to trace their descent back to 1778, but whose “qualifications” are judged by a NHN to merit inclusion.\footnote{See Neath, supra note 167, at 706 n.122. Of course, if the Registration Committee makes its enrollment determination based on arbitrary factors, this system might prove no better than blood quantum measurements. I assume, however, that the Committee, in making its decisions, considers primarily factors such as an individual’s identification with Cherokee tradition, knowledge of Cherokee history, ability to speak the Cherokee language, service to the Cherokee people, and similar factors.} Such qualifications might include a durational residence requirement, service to a NHN, or Hawaiian language aptitude.\footnote{See id.} Ka Lahui
already has such a provision in its constitution, allowing honorary citizenship free from any blood quantum requirement, but without full rights and privileges. 181 Considering the position of OHA and Ka Lahui Hawai‘i, and the broad discretion given to indigenous people in this area, a NHN citizenship requirement would most likely be the ability to trace descent back to 1778, with allowance made for those who are judged otherwise to merit inclusion. 182 A NHN could, however, instead choose to adopt a high blood quantum requirement to limit citizenship in order to increase the per capita share of any assets it acquires. Indigenous people in the continental United States have turned to using high percentage blood quantum membership requirements as a way to avoid sharing increased wealth, in their cases mainly derived from gaming operations. 183

2. Negotiating the limits of the authority of a NHN within the state and federal governments

The federal government would maintain plenary power over a NHN and may choose in certain instances to delegate responsibilities to the State of Hawai‘i. 184 A NHN would have to conform to applicable state and federal laws regarding taxes, sovereign immunity, and criminal and civil

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181 See Ka Lahui, supra note 174, at § 12. “Ka Lahui also extends “Honorary Citizenship” to individuals who are not of Hawaiian ancestry. Honorary Citizens are not entitled to the rights and privileges afforded to full Ka Lahui citizens.” Id.

182 See Rice v. Cayetano, 528 U.S. 495, 526 (2000) (Breyer, J., concurring). Justice Breyer endorsed an alternative approach to blood quantum in his Rice opinion when discussing membership requirements of Alaska natives. Justice Breyer noted that in addition to using a ¼ blood quantum requirement, the Alaska Native Claims Act includes someone “who is regarded as an Alaska Native by the Native village or Native group of which he claims to be a member and whose father or mother is . . . regarded as Native by any village or group[.]” Id. Justice Breyer added in parenthesis afterward that he thought this “a classification perhaps more likely to reflect real group membership than any blood quantum requirement.” Id.

183 See Neath, supra note 167, at 701 (pointing to the “experiences of the Mashantucket Pequots, Shakopee Sioux, and numerous other gaming tribes [as examples of how] gaming success encourages tribes to limit the disbursement of gaming revenue to ‘bona fide’ tribal members”). The Akaka Bill specifically states that it does not authorize gaming under the Indian Gaming Regulatory Act. S. 344, 108th Cong. § 9(a) (2003).

184 Neath, supra note 167, at 699. “Congress’ may, however, through its plenary power, ‘limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.’ Thus, while Indian tribes may enjoy sovereign immunity from suit, ‘(t)his aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress.’” Id.
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The extent of NHN authority in these areas would have to be negotiated between a NHN and the state and federal governments to fashion a solution appropriate to the circumstances in Hawai`i.\textsuperscript{186}

A NHN would share some general characteristics of other indigenous governments, such as sovereign immunity from lawsuits and taxation.\textsuperscript{187} Indigenous governments often choose to waive their immunity to encourage business transactions by providing outside organizations the security of recourse to enforceable judgments in case of breach.\textsuperscript{188} In other cases, disputes are heard either in indigenous government courts or not at all.\textsuperscript{189} The Akaka Bill requires a NHN to adhere to the “Indian Civil Rights Act,”\textsuperscript{190} which restricts indigenous governments from abridging basic U.S. constitutional rights such as freedom of speech and religion, freedom from unreasonable search and seizure, and freedom from cruel and unusual punishments, among others.\textsuperscript{191} Another issue would be services offered Native Hawaiian families. In OHA’s support package for the Akaka Bill, an example of one benefit of federal recognition would be the ability to hānai\textsuperscript{192} a child through a formal process based on Native Hawaiian custom, as opposed to “using a close approximation available in state or federal law.”\textsuperscript{193}

In criminal matters, the territory of indigenous governments often suffers from inefficient law enforcement due to jurisdictional questions over who should enforce the laws.\textsuperscript{194} To prevent this problem, the State of Hawai`i should enact a law similar to 18 U.S.C. § 1162, which would provide the state

\textsuperscript{185} \textit{See generally} Kahanu & Van Dyke, \textit{supra} note 32, at 437-43.
\textsuperscript{186} \textit{Id.} at 444. “Although the Indian experience serves as a starting point for the Native Hawaiian claim to sovereignty, Native Hawaiians should not limit their claims to what the Indians have, but must seek to establish their own appropriate form of self-government.” \textit{Id.}
\textsuperscript{187} \textit{Id.} at 442.
\textsuperscript{188} \textit{Id.}
\textsuperscript{189} \textit{Id.} at 443.
\textsuperscript{190} \textit{See} S. 344, 108th Cong. § 6(b)(2)(A)(vii) (2003) (requiring that organic documents governing the Native Hawaiian entity are consistent with applicable Federal law).
\textsuperscript{192} \textit{See} NEW POCKET HAWAIIAN DICTIONARY 20 (Mary Kawena Pukui & Samuel H. Elbert eds., Univ. of Haw. Press 1992) (defining hānai as a “[f]oster child [or] adopted child” or “to raise, feed, nourish, [or] sustain”). \textit{See also} KAME`ELEIHIWA, \textit{supra} note 33, at 25. “Moreover, throughout Polynesia, it is the reciprocal duty of the elder siblings to hānai (feed) the younger ones, as well as to love and ho’omaluh  (protect) them.” \textit{Id.}
\textsuperscript{194} Kahanu & Van Dyke, \textit{supra} note 37, at 443.
criminal jurisdiction in the territory of a NHN.\textsuperscript{195} When a NHN demonstrates adequate infrastructure, the state could transfer jurisdiction to a NHN over certain offenses the state warrants a NHN capable of resolving.\textsuperscript{196} This will likely be an emotional issue, since a NHN would seek to address the fact that large numbers of Native Hawaiians are incarcerated.\textsuperscript{197}

c. How a NHN would hold assets

The financial structure of a NHN should be modeled on the OHA charter, which resembles a private corporation.\textsuperscript{198} An elected board of trustees governs OHA and its mission statement is to better the condition of its beneficiaries.\textsuperscript{199} The board governing OHA has the power to “[e]xercise control over real and personal property set aside to the office”\textsuperscript{200} and to “[c]ollect, receive, deposit, withdraw, and invest money and property on


\textsuperscript{196} See Kahanu & Van Dyke, supra note 37, at 440. “The maintenance of law and order is an inherent attribute of sovereignty. Included in this right is the power to establish criminal laws, to form a police force, to establish courts and jails, and to prosecute and punish tribal members who violate tribal law. As mentioned above, Congress has specifically removed some offenses from tribal jurisdiction. Otherwise, the tribes are free to structure and operate their own court systems as they see fit, so long as they do not contravene the Indian Civil Rights Act (ICRA). Tribes possess broad authority to administer justice within their territories, and may fashion a system that best reflects their practical and cultural needs. The ICRA limits tribal punishments to six months imprisonment or $500 in fines, requires a speedy and public trial in criminal matters, and requires a trial by jury for offenses punishable by incarceration. Moreover, tribal criminal jurisdiction does not extend to non-Indians.” Id.

\textsuperscript{197} See NATIVE HAWAIIAN DATA BOOK, supra note 174, at 29 (noting Native Hawaiians make up 39%, the largest ethnic group, in Hawaii\textcloseup{'}i correctional facilities).

\textsuperscript{198} See HAW. CONST. art. XII, §§ 5-6; HAW. REV. STAT. §§ 10-1 to 10-5 (2003). “There shall be an office of Hawaiian affairs constituted as a body corporate which shall be a separate entity independent of the executive branch. The office, under the direction of the board of trustees, shall have the following general powers[.]” HAW. REV. STAT. § 10-4 (2003) (emphasis added).

\textsuperscript{199} See HAW. REV. STAT. § 10-3 (2003). “Purpose of the office. The purposes of the office of Hawaiian affairs include: (1) The betterment of conditions of native Hawaiians . . . (2) The betterment of conditions of Hawaiians.” Id. at §§ 10-3(1) & (2).

\textsuperscript{200} HAW. REV. STAT. § 10-5(2) (2003).
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behalf of the office”\textsuperscript{201} as well as to “[o]therwise act as a trustee as provided by law.”\textsuperscript{202} If a NHN adopted this structure, land and assets acquired by a NHN would be held in trust for the benefit of its citizens and administered with the consent of those citizens by elected trustees. Such an arrangement is not without precedent as indigenous governments often form state-chartered corporations to hold their lands and assets.\textsuperscript{203} The financial structure of a NHN would, in effect, be a federal corporation chartered by an act of Congress.\textsuperscript{204} A NHN would be tax-exempt,\textsuperscript{205} but the state and federal governments could make transfer of some assets conditional upon a tax agreement, especially if those assets produce revenues due to state and federal investments.

C. \textit{Transfer of Land and Assets to a Native Hawaiian Nation}

The Akaka Bill provides for the transfer of land and assets to a Native Hawaiian nation.\textsuperscript{206} Land on which to exercise sovereignty in order to strengthen and perpetuate cultural ideals is crucial to a NHN.\textsuperscript{207} The Akaka Bill must be used to transfer enough ceded lands to a NHN to establish a sufficient land base. In addition, a NHN would require adequate finances to ensure its success, which could be provided by assets already dedicated to Native Hawaiians, such as those of OHA. Also, the state and federal governments could pay compensation to a NHN for ceded lands they choose to retain. This section looks at the potential sources from which a NHN could expect to acquire land and assets.

1. \textit{Kaho`olawe}

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\textsuperscript{201} \textsc{HAW. REV. STAT.} \textsection{} 10-5(3) (2003).
\textsuperscript{202} \textsc{HAW. REV. STAT.} \textsection{} 10-5(5) (2003).
\textsuperscript{203} See Kahanu & Van Dyke, supra note 37, at 433-35 (describing creation of state-chartered tribal corporations).
\textsuperscript{204} See S. 344 \textsection{} 8(b) (2003) (envisioning and providing the foundation for a Native Hawaiian nation financial structure).
\textsuperscript{205} See Kahanu & Van Dyke, supra note 37, at 442.
\textsuperscript{206} See S. 344, 108th Cong. \textsection{} 8(b) (2003).
\textsuperscript{207} See Bradford, supra note 18, at 133. “Furthermore, money cannot be directed to the satisfaction of the harms of which Indians complain: most seek to exercise the rights to self-determine and to express their unique cultures and religions upon sacred ancestral lands. Only land restoration and legal restructuring to permit development of separate political identities can potentiate these fundamental human rights and relieve the economic deprivation and emotional pain borne inter-generationally by Indian tribes and individuals.” \textit{Id}. 
\end{flushright}
The law of the State of Hawai‘i reserves the 28,766 acres of the island of Kaho‘olawe for partial control by a Native Hawaiian nation. The state enacted legislation in 1993 that “shall 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.” If the United States recognized a Native Hawaiian nation through the Akaka Bill, the state legislation would initiate the transfer of “management and control” and establish the beginning of a land base of a NHN.

In 1953, a presidential order set aside Kaho‘olawe for military use. The U.S. Navy used the island as a bombing range for decades until finally yielding to persistent Native Hawaiian protest. In 1998, the Department of Defense returned the island to the State of Hawai‘i. The Navy is currently nearing the end of a $400,000,000 clean-up funded by the Department of Defense in 1994 and scheduled to continue until November 11, 2003, when the State of Hawai‘i takes over completely. By that time the Navy is expected to have cleared two-thirds of the island’s surface and ten percent of its subsurface, short of the 1994 projection of one hundred percent of the surface and thirty percent of the subsurface. If the state transfers “management and control” of Kaho‘olawe to a NHN it would be a mixed blessing because the island suffers not only an abundance of bombs, but also a shortage of water.

The Kaho‘olawe Island Reserve Commission (KIRC)
established by the State of Hawai‘i to govern the island has only $25 million left in its budget with no secure source of further funding.217

If not much else, Kaho‘olawe would at least provide an arena where a NHN may test how much true sovereignty the state and federal governments are going to allow it to exercise. If a NHN is not given possession of, and authority over, a desolate island, there can be no expectation of real control of more significant territory acquired later. The current legislation concerning the future of Kaho‘olawe, however, leaves the island and the KIRC funds vested in the State of Hawai‘i because the island is not being transferred in its entirety to a NHN; only its “management and control.”218 Furthermore, “[a]ll terms, conditions, agreements, and laws affecting the island, including any ongoing obligations relating to the clean-up of the island and its waters, shall remain in effect unless expressly terminated.”219 Presumably, the KIRC itself would remain in effect, creating a redundancy of control by both the State of Hawai‘i and a NHN. A NHN would not be able to use Kaho‘olawe as it pleases; for example, the current legislation states “[c]ommercial uses shall be strictly prohibited,”220 and allows the State of Hawai‘i to regulate fishing in the island’s waters.221

Section 8 of the Akaka Bill must be used to avoid this situation by transferring Kaho‘olawe and the monies dedicated to it directly to a NHN, instead of making its possession of the island subservient to the State of Hawai‘i.222 This would help establish that a NHN is not an extension of the State of Hawai‘i, but is its own separate political and financial entity having a direct, government-to-government relationship with the United States.223 To facilitate this process, the state should cede to a NHN exclusive fishing rights within the boundaries of Kaho‘olawe’s waters.224 Also, a NHN should have the power to exclude, as would any private landowner.225 In this respect, Kaho‘olawe may come to resemble Niihau, whose private owners are very

217 Id. See also HAW. REV. STAT. § 6K-5 (2002) (establishing KIRC without securing it further funding).
219 Id.
220 See HAW. REV. STAT. § 6K-3(b) (2002).
221 Id. § 6K-7.
223 See id. § 3(b).
224 HAW. REV. STAT. § 6K-2 (2002). “‘Waters’ means the area extending seaward two miles from the shoreline.” Id.
225 Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979). “[O]ne of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others.” Id.
restrictive in granting access. Or, a NHN could grant access freely, according to its own choice. If such actions are not taken, there will be little distinction between the State of Hawaiʻi and a NHN, which defeats the purpose of the Akaka Bill.

The State of Hawaiʻi must be willing to relinquish more than merely “management and control” over NHN territory, because a NHN requires the freedom of decision-making inherent in sovereignty if it is going to be a de facto quasi-sovereign. Of course, in some instances a NHN would have no alternative but to yield to state authority. There is, however, a significant difference between a NHN acquiescing to reasonable state regulation in its territory, as in the case of criminal jurisdiction, and a NHN not having any territory, but being granted only “management and control” of certain areas.

2. Replacing OHA after the recognition of a NHN

If a NHN is recognized by the United States through the Akaka Bill, then Section 8 should be used to transfer the assets of OHA to a NHN. The assets held by OHA are dedicated to Native Hawaiian use by the terms of the state constitution, and therefore the plain language of the Akaka Bill authorizes the transfer. OHA should then be dissolved by the repeal of state constitution Article XII, § 4-6, and in its place the state should create a new agency that would serve as an intermediary between the state and a NHN, modeled after the U.S. Office for Native Hawaiian Relations established by the Akaka Bill. The new agency would be responsible for taking into account the welfare of all the citizens of Hawaiʻi when discussing issues affecting a Native Hawaiian nation, and would also interact and coordinate efforts with the U.S. Office for Native Hawaiian Relations. The new agency,

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227 See S. 344, 108th Cong. § 3(b) (2003). “Purpose - It is the intent of Congress that the purpose of this Act is to provide a process for the recognition by the United States of a Native Hawaiian governing entity for purposes of continuing a government-to-government relationship.” Id.


229 HAW. CONST. art. XII, § 5. “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 and Hawaiians.” Id.


231 See id. § 4.
in conjunction with the Department of Land and Natural Resources (DLNR), would administer the transfer of ceded lands to a NHN.232

The dissolution of OHA would end the Article XII, § 4 public trust. In place of the trust, a portion of ceded lands providing a comparable level of funding to that previously available to OHA should be transferred to a NHN.233 An OHA trustee suggested a similar course of action during negotiations with the state while the Hawai`i Supreme Court was considering OHA v. State.234 The trustee suggested that a pro rata portion of the Article XII, § 4 public trust be transferred to OHA, and in exchange the statutes funding OHA be repealed.235 Section 8 of the Akaka Bill envisions such a partition by authorizing “the transfer of lands, resources, and assets dedicated to Native Hawaiian use to the Native Hawaiian governing entity.”236 The Senate Committee Report states the ceded lands are included in this section.237 The Article XII, § 4 public trust consists of ceded lands, and dedicates 20% of their revenues to Native Hawaiians.238 A pro rata portion of the Article XII, § 4 public trust would therefore be 20% of 1.2 million acres, approximately 240,000 acres. The State of Hawai`i consists of 4.1 million acres.239

One significant problem that would arise in planning a partition of the ceded lands is the fact that no one knows the exact location of the original 1.8 million acres of ceded lands, or the 1.2 million acres in the Article XII, § 4

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232 See FINAL REPORT, supra note 25, at 17 (noting that “[t]he DLNR is accountable for most of the public lands”).


235 See id.

We [OHA] agree that on or before July 1, 2001, to the partitioning of the public land trust and transfer of title to the pro rata portion of the trust’s lands to OHA to self-manage and administer . . . .

. . . .

Upon the successful completion of the partition, OHA agrees that Act 304 and Chapter 10 should be repealed. However, we cannot agree to its upfront repeal. It could be a contingent repeal based on the completion of the partitioning and transfer of a pro rata share of the trust lands to OHA.

Id.

236 See S. 344, 108th Cong. § 8(b) (2003).


public trust. Judge McKenna, in her recent opinion dismissing OHA’s attempt to enjoin the state from selling ceded lands, stated:

Thousands of acres of ceded lands have been sold by the State of Hawaii since statehood. Although it is estimated that the ceded lands now comprise around 1.2 million acres, the actual acreage and metes and bounds of the Public Lands Trust is unclear. Through Act 329 of 1997, the Hawaii Legislature ordered that a comprehensive inventory be conducted of all lands comprising the public lands trust by the end of 1998. Extensions of this deadline have been granted, but this inventory has yet to be completed.240

Although Judge McKenna used “ceded lands” and Public Lands Trust interchangeably, this is not technically correct since the ceded lands are comprised of the entire 1.8 million acres ceded by the Republic of Hawai`i to the United States, while the Public Lands Trust refers only to the 1.2 million acres in the Article XII, § 4 public trust.241 The necessary first step in negotiating a transfer of ceded lands to a NHN would be determining the exact location of the ceded lands.

3. The exact location of the ceded lands and possibilities of transfer to a NHN

In 1986, the Office of the Legislative Auditor attempted to identify the ceded lands, and in particular ceded lands subject to the Article XII, § 4 public trust.242 The Auditor’s task required first determining whether a particular parcel consisted of ceded lands, then deciding whether it fell within the Article XII, §4 public trust, and finally establishing whether a portion of its revenues should be paid to OHA.243 The difficulty inherent in such an effort is best illustrated by the Auditor’s examination of the two parcels of land.

240 OHA v. HCDCH, Civ. No. 94-0-4207, slip op. at 43-44, supra note 91.
241 See FINAL REPORT, supra note 30, at 7. “On the annexation of Hawaii by the United States in 1898, all lands owned by the Republic of Hawaii were ceded to the United States. At that time, Hawaii’s public domain included about 1,800,000 acres.” Id. See OHA v. HCDCH, Civ. No. 94-0-4207, slip op. at 43, supra note 91. “Although it is estimated that the ceded lands now comprise around 1.2 million acres, the actual acreage and metes and bounds of the Public Lands Trust is unclear.” Id.
242 See FINAL REPORT, supra note 30, at 1, 3.
243 Id. at 1, 3.
constituting the Hilo Municipal Golf Course. The Auditor determined this parcel was comprised of ceded lands within the Article XII, § 4 public trust and “possibly” subject to OHA payments. Parcel 2 consisted of twenty acres of former government lands the Territory of Hawai‘i sold to a private party in 1925, which was subsequently purchased by the County of Hawai‘i in 1972. In regards to this parcel, the Auditor stated:

Parcel 2 lost its ceded status upon its sale to a private party in 1925. We do not think it can now be considered as ceded land, nor can it be said to be subject to the public land trust or to HRS chapter 10 [statutes implementing OHA payments].

The Auditor’s conclusion that the sale to a private party took the land out of the Article XII, § 4 public trust was reasonable. The territory undoubtedly sold other parcels to private owners, and as noted by Judge McKenna, “[t]housands of acres of ceded lands have been sold by the State of Hawai‘i since statehood.” While some of the ceded lands are held privately, no provision in the Akaka Bill affects private land. Therefore, privately owned ceded lands could be transferred to a Native Hawaiian nation only by the dedication of the owner acting on his or her own free will.

The state and federal governments control the bulk of the ceded lands. The federal government controls about 400,000 acres. About half is located in national parks and is the fee simple property of the United States. Some 180,000 acres are located in military reservations, or are controlled exclusively by the Department of Defense. The United States secured from

244 Id. at 47.
245 Id.
246 Id.
247 Id.
248 Id.
249 OHA v. HCDCH, Civ. No. 94-0-4207, slip op. at 43, supra note 91.
250 Miyahara, supra note 68, at 131.
251 Id. “Of the 400,000 acres, approximately 220,000 acres were administered as national parks, 60,000 acres were located in military installations, and the remaining 120,000 acres or so, held under permission, permit, or license by the federal government under section 5(d) of the [Admission] Act, were controlled exclusively by the Defense Department.” Id. See also FINAL REPORT, supra note 30, at 24 (noting approximately 228,000 acres located in national parks became the fee simple property of the United States in 1964).
252 See Miyahara, supra note 68, at 131.
the State of Hawai‘i the lease to 30,000 acres at the cost of only $1 per lease.253 The federal government, to further reconciliation, should transfer some ceded lands via Section 8 of the Akaka Bill to help establish a land base for a NHN.

Native Hawaiians have expressed a desire for control of little-used Bellows Air Force Base (Bellows) on the eastern side of Oahu,254 a tract of about 1500 acres of ceded lands.255 The same is true of Māku Valley (Mākua) on the western side of Oahu, a 4500-acre tract the Army uses for training, despite protests from Native Hawaiians who regard the valley as a sacred cultural and historical spot.256 Judge Susan Mollway, who in 2001 issued a preliminary injunction that stopped the Army’s proposed live-fire exercise in Māku Valley because of the potential dangers to the physical environment and cultural artifacts,257 explained:

40. “Māku,” which means “parents” in Hawaiian, is considered sacred land in the Native Hawaiian culture. Before the Army took over, Native Hawaiians used Māku Valley extensively for traditional cultural uses. Historical records, oral histories, and archaeological studies dating back to the 19th century document the cultural heritage of the area, including both religious and domestic use of Māku by Native Hawaiians.

41. Māku Valley is associated with a number of Native Hawaiian legends and traditional Native Hawaiian deities. It has significant religious and social value to many Native Hawaiians. Dozens of archaeological, cultural, and historic sites have been identified at MMR, including Native Hawaiian burial areas, heiau (Native Hawaiian temples), and agricultural features.258

253 See FINAL REPORT, supra note 30, at 23. The leases, begun in 1964, expire in 2029. Id.
255 See Miyahara, supra note 68, at 137.
256 See Mālama Māku v. Rumsfeld, 163 F. Supp.2d 1202, 1213 (2001) “[T]he Army received several comments criticizing the Army for having failed to consider the impact of the proposed live-fire training on Native Hawaiian cultural practices . . . [and for not] adequately address[ing] the impact of live-fire training on native plants and native Hawaiian customs, culture, and traditions.” Id.
257 Id. at 1222.
258 Id. at 1211.
The United States should commit itself to transfer Bellows and Mākua to a NHN. A NHN would exercise sovereignty in those areas to the extent negotiated in regards to Kahoʻolawe. Given its long use as an Army training ground, Mākua would have some of the same problems as Kahoʻolawe regarding unexploded bombs.259

The State of Hawaiʻi controls the remainder of the ceded lands, of which it has only a partial inventory.260 The Department of Land and Natural Resources (DLNR) controls roughly 1.2 million acres of state-owned land, but is unable to distinguish between which are ceded lands and which are not.261 Other state agencies also control state-owned land, such as the University of Hawaiʻi—at least 102 of its acreage consists of ceded lands.262 The Department of Hawaiian Homelands (DHHL) also holds some 200,000 acres, most of which are ceded lands.263 Approximately 42,000 acres of DHHL land are homesteads, 76,000 acres are under general leases and licenses, and 82,000 acres are used for other purposes.264 The state could consider transfers of DHHL land to a NHN under Section 8 of the Akaka Bill,265 but it would have to take into account the preexisting rights of homesteaders and leaseholders.266 Homesteaders might, for example, be given the option of retaining their land in fee-simple, or transferring it to a NHN under whatever provision a NHN institutes for controlling land, possibly a similar lease arrangement.

259 See id. at 1211-12 (discussing an archaeological survey of Mākua). “[T]he presence of unexploded ordnance in the area and ‘the necessity to have [explosive ordnance disposal] escort personnel required certain modifications to traditional archaeological methods.’” Id. at 1211.

260 See generally Final Report, supra note 30, at 27-57 (discussing the extent of the State of Hawaiʻi’s inventory of its ceded lands).

261 Id. at 33. “The inventory put together by the DLNR is as precise and complete as can be expected given the circumstances under which it was prepared. The DLNR is the first to admit, however, that the inventory contains inaccuracies. The inaccuracies are in the classification of land as ceded or non-ceded and as trust land or non-trust land and in the acreages of parcels.” Id.

262 Id. at 37.

263 See Murakami, supra note 77, at 43, 49.

264 See Native Hawaiian Data Book, supra note 174, at 13. The use of 82,000 acres for “other” purposes is unexplained. Id.


266 See U.S. Const. amend. XIV, § 1. “[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]”
In 2000, the Hawai‘i legislature passed Act 125 to provide for a comprehensive inventory of the state’s ceded lands. Act 125 appropriated $250,000 to the Auditor to begin the task. Act 125 stated:

Section 2. (b) The inventory shall: (1) Identify and describe every parcel of land comprising the public land trust on August 21, 1959, and every parcel added to the public land trust thereafter.

Section 3. (a) Beginning July 1, 2000, the auditor shall identify all of the lands which are to be included in the public land trust inventory. At minimum, the auditor shall determine whether the following kinds of information about each parcel in the operating inventory would be useful: (1) The parcel’s location by metes and bounds, tax map key numbers, or both; (2) The date the parcel was acquired; (3) If conveyed out of the public land trust, the date the parcel was conveyed; (7) Whether the parcel or any portion of the parcel is ceded land, and the extent to which the parcel consists of ceded land.

The Auditor selected R.M. Towill Corporation to develop a proposal to complete the inventory and give an estimate of the inventory’s cost. Towill reported “[t]o ensure that ceded lands are properly identified, title searches back to the Great Mahele are needed.” Towill recommends a course of action that would rely on state agencies such as the DLNR for assistance, cost approximately $20 million, and produce a useable product, definitive information on the first county designated for inventory, within one year. The 2001 legislature drafted Senate Bill 107 to appropriate funding for the inventory; as yet, the bill has not been enacted. If Congress passes the Akaka Bill, then an inventory would be necessary to precisely identify the ceded lands and initiate negotiations over which properties could be transferred to a Native Hawaiian nation. The expense may be high for the

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268 Id. § 6
269 Id. §§ 2(b)(1), 3(a).
271 Id. at 20.
272 Id. at 42–44.
State of Hawai`i, but is nominal compared to the $400,000,000 the United States paid to partially clean-up Kaho`olawe.\textsuperscript{274} The United States, as an effort to further reconciliation with Native Hawaiians, could fund the cost of the inventory.

4. \textit{Compensation to a NHN for ceded lands retained by the state and federal governments}

The Honolulu International Airport (HIA) sits on ceded lands impracticable to transfer to a Native Hawaiian nation, yet this does not mean a NHN should not be compensated for the state’s possession of the land. The HIA consists of some 4400 acres, over 3700 of which are ceded lands, some 3000 of which are classified under Section 5(b) of the Admission Act\textsuperscript{275} that places them squarely in the Article XII, § 4 public trust,\textsuperscript{276} meaning 20\% of revenues from their use should go to OHA.\textsuperscript{277} In 2001 in \textit{OHA v. State}, the Hawai`i Supreme Court held OHA would be entitled to this revenue but for the fact Act 304, implementing payments to OHA from the Article XII, § 4 public trust, conflicted with federal law and therefore was invalid on its own terms.\textsuperscript{278} Federal legislation explicitly forbids payment of airport revenues to OHA:

\begin{quote}
PROHIBITION ON FURTHER DIVERSION- There shall be no further payment of airport revenues for claims related to ceded lands, whether characterized as operating expenses, rent, or otherwise, and whether related to claims for periods of time prior to or after the date of the enactment of this Act.\textsuperscript{279}
\end{quote}

The United States thus prohibits payments related to ceded lands claims “characterized as operating expenses, rent, or otherwise.”\textsuperscript{280}

\begin{footnotes}
\footnotetext{275}{See FINAL REPORT, supra note 30, at 62-64.}
\footnotetext{276}{\textsc{HAW. Const.} art. XII, § 4. \textit{See supra} note 84 and accompanying text.}
\footnotetext{277}{\textsc{HAW. Rev. Stat.} § 10-13.5 (2003). \textit{See supra} notes 88-93 and accompanying text.}
\footnotetext{278}{\textit{OHA v. State}, 96 Haw. 388, 401 (2001).}
\footnotetext{279}{\textit{Id.} at 397 (quoting Department of Transportation and Related Agencies Appropriations Act, Pub. L. 105-66, § 340, 111 Stat. 1425 (1998)).}
\footnotetext{280}{\textit{Id.} at 397. The state had argued that the airport revenues it diverted to OHA to satisfy the Article XII, § 4 public trust obligation were permissible as a kind of ground rent. \textit{Id.} at 396.}
\end{footnotes}
A Native Hawaiian nation could overcome the hurdle of the FAA legislation and profit from the HIA’s use of ceded lands by seeking compensation from the state and federal government for their possession of ceded lands. In exchange for compensation, a NHN would quitclaim on title to those ceded lands. This recommendation finds precedent in the Alaska Native Claims Act of 1971. The United States paid the Alaska natives nearly one billion dollars to extinguish indigenous title to 325 million acres of Alaska. The settlement also vested title to the balance of Alaska’s 40 million acres in Alaska natives. The United States never paid compensation to Native Hawaiians for the ceded lands. Following the Alaska model, the United States and the State of Hawai‘i could transfer some ceded lands to a NHN, and pay compensation to a NHN for clear title on the remainder.

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283 Id.
284 Id. at 29-30.

As noted above, the 1971 Bureau of Land Management report (Dept. of the Interior) entitled “Public Land Statistics,” shows that 396,000 acres of land in Hawaii are still owned by the Federal government. The Hawaiian people have not been compensated by the U.S. for the taking of this land, and thereby find themselves in a situation comparable to that of the Alaska natives before the 1971 settlement. If compensable aboriginal title in Alaska means lands the Alaska natives have “used and occupied” from “time immemorial,” then the same definition can be applied to lands used and occupied by Hawaii natives for centuries, which are now owned and used by the U.S. government.

Id. See also Apology Resolution, supra note 1, at 1512.

Whereas the Republic 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 Congress, through the Newlands Resolution, ratified the cession, annexed Hawaii as part of the United States, and vested title to the lands in Hawaii in the United States[.]

Id.

285 Jones, supra note 282, at 28-29.

[N]early 400,000 acres of what was originally Hawaiian government lands are still owned by the U.S. government. While it would not seem feasible to redistribute this land to the people (the bulk being either assigned to the Interior Department, as part of the National Park System or the military), a cash compensation for extinguishment of aboriginal title, similar to that
This would place a NHN in control of a land base with solid financial footing, similar to other indigenous governments in the United States.\textsuperscript{286}

\section*{IV. Conclusion}

Ultimately, reconciliation between the United States and Native Hawaiians, as called for in the Apology Resolution, will come when a Native Hawaiian nation stands on its own, upon its own land base. The Akaka Bill, firmly grounded in the Constitution, would be a concrete step towards reconciliation, enabling the United States to recognize the right of a Native Hawaiian nation to exist entirely separate from the State of Hawai`i. The implementation of the Akaka Bill presents challenges, but none are insurmountable. Success of the Akaka Bill would shape the possibility for a future in which a vibrant Native Hawaiian nation engages its citizens with forward-thinking, creative ideas and projects.

If the United States fails to adopt a substantive program, such as the Akaka Bill, to reconcile with Native Hawaiians, a shadow will remain upon the nation’s present, as well as its past. The United States proudly defends the liberty of people around the world, and recognizes the governments of indigenous people within its own borders. Yet, ten years after Congress passed the Apology Resolution the United States still has not resolved the legitimate demand of Native Hawaiians for sovereignty. Native Hawaiians know they will continue to exist regardless of any action, or lack of action, by the United States. Native Hawaiians have compared themselves to the \textit{wana}, the sea urchins, who despite the pounding surf, survive content in the holes in the rocks and reef. The fate of Native Hawaiians will be affected, but not determined, by how Congress votes on the Akaka Bill. What is truly at stake is the moral credibility of the United States.

\begin{footnote}{Brian Duus\textsuperscript{287}}

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\textsuperscript{286} See CHEROKEE NATION CODE ANN. (Equity 1986).

\textsuperscript{287} Class of 2004, William S. Richardson School of Law, University of Hawai`i at Mānoa. Received a BA in English and history from the University of Virginia in 1996.

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