

Government of the People, by the People, for the
People: Cultural Sovereignty, Civil Rights, and Good
Native Hawaiian Governance

Breann Swann Nu‘uhiwa *

I.	INTRODUCTION	58
II.	CULTURAL SOVEREIGNTY	62
III.	CIVIL RIGHTS IN NATIVE HAWAIIAN HISTORY AND TRADITION	65
	A. <i>Civil Rights Prior to Contact</i>	66
	B. <i>The Displacement of Kuleana</i>	69
	C. <i>The Native Hawaiian Response</i>	73
	D. <i>The Persistence of Traditional Values in Contemporary Native Hawaiian Society</i>	75
IV.	FEDERAL EXPECTATIONS REGARDING NATIVE GOVERNMENTS AND CIVIL RIGHTS.....	79
	A. <i>Relevant Federal Indian Law Principles</i>	80
	1. Inherent Native Authority	80
	2. The Trust Relationship	81
	3. Federal Plenary Power	83
	B. <i>Inherent Authority, Trusteeship, and Plenary Power in the Civil Rights Context</i>	85
	1. Inherent Authority to Administer Justice and Determine the Form of Government	85
	2. Congressional Limitations on Inherent Governing Authority	85
	3. Civil Rights in Modern Native Governments	87
	4. Civil Rights and the Native Hawaiian Government.....	88
	C. <i>Constitutionalism and the Protection of Civil Rights in Native Communities</i>	89
	1. The Adoption of Written Constitutionalism by Native Governments	89
	2. Conflicts Between Written Constitutionalism and Native Values.....	93
	3. Written Constitutionalism and the Native Hawaiian Government.....	94

* Lecturer in Law, William S. Richardson School of Law, University of Hawai‘i; LL.M. in Tribal Policy, Law and Government, Arizona State University; J.D., University of Southern California; B.A. Yale University. I would like to thank Ka Huli Ao Center for Excellence in Native Hawaiian Law and Professors Melody MacKenzie, Susan Serrano, Kapua Sproat, Rebecca Tsosie, Robert Clinton, and Mehanaokala Hind for their valuable mana‘o and support.

V. RE-ENVISIONING A KULEANA SYSTEM	96
A. <i>Looking Within to Develop Civil Rights Protections</i>	97
1. Good (Native) Governance	104
VI. CONCLUSION - GOOD (NATIVE HAWAIIAN) GOVERNANCE.....	105

I. INTRODUCTION

Real power lies with those who design the tools—it always has.
—Dr. Kathie Irwin¹

In 2014, the Native Hawaiian Roll Commission² will certify the official roll of qualified Native Hawaiians who will be eligible to participate in the process of reorganizing a Native Hawaiian governing entity.³ After the Roll Commission publishes notice of the final roll, the Commission will dissolve, and responsibility for moving the government reorganization process forward will shift to the members of the roll.⁴ In order to maintain momentum and encourage success, the members of the roll will likely hold a convention to address foundational government reorganization issues.⁵

The anticipated convention will provide an opportunity to address long-standing issues such as citizenship criteria, the special rights of

¹ Kathie Irwin, *Towards Theories of Maori Feminisms*, in FEMINIST VOICES: WOMEN'S STUDIES TEXTS FOR AOTEAROA NEW ZEALAND 1, 5 (R. Du Plessis ed. 1992).

² Act 195, HAW. REV. STAT. § 10H (2011). This Act formally recognizes the Native Hawaiian people as the only indigenous, aboriginal, maoli people of Hawai'i and establishes a Native Hawaiian Roll Commission responsible for preparing and maintaining a roll of qualified Native Hawaiians. Under Act 195, the roll of qualified Native Hawaiians compiled by the Native Hawaiian Roll Commission will be used to determine who is eligible to participate in the process of reorganizing a Native Hawaiian government for purposes of Native Hawaiian self-governance. Act 195 does not recognize a Native Hawaiian government or provide a specific process for reorganizing such a government. Act 195 (1) recognizes the Native Hawaiian community as a distinctly native community; (2) reaffirms the State of Hawaii's support for the Native Hawaiian community's development of a reorganized Native Hawaiian government; and (3) provides a process for officially enrolling as a member of the Native Hawaiian community who is eligible to participate in the reorganization of a Native Hawaiian government. Subsequent decisions about reorganizing the Native Hawaiian government and obtaining recognition of the reorganized government will be made by the enrolled members of the Native Hawaiian community and advanced through additional action. *Id.*

³ HAW. REV. STAT. § 10H-4(b) (2011) (stating that “publication of the initial and updated rolls shall serve as the basis for the eligibility of qualified Native Hawaiians whose names are listed on the rolls to participate in the organization of the Native Hawaiian governing entity.”).

⁴ HAW. REV. STAT. § 10H-6 (2011).

⁵ HAW. REV. STAT. § 10H-5 (2011).

Hawaiian Homes Commission Act beneficiaries, and the types of external recognition the Native Hawaiian governing entity might pursue. The convention will also afford the enrolled membership an opportunity to “engage in some of the most delicate and complicated creative work that is being done in this world right now—trying to adapt social and political institutions to the needs of [Native peoples’] own communities, questioning what to change and what to preserve.”⁶ In particular, the enrolled membership will likely determine at convention how the Native Hawaiian governing entity will provide civil rights protections to its citizens and others affected by its exercise of powers and authorities.

Pursuant to both federal law and Native peoples’ own understandings, Native governments are sovereign entities with inherent authority to govern their territories in accordance with their communities’ own intrinsic values.⁷ This inherent authority includes the power to determine the structure of Native justice systems and the power to use distinctly Native mechanisms to restrain government power and protect individual autonomy.⁸ However, because Native governments operate within a geographic area that the United States claims to control, they are regularly forced to contend with the values, expectations, and interests of other sovereigns—such as state and federal governments—who purport to operate within the same political space. Unfortunately, the values, expectations, and interests of these other sovereigns are often influenced by the widespread and pernicious stereotype that Native governments within the United States⁹ “are unfair to outsiders, ignore or suppress their

⁶ Sam Deloria, Keynote Address at Warm Springs (Nov. 12, 1979) *as cited in* Mary Jo B. Hunter, *The Anatomy of a Tribal Judicial Decision or How to Merge the Indian with the Law in Tribal Sovereignty in the 21st Century*, Course Materials of the 25th Annual Indian Law Conference of the Federal Bar Association 60 (Apr. 2000).

⁷ *See* *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978) (asserting that “[t]he powers of Indian tribes are, in general, ‘inherent powers of a limited sovereignty which has never been extinguished,’” and further asserting that “Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.”).

⁸ *See* FELIX COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* § 4.01[2][a] (4th prtg. 1945) (explaining that constituting and regulating the form of government is a quintessential attribute of Native sovereignty). Pursuant to its so-called plenary power, the federal government has limited certain aspects of this inherent Native authority. For example, the Indian Civil Rights Act, as amended by the Tribal Law and Order Act, imposes some, but not all, of the limitations contained in the Bill of Rights of the United States Constitution on Native governments. *See also* 25 U.S.C. § 1302 (2006).

⁹ I use the phrase “Native governments within the United States” for the sole purpose of distinguishing between Native governments operating within the purported territorial boundaries of the United States and Native governments operating outside those boundaries. By using this phrase, I do not mean to suggest that the United States’ territorial claims to Native lands, or its attendant claims to political power over Native peoples, are valid. Those are highly controversial questions that are outside the scope of

members' individual liberties, and rule without accountability."¹⁰ In order to counteract this unfounded stereotype, many Native governments include verbatim recitations of federal and state civil rights protections in their constitutions and statutes, despite the fact that those civil rights protections are often culturally irrelevant and tend to impede the expression of Native sovereignty.¹¹

This discord between Native and non-Native expectations regarding civil rights is one of the primary issues that the convention participants will encounter if the enrolled members seek to reorganize a sovereign government that would be viable within the framework of federal law if federal acknowledgement were pursued.¹² While there is currently no certainty about the specific terms and conditions that might

this article.

¹⁰ Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1061 (2007).

¹¹ Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L. J. 889, 895-96 (2003).

¹² The federal government has yet to formalize a government-to-government relationship with the Native Hawaiian people under federal law. For nearly a century, Congress has acknowledged the existence of a special legal and political relationship between the United States and Native Hawaiians, but the specific contours of that relationship remain undefined, especially as they relate to the authority of the Native Hawaiian people to engage in self-governance. This lingering ambiguity has rendered the Native Hawaiian community vulnerable to legal attacks by non-members who seek to eradicate the community's political distinctiveness and force its full assimilation into mainstream American society. *See, e.g.,* Rice v. Cayetano, 528 U.S. 495 (2000) (invalidating state process limiting voting for Office of Hawaiian Affairs Trustees to Native Hawaiian voters); Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate, 470 F.3d 827 (9th Cir. 2006) (based on challenge to authority of school created through charitable testamentary trust, established by last direct descendant of Native Hawaiian monarchy, for education and upbringing of Native Hawaiians to exercise preference in admission for Native Hawaiian children). In an effort to safeguard the authority of the Native Hawaiian community to provide for the education, welfare, and governance of its members, Native Hawaiians collaborated with the federal and Hawai'i state governments to create proposed legislation aimed at clarifying the nature of the relationship between the United States and Native Hawaiians. The product of that collaboration is the Native Hawaiian Government Reorganization Act, which has taken a variety of different forms since 2000. The Act provides a process for the reorganization of a sovereign Native Hawaiian government within the framework of federal law and the reaffirmation of a special legal and political relationship between the United States and the Native Hawaiian people that is similar in type and nature to the relationship the United States has with federally recognized Indian tribes. *See, e.g.,* Native Hawaiian Government Reorganization Act of 2012, S. 675, 112th Cong. §§ 2(4) (acknowledging special political and legal relationship between federal government and Native Hawaiian people) and § 3(6) (stating that "[t]he term 'special political and legal relationship' means the nature of the relationship between the United States and federally recognized Indian tribes.").

apply to Native Hawaiian federal acknowledgement, the U.S. Congress has repeatedly expressed an expectation that a Native Hawaiian government operating within the framework of federal law will provide civil rights protections to its citizens and other persons affected by its exercise of governmental powers and authorities.¹³

Yet “civil rights,” as they are understood and articulated by the federal government, are not necessarily congruous with core Native Hawaiian beliefs about leadership, relationships, and responsibility. Furthermore, as history demonstrates, the wholesale appropriation of American rights principles by the Native Hawaiian people can hinder Native Hawaiian sovereignty and privilege non-community members over community members.¹⁴ Accordingly, the founders of the reorganized Native Hawaiian government must take special care to balance external expectations with Native Hawaiian beliefs and values in order to develop an approach to civil rights that maximizes Native Hawaiian sovereignty. This article seeks to provide information and analysis that may be of use to the Native Hawaiian convention participants as they design a civil rights approach.

Part II explains why the concept of Native *cultural sovereignty*, as opposed to Native *political sovereignty*, is the appropriate starting point for an analysis of whether and how the Native Hawaiian governing entity should provide for the protection of civil rights.

Part III examines Native Hawaiian jurisprudential traditions regarding restraints on government power and the protection of individual autonomy in order to determine the meaning of Native Hawaiian sovereignty in the context of civil rights. In furtherance of this objective, Part III seeks to discern what might be considered the “core elements of [Native Hawaiian] cultural existence which may not be destroyed or removed”—those elements that constitute the “critical constructive material upon which [the] community rebuilds itself.”¹⁵

Part IV describes the federal government’s general assumptions and expectations regarding the protection of civil rights by Native

¹³ See, e.g., S.2899, 106th Cong. § 7(b)(3)(A)(iii) (2000); S. 344, 108th Cong. § 6(b)(2)(A)(vi) (2003); S. 147, 109th Cong. §§ 7(c)(2)(B)(iii)(I)(cc), 7(c)(4)(A)(vi) (2005); S. 310, 110th Cong. §§ 7(c)(2)(B)(iii)(I)(cc), 7(c)(4)(A)(vi) (2007); S. 1011, 111th Cong. §§ 7(c)(2)(B)(iii)(I)(cc), 7(c)(4)(A)(vi) (2009); S. 675, 112th Cong. §§ 8(c)(2)(B)(iii)(I)(cc), 8(c)(4)(A)(vi), 10(c) (2011).

¹⁴ See, e.g., JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAII? 30-53 (2008) (explaining that Kingdom of Hawaii’s recognition of “rights” of non-Hawaiians to own property in Hawai‘i functioned to dispossess Native Hawaiian community of vast portions of its ancestral lands).

¹⁵ Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL’Y REV. 191, 199, 202 (2001).

governments within the United States. Given these assumptions and expectations, Part IV also considers the federal government's probable perspective regarding the protection of civil rights by the Native Hawaiian government and analyzes the extent to which the Native Hawaiian government may wish to accommodate the federal government's perspective in order to advance Native Hawaiian sovereignty.

Part V concludes by proposing an approach to civil rights that is based on core Native Hawaiian philosophies; reconciles the values, expectations, and interests of the federal government; and could serve as a source and expression of Native Hawaiian sovereignty.

II. CULTURAL SOVEREIGNTY

The laws of those governments will not do for our government. Those are good laws for them, our laws are for us and are good laws for us, which we have made for ourselves.

—*People of the Land to King Kamehameha III, 1845*¹⁶

For over a century, federal Indian law has advanced the notion that federal law is of paramount importance when evaluating questions of Native sovereignty.¹⁷ As a result, when we are confronted with questions about Native sovereignty, such as whether and how a Native Hawaiian government might protect civil rights, we commonly begin with an analysis of federal law and work backward.¹⁸ We tend to ask first what federal law requires or prohibits with respect to Native governance. Then, as a secondary inquiry, we ask what governing authority Native peoples may exercise in light of the federal government's requirements and prohibitions. As Professor Rebecca Tsosie and former Comanche Nation of Oklahoma Chairman, Wallace Coffey explain, this is a limiting and disempowering method of assessing Native sovereignty because it prioritizes the federal government's perspective over Native peoples' own understandings and leaves Native peoples perpetually "vulnerable to restrictions on their sovereignty, and perhaps even to the total annihilation of their sovereignty."¹⁹

Tsosie and Coffey challenge Native communities and their leaders,

¹⁶ SAMUEL M. KAMAKAU, RULING CHIEFS OF HAWAII 400-01 (rev. ed. 1992).

¹⁷ *See, e.g., Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (asserting that United States Congress has exercised plenary power over Native peoples "from the beginning.").

¹⁸ *See, e.g., Matthew L.M. Fletcher, Resisting Federal Courts on Tribal Jurisdiction*, 81 U. COLO. L. REV. 973, 975 (2010) (observing that "[m]ost everyone—from tribal legislators to tribal courts to tribal members—starts their Indian country jurisdictional analyses with reference to what the United States Supreme Court has held, subjugating local tribal law in favor of outsider federal law.").

¹⁹ Coffey & Tsosie, *supra* note 15, at 194.

attorneys, and citizens to reject this disempowering approach and embrace a different thought process that begins with an introspective probe into the Native community’s own understandings.²⁰ Tsosie and Coffey denounce automatic adherence to the federal government’s definition of Native sovereignty, which is rooted in the notion of *political sovereignty*,²¹ and urge Native peoples to develop an organic understanding of their own sovereignty that is based on community knowledge.²² This organic notion of sovereignty constitutes *cultural sovereignty*, the effort of Native polities and Native peoples “to exercise their own norms and values in structuring their collective futures.”²³ As Tsosie and Coffey explain:

Cultural sovereignty is [our Ancestors’] legacy to us. 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. In each of these instances, our Ancestors exercised governmental authority to protect their lands, resources, peoples and cultures . . . We know who we are and we know the places that we were born. Once in a while we may take a journey away, but ultimately, we always come home.²⁴

²⁰ *Id.* at 191-92; *see also* Derek H. Kauanoë & Breann Swann Nu‘uhiwa, *We Are Who We Thought We Were: Congress’ Authority to Recognize a Native Hawaiian Polity United by Common Descent*, 13 ASIAN-PACIFIC L. & POL’Y J. 117, 125-27 (2012).

²¹ Coffey & Tsosie, *supra* note 15, at 194. Federal Indian law’s notion of Native sovereignty is rooted in the European understanding of sovereignty, which primarily involves the externally acknowledged authority of governing entities to assert their independence from other governing entities and to control activities and interactions within their designated territories. The term derives from the Middle English “soverainte.” Early expositions of the concept include Jean-Jacques Rousseau’s *Du Contrat Social* (Les Editions du Cheval Aile 1947) (1763) and St. Thomas Aquinas’ *Summa Theologica* Vol. II. This specific understanding of sovereignty carries with it a host of assumptions about human nature, social organizing, and the purpose of government that are distinctly western and not necessarily valid in Native communities. As alluded to in Part II of this article, this type of sovereignty is most properly characterized as “political sovereignty,” and it is an inadequate lens through which to view Native self-determination and self-governance. Coffey & Tsosie, *supra* note 15, at 192-96. The concept of political sovereignty does, however, provide a basis for understanding what the federal government believes about the governmental powers and privileges of Native peoples such as the Native Hawaiian people. Kauanoë & Nu‘uhiwa, *supra* note 20, at 126-27.

²² Coffey & Tsosie, *supra* note 15, at 196; *see also* Kauanoë & Nu‘uhiwa, *supra* note 20, at 125-26.

²³ Coffey & Tsosie, *supra* note 15, at 196.

²⁴ *Id.*

According to Tsosie and Coffey, the central challenge facing those seeking to understand cultural sovereignty is to develop a notion of sovereignty that originates within Native societies and carries a cultural meaning consistent with the traditions of those societies.²⁵ In an effort to facilitate this “change in our thinking and perhaps also . . . change in our priorities,” Tsosie and Coffey suggest three foundational inquiries: (1) “where Native peoples should ‘locate’ cultural sovereignty within their existing social structures and order”; (2) what the philosophical core of Native belief systems reveal about “what ‘sovereignty’ means, what ‘autonomy’ means, and what rights, duties, and responsibilities are entailed in our relationships”; and (3) “how we should conceptualize the relationship between Native peoples’ political and cultural sovereignty.”²⁶ Within the conceptual framework shaped by these inquiries, the Native community’s own perspective is the primary consideration, and the expectations of neighboring sovereigns are secondary considerations.²⁷

The following language from a 1996 letter to the National Chief of the Assembly of First Nations of Canada from the Mohawk Nation Council of Chiefs illustrates the proper order of considerations in a Native sovereignty analysis:

Our sovereignty exists . . . our legitimacy as a people comes from our Creator [W]e, as a people, have the right to make our own laws for our own people in our own territories, free from outside interference. This is not to say that we can do as we please, without regard for our neighbors These three rows [of beads in the treaty] represent peace, respect and friendship—the principles by which we are to co-exist. The tri-lateral beads serve to keep us at a respectful distance of one another, so that we do not accidentally trip over one another or otherwise cause distress.²⁸

Consistent with Tsosie and Coffey’s proposed framework, the Council of Chiefs begins its analysis by locating the community’s identity and political power in its relationship with the Creator. Subsequently, the Council articulates the Mohawk perspective regarding the meaning of

²⁵ *Id.* at 197.

²⁶ Coffey & Tsosie, *supra* note 15, at 196, 209; *see also* Kauanoe & Nu’uhiwa, *supra* note 20, at 127.

²⁷ Kauanoe & Nu’uhiwa, *supra* note 20, at 127.

²⁸ Letter from Mohawk Nation Council of Chiefs to Ovide Mercredi, National Chief, Assembly of First Nations (July 8, 1996), *available at* <http://sisis.nativeweb.org/mohawk/ovide.html> [hereinafter Letter from Mohawk Nation Council of Chiefs].

sovereignty and its attendant rights, duties, and responsibilities. After establishing the community’s perspective, the Council acknowledges that neighboring sovereigns also have expectations and interests that the Mohawk feel obliged to consider when exercising their governing power. The Council then concludes by proposing a solution for reconciling the community’s perspective with its external relationships that is consistent with the community’s core values of peace, respect, and friendship.

This article employs the Native sovereignty framework proposed by Tsosie and Coffey, and illustrated by the Mohawk Nation Council of Chiefs, to analyze Native Hawaiian sovereignty in the context of civil rights, and to propose a civil rights approach for the founders of the reorganized Native Hawaiian government to consider when they begin to reconstitute the government.

III. CIVIL RIGHTS IN NATIVE HAWAIIAN HISTORY AND TRADITION

[O]ur challenge today is to reach back into the past and locate the core elements which will play a role in the development of our collective future.

– Wallace Coffey and Rebecca Tsosie²⁹

The first two inquiries in the cultural sovereignty framework aim to “locate” Native sovereignty within the existing social structures and order of the Native community and probe the Native community’s philosophical core to identify, among other things, what rights, duties, and responsibilities are entailed in the community’s relationships.³⁰ For purposes of analyzing Native Hawaiian cultural sovereignty in the context of civil rights, these two inquiries are indivisible.

In order to determine the potential locus of Native Hawaiian sovereignty with respect to civil rights, we must first examine Native Hawaiian jurisprudential traditions regarding restraints on government power and protection of individual autonomy.³¹ In particular, we must understand how Native Hawaiian society has conceptualized government power and individual autonomy over the course of its history, and we must identify core understandings that are so fundamental to the identity of the community that they have transcended the community’s significant social, political, and economic changes.³² In other words, locating Native

²⁹ See Coffey & Tsosie, *supra* note 15, at 196.

³⁰ See Letter from Mohawk Nation Council of Chiefs, *supra* note 28 and accompanying text.

³¹ See Coffey & Tsosie, *supra* note 15, at 199-200 (asserting that Native communities seeking to define their sovereignty from within “will need to examine their own jurisprudential traditions to assess the limitations on government power over individuals.”).

³² See *id.* at 202 (suggesting “a different type of thinking, one that sees past and

Hawaiian sovereignty with respect to civil rights requires us to identify which Native Hawaiian ideas about sovereignty and civil rights constitute the “living tradition” of the community.

A. *Civil Rights Prior to Contact*

When the original ancestors of the Native Hawaiian people first settled in the Hawaiian archipelago, “no man was made chief over another.”³³ Early Hawaiian society functioned pursuant to a “highly organized, self-sufficient subsistence social system,” according to which elders provided leadership and guidance to the younger members of their extended families who “performed most of the daily productive work of fishing, cultivation, and gathering.”³⁴ Within this family-based governing system, the intimate family relationships between the community’s leadership and the community’s people compelled the leadership to act in the people’s best interests.³⁵ Like other Native communities existing contemporaneously, early Native Hawaiian society neither had nor needed a discreet notion of civil rights because every member of a family was related to every other member of the family.³⁶

Subsequently, voyaging between Hawai‘i and Tahiti sparked geometric population growth in Hawai‘i.³⁷ During the expansion period, the Native Hawaiian people restructured their existing social and political systems and centralized leadership responsibility in a newly formed sociopolitical class known as the Ali‘i³⁸ (chiefs).³⁹ The Ali‘i governed pursuant to a “system of political and social relationships based on obligations as well as bonds of affection.”⁴⁰ Within the Ali‘i system,

future generations as related to the present generation by core elements of cultural existence which may not be destroyed or removed.”).

³³ SAMUEL M. KAMAKAU, *KA PO‘E KAHIKO: THE PEOPLE OF OLD* 3 (1992).

³⁴ DAVIANNA PŌMAIKA‘I MCGREGOR, *NĀ KUA‘ĀINA* 24 (2007).

³⁵ DAVIDA MALO, *KA MO‘OLELO HAWAI‘I ENGLISH TRANSLATION* 42 (2006); KAMAKAU, *supra* note 33, at 3; VINE DELORIA, JR. & CLIFFORD M. LYTLE, *THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY* 201 (1984).

³⁶ *See* DELORIA & LYTLE, *supra* note 35, at 201 (observing that “Indian tribal societies had no concept of civil rights because every member of the society was related, by blood or clan responsibilities, to every other member.”).

³⁷ MCGREGOR, *supra* note 34, at 25; MALO, *supra* note 35, at 42; KAMAKAU, *supra* note 33, at 4.

³⁸ Because ‘ōlelo Hawai‘i (the Hawaiian language) is an indigenous, rather than foreign, language in Hawai‘i, Hawaiian words are not italicized in this article unless italicization is required to preserve the integrity of cited material.

³⁹ MALO, *supra* note 35, at 42; KAMAKAU, *supra* note 33, at 4.

⁴⁰ NOENOE K. SILVA, *ALOHA BETRAYED* 40 (2004). Professor Silva differentiates between the feudal system in Europe in the Middle Ages and the ali‘i

which centered around land tenure, “[a] reciprocal relationship was maintained: the *Ali‘i Nui* [(high-ranking chiefs)] kept the *‘Āina* [(land)] fertile and the *Akua* [(gods)] appeased; the *maka‘āinana* [(people of the land)] kept the *Ali‘i Nui* [(high-ranking chiefs)] clothed and fed.”⁴¹ Professor Lilikalā Kame‘eleihiwa explains:

Ali‘i Nui were the protectors of the *maka‘āinana* Should a famine arise, the *Ali‘i Nui* was held at fault and deposed Should an *Ali‘i Nui* be stingy and cruel to the commoners . . . he or she would cease to be *pono*,⁴² lose favor with the *Akua* and be struck down, usually by the people.⁴³

As Professor Kame‘eleihiwa’s description illustrates, the primary restraint on the governing power of the *Ali‘i* was the *Ali‘i*’s own responsibility to provide just and productive leadership. Beyond the gods’ laws and the sacred chiefly laws, very few external legal restraints purported to limit the actions of the *Ali‘i*.⁴⁴ However, additional external restraints were not necessarily needed to control the *Ali‘i*’s exercise of governing power, because the authority of the *Ali‘i* to govern was inseparable from the responsibility of the *Ali‘i* to govern well. Concepts of authority and responsibility are so indivisible in traditional Native Hawaiian thought that they are both encompassed by the same term in the

system because “the Hawaiian system was stratified but interdependent, and the *ali‘i*, *kahuna*, and *maka‘āinana* regarded themselves as related much more closely and affectionately than did feudal landlords and serfs.” *Id.* at 39.

⁴¹ LILIKALĀ KAME‘ELEIHIWA, *NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI?* 26 (1992). In addition to keeping the ‘āina fertile and appeasing the *akua*, the *ali‘i* were also responsible for proclaiming the word of the chiefdom, providing a forum for the appeal of hardships, comforting the just and oppressing wrongdoers, judging the life and death of persons, inspiring the masses in times of war, caring for the *koa* (warriors), and exacting tributes, among other duties. MALO, *supra* note 35, at 42; KAMAKAU, *supra* note 33, at 3, 11.

⁴² In the ancient Native Hawaiian world, “*pono*” meant that the gods, chiefs, priests, people of the land, and land “lived in balance with each other, and that people had enough to eat and were healthy. This state of balance hinged on *ali‘i* acting in accordance with the shared concept of *pono*.” SILVA, *supra* note 40, at 16.

⁴³ SILVA, *supra* note 40, at 39-40 (citing KAME‘ELEIHIWA, *supra* note 41).

⁴⁴ See RALPH KUYKENDALL, *THE HAWAIIAN KINGDOM* 8, 10 (1938) (stating that *Ali‘i* were believed to be descended from gods and explaining that, “[g]enerally speaking, the will of the ruling chief was the law of the land, but there was a fairly large body of traditional or customary law relating mainly to such subjects as water rights, fishing rights, and land usage, and this customary law was ordinarily respected”). There were ruler’s edicts that entitled certain people to rights within society, but the decision to create and adhere to such edicts fell squarely within the discretion of the *ali‘i*. KAMAKAU, *supra* note 33, at 16; MALO, *supra* note 35, at 47.

Hawaiian language:

kule.ana. nvt. *Right, privilege, concern, responsibility, title, business, property, estate, portion, jurisdiction, authority, liability, interest, claim, ownership, tenure, affair, province; reason, cause, function, justification; small piece of property, as within an ahupua'a; blood relative through whom a relationship to less close relatives is traced, as to in-laws.*⁴⁵

Professor Noenoe Silva explains this connection between authority and responsibility in the context of Ali'i leadership by pointing out that "[t]he kuleana 'authority' that allowed certain ali'i to . . . rule a district or island and receive [tribute], included the obligation to manage the land and the resources wisely."⁴⁶ Accordingly, within the Ali'i system, the responsibilities inherent in the leaders' authority to govern compelled them to act in the best interests of the people.⁴⁷ These inherent responsibilities were internally reinforced by the moral duties instilled in the leaders during their youth, their interests in maintaining a peaceful and productive society, and their interests in ensuring the continuity of their leadership and the succession of leaders.⁴⁸

⁴⁵ MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 179 (1986 ed.) (emphasis added).

⁴⁶ SILVA, *supra* note 40, at 40.

⁴⁷ See *supra* notes 43, 45 and accompanying text.

⁴⁸ MALO, *supra* note 35, at 43. In order to prepare the ali'i to act in the best interests of the people, young ali'i

were sent out to live with wise and skilled people, and to listen first to the words of experts and to the important things that would benefit their rule. . . . Furthermore, [these young people] would initially live with another ali'i in a state of poverty, starvation and famine so they would remember what these conditions of life were like. Some were taught to take care of the people using great patience and they were even belittled below the position of the maka'āinana These were the things that brought continuity to the reign of the ali'i and guaranteed the succession of the ali'i (kuamo'o ali'i) so their reign would not be known for any disorders, but beloved for its justice. *Id.*

The possession of leadership authority by specific ali'i was contingent upon the practice of good governance by those ali'i, as the maka'āinana were known to rebel against unsatisfactory leadership both by engaging in battle and by relocating themselves and their valuable labor to other chiefdoms under more favorable leadership. See Rona Tamiko Halualani, *Purifying the State: State Discourses, Blood Quantum, and the Legal Mis/recognition of Hawaiians*, in BETWEEN LAW AND CULTURE: RELOCATING LEGAL STUDIES 146 (EDS. LISA C. BOWER, DAVID THEO GOLDBERG, MICHAEL C. MUSHENO) (2001); E.S. CRAIGHILL HANDY AND ELIZABETH GREEN HANDY, NATIVE PLANTERS IN OLD HAWAII 41 (1972); HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER:

While the people did not hold enforceable legal rights against the Ali‘i, the protection of individual dignity was a natural incident of the restraint placed upon the Ali‘i by their kuleana. Furthermore, because the kuleana of the Ali‘i included not only a responsibility to refrain from abuse of power, but also an affirmative duty to create a peaceful and productive society, the protections afforded the Native Hawaiian people under the Ali‘i system were presumably broader in scope than American civil rights.⁴⁹ Within the Ali‘i system, the Native Hawaiian people did not merely possess rights to be free from government tyranny. They were also owed an affirmative duty of just and effective governance by their leadership. Therefore, prior to sustained contact with Europeans, the Ali‘i’s kuleana to lead responsibly and act in the best interests of the collective whole protected the civil rights of the Native Hawaiian people.

B. *The Displacement of Kuleana*

The Ali‘i system continued to predominate until the early 1840s,⁵⁰ but the complex notion of kuleana undergirding the system began to be displaced when Captain James Cook arrived in Hawai‘i in 1778.⁵¹

Prior to sustained contact between foreigners and the Native Hawaiian people, “Hawaiian society was predominantly a subsistence agricultural economy” with “no evidence of a monetary system or commodity production.”⁵² At that time, Native Hawaiian society was centered on the collective kuleana of the community to mālama ‘āina, or

COLONIALISM AND SOVEREIGNTY IN HAWAI‘I 5 (rev. ed. 1999); MALO, *supra* note 35, at 47; KUYKENDALL, *supra* note 44, at 157.

⁴⁹ See Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379, 1400 (2006) (observing that “[t]he [United States] Constitution says what the government may do and what it may not do, but for the most part it does not say what the government must do.”). Commentators from other Native communities have observed similar differences between American legal principles and traditional Native legal principles. See, e.g., RUPERT ROSS, *DANCING WITH A GHOST, EXPLORING INDIAN REALITY* 170 (1992) (quoting attendee of aboriginal policing conference who questioned, “why does your law, from the Ten Commandments to the criminal code, speak only of what people should not do? Why don’t your laws speak to people about what they should be?”).

⁵⁰ The ali‘i system predominated from at least the time of Kapawa through 1840. See KAMAKAU, *supra* note 33, at 3; KUYKENDALL, *supra* note 44, at 157.

⁵¹ SALLY ENGLE MERRY, *COLONIZING HAWAI‘I: THE CULTURAL POWER OF LAW* 40 (2000); VAN DYKE, *supra* note 14, at 21. Throughout the article, the term “contact” is used to describe the point of interaction between Captain Cook and the Native Hawaiian people because it marked the beginning of *sustained* contact between the Native Hawaiian people and foreigners. Native Hawaiian historical sources indicate that Captain Cook was not the first foreigner to visit Hawai‘i. SILVA, *supra* note 40, at 18.

⁵² MCGREGOR, *supra* note 34, at 25; SILVA, *supra* note 40, at 26.

care for the land.⁵³ In the wake of contact, however, Hawai'i burgeoned into a major port of call for foreign fur and sandalwood traders, and Native Hawaiian society began to shift its focus away from subsistence living toward the production of commodities for the international mercantile economy.⁵⁴

Along with mercantilism, foreign traders also brought other pestilences such as gonorrhea, syphilis, leprosy, measles, whooping cough, tuberculosis, and ma'i 'ōku'u (squatting sickness).⁵⁵ These maladies killed hundreds of thousands of Native Hawaiians over a brief period of time.⁵⁶ This mass death, coupled with the society's shift in focus toward commodity production, resulted in the neglect of much of the daily planting, fishing, and other traditional duties of the people.⁵⁷ Consequently, Native Hawaiian society suffered from periodic famines and fell into a general state of disorder.⁵⁸

In the midst of this societal upheaval, many Native Hawaiians abandoned their existing system of religious beliefs, creating what Professor Jon Van Dyke refers to as a "spiritual vacuum."⁵⁹ Within

⁵³ MCGREGOR, *supra* note 34, at 25; SILVA, *supra* note 40, at 39-41; VAN DYKE, *supra* note 14, at 11.

⁵⁴ MCGREGOR, *supra* note 34, at 30; VAN DYKE, *supra* note 14, at 21.

⁵⁵ O.A. BUSHNELL, THE GIFTS OF CIVILIZATION: GERMS AND GENOCIDE IN HAWAI'I 276-77, 281-82 (1993); A.W. Crosby, *Hawaiian Depopulation as a Model for the Amerindian Experience*, in EPIDEMICS AND IDEAS: ESSAYS ON THE HISTORICAL PERCEPTION OF PESTILENCE 177, 190, 192-93 (Terence Ranger and Paul Slack eds. 1992); VAN DYKE, *supra* note 14, at 19-21; KAMAKAU, *supra* note 33, at 237.

⁵⁶ BUSHNELL, *supra* note 55, at 276-77, 281-82; Crosby, *supra* note 55, at 177, 190, 192-93; VAN DYKE, *supra* note 14, at 19-21; KAMAKAU, *supra* note 33, at 237; MCGREGOR, *supra* note 34, at 30.

⁵⁷ VAN DYKE, *supra* note 14, at 21; SILVA, *supra* note 40, at 26; MCGREGOR, *supra* note 34, at 30.

⁵⁸ VAN DYKE, *supra* note 14, at 21; MCGREGOR, *supra* note 34, at 30.

⁵⁹ VAN DYKE, *supra* note 14, at 21-22. Prior to the death of King Kamehameha I, the Native Hawaiian people followed a system of religious kapu (taboos), including the 'ai kapu (eating taboos). SILVA, *supra* note 40, at 27-8. Following Kamehameha's death, Native Hawaiian leadership abolished the kapu system. KAME'ELEIHIWA, *supra* note 41, at 79-82. Professor Silva likens the psychological effect of the mass death of Native Hawaiians to the post-traumatic stress suffered by the Yup'ik people as a result of similar circumstances:

Their medicines and their medicine men and women had proven useless. Everything they had believed in had failed. Their ancient world had collapsed . . . from their inability to understand and dispel the disease, guilt was born into them. They had witnessed mass death—evil—in unimaginable and unacceptable terms.

SILVA, *supra* note 40, at 27. Professor Kame'eiehiwa draws a connection between this

months of this abandonment, a company of protestant missionaries from New England arrived in Hawai‘i, “promising life when death was everywhere” at a time when it seemed that Native Hawaiians’ “own religion, akua, and Ali‘i could not prevent them from dying.”⁶⁰ Initially, these missionaries focused on proselytizing Native Hawaiians, but it was not long before they began to exert significant influence outside the religious sphere of Hawaiian society.⁶¹

In direct response to missionary pressure, the Ali‘i adopted written, theocratic laws that prohibited acts such as murder, theft, and adultery, as well as Native Hawaiian cultural practices such as ‘awa drinking and hula.⁶² These sumptuary laws were based on western beliefs regarding the position of the individual in society, the purpose of government, and the function of written law; and they were not consonant with Native Hawaiian beliefs about kuleana and the relationship between the leadership and the people.⁶³ Therefore, while passage of the written sumptuary laws seemed like little more than a reinstatement of the pre-existing kapu system, the establishment of these laws dramatically recast the relationship between Native Hawaiian leadership and the Native Hawaiian people.⁶⁴ As Professor Jonathan Kay Kamakawiwo‘ole Osorio explains, the promulgation of written laws “drove a wedge between Ali‘i and Maka‘āinana by creating a new layer of authority between them, a layer that neither could control.”⁶⁵

Throughout the 1820s and 30s, the push to expand this new layer

post-traumatic stress and the willingness of the people to abandon the kapu system, concluding that the people abandoned the kapu because the Akua had failed to protect them. *Id.* at 30 (analyzing KAME‘ELEIHIWA, *supra* note 41, at 81-82). *See also* JONATHAN KAY KAMAKAWIWO‘OLE OSORIO, DISMEMBERING LAHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887 10-11 (2002) (explaining that “[t]he great dying disrupted the faith that had held Hawaiian society together for centuries”). *But see* MCGREGOR, *supra* note 34, at 33 (noting that, while kapu system was no longer sanctioned by Native Hawaiian government, spiritual beliefs and customs consistent with kapu system continued to be practiced in most rural communities and settlements).

⁶⁰ OSORIO, *supra* note 59, at 12; MCGREGOR, *supra* note 34, at 31; SILVA, *supra* note 40, at 31.

⁶¹ *See, e.g.*, MERRY, *supra* note 51, at 63-114 (explaining correlation between adoption of Christianity and adoption of Anglo-American law, which greatly empowered non-Hawaiians in law and politics).

⁶² OSORIO, *supra* note 59, at 11, 13; MERRY, *supra* note 51, at 45, 69; KUYKENDALL, *supra* note 44, at 49; VAN DYKE, *supra* note 14, at 23.

⁶³ OSORIO, *supra* note 59, at 13; MERRY, *supra* note 51, at 45-46, 67-76.

⁶⁴ OSORIO, *supra* note 59, at 13; MERRY, *supra* note 51, at 45-46, 67-76.

⁶⁵ OSORIO, *supra* note 59, at 13.

of legal authority between the Ali'i and the people intensified. Responding to an "increasingly difficult international situation in which the threat of a colonial takeover was very real and immediate," Native Hawaiian leaders "engaged in a search for sovereignty in Euro-American terms," in the hopes of warding off imperialist European nations that were annexing so-called "primitive" societies throughout the Pacific.⁶⁶ In an effort to address this challenging political issue, the Native Hawaiian government further appropriated western legal practices and institutions as it "sought to form a 'civilized' society as that concept was understood in the nineteenth century by the European powers that created it."⁶⁷ Between 1839 and 1842, the Native Hawaiian government promulgated a Declaration of Rights, a constitution that formally reorganized Native Hawaiian society into a constitutional monarchy, and an extensive body of laws that incorporated laws passed since 1823, "as well as a kind of common law system that consist[ed] of ancient tabus, the practices of celebrated chiefs . . . and the principles of the Bible."⁶⁸ Collectively, the Declaration, Constitution, and body of laws were referred to as Kumu Kānāwai, or "foundation of law."⁶⁹

The Kumu Kānāwai created a new governance structure that redistributed and restrained the authority of Native Hawaiian leadership and specifically enumerated the rights of the people with respect to that governance structure.⁷⁰ This new governance structure was developed primarily by American and European advisors according to western principles⁷¹ and sought to protect the people by constraining the monarchy, "reflecting American opposition to aristocracy and Enlightenment ideas of rights."⁷² For this reason, the Kingdom of Hawaii's rights system resembled the United States' individual rights system and recognized many similar rights, including rights to protection

⁶⁶ MERRY, *supra* note 51, at 36, 77.

⁶⁷ *Id.* at 36.

⁶⁸ *Id.* at 78; HE KUMU KANAWAI A ME KE KANAWAI HOOPONOPONO WAIWAI NO KO HAWAII NEI PAE AINA NA KAMEHAMEHA III I KAU [Constitution] (1839); KE KUMU KANAWAI O KO HAWAII PAE AINA [CONSTITUTION OF THE HAWAIIAN ISLANDS] 1840 (Kingdom of Hawai'i); KUMU KANAWAI, A ME NA KANAWAI O KO HAWAII PAE AINA, UA KAUIA I KE KAU IA KAMEHAMEHA III (1842).

⁶⁹ MERRY, *supra* note 51, at 78.

⁷⁰ *Id.* at 81.

⁷¹ *Id.* at 77-78. Kuykendall explains that William Richards oversaw the drafting of the first Hawaiian Constitution because he was the only person available to do it. *See* KUYKENDALL, *supra* note 44, at 154-55 ("That Richards was specially qualified for his new post can hardly be maintained; he was, however, about the only one available for it, and was no doubt as well qualified as any of his associates.").

⁷² MERRY, *supra* note 51, at 81.

in worship, redress for injuries, freedom from unequal laws, impartiality in the legal system, freedom of speech, freedom of assembly, trial by jury, protection against slavery, and protection against unreasonable search and seizure, among others.⁷³ While the rights system contained small vestiges of the traditional system that previously predominated,⁷⁴ the rights system was largely incompatible with Native Hawaiian culture and knowledge. As Sally Engle Merry observes,

the notion that law should serve as a constraint on the chiefs’ power over commoners represented a radical break from Hawaiian conceptions of this relationship as rooted in aloha (love, regard) and service by the people to the earthly representatives of the Akua.⁷⁵

C. *The Native Hawaiian Response*

Given the conflict between the Kingdom’s new individual rights system and the traditional Native Hawaiian system, Native Hawaiians continued to rely upon the relationships and bonds connecting Native Hawaiian leadership to the people, and they generally declined to take advantage of the benefits conferred upon them by the Kingdom’s constitution and laws.⁷⁶ For the Native Hawaiian people, the relationships and kuleana that had balanced society for centuries remained at the center of the community’s collective identity and continued to inform Native Hawaiian existence and interactions.⁷⁷

Similarly, notable Native Hawaiian leaders continued to operate pursuant to the philosophies of the traditional system, despite the government’s new rights structure. In fact, the development of the new

⁷³ HE KUMU KANAWAI O KO HAWAII NEI PAE AINA [CONSTITUTION OF THE HAWAIIAN ISLANDS] 1852, art. 1-21 (Kingdom of Hawai‘i); HE KUMU KANAWAI A ME KE KANAWAI HOOPONOPONO WAIWAI NO KO HAWAII NEI PAE AINA NA KAMEHAMEHA III I KAU [Constitution] (1839); KE KUMU KANAWAI O KO HAWAII PAE AINA [CONSTITUTION OF THE HAWAIIAN ISLANDS] 1840 (Kingdom of Hawai‘i) pts. I-V. Some scholars argue that the 1839 Constitution is effectively a Hawaiian Magna Carta and should not be characterized as one of the Kingdom’s constitutions. *See, e.g.*, RALPH KUYKENDALL, CONSTITUTIONS OF THE HAWAIIAN KINGDOM: A BRIEF HISTORY AND ANALYSIS 7 (1940). However, because the 1839 Constitution was the first formal step toward Hawaii’s transition to a constitutional monarchy and its first official acknowledgment that all people within Hawaiian society possess natural rights that the government ought to protect, it is treated as a constitution for purposes of this analysis.

⁷⁴ *See* KE KUMU KANAWAI O KO HAWAII PAE AINA [CONSTITUTION OF THE HAWAIIAN ISLANDS] 1840 (Kingdom of Hawai‘i).

⁷⁵ MERRY, *supra* note 51, at 81.

⁷⁶ VAN DYKE, *supra* note 14, at 26-27; MCGREGOR, *supra* note 34, at 38 (explaining how this dynamic manifested in specific context of land claims).

⁷⁷ VAN DYKE, *supra* note 14, at 26-27; MCGREGOR, *supra* note 34, at 38.

rights system was, in part, an attempt by King Kamehameha III to codify and protect the rights of Native Hawaiians who were being exploited for their labor and disenfranchised from the land.⁷⁸ Prince Kūhiō described the Declaration of Rights, in particular, as an act not “wrung from an unwilling sovereign by force of arms” but given “by a wise and generous ruler, impressed and influenced by . . . the needs of his people.”⁷⁹

The concept of kuleana also guided the actions of Queen Lili‘uokalani, a Native Hawaiian leader driven throughout her administration by “the ideological and practical imperative of ‘Hawaii for the Hawaiians.’”⁸⁰ Queen Lili‘uokalani’s sense of kuleana to the Native Hawaiian people led her to consider her people’s call for constitutional revisions that would restore balance by, among other things, removing voting restrictions that disenfranchised many Native Hawaiians.⁸¹ Describing her motivation for contemplating the restoration of “some of the ancient rights of [her] people,” Queen Lili‘uokalani stated the following:

Of all the rulers of the Hawaiian Islands for the last half-century, I was the only one who assented to a modification of the existing constitution on the expressed wishes, not only of my own advisers, but of two-thirds of the popular vote, and, I may say it without fear of contradiction, of the entire population of native or half-native birth.⁸²

The Queen further explained that a leader who could disregard such a request must be “deaf to the voice of the people, which tradition tells us is the voice of God.”⁸³

The decision of Native Hawaiian leaders and the Native Hawaiian people to continue abiding by the principle of kuleana under the Kingdom’s new rights structure significantly impacted the flow of power within the Kingdom. Despite the fact that Native Hawaiian leadership had hoped the new system would protect the rights of the Native Hawaiian

⁷⁸ VAN DYKE, *supra* note 14, at 25.

⁷⁹ Prince J.K. Kalanianaʻole, *The Story of the Hawaiians*, 21 MID-PACIFIC MAGAZINE 124 (Feb. 1921).

⁸⁰ NEIL THOMAS PROTO, *THE RIGHTS OF MY PEOPLE* 10 (2009). Reflecting upon her own leadership approach, Lili‘uokalani observes that she was “suspected of having the welfare of the whole people also at heart” and asks “what sovereign with a grain of wisdom could be otherwise minded?” QUEEN LILI‘UOKALANI, *HAWAII’S STORY BY HAWAII’S QUEEN* 234 (1898).

⁸¹ QUEEN LILI‘UOKALANI, *supra* note 80, at 237-39; PROTO, *supra* note 80, at 11-12.

⁸² QUEEN LILI‘UOKALANI, *supra* note 80, at 237, 239.

⁸³ PROTO, *supra* note 80, at 12.

people, the system primarily enured to the benefit of foreigners who vigorously asserted their newly created individual rights to property ownership and government participation.⁸⁴ Likewise, Queen Lili‘uokalani’s alleged attempt to use the Kingdom’s constitution to restore balance to the Native Hawaiian community was treated as a crime against the Kingdom by the United States military-backed rebels who staged a *coup d’état* to overthrow the Kingdom government in 1893.⁸⁵ Through the lens of hindsight—which was, of course, unavailable to the Kingdom leaders forced to make these difficult decisions—two important lessons emerge. The first is that balancing Native values and western law requires an extreme amount of caution and scrutiny. The second is that Native Hawaiian leaders have historically demonstrated extraordinary resourcefulness and ingenuity in their efforts to perpetuate traditional values in changing times.

D. *The Persistence of Traditional Values in Contemporary Native Hawaiian Society*

In the face of the substantial challenges endured by Queen Lili‘uokalani, Native Hawaiian Kingdom subjects, and others who have actively operated pursuant to a kuleana philosophy within the western rights system, the Native Hawaiian people have consistently embraced the notion of kuleana and continually sought to secure a place for the concept in modern Hawaiian governance and rights discourse.

The Hawai‘i Supreme Court, under the guidance of its first Native Hawaiian Chief Justice, William S. Richardson, relied heavily on the principle of kuleana in its landmark decisions concerning the rights of the people to access community resources such as water, public roads, Hawaii’s beaches, gathering areas, and newly created lands.⁸⁶ In *Reppun v. Board of Water Supply*, a seminal case regarding water rights in Hawai‘i, the Court invoked the notion of kuleana in its rejection of the modern western conceptualization of water as a private commodity, and the attendant creation of private and exclusive interests in water, which the

⁸⁴ VAN DYKE, *supra* note 14, at 25-27.

⁸⁵ QUEEN LILI‘UOKALANI, *supra* note 80, at 237-39; *see* Joint Resolution to Acknowledge the 100th Anniversary of the Jan. 17, 1893 Overthrow of the Kingdom of Hawaii, Sec. 2, Pub. L. 103-150, 107 Stat. 1510 (1993).

⁸⁶ *See* *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 504 P.2d 1330 (1973), *aff’d on reh’g*, 55 Haw. 260, 517 P.2d 26 (1973) (per curiam); *Reppun v. Board of Water Supply*, 65 Haw. 531 (1982); *In re Kelley*, 50 Haw. 567, 445 P.2d 538 (1968); *In re Ashford*, 50 Haw. 314, 440 P.2d 76 (1968); *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 656 P.2d 745 (1982); *State ex rel. Kobayashi v. Zimring*, 58 Haw. 106, 566 P.2d 725 (1977). For a discussion of Chief Justice Richardson’s approach in these cases, *see* Jon M. Van Dyke & Maile Osika, *William S. Richardson: A Visionary with A Common Touch*, 33 U. HAW. L. REV. 83 (2010).

Court perceived as inappropriately compelling “the drawing of fixed lines of authority and interests which were not consonant with Hawaiian custom.”⁸⁷ Speaking on behalf of the Court, Chief Justice Richardson asserted:

the distinction drawn between “rights” and “supplies by permission” or “favours”. . . would make no sense at all under the ancient system of allocation. Under the ancient system both the self-interest and responsibility of the konohikis would have created a duty to share and to maximize benefits for the residents of the ahupuaa. In other words, under the ancient system the “right” of the konohiki to control water was inseparable from his “duty” to assist each of the deserving tenants.⁸⁸

Extending this notion to the responsibilities of the government to the people, the Richardson Court opined in *Ahuna v. Department of Hawaiian Home Lands* that the Hawai‘i state government’s exercise of authority with respect to the Hawaiian Homes Commission Act should be judged by the most exacting fiduciary standards, including the duty to administer the land trust solely in the interests of the trust’s beneficiaries and the duty to use reasonable skill and care in administering the trust.⁸⁹

Chief Justice Richardson not only relied upon the traditional notion of kuleana as a binding legal principle, he personally adhered to the concept as a Native Hawaiian leader. As Professor Van Dyke and Maile Osika observe, Chief Justice Richardson “sought to resolve disputes by drawing upon principles that best reflect Hawaiian thoughts and values,” and he “wrote opinions with a passionate commitment to Hawai‘i’s history, context, and culture.”⁹⁰ Professor Williamson Chang further notes that Chief Justice Richardson’s jurisprudence “resurrect[ed] the principles and values of Hawai‘i’s kings and queens” and “drew on Native Hawaiian values, which emphasized kinship and stewardship of the environment.”⁹¹ Reflecting on the lasting impact of this jurisprudence, Professor Melody MacKenzie explains that Chief Justice Richardson established, by example, aspirations for the leaders who would follow in his footsteps to “protect those who are powerless from those who have power,” “fight for those who lack economic security and life’s basic necessities,” and “seek

⁸⁷ See *Reppun*, 65 Haw. at 547.

⁸⁸ *Id.*

⁸⁹ *Ahuna v. Dep’t of Hawaiian Home Lands*, 64 Haw. 327, 340 (1982).

⁹⁰ Van Dyke & Osika, *supra* note 86, at 97.

⁹¹ Williamson B.C. Chang, *The Life of the Law Is Perpetuated in Righteousness: The Jurisprudence of William S. Richardson*, 33 U. HAW. L. REV. 99, 108 (2010).

justice for Hawai‘i’s native people and, indeed, for all people in Hawai‘i.”⁹²

In addition to Chief Justice Richardson, many other contemporary Native Hawaiian leaders have continued to sustain an abiding sense of kuleana. The five Native Hawaiian organizations that “represent the greatest amount of power and exert the widest influence on the largest number of persons in the Hawaiian community”⁹³ ground their missions in their obligations to serve the Native Hawaiian community. Kamehameha Schools’ “mission is to fulfill [Bernice Pauahi Bishop’s] desire to create educational opportunities in perpetuity to improve the capability and well-being of people of Hawaiian ancestry”;⁹⁴ the Department of Hawaiian Home Lands provides for “the rehabilitation of the native Hawaiian people” through its homesteading program;⁹⁵ the Queen Lili‘uokalani Trust/Children’s Center seeks to benefit orphan and other destitute children in Hawai‘i, especially Native Hawaiian children;⁹⁶ Alu Like, Inc. aims to assist Native Hawaiians “who are committed to achieving their potential for themselves, their families[,] and communities”;⁹⁷ and the Office of Hawaiian Affairs strives

[t]o mālama (protect) Hawai‘i’s people and environmental resources and OHA’s assets, toward ensuring the perpetuation of the culture, the enhancement of lifestyle and the protection of entitlements of Native Hawaiians, while enabling the building of a strong and healthy Hawaiian people and nation, recognized nationally and internationally.⁹⁸

The persistence of the traditional notion of kuleana among contemporary Native Hawaiian leaders in positions of great influence and authority suggests that the philosophical core of the community has remained intact

⁹² Melody Kapilialoha MacKenzie, *Ka Lama Ku O Ka No‘eau: The Standing Torch of Wisdom*, 33 U. HAW. L. REV. 3, 15 (2010).

⁹³ GEORGE HU‘EU SANFORD KANAHELE, KŪ KANAKA: STAND TALL 431 (1986).

⁹⁴ Kamehameha Schools Strategic Plan, KAMEHAMEHA SCHOOLS, available at <http://www.ksbe.edu/osp/StratPlan/MissionVision.pdf> (last visited Apr. 25, 2013).

⁹⁵ Hawaiian Homes Commission Act, 42 Stat. 108 (1921), reprinted in 1 Haw. Rev. Stat. 191 (1993 and Supp. 2003).

⁹⁶ Her Majesty’s Legacy, QUEEN LILI‘UOKALANI CHILDREN’S CENTER LILI‘UOKALANI TRUST, <http://www.qlcc.org/> (last visited Apr. 25, 2013).

⁹⁷ About Us—Mission, ALU LIKE, INC. http://www.alulike.org/about/about_mission.html (last visited Oct. 2, 2011).

⁹⁸ About the Office of Hawaiian Affairs, OFFICE OF HAWAIIAN AFFAIRS, <http://www.oha.org/content/about> (last visited Apr. 25, 2011).

despite a history of mass death, forced assimilation, and continuous dispossession of Native Hawaiian land, resources, and self-governing authority.

As that philosophical core pertains specifically to the relationship between Native Hawaiian leaders and Native Hawaiian society, scholar George Kanahele observes that the government and the governed remain inextricably linked in Native Hawaiian philosophy.⁹⁹ Contemporary Native Hawaiian understandings of leadership continue to be based on the notion that “leading is always a two-way relationship, involving the one who is led and the one who is leading. The truth of [which] is revealed in the saying ‘*I ali ‘i nō ke ali ‘i i ke kanaka,*’ ‘A chief is a chief because of his subjects’” as well as the saying, “‘*I lele nō ka lupe i ke pola,*’ ‘The tail makes the kite fly.’”¹⁰⁰

The maintenance of a peaceful and orderly Native Hawaiian society continues to be the right and responsibility of all members of the community. As Kanahele observes, within Native Hawaiian society, peace and order do not result from crushing authoritarianism or the robust protection of individual rights.¹⁰¹ Rather, peace and order result from the commitment of Native Hawaiian leadership and Native Hawaiian people alike to live according to the community’s core values.¹⁰² These values restrain individual exercises of power by placing an affirmative duty on all Native Hawaiians, including Native Hawaiian leaders, to act in the best interests of all other members of Native Hawaiian society.¹⁰³ Moreover, because this duty is reciprocal, it is simultaneously a right and a responsibility, and simultaneously a burden and a reward. Once it is set in motion, it motivates and enforces itself.

To the extent that this kuleana-based philosophical core continues to animate the relationship between contemporary Native Hawaiian society and its leadership, those seeking to develop a civil rights system that expresses Native Hawaiian cultural sovereignty would be wise look to this philosophical core as a primary consideration. As a secondary matter, those reorganizing the Native Hawaiian government may also elect to consider the expectations of neighboring sovereigns and the extent to which the Native Hawaiian government ought to address those

⁹⁹ KANAHELE, *supra* note 93, at 407-08 (observing that “[t]he power that the leader is called upon to show, then, is not his alone, but is his joined with that of his followers,” and further noting that power of Native Hawaiian leadership “is always relational and conditional.”).

¹⁰⁰ *Id.* at 407 (internal citations omitted).

¹⁰¹ *Id.* at 408.

¹⁰² *Id.*

¹⁰³ *Id.*

expectations in furtherance of its own sovereignty and diplomatic relationships. Specifically, the founders of the reorganized Native Hawaiian governing entity may want to consider the United States government’s expectations regarding the protection of civil rights by Native governments under federal law.¹⁰⁴

IV. FEDERAL EXPECTATIONS REGARDING NATIVE GOVERNMENTS AND CIVIL RIGHTS

In order to ensure their survival, [Native communities] must redirect their attention in an unsentimental and realistic way to the legal and political costs and benefits of each possible course of action.

-Sam Deloria¹⁰⁵

Culturally, the Native Hawaiian people are not an “Indian tribe.” However, because the Native Hawaiian people, like Alaska Natives, are the Native people of a geographical area that the federal government considers to be part of the United States, the federal government regularly acts pursuant to a special political and legal relationship with the Native Hawaiian people that resembles the relationship between the federal government and Indian tribes.¹⁰⁶ Therefore, if the Native Hawaiian people seek to establish and operate a sovereign government that might be eligible for the same privileges and immunities available to federally recognized Indian tribes, the government will likely be expected to work within the framework of federal Indian law and adhere to federal Indian

¹⁰⁴ Whether or not the Native Hawaiian people should pursue the repatriation of Native Hawaiian self-governing authority through federal recognition as a Native sovereign is a question beyond the scope of this article. However, to the extent that the Native Hawaiian people seek to reorganize within the framework of federal law, the expectations of the United States government are highly pertinent.

¹⁰⁵ Sam Deloria, *New Paradigm: Indian Tribes in the Land of Unintended Consequences*, 46 NAT. RESOURCES J. 301, 305 (2006).

¹⁰⁶ See, e.g., Native Hawaiian Education Act, 20 U.S.C. §§ 7511-7517 (2006); Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (2006); Native American Languages Act, 25 U.S.C. § 2901-2906 (2006); American Indian, Alaska Native, and Native Hawaiian Culture and Art Development Act, 20 U.S.C. §§ 4401, 4441-42 (2006). These statutes exemplify Congress’ established practice of legislating with respect to Native Hawaiians and including Native Hawaiians in federal legislation directed at Native peoples. In addition, the Native Hawaiian Government Reorganization Act asserts that the federal government derives its authority to act with respect to the Native Hawaiian people from the same provisions of the United States Constitution that Congress generally has cited as authority to take action with respect to Indian tribes and Alaska Natives—e.g., the Indian Commerce, Treaty, Supremacy, and Property Clauses, and the War Powers. Native Hawaiian Government Reorganization Act of 2012, S. 675, 112th Cong. § 2(2)

law principles regarding the protection of civil rights.¹⁰⁷

A. *Relevant Federal Indian Law Principles*

Federal Indian law is “the most byzantine series of statutes, regulations, treaties, and court opinions that any nation has ever possessed.”¹⁰⁸ This body of law, which predates the official establishment of the federal government, is notorious for its complexities, contradictions, and incoherence. Accordingly, a Native body politic that seeks to organize within the framework of federal Indian law must be willing to embrace what Professor Philip Frickey calls the “courage of our confusions”—*i.e.*, the bravery to exist in a nebulous space outside, above, and between the general norms of American public law.¹⁰⁹ Navigating that space can be difficult, but there are consistent themes and tenets within federal Indian law that provide insight into the federal government’s perspective on the exercise of governing authority and the protection of civil rights by Native governments.¹¹⁰

1. Inherent Native Authority

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.’”¹¹¹

¹⁰⁷ The proposed Native Hawaiian Government Reorganization Act states that the Native Hawaiian governing entity will have “the inherent powers and privileges of self-government of an Indian tribe under applicable Federal law.” S. 675, 112th Cong. § 6(a)(1) (2012). According to federal law, the powers and privileges of self-government of Indian tribes are limited by the Indian Civil Rights Act of 1968 (25 U.S.C. § 1301–1341 (2006)). Therefore, a Native Hawaiian governing entity reorganized pursuant to the proposed Native Hawaiian Government Reorganization Act would presumably be bound by the limitations contained in the Indian Civil Rights Act.

¹⁰⁸ Coffey & Tsosie, *supra* note 15, at 191.

¹⁰⁹ See Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431 (2005).

¹¹⁰ It is important to remember that federal Indian law articulates the federal government’s understanding of its relationship with those Native communities in the United States that the federal government recognizes as politically sovereign. Federal Indian law is neither the source of Native sovereignty nor a comprehensive treatment of Native sovereignty issues. Rather, it is a limited articulation of what the federal government believes Native sovereignty ought to be and what exercises of Native sovereignty it will respect and support. See *supra* notes 9, 104.

¹¹¹ COHEN, *supra* note 8, § 4.01[1][a]; *United States v. Wheeler*, 435 U.S. 313, 322 (1978) (internal citations omitted). See also *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883) (finding no federal jurisdiction to try Indian for murder of another Indian on reservation when offense had been tried by tribal council); *Talton v. Mayes*, 163 U.S. 376, 384–85 (1896) (holding that powers of local self-government enjoyed by Cherokee

In other words, because Native peoples exercised sovereign authority over their societies and territories centuries before the formation of the United States and the adoption of its constitution, federal law recognizes the general governing authority of Native peoples as inherent authority derived from their pre-existing sovereign status, rather than delegated authority derived from a grant of power by the federal government.¹¹² Federal law further holds that Native peoples retain all aspects of their inherent governing authority that have not been withdrawn explicitly by treaty or statute,¹¹³ or implicitly as a result of their alleged transition from independent foreign nations to domestic dependent nations.¹¹⁴

The contention that Native nations transformed at some point into domestic dependent nations with limited inherent governing authority is one of the most controversial Indian law issues addressed in federal jurisprudence. While the voluntary surrender of governing authority through treaties is a familiar legal concept, the notion that one sovereign may dispossess other, nonconsenting sovereigns of inherent governing authority through unilateral domestic action is an idea unique to Native-federal relations within United States law. Yet despite the controversy surrounding Native nations' domestic dependent nation status, this status forms the foundation of two very significant federal Indian law principles commonly referred to as the Native-federal "trust relationship" and federal "plenary power" over Native peoples.

2. The Trust Relationship

The United States Supreme Court first articulated the idea of a trust relationship between Native peoples and the federal government in

Nation existed prior to United States Constitution and are not operated upon by Fifth Amendment).

¹¹² COHEN, *supra* note 8, § 4.01[1][a].

¹¹³ Regarding the "limited" nature of inherent Native sovereignty, the *Wheeler* Court asserted that inherent Native sovereignty "is of a unique and limited character" and "exists only at the sufferance of Congress and is subject to complete defeasance." *Wheeler*, 435 U.S. at 323. The Court further intimated that the federal government reserves for itself the right to divest Native governments of their inherent sovereign authority unilaterally through congressional action. *Id.*

¹¹⁴ *Wheeler*, 435 U.S. at 322-23. Federal Indian law asserts that Native peoples' purported domestic dependent nation status places Native peoples in a ward-guardian relationship that confers upon the federal government both a trust responsibility to Native peoples and plenary power over them. *See* *United States v. Kagama*, 118 U.S. 375, 384 (1886) (asserting that "[f]rom [the tribes'] very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power."). As a result, federal law does not recognize the inherent authority of Native peoples to take sovereign action that is perceived to be inconsistent with their "dependent" status. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978).

Cherokee Nation v. Georgia, a case that questioned whether Indian tribes constitute foreign nations within the meaning of Article III of the United States Constitution.¹¹⁵ Describing Native peoples for the first time as domestic dependent nations rather than foreign nations, the Court averred that the United States' purported incorporation of Native peoples into its claimed territory created a relationship between Native peoples and the federal government that resembles the relationship between a ward and his guardian.¹¹⁶ The Court further asserted that, as a result of this relationship, Native peoples exist "in a state of pupilage . . . completely under the sovereignty and dominion of the United States," looking to the federal government for protection and appealing to it "for relief to their wants."¹¹⁷

Initially, this notion of trusteeship, which sprang from ethnocentric illusions about the superiority of western religion and civilization,¹¹⁸

¹¹⁵ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

¹¹⁶ *Id.* at 17.

¹¹⁷ *Id.* at 10.

¹¹⁸ See Tonya Kowalski, *The Forgotten Sovereigns*, 36 FLA. ST. U.L. REV. 765, 773-81 (2009). See generally Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591 (2009). For example, in *Johnson v. McIntosh*, Chief Justice John Marshall articulated the early Americans' prejudiced view that "the tribes of Indians inhabiting this country were fierce savages . . . [and] [t]o leave them in possession of their country, was to leave the country a wilderness." *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 590 (1823). Chief Justice Marshall also asserted that "the character and religion of [Native peoples] afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy." *Id.* at 573. Similarly, President Thomas Jefferson offered the following description of the relationship between the federal government and Native peoples:

[O]ur settlements will gradually circumscribe and approach the Indians, and they will in time either incorporate with us as citizens of the United States, or remove beyond the Mississippi. The former is certainly the termination of their history most happy for themselves; but, in the whole course of this, it is essential to cultivate their love. As to their fear, we presume that our strength and their weakness is now so visible that they must see we have only to shut our hand to crush them, and that all our liberalities to them proceed from motives of pure humanity only.

10 WRITINGS OF THOMAS JEFFERSON 369-71 (Andrew A. Lipscomb ed., 1904).

Over the years, federal Indian law and policy has, in many ways, conformed to President Jefferson's strategy. RONALD TAKAKI, *IRON CAGES: RACE AND CULTURE IN NINETEENTH-CENTURY AMERICA* 62-63 (1979). The federal government has, at different points in history, espoused detrimental policies such as removal, forced assimilation, allotment of Native lands, and termination. CAROLE E. GOLDBERG ET AL., *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM* 14-42 (6th ed. 2010). Yet these actions were all taken under the auspices of the federal government's purported trust relationship with Native peoples and its attendant responsibility to act in their best interests. *Id.*

focused primarily on the United States’ obligations to protect Native peoples and did not involve a source of federal power.¹¹⁹ However, in the late nineteenth century, the United States Supreme Court began to point to the trust relationship as a nontextual source of federal power over Native peoples.¹²⁰ Thus, the trust relationship spawned a corollary principle that quickly eclipsed the trust relationship itself with regards to impact and significance—the notion of federal “plenary power” over Native peoples.

3. Federal Plenary Power

Federal Indian law characterizes Congress’ power to legislate with respect to Native peoples as “plenary and exclusive.”¹²¹ This so-called plenary power generally preempts state authority over Indian affairs and involves broad congressional authority to govern Native peoples without their consent.¹²² Pursuant to its asserted plenary power, Congress has enacted laws that touch nearly every aspect of Native governance, including laws that directly restrict the exercise of tribal governing authority¹²³ and laws that acknowledge and terminate the very existence of specific Native governments under federal law.¹²⁴

The United States Supreme Court generally identifies the Indian Commerce Clause¹²⁵ and the Treaty Clause¹²⁶ as the main constitutional

¹¹⁹ *Johnson v. McIntosh*, 21 U.S. at 584.

¹²⁰ *Id.* (stating that “in the late nineteenth century, the trusteeship became a sword the federal government could employ as a source of power to attack tribal governance”). See *United States v. Kagama*, 118 U.S. 375, 384 (1886) (alleging that United States government possesses duty of protection with respect to Native peoples, “and with it the power”); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (asserting that “[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning”); and *United States v. Sandoval*, 231 U.S. 28, 46 (1913) (claiming that “long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders.”).

¹²¹ *United States v. Lara*, 541 U.S. 193, 200 (2004).

¹²² COHEN, *supra* note 8, §5.02[1].

¹²³ 25 U.S.C. §§ 1301-41 (2006).

¹²⁴ See, e.g., 25 U.S.C. §§ 891-902 (repealed) (terminating tribal status of Menominee); 25 U.S.C. §§ 903- 903f (restoring tribal status of Menominee). The actions taken by Congress with respect to the Menominee demonstrate its asserted authority to determine “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.” *Sandoval*, 231 U.S. at 46.

¹²⁵ U.S. CONST., art. I, § 8, cl. 3.

¹²⁶ *Id.* art. II, § 2, cl. 2.

sources of Congress' plenary power over Indian affairs.¹²⁷ However, scholars and jurists do not universally agree that these clauses provide adequate constitutional support for Congress' exercise of such broad, unilateral authority.¹²⁸ Additionally, the Supreme Court's previous reliance upon colonialist and racist notions to justify Congress' plenary power casts a shadow over the exercise of this power that the courts have yet to address.¹²⁹ Nonetheless, the Supreme Court consistently acknowledges and reaffirms Congress' plenary power and "has shown no signs of reevaluating the scope of federal Indian affairs powers."¹³⁰

Taken together, the concepts of federal plenary power, the Native-federal trust relationship, and inherent Native authority form the foundation of the federal government's approach to the political sovereignty of Native peoples. Accordingly, these concepts will likely form the foundation of the federal government's understanding of Native Hawaiian political sovereignty under federal law. Specifically, the federal government will presumably characterize a federally recognized Native Hawaiian polity as a domestic dependent entity under the guardianship of the United States that possesses inherent self-governing authority

¹²⁷ *United States v. Lara*, 541 U.S. 193, 200 (2004).

¹²⁸ *See id.* at 214-25 (Thomas, J., concurring) ("I cannot agree with the Court, for instance, that the Constitution grants to Congress plenary power to calibrate the metes and bounds of tribal sovereignty."); Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 238 (2002) ("tribal and federal courts can and should reconsider the scope of Indian affairs powers of Congress in light of the limited delegation of such authority contained in the Indian Commerce Clause."); Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201, 265 (2007) ("[t]he Indian Commerce Clause was adopted to grant Congress power to regulate Indian trade . . . [but] did not. . . grant to Congress a police power over the Indians, nor a general power to otherwise intervene in tribal affairs."); Ann E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy, and United States v. Lara: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J. L. REFORM 651, 656 (2009) (asserting that Congress' vague provisions regarding Native peoples "enabl[ed] the adoption of radical, seemingly baseless principles such as Congress' unbounded (or, at the very least, nearly unbounded) plenary power over tribes."); Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L. J. 579, 597-98 (2008) ("[t]he [Supreme] Court also appears very uncomfortable with federal plenary and exclusive power over Indian affairs where the single provision in the Constitution that authorizes federal control only relates to commerce with Indian tribes").

¹²⁹ GOLDBERG ET AL., *supra* note 118 at 500. *See* Nancy Carter, *Race and Power Politics as Aspects of Federal Guardianship Over American Indians: Land-Related Cases, 1887-1924*, 4 AM. INDIAN L. REV. 197, 227 (1976). *See generally* Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1989).

¹³⁰ GOLDBERG ET AL., *supra* note 118, at 500.

constrained by the overriding plenary power of the federal government. Along with that characterization will come a host of federal expectations specific to the articulation and protection of civil rights by the Native Hawaiian government.

B. *Inherent Authority, Trusteeship, and Plenary Power in the Civil Rights Context*

The federal government’s expectations regarding civil rights and Native self-governance are defined by the consistently reaffirmed principle that Native governments have the inherent authority to administer justice and determine their own forms of government, as well as the federal government’s belief that its plenary power authorizes it to limit Native governing power through federal legislation, such as the Indian Civil Rights Act of 1968.

1. *Inherent Authority to Administer Justice and Determine the Form of Government*

Native peoples have historically pursued their own societal objectives in accordance with their own norms, values, and philosophies related to governance and justice. Prior to contact with Europeans, Native communities freely exercised this sovereign authority with little interference. Since sustained contact with western governments, however, Native peoples have been consistently pressured to abandon their traditional methods of governance and justice administration in favor of western government and justice models. These struggles over how Native peoples should govern and achieve justice have spanned centuries and, in many ways, have defined the general contours of the relationship between Native peoples and the U.S. federal government. This history of conflict notwithstanding, federal courts have consistently upheld the inherent authority of Native governments to determine their own forms of government and administer justice as they deem appropriate.¹³¹

2. *Congressional Limitations on Inherent Governing Authority*

The federal government does not, however, perceive the inherent authority of Native governments to determine their own forms of government and administer justice as full and unlimited. In 1968,

¹³¹ See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62-63 (1978) (describing authority of Native governments to determine their own form); *Ex parte Crow Dog*, 109 U.S. 556, 567 (1883) (upholding Native government’s right of self-government and its authority to maintain peace and order among its own members); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14-15 (1987) (requiring that tribal court be permitted to determine its own jurisdiction and holding that comity requires that tribal remedies be exhausted before question of subject matter jurisdiction of tribal court is addressed by federal court exercising diversity jurisdiction).

Congress exercised its purported plenary power to limit inherent Native authority by passing the Indian Civil Rights Act.¹³² Primarily a response to concerns about the rights of criminal defendants in Native courts, the Indian Civil Rights Act imposed on Native governments many, but not all, of the restraints contained in the Bill of Rights of the United States Constitution.¹³³ These restraints prohibit Native governments from, among other things, denying due process, denying equal protection of the laws, abridging the freedom of speech, placing a person in double jeopardy, and taking private property without just compensation.¹³⁴

While the Indian Civil Rights Act limits inherent Native governing authority, it does not transfer to the federal courts power to review alleged violations of Indian Civil Rights Act prohibitions, except in the narrow context of *habeas corpus* cases involving the unlawful detention of individuals by Native governments.¹³⁵ Indian Civil Rights Act cases arising outside the *habeas corpus* context fall within the exclusive jurisdiction of Native governments and are to be resolved through Native justice systems.¹³⁶

A particularly controversial restraint placed on Native governments by the Indian Civil Rights Act is the Act's sentencing limitation, which originally limited Native governments to issuing sentences of up to six months in jail and imposing five hundred dollar fines, even for very serious crimes.¹³⁷ The sentencing limitation in the Act has been amended twice since the Act's passage.¹³⁸ In 1986, it was amended to increase Native sentencing authority to one year in jail and five thousand dollars per offense,¹³⁹ and in 2010, the Tribal Law and Order Act amended the Indian Civil Rights Act to increase Native sentencing authority to three years in jail, up to a nine-year stacked sentence, and fifteen thousand dollars.¹⁴⁰ However, Native governments may only exercise the increased sentencing authority described in the

¹³² 25 U.S.C. §§ 1301-1341 (2006).

¹³³ See VINE DELORIA, JR. AND CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 127-28 (1983) (describing the impetus for enacting the Indian Civil Rights Act). See also 25 U.S.C. § 1302 (2006).

¹³⁴ 25 U.S.C. § 1302 (2006).

¹³⁵ See *Martinez*, 436 U.S. at 70.

¹³⁶ *Id.* at 65.

¹³⁷ 25 U.S.C. § 1302 (1968), amended by 25 U.S.C. § 1302 (1986) and 25 U.S.C. § 1302 (2010).

¹³⁸ See *id.*

¹³⁹ Pub. L. No. 99-570, § 4217, 100 Stat. 3207 (1986).

¹⁴⁰ Pub. L. No. 111-211, § 234(a)(2)-(3), 124 Stat. 2279 (2010).

Tribal Law and Order Act if they take certain special measures to protect the “rights” of defendants, as those rights are understood and articulated by the federal government.¹⁴¹

3. Civil Rights in Modern Native Governments

In response to the federal government’s imposition of Western liberal individual rights principles through legislation such as the Indian Civil Rights Act, many Native governments have incorporated individual rights protections into their constitutions and statutes, and they tend to affirm individual rights in their Native justice systems through Native customary or common law.¹⁴² In fact, analyses of Native court opinions reveal “deep assimilation of Anglo constitutional principles and an intriguing jurisprudential syncretism.”¹⁴³

Professor Duane Champagne observes that many Native communities have grown so accustomed to colonial constitutions and governments that other systems of governance may now appear radical and undesirable, even if they are more effective and culturally appropriate.¹⁴⁴ Moreover, because contemporary Native communities “are

¹⁴¹ The Tribal Law and Order Act amended the Indian Civil Rights Act to include the following provision regarding the rights of defendants sentenced to more than one year in prison:

- (c) RIGHTS OF DEFENDANTS.—In a criminal proceeding in which an Indian tribe, in exercising powers of self-government, imposes a total term of imprisonment of more than 1 year on a defendant, the Indian tribe shall—
- (1) provide to the defendant the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution; and
 - (2) at the expense of the tribal government, provide an indigent defendant the assistance of a defense attorney licensed to practice law by any jurisdiction in the United States that applies appropriate professional licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys;
 - (3) require that the judge presiding over the criminal proceeding—
 - (A) has sufficient legal training to preside over criminal proceedings; and
 - (B) is licensed to practice law by any jurisdiction in the United States;
 - (4) prior to charging the defendant, make publicly available the criminal laws (including regulations and interpretative documents), rules of evidence, and rules of criminal procedure (including rules governing the recusal of judges in appropriate circumstances) of the tribal government; and
 - (5) maintain a record of the criminal proceeding, including an audio or other recording of the trial proceeding. *Id.* § 234(c).

¹⁴² Goldberg, *supra* note 11, at 892.

¹⁴³ See Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 *FORDHAM L. REV.* 479, 528-29 (2000).

¹⁴⁴ Duane Champagne, *Remaking Tribal Constitutions: Meeting the Challenges*

now multicultural and express a variety of values and orientations,” including “Western educational and scientific knowledge,” they are prone to internal disagreements about “fundamental issues of social and political organization,” such as constitutional rights.¹⁴⁵ Tsosie and Coffey point out that

one of the challenges of cultural sovereignty is to examine how tribal societies have incorporated Western notions of the relationship between individuals and their government, which has been inculcated by federal policy and by statutes such as the Indian Civil Rights Act that protect individual rights to free speech, property, and personal security.¹⁴⁶

Taking up this challenge, Professor Carole Goldberg questions whether the internalization of western liberal individual rights principles in response to federal law helps or hinders Native peoples.¹⁴⁷ Goldberg asserts that, on one hand, such internalization clearly displaces traditional community understandings of rights, responsibilities, and relationships, thereby “diminish[ing] tribal cultures and weaken[ing] tribal societies”;¹⁴⁸ but, on the other hand, reflects the power of Native peoples “to adapt their cultures and long-term values to take account of new conditions, challenges, and encounters,” which is both an expression of Native sovereignty and an act of resistance against the notion that Native culture must remain static in order to be viable.¹⁴⁹ Given these competing considerations, Goldberg concludes that

[g]rowing evidence . . . suggests that institutions associated with individual rights are gaining adherents within Indian country, and there is no reason to fear such developments if their pace and direction can be controlled by Indian people.¹⁵⁰

4. Civil Rights and the Native Hawaiian Government

The federal government will likely concede that a federally recognized Native Hawaiian government possesses the inherent Native

of Tradition, Colonialism, and Globalization, in AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS 20 (Eric D. Lemont ed., 2006).

¹⁴⁵ *Id.* at 30.

¹⁴⁶ Coffey & Tsosie, *supra* note 15, at 199-200.

¹⁴⁷ Goldberg, *supra* note 11, at 889-91.

¹⁴⁸ *Id.* at 901.

¹⁴⁹ *Id.* at 910.

¹⁵⁰ *Id.* at 937.

authority to formalize the relationship between Native Hawaiian leadership and Native Hawaiian society in a manner that is culturally appropriate and beneficial to the community. Furthermore, the federal government will probably acknowledge the inherent Native authority of the Native Hawaiian government to develop its own method of enforcing restraints on its governing authority in accordance with its government structure and any related standards.

The Native Hawaiian government will then be called upon to reconcile this inherent power to govern according to community values with the government’s need to address western liberal individual rights values imposed by the federal government, surrounding communities, non-members living and working within the community, and, most importantly, community members who have embraced western ideals.¹⁵¹ To the extent that the Native Hawaiian government agrees with Goldberg’s analysis and elects to provide for the protection of individual rights pursuant to a community-controlled pace and direction, the government must then decide whether it will enshrine those rights protections in a written constitution.

At that point, rather than conform automatically to the established norm of tribal constitutionalism, the Native Hawaiian government would be well advised to take the opportunity to do what the vast majority of Native communities governing pursuant to written constitutions did not have the luxury of doing prior to adopting their constitutions—critically consider the history and nature of western constitutionalism and its efficacy in Native communities.

C. *Constitutionalism and the Protection of Civil Rights in Native Communities*

The modern notion that individual rights must be constitutionally rooted has not always dominated American thought. More importantly, meaningful questions exist regarding written constitutionalism’s cultural relevance to Native peoples—including the Native Hawaiian people—and its efficacy as a means of articulating and protecting civil rights in Native communities.

1. The Adoption of Written Constitutionalism by Native Governments

Initially, Americans believed that individual rights originated externally and were confirmed through, rather than derived from, positive law.¹⁵² The prevailing understanding of the origin of rights during the

¹⁵¹ Champagne, *supra* note 144, at 30.

¹⁵² See Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43, 65 (1989); LOUIS HENKIN, *THE AGE OF RIGHTS* 113 (1990). See also RICHARD A. PRIMUS, *THE AMERICAN LANGUAGE OF RIGHTS* 235 (1999) (“Locke and Jefferson grounded rights in the law of nature, Dickinson in reason, Moses Mather in God, John

federal government's formative years was that "rights do not derive from the Constitution, do not depend upon their enumeration in the Constitution, and are not limited to those enumerated there."¹⁵³ However, the American notion of the origin of rights has evolved significantly over the course of two centuries, and now, the dominant perspective in the United States is that rights are constitutional protections that are shaped and defined through construction and interpretation.¹⁵⁴ Rights are believed to be "rooted in the Constitution and are respected because they are there, or deemed to be there."¹⁵⁵ As a result, the legislative, executive, and judicial branches of the federal government base their actions on the Constitution and disclaim "any authority to add, subtract or modify rights on any basis not supported by the Constitution."¹⁵⁶ Accordingly, the notion of "constitutional rights" has become coextensive with the notion of individual rights in America.

Given this prevailing American understanding, when Native governments were confronted with the federal government's expectation that they would protect "individual rights," hundreds of them incorporated individual rights protections into their constitutions.¹⁵⁷ Majority society interpreted such actions as indicative of the "modernization" and "legitimization" of the respective Native governments.¹⁵⁸ The assumption underlying this interpretation is a generic account of modern constitutionalism as a universal good. Professor Horst Dippel explains this "deplorable state of affairs" as follows:

Today, constitutions are taken for granted as fundamental documents, the *sine qua non* of any legitimate political order. Whether this attitude is based on faith in self-evident

Quincy Adams and Jefferson Davis in the Declaration . . .").

¹⁵³ HENKIN, *supra* note 152, at 113.

¹⁵⁴ *Id.* at 83-84.

¹⁵⁵ *Id.* at 84.

¹⁵⁶ *Id.* While the Ninth Amendment theoretically recognizes reserved rights, and there is an announced practice of recognizing unenumerated rights, it is rare for the federal government to act outside the explicit authority of the Constitution. *Id.* at 112-13. See also Ronald M. Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. CHI. L. REV. 381, 386-91 (1992) (denouncing distinction between "enumerated" and "unenumerated" rights, given that all constitutional rights are product of constitutional interpretation).

¹⁵⁷ Goldberg, *supra* note 11, at 892-96.

¹⁵⁸ See generally DUANE CHAMPAGNE, SOCIAL ORDER AND POLITICAL CHANGE: CONSTITUTIONAL GOVERNMENTS AMONG THE CHEROKEE, THE CHOCTAW, THE CHICKASAW, AND THE CREEK (1992). For example, the "Five Civilized Tribes" (i.e., the Cherokee, Choctaw, Chickasaw, Creek, and Seminole) were characterized as such due, in large part, to their adoption of western legal systems.

truths or mere complacency, it tends to make questions about traditions, shared values, and historic evolution seem [moot]. Actually, they are most pertinent¹⁵⁹

Although many federally recognized Native governments currently govern pursuant to written constitutions, most Native governments in the United States did not adopt constitutionalism on a purely voluntary basis.¹⁶⁰ In the nineteenth and twentieth centuries, extenuating sociopolitical circumstances forced a number of Native communities “to adopt constitutionalism throughout their legal systems, tribal governments, and daily lives.”¹⁶¹ In the mid-nineteenth century, at least eight Native communities in the continental United States transitioned from their traditional forms of governance to written constitutionalism.¹⁶² These communities, which included the Cherokee Nation and the Creek Confederacy, adopted constitutionalism as a means of preserving their self-governing powers in the face of external pressure from the federal government.¹⁶³ As legal scholars Vine Deloria, Jr. and Clifford Lytle explain in the following passage, these early transitions to constitutionalism reflect a voluntary response to external pressure:

Unquestionably, the Creeks would not have built this kind of political structure without the constant pressure by the United States to reform their government in ways that would make it easier for the whites to deal with the Creeks. At the same time the innovations and changes were initiated by the Creeks themselves and were not dictated by the federal government to force political compatibility. . . . Self-government was not ‘given’ to these Indians; they preserved their own version of self-government by innovation.¹⁶⁴

The next large wave of transitions from traditional tribal governance to written constitutionalism came in the mid-twentieth century in response to the Indian Reorganization Act of 1934. “Under the Indian

¹⁵⁹ CONSTITUTIONS OF THE WORLD FROM THE LATE 18TH CENTURY TO THE MIDDLE OF THE 19TH CENTURY 7 (Horst Dippel ed., 2008).

¹⁶⁰ GOLDBERG ET AL., *supra* note 118, at 31-32.

¹⁶¹ NATIVE AMERICANS AND THE LAW: CONSTITUTIONALISM AND NATIVE AMERICANS, 1903-1968 xi (John R. Wunder ed. 1996) [hereinafter NATIVE AMERICANS AND THE LAW].

¹⁶² Robert J. Miller, *Tribal Constitutions and Native Sovereignty* (Apr. 4, 2011) available at <http://ssrn.com/abstract=1802890>.

¹⁶³ DELORIA & LYTLE, *supra* note 35, at 23.

¹⁶⁴ *Id.*

Reorganization Act . . . all Indian tribes were forced to consider adoption of modern constitutional principles,” which included “new tribal governments based upon representative democracy and economic development committees.”¹⁶⁵

While not required to accept the Indian Reorganization Act or adopt a written constitution pursuant to the Act’s terms, Native communities faced intense pressure to organize and adopt constitutions under the Act because “only tribes which had constitutions drawn up under the provisions of the Indian Reorganization Act were assured that the powers specified in those documents could not be withdrawn or abridged by the Secretary of the Interior.”¹⁶⁶ Moreover, “the adoption of a tribal constitution was a prerequisite to tribal business incorporation,” which was a significant factor for communities seeking economic development.¹⁶⁷ Ultimately, of the 252 Native communities that voted in the Indian Reorganization Act referendum, 174 voted in favor of the Act.¹⁶⁸ Of those 174, 92 also adopted tribal constitutions pursuant to the Act.¹⁶⁹ “Since its passage, more than a hundred Indian nations have adopted [Indian Reorganization Act] constitutions . . . [and countless] others govern under constitutions modeled after [Indian Reorganization Act] constitutions.”¹⁷⁰

Currently, tribal constitutions are nearly synonymous with Native self-governance. While the federal government rarely makes an explicit demand that a Native community adopt a formal written constitution, many Native communities elect to do so in order to bolster their claims to continuing self-governance in the eyes of the federal government. For example, most Native communities that obtained federal recognition through the process administered by the Department of the Interior’s Office of Federal Acknowledgment adopted a written constitution either before or after receiving federal recognition.¹⁷¹ Likewise, the vast majority

¹⁶⁵ NATIVE AMERICANS AND THE LAW, *supra* note 161, at xi.

¹⁶⁶ Lawrence C. Kelly, *The Indian Reorganization Act: The Dream and the Reality*, 44 PACIFIC HISTORICAL REVIEW 291, 303 n.17 (1975).

¹⁶⁷ *Id.* at 303.

¹⁶⁸ *Wheeler-Howard Act, to Exempt Certain Indians: Hearings on S. 2103 Before the H. Comm. on Indian Affairs*, 76 Cong. 390-95 (1940), available at <http://babel.hathitrust.org/cgi/pt?id=mdp.39015019146391;seq=394;view=1up;num=390>.

¹⁶⁹ Kelly, *supra* note 166, at 304.

¹⁷⁰ AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS 3 (Eric D. Lemont ed., 2006).

¹⁷¹ See, e.g., CONST. OF THE GRAND TRAVERSE BAND OF OTTAWA & CHIPPEWA INDIANS, available at <http://thorpe.ou.edu/constitution/GTBcons3.html> (last visited Mar. 20, 2013); CONST. OF THE JAMESTOWN CLALLAM TRIBE, available at http://www.jamestowntribe.org/govdocs/gov_const.htm (last visited Mar. 20, 2013);

of Native communities that obtained federal recognition through federal legislation now govern pursuant to a written constitution.¹⁷²

2. Conflicts Between Written Constitutionalism and Native Values

Despite the prevalence of modern constitutionalism in Indian country, there is still lingering controversy about the cultural relevance of tribal constitutions.¹⁷³ Deloria and Lytle assert that written constitutionalism is a European-American form that is at odds with traditional Native ways of governing.¹⁷⁴ They explain the incompatibility of document-based governance with Native governance forms as follows:

ARTICLES OF CONFEDERATION OF THE TUNICA-BILOXI INDIAN TRIBE, *available at* <http://thorpe.ou.edu/constitution/tunica-biloxie/index.html> (last visited Mar. 20, 2013); CONST. OF THE TIMBISHA SHOSHONE INDIAN TRIBE, *available at* http://timbisha.com/index.php?option=com_content&view=article&id=6&Itemid=2 (last visited Mar. 20, 2013); CONST. OF THE POARCH BAND OF CREEK INDIANS; CONST. OF THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH), *available at* <http://thorpe.ou.edu/constitution/wampanoag/index.html> (last visited Mar. 20, 2013); CONST. OF THE SAN JUAN S. PAIUTE TRIBE; CONST. OF THE MOHEGAN TRIBE OF INDIANS OF CONN., *available at* <http://www.mohegan.nsn.us/Government/sovereignty.aspx> (last visited Mar. 20, 2013); CONST. OF THE JENA BAND OF CHOCTAW INDIANS; CONST. OF THE NOTTAWASEPPI HURON BAND OF POTAWATOMI, *available at* <http://www.nhbpi.com/TribalCode.html> (last visited Mar. 20, 2013); CONST. OF THE SAMISH INDIAN NATION; CONST. OF THE MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS (GUN LAKE TRIBE); SNOQUALMIE INDIAN TRIBAL CONST., *available at* <http://www.snoqualmietribe.com/sites/default/files/linkedfiles/constitution.pdf> (last visited Mar. 20, 2013); CONST. OF THE COWLITZ INDIAN TRIBE; MASHPEE WAMPANOAG CONST.,

¹⁷² See, e.g., CONST. OF THE CONFEDERATED TRIBES OF THE COOS, LOWER UMPQUA AND SIUSLAW INDIANS, *available at* <http://ctclusi.org/sites/default/files/Constitution%20CTCLUSI.pdf> (last visited Mar. 20, 2013); CONST. OF THE FEDERATED INDIANS OF GRATON RANCHERIA; CONST. OF THE COW CREEK BAND OF UMPQUA TRIBE OF INDIANS, OR.; CONST. OF THE LITTLE RIVER BAND OF INDIANS OF MANISTEE, MICH., *available at* <https://www.lrboi-nsn.gov/index.php/tribal-code> (last visited Mar. 20, 2013); CONST. OF THE MASHANTUCKET (W.) PEQUOT TRIBE; CONST. OF THE POKAGON BAND OF POTAWATOMI INDIANS, *available at* <http://www.pokagonband-nsn.gov/government/constitution> (last visited Mar. 20, 2013); CONST. OF THE LITTLE TRAVERSE BAY BAND OF ODAWA INDIANS, *available at* <http://www.ltbbodawa-nsn.gov/odawaregister/Constitution/LTBB%20constitution%20final%20request%20for%20election%20by%20resolution%20110203-02.pdf> (last visited Mar. 20, 2013); CONST. OF THE SHAWNEE TRIBE, *available at* <http://www.absenteeshawneetribe-nsn.gov/Constitution.aspx> (last visited Mar. 20, 2013).

¹⁷³ For a discussion of the controversy surrounding the creation of tribal constitutions, see FELIX S. COHEN, DAVID EUGENE WILKINS, LINDSAY GORDON ROBERTSON, *ON THE DRAFTING OF TRIBAL CONSTITUTIONS* (2007).

¹⁷⁴ DELORIA & LYTLE, *supra* note 35, at 17.

The most profound and persistent element that distinguishes Indian ways of governing from European-American forms is the very simple fact that non-Indians have tended to write down and record all the principles and procedures that they believe essential to the formation and operation of a government. The Indians, on the other hand, benefiting from a religious, cultural, social and economic homogeneity in their tribal societies, have not found it necessary to formalize their political institutions by describing them in a document.¹⁷⁵

During the referendum on the Indian Reorganization Act, seventeen Pueblos of New Mexico advanced Deloria and Lytle's point one step further by asserting that it was not only unnecessary for them to adopt a written constitution, but it was also detrimental to their self-governance.¹⁷⁶ Those Pueblos "refused constitutions because they believed the inflexibility of written documents would eventually weaken tribal cohesion and lead to factionalism."¹⁷⁷ Indeed, many of the Native communities that either adopted constitutions under the Indian Reorganization Act or operate according to similar constitutions have come to recognize certain inadequacies and irrelevancies of the American constitutional model in the context of Native self-governance. This recognition has prompted many Native governments to engage in reform efforts in search of an answer to the recurring question of whether Native communities can effectively use written constitutions to "balance a largely spiritual, holistic, oral, family-based, consensus-oriented view of the world within a larger society that is secular, individualistic, written and majoritarian[.]"¹⁷⁸ This question will loom large for the founders of the reorganized Native Hawaiian government as they begin the complicated work of structuring government institutions "to combine traditional ways of thinking with contemporary challenges" and developing strategies "to meet current as well as future needs" of the Native Hawaiian people.¹⁷⁹

3. Written Constitutionalism and the Native Hawaiian Government

It may seem axiomatic that the reorganized Native Hawaiian government would protect civil rights through a modern constitution. After all, prior to the unlawful overthrow of the Kingdom of Hawai'i in

¹⁷⁵ *Id.*

¹⁷⁶ NATIVE AMERICANS AND THE LAW, *supra* note 161, at 144.

¹⁷⁷ *Id.*

¹⁷⁸ AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS, *supra* note 170, at 3.

¹⁷⁹ Coffey & Tsosie, *supra* note 15, at 208.

1893, the Native Hawaiian community had been governing itself as a constitutional monarchy for over half a century.¹⁸⁰ Interests of time and convenience may tempt the Native Hawaiian people to simply pick up governance where the Kingdom of Hawai‘i left off, and external pressure from the federal government “to simply move forward and adapt is strong.”¹⁸¹

However, a Native Hawaiian preference for constitutional governance should not be assumed. As was the case with many other transitions from traditional forms of Native governance to constitutionalism in the mid-nineteenth century, the Kingdom of Hawaii’s transition to constitutionalism was not the result of its own natural governmental evolution, but rather, was a response to dire, seemingly insurmountable, circumstances.¹⁸² Furthermore, as explained *supra* Part I, Section C, the Kingdom’s western constitutional rights system was not necessarily consonant with Native Hawaiian traditional values and knowledge, and it ultimately enured to the benefit of foreigners rather than Native Hawaiians.

Moreover, at the present moment in world history, the concept of the sovereign state that underlies constitutionalism is steadily decreasing in relevance. As explained by Professor S. James Anaya, the concept of the state as the highest form of social organizing is problematic because it does not accurately reflect the day-to-day realities of how agency flows through society, and it devalues and delegitimizes alternative forms of social organizing.¹⁸³ According to Anaya, the state has diminished in

¹⁸⁰ See *supra* note 73 and accompanying text.

¹⁸¹ AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS, *supra* note 170, at 4.

¹⁸² As explained previously, the Native Hawaiian people functioned without constitutional documents for over half a century after sustained contact with foreigners began. However, like other Native communities in the United States that had their oral languages reduced to written form in the early 1800s, Hawai‘i eventually formalized its government structure through written constitutions in response to external pressure. See *supra* notes 66-68 and accompanying text. From the community’s perspective, the adoption of a written constitution was not a means of placating foreign interests, but rather, a means of protecting the people from those foreign interests. As Hawaii’s Prince Kūhiō observed, the first Hawaiian Constitution was unique because it was not “‘wrung from an unwilling sovereign by force of arms,’ but rather was the free surrender of power ‘by a wise and generous ruler, impressed and influenced by the logic of events, by the needs of his people, and by the principles of the new civilization that was dawning on his land.’” VAN DYKE, *supra* note 14, at 26 (quoting Kalanianaʻole, *supra* note 79). Native Hawaiian leadership sought to protect Native Hawaiian resources and lifeways by articulating the community government’s powers and responsibilities in a form that foreigners could understand and would respect. See *supra* note 73 and accompanying text.

¹⁸³ S. James Anaya, *Indigenous Law and Its Contribution to Global Pluralism*, 6 INDIGENOUS L.J. 3, 3-5 (2007).

importance “in the face of both local and transnational spheres of authority and community,” and “Indigenous peoples have pointedly undermined the premise of the state as the highest and most liberating form of human association.”¹⁸⁴ Supranational legal institutions, multinational corporations, and self-determining local communities have all called into question whether the state model continues to be a relevant and viable form of social organizing. Therefore, a Native community organizing in the present day should not necessarily take the superiority of the state constitutional model for granted.¹⁸⁵

V. RE-ENVISIONING A KULEANA SYSTEM

[F]ew generations are ever given as great a chance to influence their own destiny as a people than are Hawaiians living today.

—George Kanahele¹⁸⁶

This moment in Native Hawaiian history, like the late 1830s, calls for a grand scale re-imagination and reorganization of Native Hawaiian law and government. The existing relationship between the Native Hawaiian people, the United States, and the State of Hawai‘i, which subordinates Native Hawaiian society to federal and state governments and fails to acknowledge Native Hawaiians’ inherent self-governing authority, will eventually crumble under the moral weight of the United States’ and the State of Hawaii’s obligation to right historic wrongs and extend to the Native Hawaiian people *at least* the same level of recognition extended to Native American and Alaska Native communities. When that relationship does crumble and is built anew, the Native Hawaiian people will have the opportunity to craft a new vision for a civil rights system that effectively promotes peace and order within Native

¹⁸⁴ *Id.* at 9.

¹⁸⁵ This point is particularly relevant for the Native Hawaiian people because, at the present moment, the community is not yet formally recognized by any external political entities as a self-governing state. This fact is seen by some as a barrier to the development of Native Hawaiian governing systems, including but not limited to a civil rights system. However, a lack of externally acknowledged political sovereignty should not deter the Native Hawaiian people from engaging in the important process of societal development and reorganization. Social organizing and institutional development can occur outside the traditional framework of an independent nation or a domestic dependent nation. Moreover, to the extent that Professor Anaya is correct about the increasing irrelevance of the state as a form of organizing, the Native Hawaiian community may have the opportunity to set a new course for itself and other unrecognized Native communities by asserting its sovereignty and addressing its needs in the absence of a traditional political form.

¹⁸⁶ KANAHELE, *supra* note 93, at 462.

Hawaiian society and advances the best interests of the entire community, including its individual members.

Attempting to reconcile the kuleana-based philosophical core of the Native Hawaiian community with the federal government’s perspective on the protection of civil rights by Native governments will invoke important and difficult questions for the Native Hawaiian people to address as the community reorganizes its government. Is a written system of individual civil rights naturally consonant with the traditional notion of kuleana that connects Native Hawaiian leadership to the Native Hawaiian people? If not, is there a way to reconcile the two in order to preserve Native Hawaiian cultural sovereignty *and* Native Hawaiian political sovereignty?

Given the expectations of the federal government and its advancement of individual rights and constitutionalism as universal goods, it would be tempting to fashion a civil rights system that closely mirrors that of the federal government. However, the founders of the reorganized Native Hawaiian government would be wise to heed traditional wisdom that warns, “mai lilo ‘oe i puni wale, o lilo ‘oe i kamali‘i—do not believe all that is told you lest you be [led as] a little child.”¹⁸⁷ A new political entity such as the reorganized Native Hawaiian government may ultimately choose to assert its sovereign authority by incorporating modern constitutionalism and individual rights, but such a decision should come as a result of careful analysis.

A. *Looking Within to Develop Civil Rights Protections*

Despite what appears to be a general dissonance between individual constitutional rights protections and Native Hawaiian understandings about the relationship between Native Hawaiian leadership and the Native Hawaiian people, the community’s constitutional enshrinement of *culturally consistent* civil rights protections might serve two important purposes.

First, enshrining civil rights protections in a written constitution might offer added protection against federal government intrusion into internal Native Hawaiian governance. Expressing the governing standards of the Native Hawaiian people in a form that the federal government can understand and appreciate will likely allay federal fears about Native Hawaiian justice administration and keep the federal government from intervening to protect individual rights.¹⁸⁸ Decreasing the potential for

¹⁸⁷ MARY KAWENA PUKUI, ‘ŌLELO NO‘EAU: HAWAIIAN PROVERBS AND POETICAL SAYINGS 226 (2004).

¹⁸⁸ The federal government is apt to legislate in areas where it believes the rights of individuals, especially non-members, are implicated but not protected by the laws of the Native government. *See, e.g., supra* note 128.

federal government intervention would enhance Native Hawaiian political sovereignty, thereby facilitating the expanded expression of Native Hawaiian cultural sovereignty.

Second, articulating civil rights principles in a written document may provide a unique way to proliferate traditional Native Hawaiian values. It has been astutely observed that Native communities

have been denied the luxury of seeing their own fundamental values organically incorporated into their political documents over the span of millennia. Native cosmologies, including oral origin stories and creation myths, that served as many Indian nations' original "constitutions" have been systematically attacked and weakened by federal policies of termination, relocation, and assimilation. Reform leaders therefore face a difficult dual challenge. They must first reaffirm (and in some cases rediscover) these core beliefs and then develop strategies for having them serve as the foundation of their governments.¹⁸⁹

If the founders of the reorganized Native Hawaiian government elect to govern pursuant to a written constitutional rights system, they can maximize cultural sovereignty by including in that written system an articulation of the traditional cosmologies and beliefs that define the relationship between Native Hawaiian leadership and the Native Hawaiian people. The founders could then describe the core value of kuleana that undergirds that relationship and articulate civil rights that are based on the conceptual framework that the concept of kuleana provides. Such rights could, for example, highlight the indivisibility of leadership authority and responsibility and focus on the affirmative duties of the government to manage Native Hawaiian land, resources, and sovereignty wisely.¹⁹⁰

The Diné (Navajo) people of the Southwest have taken a similar approach to governance. While the Diné do not govern pursuant to a constitution, they have developed an extensive body of written law that they enforce through what many consider to be an exemplary tribal justice system. That body of written law includes the Diné Bi Beehaz'áanii Bitse Siléí (Declaration of the Foundation of Diné Law)¹⁹¹ and the Diné Bi

¹⁸⁹ AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS, *supra* note 170, at 4.

¹⁹⁰ *See supra* note 47, and accompanying text.

¹⁹¹ 1 NAVAJO NATION CODE § 201, *available at* <http://www.navajocourts.org/dine.htm> (last visited Feb. 15, 2013). This sections states that:

We, the Diné, the people of the Great Covenant, are the image of our

Beenahaz'áanii (Diné Law),¹⁹² which is comprised of Diyin Bitsqádeę

ancestors and we are created in connection with all creation. . . .

The Holy People ordained,

Through songs and prayers,

That

Earth and universe embody thinking,

Water and the sacred mountains embody planning,

Air and variegated vegetation embody life,

Fire, light, and offering sites of variegated sacred stones embody wisdom.

These are the fundamental tenets established.

Thinking is the foundation of planning.

Life is the foundation of wisdom.

Upon our creation, these were instituted within us and we embody them.

Accordingly, we are identified by:

Our Diné name,

Our clan,

Our language,

Our life way,

Our shadow,

Our footprints.

Therefore, we were called the Holy Earth-Surface-People.

From here growth began and the journey proceeds.

Different thinking, planning, life ways, languages, beliefs, and laws appear among us,

But the fundamental laws placed by the Holy People remain unchanged.

Hence, as we were created with living soul, we remain Diné forever. *Id.* § 201.

¹⁹² *Id.* § 202. This sections states that:

The Diné bi beenahaz'áanii embodies Diyin bitsqádeę beenahaz'áanii (Traditional Law), Diyin Dine'é bitsqádeę beenahaz'áanii (Customary Law), Nahasdzáán dóó Yádilhił bitsqádeę beenahaz'áanii (Natural Law), and Diyin Nohookáá Diné bi beenahaz'áanii (Common Law).

These laws provide sanctuary for the Diné life and culture, our relationship with the world beyond the sacred mountains, and the balance we maintain with the natural world.

Beenahaz'áanii (Diné Traditional Law),¹⁹³ Diyin Dine'é Bitsaądeę

These laws provide the foundation of Diné bi nahat'á (providing leadership through developing and administering policies and plans utilizing these laws as guiding principles) and Diné sovereignty. In turn, Diné bi nahat'a is the foundation of the Diné bi naat'á (government). Hence, the respect for, honor, belief and trust in the Diné bi beenahaz'áanii preserves, protects and enhances the following inherent rights, beliefs, practices and freedoms:

- A. The individual rights and freedoms of each Diné (from the beautiful child who will be born tonight to the dear elder who will pass on tonight from old age) as they are declared in these laws; and
- B. The collective rights and freedoms of the Diyin Nohookáá Diné as a distinct people as they are declared in these laws; and
- C. The fundamental values and principles of Diné Life Way as declared in these laws; and
- D. Self-governance; and
- E. A government structure consisting of Hózhóójí Nahat'á (Executive Branch), Naat'ájí Nahat'á (Legislative Branch), Hashkééjí Nahat'á (Judicial Branch), and the Naayee'jí Nahat'á (National Security Branch); and
- F. That the practice of Diné bi nahat'a through the values and life way embodied in the Diné bi beenahaz'áanii provides the foundation for all laws proclaimed by the Navajo Nation government and the faithful adherence to Diné Bi Nahat'á will ensure the survival of the Navajo Nation; and
- G. That Diné bi beenahaz'áanii provides for the future development and growth of a thriving Navajo Nation regardless of the many different thinking, planning, life ways, languages, beliefs, and laws that may appear within the Nation; and
- H. The right and freedom of the Diné to be educated as to Diné Bi beenahaz'áanii; and
- I. That Diné Bi beenahaz'áanii provides for the establishment of governmental relationships and agreements with other nations; that the Diné shall respect and honor such relationships and agreements and that the Diné can expect reciprocal respect and honor from such other nations. *Id.* § 202.

¹⁹³ *Id.* § 203. This sections states that:

The Diné Traditional Law declares and teaches that:

- A. It is the right and freedom of the Diné to choose leaders of their choice; leaders who will communicate with the people for guidance; leaders who will use their experience and wisdom to always act in the best interest of the people; and leaders who will also ensure the rights and freedoms of generations yet to come; and
- B. All leaders chosen by the Diné are to carry out their duties and responsibilities in a moral and legal manner in representing the people

Beenahaz'aanii (Diné Customary Law),¹⁹⁴ Nahasdzáán dóó Yádiłhił

and the government; the people's trust and confidence in the leaders and the continued status as a leader are dependent upon adherence to the values and principles of Dine bi beenahaz'aanii; and

C. The leader(s) of the Executive Branch (Alqajji' Hózhóójí Nahat'á) shall represent the Navajo Nation to other peoples and nations and implement the policies and laws enacted by the legislative branch; and

D. The leader(s) of the Legislative Branch (Alqajji' Naat'áji Nahat'á and Alqajji' Naat'áji Ndaanit'áii or Naat'aanii) shall enact policies and laws to address the immediate and future needs; and

E. The leader(s) of the Judicial Branch (Alqajji' Hashkééjí Nahat'á) shall uphold the values and principles of Diné bi beenahaz'aanii in the practice of peace making, obedience, discipline, punishment, interpreting laws and rendering decisions and judgments; and

F. The leader(s) of the Security Branch (Alqajji' Naayee'jí Nahat'á) are entrusted with the safety of the people and the government. To this end, the leader(s) shall maintain and enforce security systems and operations for the Navajo Nation at all time and shall provide services and guidance in the event of severe national crisis or military-type disasters; and

G. Our elders and our medicine people, the teachers of traditional laws, values and principles must always be respected and honored if the people and the government are to persevere and thrive; the teachings of the elders and medicine people, their participation in government and their contributions of the traditional values and principles of Diné life way will ensure growth of the Navajo Nation; and from time to time, the elders and medicine people must be requested to provide the cleansing, protection prayers, and blessing ceremonies necessary for securing healthy leadership and the operation of the government in harmony with traditional law; and

H. The various spiritual healings through worship, song and prayer (Nahaghá) must be preserved, taught, maintained and performed in their original forms; and

I. The Diné and the government must always respect the spiritual beliefs and practices of any person and allow for the input and contribution of any religion to the maintenance of a moral society and government; and

J. The Diné and the government can incorporate those practices, principles and values of other societies that are not contrary to the values and principles of Diné Bi Beenahaz'aanii and that they deem is in their best interest and is necessary to provide for the physical and mental well-being for every individual. *Id.* § 203.

¹⁹⁴ *Id.* § 204. This sections states that:

The Diné Customary Law declares and teaches that:

A. It is the right and freedom of the people that there always be holistic education of the values and principles underlying the purpose of living

Bitsaądeę Beenahaz'áanii (Diné Natural Law),¹⁹⁵ and Diyin Nohookáá

in balance with all creation, walking in beauty and making a living; and

B. It is the right and freedom of the people that the sacred system of k'é, based on the four clans of Kiiyaa'áanii, Todích'iínii, Honagháahnii and Hashtl'ishnii and all the descendent clans be taught and preserved; and

C. It is the right and freedom of the people that the sacred Diné language (nihiinei') be taught and preserved; and

D. It is the right and freedom of the people that the sacred bonding in marriage and the unity of each family be protected; and

E. It is the right and freedom of the people that every child and every elder be respected, honored and protected with a healthy physical and mental environment, free from all abuse.

F. It is the right and freedom of the people that our children are provided with education to absorb wisdom, self-knowledge, and knowledge to empower them to make a living and participate in the growth of the Navajo Nation. *Id.* § 204.

¹⁹⁵ *Id.* § 205. This sections states that:

Diné Natural Law declares and teaches that:

A. The four sacred elements of life, air, light/fire, water and earth/pollen in all their forms must be respected, honored and protected for they sustain life; and

B. The six sacred mountains, Sisnajini, Tsoodzil, Dook'o'oslííd, Dibé Nitsaa, Dził Na'oodilii, Dził Ch'ool'íí, and all the attendant mountains must be respected, honored and protected for they, as leaders, are the foundation of the Navajo Nation; and

C. All creation, from Mother Earth and Father Sky to the animals, those who live in water, those who fly and plant life have their own laws, and have rights and freedom to exist; and

D. The Diné have a sacred obligation and duty to respect, preserve and protect all that was provided for we were designated as the steward of these relatives through our use of the sacred gifts of language and thinking; and

E. Mother Earth and Father Sky is part of us as the Diné and the Diné is part of Mother Earth and Father Sky; The Diné must treat this sacred bond with love and respect without exerting dominance for we do not own our mother or father.

F. The rights and freedoms of the people to the use of the sacred elements of life as mentioned above and to the use of the land, natural resources, sacred sites and other living beings must be accomplished through the proper protocol of respect and offering and these practices must be protected and preserved for they are the foundation of our spiritual ceremonies and the Diné life way; and

G. It is the duty and responsibility of the Diné to protect and preserve

Diné bi beenahaz'áanii (Diné Common Law).¹⁹⁶ The Diné Traditional Law, specifically, describes the relationship between Diné leadership and the Diné people in reciprocal terms as follows:

It is the right and freedom of the Diné to choose leaders of their choice; leaders who will communicate with the people for guidance; leaders who will use their experience and wisdom to always act in the best interest of the people; and leaders who will also ensure the rights and freedoms of generations yet to come . . .

. . . All leaders chosen by the Diné are to carry out their duties and responsibilities in a moral and legal manner in representing the people and the government; the people's trust and confidence in the leaders and the continued status as a leader are dependent upon adherence to the values and principles of Dine bi beenahaz'áanii . . .¹⁹⁷

To the extent that the Native Hawaiian people would like to govern pursuant to a written constitution, the codification of traditional Native Hawaiian values and principles in that constitution might relieve some concerns about the general ill fit of written constitutionalism for Native governance and give the Native Hawaiian people the opportunity to bolster the impact of traditional values on the Native Hawaiian

the beauty of the natural world for future generations. *Id.* § 205.

¹⁹⁶ *Id.* § 206. This sections states that:

The Diné Common Law declares and teaches that:

A. The knowledge, wisdom, and practices of the people must be developed and exercised in harmony with the values and principles of the Diné Bi Beenahaz'aanii; and in turn, the written laws of the Navajo Nation must be developed and interpreted in harmony with Diné Common Law; and

B. The values and principles of Diné Common Law must be recognized, respected, honored and trusted as the motivational guidance for the people and their leaders in order to cope with the complexities of the changing world, the need to compete in business to make a living and the establishment and maintenance of decent standards of living; and

C. The values and principles of Diné Common Law must be used to harness and utilize the unlimited interwoven Diné knowledge, with our absorbed knowledge from other peoples. This knowledge is our tool in exercising and exhibiting self-assurance and self-reliance in enjoying the beauty of happiness and harmony. *Id.* § 206

¹⁹⁷ *Id.* at § 203.

government's administration of justice. Such a process would reflect a practice that Professor Angela Riley might refer to as "good (Native) governance."

1. Good (Native) Governance

Reasonable minds differ as to what constitutes "good governance." The definitions of good governance promoted by international development organizations and other entities concerned with the promotion of good governance initiatives around the world are often based on distinctly Western democratic ideals. However, Native communities with values and traditions that are not based in Western thought often have ideas about good governance that differ greatly from those embraced by entities such as the United Nations, the World Bank and the International Monetary Fund. Recognizing the highly contextual nature of good governance, Professor Riley has analyzed the concept of good governance as it applies to Native peoples and articulated a notion of "good (Native) governance."¹⁹⁸

Riley explains that, while Native governments are—and should be—free to deviate from American and other western governance models, they should still strive to be "good" governments according to their own standards.¹⁹⁹ Pursuant to Riley's logic, Native sovereignty entails more than the authority to reject external intrusion into internal affairs. Native governments seeking to exercise their sovereignty as "good" governments must also govern proactively in accordance with their own standards and values. For example, Native governments are correct to assert that certain federal laws protecting workers do not apply in Indian country. However, good Native governance does not end with the assertion that those federal standards do not bind Native governments. Good Native governance requires Native governments to take the next step of asserting their inherent governing authority over such matters by developing and applying their own standards in accordance with their own community values.

This does not mean that the standards developed by Native governments need to be dramatically different from federal standards in order to be a meaningful expression of Native sovereignty. In some instances, a Native government's core values may be consistent with the federal government's, and the Native government may elect to mirror the federal government's standards and processes. In other instances, a Native government may decide that adopting certain federal standards advances the Native community's political strategy of maintaining a positive diplomatic relationship with the United States. It is within each Native

¹⁹⁸ Riley, *supra* note 10, at 1049.

¹⁹⁹ *Id.*

government's sovereign discretion to adopt the particular standards it believes are appropriate. Provided that the Native government is proactively exercising its independent governing authority when adopting such standards, it is still an exercise of Native sovereignty.

Accordingly, the ultimate goal of Native sovereignty is not to empower Native communities merely to reject the governing authority of other sovereigns, but rather, to empower Native communities to further their own cultural, social, and economic health and welfare through the exercise of independent governing authority. Contrary to what federal Indian law's Native sovereignty doctrine posits, political independence is a means, not an end, for Native peoples, and it is only desirable to the extent that it affords Native governments the freedom to act in the best interests of their people and practice good (Native) governance.

While the heavy emphasis on questions of sovereignty in Native law leads many to believe that sovereignty is primary and good (Native) governance is ancillary, the exact opposite is true. As quickly as the federal government acknowledges the sovereign power of a Native entity, it can and will act to usurp that power if it believes that the Native government is not wielding the power in a manner that meets the federal government's expectations.²⁰⁰ Moreover, a Native people will not tolerate a bad Native government for long before taking corrective action. Accordingly, good (Native Hawaiian) governance will be absolutely crucial to the restoration and maintenance of both political and cultural sovereignty within the Native Hawaiian community.

VI. CONCLUSION—GOOD (NATIVE HAWAIIAN) GOVERNANCE

In light of these considerations, what does good Native Hawaiian governance mean in the context of civil rights? The reorganized Native Hawaiian government, as a sovereign, could theoretically refuse to acknowledge individual civil rights. However, the government will probably not be eligible for external recognition if it does not articulate some form of civil rights protections. In addition, it is highly likely that individual Native Hawaiian citizens have become accustomed to a western individual rights system over the course of time and expect some standard of individual rights to be articulated, whether in writing or otherwise.

Most importantly, government abuses of power and the oppression of individual citizens are no more consistent with Native Hawaiian values than they are with American values. Therefore, it would be illogical for the reorganized Native Hawaiian government to go to extraordinary lengths to avoid articulating some standard of civil rights to guide its

²⁰⁰ For example, the 111th Congress considered proposed legislation intended to sever the government-to-government relationship between the United States and the Cherokee Nation in response to the Cherokee Nation's decision to strip the descendants of Cherokee Freedmen of their tribal membership. *See* H.R. 2761, 111th Cong. (2009).

functioning. Instead, the reorganized government should focus its energy on addressing the question of how a Native Hawaiian government, acting according to principles of good (Native Hawaiian) governance, might articulate civil rights protections in a way that advances Native Hawaiian sovereignty.

A decision by the Native Hawaiian people to create a culturally based written constitution that incorporates a notion of civil rights rooted in traditional Native Hawaiian values would be a strong expression of the people's inherent sovereignty. Native Hawaiian cultural and political sovereignty could be maximized by defining the relationship between Native Hawaiian leadership and the Native Hawaiian people from within the community and, as appropriate, incorporating external notions and expectations to the extent that such incorporations serve the people's best interests. Provided that the community's kuleana-based philosophical core is preserved, creating a contemporary written civil rights system would not be a rejection of traditional values, but rather, a means of connecting the Native Hawaiian past with its present and future in the context of governance.

The founders of the reorganized Native Hawaiian government will soon have a rare opportunity that many Native communities might like to approach again with the benefit of hindsight—the opportunity to create a brand new system of community law and government that is an outgrowth and reflection of the community's shared values and understandings. The founders should seize this tremendous opportunity to be bold and innovative, and to approach written constitutionalism and civil rights in a unique way that comports with the Native Hawaiian core value of kuleana and simultaneously empowers both the government and the people.