Reconciling Maoli Interests in a Haole Forum: Limitations to the U.S. Department of the Interior's Consultation Policy That Undermine Native Hawaiian Self-Determination

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ABSTRACT

Nearly one hundred thirty years after the United States illegally overthrew the Hawaiian Kingdom, the U.S. Department of the Interior unilaterally drafted the United States' first consultation policy with the "Native Hawaiian Community." The policy recognizes a "government-to-sovereign" relationship between the United States and the Native Hawaiian Community resembling, in part, yet distinct from its existing "government-to-government" relationships with American Indian tribes and Alaska Native corporations. Despite recognition as the Indigenous people of Hawaiʻi by the federal legislative and executive branches, Native Hawaiians have not received comparable exemption from the Fifteenth Amendment's supposed prohibition on ancestry-based voting restrictions. The U.S. Supreme Court's decision in Rice v. Cayetano crucially stunted Native Hawaiians' ability to organize a representative government

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recognized by the United States, holding Hawaiian ancestry was a "proxy" for race. Consequently, Rice significantly limits consultation efforts because the Court's failure to apply the self-determination principles extended to other Indigenous peoples in America denied Native Hawaiians a means of forming a recognized government required for meaningful consultation. To forecast the kinds of futures the Department of the Interior's policy could enable for Native Hawaiians, this Article analyzes emerging political issues that Native Hawaiians have faced in the United States as a consequence of Rice – specifically, the foreign political management of our internal affairs.

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I. INTRODUCTION

Nearly one hundred thirty years after the United States illegally overthrew the Hawaiian Kingdom, the U.S. Department of the Interior ("DOI" or "the Department") announced a unilateral draft of its first consultation policy with the "Native Hawaiian Community" ("NHC").[1] The DOI defines the NHC as the distinct Native Hawaiian Indigenous political community that Congress, exercising its plenary power over Native American affairs, has recognized and with which Congress has implemented a special political and trust relationship.[2] Yet, because an independent Hawaiian government has not been allowed to organize since the 1893 overthrow of the Hawaiian Kingdom, no politically recognized Hawaiian government took part in drafting the policy.[3] For the same reason, no politically recognized Hawaiian

[1] *See* U.S. DEP'T. OF THE INTERIOR, DEPARTMENT MANUAL, POLICY ON CONSULTATION WITH THE NATIVE HAWAIIAN COMMUNITY (proposed Oct. 18, 2022) (to be adopted as pt. 513, ch. 1) [hereinafter DOI Policy on Consultation]. The illegal overthrow occurred in 1893. *See* discussion *infra* Section II.A.

[2] DOI Policy on Consultation, *supra* note 1, at 1.4(G).

[3] *See* Off. of Native Hawaiian Rels., *Frequently Asked Questions – Consultation*, U.S. DEP'T OF THE INTERIOR, https://www.doi.gov/hawaiian/frequently-asked-questions-consultation (last visited Nov. 30, 2023) (noting that federal consultation with Native Hawaiians would occur through "informal representatives of the community, which does not currently have a unified formal government.").

government participated in drafting the agency policy's associated procedures.[4] As a result, the consultation rules omit certain provisions that would ensure meaningful consultation.[5]

The DOI policy recognizes a "government-to-sovereign" relationship between the United States and the NHC, resembling in part – yet distinct from – existing "government-to-government" relationships with American Indian tribes and Alaska Native corporations.[6] The federal courts, however, have treated Kānaka Maoli[7] differently from the recognized Indigenous peoples of the continental United States, notably in the existential matter of political identity.[8]

As analyzed in this Article, the Court's decision in *Rice v. Cayetano* significantly limited the ability of Kānaka Maoli to organize as a governing entity or assert political sovereignty.[9] In *Rice*, the Court held that Native Hawaiian ancestry was a "proxy for race" and concluded that a state-run

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[4] *See id.*

[5] *See* U.S. DEP'T. OF THE INTERIOR, DEPARTMENT MANUAL, PROCEDURES FOR CONSULTATION WITH THE NATIVE HAWAIIAN COMMUNITY (proposed Oct. 18, 2022) (to be adopted as pt. 513, ch. 2) [hereinafter DOI Procedures on Consultation].

[6] The DOI has coined the term "government-to-sovereign relationship" to describe the "special political and trust relationship that exists between the United States and the NHC in the absence of a 'government-to-government' relationship." *See* U.S. DEP'T. OF THE INTERIOR, PROPOSED NATIVE HAWAIIAN COMMUNITY CONSULTATION POLICY & PROCEDURES: FREQUENTLY ASKED QUESTIONS (2022), https://www.doi.gov/sites/doi.gov/files/20221205-faqs-doi-draft-dm-1-2-onhr.pdf. The DOI states that the term "government-to-sovereign relationship" also speaks to the NHC's "unrelinquished inherent sovereignty" and claims the proposed consultation policy and procedures reflects its "respect for the NHC's unique legal relationship with the United States, which Congress has recognized in over 150 statutes." *Id.*

[7] "Kanaka maoli" means a "Hawaiian native." MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 240 (1986) [hereinafter HAWAIIAN DICTIONARY]. "Kānaka" is the plural form of "kanaka." *Id.* at 127. While federal documents distinguish some Native Hawaiians from others based upon an arbitrary blood quantum, this Article uses "Kānaka Maoli" to refer to all Native Hawaiians – descendants of the aboriginal people living in Hawai'i prior to 1778. *See, e.g.*, 42 U.S.C. § 3057k (defining "Native Hawaiian" as "any individual . . . whose ancestors were natives of the area which consists of the Hawaiian Islands prior to 1778"). Accordingly, this Article references "Kanaka Maoli," "Kānaka Maoli," and "maoli" interchangeably with "Native Hawaiian" and "Native Hawaiians," respectively.

[8] *Compare* Rice v. Cayetano, 528 U.S. 495, 521 (2000) (concluding that limiting voters to "native Hawaiians" violated the Fifteenth Amendment by using ancestry as proxy for race), *with* Morton v. Mancari, 417 U.S. 535, 542 (1974) (holding that employment preferences for Indians in the Bureau of Indian Affairs did not constitute racial discrimination because of the political status of Indian tribes).

[9] Rice v. Cayetano, 528 U.S. 495 (2000). Justice Kennedy delivered the 7–2 opinion in favor of the plaintiff. *Id.* at 497. Chief Justice Rehnquist and Justices O'Connor, Scalia, Souter, Thomas, and Breyer joined in the majority opinion, while Justices Stevens and Ginsburg each authored dissenting opinions. *Id.* at 495, 497; *see also infra* Section IV.A.

election for trustees of the Office of Hawaiian Affairs ("OHA"), a quasi-state agency responsible for the wellbeing of Native Hawaiians,[10] violated the Fifteenth Amendment by recognizing votes of only Native Hawaiian citizens.[11] By crucially mischaracterizing the caucasian plaintiff as "Hawaiian" merely on account of his residence in Hawai'i, the Court also cast ambiguity on what it means to be Hawaiian.[12] Compared to other Indigenous peoples engaging in federal consultation through recognized tribal governments, *Rice* stunts meaningful consultation efforts because it continues to deny Native Hawaiians a means of electing individuals to represent Native Hawaiian interests within Hawai'i.[13] This Article examines the post-*Rice* political status of Kānaka Maoli to analyze potential impacts of the DOI's recent consultation policy and to recommended changes to the policy.[14]

A. Political Status of Native Hawaiians in the United States

The United States has yet to reconcile historic Native Hawaiian justice claims for the illegal overthrow of the Hawaiian Kingdom.[15] Colonization and settler colonialism in Hawai'i and Indigenous lands in North America have led to a "crucial similarity" among Native Hawaiians and Native Americans: "the destruction of their sovereign autonomy and authority over their lands and resources."[16] Yet, divergent histories surrounding induction of Native lands into the United States distinguish the current political and social status of Native Hawaiians from federally recognized American

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[10] Although administratively housed within Hawai'i's executive branch of government, OHA is often referred to a "quasi-state" agency for its distinct function in maintaining the state government's accountability to its constituents of Native Hawaiian ancestry described further in Section II.D of this article. *See* About, Off. of Haw. Aff., https://www.oha.org/about/ (last visited Jan. 28, 2024); Chad Blair, *OHA: Agency at a Crossroads Is Caught in a Power Struggle*, HONOLULU CIV. BEAT (Sept. 21, 2015), https://www.civilbeat.org/2015/09/oha-agency-at-a-crossroads-is-caught-in-a-power-struggle/.

[11] *Rice*, 528 U.S. at 499; *see infra* Section IV.A.

[12] *See id*.

[13] *See id*. at 531–32, 538 (Stevens, J., dissenting) (rejecting the majority opinion that because Native Hawaiians lack federal recognition, they are therefore not entitled to the political, rather than racial, classification of federally recognized tribes, designed to help promote self-governance).

[14] *See infra* Parts IV and V.

[15] President Dwight D. Eisenhower dissolved the Territory of Hawai'i and established the State of Hawai'i in 1959. *See* Admission Act of 1959, Pub. L. No. 86-3, 73 Stat. 4.

[16] Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95, 144 (1998).

Indians and Alaska Natives.[17] As a consequence of westward expansion, federally recognized American Indian tribes typically secured their political status from the numerous treaties entered into between individual tribes and the federal government.[18] More recently, the Alaska Native Claims Settlement Act of 1971 departed from the United States' reservation system by extinguishing aboriginal land title in Alaska through the mandated creation of twelve private, for-profit Alaska Native regional corporations and over 200 village corporations owned by enrolled Alaska Native shareholders.[19] Unlike the Alaska Native corporations or tribes recognized through formal treaties, Hawai'i became a part of the United States through an illegal overthrow followed by annexation.[20] None of these historic distinctions, however, adequately excuse the federal government's failure to assume comparable responsibilities for the protection of Kānaka, their ancestral lands, and their political sovereignty.[21]

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[17] *See* Le'a Malia Kanehe, *The Akaka Bill: The Native Hawaiians' Race for Federal Recognition*, 23 U. HAW. L. REV. 857, 860 (2001) (discussing Native Hawaiians being the only group within the class of "Native American" not extended federal recognition); *see infra* note 248 and accompanying text. The term "Indian" specifically refers to those Native tribes in the continental United States that have been federally recognized as subject to Federal Indian Law principles. *See* S. REP. NO. 110-260 (2008); S. REP. NO. 107-66 (2001); S. REP. NO. 675 (2012). For the purposes of this Article, "Indian" refers to federally recognized "American Indian" tribes and Alaska Native Corporations.

[18] *See Indian Treaties and the Removal Act of 1830*, OFF. OF THE HISTORIAN, https://history.state.gov/milestones/1830-1860/indian-treaties (last visited Sept. 19, 2023).

[19] *About the Alaska Native Claims Act*, ANCSA REG'L ASS'N, https://ancsaregional.com/about-ancsa/ (last visited Sept. 19, 2023). In 1975, amendments to the Alaska Native Claims Act established a thirteenth Alaska Native regional corporation "to ensure that Alaska Native people who were not permanent residents of Alaska but who were otherwise eligible to enroll in an Alaska Native regional corporation were included in the land claims settlement." *Id.*

[20] *See* discussion *infra* Section II.B.

[21] *See* DAVID H. GETCHES, ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 994 (7th ed. 2017); *see also* D. Kapua'ala Sproat, *Wai Through Kānāwai: Water for Hawai'i's Streams and Justice for Hawaiian Communities*, 95 MARQ. L. REV. 127, 145 (2011) ("In light of Hawai'i's unique history . . . issues impacting Kānaka Maoli implicate restorative justice principles that underscore the importance of respecting Indigenous rights in partial redress for the harms of American colonialism."); N. Mahina Tuteur, *Reframing Kānāwai: Towards a Restorative Justice Framework for Indigenous Peoples*, 7 INDIGENOUS PEOPLES' J.L., CULTURE & RESIST. 59, 69–70 (2022) ("Reparative justice for group-based human rights violations can take a variety of forms, including restitution of land and personal property, compensation for personal property, compensation for specific losses, and institutional reforms to guarantee non-repetition of abuses."); Eric K. Yamamoto & Ashley Kaiao Obrey, *Reframing Redress: A "Social Healing Through Justice" Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 ASIAN AM. L.J. 5, 32–36 (2009) (describing the concept of reparatory justice and the "Four R's of Social Healing" consisting of recognition, responsibility, reconstruction, and reparation).

While Kānaka lack a federally recognized government, Native Hawaiians nonetheless embody the elements of people who are "Indigenous" under the United Nations' working definition.[22] One United Nations study found:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions, and legal system.[23]

Partially in response to the *Rice* decision and drawing from the bodies of law applicable to American Indians and Alaska Natives, legislation has been introduced in the U.S. Congress since *Rice* to clarify the political status of Native Hawaiians and to support Native Hawaiian governance recognized by the United States.[24] Daniel Kahikina Akaka, the only Native Hawaiian to represent the State of Hawai'i in the U.S. Senate thus far,[25] proposed several measures between 2000 and 2011 to clarify the U.S. government's policy regarding its relationship with Native Hawaiians.[26] Titled the Native Hawaiian Government Reorganization Act, but often called the "Akaka Bill" after its primary sponsor, the proposed legislation sought, in part, to facilitate

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[22] José R. Martínez Cobo (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities), *Study on the Problem of Discrimination against Indigenous Populations*, 29, U.N. Doc. E/CN/Sub.2/1986/7/Add.4 (1987).

[23] *Id.*

[24] Melody K. MacKenzie, *Historical Background*, *in* NATIVE HAWAIIAN LAW: A TREATISE 5, 35 (Melody K. MacKenzie, Susan K. Serrano & D. Kapua'ala Sproat, eds., 2015); *see, e.g.,* S. REP. NO. 110-260 (2008); S. REP. NO. 107-66 (2001); S. REP. NO. 675 (2012).

[25] Alex Dobuzinskis, *Former Senator Akaka, First Native Hawaiian in Senate, Dies at 93*, REUTERS (Apr. 6, 2018, 1:54 PM), https://www.reuters.com/article/us-usa-congress-akaka/former-senator-akaka-first-native-hawaiian-in-senate-dies-at-93-idUSKCN1HD32X.

[26] *See*, *e.g.*, S. 2899, 106th Cong. (2000); S. 81, 107th Cong. (2001); S. 344, 108th Cong. (2003); S. 147, 109th Cong. (2005); S. 310, 110th Cong. (2007); S. 1011, 111th Cong. (2009); S. 675, 112th Cong. (2011).

a process for federal recognition of a Native Hawaiian governing entity.[27] The Akaka Bill also sought to establish what is now known as the DOI's Office of Native Hawaiian Relations ("ONHR")[28] as well as require interagency coordination between federal agencies that administer programs and implement policies impacting Native Hawaiians such as the DOI consultation policy.[29]

While Congress never passed the original Akaka Bill or its later versions, local efforts created a registry of eligible Kānaka Maoli in Hawai'i for future participation in nation-building activities such as voting.[30] Creating a registry represents the first step in legally replicating what the *Rice* Court prohibited the State of Hawai'i from organizing: a method for Kānaka Maoli to determine the management of lāhui[31] resources temporarily held by the state.[32] In other words, a first step towards asserting political self-

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[27] *See*, *e.g.*, S. 2899, 106th Cong. (2000); S. 81, 107th Cong. (2001); S. 344, 108th Cong. (2003); S. 147, 109th Cong. (2005); S. 310, 110th Cong. (2007); S. 1011, 111th Cong. (2009); S. 675, 112th Cong. (2011).

[28] Native Hawaiian Government Reorganization Act, S. 675, 112th Cong. § 5 (2011); *see About Our Office*, U.S. DEP'T OF THE INTERIOR, OFF. OF NATIVE HAWAIIAN REL., https://www.doi.gov/hawaiian/aboutus (last visited Sept. 19, 2023).

[29] *See, e.g.*, *Federal Programs and Services*, U.S. DEP'T OF THE INTERIOR, OFF. OF NATIVE HAWAIIAN REL., https://www.doi.gov/hawaiian/programs (last visited Nov. 25, 2023).

[30] *See, e.g.,* Sally Apgar, *Sign-up Drives Parallel Akaka Bill,* HONOLULU STAR-BULLETIN (July 19, 2005), https://archives.starbulletin.com/2005/07/19/news/story4.html; *Native Hawaiian Roll Commission Named*, DEP'T OF HAWAIIAN HOME LANDS (Sept. 8, 2011), https://dhhl.hawaii.gov/2011/09/08/native-hawaiian-roll-commission-named/; Susan Essoyan, *Certified Native Hawaiian Roll Posted Online with 95,690 Names*, STAR ADVERTISER (July 28, 2015), https://www.staradvertiser.com/2015/07/28/breaking-news/certified-native-hawaiian-roll-posted-online-with-95690-names/.

[31] "Lāhui" means "nation," "race," "tribe," "people," or "nationality." HAWAIIAN DICTIONARY, *supra* note 7, at 190. This article specifically uses "lāhui" to refer to the unified nation of Kānaka Maoli whose sovereignty has been significantly limited in functional capacity but not entirely extinguished by the United States government.

[32] OHA, exists for this purpose. The Hawai'i Constitution asserts that OHA "shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust" for Kānaka Maoli. HAW. CONST. art. XII, § 5.

determination.[33] Yet, each attempt to create a Hawaiian registry has faced legal challenges built upon *Rice*.[34]

In 2004, Hawai'i Maoli, a nonprofit arm of the Association of Hawaiian Civic Clubs, encouraged Hawaiians to step forward and "Kau Inoa"[35] in the process of self-determination.[36] Hawai'i Maoli required verification of maoli ancestry but had no minimum blood-quantum or age requirement.[37] Buoyed by the flawed precedent of *Rice,* non-Native Hawaiian individuals like H. William Burgess infamously challenged Kau Inoa and the existence of other Native Hawaiian programs such as OHA, declaring themselves "Hawaiian" by virtue of their Hawai'i residence.[38] According to these plaintiffs, their self-proclaimed "Hawaiian identity" entitled them to participate in any process that would establish a Native Hawaiian government despite not having

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[33] *See* DEP'T OF HAWAIIAN HOME LANDS, *supra* note 30 ("The roll is to be used as the basis for participation in the organization of a Native Hawaiian governing entity."); Essoyan, *supra* note 30 ("[A] certified list of 95,690 people of Hawaiian ancestry . . . will be used to elect delegates later this year to a governance 'aha, or constitutional convention, which is expected to consider different options for Hawaiian self-determination."); Apgar, *supra* note 30 (describing Kau Inoa's 2005 registration efforts to "get [Native Hawaiians] together under one model (of government) instead of all different kinds").

[34] *See infra* notes 38 and 50–52 and accompanying text.

[35] "Kau" means "to place" or "to put." HAWAIIAN DICTIONARY, *supra* note 7, at 133. "Inoa" means "name." HAWAIIAN DICTIONARY, *supra* note 7, at 101. "Kau Inoa" means "to place your name." Apgar, *supra* note 30.

[36] Apgar, *supra* note 30.

[37] *See* KAU INOA, *Native Hawaiian Registration Form*, https://www.signnow.com/jsfiller-desk14/?mode=cors&requestHash=45c940ec515817c336007ff8dfda08009c4df5f36f05cf6d9e08165c797103e4&lang=en&projectId=1357132859&loader=tips&MEDIUM_PDFJS=true&PAGE_REARRANGE_V2_MVP=true&isPageRearrangeV2MVP=true&jsf-page-rearrange-v2=true&jsf-new-header=false&routeId=c32e021d64b48ad41087bcf718249b87#32bc26ab99d645aebba457f0b6d1b624.

[38] Anosh Yaqoob, *Legal Update: Summary of New Lawsuit* Kuroiwa v. Lingle, KA HE'E, http://www2.hawaii.edu/~nhlawctr/article5-5.htm (last visited Oct. 17, 2023). The plaintiffs, a group of non-Hawaiians, demanded registration with Kau Inoa and argued the program discriminated on the basis of race. KA WAI OLA STAFF, *Kau Inoa Presses Ahead Despite Possible Threat of Legal Attack*, KA WAI OLA (Sept. 2007), https://kawaiola.news/wp-content/uploads/2017/10/KA_WAI_OLA_200709.pdf. Many of the plaintiffs, as well as their attorney, H. William Burgess, were previously involved in legal challenges against Native Hawaiian programs and funding. *See* Arakaki v. Lingle, 477 F.3d 1048 (9th Cir. 2007) (many of the same plaintiffs unsuccessfully sought to dismantle the funding base for OHA and the Department of Hawaiian Home Lands ("DHHL")).

ancestral connections to the people inhabiting the Hawaiian Islands prior to 1778.[39]

In 2011, the Hawai'i State Legislature enacted Act 195 and established the Native Hawaiian Roll Commission, mandating the facilitation of the Kana'iolowalu initiative in collaboration with the state government.[40] Kana'iolowalu differed from Kau Inoa in that the state recognized the new initiative through legislation.[41] Like Kau Inoa, the Roll Commission and Kana'iolowalu called upon a network of Native Hawaiians interested in nation-building, this time as a joint effort between OHA and the legislature.[42] Former Governor John Waihe'e, the only Native Hawaiian thus far to sit in

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[39] Ka Wai Ola Staff, *Kau Inoa Presses Ahead Despite Possible Threat of Legal Attack*, KAI WAI OLA (Sept., 2007), https://kawaiola.news/wp-content/uploads/2017/10/ KA_WAI_ OLA_200709.pdf (explaining that all five opposers of Kau Inoa "wish to vote in all elections which important public issues are being considered or public officials are being elected.") The year 1778 refers to the year British Captain James Cook arrived in Hawai'i and ushered in the beginning of colonization, when Haole settlers began claiming the islands as their own. *See Cook Landing Site, HI*, NAT'L PARK SERV., https://www.nps.gov/places/cook-landing-site.htm (last visited Jan. 26, 2024) (describing Captain Cook's first arrival in 1778 on the island of Kaua'i).

[40] HAW. REV. STAT. § 10H-3 (2011); *see Native Hawaiian Roll Commission Named*, *supra* note 30 ("The roll is to be used as the basis for participation in the organization of a Native Hawaiian governing entity."); Essoyan, *supra* note 30 ("The Native Hawaiian Roll Commission launched its Kanaiolowalu registry initiative in July 2012 and signed up more than 40,000 registrants.").

[41] 'Ōiwi TV, *FAQ 02: How does Kana'iolowalu differ from Kau Inoa*, VIMEO (Nov. 28, 2012, 3:54 PM), https://vimeo.com/54478186; *see* HAW. REV. STAT. § 10H-3 (2011) (codifying the Native Hawaiian Roll Commission in state law).

[42] *See* Linda Zhang, *Re-Building a Native Hawaiian Nation: Base Rolls, Membership, and Land in an Effective Self-Determination Movement*, 21 UCLA ASIAN PAC. AM. L.J. 69, 76–77 (2017) (noting that OHA funded the state legislature-created Native Hawaiian Roll Commission).

the State of Hawai'i's highest executive seat,[43] later served as the Chair of the Native Hawaiian Roll Commission.[44]

The primary nation-building task for members registered with Kana'iolowalu was to "independently commence the organization of a convention of qualified Native Hawaiians, established for the purpose of organizing themselves."[45] To preserve its neutrality, OHA transferred the organizational task to Na'i Aupuni to independently administer an election, convention, and final ratification vote among Kānaka delegates.[46] Additionally, Act 195 earmarked nearly $2.6 million for Kana'iolowalu, which Na'i Aupuni inherited and used to fund an 'aha[47] of delegates chosen by more than 95,000 certified voters on the Native Hawaiian Roll.[48]

Attorney William Meheula defended Na'i Aupuni against claims by individuals who sought to participate in an election they believed to be

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[43] *Gov. John Waihee*, NAT'L GOV. ASS'N, https://www.nga.org/governor/john-waihee/ (last visited Feb. 7, 2024) ("In 1986 [John Waihe'e] became Hawaii's fourth elected governor and the first elected governor of Hawaiian ancestry."). His liutenant governor and later successor, Benjamin Cayetano became the first elected governor of Filipino ancestry. Nancy Yoshihara, *Los Angeles Times Interview: Benjamin Cayetano: On the Success of Asian American Politicians–or Lack Thereof*, L.A. TIMES (Sept. 17, 1995, 12:00 AM), https://www.latimes.com/archives/la-xpm-1995-09-17-op-47085-story.html. Governors Linda Lingle and Neil Abercrombie settled in Hawai'i from St. Louis, Missouri and Williamsville, New York, respectively. *Gov. Linda Lingle*, NAT'L GOV. ASS'N, https://www.nga.org/governor/linda-lingle/ (last visited Feb. 7, 2024); Gov. Neil Abercrombie, NAT'L GOV. ASS'N, https://www.nga.org/governor/neil-abercrombie/ (Feb. 7, 2024). In 2014, Governor David Ige became the first elected governor of Okinawan descent. *Gov. David Ige*, NAT'L GOV. ASS'N, https://www.nga.org/governor/david-ige/ (last visited Feb. 7, 2024). Hawai'i's current governor, Josh Green, is from Pittsburgh, Pennsylvania. *Gov. Josh Green*, NAT'L GOV. ASS'N, https://www.nga.org/governors/hawaii/ (last visited Feb. 7, 2024).

[44] *See Native Hawaiian Roll Commission Named*, *supra* note 30.

[45] HAW. REV. STAT. §10H-5 (2011).

[46] Timothy Hurley, *OHA Transfers Nation-Building Task*, STAR ADVERTISER (May 29, 2015), https://www.staradvertiser.com/2015/05/29/hawaii-news/oha-transfers-nation-building-task/. The five members of Na'i Aupuni were unpaid directors with ties to Hawaiian royalty and formed after OHA reached out to all the ali'i trusts, royal societies, and other Native Hawaiian organizations to discuss self-determination and nation-building. *Id.*

[47] 'Aha refers to a convention, gathering, or assembly. HAWAIIAN DICTIONARY, *supra* note 7, at 5.

[48] *Election Notice to be Sent to More Than 95,000 Certified Voters on the Native Hawaiian Roll*, NA'I AUPUNI (July 31, 2015), https://web.archive.org/web/20230313091212/http://naiaupuni.org/docs/NA-NR-ElectionNotice-073115.pdf.

illegitimate.[49] In one such case, *Akina v. Hawai'i*, the named plaintiff alleged in federal court that Na'i Aupuni wrongfully prevented him from running for a delegate seat to the convention and from voting in Na'i Aupuni's election after he failed to affirm "the unrelinquished sovereignty of the Native Hawaiian people."[50] Although U.S. District Court Judge Michael Seabright denied the plaintiff's motion for a preliminary injunction,[51] thus allowing Na'i Aupuni to conduct their election, the organization decided against its final goal of advancing a constitutional ratification vote.[52] Despite its dissolution, Na'i Aupuni and the 'aha nonetheless created a maoli-led forum that "generated a long overdue and significant dialogue among the participants and within the larger community."[53] If meaningfully executed,

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[49] Akina v. Hawai'i, 835 F.3d 1003, 1006–08 (9th Cir. 2016) (affirming denial of a preliminary injunction to halt the election of Native Hawaiian delegates seeking to discuss the formation of a Native Hawaiian governing entity); *see* Jennifer Sinco Keller, *Lawsuit: Native Hawaiian Election Would Be Unconstitutional*, ASSOC. PRESS (Aug. 13, 2015, 2:24 PM), https://apnews.com/article/ee825aa2af1942c786307e89c2cfc438 (describing how the plaintiffs in *Akina v. Hawai'i* objected to their exclusion from the delegate vote).

[50] Akina v. Hawaii, 141 F. Supp. 3d 1106, 1121 (D. Haw. 2015). The named plaintiff, Keli'i Akina has since been elected to OHA's Board of Trustees following several campaigns that capitalized on the *Rice* decision in his slogan, "Everyone can vote OHA." Anita Hofschneider, *Akina Spends More than $150K to Keep Souza from OHA Seat*, HONOLULU CIV. BEAT (Oct. 13, 2020), https://www.civilbeat.org/2020/10/akina-spends-more-than-150k-to-keep-souza-from-oha-seat/.

[51] *See Akina*, 141 F.Supp. at 1136.

[52] Williamson Chang, *Nai Aupuni Decision to Sidestep Legal Challenge Raises New Legal Issues*, HONOLULU CIV. BEAT (Dec. 17, 2015), https://www.civilbeat.org/2015/12/nai-aupuni-decision-to-sidestep-legal-challenge-raises-new-legal-issues/ (describing why Na'i Aupuni decided to invite all 196 delegate candidates to participate in the convention as delegates); Chad Blair, *Native Hawaiian Constitution Adopted*, HONOLULU CIV. BEAT (Feb. 27, 2016), https://www.civilbeat.org/2016/02/native-hawaiian-constitution-adopted/ (describing how a constitution was adopted by a vote of eighty eight to thirty from the participating delegates); *Na'i Aupuni Decides Not to Pursue Ratification Vote*, NA'I AUPUNI (Mar. 16, 2016), https://web.archive.org/web/20220616133336/http://www.naiaupuni.org/docs/NewsRelease-NaiAupuniDecidesNoRatificationVote-031616.pdf (explaining the belief that, after sharing the proposed constitution with the community, Na'i Aupuni should defer to the 'aha participants to arrange for a ratification process.)

[53] *Na'i Aupuni Seeks Broader Group to Ratify Native Hawaiian Constitution*, MAUI NOW (Mar. 17, 2016), *https://mauinow.com/2016/03/17/na%CA%BBi-aupuni-seeks-broader-group-to-ratify-native-hawaiian-constitution/.* The forum allowed for Kānaka Maoli to organize meetings with other Kānaka Maoli in order to discuss varying views of the future. *See id.* While Native Hawaiians may not all agree on whether independence, federal recognition, or continuation of the status quo results in the preferred alternative future, "it is crucial that this conversation continues." *Id.*

the DOI Policy on Consultation has the potential to continue this type of dialogue and enable political self-determination by the lāhui.[54]

The Native Hawaiian population in Hawai'i is declining.[55] As of 2020, more than fifty-five percent of Native Hawaiians live outside Hawai'i.[56] Even more alarming: although Native Hawaiians make up only about twenty percent of Hawai'i's general population, Native Hawaiians are overrepresented in Hawai'i prisons and make up forty percent of incarcerated individuals in the state.[57] With relatively low representation among the general population, the Native Hawaiian vote runs the risk of being deafened by a majority of competing interests.[58]

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[54] *See infra* notes 397–99 and accompanying text.

[55] *U.S. Census Bureau Releases Key Stats in Honor of Asian American, Native Hawaiian, and Pacific Islander Heritage Month*, U.S. DEP'T OF COM. (May 3, 2022) [hereinafter *U.S. Census Bureau Releases Key Stats*], https://www.commerce.gov/news/blog/2022/05/us-census-bureau-releases-key-stats-honor-asian-american-native-hawaiian-and. In 2020, the U.S. Census Bureau reported 619,855 Native Hawaiians across the United States. *Id.* In 2021, there were fewer Native Hawaiians living inside of Hawai'i (309,800) than living in other states (370,000). Jennifer Sinco Kelleher & Associated Press, *Hawaiians Cannot Afford to Live in Hawaii*, FORTUNE (Jan. 23, 2023, 2:10 AM), https://fortune.com/2023/01/23/hawaiians-cannot-afford-to-live-in-hawaii-las-vegas-drawing-natives/.

[56] Ku'uwehi Hiraishi, *Majority of Native Hawaiians Don't Live in Hawai'i, According to US Census Report*, HAW. PUB. RADIO (Sept. 22, 2023, 1:05 PM), https://www.hawaiipublicradio.org/local-news/2023-09-22/majority-of-native-hawaiians-dont-live-in-hawaii-us-census-report.

[57] Charlotte West, *Native Hawaiians are Overrepresented in Prisons. Cultural Education Could Help*, HONOLULU CIV. BEAT (May 21, 2023), https://www.civilbeat.org/2023/05/native-hawaiians-are-overrepresented-in-prisons-cultural-education-could-help/#:~:text=Native%20Hawaiians%20like%20Kaluhiokalani%20are,40%25%20of%20people%20in%20prison. Disparate treatment before the courts, discretionary paroling practices, and culturaly inappropriate or unavailabe reentry services are several contibuting factors to the high incarceration rate of Native Hawaiians. OFF. OF HAWAIIAN AFF., *The Impact of the Criminal Justice System on Native Hawaiians*, https://www.oha.org/wp-content/uploads/2014/11/factsheets_final_web_0.pdf (last visited Nov. 14, 2023). Because people convicted of certain offenses may be denied civil and political participation such as voting or sitting on a jury, "Native Hawaiians are disproportionatly more likely to receive criminal conviction, they are more likely to have their voting rights taken away, leaving a large section of some communities disenfranchised and unable to make decisions to change and better their own communities." *Id.*; *see* HAW. REV. STAT. § 831-2 (2006) (providing that from the time of a person's sentence until the person's final discharge, convicted felons may not vote in an election or hold public office).

[58] *See* OFF. OF HAWAIIAN AFF., *The Impact of the Criminal Justice System on Native Hawaiians*, https://www.oha.org/wp-content/uploads/2014/11/factsheets_final_web_0.pdf (last visited Nov. 14, 2023).

The United States adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2010, affirming its "commitment to address the consequences of history."[59] President Obama recognized the United States' direct and existential harm to Indigenous peoples through colonization, emphasizing that "few have been more marginalized and ignored by Washington for as long as Native Americans–our First Americans."[60] Notably, UNDRIP recognizes the "urgent need to respect and promote the inherent rights of [I]ndigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories, and philosophies, especially their rights to their lands, territories and resources[.]"[61] Further, UNDRIP affirms the "fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development[.]"[62]

Professor James Anaya, Former UN Special Rapporteur on the Rights of Indigenous Peoples, explained that the right of self-determination is "to be

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[59] U.S. DEP'T OF STATE, ANNOUNCEMENT OF U.S. SUPPORT FOR THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 1 (Jan. 12, 2011), https://2009-2017.state.gov/s/srgia/154553.htm; G.A. Res. 61/295, annex, U.N. Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter UNDRIP] (protecting the collective and individual rights of Indigenous peoples in relation to self-government, land, education, employment, health, and other areas and also requiring countries to consult with Indigenous peoples to obtain consent on matters which concern them). Following twenty-five years of hard negotiations, one hundred forty-four countries voted for the UNDRIP, eleven abstained, and only four (Canada, Australia, New Zealand, and the United States, collectively referred to as "CANZUS") voted against the declaration. Kristy Gover, *Settler–State Political Theory, "CANZUS" and the UN Declaration on the Rights of Indigenous Peoples*, 26 EUR. J. INT'L L. 345, 345, 346 n.1 (2015). Since 2007, CANZUS have reversed their positions and now endorse the UNDRIP. *Id*. at 346. "The CANZUS states are all affluent liberal democracies settled during the period of intensive British imperial expansion in the 19th century," and Indigenous people "are vastly outnumbered by a predominantly English-speaking settler majority[.]" *Id*. at 356.

[60] *Remarks by the President During the Opening of the Tribal Nations Conference & Interactive Discussion with Tribal Leaders*, OFF. OF THE PRESS SEC'Y (Nov. 5, 2009, 9:37 AM), https://obamawhitehouse.archives.gov/the-press-office/remarks-president-during-opening-Tribal-nations-conference-interactive-discussionw#:~:text=And%20few%20have%20been%20more,Treaties%20were%20violated.

[61] UNDRIP, *supra* note 59, at 2.

[62] UNDRIP, *supra* note 59, at 3. Federal programs such as the Advisory Council on Historic Preservation have incorporated the UNDRIP and applied it to Native Hawaiians. *Integrating the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and Free Prior and Informed Consent (FPIC) into Hawai'i's Aha Moku System*, DEP'T OF LAND & NAT. RES. AHA MOKU ADVISORY COMM. (2021), http://www.ahamoku.org/wp-content/uploads/2021/02/UNDRIP.brochure.pdf.

full and equal participants in the creation of the institutions of government under which [Indigenous peoples] live and, further, to live within a governing institutional order in which [Indigenous peoples] are perpetually in control of their own destinies."[63] However, the current legal landscape does not sufficiently allow Native Hawaiians to control their political destiny within the confines of American jurisprudence.[64] Specifically, *Rice* has wrongfully quashed Native Hawaiian efforts to seek self-governance by distinguishing Native Hawaiians as merely a racial category, compared to the political status of Native Americans across the continental United States.[65] If Hawai'i's political landscape continues to shift away from Indigenous interests and towards commercial development interests under the guise of racial equality as asserted by individuals like H. William Burgess, Kānaka Maoli must ask ourselves: *what will it mean to be a Hawaiian in a haole*[66] *Hawai'i?*

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[63] S. Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 340 (1994); *The U.N. Declaration on the Rights of Indigenous Peoples Turns 14*, CULTURAL SURVIVAL (Sept. 3, 2021), https://www.culturalsurvival.org/news/un-declaration-rights-indigenous-peoples-turns-14.

[64] *See infra* Section IV.B (discussing how and why the current legal landscape, particularly under *Rice* limits Native Hawaiian political organization); Michael Carroll, *Every Man Has a Right to Defend His Own Destiny: The Development of Native Hawaiian Self-Determination Compared to Self-Determination of Native Alaskans and the People of Puerto Rico*, 33 J. MARSHALL L. REV. 639, 661 (2000) ("Although maintaining the status quo will satisfy the self-determination rights of those native Hawaiians who agree with United States domination over Hawai'i, it will not satisfy the rights of native Hawaiians who want to establish their own government."). While Native Hawaiians currently raise awareness of human rights violations against Native Hawaiians by the United States at the international level, any action regarding these claims cannot be expected, "given the limitation of their respective institutional mandates." S. JAMES ANAYA & ROBERT A. WILLIAMS, JR., STUDY ON THE INTERNATIONAL LAW AND POLICY RELATING TO THE SITUATION WITH THE NATIVE HAWAIIAN PEOPLE 25–26 (2015).

[65] Kathryn N. S. Hong, *Understanding Native Hawaiian Rights: Mistakes and Consequences of* Rice v. Cayetano, 15 ASIAN AM. L. J. 9, 35 (2008); Gavin Clarkson, *Not Because They are Brown, But Because of Ea: Why the Good Guys Lost in* Rice v. Cayetano, *and Why They Didn't Have to Lose*, 7 MICH. J. RACE & L. 317, 318 (2002); *see* Rice v. Cayetano, 528 U.S. 495, 514–17 (2000).

[66] While "haole" may mean "white person" or "any foreigner," it also refers to a distinct behavior. HAWAIIAN DICTIONARY, *supra* note 7, at 58. This Article uses "haole" in reference to the foreign attitude which "assumes airs of superiority" in Hawai'i regardless of the vessel's race. *See id.* To be haole is to reject the underlying values of Aloha 'Āina. *See id.* This Article does *not* use the term interchangeabley with "white person," or "any foreigner" because a haole attitude may be possessed by bodies of any race and regardless of origin. *See id.* ("ho'ohaole 'ia" means Americanized or Europeanized). Despite the complex historical use

B. "Future Studies" Framework

This Article deploys a futures studies framework to analyze how the Department's consultation policy may affect maoli self-determination.[67] Specifically, the following futures studies analysis identifies emerging political obstacles Native Hawaiians face in the aftermath of *Rice*.[68] It further articulates how consultation efforts might move beyond the limits imposed by *Rice* on Native Hawaiian self-determination.[69]

Analyzing emerging issues through a futures studies framework focuses on "furthering both narrowly professional as well as broadly participative inquiry into the future."[70] Experts in the field do not attempt to delineate precisely what will happen to a government before it actually happens.[71] Instead, futurists *forecast* a wide variety of alternative futures rather than *predict* a distinct one.[72]

Debates persist within futures studies over whether ethical or moral absolutism is preferable to that of relativism when evaluating governmental behavior.[73] Ethical or moral absolutism asserts a universally binding set of values while ethical or moral relativism implies the opposite.[74] For example, Yale University Professor Wendell Bell, one of the founders of futures studies, holds the view that "there is a set of core values underlying all human action across all cultures that must be the basis of all good futures studies and futures consulting."[75] On the other hand, futurists like retired University of Hawai'i Professor James Dator[76] believe that no such common set of values

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of "haole," a federal district court convicted two Native Hawaiian men of Hawai'i's first racially motivated hate crime because it strictly interpreted "haole" to mean "white person," ignoring the expert witness' opinion that the victim's behavior, not his complexion, motivated one defendant's reference to the victim as Haole. United States v. Alo-Kaonohi, 635 F. Supp. 3d 1074 (D. Haw. 2022).

[67] *See infra* Section IV.C.

[68] *See infra* Section IV.C.

[69] *See infra* Part V. *See generally* Lisset M. Pino, *Colonizing History:* Rice v. Cayetano *and the Fight for Native Hawaiian Self-Determination*, 129 YALE L.J. 2574 (2020).

[70] James A. Dator, *The Future Lies Behind! Thirty Years of Teaching Futures Studies*, 42(3) AM. BEHAV. SCIENTIST 298, 302 (1998) [hereinafter *The Future Lies Behind!*].

[71] *Id.* at 301.

[72] *Id.* at 303.

[73] *Id*. at 302.

[74] *See id.*

[75] *Id.* at 302, 308.

[76] The 1971 Hawai'i legislature created a Hawai'i Research Center for Futures Studies within the University of Hawai'i, first directed by Dator. HAW. RSCH. CENTER FOR FUTURES STUD., https://manoa.hawaii.edu/futures-center/ (last visited Sept. 20, 2023). "The Center is

exists "beyond vague generalities . . . that can be used to require or outlaw specific actions."[77]

This Article utilizes Dator's position over that of Bell because the Department's policy may be ethical by one set of standards (e.g., UNDRIP which endorses Indigenous self-determination) while impermissible by another (e.g., American jurisprudence that precludes self-determination from Indigenous peoples that the judiciary has yet to recognize).[78] Acknowledging that these differences may stem from conflicting values allows for the skepticism of dominant views that Bell himself employed to question dominant governments.[79] Because Indigenous peoples share some common historical experiences, including non-dominance in comparison with foreign states,[80] the current political situation of Kānaka Maoli within the United States warrants Dator's conception of futures studies.

Dator categorizes the innumerable alternative futures into four major (generic) images for any human system, including a Native Hawaiian government:

> *Continuation* – usually of "economic growth" [e.g., the status quo's conflict between economic development and traditional practices];

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best known for its work in judicial foresight, which began with the Hawai'i State Judiciary in 1971 (under the encouragement of Chief Justice William S. Richardson and Chief Court Administrator Lester Cingcade)." *The Future Lies Behind!*, *supra* note 70, at 300.

[77] *The Future Lies Behind!*, *supra* note 70, at 302.

[78] *See id*.

[79] *See, e.g.*, Wendell Bell, *The American Invasion of Grenada: A Note on False Prophecy*, 10 FORESIGHT 27, 28 (2008) (criticizing the role of non-credible future predictions by the United States government as justification for the 1983 invasion of Grenada).

[80] While the United Nations has never adopted a formal definition of "Indigenous Peoples," a working definition generated by Indigenous peoples includes four elements:

> Indigenous communities, peoples, and nations are those which, [1] having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, [2] consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They [3] form at present non-dominant sectors of society and [4] are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultrual patters, social institutions, and legal system.

Cobo, *supra* note 22, at 29.

> *Collapse* – from, usually, one of a variety of different reasons such as environmental overload and/or resource exhaustion, economic instability, moral degradation, external or internal military attack, meteor impact, and so on;
>
> *Disciplined society* – in which society in the future is seen as organized around some set of overarching values usually considered to be ancient, traditional, natural, ideologically correct, or God-given; and
>
> *Transformational society* – usually either of a high-tech or a high-spirit variety, which sees the end of current forms and the emergence of new (rather than the return to older, traditional) forms of beliefs, behavior, organization, and perhaps, intelligent life-forms.[81]

Dator's framework utilizes two common approaches to analyses: "deductive forecasting" and "emerging-issue analysis."[82] Following the first approach, futurists paint a picture of each of these four alternative futures by deducing characteristics from each of the four generic societal images.[83] Emerging-issue analysis, on the other hand, seeks to identify "future problem[s and opportunities] at their earliest possible emergence rather than waiting until they are fully formed and [manifested as] powerful trends."[84] While deductive forecasting identifies important trends, emerging-issue analysis provides more utility as "[t]here are specific techniques involved in learning how to spot emerging issues and then to present them to decision makers."[85]

Emerging-issue analysis within Dator's futures studies framework is deployed in this Article, not only to anticipate obstacles in Native Hawaiian consultation, but also to propose meaningful solutions.[86] This framework is

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[81] *The Future Lies Behind!*, *supra* note 70, at 305.

[82] *Id*. Dator's "deductive forecasting" is a technique used to forecast "general characteristics" of alternative futures "by deducing it from each of the societal images" (continuation, collapse, disciplined society, and transformational society). *Id*. Emerging-issue analysis, built upon the work of Graham Molitar, consists of studying a problem or opportunity through its S-curve life cycle, which consists of four stages: emergence unnoticed by the general population, slow growth, rapid and noticed growth, and "full blown" status "whereupon a great deal of time and attention is spent . . . until it eventually fades away . . . [or] reemerges." *Id*.

[83] *Id.*

[84] *Id.* at 306.

[85] *Id.*

[86] *See infra* Part V.

applied to Kānaka Maoli who face a novel consultation policy with the potential to either amplify their collective voice or further drown them in a sea of feigned advocacy. The legal obstacle created by *Rice* is an emerging issue to be analyzed in order to deduce how to avoid the "continuation" of status quo (in the form of self-determination efforts stymied by *Rice*) and move towards a "transformational" future (utilizing tools within a haole forum to advance maoli interests).

The critical presumption among futurists that "'[t]here are no future facts, [and] there are no past possibilities'" urges scholars, advocates, decisionmakers, and communities to refer to the past in forecasting their future.[87] An ʻōlelo noʻeau[88] heeds the same refrain: "i ka wā ma mua, i ka wā ma hope," or "the future is in the past; the past is prologue."[89] Forecasting alternative futures for Kānaka Maoli identifies the most crucial issues that have and can conceivably continue to hinder self-determination for Kānaka Maoli.[90]

Part II of this Article tells the story of governance in Hawaiʻi by chronicling its evolution from a constitutional monarchy to statehood.[91] Part III examines the legal rules forming the present foundation for federal consultation with Native Hawaiians, including the federal trust relationship with the NHC, the United States' acknowledgement of its role in illegally overthrowing the Hawaiian Kingdom, and the Executive Order underlying tribal consultation.[92] Part IV analyzes *Rice* before forecasting how the Court's flawed holding may affect federal consultation with the NHC.[93] Part V then proposes a starting point for future research, analysis, and discussion on how to further Native Hawaiian self-determination and political self-governance, including proposed amendments to the DOI consultation policy, suggestions regarding the Department's organization, and a call to action for

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[87] *Id*. at 302 (quoting Wendell Bell & James A. Mau, *Images of the Future: Theory and Research Strategies*, *in* THE SOCIOLOGY OF THE FUTURE: THEORY, CASES, AND ANNOTATED BIBLIOGRAPHY 6, 9 (Wendell Bell & James A. Mau eds.,1971)).

[88] "'Ōlelo noʻeau" means "proverb," "wise saying," or "traditional saying." HAWAIIAN DICTIONARY, *supra* note 7, at 284.

[89] *See* Natalia Kurashima, Jason Jeremiah & Tamara Ticktin, *I Ka Wā Ma Mua: The Value of a Historical Ecology Approach to Ecological Restoration in Hawai'i*, 71(4) PAC. SCI. 437, 440 (2017).

[90] *See infra* Section IV.C.

[91] *See infra* Part II.

[92] *See infra* Part III.

[93] *See infra* Part IV.

members of the lāhui to learn more about political sovereignty and self-determination and to speak knowledgeably with other Kānaka Maoli and residents of Hawai'i about these topics.

II. BACKGROUND

Hawai'i's induction into the United States differed significantly from the creation of states through westward expansion.[94] This section dissects specific inflection points in the history of Hawaiian governance that exhibit incremental steps of assimilation, ultimately allowing a western nation to absorb, through statehood, an internationally recognized and constitutionally organized sovereign nation. This section also sets the stage for the legal issues presented in *Rice* by elaborating upon the 1978 Constitutional Convention and OHA's creation, both of which were meant to address insufficiencies in the state government's service to Hawai'i's Native Hawaiian population.

Soon after Kamehameha III (Kauikeaouli) signed Hawai'i's first constitution and reluctantly appointed foreign individuals to seats of political power, historian Samuel Mānaiakalani Kamakau described some Kānaka Maoli as living "like wanderers on the earth . . . not seen again in this Hawai'i."[95] Some of those Native Hawaiians sailed to Oregon, Tahiti, and Peru, while others traveled to Nantucket, New Bedford, Sag Harbor, and other American ports because they felt Hawai'i's laws had begun to favor foreigners who stayed in the islands to satiate a colonizing hunger for new lands.[96] Because of these converging interests in Hawai'i's land, the monarchial government fluctuated between eras of centralization and decentralization to avoid complete takeover by the western colonizing forces.[97] The legacy of these colonizing forces continues to drive Kānaka away from their ancestral lands today.[98] The constitutions that emerged

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[94] *See A Guide to the United States' History of Recognition, Diplomatic, and Consular Relations, by Country, since 1776: Hawaii*, OFF. OF THE HISTORIAN, https://history.state.gov/countries/hawaii (last visited Jan. 26, 2024); *Westward Expansion (1801-1861),* SMITHSONIAN AMERICAN ART MUSEUM, https://americanexperience.si.edu/historical-eras/expansion/#:~:text=Westward%20expansion%20began%20in%20earnest,size%20of%20the%20young%20nation (last visited Jan. 26, 2024).

[95] SAMUEL M. KAMAKAU, RULING CHIEFS OF HAWAI'I 403–04 (Kamehameha Publishing rev. ed. 1992).

[96] *Id*. at 404.

[97] *See infra* Section II.A.

[98] *See New Census Data Confirms More Native Hawaiians Reside on the Continent Than in Hawai'i*, OHA (Sept. 25, 2023), https://www.oha.org/news/new-census-data-more-native-hawaiians-reside-continent/.

between 1840 and 1887, during times of political change within the Kingdom of Hawai'i, served as both a sword and shield for ali'i in power.[99] Scholars of Federal Indian Law often study how policies affect tribal sovereignty based on the tribe's situation in thematic eras such as "Removal," "Assimilation," and "Self-Determination."[100] Understanding ea,[101] or Native Hawaiian sovereignty, however, begins with understanding how the haole interests have intentionally diminished that sovereignty.

A. *Constitutional Monarchy of Hawai'i (1840–1893)*

The constitutional monarchy of Hawai'i and its early challengers demonstrate the enduring push and pull between Native Hawaiian and colonial interests. Kamehameha I bore the name Ka'iwakīloumoku, or "the 'iwa bird that hooks the islands together," for the prophecy he would fulfill by consolidating the formerly independent islands of Hawai'i.[102] Upon the death of Kamehameha I, his first son, Kamehameha II (Liholiho) abolished the traditional system of law, the kapu.[103] A mere few months later, Calvinists and other Protestants from the American Board of Commissioners for Foreign Missions sailed into the heart of the spiritual vacuum left by the end of the kapu.[104] After abolishing the kapu, ali'i amenable to Christian

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[99] For example, through the Constitution of 1840, Kauikeaouli "refin[ed] ancient structures" and adopted Anglo-American law by "reaffirming in the relatively new governmental system that which was held traditionally in practice," demonstrating "ali'i agency in using law for their own purposes." *See* KAMANAMAIKALANI BEAMER, NO MĀKOU KA MANA: LIBERATING THE NATION 129 (2014).

[100] *See* DAVID E. WILKINS & HEIDI K. STARK, AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM 121, 123–24 (4th ed. 2017).

[101] "Ea" means "sovereignty" and "life." HAWAIIAN DICTIONARY, *supra* note 5, at 36.

[102] KA'IWAKĪLOUMOKU PACIFIC INDIGENOUS INSTITUTE, https://kaiwakiloumoku.ksbe.edu/article/kaiwakiloumoku-about-our-name#:~:text=The%20epithet(1)%20Ka'iwakīloumoku%20was,moku%20–%20into%20a%20single%20nation (last visited Sept. 21, 2023).

[103] The kapu system "was the principle by which all activity was organised" in old Hawai'i. Stephenie S. Levin, *The Overthrow of the Kapu System in Hawaii*, 77 J. POLYNESIAN SOC'Y 402, 411–12 (1968) (describing the kapu system as a system of classification and the "hierarchical order of society"). The abolishment of the kapu system in 1819 marked a radical change and the repudiation of kinship ties deeply entrenched in Hawai'i's stratified society. *Id.* at 425.

[104] JOHN VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? 22 (2008) [hereinafter WHO OWNS THE CROWN LANDS?]. Following his death, Ka'ahumanu and Keōpūolani, Pai'ea's favorite wife and most sacred wife, respectively, detested the kapu system and joined Liholiho in an "extraordinaty event" by eating from the same food vessel. KAMAKAU, *supra* note 95, at 224. The same day, Liholiho decreed the destruction of every temple and idol in the kingdom. KING DAVID KALĀKAUA, THE LEGENDS AND MYTHS OF HAWAI'I 27 (1990).

influences (namely Queen Ka'ahumanu, Liholiho, and the Council of Chiefs) consolidated the monarchy as a centralized secular government.[105] Protestant missionaries secured their influence in Hawai'i by opening schools almost immediately after their arrival and teaching the English language through reading and writing.[106] When Kauikeaouli ascended the throne as his brother's heir at eleven years old, his motto reflected a vision to equip the lāhui with the skills necessary to contend and communicate with foreign nations: He aupuni palapala ko'u ("Mine is a kingdom of literacy").[107] He also promulgated Hawai'i's first constitution to protect rights and assert the lāhui's sovereignty.[108]

Similar in function to the U.S. Bill of Rights,[109] Hawai'i's 1839 Declaration of Rights[110] proclaimed the inalienable rights of the people of Hawai'i and ensured equal protection for chiefs and common people alike.[111] While the 1840 Constitution, enacted shortly after the Declaration of Rights, proved significant by establishing a constitutional monarchy,[112] its greater importance lies in the fact that Kauikeaouli demonstrated the level of political sophistication necessary to convince western maritime powers to acknowledge Hawai'i's sovereignty despite political imposition by western

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[105] DAVIANNA P. MCGREGOR, *The Cultural and Political History of Hawaiian Native People*, in OUR HISTORY, OUR WAY: AN ETHNIC STUDIES ANTHOLOGY 333, 343 (1996).

[106] WHO OWNS THE CROWN LANDS?, *supra* note 104, at 23.

[107] Nanea Armstrong-Wassel, *Nūpepa Preserve Information from Hawaiian Worldview*, KA WAI OLA (Jan. 1, 2018), https://kawaiola.news/moolelo/nupepa-preserve-information-hawaiian-worldview/. Following the first newspaper printing in 1822, experts estimate that over 125,000 newspaper pages were written – equivalent to roughly one million standard pages of typed text today. *Id.* Not only did this repository preserve information about practically every aspect of Hawaiian life, culture and history, it safeguarded 'ike Hawai'i ("Hawaiian knowledge") for future generations. *Id.* It captured how Hawaiians of the time were engaging and interacting with the world around them on a global scale. And, most importantly, it served as a space in which this information could be recorded from a Maoli perspective. *Id.*

[108] *See* WHO OWNS THE CROWN LANDS?, *supra* note 104, at 26.

[109] The United States Bill of Rights comprises the first ten amendments of the U.S. Constitution and spells out the rights of American citizens in relation to their government by guaranteeing civil rights and liberties to the individual and setting rules for due process of law. U.S. CONST. amend. I–X.

[110] KAMEHAMEHA III, KE KUMUKĀNĀWAI O KA MAKAHIKI 1839 (1839), *reprinted in* KA HO'OILINA: JOURNAL OF HAWAIIAN LANGUAGE SOURCES 30–32 (Mar. 2002).

[111] *See* KAMEHAMEHA III, KE KUMUKĀNĀWAI O KA MAKAHIKI 1840 (1840), *reprinted in* KA HO'OILINA: JOURNAL OF HAWAIIAN LANGUAGE SOURCES 34–59 (Mar. 2002) (providing the original text, a second version with diacritical marks added, and an English translation).

[112] "A system of government in which a monarch shares power with a constitutionally organized government." *Constitutional Monarchy*, BRITANNICA.COM, https://www.britannica.com/topic/constitutional-monarchy (last visited Sept. 25, 2023).

nations.[113] Just one month after the publication of the 1839 Declaration of Rights, Kauikeaouli responded to a threat of western incursion known as the LaPlace Affair.[114] Kauikeaouli charged diplomats William Richards, Timoteo Haʻalilio, and Sir George Simpson with securing from Britain, France,[115] and later the United States, "full recognition . . . of the independence of the Hawaiian Government."[116]

Kauikeaouli, working closely with Kekāuluohi,[117] crafted the 1840 Constitution to establish the House of Representatives as part of a legislative body, granting the people a voice in government.[118] Along with establishing Hawaiʻi's bicameral legislature, the 1840 Constitution contained provisions for an independent judiciary and some of the checks and balances found in western constitutions.[119] Yet, the Constitution did not simply mimic western

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[113] J. CORLEY, LEVERAGING SOVEREIGNTY: KAUIKEAOULI'S GLOBAL STRATEGY FOR THE HAWAIIAN NATION, 1825–1854, at 45 (2022); *see* KAMEHAMEHA III, KE KUMUKĀNĀWAI O KA MAKAHIKI 1840 (1840), *reprinted in* KA HOʻOILINA: JOURNAL OF HAWAIIAN LANGUAGE SOURCES 34–59 (Mar. 2002).

[114] CORLEY, *supra* note 113, at 45. Captain Cyrille P.T. LaPlace of France extorted political concessions from Kauikeaouli by threat of attack. *Id*. at 38.

[115] Britain and France later recognized the sovereignty of the Hawaiian Kingdom in the Anglo-Franco Proclamation signed on November 28, 1843. *Celebrating Lā Kūʻokoʻa, Independence Day*, KAMEHAMEHA SCHS. (Nov. 22, 2021), https://www.ksbe.edu/article/celebrating-la-kuokoa-independence-day. The nations also acknowledged the efforts of Richards, Haʻalilio, and Simpson to secure such recognition of sovereignty for the Kingdom. *Id.* Lā Kūʻokoʻa or "Independence Day" is a Kingdom holiday that recently celebrated its 180th anniversary on November 28, 2023 and today represents "an affirmation of identity and joyful pride in being a part of the lāhui[.]" *Id.*; *see also Novemaba 28: Lā Kūʻokoʻa*, UNIV. OF HAW. AT MANOA (Nov. 26, 2018), https://manoa.hawaii.edu/punawaiola/ 2018/11/26/novemaba-28-la-ku%ca%bboko%ca%bba/.

[116] *J. C. Calhoun to Haalilio and William Richards, July 06, 1844*, POLYNESIAN, March 29, 1845, at 184, https://chroniclingamerica.loc.gov/lccn/sn82015408/1845-03-29/ed-1/.

[117] CORLEY, *supra* note 113, at 45–46. Kekāuluohi was the third Kuhina Nui for the Kingdom of Hawaiʻi. *Id*. "Kuhina Nui" refers to a powerful officer who shared executive power with the king in the days of the monarchy and loosely means "prime minister," or "premier." HAWAIIAN DICTIONARY, *supra* note 7, at 173.

[118] *See* KAMEHAMEHA III, KE KUMUKĀNĀWAI O KA MAKAHIKI 1840 (1840), *reprinted in* KA HOʻOILINA: JOURNAL OF HAWAIIAN LANGUAGE SOURCES 49–50 (Mar. 2002) ("[P]ersons to sit in council with the nobles and establish laws for the nation . . . shall be chosen by the people, according to their wish, from Hawaiʻi, Maui, Oʻahu, and Kauaʻi. The law shall decide the form of choosing them, and also the number to be chosen. This representative body shall have a voice in the business of the kingdom. No law shall be passed without the approbation of a majority of them.").

[119] CORLEY, *supra* note 113, at 44.

constitutions.[120] Rather, the Constitution's western elements protected the continuation of traditional Hawaiian institutions and customs in the face of western settlement.[121]

As another measure to secure western recognition of Hawai'i's sovereignty and legitimacy, the 1840 Constitution also established the Chiefs' Children's School with funding from the Kingdom, which was designed to internationalize the royal children who would become future Kingdom leaders.[122] While Kauikeaouli sought to teach the protocols, knowledge systems, and languages of other countries to prepare the royal children to rule in a new Hawai'i,[123] the royal children did not mature quickly enough to fill seats of political power occupied by foreigners.[124]

The 1852 Constitution reduced the mō'ī's[125] influence by distributing power among the three branches of government with the ability to "perform the King's duties and assume all powers vested in the King by the Constitution" where such authority, when exercised, was subject to the mō'ī's approval.[126] Bestowed with a say in how the mō'ī ruled, the legislature, judiciary, and executive cabinet began to isolate Kauikeaouli's power and that of his successors in a manner similar to the home government of its main author, Chief Justice Lee.[127]

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[120] *Id.*

[121] *See id.*

[122] *Id*. at 78.

[123] *Id*. "[Kauikeaouli] was giving his own people, chiefs and commoners, the offices which they could fill; and only those which they could not fill were being given to foreigners, and that when the young chiefs were sufficiently instructed in the English language the offices were to be given back to them. . . . [T]he new ways of civilized governments were to be added to the old ways of the Hawaiian government." KAMAKAU, *supra* note 95, at 402. Kauikeaouli appointed foreigners Robert C. Wylie as Minister of Foreign Affairs, G.P. Judd as Minister of the Treasury, William Richards as Minister of Education, and John Ricord as Attorney General to administer both foreign and internal affairs of the government. *Id.*

[124] *See* Linda K. Menton, *A Christian and "Civilized" Education: The Hawaiian Chiefs' Children's School, 1839–50*, 32 HIST. OF EDUC. Q. 213, 242 (1992); Julie Kaomea, *Education for Elimination in Nineteenth-Century Hawai'i: Settler Colonialism and the Native Hawaiian Chiefs' Children's Boarding School*, 54 HIST. OF EDUC. Q. 123, 124 (2014).

[125] Mō'ī means "sovereign," "monarch," or "ruler," and is used to refer to the ruling monarch of Hawai'i. HAWAIIAN DICTIONARY, *supra* note 7, at 251.

[126] *Id.* (quoting KINGDOM OF HAW. CONST. OF 1852 art. XLVII).

[127] WHO OWNS THE CROWN LANDS?, *supra* note 104, at 65. Notably, Chief Justice William Little Lee, originally from the American South, influenced the decentralization of the ali'i's political authority. *How Jon Van Dyke Analyzed the Hawaiian Constitutions of 1840–1893*, ARCHIVAL COLLECTIONS AT THE UNIV. OF HAW. SCH. OF L. LIBR., http://archives.law.hawaii.edu/exhibits/show/jvd-scholarship/hawaiian-constitutional-histor (last visited Sept. 26, 2023).

Kamehameha IV (Alexander Liholiho) and his advisors sought to amend the Constitution by restoring the mōʻīʻs position of power to no avail.[128] The next king, Kamehameha V (Lota Kapuāiwa) impaneled a Constitutional Convention in 1864 to draft a new constitution instead of swearing to support the previous one.[129] When the drafting body dissolved, members of the executive cabinet drafted a new constitution to reflect Kapuāiwa's desire that "the prerogatives of the Crown . . . be more carefully protected . . . and that the influence of the Crown . . . be seen pervading every function of the government."[130]

As a result, the 1864 Constitution increased the economic power of the King but disenfranchised citizens through the imposition of specific literacy, property, and income qualifications to vote, all of which Kapuāiwa opposed.[131] Additionally, the executive and legislative branches became positions for wealthy individuals literate in English, Hawaiian, and European languages.[132] The Bayonet Constitution[133] significantly tempered Kalākaua's political power as a sovereign over the entire kingdom.[134] First, the 1887 Constitution removed words such as "the Kingdom is His" from the 1864 Constitution and required the King to gain approval of the Legislature to remove any Cabinet Minister.[135] In addition to a higher bar for removal, Cabinet members enjoyed increased control over the government: acts of the King had no effect unless approved by a member of the Cabinet,[136] and every action taken by the King had to be "with the advice and consent of the

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[128] Jon Van Dyke, *The 1864 Constitution*, ARCHIVAL COLLECTIONS AT THE UNIV. OF HAW. SCH. OF L. LIBR. [hereinafter *1864 Constitution*], http://archives.law.hawaii.edu/items/show/5582 (last visited Sept. 26, 2023).

[129] MacKenzie, *supra* note 24, at 20.

[130] *1864 Constitution*, *supra* note 128 (quoting 2 RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM: TWENTY CRITICAL YEARS, 1854-1874 127 n.44 (1953)).

[131] *Id*.

[132] *See id.* "The egalitarian phrase in Article I of the 1852 Constitution proclaiming that 'God hath created all men free and equal'" was removed from the 1864 Constitution, and the Kuhina Nui office was entirely abolished by the 1864 Constitution. *Id.*

[133] The 1887 Constitution earned the name "Bayonet Constitution" for the weapons with which haole descendants of missionaries and sugar planters led by Lorrin A. Thurston forced the hand of King David Kalākaua. "The 1887 Constitution," Jon Van Dyke, *The 1887 Constitution*, ARCHIVAL COLLECTIONS AT THE UNIV. OF HAW. SCH. OF L. LIBR. [hereinafter *1887 Constitution*], http://archives.law.hawaii.edu/items/show/5583 (last visited Sept. 26, 2023).

[134] *See 1887 Constitution*, *supra* note 133.

[135] *Compare* KINGDOM OF HAW. CONST. OF 1864 *with* KINGDOM OF HAW. CONST. OF 1887.

[136] WHO OWNS THE CROWN LANDS?, *supra* note 104, at 120.

Cabinet."[137] Other traditional powers of the constitutional monarch were equally stripped: the King's veto for legislation could be overridden by a two-thirds vote of the Legislature,[138] and the King's status as "commander-in-chief" was eliminated with control of the military transferring to the Legislature as well.[139] The Bayonet Constitution also limited voting for political representatives to those who spoke Hawaiian, English, Portuguese, other European languages, and Puerto Rican, strategically disadvantaging certain votes.[140] Following the Bayonet Constitution's ratification in 1887, the King's power decreased along with representation of Indigenous and Asian immigrant peoples of Hawai'i, while haole usurpers benefited from self-imposed power.[141]

B. *Overthrow and Republic of Hawai'i (1893–1898)*

Political assimilation reared its ugly head in the annexation of Hawai'i to the United States.[142] In the late nineteenth and early twentieth centuries, the U.S. executive and legislative branches implemented a slew of assimilative policies across the continent, attempting to "kill the Indian to save the man."[143] Such policies eerily resembled measures in Hawai'i that sought to

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[137] KINGDOM OF HAW. CONST. OF 1887 art. LXXVIII; WHO OWNS THE CROWN LANDS?, *supra* note 104, at 120.

[138] KINGDOM OF HAW. CONST. OF 1887 art. XLVIII; WHO OWNS THE CROWN LANDS?, *supra* note 104, at 120.

[139] WHO OWNS THE CROWN LANDS?, *supra* note 104, at 120.

[140] KINGDOM OF HAW. CONST. OF 1887 art. LXII; WHO OWNS THE CROWN LANDS?, *supra* note 104, at 145.

[141] *See, e.g.,* MacKenzie, *supra* note 24, at 20; JONATHAN K. OSORIO, DISMEMBERING LAHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887, at 240 (2002) ("The king's signature ended the twenty-three-year-old constitution established by Lota Kapuāiwa and inaugurated one that would divide the nation because of its content and its origins. For the king, [the Bayonet] constitution meant the abrupt and nearly total termination of any executive power or royal authority. For haole, it meant not only an enhanced representation in the legislature and control of the executive, it also retrieved their ability to define the nation and membership in it.").

[142] *See generally* Larry A. DiMatteo & Michael J. Meagher, *Broken Promises: The Failure of the 1920's Native American Irrigation and Assimilation Policies*, 19 U. HAW. L. REV. 1 (1997); Ann Piccard, *Death by Boarding School: "The Last Acceptable Racism" and the United States' Genocide of Native Americans*, 49 GONZ. L. REV. 137 (2013); Tonya Kowalski, *The Forgotten Sovereigns*, 36 FLA. ST. U. L. REV. 765 (2009).

[143] Captain Richard Henry Pratt, a firm believer in the forced assimilation of Indigenous peoples to American culture, uttered this infamous phrase in 1892 during his speech at the National Conference of Charities and Correction held in Denver, Colorado. Captain Richard H. Pratt, The Advantages of Mingling Indians with Whites, Address before the Nineteenth Annual National Conference of Charities and Corrections (June 23-29, 1892), *in* PROC. NAT. CONF. CHARITIES CORR. 45, 46 (Isabel C. Barrows ed., 1892).

oppress the Islander to take his land.[144] The U.S. Supreme Court similarly decided consequential legal issues by mischaracterizing peoples within newly acquired territories as "barbarians" through a series of judicial decisions known as the *Insular Cases*.[145] Such categorization served as a retroactive justification for the ultimate assimilative act of illegally overthrowing the independent Kingdom of Hawai'i.[146]

Hawai'i's Queen, Lili'uokalani, proposed the 1893 Constitution to address the restraints on Native Hawaiian political power in governing the Kingdom.[147] As King Kalākaua's sister and successor, Queen Lili'uokalani detested the Bayonet Constitution because she felt its proponents facilitated its passage under the guise of democracy and had not given the people a choice in the decision.[148] Members of her Cabinet, however, refused to sign

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[144] Common assimilation policies included replacing the traditional and communal economy with a system of private property; intensified education through boarding schools; regulating every aspect of Indian social life, including marriage, dispute settlement, and religious practice; granting U.S. citizenship; and allowing tribes to become self-governing only by adopting constitutions ultimately subject to Congress' approval. *See, e.g.*, Indian General Allotment Act, 25 U.S.C. §331-334 1887 (repealed 2007); *see also* Addie Rolnick, *Assimilation, Removal, Discipline, and Confinement: Native Girls and Government Intervention*, 11 COLUMBIA J. RACE & L. 811, 826 (2021) ("The goal of [assimilation policies like allotment] included detribalization through the division of communally held tribal land and indoctrination into a Western, capitalist way of life through individualized property ownership.").

[145] *E.g.,* Downes v. Bidwell, 182 U.S. 244, 287 (1901) (holding that the territory of Puerto Rico was not part of the U.S. constitutionally with respect to tariffs because new territories were "inhabited by alien races" that could not be governed by Anglo-Saxon principles); *see also* Christiana D. Ponsa-Kraus, *The* Insular Cases *Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449, 2460 (2022); Dolace McLean, *Cultural Identity and Territorial Autonomy: U.S. Virgin Islands Jurisprudence and the* Insular Cases, 91 FORDHAM L. REV. 1763, 1765 (2023).

[146] *See* LORRIN A. THURSTON, A HANDBOOK ON THE ANNEXATION OF HAWAI'I 31 (1897) ("The Native Hawaiians, only 33,000 in number, are a conservative, peaceful and generous people. They have had during the last twenty years, to struggle against the retrogressive tendencies of the reigning family; but in spite of that, a very large proportion of them have stood out against such tendencies, and are supporters of the Republic and of annexation.").

[147] MacKenzie, *supra* note 24, at 20.

[148] HELENA G. ALLEN, THE BETRAYAL OF LILIUOKALANI: LAST QUEEN OF HAWAI'I 1838–1917, at 215 (1982). Lili'uokalani also opposed the Bayonet Constitution afer she had visited the daughter of Walter Murray Gibson (a foreign-born leader in the Church of Latter Day Saints whose political campaign embraced the Native Hawaiian interest) and heard first-hand a story of several men forcibly entering her home to attack her father and her husband "without regard for the gray hairs of the old gentleman." *Id.* This incident played a role in racial

the Queen's proposed constitution, as it would have reduced the Cabinet's unbound authority by limited voting power to subjects of the Kingdom who owed no allegiance to the imperialistic United States.[149] In fact, the Queen's proposed constitution was viewed as "arrogantly autocratic and intentionally provocative," a justification later deployed by the Hawaiian League to overthrow the long-standing monarchy of Hawai'i and to push for annexation by the United States.[150] The Hawaiian League included two factions: minority radicals led by Thurston who sought to overthrow the monarchy and annex Hawai'i to the United States, and majority conservatives led by Sanford B. Dole who wanted Hawai'i to remain an independent monarchy but with curtailed monarchial powers.[151] By the third week of 1893, Queen Lili'uokalani reached exactly the same conclusion the counter-revolutionists had: there was no longer a neutral zone of cooperation or appeasement between the monarchy (dedicated to Hawaiian heritage) and the haole businessmen (dedicated to commercial gain).[152] Due to the influence of American businessmen organizing as the Hawaiian League, the Hawaiian Kingdom was depicted as ripe for their revolution.[153]

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consciousness among Kānaka Maoli. After the attack on his family led by Thurston and Dole's reformists, Gibson fled the islands for fear of his life, dying penniless in San Francisco. *Id.* at 216. When his son-in-law returned his body to Hawai'i for a funeral and burial, defective embalming caused Gibson's skin to turn black. *Id.* Upon viewing Gibson's open casket, Thurston wrote in his memoirs that now even God had seen Gibson for the "black devil" he was. *Id.* Having become more color conscious, Kānaka whispered; for whispers were all they dared that "now he is one of us" – signaling color and racism as an emerging issue. *Id.*

[149] *See id*. at 284–88; NEIL THOMAS PROTO, THE RIGHTS OF MY PEOPLE: LILIUOKALANI'S ENDURING BATTLE WITH THE UNITED STATES 1893–1917, at 15–16 (2009).

[150] PROTO, *supra* note 149, at 13 (quoting a friend of coup d'état leader William O. Smith); *see also* ALLEN, *supra* note 148, at 286–88; THOMAS COFFMAN, NATION WITHIN: THE HISTORY OF THE AMERICAN OCCUPATION OF HAWAI'I 148–51 (rev. ed. 2016).

[151] ALLEN, *supra* note 148, at 214.

[152] *Id.* at 283. "In 1889, Robert W. Wilcox led an insurrection against the so-called 'Reform Government,' composed of a small cadre of sugar planters, missionary descendants, and their allies, who two years earlier had imposed the 'Bayonet Constitution' upon King Kalākaua, Wilcox intended to return rights to the monarchy and to Native Hawaiians." Helen G. Chapin, *Robert Wilcox and the 1889 Rebellion*, KA'IWAKĪLOUMOKU PAC. INDIGENOUS INST., https://kaiwakiloumoku.ksbe.edu/article/historical-snapshots-robert-wilcox-and-the-1889-rebellion (last visited Sept. 23, 2023). "The government brought Wilcox to trial for high treason. Hawaiians, however, accused those in power of being usurpers and having blood-stained hands. A jury of his peers refused to convict Wilcox. He would lead another rebellion in 1895." *Id.*

[153] According to author Helena G. Allen,

Following the overthrow of the Hawaiian Kingdom, a so-called "Provisional Government" established its own 1894 Constitution that temporarily governed Hawai'i while the Queen and her supporters were imprisoned.[154] The 1894 Constitution became the supreme law of the Republic and established an Executive Council that would swear allegiance to the Provisional Government, nullifying all previous constitutions.[155] Written primarily by Dole (the Republic's only "President" and the Territory's first Governor), the 1894 Constitution allowed the Territory, on behalf of the United States, to claim the Crown Lands, which by 1894 consisted of about 971,463 acres, free and clear of any trust (constructively, a seizure of expropriation without just compensation).[156] The 1893 overthrow

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> The revolutionists had a door badly weakened, if not completely rotten, one which Lili'uokalani had inherited from her brother Kalākaua, one which . . . continued to splinter further during the past two years of her reign. The revolutionists had at least determined leaders in such men as L.A. Thurston, labelled by more than one unbiased historian as a 'rabid radical.' The three percent followers were primarily among the Americans born in Hawai'i, second generation missionary sons, *American businessmen who were not even naturalized citizens*, and a few naturalized foreigners.

ALLEN, *supra* note 148, at 283–84 (emphasis added). Historians generally agree that a country is ripe for to revolution if there is (1) a 'rotten door' to break down, (2) strong opposition leadership, and (3) as little as three percent of the population willing to follow. *Id.* at 283. All three circumstances for a revolution were in play when the Haole Hawaiian League overthrew the Kingdom on January 17, 1893.

[154] WHO OWNS THE CROWN LANDS?, *supra* note 104, at 172–73; *see also* A.F. Judd, *Constitution of the Republic of Hawaii*, 4 YALE L.J. 53, 53 (1894). Most Kānaka Maoli would not declare an oath to the Provisional Government, "and at a meeting attended by 2,000 Native Hawaiians on April 9, 1894, those continuing to support the monarchy agreed to boycott the election for delegates to the 1894 Constitutional Convention." Jon Van Dyke, *1894 Constitution of the Republic of Hawaii*, ARCHIVAL COLLECTIONS AT THE UNI. OF HAW. SCH. OF L. LIBR., http://archives.law.hawaii.edu/items/show/5585 (last visited Nov. 28, 2023). The members of the Republic's Constitutional Convention are pictured in THURSTON TWIGG-SMITH, HAWAIIAN SOVEREIGNTY: DO THE FACTS MATTER? 216–17 (1998).

[155] ALLEN, *supra* note 148, at 317–18 (declaring the 1894 Constitution "to be the Constitution and the supreme law of the Republic of Hawaii" during Sanford B. Dole's oath of office).

[156] WHO OWNS THE CROWN LANDS?, *supra* note 104, at 174. The Māhele of 1848 represented the most consequential "land division" in Hawai'i that sought to reconceptualize traditional stewardship of 'āina in a manner more compatible with concepts of western land title. *See* MacKenzie, *supra* note 24, at 13. The Crown Lands included 'āina retained by the sovereign leader of Hawai'i. WHO OWNS THE CROWN LANDS?, *supra* note 104, at 6.

represented the most explicit loss of Indigenous political control in Hawai'i, making way for haole men in power to promote assimilation to western society.[157]

The Newlands Resolution of 1898, a joint resolution that provided for the annexation of the Republic of Hawai'i, committed Hawai'i to a future of American governance consented to by the haole usurpers of the Hawaiian government.[158] Acquiring a foreign nation through a joint resolution is in and of itself unconstitutional by American legal standards because it undermines the U.S. Constitution's careful allocation of powers which deliberately prohibits the House of Representatives from having any power over foreign affairs.[159] Enacting a joint resolution requires a majority vote in the Senate and the House, but doing so to create a treaty with a foreign nation undermines the explicit delegation of the treaty-making power to the President and the Senate.[160] In 1988, Douglas Kmiec from the U.S. Department of Justice examined the annexation of Hawai'i and found no constitutional power permitting the United States to annex Hawai'i.[161] Professor Williamson Chang, who argues against efforts to legitimize the annexation, explains that "[s]uch an admission of failure, given that the [United States] has the burden of proving how it acquired Hawai'i, is a virtual confession of the lack of U.S. sovereignty over Hawai'i."[162]

C. *Conflicting Images of Statehood for Hawai'i (1919–1978)*

Although Hawai'i became a state in 1959,[163] efforts to admit Hawai'i to the Union began decades earlier.[164] Statehood was first propositioned by a Hawaiian – more specifically, an ali'i on a mission to secure a future for Native Hawaiians in Hawai'i amidst widespread declining health and population.[165] Statehood efforts in the early 1920s stands in stark contrast with the efforts of American businessmen in the 1950s who pursued

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[157] WHO OWNS THE CROWN LANDS?, *supra* note 104, at 162–63, 169–71.

[158] *See* Newlands Resolution, Res. 55, 55th Cong. (1898) (consented to by the Republic of Hawai'i, with Sanford B. Dole as its president).

[159] Williamson Chang, *Darkness over Hawaii: The Annexation Myth is the Greatest Obstacle to Progress*, 16 ASIAN-PAC. L. & POL'Y J. 70, 81–82 (2015).

[160] *Id.* at 82.

[161] *Id.* at 83.

[162] *Id.* at 83–84.

[163] An Act to Provide for the Admission of the State of Hawaii into the Union (Pub. L. 86-3, 73 Stat. 4, enacted March 18, 1959) [hereinafter Hawai'i Admissions Act].

[164] *See infra* note 174 and accompanying text.

[165] *See infra* note 178 and accompanying text.

statehood for the business opportunities it would enable.[166] The earlier effort resulted in the security of reserved lands to build homes for Native Hawaiians through federal legislation.[167] The later effort secured Hawai'i's status as America's fiftieth state, introducing issues of citizenship, land rights, and voting rights which continue to shape the story of governance in Hawai'i.[168]

The 1900 Organic Act codifying Hawai'i's territorial status subjugated citizens to provisions of the U.S. Constitution without representation in the United States government.[169] U.S. citizenship and the application of U.S. constitutional principles to Hawai'i still affects U.S. territories today.[170] In particular, the U.S. Supreme Court held in *Hawaii v. Mankichi* that U.S. citizenship not only extended to Kānaka but also that the "granting of citizenship . . . [is] the determinative factor in deciding whether a territory had been incorporated into the United States."[171] *Mankichi* relied on other *Insular Cases* decided between 1901 and 1905, in which the Court constitutionally justified imperialist policies toward its assumed territories: Hawai'i, Puerto Rico, and the Philippines.[172]

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[166] *See infra* note 189 and accompanying text.

[167] *See infra* notes 178–85 and accompanying text.

[168] *See* ROGER BELL, LAST AMONG EQUALS: HAWAIIAN STATEHOOD AND AMERICAN POLITICS 328 (1984); MacKenzie, *supra* note 24, at 32–33; Kristina M. Campbell, *Citizenship, Race, and Statehood*, 74 RUTGERS U. L. REV. 583, 616-25 (2022) (discussing the broader civil rights issues asssociated with Hawai'i's statehood).

[169] Organic Act of 1900, ch. 339 § 4, 141 ("[A]ll persons who were citizens of the Republic of Hawaii on August twelfth, eighteen hundred and ninety-eight, are hereby declared citizens of the United States and citizens of the Territory of Hawaii.").

[170] *See* Gustavo A. Gelpi, *The Insular Cases: A Comparative Historical Study of Puerto Rice, Hawai'i, and the Philippines*, THE FEDERAL LAWYER, Mar.–Apr. 2011, at 22, 25.

[171] Juan R. Torruella, *The* Insular Cases*: The Establishment of a Regime of Political Apartheid*, 29 U. PENN. J. INT'L L. 283, 314 (2007); *see, e.g.*, Downes v. Bidwell, 182 U.S. 244 (1901); Hawai'i v. Mankichi, 190 U.S. 197 (1903); Dorr v. United States, 195 U.S. 138 (1904).

[172] *Downes*, 182 U.S. at 286. The Court devised the doctrine of "territorial incorporation," from which two types of territories emerged: *incorporated* territories like Hawai'i, in which the U.S. Constitution fully applied and which the United States had destined for statehood, and *unincorporated* territories, including American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands, in which only "fundamental" constitutional guarantees applied and which the United States had deemed premature for statehood. *See* Gelpi, *supra* note 170, at 22, 25. American Samoa is uniquely situated as the only unincorporated territory of the United States where the inhabitants are not American citizens at birth. Without U.S. citizenship, American Samoans may not vote in U.S. elections, run for office outside American Samoa, or apply for certain jobs. *See* Fitisemanu v. United States, 1

In considering the rights (or lack thereof) attributed to United States territories, statehood may be viewed as the lesser of two evils for Hawai'i.[173] Yet the two different attempts to obtain statehood, first in the 1920s and later in the 1950s, reflect differing motives and were met with different levels of public support.[174] Contrary to the "romantic images of Hawai'i peddled globally by the billion-dollar tourism industry," groups of differing ethnic backgrounds and economic interests engaged in heated political battles stemming from opposing histories.[175] The 1887 Bayonet Constitution strategically disenfranchised the Native Hawaiian vote while also denying the vast majority of immigrant laborers of Chinese and Japanese ancestry the right to vote.[176] Thus, some support for statehood later derived from a need to advocate for Hawai'i's broader public interest through political

F.4th 862 (10th Cir. 2021) (holding on appeal that citizens of American Samoa were not birthright citizens of the United States by virtue of the Fourteenth Amendment's Citizenship Clause); Susak K. Serrano & Ian Falefuafua Tapu, *Reparative Justice in the U.S. Territories: Reckoning with America's Colonial Climate Crisis*, 110 CAL. L. REV. 1281, 1283 (2022).

[173] *See* Gelpi, *supra* note 170 (discussing the limited rights of citizens in U.S. territories). *See also* Micah Hicks, *Has Statehood Actually Worked Out for Hawaii?*, HONOLULU CIV. BEAT (Aug. 16, 2019), https://www.civilbeat.org/2019/08/has-statehood-actually-worked-out-for-hawaii/; Campbell, *supra* note 168, at 594 (describing how *Balzac v. Porto Rico*, 258 U.S. 298 (1922), presented a "significant limitation to the constitutional rights of territorial citizens" and how the U.S. Supreme Court "reaffirmed [Territorial Incorporation Doctrine] in a way that had repercussions not just for the residents of Puerto Rico, but for all inhabitants of the various United States territories").

[174] BELL, *supra* note 168, at 45 (describing how the statehood bills of 1919 and 1920 "were, at most, token gestures designed to placate those in the islands and in Congress who rightly viewed territorial rule as a transitory step toward full-fledged democracy and who had supported annexation on this basis"). The first pursuit of statehood was not widely supported. *See id.*

[175] Dean I. Saranillio, *Colliding Histories: Hawai'i Statehood at the Intersection of Asians "Ineligible to Citizenship" and Hawaiians "Unfit for Self-Government,"* 13 J. ASIAN AM. STUD. 283, 283–84 (2010) [hereinafter Saranillio, *Colliding Histories*]. Congress has found that "in 1853, [I]ndigenous Hawaiians made up 97% of the islands' population," but "by 1923, their numbers had dwindled to 16%, and the largest percentage of Hawaii's population was Japanese." *Hawaii: Life in a Plantation Society*, LIBR. OF CONG., https://www.loc.gov/classroom-materials/immigration/japanese/hawaii-life-in-a-plantation-society/ (last visited Sept. 26, 2023).

[176] WHO OWNS THE CROWN LANDS?, *supra* note 104, at 150 (explaining that drafters of the Bayonet Constitution "gave Portuguese laborers advantages over other immigrant workers because they thought the Portuguese voters would benefit their political agenda"); *see supra* Section II.A.

representation and the tourism industry that began replacing the sugar industry.[177]

Prince Jonah Kūhiō Kalaniana'ole (Kūhiō) first proposed the idea of statehood to the U.S. Congress in 1919 to improve the living conditions of Kānaka Maoli who experienced immense losses in land and life following the illegal overthrow.[178] Known affectionately as Ke Ali'i Maka'āinana or "The People's Prince," Kūhiō forcefully advocated for Native Hawaiians, who suffered terribly at the hands of plantation owners.[179] Kūhiō believed that one way to ensure civil rights for his people was the admission of Hawai'i to the Union.[180] He could not, however, garner enough support in Congress to obtain statehood.[181] Instead, he secured Congressional approval for the Hawaiian Homes Commission Act of 1921 ("HHCA"), which set aside 200,000 acres of Crown Lands across Hawai'i for Native Hawaiian homesteading.[182] As a delegate, Kūhiō explained the situation of Kānaka Maoli on the U.S. congressional stage:

> Many causes have been assigned . . . but the *principal cause was the coming of the new civilization*. The Hawaiians for generations have been an agricultural and seafaring people. With the coming of the foreigner conditions gradually changed, the lands were used in large tracts, and cheap labor had to be used to cultivate them successfully. With the cheap labor came competition in the trades until the *Hawaiians were crowded out and forced into the tenements of the cities and towns, becoming susceptible to all of the modern diseases which accompany civilization*.[183]

Met with significant opposition from ranchers and sugar plantation owners who lobbied to limit the HHCA beneficiary class of Hawaiians to a smaller

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[177] Jessica Terrel, *Will Hawaii Finally be Able to Break its Dependence on Tourism?*, HONOLULU CIV. BEAT (Oct. 12, 2020), https://www.civilbeat.org/2020/10/will-hawaii-finally-be-able-to-break-its-dependence-on-tourism/.

[178] H.R. 12210, 64th Cong. (1919); LORI KAMAE, THE EMPTY THRONE: A BIOGRAPHY OF HAWAII'S PRINCE CUPID 178 (1980).

[179] KAMAE, *supra* note 178, at 122, 178–80.

[180] *Id*. at 178.

[181] *Id*.

[182] WHO OWNS THE CROWN LANDS?, *supra* note 104, at 251.

[183] *Hawaiian Homes Commission Act of 1920: Hearing on H.R. 13500 Before the S. Comm. on the Territories*, 66th Cong. 67 (1921) (statement of Kūhiō as Hawai'i's delegate to Congress) (emphases added).

class of full-blooded Hawaiians, Kūhio insisted on a blood quantum of one thirty-second.[184] In order to secure the passage of the HHCA, however, Kūhiō made the reluctant compromise to limit the beneficiary class to "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778."[185] Wesleyan University Professor of Anthropology and American Studies J. Kēhaulani Kauanui described attitudes fixated on blood quantum as distinctly colonial: "the enfranchisement of [I]ndigenous peoples in the United States entailed the domestication of previously recognized sovereign entities, the project of erasing their distinctiveness through discourses of deracination was essential to and remains a key feature of contemporary neocolonial entrenchment."[186]

By contrast, the circumstances leading to the successful bid for statehood began in the mid-1930s and was "clearly seen as an attempt to reconsolidate haole racial power and privilege."[187] A group of landowner plantation families in Hawai'i known as the "Big Five" had close ties with the federal government as well as local news distribution that allowed them to manipulate support from the general public. [188] Their motivation to join the Union arose from acts of Congress following the Great Depression that

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[184] Ku'uwehi Hiraishi, *Blood Quantum Policy an 'Act of Compromise' for Hawaiian Homes,* HAW. PUB. RADIO (July 14, 2021, 2:50 PM), https://www.hawaiipublicradio.org/local-news/2021-07-14/blood-quantum-policy-an-act-of-compromise-for-hawaiian-homes.

[185] *Id*.; Hawaiian Homes Commission Act, 42 Stat. at 124; *see* Troy Andrade, *Belated Justice: The Failures and Promise of the Hawaiian Homes Commission Act*, 46 AM. L. REV. 1, 27 (2022) ("The push for a high blood quantum requirement was no doubt an effort to ensure that, with the continued decline in the full blood Hawaiian population, the HHCA would cease to exist and lands would be returned to the United States.").

[186] J. Kēhaulani Kauanui, *The Politics of Hawaiian Blood and Sovereignty in* Rice v. Cayetano, *in* SOVEREIGNTY MATTERS 87, 98 (Joanne Barker ed., 2005).

[187] DEAN ITSUJI SARANILLIO, UNSUSTAINABLE EMPIRE: ALTERNATIVE HISTORIES OF HAWAI'I STATEHOOD 97 (2018) [hereinafter SARANILLIO, UNSUSTAINABLE EMPIRE].

[188] *See id*; Saranillio, *Colliding Histories*, *supra* note 175, at 294 ("Japanese Americans represented a new political force that gave birth to a new arrangement of power in Hawai'i. The emergence of various labor movements of plantation and dockworkers, changing demographics and their impact on voting, and the disenfranchisement of rights through martial law during World War II would alter Hawai'i's political landscape."). Lorrin P. Thurston, the son of Lorrin A. Thurston, served as Chairman of Hawai'i Statehood Commission between 1955 and 1959 and as a member of the group since its conception. *Oral History: Lorrin Potter Thurston*, OUTRIGGER CANOE CLUB SPORTS, https://www.outriggercanoeclubsports.com/occ-archives/oral-histories/lorrin-potter-thurston/ (last visited Sept. 28, 2023). Thurston also served as President, General Manager, and Publisher of a newspaper, the Honolulu Advertiser, between 1931 and 1961. *Id.*

"extinguished the profitable tariffs and empowered dockworkers to unionize in ways that would extinguish mutual interests of the Big Five."[189]

The Hawai'i State Commission successfully paved a path to Hawai'i Statehood by appealing, in part, to disenfranchised Japanese citizens following World War II, who "became objects of propaganda that were globally circulated to prove Japanese American loyalty to the United States and reconcile postwar relations between the two countries."[190] Although the multiethnic population of Hawai'i hindered Congressional support of statehood in the 1920s, that same characteristic played a much different role in the 1950s efforts.[191]

Finally, in 1959, four decades after Kūhiō's attempt to secure statehood, the Hawai'i Admission Act conveyed HHCA administrative responsibilities to the state government, but reserved federal control over blood quantum requirements.[192] Yet, the state's continued failure to address Native Hawaiian issues would lead to crucial constitutional amendments.[193]

D. The 1978 Constitutional Convention and Creation of the Office of Hawaiian Affairs

The 1978 Constitutional Convention and its creation of OHA represented an important reshaping of the State Constitution to reconcile maoli interests in the haole forum of an American state. To fill gaps left by the 1959 Constitution, the 1978 Constitutional Convention ("Con Con") importantly incorporated Native Hawaiian rights and other provisions benefiting the

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[189] *See* SARANILLIO, UNSUSTAINABLE EMPIRE, *supra* note 187.

[190] *Id.*

[191] *See* Saranillio, *Colliding Histories*, *supra* note 175, at 289–90. In the 1950s, deliberate western positioning of Hawai'i and its Native Hawaiian and Pacific islander population as the "frontiers of America's new strategic position in the world" furthered narratives of U.S. imperialism as "spreading democracy," rather than traditional European colonization. *Id.*

[192] *See* Mgmt. and Disposition of Geothermal Res. on DHHL Lands, Op. Att'y Gen. 14-1 (2014) ("It is clear from the Admission Act . . . that the State has an obligation to manage such resources . . . pursuant to the HHCA"). U.S. Representative Kai Kahele proposed a compromise to lower the blood quantum requirement for successors of leases from one-quarter to one thirty-second. H.R. 9614, 117th Cong. (2022). Although the measure died and Kahele opted against reelection in order to run unsuccessfully for the Hawai'i gubernatorial seat, his Congressional successor Jill Tokuda has promised to reintroduce the measure during her term. Blaze Lovell, *Kahele Introduces Bill Lowering Blood Quantum for Home Lands*, HONOLULU CIV. BEAT (Dec. 21, 2022), https://www.civilbeat.org/beat/kahele-introduces-bill-lowering-blood-quantum-for-home-lands/.

[193] *See infra* Section II.D (describing the impetus behind the amendments enacted during the 1978 Constitutional Convention).

public interest.[194] The 1978 Con Con specifically established the Office of Hawaiian Affairs to serve the needs of Native Hawaiians independent of the State's resources or interests:

> The committee intends that *[OHA] will be independent from the executive branch and all other branches of government* although it will assume the status of a state agency . . . . The status of [OHA] is to be *unique and special.* . . . The committee developed this office based on . . . the University of Hawaii [i]n particular, . . . so that the office could have *maximum control over its budget, assets, and personnel*. The committee felt that it was important to arrange a method whereby the *assets of Hawaiians could be kept separate* from the rest of the state treasury.[195]

As OHA is the only public office charged with assessing the policies and practices of state agencies impacting Kānaka resources,[196] establishing OHA's Board of Trustees through an election limited to Kānaka Maoli was a strong consensus among Con Con representatives:

> [P]eople to whom assets belong should have control over them. . . . [A] board of trustees chosen from among those who are interested parties would be the best way to *insure proper management and adherence to the needed fiduciary principles. . . . The election of the board will enhance representative governance and decision-making accountability* and, as a result, *strengthen the fiduciary relationship*.[197]

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[194] For example, Amendment 31 proposed the adoption of 'ōlelo Hawai'i as an official state language, the adoption of Kauikeaouli's refrain "Ua mau ke ea o ka 'āina i ka pono" (the sovereignty of the land is perpetuated through righteousness) as the state motto, and the amendment of the Constitution's preamble to better reflect Hawaiian custom. Res. 31, *in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 546–47 (1980) [hereinafter CONCON PROCEEDINGS]. Additional changes included the establishment of the State Water Commission, the promotion of Hawaiian culture in schools, a grant of legislative funding for the Department of Hawaiian Home Lands, and protections for the customary rights of Kānaka Maoli. *Id*. at 543, 545.

[195] Stand. Comm. Rep. No. 59, *in* CONCON PROCEEDINGS, *supra* note 194, at 645 (1980) (emphasis added).

[196] *See* HAW. REV. STAT. § 10-3(4) (2011).

[197] Stand. Comm. Rep. No. 59, *in* CONCON PROCEEDINGS, *supra* note 194, at 644 (emphasis added).

Although OHA provided a vehicle for Hawaiians to control funds set aside exclusively for their benefit, litigants like William Burgess deployed U.S. constitutional principles to attack Native Hawaiians' ability to exercise that sovereignty.[198] Several challenges have been successful, leading to the status quo under which all Hawai'i residents may vote or run for OHA's board of trustees.[199] Other challenges have been less successful but have nonetheless attempted to chip away at impactful Native Hawaiian programs.[200]

Based on the U.S. constitutional principles utilized in attacking beneficiary programs at the state level, new federal initiatives could face similar criticism for empowering Native Hawaiian autonomy in policymaking.[201] The proposed DOI consultation policy represents another means to protect Indigenous interests.[202] Yet, its potential to protect and advance Native Hawaiian interests through consultation may be limited so long as the lāhui and its Native Hawaiian constituents remain in a state of legal ambiguity.[203] Such "legal limbo" is a result of the federal government's inconsistent treatment of Native Hawaiians as a political class in some instances (e.g., the DOI Policy on Consultation discussed herein) and as a strictly racial class in other instances, namely by the Court in *Rice* for purposes of the voting criteria under the Fifteenth Amendment.[204]

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[198] *See, e.g.*, Arakaki v. Hawaii, 314 F.3d 1091 (9th Cir. 2002); MacKenzie, *supra* note 24, at 35.

[199] *See, e.g.*, Arakaki, 314 F.3d at 1095 (9th Cir. 2002) (citing Rice v. Cayetano, 528 U.S. 495 (2000), the court ruled in favor of plaintiffs who claimed that OHA's candidate restriction violated the Fifteenth Amendment and the Voting Rights Act, so that now, non-Hawaiians may vote *and* run for OHA).

[200] *See, e.g.*, Corboy v. Louie, 128 Hawai'i 89, 91, 283 P.3d 695, 697 (2011) (holding that taxpayer plaintiffs, who are not Native Hawaiian and several of whom also participated in *Arakaki*, lacked standing to seek exemption from real property taxes equal to the exemption granted to Hawaiian homestead lessees under the HHCA).

[201] *See id.*

[202] *Interior Department Announces Development of First-Ever Consultation Policy with Native Hawaiian Community,* U.S. DEP'T OF THE INTERIOR (Oct. 18, 2022), https://www.doi.gov/pressreleases/interior-department-announces-development-first-ever-consultation-policy-native (quoting Secretary Deb Haaland, who stated that the "new and unprecedented consultation policy will help support Native Hawaiian sovereignty and self-determination as we continue to uphold the right of the Native Hawaiian Community to self-government").

[203] *See infra* notes 258–61 and accompanying text.

[204] DOI Policy on Consultation, *supra* note 1; Rice. v. Cayetano, 528 U.S. 495 (2000).

III. LEGAL RULES

The Department intended its Native Hawaiian Community consultation policy to "affirm[] and honor[] the special political and trust relationship between the United States and the Native Hawaiian Community" and to confirm the Department's intent to apply the principles underlying Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships[205] as well as Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments").[206] However, legal ambiguity persists because the Department has extended tribal consultation principles usually reserved for federally recognized tribes to the non-federally recognized NHC, which does not exercise the same political sovereignty as the federally recognized tribes served by the Bureau of Indian Affairs ("BIA").[207] Further, despite the Department's authority to enact its own rules and regulations, policies will not survive judicial review if they are challenged in court and found to be arbitrary, capricious, an abuse of discretion, or contrary to existing laws.[208] To demonstrate the legal tools that limit and enable consultation with the Native Hawaiian Community, the following section examines the legal rules that form the foundation of the DOI's federal consultation policy with Native Hawaiians, including a discussion on the federal trust relationship with Native Hawaiians, the Apology Resolution, and Executive Order 13175.

A. *Federal Trust Relationship with Native Hawaiians*

The United States' responsibility to certain Indigenous peoples stems from those Indigenous peoples' respective trust relationships with the federal

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[205] *Interior Department Announces Development of First-Ever Consultation Policy with Native Hawaiian Community,* U.S. DEP'T OF THE INTERIOR (Oct. 18, 2022), https://www.doi.gov/pressreleases/interior-department-announces-development-first-ever-consultation-policy-native.

[206] DOI Policy on Consultation, *supra* note 1, at 1.1.

[207] Native Hawaiians are not included in the 574 Native tribes listed on the Federal Registry's "Indian Entities Recognized and Eligible to Receive Services from the Bureau of Indian Affairs." *See* 88 Fed. Reg. 54654 (Aug. 11, 2023). Further, no "Native Hawaiian Community" or any other entity is viewable when searching for Federally Recognized Tribes in Hawai'i on the BIA website. *Search Federally Recognized Tribes*, U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFF., https://www.bia.gov/service/tribal-leaders-directory/federally-recognized-tribes (select "Hawaii" from dropdown; then click "apply") (last visited Sept. 28, 2023).

[208] Kevin Casey et al., *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIR. B.J. 279, 336 (2002); *see* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

government.[209] In *Seminole Nation v. United States*, the Court recognized "the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people."[210] As the Court developed concepts of the government's trust responsibility to Indigenous peoples, it recognized that tribes' inherent sovereignty to exercise control over their lands and natural resources derived from the tribe's treaty with the federal government.[211] Yet, by recognizing such inherent sovereignty, the Court also absolved the federal government of a heightened fiduciary responsibility to care for those resources.[212] As a result, tribes may enforce their trust rights under federal treaties and laws, but they are more

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[209] *See* Morton v. Mancari, 417 U.S. 535, 552 (1974) ("'In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to peform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic[.]'") (quoting Bd. of Cnty Comm'rs v. Seber, 318 U.S. 705, 715 (1943)).

[210] Seminole Nation v. United States, 316 U.S. 286, 296 (1942).

[211] *See e.g.*, Montana v. United States, 450 U.S. 544 (1981) (recognizing tribes' inherent sovereignty to regulate lands on which tribes exercise absolute and undisturbed use and occupation). While the Supreme Court held that General Allotment Act of 1887 created only a *limited* trust relationship, imposing no duty upon the federal government to manage timber in tribal lands, United States v. Mitchell (*Mitchell I*), 445 U.S. 535, 546 (1980), it later held that other statutes and regulations could nonetheless established a fiduciary relationship between the United States and tribes. *See, e.g.*, United States v. Mitchell (*Mitchell II*), 463 U.S. 206 (1983). In *Mitchell II*, the Court held that "[a]ll of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds). *Id.* at 206 ((holding that "the United States was subject to suit for money damages because timber management statutes and other legal rules imposed fiduciary duties upon the United States," despite the holding of *Mitchell I*). Thus, "where the Federal Government takes on or has control or supervision over tribal monies or properties, a fiduciary relationship normally exists with respect to such monies or properties. *Id.* at 225.

[212] *See Mitchell I*, 445 U.S. at 540–41; Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L.REV. 1137, 1151 (1990) ("Justice Marshall's majority opinion held that Congress had not intended to impose fiduciary responsibilities upon the federal government for allotment management, much less to make damages available for the breach of such duties."); *see also* Arizona v. Navajo Nation, 599 U.S. 555, 569–70 (2023) (concluding the federal government's treaty with the Navajo Nation does not require the United States to take "affirmative steps to secure water" for the Nation and thus the federal government did not breach its trust duty in failing to provide access to clean potable water to thousands of Navajos).

likely to win lawsuits involving those rights "when the government's duty to act is clear and express, or when Congress has delegated to a federal agency elaborate control over the tribal resource in question."[213]

Similarly, the Hawaiian Homes Commission Act established all essential elements of a common law trust, warranting the extension of the United States' fiduciary duties to beneficiaries of the Act.[214] The HHCA designated 200,000 acres of federally controlled "ceded" lands as available for Hawaiian homesteads, thereby creating a fiduciary trust relationship between the United States as the settlor-trustee and a subpopulation of the Native Hawaiian Community as a beneficiary class to receive designated lands that represent the trust corpus.[215] Until 1993, the "ceded" lands under federal control included Kaho'olawe, the smallest of the eight main Hawaiian Islands which the U.S. military used as a target and training area during World War II.[216] The United States then created another trust relationship with Native Hawaiians through a 1953 Executive Order that placed control of Kaho'olawe under the Secretary of the Navy who ensured restoration of its "habitable condition" when it no longer needed the island for navy purposes.[217]

Despite the lack of a recognized government, Native Hawaiians like George Helm and James Kimo Mitchell politically activated the NHC in the 1970s through their group Protect Kaho'olawe 'Ohana.[218] In 1976, Helm, Mitchell, and other Hawaiians, engaged in peaceful civil disobedience by establishing their presence on Kaho'olawe despite government opposition:

> This persistence, combined with the loss at sea of two leaders of [Protect Kaho'olawe] 'Ohana, George Helm and James Kimo Mitchell, galvanized the Hawaiian community

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[213] Stephen L. Pevar, *The Federal-Tribal Trust Relationship: Its Origin, Nature, and Scope*, CALIF. WATER LIBR. 4–5 (2009), https://cawaterlibrary.net/wp-content/ uploads/2017/ 05/The-Federal-Tribal-Trust-Relationship.pdf.

[214] *See* MacKenzie, *supra* note 24, at 30–31.

[215] *See* Day v. Apoliona, 496 F.3d 1027 (9th Cir. 2007) (affirming that each member of the HHCA beneficiary class–Native Hawaiians with a blood quantum of one-half–had standing to sue under 42 U.S.C. § 1983);

Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, §201(a)(7), 42 Stat. 108, 108 (1921) (defining "native Hawaiian" as "any descendent of not less than one-half part of the blood of races inhabiting the Hawaiian Islands previous to 1778").

[216] MacKenzie, *supra* note 24, at 39.

[217] *Id.*

[218] PROTECT KAHO'OLAWE 'OHANA, http://www.protectkahoolaweohana.org/ (last visited Sept. 28, 2023).

> and called statewide and national attention to the destruction of the island.
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> . . . .
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> In 1993, after years of sustained efforts by [Protect Kahoʻolawe] ʻOhana, Congress recognized the cultural significance of [Kahoʻolawe], required the navy to return the island to the state, and directed the navy to conduct an unexploded ordinance cleanup and environmental restoration in consultation with the state.[219]

Through Protect Kahoʻolawe ʻOhana's activism, state law now guarantees that Kahoʻolawe will be transferred to the "sovereign" Native Hawaiian entity "upon its recognition."[220] Thus, federal recognition means that the lāhui would regain management and control over federal trust resources – namely Crown Lands.[221] In addition to establishment of a trust relationship through the HHCA and the future turnover of Kahoʻolawe, the federal government's duty to reconcile with the Native Hawaiian Community was further developed through the Executive Branch's apology for past harms a century after the illegal overthrow.[222]

B. *The Apology Resolution*

The federal legislative and executive branches jointly recognized Native Hawaiians as the Indigenous people of Hawaiʻi through Public Law 103-150, known as the Apology Resolution.[223] President William B. Clinton signed

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[219] MacKenzie *supra* note 24, at 39–40. "The same year, the Hawaiʻi state legislature established the Kahoʻolawe Island Reserve, consisting of the island and its surrounding ocean waters, to be used for Native Hawaiian cultural, spiritual, and subsistence purposes; fishing; environmental restoration; historic preservation; and education." *Id*. at 40; *see also* HAW. REV. STAT. § 6–3 (1993).

[220] HAW. REV. STAT. § 6K-9 ("Upon its return to the State, the resources and waters of Kahoʻolawe shall be held in trust as a part of the public land trust; provided that the State shall transfer management and control of the island and its waters to the sovereign native Hawaiian entity upon its recognition by the United States and the State of Hawaii.").

[221] MacKenzie, *supra* note 24, at 40–41 ("Hawaiʻi law also guarantees that when a sovereign Native Hawaiian entity is established and recognized by the United States, the state will transfer management and control of Kahoʻolawe to that entity.").

[222] *See infra* Section III.B.

[223] Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaiʻi, S.J. Res. 19, 103rd Cong., Pub. L. No. 103-150, 107 Stat. 1510 (1993).

the resolution in 1993, acknowledging that the "United States caused armed naval forces of the United States to invade the sovereign Hawaiian nation."[224] The resolution formally apologized to the NHC for the United States' role in the illegal overthrow of the Hawaiian Kingdom and found that Native Hawaiians "never directly relinquished their claims to their inherent sovereignty as a people" despite the "deprivation of the[ir] rights [] to self-determination."[225] The Apology Resolution established a strong foundation for U.S. reconciliation with the NHC.[226] Yet, subsequent U.S. Supreme Court decisions have cast a shadow of doubt over the significance of that resolution.

In *Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawai'i*, for example, the Court held that the Apology Resolution held no "operative effect," deeming its substantive provisions merely conciliatory or precatory.[227] In 2008, individual Native Hawaiians and OHA filed suit in state court to prevent the State of Hawai'i from selling "ceded" lands, arguing that the Apology Resolution "changed the legal landscape and restructured the rights and obligations of the State."[228] The Hawai'i Supreme Court relied on a plain reading of the Apology Resolution in favor of OHA and Native Hawaiians.[229] The U.S. Supreme Court, however, reasoned that "[s]uch terms are not the kind that Congress uses to create substantive rights – especially those that are enforceable against the co-sovereign States."[230] Although the Court limited the reach of the Apology Resolution in supporting Native Hawaiian political sovereignty, the Executive Branch has utilized its executive order authority to mandate consultation as one method of reconciliation with Indigenous peoples.[231]

C. *Executive Order 13175*

In 2000, President Clinton issued Executive Order 13175, which mandated agencies to formally consult with Indian tribes regarding the development of

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[224] *See id.*

[225] *Id.* at ¶ 29, §1(3).

[226] *See id.* at § 1(4) (committing to "acknowledge the ramifications of the overthrow . . . in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people"); Eric K. Yamamoto & Sarah D. Ayabe, *Courts in the Age of Reconciliation:* Office of Hawaiian Affairs v. HCDCH, 33 U. HAW. L. REV. 503, 518 (2011).

[227] Hawaii v. Off. of Hawaiian Affs., 556 U.S. 163, 173–75 (2009).

[228] Off. of Hawaiian Affs. v. State Hous. & Cmty. Dev. Corp., 117 Hawai'i 174, 190, 177 P.3d 884, 900 (2008).

[229] *Id.* at 191, 195, 177 P.3d at 901, 905.

[230] *Hawaii v. Off. of Hawaiian Affs.*, 556 U.S. at 173 (referencing, for example, Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1, 17–18 (1981)).

[231] *See infra* Section III.C.

regulations and legislation affecting those tribes.[232] Executive Order 13175 focused on regulations implicating tribal self-government, tribal trust resources, Indian tribal treaties, and other rights.[233] The order charged all executive departments and agencies to engage in consistent, meaningful, and robust consultation with tribal officials.[234] As a result, federally recognized Indian tribes may actively participate in the drafting of federal regulations, legislative comments, and proposed legislation that may affect their rights.[235]

Reinforcing the initial Executive Order, a 2009 Presidential Memorandum required "each agency to prepare and periodically update a detailed plan of action to implement the policies and directives of Executive Order 13175."[236] A subsequent 2022 Presidential Memorandum charged the head of each agency to "designate a primary point of contact for Tribal consultation matters who is responsible for advising agency staff on all matters pertaining to Tribal consultation [who would] serv[e] as the primary point of contact for Tribal officials seeking to consult with the agency."[237] Although Native Hawaiians are not listed in the Federally Recognized Indian Tribe List[238] and thus, are not directly implicated by Executive Order 13175, at least one federal department, the DOI, has chosen to extend its underlying principles to the NHC.[239]

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[232] Exec. Order No. 13175, 3 C.F.R § 1(b) (2000), *reprinted in* 25 U.S.C. § 5130 (formerly cited as 25 U.S.C. § 479a(2)). "Indian tribes" are defined as any "Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994."

[233] Diana C. David, *Green Energy in Indian Country as a Double-Edged Sword for Native Americans: Drawing on the Inter-American and Colombian Legal Systems to Redefine the Right to Consultation*, 38 ENVIRONS ENV'T. L. & POL'Y J. 223, 234 (2015).

[234] 3 C.F.R. § 5 (2000).

[235] *Id.* at § 1(b) (referencing the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. § 5130 (formerly cited as 25 U.S.C. § 479)).

[236] *Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships*, 2021 DAILY COMP. PRES. DOC. 91 (Jan. 26, 2021) (explaining Memorandum on Tribal Consultation, 2009 DAILY COMP. PRES. DOC. 887 (Nov. 5, 2009)).

[237] *Memorandum on Uniform Standards for Tribal Consultation*, 2022 DAILY COMP. PRES. DOC. 1083 (Nov. 30, 2022).

[238] 25 U.S.C. § 5130.

[239] *See* DOI Policy on Consultation, *supra* note 1; DOI Procedures on Consultation, *supra* note 5.

IV. ANALYSIS

This Article's analysis focuses on the current political status of Native Hawaiians and the potential for initiatives such as DOI consultation to help or hinder the advancement of the Native Hawaiian Community. Relying upon the background information and the governing legal rules explored in Parts II and III, the following analysis discusses the effectiveness of the Department's consultation policy with Native Hawaiians by investigating how *Rice* and its legacy affects Native Hawaiian self-determination. Part IV.A explores the errors in the *Rice* decision and the obstacle it presents to meaningful Native Hawaiian self-determination.[240] Part IV.B. analyzes limits to the Department's consultation policy stemming from *Rice* as precedent.[241] Finally, Part IV.C. deploys a futures studies analysis to forecast two possible futures for Kānaka Maoli governance if *Rice* continues to guide federal court adjudication of maoli issues.[242]

The formalist decision in *Rice v. Cayetano* represents a key loss of self-determination for Native Hawaiians.[243] In *Rice v. Cayetano*, haole Hawai'i resident Harold Rice sued Ben Cayetano in his official capacity as Governor and contested OHA's voting scheme restricting its elections to voters of Native Hawaiian ancestry.[244] The Governor and OHA asserted that "the voting limitation was not racial, but rather a limitation that flowed from a recognition by the United States of its political relationship with aboriginal peoples and its long history of granting special rights and protections to such people based upon the fact that they once owned land now part of the United States."[245] Nevertheless, the Court held that the Office of Hawaiian Affairs' election policy violated the Fifteenth Amendment' prohibition of discrimination on the basis of race.[246]

The Department's reliance on individual Native Hawaiian Organizations ("NHOs") for consultation demonstrates a crucial legal problem created by *Rice*: the federal government is unable to meaningfully consult with the

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[240] *See infra* Section IV.A.

[241] *See infra* Section IV.B.

[242] *See infra* Section IV.C.

[243] *See* Chris K. Iijima, *Race over Rice: Binary Analytical Boxes and a Twenty-first Century Endorsement of Nineteenth-Century Imperialism in* Rice v. Cayetano, 53 RUTGERS L. REV. 91, 108 (2000); Pino, *supra* note 69, at 2601 ("The Court's decision in *Rice* has repeatedly stymied OHA's efforts to support the fight for Kānaka Maoli sovereignty.").

[244] *See* Iijima, *supra* note 243, at 96.

[245] *Id.* (citing Brief of Amici Curiae Office of Hawaiian Affairs, et al. as Amici Curiae supporting respondent at 3; Rice v. Cayetano, 528 U.S. 495, 495 (2000)).

[246] Rice v. Cayetano, 528 U.S. 495, 517 (2000); *see* Iijima, *supra* note 243, at 96.

unified voice of an Indigenous people that its highest court erroneously decided to politically ignore.[247] Because *Rice* mischaracterizes the inquiry of Native Hawaiian ancestry as unconstitutional racial exclusivity,[248] the NHC is unable to elect anyone resembling a "tribal official" referred to in Executive Order 13175 and subsequent memoranda.[249] The Department's policy to consult with NHOs accordingly illuminates unique problems facing Kānaka Maoli. Most notably, *Rice* provides a legal basis for opponents to undermine the embers of inherent sovereignty that politically distinguish Kānaka Maoli from other "races" in Hawai'i.

A. Rice-*ists are Wrong*

The Court made two crucial errors in *Rice* that perpetuate the colonizing forces that Con Con representatives sought to reconcile through the creation of OHA.[250] First, the Court mistakenly declared OHA's use of ancestry as a proxy for race: "The State maintains this is not a racial category at all but instead a classification limited to those whose ancestors were in Hawaii at a particular time. . . . We reject this line of argument. *Ancestry can be a proxy for race. It is that proxy here*."[251] By inappropriately labeling Native Hawaiians as a mere racial category, the Court consequently applied the

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[247] *See supra* Section I.A.

[248] *Rice*, 528 U.S. at 517 ("The ancestral inquiry mandated by the State implicates the same grave concerns as a classification specifying a particular race by name. . . . The ancestral inquiry mandated by the State is forbidden by the Fifteenth Amendment for the further reason that the use of racial classifications is corruptive of the whole legal order democratic elections seek to preserve."); *see also* Hong, *supra* note 65, at 29 (discussing how the Court's holding reflected a failure to recognize a distinction between "political" and "racial" classifications and, thus, failed to acknowledge that Indigenous rights are necessarily tied to race).

[249] "Tribal officials" refers to elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations. 3 C.F.R § 1(d) (2000), *reprinted in* 25 U.S.C. § 5130 (formerly cited as 25 U.S.C. § 479a). As acknowledged in the DOI's consultation policy, "the Native Hawaiian Community has been without a formal government for over a century," so no government apparatus has been able to elect or appoint what could be considered a tribal official. *See* DOI Policy on Consultation, *supra* note 1, at n.1.

[250] *See* Mililani B. Trask, Rice v. Cayetano*: Reaffirming the Racism of Hawaii's Colonial Past*, 3 ASIAN-PAC. L. & POL'Y. J. 352, 355 (2002) ("The exclusion of [] Hawaiians from the federal policy which allows Native American Indians and Alaskan Natives to exercise internal self-determination through autonomous, federally recognized sovereign entities . . . means that Hawaiians continue to be denied the right to self-determination to this very day.").

[251] *Rice*, 528 U.S. at 514 (emphasis added).

wrong, and more stringent, standard of review in evaluating OHA's election in light of the Fifteenth Amendment.[252]

The second crucial error of *Rice* lies in the Court's failure to refer to Native Hawaiians as an Indigenous people which definitionally recognizes the painful history of American settler colonialism in Hawai'i.[253] The Court reasoned that if it concluded OHA's voting scheme was constitutional, it would necessarily have to conclude that Congress "has determined that native Hawaiians have a status like that of Indians in organized tribes, and . . . has delegated to the State a broad authority to preserve that status."[254] Although the Court acknowledged that OHA's election policy reflected the state's effort to preserve a commonality of Native Hawaiians,[255] the Court characterized such provisions as unlawful "racial discrimination" for singling out "identifiable classes of persons . . . *solely* because of their ancestry or ethnic backgrounds."[256] Native Hawaiians do not merely share a common ancestry: Kānaka Maoli share a right to self-determination of their future as

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[252] *See* Ellen D. Katz, *Race and the Right to Vote after* Rice v. Cayetano, 99 MICH. L. REV. 491, 504–10 (2000). Justice Kennedy's categorization of Native Hawaiians as a race led to the imposition of strict scrutiny as the standard of review, whereby a law must be narrowly tailored to serve a compelling government interest. *See id.* (discussing how under *Rice*, a special-purpose district that classifies voters by race implicates the fundamental right to vote, thus triggering strict scrutiny). The Supreme Court has held that all government programs with racial classifications are subject to strict scrutiny. *See, e.g.,* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (adopting strict scrutiny review for racial preferences in government contracting); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (holding that strict scrutiny review applies to government programs designed to benefit racial minority business owners). Indian preferences, however, are reviewed under the rational basis review, a lower threshold, because tribal classifications are political, not racial. *See, e.g.*, Morton v. Mancari, 417 U.S. 535 (1974); United States v. Antelope, 430 U.S. 641 (1977).

[253] *See* Cobo, *supra* note 22. *See* Pino, *supra* note 69, at 2574 ("Justice Kennedy's majority opinion in Rice provides an account of Hawaiian history that reduces American intervention in Hawai'i to the actions of specific individuals, minimizing the role of the U.S. government."). The Court looked to relevant legislative enactments that exhibited Congress' concern for the condition of Hawaiians soon after the territorial government's establishment. *See Rice*, 528 U.S. at 507 (referencing H.R. REP. NO. 839, 66th Cong., at 2–6 (1920)). However, the Court stated that even if the Court were to "take the substantial step of finding authority in Congress, delegated to the State, to treat Hawaiians [] as tribes, Congress may not authorize a State to create a voting scheme of this sort." *Rice*, 528 U.S. at 519.

[254] *Rice*, 528 U.S. at 518.

[255] *Id.* at 515.

[256] *Id.* (emphasis added).

an Indigenous people and of the management of Hawai'i's lands and natural resources.[257]

1. *Native Hawaiians are a Racial* and *Political Class*

Justice Anthony Kennedy, who authored the majority opinion in *Rice*, incorrectly categorized the white plaintiff as "Hawaiian" by virtue of his residence in the State of Hawai'i, creating ambiguity around what it means to be "Hawaiian" from the outset of the decision.[258] By creating uncertainty around the definition of "Hawaiian," Justice Kennedy opened the door to a more consequential inquiry into the definition of "Native Hawaiians," the more inclusive of OHA's two categories of beneficiaries.[259] Justice Kennedy's opinion ignored the HHCA, which set aside lands specifically for Native Hawaiians comparable to land reservation for federally recognized tribes, and ignored the Apology Resolution, which recognized the federal government's culpability in the illegal overthrow of the Hawaiian Kingdom.[260] Thus, when *Rice* equated ancestry with race, it weakened maoli control by inappropriately tethering political sovereignty to blood quantum.[261]

Furthermore, in describing Native Hawaiians merely as a racial class,[262] the Court failed to acknowledge Kānaka Maoli as members of a living culture determined to transmit traditions to future generations despite its

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[257] *See generally* Jonathan K. Osorio, *"What Kine Hawaiian Are You?" A Mo'olelo About Nationhood, Race, History, and the Contemporary Sovereignty Movement in Hawai'i*, 13 CONTEMP. PAC. 359 (2001) (discussing Native Hawaiian conceptions of race and nationality and the contemporary sovereignty movement); Anaya, *supra* note 63 (assessing Native Hawaiians' right to self-determination under international law precepts).

[258] *Rice*, 528 U.S at 499. Rather than "Hawaiian" identity being derived from ancestral connection to the aboriginal people inhabiting Hawai'i prior to 1778, the holding from *Rice* implies that being "Hawaiian" equates broadly to citizenship in the State of Hawai'i. *See id.*; Lisa Cami Oshiro, *Recognizing* Nā Kānaka Maoli*'s Right to Self-Determination*, 25 N.M. L. REV. 65, 89–90 (1995) (describing common misuse of the term "Hawaiian," which conflates residency in Hawai'i with Native Hawaiian ancestry).

[259] OHA's beneficiaries include all Native Hawaiians, regardless of blood quantum. *See* MacKenzie, *supra* note 24, at 33–34. The Hawai'i Constitution and Hawai'i Revised Statutes, however, refer to OHA's beneficiaries as "native Hawaiians and Hawaiians." *See id.*

[260] *See supra* Section III.A.

[261] Kauanui, *supra* note 186, at 98.

[262] *Rice*, 528 U.S. at 516.

independence having been limited by colonization's lasting barriers.[263] In Justice Kennedy's skewed view, Native Hawaiians are only unified in their racial and ethnic makeup.[264] However, Congress had already acknowledged that the United States extends services to Native Hawaiians not "because of their race, but because of their unique status as the [I]ndigenous people of a once sovereign nation."[265] In describing ancestry as a proxy for race, the *Rice* Court relied on its ruling upholding the constitutionality of curfews against individuals of Japanese descent during World War II, which emphasized that "[d]istinctions between citizens *solely* because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[266] Yet, ancestry is not the *sole* distinction between Native Hawaiians and other residents of Hawai'i, and political classification of Kānaka Maoli as the Indigenous people of Hawai'i would allow the state and federal governments to fulfill their respective trust duties.[267]

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[263] *See* Cobo, *supra* note 22, at 29 (defining Indigenous peoples as "those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them."). The distinction of "Indigeneity" is paramount because it accounts for the fact that Indigenous communities do not exist as snapshots in history taken when colonial forces began imposing their political dominance shortly after arrival. *See* J. Kēhaulani Kauanui, *"A Structure, Not an Event": Settler Colonialism and Enduring Indigeneity*, 5 CULTURAL STUD. ASS'N 1, 4–5 (2016).

[264] *See Rice*, 528 U.S. at 516–17, 523 ("The State's position rests, in the end, on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters."); *see also* Hong, *supra* note 65, at 35 (explaining that the Court erred "in that it forced the unique situation of Native Hawaiians into ill-fitting legal categories . . . . As a result, the Court produced an opinion that imposed civil rights concerns onto a case about indigenous peoples").

[265] *See, e.g.*, 20 U.S.C. § 7512(12)(B).

[266] *Rice*, 528 U.S. at 517 (emphasis added) (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)); *see* Kathryn A. Bannai, *Gordon Hirabayashi v. United States: "This is an American case,"* SEATTLE J. SOC. JUST. 41, 42 (2012). Ironically, the Court in *Hirabayashi* affirmed the conviction of appellant Hirabayashi who violated the Act of Congress of March 21, 1942 (56 Stat. 173) by disregarding a curfew order on persons of Japanese ancestry. *See Hirabayashi*, 320 U.S. at 100–02. Although the law was based solely upon one's ancestry, the Court did not find the curfew unconstitutional because "in [the] time of war[,] residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry. *Id.* at 101.

[267] *See e.g.*, Ian Falefuafua Tapu, *How to Say Sorry: Fulfilling the United States' Trust Obligation to Native Hawaiians by Using the Canons of Construction to Interpret the Apology Resolution*, 44 N.Y.U. REV. L. & SOC. CHANGE 445, 468–84 (discussing the sources of the federal government's trust obligations towards Native Hawaiians as the Indigenous people of Hawai'i).

The *Rice* Court specifically refused to rely on its 1978 holding in *Morton v. Mancari* affirming the political sovereignty of Indians.[268] In *Mancari*, the Court held that due to Indians' political status, employment and promotion preferences for Indian applicants and employees at the BIA did not violate civil rights legislation forbidding discrimination based on race.[269] The Indian employment preferences represented the legacy of the Indian Reorganization Act of 1934, which intended to provide tribes with a greater degree of self-government.[270] Similarly, OHA is designed to eventually transfer its assets to a future Native Hawaiian government and "hold[s] title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians."[271]

As a result of *Rice*, all voting citizens of Hawai'i, regardless of their association with the NHC, have voting control over the administration of revenues and proceeds from public lands held in trust for Native Hawaiians.[272] Native Hawaiians comprise only about twenty percent of the general population in Hawai'i.[273] Opening candidacy and voter eligibility for OHA trustees to the general public runs the significant risk of non-Hawaiian residents having plenary control over the lives and destinies of Hawaiians in Hawai'i.[274] This is not self-determination.

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[268] *Rice*, 528 U.S. at 522 ("To extend *Mancari* to this context would be to permit a State, by racial classification, to fence out whole classes of its citizens from decision-making in critical state affairs. The Fifteenth Amendment forbids this result.").

[269] 417 U.S. 535, 542, 549–51 (1974).

[270] *Id*. at 541–42.

[271] HAW. CONST. art. XII, § 5.

[272] *See Rice*, 528 U.S. at 521. *Rice* has "repeatedly stymied OHA's efforts to support the fight for Kānaka Maoli sovereignty" and has "frustrated attempts to exercise indigenous sovereignty in other U.S. territories" by restricting those territories' Indigenous inhabitants. Pino, *supra* note 69 at 2601. For example, "Chamorro activists have pushed for a Guam political-status plebiscite [since the 1980s] in which the vote is limited to Chamorros as the native inhabitants of Guam." *Id.* at 2602. Relying on *Rice*, however, the Ninth Circuit affirmed the district court's 2019 order enjoining the purportedly "racial classification-based" plebiscite. *See id.* at 2603.

[273] *New Census Data Confirms More Native Hawaiians Reside on the Continent Than in Hawai'i*, OHA (Sept. 25, 2023), https://www.oha.org/news/new-census-data-more-native-hawaiians-reside-continent/ ("The proportion of Native Hawaiians in Hawai'i remained stable from 2010 to 2020, currently constituting 21.8% of the state's population"); *see supra* notes 55–57 and accompanying text.

[274] *See supra* Section II.B*;* Pino, *supra* note 69, at 2605 (citing Noelani Goodyear-Ka'ōpua, *Introduction*, *in* A NATION RISING: HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND

Rice also ignores the 1993 Apology Resolution, enacted by Congress and signed into public law by President Clinton.[275] In doing so, Justice Kennedy failed to analyze OHA's election procedures as an act of self-determination by an Indigenous people.[276] When the Court decided *Rice*, as the dissenting Justices pointed out, more than one-hundred fifty federal laws expressly include Native Hawaiians as part of the class of Native Americans who benefit from policies relating to the United States' duty to Indigenous peoples.[277] Through the passages of numerous laws, Congress had made clear that Native Hawaiians enjoy "the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities."[278] Further, congressional authority to legislate in matters affecting the aboriginal or Indigenous peoples of the United States "includes the authority to legislate in matters affecting the native peoples of Alaska and Hawai'i."[279] Because Congress intended to extend the same privileges to Native Hawaiians and the Apology Resolution acknowledged Native Hawaiians' inherent sovereignty and rights to self-determination, Native Hawaiians are a political class within the United States.[280] Thus, the Court should have acknowledged OHA's voter restriction as a legal act of self-determination.[281]

SOVEREIGNTY 1, 29 (Noelani Goodyear-Ka'ōpua et al. eds., 2014)) ("[B]y invalidating Hawaiian-only voting for OHA trustees, *Rice* eliminated 'the small measure of electoral control over resources Kānaka Maoli could collectively exercise within the settler state system.'").

[275] Kara M. L. Young, *Kamehameha's Hawaiians-Only Admissions Policy*, 26 UNIV. HAW. L. REV. 309, 324–26 (2003); *see* Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawai'i, S.J. Res. 19, 103rd Cong., Pub. L. No. 103-150, 107 Stat. 1510 (1993).

[276] *See* Stand. Comm. Rep. No. 59, *in* CONCON PROCEEDINGS, *supra* note 194, at 644–45 (1980) (recognizing the inherent sovereignty of Native Hawaiians and noting the Native Hawaiian-only OHA election provision is necessary because the "people to whom assets belong should have control over them").

[277] *Rice*, 528 U.S. at 533–34 (Stevens, J., dissenting).

[278] 42 U.S.C. § 11701(19).

[279] *Id.* at § 11701(17).

[280] Van Dyke, *supra* note 16, at 108. A number of federal statutes extend "the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities" to Kānaka Maoli. Native Hawaiian Health Care Improvement Act, 42 U.S.C. § 11701(19) (1992); *see, e.g.*, Native American Programs Act, 42 U.S.C. § 2991 (1975); American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1978); National Museum of the American Indian Act, 20 U.S.C. § 80q (1989); Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (1990).

[281] *See* 42 U.S.C. § 11701(19) (recognizing "[t]he historical and unique legal relationships which extend to the Hawaiian people the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities").

Mililani B. Trask, a lawyer and well-known Native Hawaiian rights activist who now serves as an OHA trustee, has asserted that "[t]he exclusion of Native [] Hawaiians from the federal policy which allows Native American Indians and Alaska Natives to exercise internal self-determination through autonomous, federally recognized sovereign entities" is, itself, "a clear violation of the Equal Protection Clause," which the Court did not address in *Rice*.[282]

Further, as an exercise of self-determination, each federally recognized tribe evaluates tribal eligibility according to their own membership ordinances.[283] Some tribes like the Cherokee Nation, have tribal members who do not descend from the same ancestors.[284] Other policies, like that of the Santa Clara Pueblo, have excluded some biological children of tribal members from tribal membership.[285] Therefore, even if a broad definition of "Native Hawaiian" tied to ancestry allows for a person of one sixty-fourth Hawaiian blood to vote for OHA trustees, decisions regarding eligibility should also be viewed as an act of self-determination. However, in arguing that the OHA voting scheme is essentially a race-based voting qualification,

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[282] Trask, *supra* note 250.

[283] *See* 25 C.F.R. § 23.108(a) ("The Indian Tribe of which it is believed the child is a member (or eligible for membership and of which the biological parent is a member) determines whether the child is a member of the Tribe, or whether the child is eligible for membership in the Tribe and a biological parent of the child is a member of the Tribe, except as otherwise provided by Federal or Tribal law.")

[284] *See* Cherokee Nation v. Nash, 267 F.3d 86, 140 (D.C. Cir. 2017) (holding that descendants of people once enslaved by the Cherokee Nation also qualify as Cherokee).

[285] *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 51–52 (1978). The Indian Civil Rights Act ("ICRA"), 25 U.S.C. §§ 1301-1304 applies individual liberties under the U.S. Constitution to individual members within a tribe, limiting tribal government decisionmaking. *See* Seth E. Montgomery, *ICRA's Exclusionary Rule*, 102 B.U. L. REV. 2101, 2104–06 (2022). In Santa Clara Pueblo v. Martinez, a Pueblo woman, Martinez, sued her tribe over its member ordinance which provided that if she married and had children with a non-member of the tribe, her children would not have member eligibility. Lucy A. Curry, *A Closer Look at* Santa Clara Pueblo v. Martinez*: Membership by Sex, by Race, and by Tribal Tradition,* 16 WIS. WOMEN'S L.J. 161, 161– 62 (2001) ("The membership Ordinance afforded membership rights to children of Santa Claran men and nonmembers, while denying membership to children of marriages between Santa Claran women and nonmembers."). Martinez sued under ICRA on the basis of sex discrimination because the same policy did not hold true for men who had children with non-Pueblo women. *Santa Clara Pueblo*, 436 U.S. at 51. The Court held that Title I of ICRA may not be interpreted to impliedly authorize claims for declaratory or injunctive relief of exclusive membership ordinances because abrogating tribal decisions is another means of destroying cultural identity "under the guise of saving it." *Id*. at 54 (quoting Martinez v. Santa Clara Pueblo, 402 F. Supp. 5, 18–19 (D. N.M. 1975)).

the Court disguises an abrogation of Indigenous self-determination rights as the preservation of U.S. constitutional rights.[286]

In *Rice*, the Court paid attention to the purpose and command of the Fifteenth Amendment but failed to adequately understand the historical context surrounding its ratification.[287] As Justice John Paul Stevens explained in his dissenting opinion, OHA's voting scheme violated "neither the letter nor the spirit" of the Fifteenth Amendment, which prohibits voting restrictions "on account of race, color, or previous condition of servitude."[288] Without explicitly referring to race, color, or servitude, the majority opinion relied on the flawed assumption that because ancestry *can be* a proxy for race, "ancestry *is always* a proxy for race."[289] Unlike many of the voting schemes in southern states that excluded any potential voter with a "taint" of "Black blood," OHA's voting scheme excluded no descendant of a 1778 aboriginal resident just because he or she was also part European, Asian, or African, as a matter of race.[290] Majority author Justice Kennedy noted OHA's scheme "demean[ed] the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."[291] The dissent, however, drew an important distinction: ancestry as the basis for *restricting* one's right to vote differs from the relevance of ancestry to claims of "an *interest in trust property*, or to a shared interest in a proud heritage."[292]

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[286] *See* Katz, *supra* note 252, at 512 (describing the intrinsic value of voting as political participation and the dissonance between these values and the reasoning stated in *Rice*).

[287] *See* Rice v. Cayetano, 528 U.S. 495, 538 (2000) (Stevens, J., dissenting).

[288] *Id*. at 538–39 (quoting U.S. CONST. amend. XI, § 1).

[289] *Id.* at 539–40.

[290] *See* Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1179 (1997):

> Individual rights of those who has any significant amount of Black ancestry were restricted severely by law. . . . [A]ll rights were rooted in the past, in remote African ancestry. Ancestry alone determined status, which was fixed. A [Black person] could not buy out of her assigned race . . . nor were her children released from its taint. As historian Gilbert Stephenson bluntly stated, "miscegenation has never been a bridge upon which one might cross from the [Black] race to the Caucasian, though it has been a thoroughfare from the Caucasian to the [Black]."

Id. (quoting GILBERT THOMAS STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 19 (1910)).

[291] *Rice*, 528 U.S. at 517.

[292] *Id.* at 544–45 (Stevens, J., dissenting) (emphases added).

2. *OHA's Election Permissibly Excluded Non-Hawaiians*

The *Rice* majority failed to apply *Mancari* to OHA's voting scheme.[293] In *Mancari*, the Court held that an employment preference for Indians (federally recognized Native Americans and Alaska Natives) within the Bureau of Indian Affairs did not violate the Equal Employment Opportunity Act of 1972 because it "reasonably and directly related to a legitimate, nonracially based goal."[294] The limited exception to the Equal Employment Opportunity Act provided in *Mancari* should extend to *Rice* because "one of the very purposes of OHA – and the challenged voting provision – is to afford Hawaiians a measure of self-governance," representing a both legitimate and nonracially based goal.[295] The Court refused to apply *Mancari,* reasoning that Congress may not authorize a state to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, and thereby excluding all non-Indian citizens.[296] However, the Court's error becomes clear when analyzing *Mancari* together with the purpose of OHA's election.

Opponents of Indian preference, including the class of non-Indian employees who initiated the *Mancari* litigation, claimed that the 1972 Equal Employment Opportunity Act implicitly repealed the BIA's preference policies, which allegedly deprived non-Indians of rights (in this case, rights to a public job) without due process of law.[297] The *Mancari* Court, however, recognized that if there were no Indian employment preference within the BIA, "primarily non-Indian-staffed BIA [would have] plenary control, for all practical purposes, over the lives and destinies of the federally recognized Indian tribes."[298] The Court ruled in favor of the BIA, holding that Indians have a distinct political status for four reasons: (1) Congress had long

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[293] *Id.* at 522; Jeanette Wolfley, Rice v. Cayetano*: The Supreme Court Declines to Extend Federal Indian Law Principles to Native Hawaiians Sovereign Rights*, 3 ASIAN-PAC. L. & POL'Y J. 359, 364 (2002) ("Declining to confront the rather simple logic of the trust relationship and the application to Native Hawaiians, the majority of the Court simply stated, 'If Hawaii's restriction were to be sustained under *Mancari* we would be required to accept some beginning premises not yet established in our case law.'") (quoting *Rice*, 528 U.S. at 518).

[294] Morton v. Mancari, 417 U.S. 535, 554 (1974).

[295] *Rice*, 528 U.S. at 520 (quoting Brief for Respondent at 34); *see also* Clarkson, *supra* note 65, at 317 (describing Native Hawaiians, in the wake of the *Rice* case, as "victims of a constitutionally faulty remedial infrastructure that was based on race rather than their inherent sovereignty as [I]ndigenous people").

[296] *Rice,* 528 U.S. at 520.

[297] *Mancari*, 417 U.S. at 539.

[298] *Id.* at 542.

recognized a "federal policy of providing a unique legal status to Indians in matters concerning tribal . . . reservation employment[;]" (2) Congress had recently enacted two laws giving Indians "preference in Government programs for training teachers of Indian children[;]" (3) Indian preferences "have been treated as exceptions to . . . [o]rders forbidding employment discrimination[;]" and (4) courts do not favor repeals by implication.[299] Accordingly, the Court concluded that the Indian preference did not constitute racial discrimination because it was reasonably and rationally designed to further Indian self-government and to make the BIA more responsive to the needs of its constituents.[300] The same concept should apply to OHA trustee elections for greater accountability to its constituents – Native Hawaiians.

The Court's refusal to apply *Mancari* in *Rice* directly contradicts the decisions of both the district court and the Ninth Circuit.[301] District court Judge David A. Ezra held that *Mancari* "is equally applicable to Native Hawaiians as to formally recognized Native Americans."[302] Judge Ezra based his conclusion on extensive evidence that "the guardian-ward relationship [upon which *Mancari* depends] existed, and currently exists, between the federal Government and Native Hawaiians and between the State of Hawaii and Native Hawaiians."[303] Likewise, the Ninth Circuit indicated that *Mancari* does not "[compel the Court] to invalidate the voting restriction simply because it appears to be race-based without also considering the unique trust relationship that gave rise to it."[304] Both lower courts discussed, at length, the unique status of Native Hawaiians that justified OHA's limited voting scheme, which the Supreme Court later dismissed.[305]

Disenfranchising Native Hawaiians in matters of Hawaiian governance could eventually mean that Kānaka "have no voice in determining their future."[306] Justice Kennedy referred to the Proceedings of the 1978 Con Con

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[299] *Id.* at 548–49.

[300] *Id.* at 554.

[301] *See* Rice v. Cayetano, 146 F.3d 1075 (9th Cir. 1998); Rice v. Cayetano, 963 F. Supp. 1547, 1554 (D. Haw. 1997); *see* Pino, *supra* note 69, at 2582–83

[302] *Rice*, 963 F. Supp. at 1554.

[303] *Id.*

[304] *Rice*, 146 F.3d at 1081.

[305] *See* Rice v. Cayetano, 146 F.3d 1075, 1080–81 (9th Cir. 1998); Rice v. Cayetano, 963 F. Supp. 1547, 1554 (D. Haw. 1997).

[306] Queen Lili'uokalani once noted that constitutionally limiting the vote as a matter of allegiance to no other country would neither be unwise nor a departure from other civilized nations. Queen Lili'uokalani, *My Own Nation (1899)*, *in* SAY WE ARE NATIONS: DOCUMENTS

in discussing OHA's administrative positioning in the executive branch, but failed to acknowledge important details in the same standing committee report only a few pages earlier:

> The special *election for [OHA] trustees is not equivalent to a general election*, and the vote is *not for officials who will perform general governmental functions* in either a representative or executive capacity. . . . [I]t reflects the fact that the trustees' fiduciary responsibilities run only to native Hawaiians and Hawaiians and "a board of trustees chosen from among those who are interested parties would be the *best way to insure proper management and adherence to the needed fiduciary principles*."[307]

Rather than a racially discriminatory scheme demeaning individuals on account of their race, OHA's election sought a political consensus to recognize the special claim to self-determination possessed by the Indigenous people of Hawai'i.[308] Further, even if the classification of Kānaka Maoli as a strictly racial group were true, the fiduciary relationship established between OHA trustees and Native Hawaiians should justify

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OF POLITICS AND PROTEST IN INDIGENOUS AMERICA SINCE 1887, at 13, 14 (Daniel M. Cobb ed., 2015). Referring to Hawaiians as the "children of the soil – the native inhabitants of the Hawaiian Islands and their descendants," Lili'uokalani warned that "quasi-Americans" who called themselves Hawaiian, then American when it suited them were the very ones demanding to "be allowed to vote, seek office, to hold the most responsible of positions, without becoming naturalized, and reserving to himself the privilege of protection under the guns of a foreign man-of-war" against the government under which he lives." *Id.* at 14–16. Those Americans who illegally overthrew the Kingdom of Hawai'i claimed to be "Hawaiian" when the label came with power but were distinctly American when asserting their individual liberties and extinguishing Indigenous sovereignty. *Id.* at 15. When the Provisional Government established the Republic of Hawai'i, it made the national day of Independence of the United States as its own. *Id.* at 17. Representatives made speeches claiming to be American citizens despite representing themselves as Hawaiians in Washington. *Id.*

[307] *Rice*, 146 F.3d 1075, 1081 (9th Cir. 1998) (citing Stand. Comm. Rep. No. 59, *in* CONCON PROCEEDINGS, *supra* note 194, at 644) (emphasis added).

[308] *See* Stand. Comm. Rep. No. 59, *in* CONCON PROCEEDINGS, *supra* note 194, at 644; Troy J.H. Andrade, (*Re)Righting History: Deconstructing the Court's Narrative of Hawai'i's Past*, 39 U. HAW. L. REV. 631, 641 (2017) ("The goal of the entity, which Hawai'i's people ratified, was truly reconciliatory: to 'unite Hawaiians as a people[,]' to ensure that 'Hawaiians have more impact on their future[,]' and to provide it 'maximum independence.' But, that goal would be put to the test.").

restricting voting eligibility to fit the parameters of the beneficiary class.[309] Until the law permits organization of a formal Native Hawaiian government, Kānaka Maoli must figure out how best to utilize the Department's consultation policy when possible.

B. Rice *Will Prevent Meaningful NHC Consultation*

While this Article criticizes some of the consultation policy's proposed language, the policy nevertheless possesses great potential to enhance Kānaka Maoli sovereignty because the act of engaging in working relationships with other governments is a critical function of all self-determination.[310] All federal agencies now have formal consultation policies prescribing how they will consult with tribal governments on policy making.[311] Yet, the manual for consultation with the NHC may not guarantee deference to NHC comments comparable to the deference offered to tribal governments represented by tribal officials.[312] The NHC consultation manual's language is problematic for two reasons. First, its definition of NHOs does not require members to be Native Hawaiian.[313] Second, consultation relies on political self-determination, which *Rice* has significantly limited for the Native Hawaiian Community.[314] By preventing the election of representatives that could serve in the same capacity as tribal officials by the NHC, *Rice* prevents meaningful consultation with the NHC.

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[309] *See Rice*, 146 F.3d at 1081. It is unclear why OHA's election needed to be tied to the state election in the first place. Perhaps doing so would save on financial costs, as the Con Con standing committee report suggests: "the cost [of] electing the board of trustees would be nominal, provided it is held at the same time as the state general elections." Stand. Comm. Rep. No. 59, *in* CONCON PROCEEDINGS, *supra* note 194, at 644. If no other reason prevents OHA from severing its election from that of the State, restructuring the election outside of the State's administrative funding might avoid conflicts with the *Rice* holding. *See Rice*, 146 F.3d at 1076, 1081.

[310] REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT 256 (Miriam Jorgensen ed., 2007) [hereinafter REBUILDING NATIVE NATIONS].

[311] *Id*. at 249. For example, the Rhode Island Department of Transportation and the Narragansett Tribe signed a ten-year agreement in 1998 specifying that the state would hire tribal members to monitor federally funded highway construction projects, thereby helping to ensure proper identification and respectful treatment of human remains and cultural artifacts. *Id.* at 247. Similarly, tax agreements are among the most prevalent examples of new tribal-state relationships, and Arizona, Nevada, Oklahoma, Utah, Washington, Wisconsin, and Wyoming have agreements with native nations that address motor fuel or tobacco taxes. *Id.* at 248.

[312] DOI Policy on Consultation, *supra* note 1, at 1.1.

[313] *Id*. at 1.4.

[314] *Id*. at 1.5.

1. *So-Called "Native Hawaiian Organizations"*

The UN Declaration on the Rights of Indigenous Peoples specifically states that Indigenous peoples have the right to participate in decision-making matters affecting their rights "through representatives chosen by themselves in accordance with their own procedures."[315] Further, UNDRIP confirms the right to consultation between federal and tribal governments, and mandates cooperation with concerned Indigenous peoples "through their own representative institutions in order to obtain their free, prior, and informed consent before adopting and implementing legislative or administrative measures that may affect them."[316] Government-to-government relationships should thus reflect and enforce Indigenous sovereignty, but the DOI policy arbitrarily places NHOs in the same consultative capacity as a tribal government official.[317] For purposes of DOI consultation with Native Hawaiians, NHOs are defined as:

> (1) Any organization that:
>
> a) serves and represents the interests of Native Hawaiians;
>
> b) has as a primary and stated purpose the provision of services to Native Hawaiians; and
>
> c) has expertise in Native Hawaiian affairs;
>
> (2) Includes but not limited to:
>
> a) Native Hawaiian organizations registered with the Department of the Interior's [ONHR]; and
>
> b) Homestead Association and HHCA Beneficiary Associations (collectively "HBA") as defined under 43 C.F.R. §§ 47.10 and 48.6.[318]

NHOs "stated purpose" or asserted "expertise" in Native Hawaiian affairs generally opens the door for many organizations to be NHOs under the

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[315] UNDRIP, *supra* note 59, at art. 18.

[316] *Id*. at art. 19.

[317] DOI Policy on Consultation, *supra* note 1, at 1.6 ("NHOs are the informal representatives of the [NHC]. The requirement to work with NHOs is necessary because the NHC currently lacks a unified formal government. . . . Federal Officials identitfy the most appropriate NHC leaders to work with on a particular project.").

[318] *Id.* at 1.4(H).

policy.[319] By relying on such ambiguous definition or by merely registering as a NHO with the ONHR under subsection (2)(a), the DOI consultation manual's current language risks being counterproductive to nation-building.[320] While the Department should not be responsible for the political organization of Native Hawaiians, it should ensure that the Department and the NHC interact as equals in a relationship akin to a government-to-government interaction.[321] "In a hierarchical contracting relationship, a government contracts with a nonprofit or community-based organization to carry out a policy or deliver a service," and the government maintains the upper hand and the ability to "dictate the terms of the relationship."[322] Conversely, government-to-government relationships are "negotiated by both governments and the terms of the relationship are mutually developed and agreed upon."[323] That the DOI consultation manual contains unilaterally drafted terms – including the definition of NHOs – demonstrates the

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[319] The current list of Native Hawaiian organizations registered with the Deparmtent's ONHR currently contains 163 NHOs under the DOI Consultation Policy's definition. *Id.* at 1.4(H)(2)(a); *see* U.S. DEP'T INTERIOR, OFF. NATIVE HAWAIIAN REL., NATIVE HAWAIIAN ORGANIZATION NOTIFICATION LIST (2023) [hereinafter NATIVE HAWAIIAN ORGANIZATION NOTIFICATION LIST], https://www.doi.gov/sites/doi.gov/files/nhol-complete-list.pdf. While some organizations listed such as Kamehameha Schools (a Native Hawaiian educational institution, landowner, and trust), and Nā 'Aikāne o Maui (an educational organization uplifting all aspects of Hawaiian culture), clearly represent Native Hawaiian interests and provide specific details as to how they do so, others listed organizations do not. *See id.* at 35, 61. For example, Meje, Inc., offers no discription in the organization's association with the Native Hawaiian Community but merely states a vague interest in "preserving the cultural understandings of the traditional work values and ethics of the Hawaiian Culture." *See id.* at 59.

[320] Although subsection (2)(b) of the definition of "Native Hawaiian Organization" refers to a program that verifies that its beneficiaries are Native Hawaiian, the HHCA infamously limits its beneficiary class by a blood quantum requirement of 50%. *See* DOI Consultation Policy, *supra* note 1 at 1.6; Hawaiian Homes Commission Act, *supra* note 178 at 124. In an ethnically diverse land base like Hawai'i, such a requirement is not sustainable and affects private matters of individual choice including marriage and procreation. *See* Hokulani McKeague, *Hokulani McKeague v. Department of Hawaiian Homelands: A Case for the Unconstitutionality of Blood Quantum*, 42 HAWAII L. REV. 204, 209 (2019).

[321] *See* REBUILDING NATIVE NATIONS, *supra* note 310, at 256. The Manual notes that a special political and trust relationship may continue to exist even without a formal government-to-government relationship. DOI Policy on Consultation, *supra* note 1, at 1.1 n.1; *see, e.g.*, Doe v. Kamehameha Schs./Bernice Pauahi Bishop Est., 470 F.3d 827, 847–48 (9th Cir. 2006) ("Congress has reaffirmed the unique relationship that the United States has with Hawai'i as a result of the American involvement in the overthrow of the Hawaiian monarchy.").

[322] REBUILDING NATIVE NATIONS, *supra* note 310, at 257.

[323] *Id.*

Department's upper hand in what should be a "government-to-sovereign" relationship but more closely resembles a unilateral contracting relationship.[324] Further, by omitting any requirement that NHOs must be run by or comprised of Native Hawaiians, the DOI manual's proposed language poses the same threat to sovereignty that *Rice* enabled: non-Hawaiians having a dominant voice in the management of resources specifically for Kānaka Maoli.[325]

Successful government-to-government relationships with Indigenous peoples should expand Indigenous influence in decisions over policy areas, people, and lands that affect Native peoples.[326] Such relationships should amplify the impact of a Native nation's actions by offering means to capitalize on Indigenous resources and expertise, productively address native concerns, and promote comprehensive community development.[327] These features rely on choices made by each participating government in a way that can assist Indigenous communities to formulate comprehensive and long-

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[324] *See* Charles Wilkinson, *Indian Law into the Twenty-First Century: The Role of Bilateralism in Fulfilling the Federal-Tribal Relationship: The Tribal Rights-Endangered Species Secretarial Order*, 72 WASH. L. REV. 1063, 1063, 1087 (1997). Wilkinson described bilateralism as a successful model for government-to-government relationships between the United States and Indian tribes from unilateral to bilateral federal policymaking. *See id.* at 1063, 1087. He described how "bilateralism was carried through the negotiating process where the two teams, as equals, developed protocols, set meeting dates, negotiated, developed working drafts, and eventually agreed upon a final Secretarial Order." *Id.* at 1087. Yet Wilkinson also warned that "dilution" of the process has the potential to generate anger or reduce efficacy, *Id.* at 1086. While the DOI solicited comments and suggestions related to its consultation policy and procedure with the NHC, they only did so *after* drafting the policy themselves, and it is unclear to what extent the comments that *were* received actually affected the proposed policy. *See* U.S. Dep't Interior, Off. Native Hawaiian Rels., *DOI Consults on its Native Hawaiian Community Consultation Policy and Procedures* (Dec. 5, 2022), https://www.doi.gov/hawaiian/doi-consults-on-its-native-hawaiian-community-consultation-policy-and-procedures.

[325] *See* Trask, *supra* note 250, at 354–55.

[326] In its 2022-2027 Strategic Plan, the U.S. Government Accountability Office recognized evaluation of "federal policies and programs that serve Indian tribes, their members, and other indigenous groups," assessment of "federal efforts to protect Native American cultural, environmental, and natural resources," and examination of "federal efforts to foster tribal self-determination, self-governance, and economic development" as specific performance goals for the federal government to achieve in maintenance of its government-to-government relationships with tribes. U.S. GOV. ACCOUNTABILITY OFF., STRATEGIC PLAN 2022-2027, at 21 (2022).

[327] REBUILDING NATIVE NATIONS, *supra* note 310, at 256–58

term policies.[328] The Department's policy with the NHC, however, did not rely on any choices made by a representative body designated by the NHC.[329] The consultation policy, therefore, lacks input from one participating sovereign party.[330]

2. *Non-Binding Consultation*

The 2009 publication, *Government to Government: Models of Cooperation Between States and Tribes*, proposes several guiding principles for developing and nurturing intergovernmental relationships: mutual understanding and respect; communication; a process for addressing disagreements and concerns, institutionalization; and most importantly, a commitment to cooperation in anticipating whether the policy may effectively nurture nation-building and how much accountability it places on the United States.[331] At the heart of each principle is the critical understanding that intergovernmental relationships with states, counties, boroughs, and cities are not a substitute for a tribe's direct relationship with the federal government, but rather a complement to it.[332]

The consultation process itself is a step in the right direction toward empowering Native Hawaiians to manage their own affairs. However, the current decision-making language in the proposed policy allows the Department to act before the consultation process concludes.[333] A pre-emptive decision-making "loophole" left by the Department contradicts its broader mission to build trust with the NHC by granting the Department deference in making decisions regardless of consultation:

> *In some situations, the [Department] makes decisions throughout the consultation process.* . . . Whether the final decision aligns with or differs from the positions of the Native Hawaiian Community, documenting and sharing this information is an important tool in *building trust* with the [NHC] and securing their future participation and

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[328] *See id.*

[329] *See supra* note 6 and accompanying text (explaining the DOI's purposeful use of "government-to-sovereign" rather than "government-to-government" relationship with the Native Hawaiian Community).

[330] *See* DOI Policy on Consultation, *supra* note 1.

[331] SUSAN JOHNSON ET AL., NAT'L CONF. OF STATE LEGISLATURES, GOVERNMENT TO GOVERNMENT: MODELS OF COOPERATION BETWEEN STATES AND TRIBES 6–11 (Sia Davis ed., 2009).

[332] *See id.* at 11.

[333] *See* DOI Procedures on Consultation, *supra* note 5, at 2.7.

assistance.[334]

A commitment to cooperation requires that partnering governments consent to a level of accountability for adherence to the terms of the relationship,[335] and "negotiation of and participation in intergovernmental relationships can be resource intensive."[336] Parties must therefore commit to cultivating and maintaining the relationship and sufficient financial support to ensure a sustainable and effective relationship.[337] For example, as a measure to maintain and respect the relationship, states typically appropriate funds to staff Indian Affairs commissions and state legislative committees.[338] Here, the Department may devote time and resources to seek opinions from NHOs or individual Native Hawaiians,[339] demonstrating a significant commitment to developing and maintaining the relationship by holding in-person consultation sessions with representatives traveling to Hawai'i for face-to-face conversations.

Despite its potential to support the NHC, the DOI consultation policy lacks key aspects of self-determination. The Department failed to allow Kānaka to generate their own list of NHOs available for consultation.[340] Instead, the Department generated its own reference list of NHOs to serve in a representative capacity for all Kānaka Maoli.[341] Further, upon conclusion of a consultation, the consultation manual requires the Department to complete a Consultation Report summarizing consultation activities, which are combined to develop an Annual Report.[342] These reports, however, make no commitment to cooperation with the NHC – it merely attempts to establish a

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[334] *Id.* (emphasis added).

[335] *See* REBUILDING NATIVE NATIONS, *supra* note 310, at 259, 268.

[336] REBUILDING NATIVE NATIONS, *supra* note 310, at 261. Kieran O'Neil, Comment, *In the Room Where It Happens: How Federal Appropriations Law Can Enforce Tribal Consultation Policies and Protect Native Subsistence Rights in Alaska,* 98 Wash. L. Rev. 659, 663–64 (2023) (describing how while administrations continue to laud consultation as the best method for American Indian and Alaska Native perspectives in federal decision-making, "communities continue to be left out of federal management decisions that directly affect them")

[337] REBUILDING NATIVE NATIONS, *supra* note 310, at 261.

[338] *Id.* at 261–62.

[339] *See, e.g.*, DOI Procedures on Consultation, *supra* note 5, at 2.4.

[340] *See* NATIVE HAWAIIAN ORGANIZATION NOTIFICATION LIST, *supra* note 319.

[341] *See id*.

[342] DOI Procedures on Consultation, *supra* note 5, at 2.8; DOI Consultation Policy, *supra* note 1, at 1.4(d), 1.11.

record.[343] Records of consultation activities are instead used to develop the Native Hawaiian Community Consultation Annual Report "to promote consultation" as a "comprehensive list of all consultation efforts undertaken that year and may include, but is not limited to, the scope, cost, and activities of the consultation efforts. . . . The report should also include proposed plans and recommendations."[344] Neither the policy nor its procedure contemplate whether the NHC is required to review the accuracy of the report, again raising the question as to the DOI's commitment to meaningful consultation.[345]

While the proposed consultation policy demonstrates the Department's desire to acknowledge the importance of including the NHC in federal decision-making, history has demonstrated how such policies amplify Indigenous voices depending on the administration's political objectives.[346] As the ever-increasing cost of living continues to price Kānaka out of their ancestral lands, political self-determination and the development of intergovernmental relationships is crucial to avoid the disenfranchisement of Hawaiians and to ensure their voice in the future of Hawai'i.[347] Evaluating the DOI's consultation policy in tandem with the judicial limitations imposed by *Rice* will be crucial to determining what effect, if any, consultation efforts will support Native Hawaiian self-determination in the future.

C. *Alternative Futures for NHC Consultation*

As introduced in Section I.B, this Article deploys Dator's emerging-issue analysis to forecast possible futures related to Native Hawaiian consultation, namely, the impacts of *Rice* in different hypothetical futures scenarios.[348] By examining *Rice*'s potential impacts on consultation as opposed to how consultation could progress in the absence of *Rice*'s limitations, this Article

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[343] *See* DOI Procedures on Consultation, *supra* note 5, at 2.7, 2.8

[344] DOI Policy on Consultation, *supra* note 1, at 1.11 ("The report should also highlight significant consultation efforts conducted one-on-one with the [NHC]").

[345] *See id.*

[346] *See* WILKINS & STARK, *supra* note 100, at 121–24 (discussing how the federal government's engagement with Indigenous communities is dynamic and outlining the historical development of federal-tribal relationship through policy eras).

[347] *See* Sproat, *supra* note 21, at 183–85 ("Cultural and political sovereignty is essential for Indigenous Peoples' self-determination."); JOHNSON, *supra* note 331, at 11 (describing pathways for government-to-government relationships). The Manual is unclear as to how the Department will weigh input from NHOs outside Hawai'i. *See* DOI Procedures on Consultation, *supra* note 5 at 27. The current list of approximately 130 NHOs registered for notification of consultation sessions includes chapters of Hawaiian Civic Clubs situation on the U.S. continent. *See* NATIVE HAWAIIAN ORGANIZATION NOTIFICATION LIST, *supra* note 319.

[348] *See supra* notes 82–85 and accompanying text.

suggests a pathway forward.[349] In other words, how can we look to the past to shape the future for Native Hawaiian self-determination?

So far, this Article has discussed, at length, *Rice*'s disservice to Native Hawaiian self-determination.[350] Such disservice is an objective factor in assessing the potential effectiveness of the DOI's consultation policy.[351] The legacy of settler colonialism[352] and the emigration of Native Hawaiians out of Hawai'i are enduring issues that exacerbate the dangerous precedent of *Rice*. In discussing whether DOI consultation will be a service or disservice for Native Hawaiian self-determination, this section forecasts the political climate for self-determination through the *continuation* and *transformational* images of alternative futures[353] – if *Rice* remains "good law" or if it is somehow overturned.[354]

1. *If* Rice *Remains "Good Law"*

One image of the future is characterized as *continuation* of the status quo.[355] In this situation, *continuation* would assume that *Rice* remains precedent as it has for the past few decades. Such continuation exacerbated by the trend of Native Hawaiians leaving Hawai'i in recent years could

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[349] *See infra* Section IV.C.1–2; Part V.

[350] *See, e.g.*, *supra* note 286 and accompanying text.

[351] The futures studies framework requires an identification of what Dator describes as objective factors—"a variety of *environmental forces* with which any image of the future (and struggle toward a preferred future) must contend." *See The Future Lies Behind!*, *supra* note 70, at 303.

[352] Marissa Aivazis, *Researchers Explore a Distinctly Hawaiian Approach to Understanding and Healing from Settler Colonialism*, U. S. CAL. PULLIAS CTR. FOR HIGHER EDUC. (Sept. 8, 2020), https://pullias.usc.edu/blog/researchers-explore-a-distinctly-hawaiian-approach-to-understanding-and-healing-from-settler-colonialism/ ("Settler colonialism refers to the systemic efforts to assimilate, isolate, or suppress [I]ndigenous people through the elimination of their societies, culture, language, and political systems. It represents a distinct type of colonialism driven by the replacement of the uniqueness of an Indigenous population with a hybrid native-settler society that eventually consumes the original culture.").

[353] *See supra* Section I.B (discussing the "Futures Studies" framework).

[354] The *Continuation image* in this Article contemplatesthe efficacy of DOI consultation under the current restraints of *Rice. Transformational images*, on the other hand, contemplate change to the existing social or political conditions. *See supra* Section I.B. This Article selected the emerging-issue analysis because, in the Author's view, it offers more utility in the context of Native Hawaiian political self-determination. *See supra* notes 82–85 and accompanying text. Within the emerging-issue analysis, the "collapse" and "disciplined society" futures are not contemplated because both futures extend beyond the scope of this Article.

[355] *The Future Lies Behind!*, *supra* note 70, at 305.

eventually lead to the long-term failure of Native Hawaiian self-determination initiatives.[356] Because more Native Hawaiians now live on the continent than in Hawai'i,[357] self-determination has become paramount to protect Native Hawaiian rights reflected in the UNDRIP and enshrined in Hawai'i's constitution.[358] Despite their minority status in Hawai'i,[359] Native Hawaiians experience food and housing insecurity at disproportionate rates.[360] Native Hawaiians need a governing entity to advocate on behalf of maoli interests.

In the absence of a Native Hawaiian political entity, more often than not, commercial interests take the steering wheel in shaping Hawai'i's sociopolitical landscape at the expense of maoli interests.[361] Despite Hawai'i's fertile land, small farmers who produce food for their local communities struggle to stay financially afloat due to the cost of purchasing

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[356] *See* Maia Sophia Campbell, *The Right of Indigenous Peoples to Political Participation and the Case of* Yatama v. Nicaragua, 24 ARIZONA J. OF INT. & COMP. L. 499, 521–22 (2007) ("The right to political participation is linked with the right to self-determination. . . . Thus, access to government decision-making bodies through political participation is fundamental to the advancement of the right of self-determination of any group and is separate from the achievement of independent statehood.").

[357] In 2020, the U.S. Census Bureau reported 619,855 Native Hawaiians across the United States. *U.S. Census Bureau Releases Key Stats*, *supra* note 55. In 2021, there were about 309,800 Native Hawaiians in Hawai'i and about 370,000 in other states. Jennifer Sinco & Associated Press, *Hawaiians cannot afford to live in Hawaii*, FORTUNE (Jan. 23, 2023, 2:10 AM), https://fortune.com/2023/01/23/hawaiians-cannot-afford-to-live-in-hawaii-las-vegas-drawing-natives/.

[358] *See* Anaya, *supra* note 63, at 32–36.

[359] *U.S. Census Bureau Releases Key Stats, supra* note 55.

[360]Christopher R. Long et al., *Food Security Status of Native Hawaiians and Pacific Islanders in the US: Analysis of a National Survey*, 52 J. NUTRITION EDUC. & BEHAV. 788, 790 (2020); Seanna Pieper-Jordan, *Native Hawaiian Healing from White Settler Injustices and Continued Discrimination*, HAW. APPLESEED CTR. FOR L. & ECON. JUST. (Jan. 21, 2023), https://hiappleseed.org/blog/native-hawaiian-healing-white-settler-injustice-discrimination.

[361] *See* R. Hōkūlei Lindsey, *Native Hawaiians and the Ceded Lands Trust: Applying Self-Determination as an Alternative to the Equal Protection Analysis*, 34 AM. INDIAN L. REV. 223, 224 (2010) ("The practical effect of the ruling in *Rice* was that the direct link of accountability between trustee and beneficiary, created by law the Hawaiians-only voting structure, was diluted because any citizen of Hawai'i could participate in OHA elections regardless of the individual stake in decisions made by OHA trustees."); Clarkson, *supra* note 65, at 348 ("As Justice Stevens said, 'it is a painful irony indeed to conclude that native Hawaiians are not entitled to special benefits designed to restore a measure of native self-governance because they currently lack any vestigial native government – a possibility of which history and the actions of this Nation have deprived them.'").

land and the rarity of affordable leases.[362] Instead, the current economy favors the nearly one hundred large, corporate farms who produce the bulk of the produce sold to grocery stores over the seven thousand local farmers who only produce a fraction of agricultural sales.[363] Hawai'i's food economy today is a stark departure from traditional land stewardship and food production within the ahupua'a system.[364] Moreover, Hawai'i is not food sovereign because corporate, "mainland" food production has monopolized the local market.[365]

Additionally, corporate entities, who purchased lands and water diversion systems once owned by sugar plantations, dominate the control of other natural resources like water.[366] Disputes over water diversion from streams in notoriously dry Maui Komohana (West Maui) is one poignant example[367]

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[362] Jessica Terrel, *Hawai'i's Food System is Broken. Now is the Time to Fix It*, HONOLULU CIV. BEAT (Jan. 27, 2021), https://www.civilbeat.org/2021/01/hawaiis-food-system-is-broken-now-is-the-time-to-fix-it/.

[363] *Id.*

[364] *See* Leslie Hutchins & Mackenzie Feldman, *What Do Values Have to Do With It?: Resilience of Two Types of Farmers in Hawai'i to the COVID-19 Pandemic*, 5 FRONTIERS IN SUSTAINABLE FOOD SYSTEMS 1, 1 (2021) ("A history of agriculture and socio-cultural formation has led to a complex local food system in Hawai'i."); Brittany Lyte, *How Hawaii Squandered Its Food Security — And What It Will Take to Get It Back*, HONOLULU CIV. BEAT (April, 23, 2021), https://www.civilbeat.org/2021/04/how-hawaii-squandered-its-food-security-and-what-it-will-take-to-get-it-back/. An "ahupua'a" is a "land division usually extending from the uplands to the sea, so called because the boundary was marked by a heap (ahu) of stones surmounted by an image of a pig (pua'a), or because a pig or other tribute was laid on the altar as tax to the chief." HAWAIIAN DICTIONARY, *supra* note 7, at 9.

[365] *See* Lyte, *supra* note 364.

[366] *See* JONATHAN L. SCHEUER & BIANCA K. ISAKI, WATER AND POWER IN WEST MAUI 2 (2021) [hereinafter WATER AND POWER IN WEST MAUI].

[367] The State Water Code, authorizes the Commission on Water Resource Management ("CWRM") to designate water management areas for surface water use regulation after finding that serious disputes respecting the use of surface water resources are occurring. HAW. REV. STAT. § 174C-41 ("[W]hen it can be reasonably determined, after conducting scientific investigations and research, that the water resources in an area may be threatened by exiting or proposed withdrawals or diversions of water, the commission shall designate the area for the purpose of establishing administrative control over withdrawals and diversions of ground and surgace waters in the area to ensure reasonable and beneficial use of the water resources in the public interest."). Upon a unanimous vote, CWRM designated Maui Komohana as a ground and surface water management area in June 2022. Kehaulani Cerizo, *Under Landmark Decision, State Will Now Manage West Maui Water Resources*, MAUI NOW (June 14. 2022, 4:55 PM), https://mauinow.com/2022/06/14/under-landmark-decision-state-will-now-manage-west-maui- water-resources/. On August 8, 2023, the arid conditions of Maui

of the ongoing battle between legacy plantation interests in the tourism and agribusiness industries and constitutionally protected Native Hawaiian rights:[368]

> A mere few miles from the Westin Kā'anapali and other resorts, kalo cultivation continues in Kaua'ula and other West Maui valleys today. For over a century and a half, Kānaka Maoli and others who live in this area have wielded lawmaking, litigation, and other tools to contest this partial takeover. Their efforts have been significantly focused on trying to manage water in a way that allows for the preservation of traditional and customary practices, as well as the maintenance of a healthy environment that these

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Komohana caused by decades of water diversion culminated in wildfires that destroyed most of historic Lahaina, the first capitol of the Hawaiian Kingdom. *See* Naomi Klein & Kapua'ala Sproat, *Why Was There No Water to Fight the Fire in Maui?*, THE GUARDIAN (Aug. 17, 2023, 4:02 PM), https://www.theguardian.com/commentisfree/2023/aug/17/hawaii-fires-maui-water-rights-disaster-capitalism. Among the structures destroyed included the Nā 'Aikāne o Maui Cultural Center that sat on the grounds of Moku'ula and Mokuhinia, a lush inland fishpond that nourished the area both spiritually and physically. *See id.*; Jonaki Mehta, *Priceless Connections to Hawaii's Ancient Past Were Lost When Cultural Center Burned*, NAT'L PUB. RADIO (Aug. 18, 2023, 5:01 AM), https://www.npr.org/2023/08/18/1194500944/priceless-connections-to-hawaiis-ancient-past-were-lost-when-cultural-center-bur. Despite thousands of displaced residents and scores dead and some yet unaccounted for, the Hawai'i Tourism Authority nevertheless announced that West Maui would reopen for tourism mere months following the devastation and without consultation from the local community. Kiara Alfonseca, *'Slap in the Face': West Maui Set to Reopen for Tourism, with Outrage from Residents*, ABC NEWS (Sept. 19, 2023, 9:18AM), https://abcnews.go.com/US/west-maui-set-reopen-tourism-outrage-residents/story?id=103275631.

[368] Since the 1978 Con Con, the Hawai'i State Constitution has recognized water as a public trust resource that cannot be bought or sold as private property. HAW. CONST. art. XI, § 7 ("The State has an obligation to protect, control and regulate the use of Hawai'i's water resources for the benefit of its people."). Native Hawaiian law developed around the appropriation of water, as water was regarded as one of the most valued resources on the islands. *See* D. Kapua'ala Sproat, *From Wai to Kānāwai: Water Law in Hawai'i*, *in* NATIVE HAWAIIAN LAW TREATISE 522, 526–34 (Melody K. MacKenzie, Susan K. Serrano & D. Kapua'ala Sproat, eds., 2015). Kānāwai," the term used for traditional Native Hawaiian law, literally translates to "relating to water." *Id.* Similarly, the word "waiwai" demonstrates that an abundance of natural resources like water – not money – equates to wealth from the maoli perspective, as "waiwai" refers to goods, property, assets, valuables, value, worth, wealth, importance, benefit, estate, or use. HAWAIIAN DICTIONARY, *supra* note 7, at 380. When Aloha 'Āina governed the land, subsistence principles supported communities, but now Kānaka in those exact communities must fight legal wars for access to water. *See, e.g.*, Jim Mendoza, *Maui Taro Farmers Prevail in Water Dispute with State*, HAW. NEWS NOW (Apr. 16, 2016, 9:11 PM), https://www.hawaiinewsnow.com/story/32775775/maui-taro-farmers-prevail-in-water-dispute-with-state/; WATER AND POWER IN WEST MAUI, *supra* note 366.

practices rely on and promote.[369]

This juxtaposition between corporate and Native Hawaiian interests highlights repeated mismanagement of Hawai'i's resources.[370] These extractive economies continue to threaten Native Hawaiian self-determination.[371] A recognized and representative body to advocate for Kānaka Maoli interests would better protect and advance Native Hawaiians and their lifeways.[372] In the absence of any change to *Rice*'s precedent, however, consultation with entities that are not limited to Native Hawaiians only further disserves maoli self-determination efforts.[373]

2. *If* Rice *Were Overturned: In Pursuit of a* Transformational *Future*

An elimination of the *Rice* rule would potentially restore a Native Hawaiian election for OHA in a way that could usher in a *transformational* future that more appropriately supports self-determination.[374] An alternative *disciplined* future[375] – in which Hawai'i reverts to pre-western contact ways of governance – is difficult to imagine in today's context given the significant

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[369] WATER AND POWER IN WEST MAUI, *supra* note 366.

[370] Federal mismanagement of water in Hawai'i includes the recent mismanagement of resources in the hastily built Red Hill Bulk Fuel Storage Facility that has historically leaked, contaminating O'ahu families' drinking water with petroleum. Christina Jedra, *How the Red Hill Fuel System Has Threatened Oahu's Drinking Water for Decades*, HONOLULU CIV. BEAT (Dec. 12, 2021), https://www.civilbeat.org/2021/12/how-the-red-hill-fuel-system-has-threatened-oahus-drinking-water-for-decades/; *see Aloha 'Āina: Kapūkakī (Red Hill Bulk Fuel Storage Facility)*, UNIV. OF HAW. WEST O'AHU, JAMES & ABIGAIL CAMPBELL LIB., https://guides.westoahu.hawaii.edu/c.php?g=977248&p=7079960 (last visited Sept. 30, 2023) (describing how in 2014, a fuel storage tank at Red Hill spilled 27,000 gallons of jet fuel and currently continues to leak into one of Oahu's main aquifers that supplies water to a large portion of the east side of the island); *see also*, *About Red Hill Fuel Releases*, ENV'T PROT. AGENCY (May 5, 2023), https://www.epa.gov/red-hill/about-red-hill-fuel-releases (explaining that in 2021, another fuel release occurred at the Red Hill Bulk Fuel Storage Facility, operated by the United States Navy, which contaminated the drinking water of approximately 93,000 residents for around four months).

[371] *See* Klein & Sproat, *supra* note 367 (describing Maui communities' fight to "for their right to manage their own water rather than watch as it is diverted for often frivolous uses").

[372] *See supra* notes 248–50 and accompanying text (discussing how *Rice* prohibits the NHC from electing its own government officials, hindering consultation with a unified Kanaka voice).

[373] *See supra* notes 248–50 and accompanying text.

[374] *See The Future Lies Behind!*, *supra* note 70, at 305.

[375] As described earlier in this Article, a *disciplined society* is one "in which society in the future is seen as organized around some set of overarching values usually considered to be ancient, traditional, natural, ideologically correct, or God-given[.]" *Id.*

changes to governance in Hawai'i.[376] Traditional values, however, such as Aloha 'Āina,[377] would be central in a *transformational* future in which Kānaka are considered by the law, and law-makers, as more than just a racial demographic.[378] In other words, a *transformational* future, unlike continuation of the status quo would value Native Hawaiian self-determination to the fullest extent possible, requiring a significant shift in legal, moral, and normative beliefs to catalyze this change.[379]

Rice limits the chances of a *transformational* future that would amplify the Hawaiian voice in a recognized government forum.[380] *Rice* immediately changed OHA's administrative procedures as its precedent denies Native Hawaiians any legal classification beyond a racial one.[381] Such classification even created obstacles in the state legislature when, for example, OHA sought to construct housing opportunities for its beneficiaries.[382] In 2023, in response to housing-based legislation in favor of OHA beneficiaries, State House Speaker Scott Saiki asserted that he was "not sure how OHA [would] be able to restrict or give preference to Hawaiians" because "federal law does

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[376] *See supra* Part II (chronicling Hawai'i's journey from a monarchy to statehood).

[377] *See* M. J. Palau-McDonald, *Blockchains and Environmental Self-Determination for the Native Hawaiian People: Toward Restorative Stewardship of Indigenous Lands*, 57 HARV. C.R.-C.L. L. REV. 393, 402–09 (2022).

> Th[e] reciprocal relationship [with land] is encapsulated in the foundational 'Oiwi value of aloha 'aina (profound love for the land),75 and, more recently, the concept of malama 'aina (to care for, protect, and preserve the land). Prior to western contact in 1778, Kanaka manifested their kuleana in part by managing all biocultural resources "as a public trust for present and future generations" and harnessing tidal power and natural hydrology to create regenerative communal agriculture and aquaculture systems that supported a population close to present-day size. Aloha 'aina is the foundation of-and inherent in-Hawai'i's constitutional Public Trust today and has inspired generations of Kanaka to challenge colonial subordination.

Id. at 402.

[378] *The Future Lies Behind!*, *supra* note 70, at 305. As described earlier in this Article, a *transformational society* is "usually either of a high-tech or a high-spirit variety, which sees the end of current forms and the emergence of new (rather than the return to older, traditional) forms of beliefs, behavior, organization, and perhaps, intelligent life-forms." *See id.*

[379] *See id.*

[380] *See supra* Section IV.A–B.

[381] *See* Rice v. Cayetano, 528 U.S. 495, 499 (2000).

[382] Catherine Cruz, *Speaker Saiki offers OHA a deal to restrict housing in Kaka'ako in exchange for funds*, HAW. PUB. RADIO (Apr. 5, 2023), https://www.hawaiipublicradio.org/the-conversation/2023-04-05/speaker-saiki-oha-deal-to-restrict-housing-in-kakaako.

not allow for anyone to discriminate based on *race*."[383] It is apparent how *Rice* affects subsequent federal judicial decisions as precedent, but the holding also – perhaps more implicitly – impacts the scope of state legislation designed to benefit Native Hawaiian constituents.

Speaker Saiki's comments followed his proposal for OHA to receive $190 million in exchange for a perpetual easement against OHA's planned housing project development in Kakaʻako Makai. [384] In lieu of proceeds to which OHA was entitled from public trust lands between November 1978 and June 2012, OHA received the Kakaʻako Makai parcels it sought to develop as part of a $200 million settlement with the state.[385] Since 2012, however, the state has denied OHA exemptions from a residential development prohibition impacting the Kakaʻako Makai area.[386] After the legislative measure to exempt the Kakaʻako Makai development from existing restrictions died once again in the 2023 session, Speaker Saiki proposed the $190 million deal as "just" compensation.[387] OHA's Board of Trustees unanimously rejected Speaker Saiki's proposal because the dollar amounts were not comparable to what the state actually owes OHA in public lands proceeds.[388]

Although unlikely, the removal of *Rice* as a barrier to an exclusive Native Hawaiian government could facilitate the *transformational* future for self-determination efforts by absolving OHA from the legal restrictions against the voting scheme initiated by the Con Con.[389] More importantly, rejection of *Rice* would clarify the legal ambiguity around the political status of Native Hawaiians in the United States such that the judiciary would view Kānaka in

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[383] *Id.*

[384] *See* Letter from Scott K. Saiki, Speaker of the House, to Carmen "Hulu" Lindsey, OHA Board of Trustees Chair, (Apr. 3, 2023), https://s3.documentcloud.org/documents/23742051/2023-04-03-spkr-to-oha.pdf (regarding proposed Senate Bill No. 1235, S.D. 2, H.D. 1).

[385] *Id.*

[386] *Id.*

[387] Kuʻuwehi Hiraishi, *OHA Trustees Reject Speaker Saiki's $190M Deal for Kakaʻako Makai*, HAW. PUB. RADIO (Apr. 7, 2023, 1:28 PM), https://www.hawaiipublicradio.org/local-news/2023-04-07/oha-trustees-reject-speaker-saikis-190m-deal-for-kakaako-makai#:~:text=The%20Office%20of%20Hawaiian%20Affairs,worth%20more%20than%20%24190%20million.

[388] *Id.*

[389] *See supra* Section II.D.

line with the federal legislation and executive orders that afford Native Hawaiians special recognition.[390]

V. RECOMMENDATIONS

Three ideas of future governance models available for Native Hawaiians include (1) independence, in which Hawai'i is a nation-state severed from the United States; (2) federal recognition, in which Native Hawaiians would have a status as the Indigenous people of Hawai'i like American Indians and Alaska Natives; and (3) the status quo, in which Native Hawaiians remain classified as a racial class in Hawai'i with no unique political consideration.[391] While this Article does not contemplate or suggest any particular model, the following recommendations may further Native Hawaiian self-determination through incremental steps involving amendments to DOI consultation and federal ONHR hiring practices.

A. *Consultation Should be With Maoli-led NHOs*

Any consultation policy should reserve consultation to Native Hawaiian individuals or NHOs that are led by and comprised of NHC members.[392] Although this recommendation does not immediately solve the problem of the United States having an upper hand through the Department's use of non-binding language, it would limit the Department's consideration to concerns raised specifically by Native Hawaiians and not by NHOs.[393] With the current ease of registering as a NHO,[394] organizations could claim to serve some

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[390] *See supra* Section I.A (describing the differences in federal treatment of American Indians, Alaska Natives, and Native Hawaiians).

[391] *See* Candice Fujikane, *Review: Restoring Independence and Abundance on the Kulāiwi and 'Āina Momona*, 67 AM. Q. 969, 969 (2015); J. Kēhaulani Kauanui, *Precarious Positions: Native Hawaiians and US Federal Recognition*, 17 CONTEMP. PAC. 1, 11 (2005) [hereinafter *Precarious Positions*].

[392] *See supra* notes 317–25 and accompanying text (critiquing the DOI's definition of "Native Hawaiian Organization").

[393] *See supra* notes 317–25 and accompanying text.

[394] ONHR's "Native Hawaiian Organization Notification List Registration Document Provided for the Convenience of NHOs" states at the top of the form that "use of [the] form is not required." *Sample Registration Form For Nhol Fillable Fin [pdf]*, DEP'T OF INTERIOR, https://www.doi.gov/media/document/sample-registration-form-nhol-fillable-fin-pdf (last visited Feb. 9, 2024); *see supra* note 319 (describing several specific NHOs registered with the ONHR). At least one entry on ONHR's NHO list completely lacks any summary of its interest in consultation efforts. *See* NATIVE HAWAIIAN ORGANIZATION NOTIFICATION LIST, *supra* note 340, at 11.

Native Hawaiian interest while prioritizing purely commercial interests.[395] However, such restricted NHC consultation may be subject to judicial review if *Rice* still stands.[396]

The NHC should be able to voice concerns about federal actions that could affect them, but the Department's defined NHOs do not function as a representative body for the entire NHC.[397] No independent representative body means no meaningful exchange, which is key to rebuilding relationships between Indigenous and non-Indigenous peoples.[398] Without meaningful exchange, the DOI's consultation process may not accurately reflect the values of the broader NHC.[399]

Although other departments, such as the U.S. Department of Transportation, have the ability to initiate their own consultation sessions, the DOI policy will likely serve as a model for consultation between the NHC and those other agencies as it is the first to be drafted.[400] However, because

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[395] *See Sample Registration Form For Nhol Fillable Fin [pdf]*, DEP'T OF INTERIOR, https://www.doi.gov/media/document/sample-registration-form-nhol-fillable-fin-pdf (last visited Feb. 9, 2024).

[396] *See* Pino, *supra* note 69, at 2601 (describing that as a result of of *Rice*, Na'i Aupuni was unable to use the Native Hawaiian voter roll to elect constitutional convention delegates). While *Rice* was decided on Fifteenth Amendment grounds specifically related to voting criteria, the language referring to Native Hawaiians as merely a race is relevant to any constitutional analysis. *See* Katz, *supra* note 252, at 508.

[397] The last time the United States consulted with an arbitrarily recognized representative body for Native Hawaiians was when President William McKinley signed the Newlands Resolution. *See supra* Section II.B. Without dialogic exchange, finding a consultation process that can be a "cultural match" will be difficult because the consulted views may not accurately reflect the broader NHC view. *See id.*

[398] NADIA FERRARA, RECONCILING AND REHUMANIZING INDIGENOUS-SETTLER RELATIONS: AN APPLIED ANTHROPOLOGICAL PERSPECTIVE 29 (2015) ("[T]he only way to move forward and heal from the wounds of colonialism is to rebuild the relationship between indigenous and nonindigenous peoples. This entails rebuilding a sense of trust, acknowledging the wrongs of the past and learning from them, and focusing on the healing process, and supporting prosperous and sustainable indigenous communities that contribute to the overall prosperity[.]"); *see supra* Section IV.B.I (discussing measures of successful government-to-government relationships).

[399] *See* MELISSA L. TATUM ET AL., STRUCTURING SOVEREIGNTY: CONSTITUTIONS OF NATIVE NATIONS 15 (2014). The idea of institutional legitimacy, often referred to as "cultural match," is a key factor in the success of constitution drafting and constitution reform. *Id.*

[400] *See* DEP'T OF TRANSP., DEPARTMENT OF TRANSPORTATION PLAN OF ACTIONS 2 (2021) ("The Department will separately proceed with an additional standalone consultation policy regarding Native Hawaiian Organizations that will be developed in consultation with Native Hawaiian Organizations.").

other federal agencies may define their consulting partners differently than the DOI, resulting inconsistencies within the federal government have the potential to undermine agency legitimacy.[401] When a "government['s] institutions allocate power and decision-making in a way that feels [legally or] culturally illegitimate to the community," the polity as a whole tends "to ignore [the] government, criticize it, disrupt its functioning, or use it for self-interested purposes."[402] Further, political reconciliation is an ongoing process: "the political damage that has been inflicted upon tribal governments for so many decades in the past could not be undone overnight."[403] This process is, therefore, better served when Native Hawaiians are equal partners in this political reconciliation and healing.

B. *The DOI Should Consider Employment Preferences for Native Hawaiians in the Office of Native Hawaiian Relations*

So long as *Rice* remains "good law" and its precedent continues to distinguish the political classification of Native Hawaiians from that of other Indigenous peoples, the NHC faces continued barriers to assert political sovereignty.[404] The consultation policy is imperfect, but it could be improved to allow for institutional self-determination within the Department's Office of Native Hawaiian Relations.[405]

The Ninth Circuit Court of Appeals, whose decision *Rice* reversed, concluded that Kānaka, "being a group to whom obligations run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be."[406] This reasoning mirrors that of *Mancari* where the Court noted a "primarily non-Indian-staffed BIA [would have] plenary control, for all practical purposes, over the lives and destinies of the federally recognized Indian tribes."[407] While *Mancari* was rejected by the Court in the context of *Rice*, the ONHR should still consider an employment or hiring preference similar to the BIA's policy because it may not be in direct

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[401] *See id.* at 16.
[402] *Id.*
[403] *Id.*
[404] *See supra* Section IV.C.1.
[405] "The Office of Native Hawaiian Relations was authorized by Congress in Public Law 108–199 on January 23, 2004, and in Public Law 104–42 on November 2, 1995. The Office discharges the Secretary [of the Interior's] responsibilities for matters related to Native Hawaiians and serves as a conduit for the Department's field activities in Hawai'i." U.S. DEP'T INTERIOR, OFF. NATIVE HAWAIIAN REL., *About Our Office*, https://www.doi.gov/hawaiian/aboutus (last visited Oct. 3, 2023).
[406] Rice v. Cayetano, 146 F.3d 1075, 1079 (9th Cir. 1998).
[407] Morton v. Mancari, 417 U.S. 535, 542 (1974).

violation of the *Rice* rule.[408] The *Rice* Court only held OHA's state election scheme was unconstitutional under the Fifteenth Amendment and did not decide upon matters of employment preferences for federal Native Hawaiian programs.[409] Employment or hiring preferences would potentially bolster self-determination efforts by prioritizing Native Hawaiian leadership programs that directly serve the NHC.[410] Further advocacy following this narrow, potentially challenging path has the potential to propel this conversation regarding Native Hawaiian participation in decisionmaking.

VI. CONCLUSION

The Department took a step in the right direction by initiating a consultation policy with the NHC. Its language, however, has revealed areas in the law that the federal government must address before any government-to-government relationship can be forged or adequately substituted by a meaningful "government-to-sovereign" relationship. Without such changes, the DOI policy inappropriately assumes an essential element of Native Hawaiian self-determination by unilaterally drafting consultation language that distances Kānaka Maoli from the decision-making process. The history of governance in Hawai'i clearly depicts the establishment of a federal trust relationship between the United States and Native Hawaiians. Indeed, two of the three branches of the U.S. federal government have acknowledged the inherent sovereignty that underlies that trust relationship. But the *Rice* Court rejected the distinction of Kānaka Maoli as anything but a racial class. While this Article does not attempt to suggest a model for Hawaiian governance, the ability to politically organize as a lāhui – to follow whatever governance model it chooses – is an urgent and critically significant element of self-determination that *Rice* has, for over two decades now, prevented. Unless distinguished or overturned, *Rice* may similarly nullify "government-to-sovereign" consultation between the United States and the NHC.

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[408] *Rice*, 528 U.S. at 522 ("the question before us is not the one-person, one-vote requirement of the Fourteenth Amendment, but the race neutrality command of the Fifteenth Amendment").

[409] *See id.*

[410] James P. Mills, *The Use of Hiring Preferences by Alaska Native Corporations After* Malabed v. North Slope Borough*,* 28 SEATTLE U. L. REV 403, 409 (2005) ("The ability of Native corporations to offer hiring preferences to Alaska Natives is critical to federal Indian policy toward Alaska Natives because (1) the unique position of Native corporations; (2) the diminished role that tribes play in economic lives of Alaska Natives; and (3) the underlying purposes of ANCSA.").