We Are Who We Thought We Were: Congress’ Authority to Recognize a Native Hawaiian Polity United by Common Descent

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INTRODUCTION

During a floor debate in the United States House of Representatives, Congressman Eni Faleomavaega of American Samoa explained that, of the three distinct indigenous groups living within the United States proper, only Native Americans and Alaska Natives possess formal government-to-government relationships with the United States federal government.1 Native Hawaiians, on the other hand, “have yet to be afforded the same treatment as our other first Americans.”2 As Congressman Faleomavaega subsequently pointed out, the responsibility to rectify this disparity is “a moral imperative on the part of our government.”3

[Native Hawaiians] deserve this. They are not begging for anything. Just give them proper recognition . . . [T]he status of the indigenous Native Hawaiians was never properly addressed by the United States Congress, And it is within Congress’ constitutional authority to do so.4

In an attempt to fulfill the federal government’s moral imperative, the United States Congress has spent more than a decade considering several proposed versions of the Native Hawaiian Government Reorganization Act (colloquially referred to as the “Akaka Bill”)5, which seeks to restore a small measure of Native Hawaiian self-governing authority by providing a process for the formal federal acknowledgment of a reorganized Native Hawaiian governing entity.6 The proposed Act

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2 Id.
3 Id.
4 Id.
5 Hereinafter “Act.”
changes significantly with each new Congress, but from its initial introduction in 2000 to the present, the Act has consistently required that the initial reorganization of the Native Hawaiian polity be carried out by the Native Hawaiian community, united by common Native Hawaiian descent without regard to blood quantum.7

Ryan Garcia, a 2010 graduate of the California Western School of Law who describes himself as “a citizen of the United States of America and an Ethnic Hawaiian,”8 takes issue with the proposed Act’s use of Native Hawaiian descent as a criterion for participation in the initial reorganization of the Native Hawaiian polity. Using a standard anti-discrimination analysis that is inapplicable in the context of Native governance issues,9 Garcia mischaracterizes the Native Hawaiian people as an ethnic group without a shared political history, and proceeds to challenge the federal government’s authority to acknowledge such a group as self-governing. Garcia further argues that, to the extent Native Hawaiian descent is treated as a permissible membership criterion, it must be accompanied by a high blood quantum requirement to ensure that the members of the initial Native Hawaiian polity are asserting a “legitimate racial identity,” as opposed to a mere “ideological self-identification.”10

Dehumanizingly comparing Native Hawaiian people to cups of Kona coffee, Garcia contends that “[a]n ethnic blood quantum of 50.01% . . . is logically necessary to establish a legitimate racial identity,” but ultimately suggests that a fifty percent blood quantum may be more practicable.

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7 See S.2899, supra note 6, § 2(7)(A); H.R. 4904, supra note 6, § 2(7)(A); S. 81, supra note 6, § 2(7)(A); H.R. 617, supra note 6, § 2(6)(A); S. 746, supra note 6, § 2(6)(A); S. 1783, supra note 6, § 2(5)(A); S. 344, supra note 6, § 3(7); H.R. 665, supra note 6, § 2(6)(A); H.R. 4282, supra note 6, § 3(7); S. 147, supra note 6, § 3(8); S. 1011, supra note 6, § 3(12)(A); H.R. 2314, supra note 6, § 3(12)(A); S. 675, supra note 6, § 3(12)(A); H.R. 1250, supra note 6, § 3(12)(A).

8 Garcia uses the term “ethnic Hawaiian” to describe all persons of Native Hawaiian descent, regardless of blood quantum. Garcia’s clear intent is to downplay the political identity of Native Hawaiians by declining to use the correct, but politically significant, word “Native.” According to Garcia, the “vast majority of ethnic Hawaiians,” himself included, are “inauthentic” and lack a “legitimate [Native Hawaiian] racial identity” because they possess less than fifty percent Native Hawaiian blood. Ryan William Nohea Garcia, Who Is Hawaiian, What Begets Federal Recognition, and How Much Blood Matters, 11 ASIAN-PAC. L. & POL’Y J. 85, 86, 159 n. 334, 160 (2010).

9 See infra note 28 and accompanying text.

10 Garcia, supra note 8, at 86, 159.
given the quandary posed by persons with fifty percent Native Hawaiian blood.\textsuperscript{11}

Opponents of Native Hawaiian self-governance who seek to maintain the current imbalance of material wealth and political power in Hawai‘i will likely attempt to promote Garcia’s comment as an authoritative historical and legal analysis in furtherance of their own agendas. Therefore, the comment’s errors and omissions must be exposed in order to prevent undue interference with the already protracted and difficult struggle of the Native Hawaiian community to repatriate its self-governing authority.

A. Missing Context, Invented Concepts, and Misrepresentations

The comment’s main deficiency is its consistent failure to provide sufficient support and context for its most controversial assertions.\textsuperscript{12} For example, when discussing the issue of blood quantum, Garcia asserts as a “basic fact” the notion that “possession of a relatively greater proportion of ethnic blood more closely ties an individual to a particular ethnic history or genealogy as compared to an individual possessing a lesser proportion of ethnic blood.”\textsuperscript{13} The sole authority that Garcia cites for this proposition carefully points out that she is simply expressing her personal opinion, not a “fact,” and she directs her readers to the recently published book of an esteemed colleague who would probably disagree with her.\textsuperscript{14}

\textsuperscript{11} Garcia, supra note 8, at 160-61.

\textsuperscript{12} While the failure to provide sufficient supporting authority has the obvious effect of diminishing a scholar’s credibility, the failure to provide context for arguments has the more subtle, but more pernicious, effect of obscuring the truth. Professor Eric K. Yamamoto explains that a critical and contextual inquiry must be made into questions of law and justice in order to assess “what’s really going on, what’s at stake (harms and benefits), how power and status are implicated in the underlying event and the legal process itself, and what the actual results of legal decision-making will be.” Eric K. Yamamoto, Contextual/Critical Inquiry Into Law and Legal Process: A Primer (Aug. 19, 2009) (on file with the author).

\textsuperscript{13} Garcia, supra note 8, at 156.

\textsuperscript{14} Prefacing her opinion that blood quantum should play a role in the distribution of community resources, Trisha Kehaulani Watson states the following:

Okay, now for my two cents, and I emphasize that this is only my opinion. I may be wrong. Many will disagree with me. If our community comes to a consensus and the majority disagrees with me – I will defer to the community, but I hope above all else that this will begin a discussion among Hawaiians as to how we distribute our resources. I encourage you all to read [Dr. J. Kehaulani] Kauanui’s book [called Hawaiian Blood: Colonialism and the Politics of Sovereignty and Indigeneity], I think she will disagree with what I write here. Yet, I hope that she would agree that Hawaiians need to have these conversations. We need to start to have these conversations and make these decisions for ourselves or others will surely continue to make them for us, and I find that unacceptable.
Garcia does not meaningfully address that book or any other part of the large body of scholarship that explores the complex relationship between blood quantum, identity, and community membership.

Similarly, García asserts that the United States Supreme Court cases of United States v. Sandoval and Montoya v. United States, and the Ninth Circuit Court of Appeals case of Native Village of Tyonek v. Puckett, collectively require legislative acknowledgments of Native polities to pass muster under an “Express Grants Parameter” — a four-pronged test of Garcia’s own creation that he acknowledges has never been applied by any court. Pursuant to this fictional test, Garcia purports to invalidate not only the proposed Native Hawaiian Government Reorganization Act, but also the legislative acknowledgements of the Ponca Tribe, Ysleta del Sur Pueblo, and the Alabama and Coushatta Indian Tribes of Texas. Garcia’s analysis of this issue lacks any careful legal or historical analysis of the interaction between the executive, legislative, and judicial branches with regard to the federal acknowledgment of Native peoples, especially as that interaction pertains to Native Hawaiians. Such analysis is crucial to understanding the process of federal acknowledgment and the proposed Native Hawaiian Government Reorganization Act.

Garcia’s crafting of the so-called “Express Grants Parameter” exemplifies another global issue with the comment — its unusually heavy reliance on invented legal concepts and terms of art. Throughout the comment, terms like “ethnic Hawaiian,” “Blood Trust,” and “Hawaiian Blood Trust” are used as though they have an established meaning in law and legal discourse. In truth, Garcia crafted these terms, without meaningful explanation or authority, for purposes of the comment. Moreover, where Garcia uses terms and concepts that do have an established meaning in law and legal discourse — such as “cultural sovereignty” — he does not always use them correctly, leading the reader to misunderstand certain fundamental ideas about Native self-governance.


17 Native Village of Tyonek v. Puckett, 957 F.2d 631 (9th Cir. 1992).
18 Garcia, supra note 8 at 131.
19 Garcia, supra note 8 at 131-32.
20 For example, a search on LexisNexis of U.S. law reviews and journals combined using the term ethnic Hawaiian trust relationship, yields only one result—Garcia’s comment. A Google internet search of the same term in quotes yields the same result. Garcia has clearly created a new term and a false context for understanding that term.
The comment is also rife with plain misstatements of fact. For instance, Garcia asserts that the proposed Native Hawaiian Government Reorganization Act “is novel in that it is the first Congressional attempt to federally recognize a non-Indian entity, and to do so in a fashion inconsistent with the political history of the former governing entity it is ostensibly recognizing.”

To the contrary, the Alaska Native Claims Settlement Act, passed by the United States Congress in 1971, recognizes the unique political status of Alaska Natives and provides for the exercise of Alaska Native self-governance through contemporary Native corporations. Such misstatements of fact delegitimize Garcia’s claims.

Garcia also misrepresents that “a majority of Hawaii’s residents” oppose the proposed Native Hawaiian Government Reorganization Act. Garcia bases this statement primarily on the findings of an online survey commissioned by the Grassroot Institute of Hawaii, a conservative think tank opposed to the Act.

The Institute’s survey of 501 registered voters found that fifty-one percent of the polled voters opposed the proposed Act. However, the corporation commissioned to conduct the poll admits that the survey’s margin of error is +/- 4.5 percentage points. Therefore, even if one were to assume for the sake of argument that the corporation’s sampling produced an accurate representation of Hawai‘i’s residents, the

21 Garcia, supra note 8, at 86.
23 Garcia, supra note 8, at 93-94.
24 Garcia, supra note 8, at 94 n. 21.
26 Id.
27 The corporation describes its somewhat suspect methodology as follows:

Zogby International was commissioned by the Grassroot Institute of Hawaii to conduct an online survey of 501 voters in Hawai‘i from November 18, 2009 through November 23, 2009.

A sampling of Zogby International’s online panel, which is representative of the adult population of the U.S., was invited to participate. Slight weights were added to party, age, race, gender, and education to more accurately reflect the population of Hawai‘i. The margin of error is +/- 4.5 percentage points. Margins of error are higher in sub-groups.

Moreover, as Professor Washburn has observed in the context of jury selection, when registered voters are the class of persons from whom a “representative” group is drawn, there is a heightened danger that the voices of certain demographic groups will be underrepresented. Kevin K. Washburn, American Indians, Crime, and the Law, 104 Mich. L. Rev. 709, 747-48 (2006). (observing that “[b]ecause juries in most federal
4.5 percentage point margin of error would render the survey results inconclusive as to whether more than fifty percent of Hawaiʻi’s residents oppose the proposed Act.

Based on these questionable “facts” and contentions, among others, Garcia concludes that the United States Congress may not properly enact the proposed Native Hawaiian Government Reorganization Act in recognition of the self-governing authority of the Native Hawaiian people, united by common descent.\(^\text{28}\) Garcia further concludes that squaring Native descent-based membership criteria with the equal protection components of the United States Constitution would require the imposition of a high blood quantum requirement of fifty percent or more.\(^\text{29}\) Garcia would prefer, however, to see Native Hawaiian descent eliminated as a marker of community membership and replaced with “need-based eligibility criteria for remedial programs, cultural criteria for cultural programs, and political history for federal recognition.”\(^\text{30}\)

This response aims to provide a more critical and contextual inquiry into the central question addressed by Garcia’s comment: may the United States Congress properly enact legislation recognizing the self-governing authority of a Native Hawaiian people united by common descent, regardless of blood quantum? Part II explains that a liberal individual rights paradigm is not the appropriate starting point for an analysis of a Native people’s authority to unite according to common descent, or an analysis of the authority of the United States Congress to recognize the self-governing authority of such a polity. Part II further explains that a Native sovereignty framework is the proper framework to use when addressing questions about the self-governing authority of a Native polity and the authority of the federal government to engage in a government-to-government relationship with that polity.

Beginning with a Native sovereignty framework and a survey of Native Hawaiian history primarily from the perspectives of Native Hawaiian historians, Part III demonstrates the propriety of using Native Hawaiian descent as a criterion for membership in a reorganized Native Hawaiian polity. Part IV outlines the authority of the United States Congress to recognize a Native Hawaiian polity united by common descent. Part V describes how blood quantum has been used consistently throughout United States history to preserve the dominant elite’s power over marginalized communities such as African-American slaves and

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\(^{28}\) Garcia, supra note 8, at 162.

\(^{29}\) Garcia, supra note 8, at 162.

\(^{30}\) Garcia, supra note 8, at 161.
Native peoples. Part V concludes by explaining that an additional blood quantum criterion is not needed to establish “legitimate” Native Hawaiian identity or to bring Congress’ recognition of the Native Hawaiian people within the scope of its constitutional authority.

I. FRAMING THE ISSUE

The question at hand is, at its core, a question about sovereign powers: the sovereign power of the Native Hawaiian community to organize itself according to common descent, and the sovereign power of the United States to recognize the self-governing authority of a Native people so organized. Garcia frames these issues as equal protection questions and bases his reasoning on a liberal individual rights paradigm. Thus, the comment’s analysis goes off-track before it begins.

As Professor Kevin Washburn explains in the Native criminal law context, antidiscrimination principles are not appropriate norms to employ when addressing a legal regime that affects Native peoples in their lands. Native polities inhabit a unique sovereign space in the United States’ legal system, and for that reason, they do not fit neatly into existing paradigms. More specifically, Native peoples “cannot be encompassed in the ‘usual constitutional dialogue’ of individual rights” because Native sovereignty necessarily situates Native nations “beyond the federal-state paradigm that dominates individual civil liberties discourse within the U.S.”

Interestingly, the question at hand springs from a fundamental misunderstanding of the process outlined by the Native Hawaiian Government Reorganization Act. Namely, Garcia incorrectly asserts that the Act “limits eligibility in its proposed government to individuals possessing ethnic Hawaiian blood.” Garcia at 89-90. In reality, the Act simply requires that the initial process of reorganization be carried out by qualified persons of Native Hawaiian descent who meet age requirements and satisfy other relevant criteria. These “qualified Native Hawaiian constituents” would not comprise the body politic eligible to receive federal recognition under the Act. In fact, the Act specifically states that the body of qualified Native Hawaiian constituents will have the duty and authority to develop the criteria for membership in the Native Hawaiian polity. The Act is silent as to whether the body of qualified Native Hawaiian constituents must limit membership in the Native Hawaiian polity to persons of Native Hawaiian descent. Nonetheless, because the body of qualified Native Hawaiian constituents could potentially designate Native Hawaiian descent as criterion for membership in the Native Hawaiian polity, Garcia’s question is relevant and important, despite its origin in misunderstanding.

Washburn, supra note 27, at 758.


Riley, supra note 33, at 808.
political organizations with rights to continued existence, self-governance, and self-determination.\textsuperscript{35}

In light of this, Professor Angela Riley asserts that a Native polity’s sovereignty and autonomy must be the primary considerations in an analysis of a Native polity’s power to act “illiberally” with respect to matters such as membership criteria.\textsuperscript{36} Native sovereignty and autonomy must also be the primary considerations in evaluations regarding the extent to which liberal societies like the United States ought to accommodate “illiberal” actions by Native polities.\textsuperscript{37} Simply put, analyses of Native peoples’ authority to act in a manner that is inapposite to Western liberal ideals, and the United States’ authority (or perhaps duty) to accommodate such actions, should begin, not with a liberal individual rights framework, but with a Native sovereignty framework.

A. Native (Cultural) Sovereignty Framework

1. Cultural Sovereignty

In their groundbreaking article, \textit{Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations}, Professor Rebecca Tsosie and former Comanche Nation of Oklahoma Chairman Wallace Coffey articulate a concept of Native sovereignty that looks to the core of Native communities for its meaning.\textsuperscript{38} Observing that externally defined “political sovereignty”\textsuperscript{39} is only one aspect of Native sovereignty — and a highly controversial one at that — Professor Tsosie and former Chairman Coffey challenge Native peoples, their leaders, attorneys, and citizens to conceptualize Native sovereignty more organically.\textsuperscript{40} According to Professor Tsosie and former Chairman Coffey, a Native sovereignty framework is necessary to address the controversy over the Santa Clara Pueblo’s patrilineal membership rules as an example of a situation that should be addressed using a Native sovereignty framework.

\textsuperscript{35} Riley, supra note 33, at 808; Washburn, supra note 27, at 758; Charles F. Wilkinson, \textit{American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy} 113 (1987).

\textsuperscript{36} Riley, supra note 33, at 799-803, 807-8 (explaining that United States’ own theory of Native sovereignty supports perpetuation of Native polities’ autonomous existence and mandates that internal decisions regarding culture and tradition be left to Native polities, even when those decisions are inapposite to Western liberal ideals). Riley describes the controversy over the Santa Clara Pueblo’s patrilineal membership rules as an example of a situation that should be addressed using a Native sovereignty framework. \textit{Id.}

\textsuperscript{37} Riley, supra note 33, at 799-803, 807-08.


\textsuperscript{39} Professor Tsosie and former Chairman Coffey characterize Native “political sovereignty” as the product of the understandings and expectations of external bodies, such as the United States federal government, about the rights and responsibilities of Native polities. \textit{Id.} at 192-95.

\textsuperscript{40} \textit{Id.}
Coffey, this account of sovereignty should embody “cultural sovereignty,” which they describe as the effort of Native polities and Native people to exercise their own norms and values in structuring their collective futures. Cultural sovereignty “is not dependent upon any grant, gift or acknowledgment by the federal government” because it “preexists the arrival of the European people and the formation of the United States” and “is inherent in every sense of that word.”

2. The Role of Political Sovereignty

Notably, Professor Tsosie and former Chairman Coffey do not contend that political sovereignty is irrelevant or that it does not have a real impact on Native peoples. Professor Tsosie and former Chairman Coffey acknowledge a notion that Sam Deloria, Director of the American Indian Graduate Center and a member of the Standing Rock Sioux Tribe, astutely articulated during a panel discussion on cultural sovereignty:

[T]here’s no sovereignty on this earth that is unlimited. The United States at its most powerful does not have unlimited sovereignty. It has a constitution that limits its sovereignty and structures it, but more important than that, it has political and economic reality that limits its sovereignty.

Part of the political and economic reality that limits the sovereignty of Native peoples is the fact that the United States interacts with them pursuant to its own definition of Native political sovereignty, which characterizes Native peoples as dependent nations possessing limited sovereignty that exists only at the sufferance of Congress and is subject to complete defeasance. Therefore, regardless of what a Native polity knows to be true about its own identity, autonomy, and power, it must still address the United States’ competing understandings in order to protect its interests.

Accordingly, Professor Tsosie and former Chairman Coffey do not suggest that externally defined political sovereignty be completely ignored in Native sovereignty analyses. Rather, they propose that political sovereignty be taken for what it is: a unilaterally imposed notion that Native peoples are forced to contend with, not the primary source of Native sovereignty. “Cultural sovereignty is the bedrock of Native

41 Coffey & Tsosie, supra note 38, at 196.
42 Id.
43 Sam Deloria, Commentary on Nation-Building: The Future of Indian Nations, 34 Ariz. St. L.J. 55 (2002). See also, Coffey & Tsosie, supra note 38, at 196 (explaining that contemporary legal battles center around concept of political sovereignty as Native peoples attempt to define and defend boundaries of their jurisdictional authority).
45 Coffey & Tsosie, supra note 38, at 192, 196.
peoples’ self-determination . . . . But we can and must resist the dispossession of Native political autonomy . . . .”

3. The Native Sovereignty Framework

Taking both cultural sovereignty and political sovereignty into consideration, Professor Tsosie and former Chairman Coffey propose that attempts to understand and define Native sovereignty in specific contexts should include at least three foundational inquiries: (1) where is cultural sovereignty located within the Native polity’s existing social structures and order; (2) what does the philosophical core of the relevant Native belief system reveal about “what ‘sovereignty’ means, what ‘autonomy’ means, and what rights, duties, and responsibilities are entailed in [the Native polity’s] relationships”; and (3) how should the relationship between the Native polity’s cultural and political sovereignty be conceptualized. Applying these inquiries to the question at hand, the following framework emerges for evaluating the authority of the Native Hawaiian people to organize according to common descent and the authority of the United States government to extend recognition to a Native Hawaiian polity so organized:

(1) Where is cultural sovereignty located within the Native Hawaiian community’s existing social structures and order?

(2) What does the philosophical core of the Native Hawaiian community’s belief system reveal about what sovereignty and autonomy mean; and what rights, duties, and responsibilities are entailed in the relationships of the Native Hawaiian people?

(3) How should the relationship between the Native Hawaiian community’s cultural and political sovereignty be conceptualized?

Pursuant to this Native sovereignty framework, the Native Hawaiian community’s own understanding of its authority to organize according to common descent is the primary consideration; the expectations of neighboring sovereigns, such as the state and federal governments, are a secondary consideration; and an understanding of the nature and extent of Native Hawaiian sovereignty with respect to defining membership emerges from the reconciliation of these considerations.

46 Coffey & Tsosie, supra note 38, at 209.
47 Id. at 196.
II. THE POWER TO DEFINE THE PEOPLE

A. Locating Cultural Sovereignty

Pursuant to the Native sovereignty framework proposed by Professor Tsosie and former Chairman Coffey, the proper starting point for an analysis of the use of Native Hawaiian descent as a criterion for membership in a reorganized Native Hawaiian polity is locating the Native Hawaiian people’s cultural sovereignty within the community’s existing social structures and order.

The Native Hawaiian people functioned as an independent, self-governing society long before sustained contact with Europeans and Americans began. This history of Native Hawaiian self-governance forms the basis for the exercise of self-governing authority by the Native Hawaiian people in the present day. The contemporary self-governing authority of the Native Hawaiian people flows from the original sovereignty exercised by the people prior to foreigners’ appropriation of that authority. Federal law generally refers to such retained original authority as the “inherent sovereignty” of the Native people. Professor Tsosie and former Chairman Coffey describe the genesis of inherent Native sovereignty as follows:

Our Ancestors recognized themselves as distinctive cultural and political groups, and that was the basis of their sovereign authority to reach agreements with each other, with the European sovereigns, and then the United States. According to this account, the genesis of inherent Native sovereignty is a Native community’s recognition of itself as a distinctive cultural and political group. Because self-recognition necessarily requires a community to determine who constitutes the “self,” it follows that inherent Native sovereignty partially emanates from a Native community’s identification of its membership.

Contemporary federal law consistently recognizes this close relationship between inherent Native sovereignty and the power of a Native community to identify who comprises the community. All three branches of the federal government acknowledge that a Native community’s power to determine its own membership is a fundamental aspect of that community’s inherent sovereignty. The federal government

48 See, infra, notes 55-68 and accompanying text.
50 Coffey & Tsosie, supra note 38, at 196 (emphasis added).
considers the power sacrosanct, and it generally declines to interfere directly with Native membership determinations, despite its purported claims to plenary power over Native peoples. The inherent sovereignty of the Native Hawaiian people is exercised in contemporary times pursuant to a leadership structure that includes both organizations and non-organization-based leaders. For the most part, these organizations and leaders do not exert criminal or civil jurisdiction, legislate, tax, or exercise other typical sovereign powers on behalf of the Native Hawaiian people as a polity. The organizations and leaders do, however, routinely exercise the Native Hawaiian people’s sovereign power to define the Native Hawaiian community and its membership. As such, one of the main locations of Native Hawaiian cultural sovereignty within the people’s existing social structures and order is the exercise of the power to define the people through the determination of community membership.

B. Probing the Philosophical Core

Having located Native Hawaiian cultural sovereignty in the power of the Native Hawaiian people to define the community by determining membership, the next step in the analysis requires a probe of the philosophical core of the Native Hawaiian belief system to determine what sovereignty and autonomy mean, and what rights, duties, and responsibilities are entailed in the relationships of the Native Hawaiian people in the context of community membership.

1. The Origins of the Native Hawaiian People

Prolific 19th century Native Hawaiian historians Samuel Kamakau and David Malo explain that the Native Hawaiian people share the same ancestors from Wākea and Papa. The traditions do not state whether the ancient ancestors of the Native Hawaiian people were born or lived in Hawai‘i, but it is believed that some of the people of the twenty-five generations between Wākea and Kapawa voyaged to Hawai‘i from Kahiki (Tahiti) and other islands close to Kahiki. Supporting

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54 GEORGE S. KANAHELE, KŪ KANAKA. STAND TALL 429 (Univ. of Haw. Press. 1986).
56 Kapawa was born at Kūkaniloko and “was the first chief to be set up as a ruling chief.” KAMAKAU, supra note 55, at 3; MALO, supra note 55, at 5.
57 MALO, supra note 55, at 5.
archeological evidence suggests that the ancient ancestors, often personified as akua (deities), kūpua (demigods), and ʻaumakua (deified ancestors), probably came to Hawai‘i by way of the Marquesas Islands or Tahiti close to the time of Christ and were likely followed by subsequent voyagers from Tahiti who geometrically increased the population of Hawai‘i and prompted the evolution of Hawaiian society into a stratified society led by ali‘i (chiefs). The traditions, however, do not specify exactly who arrived first in Hawai‘i or when their voyages took place.

Despite the general uncertainty surrounding the initial settlement of Hawai‘i, it is clear that, from the time of Kapawa, Native people were born in the Hawaiian Islands. It is also clear that, over the course of centuries, these early inhabitants of Hawai‘i worked together to develop a distinctly Hawaiian community marked by a unique language, culture, and system of relationships. This community functioned according to “a system of political and social relationships based on obligations as well as bonds of affection.” Although foreign observers often described the system as “feudal,” it was highly interdependent despite its stratification, and the ali‘i, kahuna (experts, healers), and makaʻāinana (ordinary people) considered themselves to be much more closely and affectionately related than feudal landlords and serfs. Namely, while ali‘i status was generally determined genealogically, the ‘āina (land), akua, ʻaumakua, kahuna, and makaʻāinana belonged to the same family as the ali‘i, and that family was inextricably bound together by a network of reciprocal relationships.

“[T]he Ali‘i Nui kept the ʻĀina fertile and the Akua appeased; the

59 MALO, supra note 55, at 5.
60 MALO, supra note 55, at 5.
61 McGREGOR, supra note 58, at 24.
64 Id. at 9, 16, 41. Garcia argues that the ali‘i distinguished themselves from the rest of Native Hawaiian society based on their Tahitian lineage, “ruled over [the people] by virtue of that blood, and thereby maintained exclusive socio-political control of the islands for over half a millennium.” Garcia at 98, n. 43. Garcia cites no supporting authority for this novel proposition that the ali‘i functioned as a separate, distinctly Tahitian polity within early Hawaiian society. In fact, Garcia acknowledges that several commentators, including his main source Ralph S. Kuykendall, assert that the ali‘i and the people shared a common heritage and were one people. Garcia, supra note 8, at 98, n. 43.
makaʻāinana fed and clothed the Aliʻi Nui. “[I]n practical terms, the makaʻāinana fed and clothed the Aliʻi Nui, who provided the organization required to produce enough food to sustain an ever-increasing population.”

This traditional system of relationships undergirded all of Native Hawaiian society. Initially, the kuleana (responsibility/authority) of the aliʻi within the system was distributed among several members of the aliʻi class who controlled whole islands and groups of islands and divided and redivided territorial control among themselves through war and succession. By 1810, however, Kamehameha I had established himself as paramount chief over all of the islands and was administering the kuleana of the aliʻi class with respect to the Native Hawaiian people as a whole.

2. The Evolution of the Native Hawaiian “State”

Opinions differ as to whether the Native Hawaiian people constituted a “state,” in the western sense, before Kamehameha I assumed the position of paramount chief over all the islands. Nonetheless, most agree that when Kamehameha became paramount chief, he consolidated the islands into a state structure. Pursuant to this structure, the Native Hawaiian government functioned as one body with “many parts, but one organization.” As David Malo explains,

the corporate body of the government was the whole nation, including the common people and chiefs under the king . . . . The king was the real head of the government; the chiefs below the king, the shoulders and chest. The priest of the king’s idol was the right hand, the minister of interior (kanaka kalaimoku) the left hand, of the government. This was the theory on which the ancients worked.

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65 KAMEʻELEIWIHA, supra note 63, at 26.
66 Id. at 22.
67 MCGREGOR, supra note 58, at 26, 29.
68 KAMAKAU, supra note 55, at 196-97.
70 Id.
71 DAVID MALO, HAWAIIAN ANTIQUITIES: MOʻOLELO HAWAIʻI 187 (Bishop Museum Press. 1951) (emphasis added).
72 Id.
The formation of the Hawaiian state and the emergence of a Hawaiian national identity was signaled by symbolic gestures, such as the development of the Hawaiian national flag in or around 1812, and state actions, such as correspondence from the paramount chief to the representatives of other states on behalf of “the Hawaiian people as a whole, or at least of such part of them as gave any thought to the subject.”

There is some evidence to suggest that Kauaʻi chief Kaumualiʻi continued to resist the development of a Hawaiian state under the rule of Kamehameha I, even after the consolidation of the islands in 1810. However, there is no credible evidence to suggest that the conduct of a single deposed chief reflected the sentiment of the residents of Kauaʻi or the Native Hawaiian community at large. In fact, by the time civil war broke out on Kauaʻi in the summer of 1824, “[t]he people were unitedly of opinion that Kauai belonged to the king and that it was their duty to secure it to him.”

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73 RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM, VOL I, 1778-1854 55, 76 (Univ. of Haw. Press, 1965) [hereinafter KUYKENDALL I]. Kuykendall describes the national flag as being born from the rivalries observed between and among American and various European interests. This acknowledgement suggests a similarity among Native Hawaiians in 1812 to how contemporary people may develop a sense of patriotism in times of crisis.

74 Id. at 50.

75 Id. Kamehameha and Kaumualiʻi “met face to face and it was settled that Kauai should be a tributary kingdom and that Kaumualiʻi should continue to govern the island, acknowledging Kamehameha as his suzerain.” Id.

76 Garcia asserts, “Kaumuali‘i’s death in 1824 left Kaua‘i’s residents divided as to whether to support Kamehameha II or pursue independence.[ ] This divide sparked a bloody ‘civil war’ between Kauaians and Hawaiians.” Garcia at 105, KUYKENDALL I, supra note 73, at 118. It is of little consequence that Liholiho Kamehameha II may have pre-deceased this civil war of 1824, because it was not until March 9, 1825 that “news of [Kamehameha II’s] death reached Hawaii.” Kuykendall I at 118. Garcia incorrectly states that Kamehameha II’s death occurred in 1823. Garcia at 105. Liholiho Kamehameha II died on July 14, 1824. Kuykendall I at 79. It is undisputed that a civil war occurred on Kaua‘i. However, Garcia incorrectly characterizes the cause and purpose of the civil war. Garcia paints a picture of Kaua‘i Natives questioning whether to support Kamehameha II as their King or to pursue independence from Kamehameha II. According to Kuykendall however, this was neither the cause nor the purpose of the civil war on Kaua‘i. Instead, the issue Kaua‘i Natives faced was whether there would be a re-distribution of the division and possession of lands after the death of Kaumuali‘i. Kaumuali‘i apparently wanted to maintain the status quo. Kuykendall suggests that it was Kaumuali‘i’s own son, George Kaumuali‘i, who wanted a re-distribution of the division and possession of lands and subsequently led a rebellion. This rebellion, like any rebellion within the territory of a country, needed to be addressed by the national government. Kalanimoku, being on Kaua‘i, restored order to Kaua‘i, much like the National Guard or a local police department might be used in America to quell violent protests. In such a situation, we see a so-called “clash of forces,” but we must remember that the rebellion arose out of a disagreement about the division and possession of land after the death of Kaumuli‘i.
By the late 1830s, lingering resistance from within the Native Hawaiian community to the operation of a consolidated Hawaiian state under the leadership of Kamehameha I and his successors had ceased. The energy of the Native Hawaiian community shifted outward, as the community “sought to form a ‘civilized’ society as that concept was understood in the nineteenth century by the European powers that created it” in the hopes of warding off imperialist nations that were annexing so-called “primitive” societies throughout the Pacific. At the end of the decade, Native Hawaiian leadership reorganized the Hawaiian state into a constitutional monarchy — the Kingdom of Hawai‘i.

Garcia’s comment suggests that the evolution of the Kingdom into an internationally recognized state with naturalized citizens somehow divested the Native Hawaiian people of their political identity and their inherent sovereignty. Specifically, Garcia asserts that the subjects of the Kingdom replaced the Native Hawaiian people as “Hawaiians,” and further asserts that the Native Hawaiian people ceased to possess any distinct political status, despite having a distinct legal status. Garcia appears to base this contention on the fact that the Kingdom treated both

What appears to have been at issue was who among the lesser chiefs would have political power under the reign of Kamehameha II in the absence of Kaumuali‘i.

To further counter Garcia’s erroneous point that Kaua‘i Natives did not support Kamehameha II and sought their own independence, Kuykendall describes Kaua‘i as somber after news reached the Kingdom about the death of Liholiho Kamehameha II and his Queen. If Kauai Natives actually contemplated pursuing independence from Kamehameha II and his successors, the ripest moment to pursue independence would have been when Kamehameha II died, or shortly thereafter. Kuykendall also describes Hawaiian history as enduring violence and disorder upon the death of a reigning chief, but emphasizes that such was not so upon news of Liholiho Kamehameha II’s death.

77 MERRY, supra note 69, at 36.

78 HE KUMU KANAWAI A ME KE KANAWAI HOOPONOPONO WAIWAI NO KO HAWAI NEI PAE AINA NA KAMEHAMEHA III I KAU [Constitution] (1839). There is some debate regarding whether the 1839 Constitution was Hawai‘i’s first constitution. However, the document was labeled a constitution, and therefore is considered a constitution by some experts. See, e.g., CONSTITUTIONS OF THE WORLD FROM THE LATE 18TH CENTURY TO THE MIDDLE OF THE 19TH CENTURY (hereinafter CONSTITUTIONS) 20 (Horst Dippel ed., 2008) (stating that “the sole, official title of the 1839 document was ‘Kumu Kanawai’ (today spelled Kumukānāwai; literally, fundamental law), the same title appearing on subsequent constitutions. As such, the document is included here.”). It is undisputed, however, that by 1840, Native Hawaiian society had been reorganized into a constitutional monarchy. See KE KUMU KANAWAI O KO HAWAI NEI PAE AINA [CONSTITUTION OF THE HAWAIIAN ISLANDS] 1840 (Kingdom of Hawai‘i) [hereinafter 1840 CONSTITUTION].

79 Garcia, supra note 8, at 110.

80 Id.
Native Hawaiians and naturalized persons as “citizen-subjects” of the Kingdom.\textsuperscript{81}

Despite the growing presence of non-Natives in Hawai‘i, the Native Hawaiian community, operating as the Kingdom of Hawai‘i, continued its centuries old practice of defining community membership according to common Native Hawaiian descent for several years after the formation of the Kingdom, making limited exceptions for those foreigners who were grafted onto a Native Hawaiian lineage through marriage.\textsuperscript{82} Chapter X Section IX of the Hawaiian Kingdom’s first laws prohibited foreigners from marrying wives within the Kingdom but provided one exception for those who, before marriage and in the presence of a Governor, would “declare under oath that it is his design to remain in the country, and also take the oath of allegiance to [the Hawaiian Kingdom] government, and obtain from the Governor a certificate of marriage.”\textsuperscript{83}

In 1845, however, the Kingdom formally began to consider whether naturalization should be offered to other foreigners who were not bound to the Native Hawaiian people through blood, marriage, or other bonds of kinship. Kauma‘ea, a vocal opponent of broad naturalization, expressed the following concerns about the ability of such foreigners to become part of the community:

> They are helped by war vessels, with the hand turned against us, without love for us all . . . . If perhaps, we are opposed by those of another country and go to war with them . . . will they die together with us the true people? They will run perhaps and not stay and help us kanaka maoli. They will not wish to die with us all, and give their lives, and their dollars to the war.\textsuperscript{84}

\textsuperscript{81} Garcia, \textit{supra} note 8, at 110-11, n. 121.

\textsuperscript{82} Prior to 1846, only Native Hawaiians were considered subjects of the Kingdom of Hawai‘i. \textit{See} Jon M. Van Dyke, \textit{Population, Voting, and Citizenship in the Kingdom of Hawai‘i}, 28 U. HAW. L. REV. 81, 89 (2005).

\textsuperscript{83} The Fundamental Law of Hawaii 57 (Lorrin A. Thurston ed., 1904). Section IX, should be understood as a marriage provision and not a naturalization provision. The section was placed in the Marriage and Divorce chapter. Section X of the Marriage and Divorce chapter shows the government’s efforts to protect and advance the peoples’ interests by penalizing foreigners who fraudulently married island women, seizing the real and personal property of the foreigner, awarding the property to the Native woman deceived and banishing the foreigner from the islands. \textit{Id. available at} http://bit.ly/KDA1842laws page 57.

Despite the protests of Kaumaʻea and others, the Kingdom began to permit the naturalization of foreigners in 1846. Appreciating the gravity of this decision, contemporary Native Hawaiian historian Jonathan Kay Kamakawiwoʻole Osorio reflects that “[t]he most important political question of 1845 or of any other year for the kingdom was ‘to whom does the nation belong?’” As Dr. Osorio observes,

[t]he question is complicated because of the various ways that we might define the word nation. For the haole [(American, European)] that word can mean the country, its government, or the people it rules. But for Hawaiians, two words were necessary to convey the meaning of nationhood: aupuni, the government established by Kamehameha, and lāhui, which means gathering, community, tribe, and people. It is possible that Hawaiians came to accept the presence of the haole in the government without ever acknowledging their right to be part of the race.

Dr. Osorio’s observation alludes to the dichotomy between state and community that the naturalization issue created for the Native Hawaiian people. Between the initial settlement of Hawaiʻi and 1846, Hawaiian polity citizenship and Native Hawaiian community membership had been largely coextensive. The body politic and the Native community were essentially one and the same, and the members of both were bound together primarily by common descent (and in limited circumstances, other kinship bonds). When the Kingdom began to naturalize foreigners who were not connected to the Native Hawaiian community through kinship, the concepts of Kingdom citizenship and Native Hawaiian community membership began to take on different meanings. However, the understanding that the Hawaiian Kingdom government belonged to Native Hawaiians persevered, as evinced by Kingdom law and Hawaiʻi Supreme Court decisions.

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85 Prior to 1946, only Native Hawaiians were considered subjects of the Kingdom of Hawaiʻi. See Jon M. Van Dyke, Population, Voting, and Citizenship in the Kingdom of Hawaiʻi, 28 U. HAW. L. REV. 81, 89 (2005).

86 OSORIO, supra note 84, at 41.

87 Id. at 41 (emphasis added).

88 As mentioned in note 82 and its accompanying text, foreigners who were bound to the Native Hawaiian community through the kinship relationship of marriage were legally permitted to become Kingdom subjects beginning in 1840.

89 In the Hawaiian Kingdom Supreme Court’s own description of Hawaiian political history, the Native Hawaiian people were believed to be vested with the legislative power of the Hawaiian Kingdom. Naone v. Thurston, 1 Haw. 220, 1856 WL 4225, at *1; Rex v. Booth, 2 Haw. 616, 626-31, 1863 WL 2527, at *7 (1863). In his concurring opinion, Chief Justice Elisha H. Allen mentioned numerous other laws that
Consistent with this notion, non-Natives in the Kingdom government played supporting roles rather than leading roles. For example, according to Kamakau, Kamehameha III only utilized foreigners such as Robert C. Wyllie, Gerrit P. Judd, William Richards, and John Ricord to fulfill the duties of Minister of Foreign Affairs, Minister of the Treasury, Minister of Education, and Attorney General because, in 1845, Native Hawaiians were not yet trained or experienced in these areas. \(^90\) Kamakau highlights that Kamehameha III’s employment of foreigners in these important positions was done in an attempt to advance the interests of the Native Hawaiian people. \(^91\) Kamakau explains that Kamehameha III gave

\[
\text{his own people} \ldots \text{the offices which they could fill; and} \]
\[
\text{only those which they could not fill were [ ] given to foreigners, and that when the young chiefs were sufficiently instructed in [ ] English [ ] the offices were to be given back to them . . . .} \(^92\)
\]

\(^90\) Samuel M. Kamakau, Ruling Chiefs of Hawaii, 401-2 (Kamehameha Schools Press 1992) (1961). Given that Native Hawaiians were not meaningfully exposed to western principles of law and government until Christian missionaries came to Hawai’i’s shores in 1820, it follows that Native Hawaiians were not yet prepared in 1845 to manage these areas of Kingdom government operations.

\(^91\) Id. at 402.

\(^92\) Id. at 402 (emphasis added). The phrase “back to them” suggests that those positions were originally intended for Natives. That Native Hawaiians were being trained
In a letter to Kamakau, Kamehameha III stated that his “native helpers [did] not understand the laws of the great countries who [were] working with [the Kingdom]” and expressed a need for “new officials to help with the new system under which [he was] working for the good of the country. . . .”

The special political status of Native Hawaiians within the Kingdom was further evidenced by the Kingdom government’s focus on increasing the Native population. In 1884, such an increase was considered vital for protecting the Hawaiian Kingdom’s status as an independent state among the nations of the world. An 1884 report by the Hawaiian Kingdom Minister of Foreign Affairs that was provided to the Legislative Assembly included a section regarding foreign immigration that caused the Hawaiian Kingdom’s executive branch to grow concerned about the declining Native population and the impact of that decline on the Kingdom’s ability to preserve its international sovereign status and the welfare of its people. The Native people were identified as “the sovereign constituent[s] of the Kingdom,” and the King sought to increase the number of these constituents through foreign immigration. King David Kalākaua, early gave expression to his appreciation of this important measure, and, in a public speech, declared his royal purpose to favor the “increase of the nation” – (Hooulu Lahui) – which expression has become a national watchword among the Hawaiian people; and how the introduction of new people to mingle with them has been appreciated by the native race . . .

The Foreign Affairs report was careful to articulate the intent of the Executive in 1884, which was to implement a foreign immigration policy that would increase the Native population. The need to increase the Native population resulted from the Native population’s decline, which was attributed to new and different living conditions. The executive branch report also explained that this foreign immigration policy was supported by the Legislative Assembly, “of whose members fully three-fourths have

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93 KAMAKAU, supra note 93, at 401.

94 Walter M. Gibson, Department of Foreign Affairs, Exec. Office of the King, Report of the Minister of Foreign Affairs to the Legis. Assemb. of 1884, 14-15 (1884).

95 Id.

96 Id.
been native Hawaiians . . . .” 97 Support from the Native-dominated Legislative Assembly indicates an understanding that persons of Native Hawaiian descent, including those who were the product of “mingling,” formed the critical core of Kingdom society. 98

These historical accounts demonstrate that the Native Hawaiian people and the Kingdom government they created continued to recognize the Native Hawaiian people as a distinct political entity throughout the Kingdom period, despite the inclusion of unrelated foreigners in the Kingdom’s citizenship. These accounts confirm that the Native Hawaiian people understood the Kingdom to be a political vehicle for exercising their inherent sovereignty in furtherance of the Native Hawaiian community’s best interests.

Similarly, although the Māhele 99 has been interpreted by several scholars as having dispossessed Native Hawaiians of land, 100 real property deeds after the Māhele provide evidence that the government sought to protect Native Hawaiian interests in a society that found its dealings with the rest of the world increasing. The Māhele (the division) provided three land categories: Konohiki lands, 1.5 million acres; Crown lands, one million acres; and Government lands, 1.5 million acres. 101 “All of these

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97 Gibson, supra note 97.
98 See also, RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM, VOL. II, 1854-74, 181-82 (Univ. of Haw. Press, 1953 ) [hereinafter KUYKENDALL II].

[In the running discussion that was constantly going on, a distinction seemed to be made between immigration for labor supply and immigration for population upbuilding. For the latter purpose, several possible sources, including Europe, were suggested. * * * Much stress was laid on the importance of bringing in people who were of the same [ ] stock as the Hawaiians or people who could readily amalga-mate with the Hawaiians; . . . This meant, . . . Polynesians; but . . . nearly all Pacific islanders, including Malaysians and even Japanese, were thought of as cognate to the Hawaiians (emphasis added).

99 The Māhele (division) came about because foreign residents with land holdings wanted to protect their economic interests. MELODY MACKENZIE, HISTORICAL BACKGROUND, IN NATIVE HAWAIIAN RIGHTS HANDBOOK, 5-6 (Melody Kapilialoha MacKenzie ed., Univ. of Haw. Press 1991). The problem that arose for these foreigners was that Native Hawaiians had not previously embraced the concept of private property. As such, there was generally no fee-simple private property for foreigners to acquire. The Māhele was a transition from the traditional Hawaiian system to a private property system. Donovan C. Preza, The Empirical Writes Back: Re-Examining Hawaiian Dispossession Resulting from the Māhele of 1848 1 (May 2010) (unpublished M.A. thesis, University of Hawaii) (on file with author), available at http://bit.ly/Prezathesis. With this transition however, the government was careful to express its intent to protect the interests of Native tenants to the lands through the phrase, “ua koe ke kuleana o na kanaka” printed on the deeds.

100 Preza, supra note 102.

101 See Jocelyn B. Garavoy, “Ua Koe Ke Kuleana O Na Kanaka” (Reserving the Rights of Native Tenants): Integrating Kuleana Rights and Land Trust Priorities in
lands were granted ‘subject to the rights of native tenants.’ Deeds executed during the Māhele . . . contained the phrase ‘ua koe ke kuleana o na kanaka,’ or ‘reserving the rights of all native tenants’ . . . .”

3. The Persistence of Native Hawaiian Identity Through the Unilateral Dispossession of Native Hawaiian Political Sovereignty

Early in his “Relevant Hawaiian History” section, Garcia explains that his “history does not thoroughly review or debate the facts and circumstances contributing to the overthrow of the Kingdom of Hawaii in 1893 because doing so is unnecessary to identify who is Hawaiian as a matter of political history.”

By deciding not to address the 1887 Bayonet Constitution, Garcia ignores an important historical change of one of his foci, Hawaiian political or national identity. To truly understand the shared Hawaiian political identity, we must examine important political changes in the Hawaiian Islands and the Native Hawaiian people’s effort to maintain a shared political identity in the face of those changes.

The 1887 Bayonet Constitution, which was forced upon the King by armed threat, was a precursor to the 1893 overthrow and served to diminish the political power of the monarch and disenfranchise the Hawaiian Kingdom’s aboriginal citizens by giving voting power to American and European foreigners merely residing within the territorial dominion of the Kingdom.

This allowed non-Hawaiians (as well as non-citizens) to define themselves as politically Hawaiian. Additionally, the Bayonet Constitution stripped the King’s authority to appoint members to the House of Nobles, and required Nobles to satisfy a specific real property qualification or personal income requirement.

Despite the political setback that the Bayonet Constitution inflicted upon Native Hawaiians, the community persisted. Dr. Noenoe Silva

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102 Garavoy, supra note 104.

103 Garcia, supra note 8, at 95.

104 HAWAIIAN KINGDOM CONST. art. 62 (1887) (allowing for mere “male resident[s] of the Kingdom” of “American or European birth or descent . . . ” who can “read and write the Hawaiian, English or some European language . . . .” the right to vote for their district Representative) (emphasis added). Compare with HAWAIIAN KINGDOM CONST. art. 62 (1864) (allowing “male subject[s] of the Kingdom, who . . . know how to read and write . . . .” the right to vote for their district Representative).

105 Compare HAWAIIAN KINGDOM CONST. art 57 (1864), with Hawaiian Kingdom Const. art. 58 (1887). The 1887 constitution increased the number of Nobles to 24, whereas the 1864 constitution allowed no more than 20. Additionally, the Nobles changed from appointed positions to elected positions.

106 See HAWAIIAN KINGDOM CONST. art. 56 (1887).
explains the perseverance of the Native Hawaiian community after the Bayonet Constitution as follows:

[Pro]tests of the Bayonet Constitution eventually culminated in the founding of the first Kanaka Maoli political organization, the Hui Kālaiʻāina. * * * Haole newspaper editor Daniel Lyons used his newspaper office of the ‘Elele for organizing the Hui Kālaiʻāina. He emphasized that “the executive committee would be made up only of Hawaiians and that his role was only to start up the association.” * * * By June 1888, the hui had established a constitution as well as a platform for the upcoming elections. Among the issues on the platform were the preservation of the monarchy, amendment of the constitution, and the reduction of property qualifications for voters for the House of Nobles.107

The 1887 Bayonet Constitution provided that the first elections under the constitution would occur in 1890.108 Native Hawaiian persistence, likely through the Hui Kālaiʻāina, appears to have been successful in the 1890 elections. United States Commissioner James H. Blount reported the following:

In 1890 a legislature was elected in favor of a new constitution. The calculation of the reformers to elect all the nobles failed, owing to a defection of whites, especially amongst the intelligent laboring classes in the city of Honolulu, who were qualified to vote for nobles under the income clause. The cabinet installed by the revolution was voted out. A new cabinet, in harmony with the popular will, was appointed and remained in power until the death of the King in 1891.109

Native Hawaiians also continued to protect their political identity after the overthrow of the Hawaiian Kingdom. This persistence is most obviously evidenced by the Native Hawaiian opposition to American annexation of the Hawaiian Islands.110 Silva’s narrative describes several


108 HAWAIIAN KINGDOM CONST. art. 58 (1887).


110 Silva points out that Native Hawaiian resistance to American annexation has generally not been well-documented because resistance was often expressed in the Hawaiian language and many historians are not familiar with the Hawaiian language.
differently types of protests among Native Hawaiians, including: providing testimony to Commissioner Blount, withholding church offerings if ministers supported annexation, producing Hawaiian national flag quilts, refusing to work for the provisional government, and writing and singing the song “Kaulana Nā Pua” (also known as “Mele ‘Ai Pōhaku” or the rock-eating song), which demonstrates the sacrifice of government musicians refusing to work for the post-overthrow government. In addition, the women of Hui Aloha Āina sent a resolution to then-United States Minister Albert Willis, informing him of the Hawaiian community’s continued opposition to annexation and the unremedied unlawful overthrow.

Silva further illustrates the sentiments of the Native Hawaiian people towards their shared political identity by translating into English the following speech made by Joseph Nāwahi on July 2, 1894:

> The house of government belongs to us, as the Kamehamehas built it. We have been ousted by trespassers who entered our house and who are telling us to go and live in a lei stand that they think to build and force us all into. I am telling you, my fellow citizens, we should not agree in the least.

The Native Hawaiian community also maintained its identity by participating actively in the territorial political system that followed annexation to the United States. After Hawai‘i became a territory, three political parties emerged: the Democrats, the Republicans, and the Home Rule Party. With “Hawaii for Hawaiians” as a Home Rule Party slogan, Robert Wilcox, a Home Rule Party candidate, was elected to serve as the first territorial delegate to Congress. Other Home Rule Party candidates took the majority in both houses of the territorial legislature.

Silva explains, “[t]he lack of historical reference to such a large and organized resistance is typical of colonial situations, in which the archive in the language of the colonizer is privileged to a high degree over that of the vernacular, that is, the language of the native people.” See, SILVA, supra note 62, at 123-25.


112 SILVA, supra note 62, at 125.

113 Id. at 137.

114 After two failed attempts to pass a treaty of annexation, the United States annexed the Hawaiian Islands through a mere joint resolution in 1898 and Hawaii became a territory of the United States.

115 RALPH S. KUYKENDALL & A. GROVE DAY, HAWAII: A HISTORY, 196 (Prentice Hall, 1948) [hereinafter KUYKENDALL & DAY].

116 Id.

117 Id.
election of 1902, Prince Jonah Kūhiō Kalanianaʻole was elected as the delegate to Congress and served in that capacity for ten terms before he died in 1922.\footnote{KUYKENDALL & DAY, supra note 121.}

4. The Persistence of Native Hawaiian Identity After the Overthrow

In addition to misrepresenting the status of Native Hawaiians during the Kingdom period, Garcia also mischaracterizes Native Hawaiians as a “mere” ethnic group during Hawaiʻi’s territorial period.\footnote{The Hawaiian Islands were purportedly annexed as a territory of the United States in 1898 by the joint resolution often referred to as the Newlands Resolution and in 1959 became the 50th state of the Union.}

As a community with a shared political identity, deprived of its previous government, the Native Hawaiian community showed its political perseverance through the formation and growth of, among other entities, Hawaiian civic organizations.\footnote{See Hawaiian Civic Club of Honolulu, Club History, Founding of the Hawaiian Civic Club of Honolulu, http://www.hcchonolulu.org/?page_id=110. The Hawaiian Civic Club of Honolulu is known today as the Association of Hawaiian Civic Clubs.}


Kūhiō formed this civic club with other Native Hawaiian Republicans and Native Hawaiian Democrats out of deep concern for the perseverance of the Native Hawaiian community.\footnote{Dot Uchima, Recording Secretary, Association of Hawaiian Civic Clubs, 2 (2007), http://aohcc.org/images/stories/AHCC%20history_28Jul07.pdf.}

The founding objectives of the Hawaiian Civic club were preserving and promoting the Hawaiian heritage, traditions, language and culture; . . . promoting and supporting organizations interested in improving the conditions of the Hawaiian people and community at large as well as legislation beneficial to the Hawaiian community; and . . . perpetuating the values that dignify all human life, which are the moral and ethnical foundation of our cultural expressions that comprise a unique, rich and enduring legacy of the first people of Hawaii nei.\footnote{Id.}

Kūhiō also apparently intended for the organized leadership of the Hawaiian Civic Club to play a meaningful role in the development of the Hawaiian Homestead Commission Act passed in 1921.\footnote{Id.}

Kūhiō strongly
believed that organized leadership could both protect and advance Native Hawaiians’ interests.\textsuperscript{125} Numerous other Hawaiian civic clubs were formed with the same goals as the original Hawaiian Civic Club.\textsuperscript{126} Today, there are 58 Hawaiian Civic Clubs.\textsuperscript{127}

Decades later, Native Hawaiians such as Chief Justice William S. Richardson, advanced the rights of the Native Hawaiian people by advocating for Hawai‘i’s transition from territorial to state status within the federal structure, which allowed for greater political participation by Hawai‘i’s people, generally, and Native Hawaiians, specifically. Within the state framework, Chief Justice Richardson and other like-minded Native Hawaiians used state law and politics to secure the rights of the Native Hawaiian people and to bring the state government, to the full extent possible, in line with traditional Native Hawaiian principles. The legacy of that work is evident in state statutory and common law.

In the 1970s, Hawai‘i experienced a cultural resurgence often referred to as the “Hawaiian Renaissance.” This renaissance encouraged strong cultural and ancestral identification among Native Hawaiians, and Native Hawaiian resistance was reborn as Native Hawaiians reasserted their shared political identity.

The Hawaiian renaissance provides a social context for understanding how Native Hawaiians have pushed to preserve the political status and inherent self-governing authority of the Native Hawaiian people in contemporary times. In 1978, the people of Hawai‘i voted for a Constitutional Convention, which resulted in two important Constitutional amendments impacting Native Hawaiians. One amendment created the Office of Hawaiian Affairs, a semi-autonomous “self-governing body” and public trust with a mandate to better the conditions of both Native Hawaiians and the Hawaiian community in general.\textsuperscript{128} The other amendment constitutionally mandated funding for the Department of Hawaiian Home Lands, the state department that manages the Hawaiian Home Lands Trust, by taking discretion away from the legislature to determine how to fund the department.\textsuperscript{129}

In addition to the Office of Hawaiian Affairs and the Department of Hawaiian Home Lands, the Bishop Estate, the Queen Emma

\textsuperscript{125} Uchima, supra note 128.
\textsuperscript{126} Id.
Foundation, the Queen Liliʻuokalani Trust, and the Lunalilo Trust also exist to advance the collective self-determining interests of the Native Hawaiian people through education, medical care, children’s welfare, and kūpuna care. Notably, these entities almost universally use or have used Native Hawaiian descent as a criteria for leadership and services, carrying the traditional understanding of Native Hawaiian identity into the present day. As Dr. Osorio poignantly asserts:

I am a Native Hawaiian, He Kanaka Maoli, ʻōiwi maoli au. This is a simple enough assertion, the meaning of which is as clear as water when it springs from the rock. I belong here, not just to the land but to the other Kānaka Maoli of this ʻāina, and they belong to me . . . . [O]ur self-definition as Hawaiians has little to do with trying to gain political and economic advantage over [non-Native residents of Hawai‘i]. It has everything to do with kinship.”

III. CONGRESS’ AUTHORITY TO RECOGNIZE A NATIVE POLITY UNITED BY DESCENT

The foregoing demonstrates that the Native Hawaiian community has consistently exercised its inherent Native authority to identify itself according to common descent. Having established this, the next step in the Native sovereignty analysis is to consider how that exercise of cultural sovereignty impacts Native Hawaiian political sovereignty under federal law. Namely, we must now consider whether the Native Hawaiian community’s traditional practice of defining its membership according to common descent impacts Congress’ constitutional authority to recognize the community as a Native polity and, thus, impacts the ability of the Native Hawaiian people to assert political sovereignty within the framework of federal law.

A. Congress Retains Original Constitutional Authority to Acknowledge the Existence of a Native Polity

Contrary to Garcia's contentions, the United States Congress possesses authority under the United States Constitution to acknowledge the existence of a sovereign Native Hawaiian polity united by common descent. Although Congress has delegated authority to the executive branch to enforce and implement many aspects of federal law, Congress retains the overall authority to establish and recognize Native polities.

130 OSORIO, supra note 84, at 251-52.

131 In an attempt to invalidate Congress’ authority to recognize a Native Hawaiian polity, Garcia makes a sweeping argument challenging Congress’ asserted “plenary power” over Indian affairs. Garcia, supra note 8, at 112-16. As Garcia notes, the question of whether Congress possesses broad, plenary power over Indian affairs is the subject of a heated debate, with proponents and opponents of Native peoples on both sides of the argument. Id. The separate question, however, of whether Congress possesses
branch of the federal government to recognize Native polities and the executive branch has developed certain standards and processes for administering that authority — federal courts have consistently reaffirmed that Congress concurrently maintains its direct constitutional authority to recognize. The Department of the Interior’s processes and criteria bind the Department exclusively and should not be interpreted as limiting Congress’ discretion to recognize a Native polity as it deems appropriate. Congress has the final word as to whether a Native community should be formally acknowledged.

Congress’ original authority to recognize Native polities was articulated by the United States Supreme Court in United States v. Sandoval, where the Court explicitly held that “the questions whether, to what extent, and for what time [distinctly Indian communities] shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress.”

The Seventh Circuit Court of Appeals further explained in Miami Nation of Indians of Indiana v. United States Department of the Interior, that congressional recognition authority derives from Article I of the United States Constitution, which authorizes Congress to regulate commerce with Indians. Given that federal law characterizes Native polities as

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132 In the 1830s, Congress delegated broad authority to manage Indian affairs to the President and the Commissioner of Indian Affairs. See 25 U.S.C. § 2, 9.

133 Sandoval, supra note 15, at 46 (1913). (“in 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 . . . ”); Winnemem Wintu Tribe v. U.S. Dept. of Interior, 725 F. Supp. 2d 1119, 1132 (E.D. Cal. 2010).


136 Sandoval, supra note 15, at 46.

137 Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of the Interior, 255
“domestic dependent” rather than “foreign” nations, the prevailing view of the courts is that Congress has the power, “both directly and by delegation to the President, to establish the criteria for recognizing a tribe.” According to the Miami court, this arrangement makes “practical sense” because Congress has passed statutes granting various benefits and immunities to federally recognized Indian tribes and, “[n]aturally and legitimately, Congress is concerned which groups of Indians are given the status of tribes.”

Importantly, the Miami court notes that the recognition authority exercised by the executive branch through the Bureau of Indian Affairs’ administrative recognition process is delegated congressional authority rather than original executive authority. While this fact is not squarely addressed in Garcia’s comment, it is highly relevant to Garcia’s analysis of Congress’ authority to recognize a Native Hawaiian polity united by common descent. Specifically, understanding that the Bureau of Indian Affairs exercises delegated congressional authority to recognize Native polities highlights the logical flaw in Garcia’s argument that Congress’ authority to recognize Native polities is somehow limited by the Bureau of Indian Affairs’ administrative recognition process and its criteria.

F.3d 342, 345 (7th Cir. 2001).

138 The Miami court asserts that “[a]s an original matter, the power to recognize an Indian tribe might be thought quintessentially and exclusively Presidential, like the power to recognize (or not recognize) a foreign nation, even though Article I also gives Congress the power to regulate foreign commerce.” Id. (Internal citations omitted.) The court goes on to assert, however, that the executive branch’s authority with respect to the recognition of Native polities is not completely analogous to its authority to recognize foreign nations because Native polities possess a different legal and political status than foreign nations under federal law. The court then reaffirms that Congress maintains direct authority to establish the parameters for Native recognition and explains that the recognition authority exercised by the executive branch is delegated congressional authority, rather than original authority. Id. (stating that “the analogy to recognition of foreign governments has prevailed to the extent that Congress has delegated to the executive branch the power of recognition of Indian tribes without setting forth any criteria to guide the exercise of that power”) (emphasis added).

139 Id. (emphasis added).

140 Id.

141 Id.

Garcia dismissively notes that “[t]he current BIA recognition process is probably best understood as action taken by the executive branch pursuant to authority delegated to it by Congress, as well as under [Congress’] own inherent power,” but does not offer any analysis of this fact or address way in which this fact sharply undermines his contentions that the Bureau’s criteria and process should bind Congress’ actions. Garcia, supra note 8, at 123, n. 177.

142 See Id. at 127 (critiquing congressional recognition legislation because it is incongruous with BIA’s regulatory process) and 128 (asserting that congressional grants that fail to articulate a political historical basis for federal recognition on par with
As a matter of federal law, Congress is under no obligation to bow to administrative rules and processes developed by its delegate with respect to federal recognition.\textsuperscript{144} Consistent with this truth, Congress has stepped in and taken direct action to recognize Native polities, notwithstanding the pendency of acknowledgment petitions within the Bureau of Indian Affairs. For more than a decade, Congress has considered exercising its authority to eliminate the Bureau’s much maligned federal acknowledgment process entirely and to delegate Congress’ recognition authority to a different body that might administer that recognition authority differently.\textsuperscript{145}

B. \textit{Federal Case Law Imposes Very Few Practical Limitations on Congress’ Recognition Authority}

Notwithstanding Garcia’s unfounded claims to the contrary, the legal reality is that federal law places very few practical limitations on Congress’ authority to recognize Native polities. In the course of reaffirming Congress’ power under federal law to recognize Native polities, the \textit{Sandoval} Court asserted what appears to be the only limitation binding Congress’ recognition authority—that Congress may not “bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe.”\textsuperscript{146} The effect of this limitation, however, is quite minimal, because

\begin{quote}
[t]he Supreme Court has never refined the “arbitrariness” standard referred to in \textit{Sandoval}. In light of the deference given to congressional and executive determinations in this area, however, it would appear that the only practical limitations on congressional and executive decisions as to tribal existence are the broad requirements that: (a) the group have some ancestors who lived in what is now the United States before discovery by Europeans, and (b) the
\end{quote}

\textsuperscript{144} The administrative federal acknowledgment processes and criteria bind the Bureau of Indian Affairs exclusively and should not be interpreted as limiting Congress’ discretion to recognize a Native polity without regard to the Bureau’s processes and criteria. Mark D. Myers, \textit{Federal Recognition of Indian Tribes in the United States}, 12 STAN. L. & POL’Y REV. 271, 273, n. 32 (2001). Congress has the final word as to whether a tribe should be federally recognized. \textit{Steven Pevar, The Rights of Indians and Tribes} 263 (2d ed. 1992).


\textsuperscript{146} \textit{Sandoval, supra} note 15, at 46.
group be a “people distinct from others.”

Garcia attempts to weave together a set of limitations on Congress’ recognition authority by combining the holdings of Sandoval, a lower federal court case, a Supreme Court case that defines Indian tribes in the limited context of a specific federal statute, a Ninth Circuit case that explains when an unrecognized tribe may be considered a tribe for sovereign immunity purposes, and Cohen’s treatise on Indian law (which, ironically, states explicitly that no such limitations restrict Congress’ authority). Garcia acknowledges that no court has ever applied this so-called Express Grants Parameter, but he asserts that the fictional Parameter requires Congress to condition its recognition of Native polities on those polities’ ability to demonstrate political continuity. According to Garcia, the Parameter brings the process of congressional recognition in line with the process of administrative recognition, to the extent that both can be seen as requiring such a demonstration.

In addition to the fact that the Parameter and its purported requirements do not constitute an actual legal standard, Garcia’s unusually heavy reliance upon political continuity as a congressional recognition factor is further undermined by the controversial nature of the factor.

One of the major concerns driving the call for reform of the Bureau’s federal acknowledgment process is the “perversity” of the Bureau’s criteria for federal recognition. In particular, many take issue

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147 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, § 3.02[4], 142 (LexisNexis 2005).

148 Throughout the comment, Garcia emphasizes the significance of “political history” to federal recognition. Taken in context, it is clear that Garcia equates adequate “political history” with “political continuity” for purposes of his analysis. Accordingly, we have focused our analysis on the relevance of the political continuity of the Native Hawaiian people to the question of Congress’ authority to recognize a Native Hawaiian polity united by common descent.

149 Garcia, supra note 8, at 119 (asserting that “both routes to federal recognition are fundamentally predicated upon a particular Indian group’s political history satisfying the federal political-historical criteria”), and 131 (claiming that federal common law concerning political historical requirements for Express Grants appears less stringent than Mandatory Criteria but nevertheless precludes Congress from federally recognizing Indian group whose political history fails to establish that it was a viable political entity whose sovereignty United States may now recognize).

150 For example, Garcia contends that Congress’ failure “to articulate a political historical basis for federal recognition on par with the Bureau of Indian Affairs’ recognition criteria wrongfully treats federal recognition as if it were a remedial program, rather than an exclusive political action.” Garcia, supra note 8, at 128. Garcia even goes so far as to assert that political continuity “is the predicate factor determining eligibility for federal recognition under both routes available to obtain it” and concludes that “political history begets federal recognition.” Id. at 133.

151 CAROLE E. GOLDBERG ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 129 (6th ed. 2010); Mark D. Myers, Federal Recognition of Indian
with the Bureau’s requirement that Native polities “prove their status as self-governing entities continuously throughout history, substantially without interruption,” despite the integral role that federal and state policies have played in “the destruction and repression of these very same Native peoples and cultures.” As Steven Pevar notes, a Native polity’s struggle to prove continuous political or geographic existence is “a cruel basis for denying recognition given what the federal government has done to so many.” The injustice of this situation is particularly evident in cases where the federal government has stripped a Native polity of its land base, thereby precluding the entity from continuing to carry out its governmental functions, which can be a compelling marker of political continuity.

In an attempt to rectify this specific injustice, the proposed Indian Tribal Federal Recognition Administrative Procedures Act that has been considered by Congress over the past five years eliminates the Bureau’s political continuity criterion in favor of more reasonable criterion such as demonstrated continuity of community. This broader approach to recognition better comports with federal case law, which appears to place no practical limitations on Congress’ authority to recognize Native polities, beyond the broad requirements that a recognized polity be distinct and descended from ancestors that resided in the United States prior to sustained European contact.

C. The Inclusion of Native Hawaiian Within the Group of Native Polities That May Be Recognized by Congress

After unsuccessfully alleging that Congress’ recognition authority is limited by the Bureau of Indian Affairs’ processes and the “Express Grants Parameter,” Garcia argues that, under a “constrained view,” Congress’ authority to recognize a Native Hawaiian polity united by common descent is further limited by the Native Hawaiian people’s unique history and relationship with the United States. In Garcia’s opinion, this history and relationship bring the Native Hawaiian people outside the scope of Congress’ recognition authority. As is the case with many

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152 Myers, supra note 182 (citing Advisory Council on California Indian Policy).
154 Myers, supra note 182, 273, n. 32.
156 Kenneth E. Payson, Check One Box: Reconsidering Directive No. 15 and the Classification of Mixed-Race People, 84 CALIF. L. REV. 1233, 1245-48 (1996), and accompanying text.
proposals in Garcia’s comment, this “constrained view” finds no meaningful support in federal law.

“[F]ederal law ordinarily uses the term ‘Indian tribe’ to designate a group of native people with whom the federal government has established some kind of political relationship.”\(^\text{157}\) For example, in Sandoval, the Court discusses Congress’ authority with respect to the Pueblos of New Mexico, Native communities that hold their land in fee, are comprised of individuals who became citizens of the United States through the Treaty of Guadalupe Hidalgo, and differ in many other respects from the concept of “Indian tribe” that prevailed at the time of the decision.\(^\text{158}\) These differences notwithstanding, the Court determined that the Pueblos fell within the scope of Congress’ Indian commerce power and could be recognized as “Indians.”\(^\text{159}\) Similarly, the Interior Solicitor opined in 1932 that Alaska Natives are treated, in material respects, the same as the aboriginal tribes of the United States, despite early holdings of the courts and the Attorney General to the contrary.\(^\text{160}\) Likewise, for nearly a century, Congress has consistently asserted its authority to legislate with respect to the Native Hawaiian people on par with other Native peoples due to Congress’ asserted trust relationship with the Native Hawaiian community.\(^\text{161}\)

Garcia’s attempts to diminish the scope of Congress’ recognition authority by distinguishing Native Hawaiians from other Native peoples within the United States are generally based on misinformation and misunderstandings about the plight of the Native peoples of the continental United States. For example, Garcia asserts that Indian tribes were never “nations” in the Western sense and truly never possessed the opportunity to so become.\(^\text{162}\) In reality, many Native peoples living within

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157 Cohen, supra note 178 § 3.02[2] at 137.
158 Sandoval, supra note 15, at 175.
159 Id.
160 53 Interior Decisions 594-5 (1932). The Solicitor’s opinion is supported by a number of cases, including, among others, Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918); United States v. Berrigan et al., 2 Alaska 442 (D. Alaska 1905); and United States v. Cadzow, 5 Alaska 125 (D. Alaska 1914).
162 Garcia, supra note 8, at 139.
the United States interacted with the United States and other imperial nations pursuant to an international independence model prior to the War of 1812. These Native peoples adopted constitutions, negotiated treaties with foreign nations, and exercised plenary governing authority within their own territories, much like the Kingdom of Hawai‘i. Moreover, many of these Native peoples continue to assert their rights to full independence from the United States based on the United States’ unilateral and unauthorized appropriation of Native land, resources, and governing authority. While no Native political history is perfectly analogous to the political history of Native Hawaiians, it is also true that no Native political history is perfectly analogous to any other Native political history. This fact does not defeat the characterization of over 500 distinct Indian tribes, pueblos, and Alaska Native communities as Indian communities falling within the scope of Congress’ recognition authority.

Garcia’s arguments that Native Hawaiians are not “indigenous” because of the Kingdom’s history are equally unavailing. While it may be the case under international standards, it is not the case under federal law that the descendants of all of the Kingdom’s citizen-subjects, regardless of Native Hawaiian descent, possess a legal claim to self-determination. Specifically, it is incorrect to assert that, under federal law, indigenous rights must transmute into political or legal claims, and that “[a]t some point, an ethnic group transmutes into political body [sic] and extinguishes ethnic group claims.” Federal law does not draw this line in the sand between indigenous identity and political identity for recognition purposes. The authority of Congress to recognize a Native polity depends upon both the indigeneity and the political identity of the group. Political identity is not perceived by federal law as negating the indigeneity of a Native people, and indigeneity is not perceived as undermining the political identity of the people.

Failing to find an adequate and supportable argument that Congress lacks the authority to recognize a Native Hawaiian polity united by common descent, Garcia mounts his final argument—that a court evaluating the constitutionality of legislation recognizing such a Native Hawaiian polity must also address “the uncomfortable question of how much blood matters.”

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163 Goldberg, supra note 182.
164 Garcia, supra note 8, at 140.
165 Id. at 141.
166 See discussion, infra, Part III.
167 See discussion, infra, Part III.
168 Garcia, supra note 8, at 150.
IV. BLOOD QUANTUM AS A TOOL OF TERMINATION

Garcia purports to answer the complex question of how much blood matters by summarily asserting that: (1) the act of distinguishing between persons of Native Hawaiian descent and persons not of Native Hawaiian descent requires the Native Hawaiian polity to also distinguish between individuals possessing disparate proportions of Native Hawaiian blood;\(^{169}\) (2) a greater proportion of Native Hawaiian blood more closely ties an individual to Native Hawaiian history or genealogy;\(^{170}\) (3) a greater proportion of non-Hawaiian blood creates a stronger link to non-Hawaiian descent;\(^{171}\) and (4) an ethnic blood quantum of 50.01% is logically necessary to establish legitimate racial identity as a matter of blood, but a fifty percent blood quantum is the most practicable requirement because it ensures that an individual’s legal identity is based on “equal parts blood and ideology.”\(^{172}\)

These assertions rest on the tenuous and controversial assumptions that: (1) the concepts of descent, race, and blood quantum are coextensive; (2) “blood” is a scientific way to evaluate human identity; (3) genealogical distance is an accurate way to measure the connection of a Native Hawaiian person to the Native Hawaiian people; (3) the presence of other blood can somehow dilute Native Hawaiian blood; and (4) a “majority rules” approach is the only logical way to determine legitimate identity and access to group identity. In addition, Garcia dismisses in a few sentences the “philosophical arguments” that blood quantum paradigms are post-colonial constructs. In truth, understanding the historical, political and social context of blood quantum and unpacking the assumptions underlying blood quantum systems are integral to forming an intelligent opinion about the role that blood quantum should play in Native community membership.

\(^{169}\) Garcia, \textit{supra} note 8, at 153-54.

\(^{170}\) \textit{Id.} at 156.

\(^{171}\) \textit{Id.} at 157. Garcia does not address the obvious issue raised by this assertion—i.e., that “non-Hawaiian” is not an actual descent. Given Garcia’s logic, a person with a higher Hawaiian blood quantum than any other individual blood quantum could not claim a legitimate Hawaiian racial identity because the aggregate non-Hawaiian identities would dominate, creating a virtual identity void.

\(^{172}\) \textit{Id.} at 159-161. Garcia acknowledges that requiring a 50.01% blood quantum would create a quandary with respect to individuals possessing fifty percent blood quantum, as those individuals do not possess a majority or minority of any one type of blood. In response to this issue, Garcia lowers his proposed required blood quantum to fifty percent for “practical” purposes. Garcia then observes that a similar practical issue is raised by individuals possessing equal quanta of three or more types of blood. Garcia does not, however, propose that these individuals be afforded the same access to identity as persons possessing exactly fifty percent blood quantum. Presumably, according to Garcia’s logic, these individuals exist in a racial no-man’s land and have no right to claim any particular legitimate racial identity.
A. Differentiating Between Descent, Race, and Blood Quantum

1. Racializing Native Peoples

Despite Garcia’s automatic equation of the three, the ideas of Native descent, race, and blood quantum have not always occupied the same conceptual space. Early interactions between Native peoples and Europeans in the North American territory now considered the United States typically took the form of interactions between equal sovereigns. However, as time passed and political power shifted, Europeans and their American successors began to characterize Native peoples as permanently inferior, thereby facilitating dispossession of Native lands, resources and political authority.\(^{173}\) Initially, Europeans used the concepts of religious and national difference, rather than race, to justify their conquest of Native lands, but notions of European religious superiority, bolstered by sentiments of war eventually led to the concept of innate Indian difference.\(^{174}\) As Professor Bethany Berger observes, “[b]y the 1700s, ideas of national or cultural difference had merged with those of natural difference, and Indians had become red,” and “by the nineteenth century, as the division of human beings according to color progressed, red became the universal symbol of the inherent savagery and violence of Indian peoples.”\(^{175}\)

Like Indian tribes, the Native Hawaiian people were subject to this “familiar process of treating indigenous peoples as a race in need of reformation rather than a polity with political rights” in order to justify the appropriation of Native property and the denial of Native self-governance.\(^{176}\) For example,

\[\text{[a]s the missionaries [to Hawai‘i] confronted the failure of the law to produce the self-governing subject, they decided that Hawaiians lacked the capacity to become such persons. Complaints about their fundamental character, either too close to nature or too wedded to licentiousness and indolence, appeared more and more often in missionaries’ writings. Hawaiians were gradually reinterpreted as by nature unable to achieve the forms of self-governance associated with civilization. The problem of governance then shifted from elevating the Hawaiians to a state of self-governance to creating a system of governance within}\]


\(^{174}\) \textit{Id.} at 603-05.

\(^{175}\) \textit{Id.} at 610-11.

which these perpetual children could be adequately disciplined and controlled by those able to achieve adult status: Christian church members, but ultimately white males.\textsuperscript{177}

The concept of racial identity that was forced upon Native peoples, including Native Hawaiians, by Europeans and Americans did not comport with the traditional notions of descent underlying Native political and social organizing. The western concept of Native race is rooted in the ideas that there are consistent biological differences between certain groups of people. Traditional indigenous notions of descent, on the other hand, are neither based on nor concerned with "scientific" biological differences between groups. Rather, traditional indigenous notions of descent generally focus on the kinship, responsibility, and power associated with particular ancestral connections.

In the Native Hawaiian context, the sharp distinction between the traditional concept of descent and the western concept of race is evident in the following description of Native Hawaiian identity from \textit{Pehea Lā E Pono Ai? Native Lands and Foreign Desires}:

Hawaiian identity is, in fact, derived from the Kumulipo, the great cosmogonic genealogy. Its essential lesson is that every aspect of the Hawaiian conception of the world is related by birth, and as such, all parts of the Hawaiian world are one indivisible lineage. Conceived in this way, the genealogy of the Land, the Gods, Chiefs, and people intertwine with one another, and with all the myriad aspects of the universe. For if someone were to ask a Hawaiian, "Who are you?," he or she could only meaningfully answer by referring to his or her beginnings, to his or her genealogy and lineage, which is like a map that guides each Hawaiian’s relationship with the world. In traditional times, Hawaiians patterned their behavior after the ancestral example found in their genealogy. Today, we Hawaiians use genealogical relationships to establish our collective identity via a social network of extended ʻohana (family). Our shared genealogy helps us define our Lāhui (nation) as an entity distinct from the waves of foreigners that have inundated our islands.\textsuperscript{178}

As Kame‘eleihiwa’s description illustrates, to assume that Native racial identity and Native descent are one and the same is to improperly conflate two fundamentally incompatible ideas: (1) an identity unilaterally

\textsuperscript{177} \textit{Merry, supra} note 69, at 69.

\textsuperscript{178} \textit{Id.} at 2-3.
assigned to Native peoples under the auspices of “science” for the purpose of subordinating Native peoples to Whites and appropriating Native lands, resources, and political power; and (2) an identity inherited from Native ancestors that establishes connections between a community member and others in the community and confers upon the community member the responsibility and authority inherent to those connections. Nonetheless, like the United States Supreme Court did in Rice v. Cayetano, Garcia casually employs this “basic racist move” of mischaracterizing the Native people—a people bound together by traditional ancestral notions of belonging—as a “race” in order to deprive them their inherent self-governing rights.

By conceptually removing the Native Hawaiian people from their correct position as a sovereign political group internally bound by kinship and thrusting them into the American racial quagmire, Garcia subjects Native Hawaiians to the sordid history and idiosyncrasies of the American racial classification system. In particular, Garcia subjects Native Hawaiians to the United States’ perpetually evolving method of determining who may claim a particular racial identity.

B. Blood Quantum and Native Identity

The United States’ current preference for rigid, monoracial race classification is a sociopolitical construction that predates the nation itself. The American system of racial classification was originally designed as a mechanism for distributing labor responsibilities and social and political rights between the various peoples residing in the colonies that eventually became the United States. It has been used throughout history to determine such things as who could be subjected to slavery, who could constitute a whole person for constitutional purposes, who could own property, who could vote, and who could be naturalized as a United

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179 In Rice v. Cayetano, the Supreme Court invalidated a requirement that individuals be Native Hawaiian to vote for the trustees of a semi-autonomous agency created by the state constitution to manage assets for and better the conditions of Native Hawaiians. In doing so, the Court incorrectly compared Native Hawaiians to the Chinese, Portuguese, Japanese, and Filipino ethnic groups that immigrated to Hawai‘i. Rice v. Cayetano, 528 U.S. 495 (2000).

180 Berger, supra note 204, at 599.


States citizen. Yet from the very inception of the system, multiracial individuals have posed a threat to and “cause[d] anxiety for those for whom it [was] important to establish a one-category classification for everyone.”

A primary purpose of the existing racial classification system is to enable its users “to pigeonhole people” in order to have “a handy set of categories (and perhaps stereotypes) to relate them to.” Consequently, the government and society have constantly struggled to develop formal and informal rules that allow multiracial individuals to be categorized within the established racial classification system. The two main rules that the federal government instituted as part of this effort were the hypodescent (or “one drop”) rule and blood quantum requirements.

1. Matrilineal Slave Status and the “One Drop” Rule

Racial mixing between Whites and Blacks in what is now the United States “commenced at the very out-start of the vile slave trade.” “[I]ndeed, in those days many a negress was landed upon our shores already impregnated by someone of the demoniac crew that brought her over.” Therefore, one of the earliest questions of race confronted by the colonial governments was how to fit multiracial persons into the established sociopolitical racial structure. Consistent with the governments’ interest in furthering the slave trade and keeping power in the hands of Whites, the governments developed two general rules for

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183 See, e.g., U.S. CONST. art. I, § 2, cl. 3; art. IV, § 2, cl. 3; amend. XIII, § 1; amend. XIV, § 1; amend. XV, § 1; In re Ah Yup, 1 Fed. Cas. 223 (D. Cal. Cir. Ct. 1878).

184 Stephen Satris, “What Are They,” in AMERICAN MIXED RACE 53, 54-55 (1995). In light of this, it is no surprise that anti-miscegenation sentiment was so strong amongst Whites in the colonies and, later, the United States. The offspring of interracial relationships threatened to compromise the balance of power that heavily favored the White majority.

185 Id.

186 Id.

187 R.W. SHUFELDT, THE NEGRO: A MENACE TO AMERICAN CIVILIZATION 60 (1907), quoted in Hickman, supra note 212, at 1171.

188 Id.

189 See, e.g., 1662 Act XII, II Hening 170 (1662), quoted in Hickman, supra note 212, at 1175.
determining the racial identity of multiracial individuals: matrilineal slave status and the “one drop” rule.  

As early as 1662, the Virginia legislature created a statutory means of classifying multiracial individuals. The statute provided that mixed children of White men and Black slave women would be “held bond or free only according to the condition of the mother.” This matrilineal structure was a dramatic departure from the English common law rule that children follow the status of the father. The scheme inured greatly to the benefit of Whites because it insulated White men from responsibility for their multiracial offspring, and it added that offspring to the collection of human “property” belonging to the mothers’ slaveholders.

As the population of multiracial individuals grew over the next two centuries, the matrilineal slave status rule slowly gave way to blood quantum principles. Specifically, multiracial individuals began to be racially classified according to the percentage of their “blood” that was White or Black. For example, from 1785 to 1910, a person of mixed race was classified as a “Mulatto” in Virginia if they had one quarter “Negro blood.” The percentage of Negro blood that was required to render someone a Mulatto diminished consistently until Virginia announced in the mid-to-late 1920s that a “White” person was an individual with no trace of Negro blood, and a “Colored” person was anyone with any ascertainable trace of Negro blood. Pursuant to Virginia’s definitions of White and Colored, all persons of mixed race were racially classified as Black, regardless of their percentage of Black blood. This rule is commonly referred to as the “one drop” rule because it provided, in effect, that one drop of Black blood was sufficient to render a person Black under the law.

The one drop rule was a rule of hypodescent. It was based on the principle that a person of mixed racial heritage must assume the racial

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190 See Payson, supra note 187, at 1245-48.
191 1662 Act XII, II Hening 170 (1662), quoted in Hickman, supra note 212, at 1175.
192 Id.
193 Hickman, supra note 212, at 1175.
194 Id. at 1176.
196 Id.
197 Id.
198 Id.
199 See, e.g., Hickman, supra note 212, at 1187.
identity of the “lowest-ranking” racial group of that heritage.\textsuperscript{201} It effectively assigned multiracial individuals to a racial classification based on their non-White race, as though their non-White blood was a contaminant that precluded them from claiming a White racial identity, regardless of the quantum of that non-White blood. Although the one drop rule is now defunct as a legal tenet, it had dramatic and lingering effects on the way that multiracial identity is perceived in America.\textsuperscript{202} Most notably, it embedded in society the notion that, where a person is multiracial, one race must necessarily predominate at the expense of others.\textsuperscript{203} It foreclosed the idea that a person could simultaneously embrace more than one racial identity at a time.\textsuperscript{204} The one drop rule reified the belief that a person could be either or, but not both or many.

Garcia asserts that the use of Native Hawaiian descent to determine community membership is effectively the imposition of a hypodescent criterion.\textsuperscript{205} This assertion demonstrates a fundamental misunderstanding of both Native Hawaiian descent and hypodescent. As explained above, Native Hawaiian descent is a traditional cultural concept that predates and stands apart from modern western notions of race. While western theories of race rely upon “science” to assign biological and cultural identity to members of certain groups, the Native Hawaiian concept of descent looks to descent to determine community relationships.\textsuperscript{206} That Native Hawaiian racial identity has been superimposed on traditional Native Hawaiian ancestral identity is not axiomatic. It is simply a matter of convenience for external entities, such as the United States, that have an interest in defining the Native Hawaiian people and doing so in a way that minimizes the obligations of those external entities to Native Hawaiians. Accordingly, Native Hawaiian descent cannot properly be viewed as a racial criterion.

In particular, Native Hawaiian descent cannot be viewed as a hypodescent racial criterion. Even if one were to accept, purely for the

\begin{quote}
(“In the South it became known as the ‘one drop rule,’ meaning that a single drop of ‘Black blood’ makes a person a Black. It is also known as the ‘one Black ancestor rule,’ some courts have called it the traceable amount rule,’ and anthropologists call it the ‘hypodescent rule,’ meaning that racially mixed person are assigned the status of the subordinate group.”); see also Satris, supra note 215, at 59.
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\textsuperscript{201} Id.


\textsuperscript{203} Id.

\textsuperscript{204} Id.

\textsuperscript{205} Garcia, supra note 8, at 90, n.12, 155-56, 161.

\textsuperscript{206} EVA MARIE GARROUTTE, REAL INDIANS, IDENTITY AND THE SURVIVAL OF NATIVE AMERICA 41 (2003).
sake of argument, the misguided idea that Native Hawaiian descent is a racial marker, a Native Hawaiian descent requirement would be a blood quantum requirement rather than a hypodescent rule. Hypodescent rules function to deny individuals access to valuable racial identities (in most cases a White racial identity) on the grounds that the individual’s valuable blood is somehow tainted by less valuable or undesirable blood. The opposite notion that a person must possess a certain amount of blood, whether one drop or one hundred percent, in order to gain access a valuable racial identity constitutes a blood quantum requirement.

2. Native Peoples and Blood Quantum Requirements

The federal government has typically imposed this “opposite” of the one drop rule on multiracial individuals of Native descent. Specifically, the federal government has established standards in some contexts that prevent persons of Native descent from classifying themselves as Native if they cannot demonstrate that they have a certain quantum of Native blood. In addition to these federal blood quantum requirements, many Native communities now impose their own internal blood quantum requirements for purposes of determining tribal membership.

The notion of requiring a certain blood quantum for tribal membership was initially, in many cases, a foreign concept for Native communities, some of whom previously allowed for adoption and other means of incorporation into their communities. Nonetheless, several Native communities developed blood quantum requirements modeled after those that the Bureau of Indian Affairs established when it began maintaining tribal enrollment lists. Many of these blood quantum requirements were later enshrined in tribal constitutions drafted pursuant to the Indian Reorganization Act of 1934.

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207 For purposes of this section, we use the terms “value” and “valuable” to describe the association of certain racial identities with special social, political, and/or economic benefits.

208 See, e.g., Payson, supra note 187, at 1249 (stating that “different resource allocation issues resulted in the antithesis of the “one-drop” rule as applied to Native Americans”).

209 See id.


212 Id. at 495.

213 Id.
Many opponents of Native Hawaiian self-governance, like Garcia, challenge the use of Native Hawaiian descent as a criterion for determining eligibility to participate in the initial reorganization of a Native Hawaiian governing entity under federal law. These opponents argue that Native Hawaiian descent, standing alone, should not be enough to entitle a person to claim a Native Hawaiian identity, and they suggest that a Native Hawaiian identity should be available only to individuals with a “strong connection” to the Native Hawaiian governmental entity, evidenced by characteristics such as a threshold quantum of Native Hawaiian blood.

3. The Federal Government’s Use of Native Blood Quantum to Limit the Scope of Its Responsibility to Native Peoples

Despite their inherent differences, hypodescent rules and Native blood quantum requirements, such as those proposed by opponents of Native Hawaiian self-governance, share an important commonality — they are both designed to limit the access of multiracial individuals to valuable racial identities that would entitle them to special social, political, and economic benefits. For instance, when the one drop rule was crafted, a White racial identity was more valuable than other racial identities because it entitled a person to certain rights and privileges (e.g., voting, education, etc.) that were not available to members of other racial classifications. Similarly, when blood quantum requirements were instituted, a Native identity was of relatively high value because it could entitle a person to land, benefits, and political rights that were not available to members of other racial classifications.

In order to keep society’s power balance shifted toward it, the dominant elite must limit the access of others to the social, political, and economic resources that equate with power. Where a certain racial identity

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214 See, e.g., Statement of Gregory G. Katsas, Principal Deputy Associate Attorney General, United States Department of Justice, Before the Committee on Indian Affairs, United States Senate: Hearing on S. 310, The Native Hawaiian Government Reorganization Act of 2007, 110th Cong. 2-3, 10 (May 3, 2007).

215 Id. at 2, 10-11. In support of the blood quantum argument, Katsas cites Justice Breyer’s concurrence in Rice v. Cayetano, wherein Justice Breyer asserts that it would be unreasonable to allow persons with 1/500th Native Hawaiian blood to avail themselves of benefits reserved for Native Hawaiians. Rice v. Cayetano, 528 U.S. 495, 526-27 (2000).

216 See, e.g., U.S. CONST. art. I, § 2, cl. 3; art. IV, § 2, cl. 3; amend. XIII, § 1; amend. XIV, § 1; amend. XV, § 1; In re Ah Yup, 1 Fed. Cas. 223 (D. Cal. Cir. Ct. 1878).

entitles a person to those resources, then access to that racial identity must, in turn, be limited. Hence, the one drop rule, blood quantum, and other similar rules place the majority of multiracial persons where they can do little to claim resources and shift the balance of power — in racial classifications that are of comparatively low social, political, and economic value — while consistently shrinking the universe of persons able to claim a valuable racial identity. As C. Matthew Snipp poignantly reflected during a recent symposium on Native blood quantum requirements, “[b]lood quantum is a policy instrument that fits into a larger mission that the federal government has been engaged in since the founding of this country, and that is to solve the [Native] problem by making [Natives] go away.”

Blood quantum requirements are neither scientific nor an accurate way to measure a person’s connection to a community. Blood quantum requirements are a political tool designed to limit community membership for the purposes of distributing finite resources. With respect to Native peoples specifically, blood quantum requirements have served as a means of perpetually shrinking the universe of persons to whom the federal government owes trust obligations until no such persons exist. If a Native community elects to utilize blood quantum as a membership criteria in the face of these dangers, that is the community’s sovereign right, but there is no evidence to suggest that a Native community must do so in order to bring itself within the scope of Congress’ recognition authority.

CONCLUSION

Garcia contends that federal recognition “transforms” a Native polity into a domestic dependent nation and “establishes” a trust relationship between that polity and the United States. This misunderstanding drives opponents of Native Hawaiian rights to oppose federal recognition, and compels some individuals who are passionately committed to the advancement of Native Hawaiian rights to join their opponents in defeating federal recognition. More specifically, opponents of Native Hawaiian rights reject federal recognition because they perceive it as a process of wrongfully conferring upon the Native Hawaiian community a legal and political status to which it is not entitled. Along those same lines, some fervent supporters of Native Hawaiian rights reject federal recognition because they perceive it as a process of wrongfully conferring upon the Native Hawaiian community a legal and political status that belongs to the Native Hawaiian people, independent of any federal grant or acknowledgment, and is not the federal government’s to confer.


219 Garcia, supra note 8, at 116-17.
In order to alleviate confusion on both sides, it is important to note that federal recognition does not purport to “transform” the Native Hawaiian people into a nation or “establish” a trust relationship between the Native Hawaiian people and the United States. Federal recognition confirms the Native Hawaiian people’s existence as a distinct political society under federal law, and institutionalizes the government-to-government relationship between the Native Hawaiian people and the United States that has always existed under federal law (albeit in different forms). Federal recognition simply formalizes the trust relationship that has governed interactions between the Native Hawaiian people and the federal government since the United States incorporated Hawai‘i into its claimed territory over a hundred years ago.

While Congress’ authority to “transform” a group into a domestic dependent nation and “establish” a trust relationship with that group might raise difficult questions under constitutional law, Congress’ authority to acknowledge formally the existence of a pre-existing Native polity with whom Congress has maintained a consistent trust relationship since the United States claimed the polity’s territory is much less controversial. According to federal law, Congress has constitutional authority to federally recognize a Native people, such as the Native Hawaiian people, whose ancestors exercised governing authority within an area that the United States now claims as part of its territory. The Native people need not have an undisturbed history of self-governance in order to receive congressional recognition, but if such political continuity were an absolute legal requirement, the Native Hawaiian people would be able to satisfy that requirement, given the persistence of Native Hawaiian self-governance from historical times through the present.

In addition, Congress’ broad authority to recognize Native peoples is not sharply limited by constitutional equal protection norms. As Garcia admits,

[m]embership in a federally recognized tribe is a political,

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221 It is “[p]erhaps the most basic principle of all Indian law . . . that those powers lawfully vested in an Indian nation are not, in general, delegated powers granted by express acts of Congress, but rather ‘inherent powers’ of a limited sovereignty which has never been extinguished.” U. S. v. Wheeler, 435 U.S. 313, 322 (1978) (internal citations omitted). See, e.g., Ex Parte Crow Dog, 109 U.S. 556 (1883); Talton v. Mayes, 163 U.S. 376 (1896).
not racial, classification and is judicially significant. As the Supreme Court explained in Morton v. Mancari, the political nature of the relationship between the United States and federally recognized tribes requires courts to apply rational basis judicial scrutiny to, and thus uphold, laws rationally related to fulfilling that political relationship. . . . Mancari’s distinction between political entities and racial groups is not a mere legal fiction.\footnote{222}

A Native polity has the inherent authority to define its membership according to common descent, and Congress has the authority to legislate to extend federal recognition to a Native polity so constituted, so long as Congress’ action is rationally related to fulfilling the federal government’s trust relationship with that Native polity. Accordingly, Congress even has the authority to take actions that incorporate the concept of blood quantum — which is decidedly more “racial” in nature than the notion of descent — provided that there is a rational basis for considering blood quantum.

Congress’ authority under federal law to consider blood quantum when legislating with respect to Native polities does not, however, require a Native polity to utilize a blood quantum membership criterion in order to obtain federal recognition. A number of federally recognized Native polities are united according to common descent without additional blood quantum requirements. Moreover, as the detrimental impacts of blood quantum requirements on Native communities become more apparent with each subsequent generation, blood quantum requirements are being revealed as a mechanism that the federal government may use to circumvent rather than fulfill its trust obligations to Native peoples. Thus, not only are blood quantum requirements not a prerequisite for federal recognition, they could potentially subvert the ultimate intent of federal recognition, which is to protect the sovereignty and continued existence of Native peoples.

We do not mean to suggest, in conclusion, that federal recognition is the best way to protect the land, resources, and sovereignty of the Native Hawaiian people. The potential benefits and detriments that may flow from federal recognition must be carefully weighed in the context of the social, political, and economic goals that the community seeks to achieve. Our intent is simply to demonstrate that, to the extent that the community wants to avail itself of the benefits that federal recognition has to offer, Congress possesses the constitutional authority to extend that recognition, and the community’s decision to exercise its inherent authority to define its membership according to common descent, without blood quantum requirements, does not preclude Congress from exercising its recognition authority.

\footnote{222} Garcia, \textit{supra} note 8, at 118.