E OLA KA ʻŌLELO HAWAIʻI:
Protecting the Hawaiian Language and Providing Equality for Kānaka Maoli

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Abstract

Hawaiʻi's history is one like many other indigenous communities across the globe: a colonizing regime actively assisted in the illegal overthrow of another internationally recognized sovereign government. Following the American overthrow in Hawaiʻi, the new regime implemented laws in effect banning the teaching of the indigenous language, ʻŌlelo Hawaiʻi—an act of assimilation that tore the fabric of Hawaiian culture and society. Since the overthrow in 1893, and the near death of ʻŌlelo Hawaiʻi, Native Hawaiians have been seeking justice. Over time, the State of Hawaiʻi and the United States made some efforts to try to resolve these historical injustices and provide equality for the Native Hawaiian people. In 1978, for example, the people of the State of Hawaiʻi ratified constitutional amendments that tried to revive ʻŌlelo Hawaiʻi. The amendments included making ʻŌlelo Hawaiʻi an "official" language of the State and encouraging the teaching and use of ʻŌlelo Hawaiʻi. With four decades of resurgence of Hawaiian language speakers, questions have arisen about the use of ʻŌlelo Hawaiʻi in government spaces, particularly in court. Yet, the courts have, thus far, been coy to truly embrace the State constitutional mandates. This Article argues that the courts must allow the use of ʻŌlelo Hawaiʻi because it is a traditional

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and customary practice that is protected under the court's established precedent. This Article, thus, critically analyzes the history of the laws pertaining to ʻŌlelo Hawaiʻi as a way to illuminate how Native Hawaiians can obtain some semblance of equality in their own homeland.

Table of Contents

Introduction

Standing proudly over the island of Maui is the 10,023-foot summit of Haleakalā, which translates from ʻŌlelo Hawaiʻi, the Hawaiian language, to mean "house of the sun." The mountain is "the best place to be able to observe the sun."[1] In watching the sunrise while atop Haleakalā, Mark Twain wrote, "It was the sublimest spectacle I ever witnessed and I think the memory of it will remain with me always."[2] It was the sacred heights in this wao akua—"realm of the gods"—that Native Hawaiians,[3]

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1 Nat'l Sci. Found., Final Envtl. Impact Statement, Advanced Tech. Solar Telescope App. B(1) 16–17 (2009).

2 Mark Twain, Roughing It 396 (Gibbs Smith 2017) (1872).

3 For purposes of this Article, the terms "Kānaka Maoli," "Native Hawaiian," and "Hawaiian" are used interchangeably to refer to all those descendants of the indigenous people of Hawaiʻi regardless of blood quantum. The term "native Hawaiian" refers to those of at least one-half Hawaiian blood as defined in the Hawaiian Homes Commission Act, 1920, 42. Stat. 108 (1921), § 201.

the indigenous people of Hawai‘i, revered and honored.[4] Indeed, it was at Haleakalā that the demigod Maui lassoed the sun to slow the passage of daylight hours so that farms could be cultivated and clothing could be made.[5] For Native Hawaiians, Haleakalā is more than just a mountain; it is a place of deep spirituality where prayers in ʻŌlelo Hawai‘i could be given and answers could be found. To this day, "[a]n array of rituals still occur on Haleakala," including "[c]elebrations of the season, the solstice, commemorations, or worship of different deities."[6]

Given the significance of this space, it is not surprising that cultural practitioners placed their bodies in harm's way when construction began on the Daniel K. Inouye Solar Telescope (DKIST). On July 31, 2015, at approximately 10:00 p.m., law enforcement arrested more than a dozen Native Hawaiians, including Samuel Kaleikoa Ka‘eo, for protesting the construction of the DKIST on Haleakalā.[7] For Ka‘eo and his companions, they were fighting against the industrialization and desecration of a culturally and spiritually sacred site.[8] Ka‘eo, an award winning Hawaiian Studies professor at the University of Hawai‘i Maui College and fluent speaker of ʻŌlelo Hawai‘i with a traditional tattoo across half of his face, appeared before a Maui district court judge and was found guilty of a misdemeanor.[9]

Two years later, on August 2, 2017, law enforcement again arrested Ka‘eo and others for disorderly conduct when they blocked a convoy from taking construction equipment to the summit of Haleakalā for the DKIST.[10] Ka‘eo was released on his own recognizance and a complaint

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[4] *See* Kilakila ‘o Haleakalā v. Board of Land Natural Resources, 138 Haw. 383, 387, 382 P.3d 195, 199 (2016) ("The summit of Haleakalā has important cultural significance to Native Hawaiians. Cultural assessments . . . determined that the Haleakalā summit is one of the most sacred sites on Maui, and the Haleakalā Crater is known as 'where the gods live.' The summit was traditionally used by Native Hawaiians as a place for religious ceremonies, for prayer to the gods, to connect to ancestors, and to bury the dead. Native Hawaiians continue to engage in some of these practices at the summit.").

[5] Mary K. Pukuʻi, Samuel H. Elbert & Esther T. Mookini, Place Names of Hawaii 36 (1974).

[6] Tony Perrottet, *Descending Into Hawaii's Haleakala Crater*, Smithsonian Magazine (Dec. 2011), http://www.smithsonianmag.com/travel/descending-into-hawaiis-haleakala-crater-70943 (statement of Kiope Raymond, Associate Professor of Hawaiian Studies at the University of Hawai‘i Maui College).

[7] Will Caron, *Court Cases Reveal the Limited Deference to which the Hawaiian Language is Afforded by the State*, Hawai‘i Independent (Jan. 24, 2018), http://hawaiiindependent.net/story/court-cases-reveal-the-limited-deference-to-which-the-hawaiian-language-is.

[8] Anita Hofschneider, *Hawaiian Is An Official Language So Why Isn't It Used More?*, Civil Beat (Feb. 5, 2018), http://www.civilbeat.org/2018/02/hawaiian-is-an-official-language-so-why-isnt-it-used-more.

[9] Kuʻuwehi Hiraishi, *Maui Telescope Protestor Battles Over Hawaiian Language Use in Court*, Hawai‘i Public Radio (Jan. 24, 2018), http://www.hawaiipublicradio.org/post/maui-telescope-protestor-battles-over-hawaiian-language-use-court#stream/0.

[10] Lila Fujimoto, *Judge Says Haleakala Telescope Protester Can Be Recharged*, The Maui News (Aug. 2, 2018), http://www.mauinews.com/news/local-news/2018/08/

was filed against him on August 24, 2017.[11] Ka‘eo appeared before the same judge in the same courtroom. Ka‘eo appeared at several continued arraignments and spoke the Hawaiian language, at every hearing with an interpreter that was requested and subsequently ordered by the district court.[12] On December 8, 2017, the Maui County Prosecutor’s Office filed a motion to conduct Ka‘eo’s trial in English because every time they had a hearing they had to fly in an interpreter from another island.[13] On December 27, 2017, the day of the hearing on the prosecution’s motion, the “Court noted Defendant has responded in Hawaiian today; Arguments heard. Court made his ruling in absence of the Hawaiian Interpreter[.]”[14] The court, thus, heard arguments on the motion and issued a decision to proceed to trial in the English language despite the fact that the scheduled translator was, because of a family emergency, unable to make the hearing.[15]

On the date of trial, January 24, 2018, Ka‘eo was present and sitting directly in front of the judge at counsel’s table.[16] The trial opened and the judge—again, this was same judge that had interacted with Ka‘eo at least six times over the course of two years—asked if Ka‘eo was present.[17] Ka‘eo stood and responded in ‘Ōlelo Hawai‘i.[18] Again, the judge asked three more times if Ka‘eo was present before stating: “I’m going to give you another opportunity Mr. Ka‘eo to just identify yourself just so the record is clear. I’m going to ask you one last time, is your name Samuel Ka‘eo?”[19] Ka‘eo once again stood and responded in the Hawaiian language.[20] Displeased, the judge instructed the staff to go out into the hallway outside the courtroom and call three times for Ka‘eo to ensure that Ka‘eo, who was still sitting at counsel’s table in the courtroom, was not outside.[21] Having failed to “find” Ka‘eo outside, the court issued a criminal bench warrant for Ka‘eo’s arrest, concluding: “The court is unable to get a definitive determination for the record that the defendant

judge-says-haleakala-telescope-protester-can-be-recharged.

11 *See* Hofschneider, *supra* note 8.

12 *See State v. Kaeo*, Case No. 2DCW-17-0002038, *Interpreter Request—Hawaiian* (filed Nov. 22, 2017).

13 *See* Hofschneider, *supra* note 8.

14 *State v. Kaeo*, Case No. 2DCW-17-0002038, *Interpreter Request—Hawaiian* (filed Nov. 22, 2017).

15 *Id.* (“Note: Hawaiian Interpreter, Stanley Kiope Raymond, not present due to family emergency[.] . . . Court made his ruling in absence of the Hawaiian Interpreter”).

16 Lila Fujimoto, *Use of Hawaiian in Court Leads to Warrant*, The Maui News (Jan. 25, 2018), http://www.mauinews.com/news/local-news/2018/01/use-of-hawaiian-in-court-leads-to-warrant.

17 *Id.*

18 *Id.*

19 KHON2 News, *Judge Issues Warrant After Man Responds in Hawaiian Instead of English*, YouTube (Jan. 24, 2018), http://www.youtube.com/watch?v=pMdVGdQK-T2A.

20 *See* Fujimoto, *supra* note 16.

21 *Id.*

seated in court is Mr. Samuel Kaeo."[22] Kaʻeo and his language were literally erased from the record. Kaʻeo was invisible.

Reactions to the court's conduct flew through Hawaiʻi like wildfire. A leader in the Native Hawaiian community said, "Punishing Native Hawaiians for speaking our native language invokes a disturbing era in Hawai'i's history when ʻŌlelo Hawaiʻi was prohibited in schools, a form of cultural suppression that substantially contributed to the near extinction of the Hawaiian language."[23] One attorney said, "This is Hawaii. Where else is someone able to be Hawaiian if you can't be Hawaiian in Hawaii? That's a sad state of affairs."[24] Another attorney decried the unfairness of the decision: "There's absolutely no reason I can think of that the judge should not have allowed that. I just think that it sets a terrible toll and sets a terrible precedent for a representative of the judiciary to tell a Hawaiian speaker that you can't speak in your language."[25] The State Judiciary responded, "There is no legal requirement to provide Hawaiian language interpreters to court participants who speak English but prefer to speak in Hawaiian."[26]

Professor Kaʻeo's story typifies the reality for many Native Hawaiians—living under constant attack against your culture and language, and forced to risk your body and freedom to ensure the survival of your culture and language in your own homelands. Given the Hobson's choice of, on one hand, embracing the language of your ancestors as the State professes to encourage by making ʻŌlelo Hawaiʻi an "official language,"[27] and, on the other hand, relegating that language to history, what are Native Hawaiians to do? Abandon the language that serves as the foundation for cultural survival? Professor Kaʻeo's protection against the desecration of Haleakalā and bold stand for the Hawaiian language add to a rich and complicated history of the Hawaiian language in Hawaiʻi—a history that mirrors the social and political projects of the time, and is characterized by government sanctioned assimilation and, importantly, an unending resistance to allowing the Hawaiian language to become, like Kaʻeo in court in 2018, invisible.

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[22] *Id.*

[23] Moanikeʻala Nabarro, *Arrest Warrant Recalled for Man Who Refused to Address Maui Judge in English*, Island News (Jan. 25, 2018), http://www.kitv.com/story/37344220/arrest-warrant-recalled-for-man-who-refused-to-address-maui-judge-in-english.

[24] *Id.*

[25] *Id.*

[26] Two days after its initial statement, the State Judiciary issued the following policy regarding Hawaiian language interpreters: "The Judiciary will provide or permit qualified Hawaiian language interpreters to the extent reasonably possible when parties in courtroom proceedings choose to express themselves through the Hawaiian language." Hawaiʻi State Judiciary, Press Releases, *Judiciary Announces Hawaiian Language Interpreter Policy*, (Jan. 26, 2018), http://www.courts.state.hi.us/news_and_reports/press_releases/2018/01/judiciary-announces-hawaiian-language-interpreter-policy.

[27] Haw. Const. art. XV, § 4.

This Article critically analyzes the history of the laws pertaining to ʻŌlelo Hawaiʻi as a way to illuminate how Native Hawaiians can obtain some semblance of equality in their own homeland. This Article begins in Part I with a contextualization of the interconnection between language and culture to demonstrate the importance of ʻŌlelo Hawaiʻi to the Hawaiian culture and to Native Hawaiian identity. Part II of this Article then explores nearly two centuries of laws that regulated the Hawaiian language and used that language as a tool to assimilate, divide, and nearly erase the Native Hawaiian. This Article then in Part III critiques two modern lawsuits, *Tagupa v. Odo* and *Office of Hawaiian Affairs v. State*, where the court has failed to recognize and uphold the importance of the Hawaiian language based on arguments relating to federal law. Finally, in reclaiming the Hawaiian language and in response to the Judiciary's proposition that there is "no legal requirement to provide Hawaiian language interpreters to court participants," Part IV of this Article provides an alternative argument to protect ʻŌlelo Hawaiʻi by arguing that the use of ʻŌlelo Hawaiʻi is a traditional and customary practice that is protected under the Hawaiʻi State Constitution and the Supreme Court of Hawaiʻi's established precedent. In rethinking the way in which language protection is articulated in legal disputes, this Article seeks to challenge the State of Hawaiʻi and the United States to begin to truly repair at least one grave injustice against the Native Hawaiian people.

I. Foundations of Language for Culture

ʻO ka ʻ*Ōlelo ke kaʻā o ka mauli.*

Language is the fiber that binds us to our cultural identity.[28]

Culture develops over time and consists of ideals, values, and assumptions about the world.[29] Language cements the cultures of the people who speak them.[30] Language carries the essentials of learning about cultures, spiritual practices, medicinal practices, mathematical constructs, cosmological perspectives, and societal norms.[31] Language

[28] University of Hawaiʻi at Hilo | Ka Hakaʻula o Keʻelikōlani College of Hawaiian Language, *Mission Statement*, http://olelo.hawaii.edu (last visited Mar. 24, 2020).

[29] *See* Gloria B. Sanchez, *A Paradigm Shift in Legal Education: Preparing Law Students for the Twenty-First Century: Teaching Foreign Law, Culture, and Legal Language of the Major U.S. American Trading Partners*, 34 San Diego L. Rev. 635, 649 (1997) (asserting that " . . . culture consists of an accumulation of knowledge, including clusters of norms, and that culture is a dynamic process that is intersubjectively shared.").

[30] *See* Center for Applied Linguistics, U.S. Dep't of Health, Education, and Welfare, A Guide to Issues in Indian Language Retention 4 (1980).

[31] *See* Sanchez, *supra* note 29, at 658–59 ("Culture and enculturation form ideas, methods of analyses, perceptions, behaviors and beliefs. The language selected to structure and convey these cultural phenomena reflects cultural content. Language is a product of culture and, simultaneously, is formative of culture. Scholars have long recognized that language, like law, does not exist in the abstract. Language is understood because of culture." (citations omitted)).

protects and conveys the tales of a people.[32] Language forms the boundary of the concepts surrounding the origin and patterns of a people.[33] Language defines a people's practices, their taboos, and their specific beliefs surrounding ceremony.[34] Indeed:

> Language is not just an instrumental convenience made available by chance to the individuals who acquire it; rather, it is the very means by which individual human beings are socialized and from which they develop a consciousness of themselves. This consciousness is a direct and unique reflection of the culture and comprises the many social, ethnic, class, or gender groups who share the language.[35]

Because language is used to transmit social conventions and ideology, an individual's culture is consistently refined and enhanced in the process of enabling it to adapt and survive.[36]

For indigenous people, and those with strong oral traditions, language and culture are closely intertwined. A Lakota columnist described the value of those who can speak English and their native tongue: "People who are fluent in a Native language and English speak and think two separate world views and/or philosophies. They possess an understanding of the European and Lakota world perspectives; it is a matter of how a person thinks and perceives the world."[37] A Navajo educator described how learning both Navajo and English would allow children to "walk in both worlds."[38]

Professor Allison M. Dussias made several observations apt in critiquing language. First, Professor Dussias quoted linguist David Crystal to describe the meaning and deep sense of loss when a language becomes extinct:

> To lose a language is to lose a unique insight into the human condition. Each language presents a view of the world that is shared by no other. Each has its own figures of speech, its own narrative style, its own proverbs, its own oral or written literatures. Preserving a language may also be instructive; we can learn from the way in which different languages structure reality . . . .[39]

Second, Professor Dussias explored the connection between language and identity: "Language is more than a shared code of symbols for communication. People do not fight and die . . . to preserve a set of

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[32] Native Hawaiians Study Commission, Report on Culture, Needs, and Concerns of Native Hawaiians 173 (1983).

[33] *See id.*

[34] *See id.* at 175.

[35] David Corson, Language Policy Across the Curriculum 182 (1990).

[36] *See id.*

[37] Allison M. Dussias, *Waging War with Words: Native Americans' Continuing Struggle Against the Suppression of Their Languages*, 60 Ohio St. L.J. 901, 978 (1999) (citation omitted).

[38] *Id.* (citing Ivan F. Star Comes Out, *The Lakota Language Nears Extinction,* Indian Country Today, Sept. 28–Oct. 5, 1998, at A5*)*.

[39] *Id.* (citing David Crystal, Languages: When the Last Speakers Go, They Take with Them Their History and Culture, Civilization, Feb.–Mar. 1997, at 44).

symbols. They do so because they feel that their identity is at stake—that language preservation is a question of human rights, community status and nationhood."[40] Third, she highlighted the importance of language to history and inherited knowledge: "[T]he loss of a language means a loss of inherited knowledge that extends over hundreds or thousands of years . . . . [W]hen a language without a writing system disappears, its speakers' experience is lost forever. . . . Language loss is knowledge loss, and it is irretrievable."[41] Dussias concluded with a description of the implications that language has for religious practices: "Native Americans who are interested in participating in traditional practices feel that they cannot pray to their ancestors in English."[42] These observations provide a foundation to analyzing the similarities of Native American languages with ʻŌlelo Hawaiʻi.

Renowned linguist Samuel H. Elbert described the Hawaiian language as follows:

> Hawaiian has the simplest sound system of any Malayo-Polynesian language, and perhaps of any language in the world . . . . [B]ecause of its simple sound system, its simple grammar, its rich vocabulary, and its receptivity to incorporation of loan words, Hawaiian would be preferable to Esperanto or English as a world language.[43]

The Hawaiian language "reflected the Hawaiians' symbiotic relationship with their environment[]" as exemplified by the detailed vocabulary surrounding names of different types of rains.[44] For example, the harsh ice cold kipuʻupuʻu rains of Waimea on Hawaiʻi Island that would pelt the skin differed significantly from the gentle tuahine rain that falls in Mānoa on the island of Oʻahu.[45] But, the Hawaiian language was not limited to identifying objects. The Hawaiian language is also a poetic language imbued with kaona or rich figurative meaning: the word kipuʻupuʻu, for example, while used to describe the pelting rain, is also used to identify the most skilled warriors who would, much like the rain, create a stinging blow.[46]

The richness of the spoken Hawaiian language is, thus, of paramount significance to Native Hawaiians. Dr. Hiapokeikikane Perreira, Associate Professor at the University of Hawaiʻi at Hilo's Ka Haka ʻUla o Keʻelikōlani College of Hawaiian Language, described the specific importance of the spoken Hawaiian language to Native Hawaiians:

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[40] *Id.*

[41] *Id.* at 980.

[42] *Id.* at 981. One Navajo stated, "Navajo culture and philosophy dictates that our language is an integral part of our religion. All our ceremonial songs and prayers are in our language . . . . " *Id.*

[43] Paul F. Nahoa Lucas, *E Ola Mau Kākou I Ka ʻŌlelo Makuahine: Hawaiian Language Policy and the Courts*, Hawaiian J. of History 1, 1 (2000) (citation omitted).

[44] *Id.*

[45] Kīhei de Silva, *Hole Waimea*, Kaʻiwakīloumoku (2006), http://apps.ksbe.edu/kaiwakiloumoku/kaleinamanu/he-aloha-moku-o-keawe/hole_waimea.

[46] *Id.*

"In Hawaiian, we don't have a moment of silence. Prayer has to be spoken to be effectuated . . . . You cannot just close your eyes and think a prayer and expect it to happen in a Hawaiian being. You have to physically speak it[.]"[47] Therefore, for Native Hawaiians, "'Ōlelo, 'word' or 'speech,' [is] far more than a means of communicating[,] . . . the spoken word [does] more than send into motion forces of destruction and death, forgiveness and healing. The word [is] itself a force."[48] The Hawaiian proverb—"i ka ʻōlelo no ke ola, i ka ʻōlelo no ka make," which means, "[i]n language there is life and in language there is death"—aptly captures this sentiment.[49] Thus, for Native Hawaiians, words "can heal and give life; or, obfuscate and destroy."[50]

II. History of ʻŌlelo Hawaiʻi

> How does a language die? One obvious way is that its speakers can perish through disease or genocide . . . . More often language death is the culmination of language shift, resulting from a complex of internal and external pressures that induce a speech community to adopt a language spoken by others. These may include changes in values, rituals, or economic and political life resulting from trade, migration, intermarriage, religious conversion, or military conquest.[51]

Over time, ʻŌlelo Hawaiʻi would be used as a tool to indoctrinate and suppress the indigenous population with Western notions of religion and politics, and would be forced nearly to extinction and relegated to an underground language by a pro-American agenda to seize control of the Hawaiian Islands and its people.

A. *The Rising Missionary Influences*

In 1820, Calvinist missionaries arrived in Hawaiʻi on a religious crusade to spread their Christian beliefs.[52] The American Board of Commissioners for Foreign Missions directed these missionaries to "obtain an adequate knowledge of the language of the people; to make them acquainted with letters; to give them the Bible with skill to read it . . . above all, to convert them from their idolatries and superstitions and vices, to the living and redeeming God."[53] The missionaries quickly learned

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[47] Interview with Dr. Hiapokeikikane Perreira, in Hilo, Haw. (Aug. 3, 2018) (hereinafter Perreira Interview).

[48] Kaʻanoʻi Walk, *Officially What? The Legal Rights and Implications of ʻŌlelo Hawaiʻi*, 30 U. Haw. L. Rev. 243, 244 (2007) (citing Mary K. Pukuʻi, E.W. Haertig & Catherine Lee, Nānā I Ke Kumu: Vol. II 124 (2d ed. 2002)).

[49] Melody Kapilialoha MacKenzie & D. Kapuaʻala Sproat, *Collective Memory of Injustice: Reclaiming Hawai'i's Crown Lands Trust in Response to Judge James S. Burns*, 39 U. Haw. L. Rev. 480, n.1 (2017).

[50] *Id.* at 481.

[51] James Crawford, *Endangered Native American Languages: What is to Be Done, and Why?*, 19 Bilingual Research Journal 17, 23 (1995).

[52] *See* Native Hawaiians Study Commission, *supra* note 32, at 186.

[53] Maenette K.P.A. Benham & Ronald H. Heck, Culture and Education Policy in Hawaiʻi 54 (1998) (citation omitted). The ABCFM went throughout the United States

the Hawaiian language and, given prior missions that created a written Tahitian language, developed a written Hawaiian language.[54] The missionaries translated the Bible, and began converting the chiefly class.[55] The chiefs quickly learned the language and saw the value of knowing how to read and write so they sent teachers throughout Hawai'i to educate the people.[56] The larger project of converting the citizenry followed as Christianity became a part of the laws and the education system.[57] The missionaries first targeted adult learners because they believed if the adult population became literate, conversion would rapidly follow.[58] In 1826, nearly 20,000 adult students were enrolled in the mission schools.[59] That number doubled to 44,895 students by 1831.[60] To support the apparent thirst for schooling, the American Board of Commissioners for Foreign Missions, established Lahainaluna, an educational institution that would train young Native Hawaiian men to become the next teachers in the community.[61]

On May 21, 1841, King Kamehameha III signed into law the creation of the Kingdom's public school system—a system some have called the oldest public education system west of the Mississippi.[62] The Hawaiian language was the main language of instruction in these government schools, also called the common schools.[63] Within thirty years of creating

and focused on indigenous communities with a goal of "extirpation of tribal cultures and the transformation of Indian children into near-copies of white children." *Id.*

[54] *Id.* at 55. The missionaries developed an "orthographic base of 12 letters" that comprised the Pī'āpā, the Hawaiian alphabet. *Id.*

[55] Ralph S. Kuykendall, The Hawaiian Kingdom 1778–1854, 106 (1980).

[56] Samuel M. Kamakau, Ruling Chiefs of Hawai'i 248–49 (1961).

[57] "When schools are established, all the people shall learn the *palapala* [scripture]." Kuykendall, *supra* note 55, at 118. Kuykendall wrote: "While it was desirable for the king and chiefs and their business agents to know English, teaching such a difficult language to the people as a whole would require an immense expenditure [sic] of time and effort. If the work of the missionaries was to be effective, it must be carried on in the native tongue." *Id.* at 104.

[58] Gavan Daws, Shoal of Time: A History of the Hawaiian Islands 90 (1968).

[59] Robert C. Schmitt, Historical Statistics of Hawaii 211 (1977).

[60] *Id.*

[61] *See* Kuykendall, *supra* note 55, at 111.

[62] Translation of the Constitution and Laws of the Hawaiian Islands, Established in the Reign of Kamehameha III, Chapter VII. A Statute for the Regulation of Schools, at 61 (1841). The Kingdom government saw the value in education:

The basis on which the kingdoms rests is wisdom and knowledge. Peace and tranquility cannot well prevail in the land, unless the people are taught in letters, and in that which constitutes prosperity. If the children are not taught, ignorance must be perpetual. The children of the chiefs cannot prosper, nor any other children . . .

Id. The statute recognized the need of education and established a school in every community where there were fifteen or more children of school age. *Id.* Three adults from the community would form a community's school committee, and would request a teacher for the school. *Id.* The community was then authorized to build a schoolhouse on unused government land.

[63] There were a number of reasons that the Hawaiian language was chosen as the medium of instruction, including that it was the official policy of the missionaries to teach in the Hawaiian language.

the written Hawaiian language, "nearly three-fourths of the Native Hawaiian population over the age of sixteen years were literate in their own language."[64]

Despite the burgeoning use of ʻŌlelo Hawaiʻi, the English language—the language of business and the missionaries—became prevalent throughout the Kingdom.[65] Up until the middle of the nineteenth century, an education in the English language was limited to missionary children, foreigners, and the chiefs.[66] In 1854, the Kingdom's Minister of Public Instruction, Richard Armstrong, recommended support for a few English language classes to Native Hawaiian children.[67] By the following year, approximately twenty schools, serving 900 students, began instruction in English.[68] One newspaper heralded the success of the English language project:

> The advocates of the movement were cheered forward . . . some of the schools have been taught by missionaries, who have thereby been enabled to meet the increased expenses of living . . . . The call for English schools is becoming louder . . . . It would be no surprising thing if . . . schools in the Hawaiian language were to be entirely supplanted by those in English.[69]

By 1866, there were twenty-eight English language schools with more than 850 students. In 1874, English language schools enrolled 2,233 students.[70] In 1866, fifty-four schools taught 4,414 native children English compared to 2,000 students in the Hawaiian language common school. By 1892, government English language schools constituted 66.7 percent of the student population, whereas government Hawaiian language schools captured 5.2 percent of the student population. The prevalence of the English language and the decline of the Hawaiian language caused many to raise concerns. In 1864, Mataio Kekūanāoʻa, president of the Kingdom's board of education and father of two kings, stated, "The theory of substituting the English language for the Hawaiian, in order to educate our people, is as dangerous to Hawaiian nationality, as it is useless in promoting the general education of the people."[71] Kekūanāoʻa pleaded, "[I]f we wish to preserve the Kingdom of Hawaii for Hawaiians, and to educate our people, we must insist that the Hawaiian language shall be the language of all our National Schools, and the English shall

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64 *See* Lucas, *supra* note 43, at 2 (citation omitted).

65 *See* Native Hawaiians Study Commission, *supra* note 32, at 193.

66 *Id.*

67 In July 1854, the Kingdom passed a law titled, "Act for the encouragement and support of English schools for Hawaiian Youth," which authorized the creation of English language schools. Law of His Majesty Kamehemeha III, 1854, at 18.

68 *See* Kuykendall, *supra* note 55, at 110.

69 Benjamin O. Wist, A Century of Public Education in Hawaii 72 (1940) (citing Missionary Herald (1855)).

70 *See* Kuykendall, *supra* note 55, at 110.

71 *See id.* at 112 (citing Biennial Report of President of Board of Education to the Legislature of 1864, at 6–8, 10–12).

be taught whenever practicable, but only, as an important *branch* of Hawaiian education."[72]

B. *Use of Hawaiian Language in Government*

As English became the dominant language in schools, it tracked the rise and prevalence of the English language in the Kingdom's official business. In 1846, the Kingdom legislature enacted a law requiring publication of all laws in Hawaiian and English in the official government newspaper.[73] Disputes began to arise when there would be conflicting interpretations of the law depending on the version of the language that was used. The Kingdom Supreme Court, however, affirmed the supremacy of the Hawaiian language. In *Metcalf v. Kahai*, for example, the court concluded that the Hawaiian version of statutes "guided" its determination.[74] There, in 1856, the plaintiff's herd of cattle trespassed onto the defendant's land, and the defendant refused to return the cattle until the plaintiff paid a dollar per cattle.[75] At issue in the matter was whether the Kingdom's estrays statute provided compensation to injured landowners in the amount of "four times the amount of damage, or of value destroyed[,]" as detailed in the English version of the law, or "a fair and reasonable amount of compensation for the loss and damage sustained[,]" as translated from the Hawaiian version of the law.[76] The court, citing "the practice of this Court hitherto," affirmed the Hawaiian language version of the statute and ruled in favor of awarding a fair a reasonable amount of compensation.[77]

Later that year, in *Hardy v. Ruggles*, the court had another opportunity to address a conflict between what version of a statute—Hawaiian or English—governed.[78] There, the court addressed whether a mortgage for chattel needed to be stamped and recorded to put defendants on notice of its existence and content.[79] The English version of the statute at issue provided in relevant part, "All bills of sale or pledges of chattel property . . . shall first be duly acknowledged and then recorded with the Registrar[.]"[80] The defendant first argued that a mortgage is not required to be recorded because the word "mortgage" does not appear in the statute and "mortgage" cannot be subsumed within the meaning of

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

[73] Second Act of Kamehameha III, ch. 1, art. 1, § 5 (April 27, 1846) ("The director of the government press shall promulgate the laws enacted by the legislative council, when directed so to do by the minister of the interior; inserting them, or if so directed, their titles and outlines, in the official organ, both in the Hawaiian and English languages.").

[74] Metcalf v. Kahai, 1 Haw. 225, 226 (Haw. Kingdom 1856).

[75] *Id.* at 225–26.

[76] *Id.* at 226.

[77] *Id.*

[78] Hardy v. Ruggles, 1 Haw. 255 (Haw. Kingdom 1856).

[79] *Id.* at 256.

[80] *Id.* (citation omitted).

the word "pledges."[81] The court rejected that argument: "It is obvious from the slightest examination of the ancient and modern writers on the law of mortgages, that a mortgage is and always has been considered a kind of pledge[.]"[82] The defendant then argued that even if the English version of the statute required that chattel mortgages be filed with the Registrar of Conveyance, the Hawaiian version of the statute did not.[83] The court isolated the words "na palapala hoolilo" from the Hawaiian statute, which took the place of "pledges" in the English version, meticulously parsed out the use of those words within the entire statute, and concluded those words meant "transfer or conveyance," which included a chattel mortgage.[84]

The court then addressed whether the Kingdom's Stamp Act required the stamping of a chattel mortgage prior to filing with the Registrar, who is authorized only to record instruments that are stamped.[85] Again, a conflict existed between the two versions of the statute: the English version required all mortgages be stamped, whereas the Hawaiian version did not.[86] Despite acknowledging that the "mother tongue" of the parties was English, the court concluded:

> . . . [W]here there is a radical and irreconcilable difference between the English and Hawaiian, the latter must govern, because it is the language of the legislators of the country. This doctrine was first laid down by the Superior Court in 1848, and has been steadily adhered to ever since. The English and Hawaiian may often be used to help and explain each other where the meaning is obscure, or the contradiction slight, but in a case like the present, where the omission in the Hawaiian is clear, it is impossible to reconcile them[.][87]

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[81] *Id.*

[82] *Id.* at 257.

[83] *Id.*

[84] *Id.* at 257–58. The court specifically determined: In the statutes of 1848, palapala hoolilo is used to signify "conveyance or transfer;" and in the act relating to the recording of conveyances, passed in 1852, "conveyance" and "conveyances" are repeatedly translated by the words palapala hoolilo and such is and has been, we believe, the invariable custom. The words "lilo" and "hoolilo," . . . are very broad and indefinite in their meaning, having no corresponding word in the English language, but, on the contrary, as being capable of answering to a hundred different words in the English language; and I have observed from a very superficial examination of our statutes, that his remark is true. They are found within the limits of a few pages to be used for the words transfer, conveyance, cession and confirmation, and include within their general meaning all manner of conveyances, conditional as well as unconditional. I have examined our statutes with some care to see if I could find the words absolute sale, conveyance or transfer, for the purpose of ascertaining how they were translated in Hawaiian, and I have found where the sale or conveyance is absolute, the words used are lilo loa, lilo loa maoli ana, hoolilo loa, lilo mau loa, and the like.

[85] *Id.* at 258–59.

[86] *Id.* at 258.

[87] *Id.* at 259. Nevertheless, the Court concluded that the Kingdom statutes, when read in pari materia, mandated that chattel mortgages must be stamped and recorded, and that the Hawaiian version of the statute had a "clerical omission[.]" *Id.*

Two years later, the court carved out a narrow exception to the supremacy of ʻŌlelo Hawaiʻi as it pertained to a dispute over whether the language of a deed between two private parties included a right of piscary as an appurtenance to the land.[88] The specific issues before the court in *Haalelea v. Montgomery*, was whether the words "a me na mea e pili pono ana" were broad enough to "carry everything appurtenant to the land embraced in the conveyance," and whether the Hawaiian version of the deed would take supremacy over the English version.[89] The court sidestepped its established jurisprudence on statutory supremacy and concluded that, in the narrow context of form deeds between private parties, the Hawaiian language version of such deed was "merely a translation" of the original English version.[90] The court acknowledged that there were no exact Hawaiian terms for the two English terms, tenements and hereditaments, that were at issue.[91] Therefore, in relation to the interpretation of a deed where legal or technical language was used, the court held: "So far then as purely legal phraseology, or words of technical import, are concerned, it would seem to us both unsafe and unreasonable, to hold that the Hawaiian translation, and not the English original, should govern . . . . "[92] The court then cautioned that following the Hawaiian translation would "unbar the door to endless litigation and fraud, and involve [the] Courts in a maze of uncertainty."[93]

However, as these cases were making their way through the judicial process, rumblings of discontent with the Hawaiian language began permeating the education system in Hawaiʻi. An article in the *Pacific Commercial Advertiser* captured the sentiment of the pro-American population: "In truth the English language . . . may with all right be called a world language; and, like the English people seems destined to prevail with away even more than at present over all portions of the globe."[94] This disdain for non-English languages became codified in law:

> It shall be the duty of the President of the Board of Education to use his best endeavors, to impress upon the minds of native parents and guardians, the importance of a knowledge of the English language to their children, and to induce them to provide for them, as soon as possible, the means of acquiring it, by contributing according to their ability, the means of supporting English schools, of good character, among them.[95]

With the growing influence of the missionary presence in Hawaiʻi, specifically as it related to education, the Legislature enacted a law

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88 Haalelea v. Montgomery, 2 Haw. 62 (Haw. Kingdom 1858).
89 *Id.* at 68.
90 *Id.* at 69.
91 *Id.*
92 *Id.*
93 *Id.*
94 *Historical Development of the English Language*, Pacific Commercial Advertiser, Mar. 17, 1859.
95 Civic Code of the Hawaiian Islands 1859, ch. 10, art. 28, § 741 (1859).

overturning the precedent set in *Hardy*. Conjuring the court's language in *Hardy*, the 1859 law provided: "If at any time a radical and irreconcilable difference, shall be found to exist between the English and Hawaiian versions of any part of this Code, the English version shall be held binding."[96]

By an Act of the Legislative Assembly, approved June 22, 1868, the judges of the Supreme Court were directed to compile the Penal Laws of the Kingdom of Hawai'i in both the Hawaiian and English languages and prepare them for publication.[97] Language similar to that of the 1859 law mentioned above was included in this verson of the Penal Laws: "As a rule, the original Hawaiian version has not been varied except where a radical and irreconciable difference existed between it and the English version, as is provided by Act of 10th January 1865, that in such cases the English verson shall be held binding."[98] Additionally, the Legislature of 1880 passed an act "To provide for the codification and revision of the Laws of the Kingdom" that included a corresponding appropriation bill for "codifying, printing, and binding the Laws of the Kingdom of Hawai'i in English and Hawaiian."[99] On May 14, 1881, Justice McCully was appointed to prepare the English version and the Honorable J.M. Kapena was to prepare the Hawaiian version "from the proof sheets of the English" because "in no other way could there be secured an exact conformity of the two versions."[100]

Despite this seeming support for the continuation of ʻŌlelo Hawai'i, the English language remained the controlling language. With the influx of immigrants to work on the sugar plantations, the government chose to educate the immigrant children in English rather than Hawaiian.[101] In an 1886 report, the minister of public education stated: "In the future, therefore, if these heterogeneous elements are to be fused into one nationality in thought and action, it must be by means of the public free schools of the nation, the medium of instruction being the English language chiefly."[102] Yet a glimmer of hope remained. In 1892, in an attempt to "reconcile" discrepancies between the translation and interpretation of laws that were written in both English and Hawaiian, the Kingdom Supreme Court concluded:

> But, though this may be the case, the two versions constitute but one act. There is no dual legislation. As a rule one version is the translation of the other. The effort is always made to have them exactly coincide, and the legal presumption is that they do. We are aware that, though the Hawaiian language is the original language of this people and country, the English language is largely in use.

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[96] *Id.* at § 1493.
[97] The Penal Code of the Hawaiian Kingdom 1869, preface (1869).
[98] *Id.*
[99] Compiled Laws of the Kingdom of Hawai'i 1884, preface (1884).
[100] *Id*.
[101] Report of the President of the Board of Education to the Hawaiian Legislature 6 (1886).
[102] *Id.*

> Of necessity the English language must be largely employed to record transactions of the government in its various branches, because the very ideas and principles adopted by the government come from countries where the English language is in use. *Not that it is exclusively employed, or that the use of the Hawaiian language in any instance would not be perfectly regular and legal. The records of our courts show pleadings of all kinds in the Hawaiian language received with as much approval as those in the English. Which language would be used would depend upon the comparative familiarity of the writer with one or the other.*[103]

Although the English language gained support during the Kingdom era, the Hawaiian language was still recognized as vital, particularly as a means for the people to communicate with or through the government. That changed in 1893.

C. *Overthrow and Regime Change*

On January 17, 1893, after attempting to promulgate a new constitution, a rogue group of pro-American citizens of the Kingdom executed their long-awaited plot to overthrow the Hawaiian monarchy and move to annex Hawai'i to the United States.[104] Sanford B. Dole—the Hawai'i Supreme Court Associate Justice who resigned his position that morning—and his compatriots, dubbing themselves the Committee of Safety, proceeded from attorney W.O. Smith's law office, to Ali'iōlani Hale, the seat of the Kingdom's government, to proclaim their new government.[105] Having received the promise of United States recognition from the American emissary, John L. Stevens, the self-proclaimed government demanded possession of Ali'iōlani Hale.[106] At approximately 2:40 p.m., with no audience in initial attendance, Henry Cooper—an American denizen lawyer who eventually became a judge and attorney general—read a proclamation declaring the end of the Kingdom and the creation of the new Provisional Government.[107] The sovereign, Queen Lili'uokalani, and her forces were ready to quash what they considered to be an internal matter.[108] But because of America's involvment and its protection of the rebel Provisional Government, the Queen chose to stand down.[109] A decision to quelch the rebellion might have provided the American troops, who were protecting the rebels, cause to use their weapons against the Queen and her citizens.[110] Placed in this precarious situation, the Queen yielded to the superior armed power of the United States.[111] She wrote a letter of protest that said, in relevant part:

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[103] In re Ross, 8 Haw. 478 (Haw. Kingdom 1892) (emphasis added).
[104] Troy J.H. Andrade, *American Overthrow*, Haw. B.J. 4 (April 2018).
[105] *Id.* at 8–9.
[106] *Id.* at 9.
[107] *Id.*
[108] *Id.*
[109] *Id.* at 10.
[110] *Id.*
[111] *Id.*

> Now, to avoid any collision of armed forces, and perhaps the loss of life, I do, under this protest and impelled by said forces, yield my authority until such time as the Government of the United States shall, upon the facts being presented to it, undo the action of its representative and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands.[112]

The overthrow of their country's government caused great concern and anger amongst the Kingdom's citizenry.[113] Civic engagement heightened dramatically. Days after the overthrow, the Hawaiian newspapers—both Hawaiian and English—took a keen interest in the issue of what was next for the Kingdom.[114] One paper reported the details of a trip by members of the self-proclaimed Committee of Safety to secure annexation to the United States.[115] An editor of the *Holomua* stated in November of 1893, " . . . [T]he action of President Harrison through his representative Minister Stevens was revolutionary, and was an act of war against a weaker nation towards which it had been on the most friendly terms for fifty years, and one which it had recognized and acknowledged as an Independent Nation."[116] In local newspapers, citizens of the Kingdom held out hope that the United States and President Grover Cleveland would make amends for the conduct of their foreign minister, just as the British made amends for the actions of Captain George Paulet fifty years prior.[117] Newspapers reported the statements and analyses made by constitutional lawyers and congressmen during the debates of annexation.[118] The Hawaiian newspapers reprinted articles published across the country on the issue of annexation.[119] These Hawaiian language newspapers printed the appeals of the Hawaiian Patriotic League to the American

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[112] *Id.* (citing "Kingdom of Hawaii—1893.01.17—Statement from Queen Liliuokalani," *Hawaiian Mission Houses Digital Archive*, accessed February 7, 2018, http://hmha.missionhouses.org/items/show/883).

[113] *See id.* at 12 (citing "President's Message Relating to the Hawaiian Islands," *in* H.R. Exec. Doc. No. 47, 53d Cong., 2d Sess., at xvi (1893) (statements of the Hawaiian Patriotic League)); *see also* Noenoe K. Silva, Aloha Betrayed: Native Hawaiian Resistances to American Colonialism 145–59 (2004) (detailing the 1897 petitions signed by a majority of Native Hawaiians vehemently opposed to annexation to the United States).

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *See* Kuykendall, *supra* note 55, at 213–20 (discussing the Paulet Affair). Rear Admiral Richard Thomas, commander of the British Squadron in the Pacific, sent Lord George Paulet to Honolulu to protect British interests. *Id.* Paulet, arrived in February of 1843 and issued a series of ultimatums that Kamehameha III refused at which point Paulet ordered the Hawaiian flag lowered and the British flag raised. *Id.* This occupation lasted five months. *Id.* Admiral Thomas himself arrived in Honolulu on the frigate Dublin on July 26, 1843, to assure Kamehameha III of the English government's good faith. *Id.* Great Britain declared Paulet's act to be unauthorized and, on July 31, 1843, the Hawaiian flag was raised once again, ending the illegal occupation. *Id.*

[118] *See* Andrade, *supra* note 104, at 12.

[119] *Id.*

government, in which the Patriotic League pled: "We cry to you for justice, and for such help as the honor and fair name of American people command you to extend us."[120]

In December 1893, after an in-depth investigation, President Cleveland condemned the action of Minister John L. Stevens, calling his conduct "an act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress[.]"[121] President Cleveland then stated that a "substantial wrong has thus been done which a due regard for our national character as well as the rights of the injured people requires that we should endeavor to repair."[122] Cleveland, however, deferred action to Congress and offered to "cooperate in any legislative plan which may be devised for the solution of the problem before us which is consistent with American honor, integrity, and morality."[123]

Congress reacted in 1894.[124] Unable to push through annexation, the United States House of Representatives concluded that "neither restoration of the Queen nor annexation to the United States" should occur, and the United States Senate determined that the people in Hawai'i had a right to "establish and maintain their own form of government and domestic polity; that the United States ought in no wise to interfere therewith; and that any intervention in the political affairs of these islands by any other government will be regarded as an act unfriendly to the United States." With annexation seemingly out of reach, on July 4, 1894, the Provisional Government declared itself the Republic of Hawai'i, with Sanford Dole as its president.

Following an unsuccessful January 1895 uprising,[125] Francisco Jose Testa, editor of the Hawaiian language newspaper *Ka Makaainana*, published a book of 104 poems or songs of "decidedly nationalist

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[120] *Id.*
[121] *Id.*
[122] *Id.* at 11.
[123] *Id.* at 11–12.
[124] *Id.* at 12.
[125] Amy K. Stillman, *History Reinterpreted in Song: The Case of the Hawaiian Counterrevolution*, 23 Hawaiian J. of History 1, 1–6 (1989). In January 1895, Robert Wilcox and Samuel Nowlein, the former head of the Queen's guards, led a final military effort to reclaim the Queen's government. *See* Andrade, *supra* note 104, at 13. A battle broke out on Diamond Head at the home of a royalist after tips of weapons being landed broke to the Republic. *Id.* During this first battle, the royalists were successful in repelling the Republic's movements. *Id.* However, two additional gun battles in Mō'ili'ili and Mānoa would prove unsuccessful for the royalists. *Id.* The royalists who fought in the insurrection were arrested and jailed. *Id.* Lili'uokalani was arrested and charged with misprision of treason—essentially knowing of the plot to take back her government and failing to report it. *Id.* The Queen was imprisoned in her own palace for eight months. *Id.*

sentiment,"[126] known as the *Buke Mele Lāhui*.[127] The book's words and lyrics in the Hawaiian language newspapers "repeatedly expressed belief or hope in the eventual restoration of the Monarchy and Kingdom[.]"[128] As Hawaiian cultural expert Kīhei de Silva wrote:

> One extraordinary feature of the *Buke* is the covert exchange of aloha between the imprisoned Queen Liliʻuokalani and her loyal subjects . . . . [T]he collection gives voice to a conversation between people who most needed to speak to each other at a time when they were most forbidden to converse. Hawaiians . . . "were surveilled"; it was their good fortune—and ours—that these surveillers [sic] placed little importance on the mele that were being published in the newspapers of their day.[129]

ʻŌlelo Hawaiʻi, thus, became an important tool to stoke the flames of resistance to what the United States acknowledged as the illegal overthrow of the Hawaiian Kingdom.

The Republic of Hawaiʻi wanted to consolidate its grip on the population. In 1896, the Republic enacted drastic changes to education that included the codification of the following law mandating English as the medium of instruction:

> The English language *shall* be the medium and basis of instruction in all public and private schools, provided that where it is desired that another language shall be taught in addition to the English language, such instruction may be authorized by the Department, either by its rules, the curriculum of the school, or by direct order in any particular instance. Any schools that shall not conform to the provisions of this Section shall not be recognized by the Department.[130]

Although the law did not, on its face, forbid the use of the Hawaiian language in public schools, the intent of the new legal regime was clear: Hawaiʻi needed to appear more American and the easiest way to do so was to annihilate the Hawaiian language. Those now in power believed that English could be used as a weapon to drive Hawaiians away from their culture, spirituality, and practices, and as a tool to assimilate Hawaiians into "a new era of social development[.]"[131] Over the course of

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[126] Kīhei de Silva, *Buke Mele Lahui, Book of National Songs*, Kaʻiwakīloumoku, http://apps.ksbe.edu/kaiwakiloumoku/makalii/reviews/book/bukesongs (last visited Mar. 24, 2020).

[127] *See* Andrade, *supra* note 104, at 13.

[128] *See* Stillman, *supra* note 125, at 5.

[129] *See* de Silva, *supra* note 126.

[130] Laws of the Republic of Hawaii Act 57, § 30, at 189 (1896) (emphasis added).

[131] A. Schutz, Voices of Eden: A History of Hawaiian Language Studies 351 (1994) (quoting Charles McEwen Hyde, Thirtieth Annual Report of the Hawaiian Evangelical Association 26 (1893)). One individual relished in the notion of what change could come from the elimination of the Hawaiian language: "The present generation will generally know English; the next generation will know little else. Here is an element of vast power in many ways. With this knowledge of English will go into the young American republican and Christian ideas; and as this knowledge goes in, kahunaism, fetishism and heathenism generally will largely go out." *See* Lucas, *supra* note 43, at 8 (quoting Reverend Dr. McArthur, The Friend, Dec. 1895, at 96).

twenty years, the number of Hawaiian medium schools decreased from 150 in 1882 to zero in 1902; the number of Hawaiian teachers dramatically decreased.[132] Children were physically punished for speaking Hawaiian in schools.[133] The Republic's "ban" on Hawaiian language reached beyond the confines of the classroom: "Hawaiian was strictly forbidden anywhere within schoolyards or buildings; physical punishment could be harsh. Teachers who were native speakers were threatened with dismissal for singing Hawaiian in school, and, at times, teachers were even sent to Hawaiian-speaking homes to reprimand parents for speaking Hawaiian to their children."[134]

Despite the policy against the Hawaiian language, the Hawaiian community continuued to resist American colonialism. Indeed, the organization and civic engagement of the Hawaiian community and the Queen effectively halted two attempts at annexing Hawai'i through a treaty—the traditional means to annex an independent nation.[135] 21,000 Native Hawaiians, which represented well over half of the adult Hawaiian population at the time, signed a petition protesting a treaty of annexation that was delivered to the United States Senate.[136] That proposed treaty, due in significant part to the overwhelming opposition from the indigenous population, was never ratified with the necessary two-thirds vote of the Senate.[137]

But the rules changed. Despite admirable efforts of resistance, in 1898, the United States used a "Joint Resolution," which required a majority vote in both chambers of Congress, to unilaterally annex Hawai'i.[138] The Joint Resolution "accepted, ratified, and confirmed" cessation of Hawai'i by the rogue Republic and "annexed" Hawai'i as part of the United States "subject to [its] sovereign dominion[.]"[139] The Joint Resolution abolished all treaties, absolved the Republic of its existing debt, banned Chinese immigrants to the islands, and created a Hawaiian Commission that would "recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper."[140]

Consistent with the mandate of the Joint Resolution to reccomend legislation to Congress, the Hawaiian Commission issued its report in

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[132] *See* Benham & Heck, *supra* note 53.
[133] *Id.*
[134] *See* Lucas, *supra* note 43, at 9.
[135] *See* Andrade, *supra* note 104, at 13 (citing Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States," ch. 55, 30 Stat. 750 (1898)).
[136] *See* Silva, *supra* note 113, at 145–59.
[137] Jon Van Dyke, Who Owns the Crown Lands of Hawai'i? 209–11 (2009).
[138] "Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States," ch. 55, 30 Stat. 750 (1898). Modern Hawaiian legal scholars have questioned the power of Congress to unilaterally annex another sovereign entity without a treaty. *See* Williamson Chang, *Darkness Over Hawaii: The Annexation Myth is the Greatest Obstacle to Progress*, 16 Asian-Pac. L. & Pol'y J. 70 (2015).
[139] *Id.*
[140] *Id.*

November 1898.[141] The Hawaiian Commission report noted that there were 39,000 Native Hawaiians of the 110,000 inhabitants in Hawaiʻi, and that these Hawaiians were "a kindly, affectionate people, confiding, friendly, and liberal, many of them childlike and easy in habits and manners, willing to associate and intermarry with the European or other races, obedient to law and governmental authority."[142] The Hawaiian Commission highlighted the importance of the English language to their project of Americanizing Hawaiʻi:

> With the certain attrition which is bound to exist between them and the Americans in Hawaii, and under the influence of the existing public-school system, which makes the study of the English language compulsory, they promise to become a good class of people for the growth of republican ideals.[143]

The report further stated:

> The laws of Hawaii already provide that school attendance by all persons of school age shall be compulsory, and also that the English language shall be the universal language taught. The effect of these two enactments is the most beneficial and far-reaching in unifying the inhabitants which could be adopted. It operates to break up the racial antagonisms otherwise certain to increase, and to unite in the schoolroom the children of the Anglo-Saxons, the Hawaiians, the Latins, and the Mongolians in the rivalry for obtaining an education. No system could be adopted which would tend to Americanize the people more thoroughly than this.[144]

The Hawaiian Commission also made the bold recommendation of abolishing mixed juries and instead imposing a jury system in which the jury "shall be composed of citizens of the United States who understand the English language, without respect to color or blood."[145] The Commission continued, "As the Hawaiians will become citizens of the United States and as most of them understand the English language, the greater portion of them will be competent to sit on juries."[146] The Commission then tried to rationalize their proposed "ban" of Hawaiian language in court processes by raising fiscal concerns: "The requirement that they shall understand the English language is designed not to exclude the Hawaiians, but to avoid the expense and delay that would result if all proceedings had to be gone through in both languages through an interpreter."[147] The Commission thus proposed to Congress the following

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[141] Hawaiian Commission, Message from the President of the United States, transmitting "The Report of the Hawaiian Commission, Appointed in Pursuance of the 'Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States,' approved July 7, 1898," *in* 55th Congress, 3d Session, Senate, Doc. No. 16 (Dec. 6, 1898) at 3.

[142] *Id.*

[143] *Id.*

[144] *Id.* at 10.

[145] *Id.*

[146] *Id.* at 163.

[147] *Id.*

language about juries: "[N]o person who is not a citizen of the United States or who can not understandingly speak, read, and write the English language, shall be a qualified juror in any court of the Territory of Hawaii."[148] The Hawaiian Commission made these reccomendations despite ʻŌlelo Hawaiʻi being "the language understood by the majority of the electorate and citizens of the new territory[.]"[149] Indeed, "While the Hawaiian language was still quite strong in public life in the early days of the Territory, the main loss of language came through the school system, which attacked the language at its most vulnerable and important point, the children of Hawaiian-speaking homes."[150]

The English language was thus used as a weapon to Americanize the people of Hawaiʻi and hasten the elimination of the Hawaiian.[151] In 1900, based primarily upon the recommendation of the Hawaiian Commission, Congress passed the Organic Act, which, as relevant to language, required that "[a]ll legislative proceedings shall be conducted in the English language" and mandated that "[N]o person who is not a male citizen of the United States and twenty-one years of age and who cannot understandingly speak, read, and write the English language shall be a qualified juror or grand juror in the Territory of Hawaii."[152]

Nevertheless, many made sincere efforts to try and preserve the Hawaiian language. Indeed, the resistance to English as the primary language of government did not fade. In 1901, House Bill 55, which would have allowed the teaching of the English and Hawaiian languages in all public and private schools, was introduced and debated. Representative Kaniho from Hawai'i Island favored passage of the bill as he received a "great number of petitions praying the bill pass[.]"[153] Another legislator "strongly favored the passing of the bill in order to perpetuate the Hawaiian language, which under the present order of things, was gradually dying out and it would only be a question of a few years when there would be no need of a Hawaiian language[.]"[154] Representative Kaauwai, who

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[148] *Id.* at 39.

[149] *See* Native Hawaiians Study Commission, *supra* note 32, at 195.

[150] *Id.* at 196.

[151] This is not unlike what occurred to Native Americans. The official policy of the United States in 1887, for example, provided:

> This language [English], which is good enough for a white man and a black man, ought to be good enough for the red man . . . . The first step to be taken toward civilization, toward teaching the Indians the mischief and folly of continuing in their barbarous practices, is to teach them the English language. The impracticability, if not impossibility, of civilizing the Indians of this country in any other tongue than our own would seem to be obvious . . . . [W]e must remove the stumbling-blocks of hereditary customs and manners, and of these language is one of the most important elements.

See Dussias, *supra* note 37, at 905 (citing 1887 Comm'r of Indian Affairs Ann. Rep. xxiii).

[152] An Act to Provide a Government for the Territory of Hawaii, 56 Cong., 31 Stat. 141, §§ 41, 83 (1900) (hereinafter Organic Act).

[153] *Small Day's Work Done by the House*, Honolulu Republican, Apr. 25, 1901, at 8.

[154] *Id.*

introduced the bill, lamented: "The Hawaiian language would soon become extinct if some action was not taken to perpetuate it."[155] Yet others, like Representative Robertson, saw little need to keep the Hawaiian language alive: "The English language was gradually becoming the universal language of the world . . . . It would be a good deal better to drop the antique Hawaiian language and adopt the coming language of the world."[156] Native Hawaiian Republicans ran on a platform that included amending the law that English be the official language of legislative proceedings.[157]

The push to Americanize became more vocal. The *Pacific Commercial Advertiser* ran an article that stated that Congress "meant just what it said" when requiring English as the language for legislative proceedings in the Organic Act: "It meant that the dual nationality—the dual language, which had up to that time been one of the fundamental principles of the Hawaiian government, should be abolished, and that but one nationality—American—and one language—English—should hereafter be recognized in the government of Hawaii."[158] The paper argued that there was "no sense" in electing a man that spoke ʻŌlelo Hawaiʻi to serve in an English language only legislature.[159] The pro-American paper then compared such a Hawaiian speaking man to others: "They can elect a man who is deaf, dumb and blind; they can elect a gambler, an embezzler and a horse-thief—provided he has not been legally convicted; they can elect any half-brained, harum-scarum adventurer who has escaped the criminal courts, if they choose to do so."[160]

In March 23, 1903, Representative Charles H. Pulaʻa introduced a joint resolution requesting that Congress amend the Organic Act so as to permit the use of the Hawaiian Language[.]"[161] The measure passed the Territorial legislature.

On April 7, 1903, Territorial Governor Sanford B. Dole—the same individual who conspired against the Kingdom a decade earlier—vetoed the legislation and noted that it "goes without saying[]" that the requirement of English in government proceedings was "an important and reasonable requirement of a territory of the United States looking forward to statehood[.]"[162] In vetoing the measure and with the prospect of statehood on his mind, Dole argued that the request to allow the Hawaiian language in legislative proceedings would stand to "prejudice the standing of the territory before such authorities upon the question of the

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[155] *Id.*
[156] *Id.*
[157] *Senate Overrides Veto*, Hilo Tribune, Apr. 17, 1903, at 2.
[158] *All Legislative Proceedings Shall be Conducted in the English Language*, Pacific Commercial Advertiser, Jan. 31, 1903, at 4.
[159] *Id.*
[160] *Id.*
[161] H. Joint Res. 2, H. Sess. (1903), Haw. St. Archives Box 11, Series 228—Rec. of the Clerks.
[162] 1903 Haw. Terr. House Journal, Governor's Message No. 8 (Apr. 7, 1903), at 505.

admission of the Territory of Hawaii as a state of the American Union."[163] He cited the deliberations in Congress about statehood for Oklahoma, Arizona, and New Mexico, and noted that the opposition to those statehood bills because of the "backward condition of the people of Arizona and New Mexico as to the use of the English language and of the fact that the conduct of both courts and legislatures require the assistance of interpreters."[164] He concluded his opposition to the resolution by relegating Hawaiian language as useless: "the allowance of the Hawaiian together with the English language as a medium for the conduct of legislative proceedings, would tend to delay legislative work and add to its expense without any corresponding public benefit."[165]

The Territorial Legislature overrode Dole's veto.[166] The Hawaiian language newspaper, *Ke Aloha Aina*, praised Representative Pula'a: "It was your patience and skill and electrified Law expertise, you acted with patience and hard work, refusing the law suppressing the Hawaiian language to die for all times, saving it from being extinguished. And for that fearless efforts of yours, we therefore give and extend our great appreciation to you."[167] The United States Congress, however, did not act on the request, and the Hawaiian language was driven to near extinction. In a 1917 article in *Ka Puuhonua o Na Hawaii*, the author decried the state of the Hawaiian language: "[t]here is no child under 15 years of age who can converse correctly in the mother tongue of this land."[168] The newspapers that had been the voice of resistance dwindled from twelve in 1910 to one in 1948.[169] The project of Americanization was near complete.

Over the next few decades, although unsuccessful in fully integrating the Hawaiian language back as the medium of education, some Territorial legislators tried their best to keep the Hawaiian language alive in schools. In 1919, for example, the Territorial Legislature revised the mandate on English as the medium of instruction by adding the following language: "Provided, however, that the Hawaiian language shall be taught in addition to the English in all normal and high schools of the territory . . . provided, further, that instruction in such courses shall be elective."[170] In 1935, the Territorial Legislature slightly revised the law by adding the following: "and that daily instruction for at least ten minutes in conversation or, in the discretion of the department, in reading and writing, in the Hawaiian language shall be given in every public school conducted in any settlement of homesteaders under the Hawaiian

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[163] *Id.* at 506.
[164] *Id.* at 505.
[165] *Id.* at 506.
[166] *Id.*
[167] *Hon. Chas. H. Pulaa Praised and the Hawaiian Language and More 1903—Ke Aloha Aina*, Nupepa, May 23, 1903, at 6, http://nupepa-hawaii.com/2018/01/30/hon-charles-h-pulaa-and-the-hawaiian-language-and-more-1903.
[168] *Ka Puuhonua o Na Hawaii*, Jan. 26, 1917.
[169] *Id.* at 10.
[170] 1919 Haw. Sess. Laws Act 191, § 1.

Homes Commission[.]"[171] Although admirable, these amendments were, as one scholar described, "at best—farcical, and—at worst—insulting to the language and culture."[172] Moreover, the Territorial Department of Education, which was controlled by the American appointed governor, did nothing to enforce the laws passed by the popularly-elected territorial legislators.[173] America and those that ran the Territory, drove ʻŌlelo Hawaiʻi out of the government and out of the public lives of people in Hawaiʻi.[174]

Despite the best efforts of the English language proponents of the Territory, ʻŌlelo Hawaiʻi remained an integral part of certain sectors of public life in Hawaiʻi.[175] "Resistance to English usage was steadfast in Hawaiian churches, where reading and writing Hawaiian language was incorporated into the Sunday school curriculum."[176] The Hawaiian press also perpetuated the use of ʻŌlelo Hawaiʻi even under the threat of policies to replace it with English.[177] "In the initial years of the territory, the press moved into areas such as the printing of traditional stories and modern, locally-produced nonfiction about the history of folk heroes who defended Hawaiian soverignty."[178] Additionally, many parents and grandparents refused to speak English to their children in spite of discouragement by teachers.[179] "In many cases families refused to allow children to speak any English to them at all, because they believed that Hawaiians should speak to one another in their own language."[180]

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[171] 1935 Haw. Sess. Laws Act 22, § 1, 23. Passed by Congress and signed into law by President Warren Harding on July 9, 1921, the Hawaiian Homes Commission Act provided for the rehabilitation of the native Hawaiian people through a government-sponsored homesteading program. *See* Hawaiian Homes Commission Act, ch. 42, 42 Stat. 108 (1921) (formerly codified as amended at 48 U.S.C. §§ 691–718 (1958)) (omitted from codification in 1959) (set out in full as amended at Hawaiian Homes Commission Act, 1920, §§ 1–516). The American government defined "native Hawaiian" as individuals having at least one-half Hawaiian blood. *Id.* Pursuant to provisions of the Act, the Department of Hawaiian Home Lands provided direct benefits to native Hawaiians in the form of ninety-nine-year homestead leases at an annual rental of one dollar. *Id.*

[172] *See* Schutz, *supra* note 131.

[173] *See* Native Hawaiians Study Commission, *supra* note 32, at 196. The two major laws being referred to here are the act of 1919, requiring that ʻŌlelo Hawaiʻi be taught in high schools and teacher's colleges, *see* 1919 Haw. Sess. Laws Act 191, § 1, and a 1935 provision requiring daily instruction in the Hawaiian language in schools serving Hawaiian Homestead areas, *see* 1935 Haw. Sess. Laws Act 22, § 1, 23. Both provisions were removed in 1968, but a new requirement was revived in the form of an amendment to the Hawaiʻi Constitution in 1978.

[174] *See* Native Hawaiians Study Commission, *supra* note 32, at 195.

[175] *See id.* at 196–97.

[176] *Id.* at 196.

[177] *Id.*

[178] *Id.* at 197.

[179] *Id.*

[180] *Id.*

D. *1978 Hawai'i State Constitutional Convention and Revival*

After Hawai'i became a State in 1959, and decades after the Americanization project inculcated thousands of students, a dramatic cultural, spiritual, and most importantly, political renaissance occurred in Hawai'i. With Hawaiian families in the streets and on the beaches, Native Hawaiians rallied together in the 1960s and 1970s to hold the State government accountable for their gross mismanagement of the Hawaiian Home Lands trust, which was transferred in part to the State as a condition of Statehood.[181] Native Hawaiians regained an understanding of their past, internalized the rediscovered philosophy of aloha 'āina (respect for the land), and began to challenge the militarization of the islands, specifically by protesting the bombing of the island of Kaho'olawe, off the southern coast of Maui.[182] This elevation of a Hawaiian political consciousness led to gatherings of Hawaiians—the likes of which were likely not organized since the opposition to annexation failed at the turn of the twentieth century—to discuss sovereignty and to resolve the injustices like the significant loss of land, culture and language suffered by Native Hawaiians, culminating in the State's 1978 Constitutional Convention.

From Statehood to the 1978 Convention, Hawai'i had seen two iterations of its constitution with one constitutional convention in 1968.[183] The 1968 Con-Con, however, had done nothing to better the conditions of Hawai'i's indigenous people. Indeed, 1968 Con-Con Delegate James Bacon had introduced a proposal requiring the State to "preserve and enhance Hawaiian conditions."[184] His proposal was shot down, but not before he was forced to defend it by saying that the proposal was "not a laughing matter[.]"[185]

The 1978 Con-Con was fundamentally different. With a campaign by the League of Women Voters and Common Cause Hawaii, and the support of the local media, the 1978 Convention was framed as a "grassroots" convention.[186] Public office holders were discouraged from running as delegates, and it worked. Compared to the 1968 Con-Con, where one-third of the delegates were legislators and most of the rest were closely associated with the political elite, the 1978 Con-Con aptly represented a body dubbed the "People's Convention": only seven of the 102 delegates had held political office; there were thirty women compared with seven

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[181] *See* Paul Nāhoa Lucas, Alan T. Murakami, & Avis Kuuipoleialoha Poai, *Hawaiian Homes Commission Act*, *in* Native Hawaiian Law: A Treatise 187 (MacKenzie ed., 2015) (discussing the history of the Hawaiian Homes Commission Act).

[182] *Id.* at 162.

[183] *See* Haw. Const. (1950); Haw. Const. (1968).

[184] State of Hawai'i, Proceedings of the Constitutional Con. of Haw. of 1968, vol. I, Journal and Documents, at 209 (1973).

[185] State of Hawai'i, Proceedings of the Constitutional Con. of Haw. of 1968, vol. II, Committee of the Whole Debates, at 518 (1972) (Statement of Delegate James Bacon).

[186] Interview with John D. Waihe'e, III, in Honolulu, Haw. (Apr. 16, 2015) (hereinafter Waihe'e Interview).

women ten years earlier, and almost half of the delegates were under thirty-four years old.[187]

Several Native Hawaiians took a chance at running to be a delegate, including John D. Waiheʻe, III.[188] Waiheʻe—a recent graduate of the University of Hawaiʻi Law School whose first two cases were defending a Native Hawaiian charged with illegally hunting on another's property and another defending a Native Hawaiian charged with trespassing on Kahoʻolawe—had participated in gatherings and organizations prior to the Con-Con that discussed significant community concerns in Hawaiʻi.[189] Waiheʻe won the contest for a coveted seat as a delegate and joined 101 others for the Con-Con.[190]

Waiheʻe would become a major power broker at the Con-Con.[191] He requested and was granted a new Hawaiian Affairs Committee.[192] Waiheʻe singled out Con-Con delegate Frenchy DeSoto, from the Native Hawaiian enclave of Waiʻanae, to be selected as the chair of this newly established Hawaiian Affairs Committee. His request was granted.

The scope of the Hawaiian Affairs Committee was to consider proposals related to: (1) the protection and perpetuation of ancient Hawaiian rights, traditions, heritage, and archaeological sites; (2) the implementation of native Hawaiian culture and language; (3) the preservation of native Hawaiian vegetation and crops; (4) the recognition of problem areas common to native Hawaiians to provide for the betterment of native Hawaiian conditions; and (5) the Hawaiian Homes Commission Act.[193]

Although it did not have much support, the Hawaiian Affairs Committee, under Desoto's leadership, developed bold ideas for addressing the concerns of Hawaiians.[194] The Hawaiian Affairs Committee recommended passage of Committee Proposal No. 12, which provided in relation to the Hawaiian language that an amendment was necessary "to

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[187] State of Hawaiʻi, Proceedings of the Constitutional Convention of 1978, vol. I, at vii (1980) (hereinafter 1978 Proceedings Volume I), http://digitalcollections.hawaii.gov/docs/concon/1978/1978%20Con%20Con%20Journal%20Vol-1%20Journal.pdf.

[188] Waiheʻe Interview, *supra* note 186.

[189] *Id.*

[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] Constitutional Convention of Hawaii of 1978, Committee on Hawaiian Affairs: Scope, retrieved from the Hawaiʻi State Archives (July 20, 1978) (on file with author). Although there was a cultural and political renaissance that led up to the Con-Con, the affairs of the Kānaka Maoli were not something of a hot-button issue for the convention. For example, the Legislative Reference Bureau provided a briefing report for Hawaiian Affairs Committee members about issues facing Hawaiians, which included a primary focus on the Hawaiian Homes Commission Act and how nothing much could be done as it was established by federal law. Tom Coffman, The Island Edge of America: A Political History of Hawaiʻi 308–09 (2003). The report suggested no new ideas on how to advance its declared scope. *Id.*

[194] *See* Stand. Comm. Rep. No. 57, *in* 1978 Proceedings Volume I, *supra* note 187, at 637–41.

give full recognition and honor to the rich cultural inheritance that Hawaiians have given to all ethnic groups of this state[.]"[195] The Committee further concluded that it was "cognizant of certain practical problems that might exist if Hawaiian was declared an official language without any proviso."[196] The Committee noted, "[a]t this point in history, it might be too expensive and impractical to require both languages in these situations[,]" and delegated authority to the State legislature to determine what government documents and acts "to be in both languages.[197]

A week later, the Committee of the Whole adopted the "official language" amendment, noting "Your Committee wanted to overcome certain insults of the past where the speaking of Hawaiian was forbidden in the public school system and of today where Hawaiian is listed as a foreign language in the language department at the University of Hawaii."[198] In the end, the Committee's work to promote the Hawaiian language sailed through the convention, was ultimately ratified by the people of Hawai'i, and was subsequently codified in the Hawai'i Consitution as article XV, section 4 and provided: "English and Hawaiian shall be the official languages of Hawaii, except that Hawaiian shall be required for public acts and transactions only as provided by law."[199]

Building off of the Hawaiian Renaissance and the key legal changes at the 1978 Constitutional Convention, a group of language protectors created the 'Aha Pūnana Leo.[200] In 1983, less than fifty children under the age of eighteen were able to speak the Hawaiian language fluently.[201] This staggering statistic lead the kūpuna (elders) to realize that unless they took action, they were going to be the last generation to be able to speak the Hawaiian language.[202] They knew that their days were numbered, and wanted to pass their knowledge down to the newer generations, so that the language could survive and thrive.[203] These wise leaders created the 'Aha Pūnana Leo, a Native Hawaiian nonprofit established in 1983 with a mission to revitalize the Hawaiian language as a living language.[204] The creation of the nonprofit led to the establishment of the Pūnana Leo preschools, which were Hawaiian language immersion schools modeled after immerson schools in Aotearoa.[205] However, these

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[195] *Id.* at 638.
[196] *Id.*
[197] *Id.*
[198] *See* Comm. Whole Rep. No. 12, *in* 1978 Proceedings Volume I, *supra* note 187, at 1016.
[199] Haw. Const. art. XV, § 4.
[200] *History*, 'Aha Pūnana Leo, http://www.ahapunanaleo.org/index.php?/about/history (last visited Mar. 24, 2020).
[201] *Id.*
[202] *What is Pūnana Leo?*, 'Oiwi TV (June 4, 2013), http://oiwi.tv/apl/what-is-punana-leo.
[203] *Id.*
[204] *About Us*, 'Aha Pūnana Leo, http://www.ahapunanaleo.org/index.php?/about (last visited Mar. 24, 2020).
[205] *See* 'Aha Pūnana Leo, *supra* note 200.

immersion schools were facing shutdown because Hawai'i's law in 1984 still required the English language as the medium of instruction.[206] Thus, although the school was set up and operating, it was in violation of the law as the Hawaiian language "ban" against using and teaching ʻŌlelo Hawaiʻi in schools was still in effect.[207] It took another two years after the establishment of the Pūnana Leo preschools for the leaders of the Hawaiian language movement to finally get the "ban" on teaching through the medium of Hawaiian language reversed.[208]

E. *Native American Languages Act of 1990*

In 1990, Congress enacted the Native American Languages Act of 1990 (Languages Act).[209] Championed by Hawai'i's senior United States Senator, Daniel K. Inouye, the Languages Act recognized the value in preserving and fostering further development of "the historical, traditional languages spoken by Native Americans," which included Native Americans, Native Hawaiians, Alaska Natives and indigenous peoples in the American Pacific.[210] The provisions of the Act were drawn from a 1987 resolution from the Hawai'i State Legislature that sought federal legislation to support Native American languages.[211] That State resolution was led by the founders of ʻAha Pūnana Leo.

The Languages Act, according to one scholar, "appeared to represent a repudiation of past government policies aimed at suppressing and ultimately eradicating the traditional languages of the indigenous peoples of the United States and replacing them with English."[212] The new law

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[206] *See* Haw. Rev. Stat. § 298-2 (1984) ("The department shall regulate the courses of study to be pursued in all grades of public schools and classify them by such methods as it shall deem proper; provided, that the course of study and instruction in the first eight grades shall be so regulated that not less than fifty per cent of the study and instruction in each school day shall be devoted to the oral expression, the written composition, and the spelling of the English language.").

[207] *Id.*

[208] 1986 Haw. Sess. Laws Act 47, at 51 (1986) (amending the law to allow courses of study in the English language, "except for special projects using the Hawaiian language as approved by the board of education").

[209] Native American Languages Act, Pub. L. No. 101-477, 25 U.S.C. § 2901 (1990).

[210] 25 U.S.C. §§ 2902(1)–(6) (1990). Senator Daniel K. Inouye, a cosponsor of the bipartisan legislation and celebrated proponent for indigenous communities, urged passage of the legislation to preserve and develop Native American languages. *See* Ryan Wilson, *Senator Daniel K. Inouye*, Tribal College J. Am. Indian Higher Educ. (2013), http://tribalcollegejournal.org/senator-daniel-k-inouye.

[211] Dorothy Aguilera & Margaret D. Lecompte, *Restore My Language and Treat Me Justly: Indigenous Students' Rights to Their Tribal Languages*, *in* Affirming Students' Right to Their Own Language: Bridging Language Policies and Pedagogical Practices 77 (Scott, Straker, & Katz eds. 2009) ("In 1987, Pūnana Leo developed a state legislature resolution calling for reversal of the federal policy that had earlier resulted in Hawaiian language being banned as a medium of education in territorial schools. The resolution was taken to Hawai'i Senator Daniel Inouye, then head of the Senate Indian Affairs Committee, for introduction as a bill to be called that Native American Languages Act.").

[212] *See* Dussias, *supra* note 37, at 939.

recognized the distinct cultural and political rights of indigenous groups, and the federal government's role to act together with Native Americans to ensure the survival of these unique cultures and languages."[213] The Senate's report on the Languages Act determined that: "Language is the basis of culture. History, religion, values, feelings, ideas and the way of seeing and interpreting events are expressed and understood through language[,]" and thus, languages are "critical to the survival of cultural and political integrity of any people."[214]

III. Modern Hawaiian Language Challenges in Federal Court

Yet with all the gains made in law and in practice with the ʻAha Pūnana Leo program, the courts were still coy to allow the Hawaiian language to flourish. The resistance to the extinction of the Hawaiian language manifested itself in the modern era in two federal court cases—both of which upheld the right of the government to deny the use of the indigenous language.

A. *Tagupa v. Odo*

In 1993, Native Hawaiian attorney William E.H. Tagupa filed a federal employment discrimination lawsuit in Hawai'i state court.[215] Tagupa, a male of part-Native Hawaiian descent, applied for a faculty position at the University of Hawai'i's Ethnic Studies Program.[216] Tagupa was not hired and he subsequently filed his lawsuit.[217] Upon the State's request,

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[213] 25 U.S.C. § 2909(1); *see also* Kamanaonāpalikūhonua Souza & K. Kaʻanoʻi Walk, *ʻōlelo Hawai'i and Native Hawaiian Education*, *in* Native Hawaiian Law: A Treatise 1290 (MacKenzie ed., 2015). The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) has two articles that specifically reference language. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), available at http:// www.un.org/esa/socdev/unpfii/en/drip.html. Article 13 guarantees the right of indigenous peoples to "revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons." *Id.* Additionally, Article 13 provides that countries that have adopted the UNDRIP will take "effective measures to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means." *Id.* Article 14 mandates that indigenous peoples have the right to "establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning." *Id.* Furthermore, Article 14 requires countries to take effective measures to ensure that indigenous individuals, particularly children, including those living outside their communities, have access, when possible, to an education in their own culture and provided in their own language. *Id.*

[214] S. Rep. No. 101-250, at 1 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1840, 1841; 25 U.S.C. § 2901(9).

[215] Tagupa v. Odo, No. 94-16898, 1996 U.S. App. LEXIS 20489, at *3 (9th Cir. Aug. 8, 1996).

[216] *Id.* at *2.

[217] *Id.* Tagupa initially filed a complaint with the Office of Federal Contract Compliance Programs (OFCCP) in 1991, alleging that the university's selection committee,

the federal court removed the matter from state court.[218] After proceeding in federal court, Tagupa chose, despite his ability to speak in English, to give his deposition in the Hawaiian language.[219] Tagupa believed that "If Hawaiians [are] not going [to] use [the Hawaiian language], who will?"[220] The federal magistrate judge granted a protective order in the case that "required Mr. Tagupa to respond in English at his oral deposition."[221] Tagupa appealed the evidentiary ruling to the district court judge, President Ronald Reagan's appointee Alan C. Kay, and argued that the order violated the Hawaiʻi Constitution and the federal Languages Act.[222]

Judge Kay first addressed Tagupa's challenge pursuant to Article XV, section 4 of the Hawaiʻi Constitution, which again provided that, "English and Hawaiian shall be the official languages of Hawaii, except that Hawaiian shall be required for public acts and transactions only as provided by law."[223] After determining that "a definitive judicial determination" of the issue of whether Tagupa had a constitutionally protected right was "better left to the Hawaii state courts[,]" Judge Kay criticized Tagupa's request as "an unnecessary expense that would needlessly complicate and delay the deposition process."[224] Judge Kay concluded: "The mere fact that Hawaiian is also an official language of Hawaii does not compel this Court to ignore the practical realities of this dispute."[225] Therefore, despite his statement that he would let the state court decide the scope of the constitutional protection for the Hawaiian language, Judge Kay implicitly made that decision and placed the interest of judicial efficiency above the constitutional protection of ʻŌlelo Hawaiʻi.[226] Judge Kay determined that pursuant to the Federal Rules of Civil Procedure, the magistrate judge's order would stand as it was not "clearly erroneous or contrary to the law."[227]

Judge Kay then addressed Tagupa's argument that the Languages Act provided federal protection for his use of the Hawaiian language in federal judicial proceedings.[228] The Languages Act stated that "[i]t is

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chaired by Franklin Odo, discriminated against him because of his race and gender. *Id.* The OFCCP subsequently concluded that the selection committee did not discriminate against Tagupa. *Id.*

[218] Tagupa v. Odo, 843 F. Supp. 630, 631 (D. Haw. 1994).

[219] *Id.*

[220] Summer Kupau, *Judicial Enforcement of "Official" Indigenous Languages: A Comparative Analysis of the Māori and Hawaiian Struggles for Cultural Language Rights*, 26 U. Haw. L. Rev. 495, 495 n. 5 (citation omitted).

[221] *Tagupa*, 843 F. Supp. at 631.

[222] *Id.*

[223] *Id.* (citing Haw. Const. art. XV, § 4).

[224] *Id.*

[225] *Id.*

[226] *Id.*

[227] *Id.* (citing Fed. R. Civ. P. 72(a)).

[228] *Id.* at 631–32. The term "Native American" in the Languages Act included anyone of Native Hawaiian ancestry. *See id.* at 632 n. 3 (citing 20 U.S.C. § 4909 (defining

the policy of the United States to . . . preserve, protect, and promote the rights of Native Americans to use, practice, and develop Native American languages."[229] Section 2904 of the Languages Act also provided that the rights of "Native Americans to express themselves through the use of Native American languages *shall not be restricted in any public proceeding*, including publicly supported education programs."[230] Despite recognizing that Congress "believed that these protections were essential to ensuring its goal of protecting and encouraging the unique language and culture embodied by populations like Native Hawaiians[,]" Judge Kay again shot down the use of ʻŌlelo Hawai'i: "Congress did not, however, intend to extend the Languages Act to judicial proceedings in federal courts."[231] Judge Kay concluded that the Languages Act dealt "*almost* exclusively" with indigenous languages in the context of education and instruction.[232] As such, Tagupa's discrimination claim against the University of Hawai'i, according to Judge Kay, did not "implicate[] the rights of Native Hawaiians to maintain their culture and preserve the use of their language."[233] Judge Kay again reiterated that Tagupa was a licensed member of the Hawai'i bar who understood English and the American judicial process, and thus, "no legitimate fact finding rationale support[ed] his right to give a deposition in a language other than English."[234] Judge Kay highlighted the "needless delays and costs" that would come from Tagupa expressing himself in his indigenous language.[235] Judge Kay, therefore, rejected Tagupa's challenge and ordered him, in much the same ways that

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Native Hawaiian as any individual who is: (1) a citizens of the United States; (2) a resident of the State of Hawai'i; and (3) a descendant of the aboriginal people, who prior to 1778, occupied and exercised sovereignty in the area that now comprises the State of Hawai'i)).

[229] *Id.* at 631 (citing 25 U.S.C. § 2903 (1990)).

[230] *Id.* at 631–32 (emphasis added) (citing 25 U.S.C. § 2904 (1990)).

[231] *Id.* at 632.

[232] *Id.* (emphasis added). The court recognized that 25 U.S.C. § 2903(6) (1990) allows Native American governing bodies, States, territories, and possessions of the United States "to take action on, and give official status to, their Native American languages for the purpose of conducting *their own business*." (Emphasis added).

[233] *Id.*

[234] *Id.* at 632–33.

[235] *Id.* at 633. The court further relied upon Rule 1 of the Federal Rules of Civil Procedure, which required that the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." *Id.* The court specifically added that allowing Tagupa to provide his deposition in Hawaiian would "have the exact opposite effect. It would greatly increase the costs of litigating this dispute without any corresponding improvement in the accuracy of Mr. Tagupa's deposition testimony." *Id.* Finally, the court relied upon the Civil Justice Reform Act of October 27, 1990, which provided in relevant part: "High and increasing litigation costs cast doubt upon the fairness of the civil justice system and its ability to render justice, because those costs unreasonably impede access to the courts and make it more difficult for aggrieved parties to obtain proper and timely judicial relief or, in some cases, to obtain any relief at all." *Id.* (citation omitted). The court affirmed the magistrate judge's decision "because requiring an interpreter would prevent the just, speedy and inexpensive resolution of this case[.]" *Id.*

pro-American interests forced English onto the Native Hawaiian people, "to respond in English at his oral deposition."[236]

B. *Office of Hawaiian Affairs v. Department of Education*

On November 27, 1995, the Office of Hawaiian Affairs (OHA)—an agency also created in the 1978 Constitutional Convention to ensure the betterment of the conditions of native Hawaiians[237]—filed a lawsuit against the State of Hawaiʻi Department of Education (DOE) in the State trial court requesting that the defendants provide sufficient resources, including teachers, classrooms, and learning materials, for Hawaiian language immersion programs in public schools.[238] Indeed, OHA's expert in Hawaiian education, Dr. William Wilson, concluded that the DOE "restricted" the use of Hawaiian language in schools by:

> (1) failing to open up sufficient slots for more students to participate in the immersion programs, (2) placing immersion schools in inconvenient and out-of-the-way locations without providing transportation to those schools, (3) valuing teachers with DOE certification over those with Hawaiian language skills, and (4) failing to promise a continued State commitment to immersion programs so that parents will be encouraged to place their children in these programs.[239]

Two months after the lawsuit was filed, the defendants had it removed to federal court.[240]

In the lawsuit, OHA alleged that the DOE failed "to provide sufficient Hawaiian language in Hawaii's public schools[,]" in violation of: first, the State constitutional provision, Article X, Section 4, which required a "comprehensive Hawaiian education program"; second, the State law, Hawaiʻi Revised Statutes section 1–1, which protected "customary rights" of Hawaiians to use their Hawaiian language; third, the Languages Act; and finally, the First and Fourteenth Amendments of the United States Constitution.[241] The "crux" of OHA's argument was that the State and the DOE "should provide more Hawaiian language immersion programs in public schools."[242]

Despite requesting the removal to federal court, the DOE filed a motion for judgment on the pleadings and first argued that the state law claims should be remanded to the state court.[243] With regard to the federal law claims, the DOE contended that OHA had "no claim under [the Languages Act] because (1) the [Languages] Act provide[d] no private

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[236] *Id.* at 633.

[237] *See* Troy J.H. Andrade, *(Re)Righting History: Deconstructing the Court's Narrative of Hawai'i's Past*, 39 U. Haw. L. Rev. 631, 641–57 (2017) (discussing the creation of OHA and the subsequent legal challenges against the entity).

[238] Office of Hawaiian Affairs v. Dep't of Educ., 951 F. Supp. 1484, 1487–88 (D. Haw. 1996).

[239] *Id.* at 1494.

[240] *Id.* at 1487.

[241] *Id.*

[242] *Id.*

[243] *Id.* at 1488.

right of action and (2) the [Languages] Act provide[d] no enforceable rights which entitled [OHA] to sue under [42 U.S.C.] § 1983."[244] Thus, the "sole" issue before the federal district court was whether the Languages Act conferred a private cause of action to sue.[245] OHA argued that it had the right "to sue the State of Hawaii's educational departments and officials for 'restricting' their use of the Hawaiian language in public schools . . . " because the Languages Act created "an implied cause of action for members of the class protected under the act."[246]

After articulating the four factor test to determine whether Congress intended to "imply a private cause of action in a federal statute," Judge Kay, the same judge that authored the decision in *Tagupa v. Odo*, identified the most important question as "whether Congress intended to create the private remedy sought by the plaintiffs."[247] Judge Kay concluded that "there [was] no indication that Congress intended Hawaiians or any other Native Americans to have a private cause of action under the [Languages] Act."[248] Judge Kay reached this conclusion based on four conclusions. First, after explicitly recognizing that the "Congressional legislative history is silent as to whether Congress intended to create a private remedy," Judge Kay analyzed the "legislative history" and determined that it "weighed against inferring a private remedy."[249] Judge Kay strained logic to find some intent not to create a private right of action and found such an intent in a statement made by President George H.W. Bush when he signed the legislation.[250] Second, Judge Kay concluded that the Languages Act spoke in terms of general policies and did not place any special directives on States.[251] Third, Judge Kay held that the Languages Act did not "create affirmative duties on the states but merely evince[d] a federal policy to 'encourage' states to support Native American languages."[252] Finally, Judge Kay rationalized his conclusion to deny

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[244] *Id.*

[245] *Id.* at 1493.

[246] *Id.*

[247] *Id.* at 1494. The court identified the following four factors to ascertain whether Congress intended to imply a private cause of action in a federal statute: "(1) is the plaintiff in the special class which the statute intended to protect; (2) is there legislative intent to create a private cause of action; (3) is a private cause of action consistent with the purpose of the legislative scheme; and (4) is the cause of action traditionally relegated to state law, in which case it would be inappropriate to infer a federal cause of action." *Id.* (citations omitted).

[248] *Id.*

[249] *Id.*

[250] *Id.* (noting that President Bush "construe[d] [the Languages Act] as a statement of general policy and [did] not understand it to confer a private right of action on any individual or group.").

[251] *Id.* at 1495.

[252] *Id.* (citing 29 U.S.C. § 2903(2) (encouraging States and territorial governments to allow exceptions to teacher certification programs); 29 U.S.C. § 2903(4) (encouraging State and local education programs to work with "Native American parents, educators, Indian tribes, and other Native American governing bodies in the implementation of programs to put this policy into effect"); 29 U.S.C. § 2903(8) (encouraging educational

the existence of a private right of action by stating that the Languages Act, while providing affirmative obligations to the federal government, did not create such duties on states, particularly the State of Hawai'i.[253] Under similar logic, Judge Kay concluded that the Languages Act "[did] not unambiguously confer upon [OHA] an enforceable right to sue under [42 U.S.C.] 1983."[254] Professor Allison M. Dussias aptly noted, "[t]he court's decision rejected [] OHA's attempt to utilize [the Languages Act] as a tool to aid Native Americans in their longstanding, congressionally supported struggle to preserve and protect their languages against continuing assimilationist pressures, and to undo the lingering effects of past language eradication efforts."[255] Professor Dussias further asserted that the Languages Act, as interpreted by Judge Kay, "was revealed to have not provided a basis for relief for individuals who were aggrieved by government failures to honor the policies [the Languages Act] purported to establish because of its failure to provide for a private cause of action for enforcement of its provisions."[256]

Despite the reluctance of the federal court to allow Hawaiian language based upon the protections afforded in the Languages Act, there are other persuasive arguments—not argued or decided there—that govern the rights of Hawaiians to their language, culture, and identity.

IV. Reframing Native Hawaiian Rights—'Ōlelo Hawai'i as a Traditional and Customary Practice

In 2020, the use of ʻŌlelo Hawaiʻi is on the rise. Students are afforded the opportunity to learn the Hawaiian language from immersion preschools through doctoral degrees at the University of Hawai'i.[257] But, despite these advances, the Hawaiian language has not and arguably can never return to its original prominence as the language of these islands until the State of Hawai'i allows and actively encourages its use in governmental proceedings.[258] As Professor Kaleikoa Kaʻeo unfortunately discovered, the State of Hawai'i was unwilling to recognize his language and his body.

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institutions to include Native American languages in the school's curriculum)).

[253] *Id.* at 1495.

[254] *Id.* at 1496–97. To determine whether a statute provided enforceable rights that can be pursued through section 1983, the court must analyze the following: "(1) is the plaintiff an intended beneficiary of the statute, (2) does the statute impose a binding obligation on the state, and (3) is the asserted right too 'vague and amorphous' as to be 'beyond the competence of the judiciary to enforce?'" *Id.* at 1497 (citations omitted).

[255] *See* Dussias, *supra* note 37, at 971.

[256] *Id.*

[257] *See* ʻAha Pūnana Leo, *supra* note 200.

[258] Linguistic experts agree that dying languages can only survive when immersion schools are in a place that students can get at least four hours of study per day in the language. *See* William O'Grady & Ryoko Hattori, *Language Acquisition and Language Revitalization*, () (on file with author).

Recently, scholars and advocates have harnessed archival discoveries and carefully crafted legal provisions to reframe the way in which Native Hawaiian rights are protected.[259] The following analysis adds to this rich legacy. Over the course of several decades, the Supreme Court of Hawai'i has used Hawai'i law—both constitutional and statutory—as a means to delineate the scope and breadth of Native Hawaiian traditional and customary rights. As discussed below, the State of Hawai'i has an obligation to allow the speaking of 'Ōlelo Hawai'i in the courtroom because the Hawaiian language is a traditional and customary practice that is entitled to legal protection in all facets of life, including in the courtroom.

A. *Traditional and Customary Rights for Native Hawaiians—A Legal Framework*

In much the same way that the laws regarding language had their roots in Kingdom law, so too did the protections of Native Hawaiian traditional and customary rights.[260] Over time, that protection became firmly established in state law through the court's interpretation of Article XII Section 7 of the Hawai'i State Constitution and section 1–1 of the Hawai'i Revised Statutes.

Article XII, Section 7 of the Hawai'i State Constitution provides the State with an affirmative duty to protect traditional and customary rights: "The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights."[261] In passing this constitutional amendment at the 1978 Con-Con, "the Committee on Hawaiian Affairs added what is now Article XII, Section 7 to reaffirm customarily and

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[259] *See* D. Kapua'ala Sproat, *Wai Through Kānāwai: Water for Hawai'i's Streams and Justice for Hawaiian Communities*, 95 Marq. L. Rev. 127 (2011); David M. Forman, *The Hawaiian Usage Exception to the Common Law: An Inoculation Against the Effects of Western Influence*, 30 U. Haw. L. Rev. 319 (2008); Troy J.H. Andrade, *Legacy in Paradise: Analyzing the Obama Administration's Efforts of Reconciliation with Native Hawaiians*, 22 Mich. J. Race & L. 273 (2017).

[260] King Kamehameha III codified traditional and customary rights and thereby incorporated protections for ancient tradition, custom, and usage. *See* David M. Forman & Susan K. Serrano, Ho'ohana Aku, a Ho'ōla Aku: A Legal Primer for Traditional and Customary Rights in Hawai'i 8 (2012) ("Although the courts were authorized to rely upon principles of common law adopted in other jurisdictions, they could do so only where such interpretations would not conflict with native usage or kingdom law. Decisions of the Land Commission were also required to be consistent with native customs. As a result, traditional and customary rights survived the transition from communal land tenure to a western system of private property rights.").

[261] Haw. Const. art. XII, § 7. "Ahupua'a" is defined as a "[l]and 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 later as tax to the chief. . . . " Mary Kawena Puku'i & Samuel H. Elbert, Hawaiian Dictionary 9 (1986). Each ahupua'a could sustain an entire community.

traditionally exercised rights of native Hawaiians, while giving the State the power to regulate these rights."[262] Although these "rights" appeared to have been associated with property rights specifically for tenants within a particular ahupuaʻa, the Hawaiian Affairs Committee report explicitly stated that the new section "reaffirm[ed] *all* rights customarily and traditionally held by ancient Hawaiians."[263] The drafters of the 1978 constitutional amendment determined that it was important to eliminate specific categories of rights so that the courts or legislature would not be constrained in their actions to further protect Native Hawaiian culture.[264] The legislative history emphasized that Article XII, Section 7 should not be "narrowly construed" and that the provision was not intended to "remove or eliminate any statutorily recognized rights or *any* rights of native Hawaiians[,]" but was again intended to "provide a provision in the Constitution to encompass *all* rights of native Hawaiians."[265]

In addition, section 1–1 of the Hawaiʻi Revised Statutes delineates a common law exception that establishes and enforces the traditional and customary rights of Native Hawaiians: "The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly . . . fixed by Hawaiian judicial precedent, or established by Hawaiian usage[.]"[266] The Hawaiʻi Supreme Court has cited section 1–1 of the Hawaiʻi Revised Statutes as an additional basis for protecting traditional and customary rights, even though such rights were not expressly enumerated therein.[267]

The Hawaiʻi Supreme Court has used these two laws as a basis for reaffirming, recognizing, and protecting the traditional and customary rights of Native Hawaiians. From the recognition of traditional gathering rights in *Kalipi v. Hawaiian Trust Company*, to the affirmation of traditional and customary access rights in *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission*, Hawaiʻi's high court has been on the cutting edge in the modern era of protecting Hawaiʻi's indigenous people.[268]

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[262] Pele Def. Fund v. Paty, 73 Haw. 578, 619, 837 P.2d 1247, 1271 (1992) (citing Stand. Comm. Rep. No. 57, *in* 1978 Proceedings Volume I, *supra* note 187, at 637–640) (emphasis added).

[263] *Id.*

[264] *Id.*

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

[266] Haw. Rev. Stat. § 1–1.

[267] *See* Pub. Access Shoreline Haw. v. Haw. Cty. Planning Comm'n (*PASH*), 79 Haw. 425, 429, 903 P.2d 1246, 1250 (1995) (holding that the reasonable exercise of traditional gathering practices by native Hawaiians is entitled to protection under the State Constitution after an unincorporated public interest membership organization (PASH) challenged the decision of the Hawaiʻi county planning commission to refuse the group standing to participate in a contested case hearing on an application for a special management area use permit awarded to a developer).

[268] Kalipi v. Hawaiian Tr. Co., 66 Haw. 1, 656 P.2d 745 (1982); *PASH*, 79 Haw. 425, 903 P.2d 1246 (1995).

The first modern case to address traditional and customary rights was *Kalipi*. There, in 1982, the plaintiff, William Kalipi, sought to exercise traditional Hawaiian gathering rights on undeveloped land belonging to the defendants in the ahupua'a (traditional land divisions) of 'Ōhi'a and Manawai on the island of Moloka'i.[269] Kalipi, a resident of Moloka'i, owned a house lot in east 'Ōhi'a, where he was raised, as well as an adjoining taro patch in Manawai.[270] At the time of trial, however, Kalipi did not reside on the property and therefore was not a resident of the ahupua'a in which he sought to exercise his gathering rights.[271] The Hawai'i Supreme Court, in an opinion written by Native Hawaiian Chief Justice William S. Richardson,[272] recognized the obligation placed upon Hawai'i courts "to preserve and enforce traditional rights exercised by descendants of native Hawaiians for subsistence, cultural and religious purposes."[273] The *Kalipi* court stated that "where practices associated with the ancient Hawaiian way of life have, without harm to anyone, been continued, reference to Hawaiian usage in Hawai'i Revised Statutes section 1–1 insures their continuance for so long as no actual harm is done thereby."[274] The court explained that its decision "did not expressly preclude the possibility that the doctrine of custom might be utilized as a vehicle for the retention of some such rights."[275] According to the court, under the doctrine of custom, a usage became law of the place or of the subject matter to which it related by common consent and uniform practice.[276] Therefore, the following seven requirements had to be established in order for a custom to be recognized: the custom must be ancient, exercised without interruption caused by anyone possessing a paramount right, peaceable and free from dispute, reasonable, certain, obligatory, and not repugnant or inconsistent with other laws or customs.[277] The court held that there was "no inconsistency in finding that the Hawaiian usage exception in section 1–1 may be used as a vehicle for the continued existence of those customary rights which continued to be practiced and which worked no actual harm upon the recognized interests of others."[278]

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[269] *Kalipi*, at 3, 656 P.2d at 747.
[270] *Id.*
[271] *Id.*
[272] Williamson B.C. Chang, *The Life of the Law is Perpetuated in Righteousness: The Jurisprudence of William S. Richardson*, 33 U. Haw. L. Rev. 99 (2010); Melody Kapilialoha MacKenzie, *Ka Lama Kū O Ka No'eau: The Standing Torch of Wisdom*, 33 U. Haw. L. Rev. 3 (2011).
[273] *Kalipi*, 66 Haw. at 2, 656 P.2d at 746 (citing Haw. Rev. Stat. § 7–1; Haw. Const. art. XII, § 7).
[274] *Id.*
[275] *Id.* at 11–12, 656 P.2d at 751–52.
[276] *Id.* (citing *State ex rel. Thornton v. Hay*, 462 P.2d 671, 677 (Or. 1969)).
[277] *Id.* (citing Thornton, 462 P.2d at 678).
[278] *Id.* The court based its formulation of the rule of custom on a Kingdom of Hawai'i Supreme Court decision, *Oni v. Meek*. 2 Haw. 87, 90 (1858). There, Oni, a hoa'āina (tenant) of Honouliuli, filed suit alleging a traditional right of pasturage when some of his horses, which had been pastured on the defendant's unoccupied land, were

In *Ka Paʻakai o Ka ʻĀina v. Land Use Commission*, Ka Paʻakai o Ka ʻĀina, a consortium of Native Hawaiian organizations appealed the state Land Use Commission's (LUC) grant of a developer's petition to reclassify land on Hawaiʻi Island.[279] The developer's petition sought to reclassify approximately 1,000 acres of land in the ahupuaʻa of Kaʻūpūlehu in North Kona from a conservation to an urban district.[280] The shoreline portion of the property was used for fishing and gathering resources, including limu (seaweed), ʻopihi (limpets), and sea salt.[281] The Hawaiʻi Supreme Court introduced an analytical framework specifically for governmental decisionmakers to weigh when balancing their obligations to protect the exercise of Native Hawaiian traditional and customary rights for subsistence, cultural, and religious puposes against private property rights and competing public interests, in accordance with Hawaiian custom and usage, English common law, as well as statutory and constitutional provisions.[282] The court further concluded that Article XII, Section 7 of the Hawaiʻi State Constitution "placed an *affirmative* duty on *the state and its agencies* to preserve and enforce traditional rights exercised by descendants of native Hawaiians for subsistence, cultural and religious purposes."[283]

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impounded and sold as strays. *Id.* Oni contended that he had a right to pasture his animals on the upland of that ahupuaʻa on the grounds of custom. *Id.* at 89. In *Oni v. Meek*, the Kingdom Supreme Court concluded "that before the Court can sustain this claim on the ground of custom, the custom attempted to be set up must appear to have existed from time immemorial; to be reasonable, to be certain, and not inconsistent with the laws of the land." *Id.* According to scholars, "The court's muddled analysis contributed to long-lasting misconceptions about the nature and scope of traditional and customary rights in Hawaiʻi." David M. Forman & Susan K. Serrano, *Traditional and Customary Access and Gathering Rights*, *in* Native Hawaiian Law: A Treatise 792 (MacKenzie ed., 2015); *see* David M. Forman & Stephen M. Knight, *Native Hawaiian Cultural Practices Under Threat*, 1 Haw. B.J. 1, 8–13 (1997) (examining the Hawaiʻi Supreme Court's decision in *Oni v. Meek* and concluding that the court's rejection of Oni's claim to pasturage on unoccupied land in the ahupuaʻa was based on contract law rather than custom).

[279] Ka Paʻakai o Ka ʻĀina v. Land Use Comm'n, State of Hawaiʻi (*Ka Paʻakai*), 94 Haw. 31, 7 P.3d 1068 (2000), *as amended* (Jan. 18, 2001).

[280] *Id.*

[281] *Id.* at 37, 7 P.3d at 1074.

[282] *Id.* at 46–47, 7 P.3d at 1083–84 ("We therefore provide this analytical framework in an effort to effectuate the State's obligation to protect native Hawaiian customary and traditional practices while reasonably accommodating competing private interests: In order to fulfill its duty to preserve and protect customary and traditional native Hawaiian rights to the extent feasible, the LUC, in its review of a petition for reclassification of district boundaries, must—*at a minimum*—make specific findings and conclusions as to the following: (1) the identity and scope of 'valued cultural, historical, or natural resources' in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; (2) the extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the LUC to reasonably protect native Hawaiian rights if they are found to exist.").

[283] *Ka Paʻakai*, 94 Haw. at 31, 7 P.3d at 1068 (citing Haw. Const. art. XII, § 7) (emphasis

In *Pele Defense Fund v. Paty*, the State of Hawai'i and the James Campbell Estate exchanged property, in which the State received Campbell Estate's Kahauale'a land and Campbell Estate received Puna lands, including, among others, the Wao Kele o Puna, the Puna Forest Reserve, and other state lands.[284] The exchange followed a series of studies and hearings and the designation of a portion of the Kilauea Middle East Rift Zone, located primarily within Wao Kele o Puna, as a geothermal resource subzone.[285] The Pele Defense Fund argued that the exclusion of their members from the exchanged lands violated their traditional and customary gathering and access rights under Article XII, Section 7 of the Hawai'i Constitution.[286] The Hawai'i Supreme Court, in an opinion authored by Associate Justice Robert G. Klein, a Native Hawaiian jurist who clerked for Chief Justice William S. Richardson, cited to *Kalipi* in concluding that separately "HRS section 1–1's 'Hawaiian usage' clause may establish certain customary Hawaiian rights . . . ."[287] Therefore, "the retention of a Hawaiian tradition should in each case be determined by balancing the respective interests and harm once it is established that the application of the custom has continued in a particular area."[288]

In *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission*, an unincorporated public interest membership organization, PASH, challenged the decision of the Hawai'i county planning commission to deny that organization standing to participate in a contested case hearing on a developer's application for a special management area use permit, which was necessary to develop a resort complex.[289] The planning commission denied PASH's request to participate in the contested case hearing because PASH's interests were "not clearly distinguishable from that of the general public."[290] On appeal, in another decision authored by Justice Klein, the Hawai'i Supreme Court analyzed the issue of standing and reaffirmed the importance of respecting traditional and customary rights: "PASH sufficiently demonstrated that its members, as native Hawaiians who have exercised such rights as were customarily and traditionally exercised for subsistence, cultural, and religious purposes on undeveloped lands, have an interest in proceeding for the approval of a [] permit for the development of lands within the ahupua'a which are clearly distinguishable from that of the general public."[291] After addressing the issue of standing, the Hawai'i Supreme Court responded to the developer's arguments that the planning commission had "no obligation . . . to

added).

[284] *Pele Def. Fund*, 73 Haw. at 587, 837 P.2d at 1255.

[285] *Id.*

[286] *Id.* at 585, 837 P.2d at 1253.

[287] *Kalipi*, 66 Haw. at 9–10, 656 P.2d at 750.

[288] *Pele Def. Fund*, 73 Haw. at 618, 837 P.2d at 1270–71; *see Kalipi*, 66 Haw. at 9–10, 656 P.2d at 750–51.

[289] *PASH*, 79 Haw. at 429, 903 P.2d at 1250.

[290] *Id.*

[291] *Id.* at 434, 903 P.2d at 1255.

consider, much less require, protection of traditional and customary rights" for private property development.[292] The court disagreed with the developer and held that the "reasonable exercise of traditional gathering practices by native Hawaiians is *entitled to protection* under the State Constitution, and, thus, summary extinguishment of those rights will not be allowed by the state merely because rights are deemed inconsistent with generally understood elements of the western doctrine of 'property.'"[293] Indeed, after reviewing a history of property rights in Hawai'i, the court concluded, "the western concept of exclusivity is not universally applicable in Hawai'i."[294]

In 1998, in another opinion authored by Justice Klein, the Supreme Court of Hawai'i addressed the scope of the constitutional protections for traditional and customary rights in a criminal law context in *State v. Hanapī*.[295] The case involved Alapa'i Hanapī, a native Hawaiian cultural practitioner who resided in the ahupua'a of 'Aha'ino on the island of Moloka'i on his family's land that adjoined twin fishponds, Kihaloko and Waihilahila.[296] Hanapī claimed that "for generations [his] family and . . . ancestors have practiced traditional [N]ative Hawaiian religious, gathering, and sustenance activities in and around the fishponds."[297] Local attorney Gary Galiher purchased the land next to Hanapī's property and subsequently put up a fence and proceeded to illegally grade and fill the area near the ponds.[298] Hanapī viewed Galiher's actions as "the desecration of [a] traditional ancestral cultural site" and firmly believed that it was his right and obligation as a Native Hawaiian tenant to perform traditional religious ceremonies to heal the land.[299] Hanapī entered Galiher's land to perform healing rituals and was charged with criminal trespass.[300] At his trial, where he represented himself *pro se*, Hanapī sought to assert his constitutionally protected right as a defense

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[292] *Id.* at 435, 903 P.2d at 1256.

[293] *Id.* at 442, 903 P.2d at 1263 (emphasis added); Haw. Const. art. 12, § 7.

[294] *Id.* at 442–47, 903 P.2d at 1263–68. In *PASH*, the court also concluded that, "those persons who are '*descendants of native Hawaiians* who inhabited the islands prior to 1778,' and who assert otherwise valid customary and traditional Hawaiian rights under [Haw. Rev. Stat.] § 1–1, are entitled to protection regardless of their blood quantum. Customary and traditional rights in these islands flow from native Hawaiians' pre-existing sovereignty. The rights of their descendants do not derive from their race per se, and were not abolished by their inclusion within the territorial bounds of the United States." *Id.* at 449, 903 P.2d at 1270. The court's elaboration of who would be protected did not address the issue of whether non-Hawaiians could also exercise such rights, but merely clarified that there was no blood quantum requirement for Native Hawaiians seeking to exercise their traditional and customary rights. *Id.* at 449 n. 41, 903 P.2d 1270 n. 41.

[295] State v. Hanapī, 89 Haw. 177, 970 P.2d 485 (1998).

[296] *Id.* at 178, 970 P.2d at 486.

[297] *Id.*

[298] *Id.*

[299] *Id.* at 180, 970 P.2d at 488.

[300] *Id.*

to his criminal conviction.[301] The trial court refused to allow the defense and found Hanapī guilty of criminal trespass in the second degree.[302] On appeal, the Hawai'i Supreme Court expanded constitutional protection of Native Hawaiian traditional and customary rights to the criminal law context as a defense of privilege "for purposes of enforcing criminal trespass statutes" so long as the right was "reasonably exercised."[303] Justice Klein articulated a test for establishing whether conduct is constitutionally protected as a Native Hawaiian right:

> First, he or she must qualify as a "native Hawaiian" within the guidelines set out in *PASH* . . . . Second, once a defendant qualifies as a native Hawaiian, he or she must then establish that his or her claimed right is constitutionally protected as a customary or traditional native Hawaiian practice . . . . Finally, a defendant claiming his or her conduct is constitutionally protected must also prove that the exercise of the right occurred on undeveloped or "less than fully developed property."[304]

The *Hanap*ī court emphasized that, "[t]he fact that the claimed right is *not* specifically enumerated in the Constitution or statutes[] does not preclude further inquiry concerning other traditional and customary practices that have existed."[305]

B. *Speaking Hawaiian is a Constitutionally Protected Traditional and Customary Practice*

'Ōlelo Hawai'i is a traditional and customary right that is entitled to constitutional protection under Article XII, Section 7 of the Hawai'i State Constitution, and Hawai'i Revised Statutes section 1–1. Again, to establish a traditional and customary right, the court first analyzes whether the person asserting the right is a Native Hawaiian.[306] Assuming one is a Native Hawaiian, the next question to address is whether "the claimed right is constitutionally protected as a customary or traditional native Hawaiian practice."[307] "To establish the existence of a traditional or customary native Hawaiian practice, there must be an adequate foundation in the record connecting the claimed right to a firmly rooted traditional or customary native Hawaiian practice."[308] Again, the court in *Hanap*ī additionally held that "the fact that the claimed right is *not* specifically enumerated in the Constitution or statutes, does not preclude further inquiry concerning other traditional and customary practices that have

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[301] *Id.*
[302] *Id.* at 182, 970 P.2d at 490.
[303] *Id.* at 184, 970 P.2d at 492.
[304] *Id.* at 185–86, 970 P.2d at 493–94.
[305] *Id.* at 186, 970 P.2d at 494.
[306] *Id.* at 185–86, 970 P.2d at 493–94 (citing *PASH* at 449, 903 P.2d at 1270); Haw. Const. art. XII, § 7 (for purposes of state law a "Native Hawaiian" is defined as a descendant of the races inhabiting the Hawaiian islands previous to 1778).
[307] *Hanap*ī, 89 Haw. at 186, 970 P.2d at 494.
[308] *Id.*

existed."[309] Because communicating in ʻŌlelo Hawaiʻi is not specifically identified in the Constitution or statutes as a traditional and customary right, a court, under a case of first impression, will have to look to the proposed protected practice's history. As detailed *supra* Part II of this Article, the Hawaiian language existed as a rich spoken language prior to Western contact in 1778.[310] With Western contact came the written form of the language, which has, over time, been relegated to a second language—after the English language.[311] Despite the concerted effort to eradicate the language, ʻŌlelo Hawaiʻi survived and has existed as a means for Native Hawaiians to continue their subsistence, cultural, and religious practices.[312] The steady resistance to the language's death—be it through the proliferation of Hawaiian language newspapers or the small gains to language parity in law—allowed it to survive.

ʻŌlelo Hawaiʻi is the engine that enabled the existence of all other Native Hawaiian rights customarily and traditionally exercised for subsistence, cultural, and religious purposes. In reference to the Hawaiian language and customs exercised for religious purposes, Dr. Hiapo Perreira explained that "in Hawaiian, we don't have a moment of silence. Prayer has to be spoken to be effectuated. So, I think therein lies evidence of what we are talking about today (language as a traditional and customary right). You cannot just close your eyes and think a prayer and expect it to happen in a Hawaiian being. It has to be physically spoken."[313] In addition, the Hawaiian language plays a central role in hula; indeed, Dr. Perreira concluded:

> Hawaiians don't have abstract dancing. It does not exist, throughout all of [Hawaiʻi's] history. You need the *words* that are then put to melody that is then danced to. You can go back to the most archaic, religious dances on the heiau [temple], there is absolutely no performance that is done to just a beat and that in and of itself emphasizes the importance of language and what it means to the Hawaiian as a being in the world.[314]

With regard to the use of ʻŌlelo Hawaiʻi and gathering rights, Dr. Perreira stated:

> You scream for customary gathering rights because you want to be able to go into a certain area to pick foliage of a certain kind to fashion it in a certain way to then utilize it in a certain ceremony getting back again to the language because *without the language that ceremony would not be* which means that everything else after that

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[309] *Id.*

[310] *See* Native Hawaiians Study Commission, *supra* note 32, at 173, 186.

[311] *Id.* at 189.

[312] *Id.* at 173, 192.

[313] *See* Perreira Interview, *supra* note 47.

[314] *Id.* "Heiau" is defined as "a pre-christian place of worship, a temple for the worship of one or more of the gods, a high place of worship." *See* Pukuʻi & Elbert, *supra* note 261, at 64.

> is invalidated. So, you cannot remove [the language] or say that it is separate because it just goes hand in hand.[315]

To be clear, without the Hawaiian language, the currently protected Native Hawaiian traditional and customary rights, such as those granting access and gathering rights, would garner little importance.

The government would likely argue that the use of the Hawaiian language is not a traditional and customary right because the constitutional protections have only applied in the land use context and ʻŌlelo Hawaiʻi has nothing to do with land. However, the framers of Article XII, Section 7 suggested that the government look at these tests broadly when determining whether or not a practice is considered a traditional and customary right.[316] Specifically, the delegates felt that traditional and customary rights should not be described as "attached to land," but as personal rights.[317] Put another way, rather than being attached to land, traditional and customary rights were *inherently held* by Native Hawaiians.[318] The delegates intended not to remove or eliminate any statutorily recognized rights or any rights of Native Hawaiians from consideration under the provision, but rather to provide a provision in the Constitution to encompass all rights of Hawaiʻi's indigenous population.[319] The framers of the constitutional amendment did not say that the rights covered under the provision were "limited" to access and gathering rights.

Furthermore, the Hawaiʻi Supreme Court's willingness to incorporate non–land use Native Hawaiian traditions and customs into the common law demonstrates a willingness to expansively interpret the constitution's mandate.[320] In *O'Brien v. Walker*, for example, John A. Cummins and his wife executed a deed of trust giving the income from their estate to the their four named children for life, and then, upon the death of their last surviving child, to the "lawful issue of the children aforesaid then surviving."[321] The issue before the court was whether a child adopted under the laws of Hawaiʻi by one of Cummins's four named children was considered a "lawful issue" and therefore entitled to his or her parent's share in the corpus.[322] The Hawaiʻi Territorial Supreme Court, after "[a] careful study of all of the Hawaiian decisions upon adoption[,]" concluded that it could recognize "the ancient Hawaiian customs

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315 *Id.*

316 Hawaiian Affairs Comm., Standing Comm. Rep. No. 57, *in* 1978 Proceedings Volume I, *supra* note 187, at 637, 640 (1980).

317 *See* 1978 Proceedings Volume I, *supra* note 187, at 639, 640 (1980).

318 *Id.*

319 *Id.*

320 *See* O'Brien v. Walker, 35 Haw. 104, 109 (Haw. Terr. 1939). John A. Cummins, who was arrested and imprisoned for his participation in the 1895 counterrevolution, held the following positions in the Kingdom government: "Member of Privy Council, June 18, 1874, of House of Representatives, 1874, of Board of Immigration, 1886, of Commission to Paris Exposition, 1889, of House of Nobles, Oahu, 1890, and was the Minister of Foreign Affairs, June, 1890, to February 26, 1891." *Id.* at 128 n.15.

321 *Id.* at 109.

322 *Id.*

and usage of adoptions" to coexist with the changing western legal landscape.[323] The court reasoned:

> In a case where the status of adoptions was fully developed by ancient customs and usage as the law of the land, a subsequent enactment by the legislature providing a procedure for adoptions would merely, in effect, be an Act to preserve the rights already accrued to adopted children and a subsequent enactment defining the status of adopted children for the purpose of intestacy which was substantially the same as it existed prior thereto by ancient customs, would in effect be the mere codification or crystallization of rights already in existence.[324]

The court explained a required inquiry for ascertaining the testator's intent: "where the construing of the intent of the user in respect to adopted children of a general word such as 'issue' becomes necessary, is whether they recognize or deny the ancient Hawaiian customs or usage of adoptions."[325] The instrument, however, did not "clearly indicate[] what the intent of John A. Cummins was when he used the word 'issue.'"[326] The court then made several inferences—such as Cummins being Native Hawaiian, married to a Native Hawaiian woman, and born in a time when Hawaiian custom and usage would recognize hānai heirs as lawful issues—to conclude that the adopted children of one of Cummins's heirs was a "lawful issue."[327] The *O'Brien* court's reference to and incorporation of the ancient Hawaiian practice of "hānai" displayed an acquiescence even in the oppressive Territorial regime to integrate Native Hawaiian traditional and customary practices outside the land use context into the law.[328]

As another example of the court recognizing Native Hawaiian traditional and customary rights outside the context of land use, in 1974, Chief Justice William S. Richardson authored a Hawai'i Supreme Court opinion recognizing the significance of 'ohana, or family, and hānai in tort cases.[329] In *Leong v. Takasaki*, the issue before the court was whether a child who witnessed his step-grandmother get hit by a vehicle could recover for negligent infliction of emotional distress, a cause of action that generally requires the plaintiff to prove a close familial (often blood) relationship with the victim.[330] Citing *O'Brien*, the court recognized that formal adoption laws replaced ancient Hawaiian custom and usage,[331]

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[323] *Id.* at 118 (" . . . Hawaii nevertheless did not turn her back completely on her past, for she definitely preserved as an exception thereto that which had been fixed by Hawaiian judicial precedent or established by Hawaiian usage.").
[324] *Id.* at 117.
[325] *Id.* at 120.
[326] *Id.* at 127.
[327] *Id.* at 126–32.
[328] *See id.* at 118–120.
[329] Leong v. Takasaki, 55 Haw. 398, 410–11, 520 P.2d 758, 766 (1974).
[330] *Id.* at 309, 410, 520 P.2d at 760, 766.
[331] *See* Maui Land & Pineapple Co. v. Naiapaakai Heirs of Makeelani ("*Naiapaakai Heirs of Makeelani*"), 69 Haw. 565, 566, 751 P.2d 1020, 1020–21 (1988) (concluding

but that "[n]evertheless the custom of giving children to grandparents, near relatives, and friends to raise whether legally or informally remains a strong one."[332] In recognizing this Hawaiian custom, the court allowed the plaintiff in a tort action to recover for his injuries.

Finally, in the context of determining visitation rights and an analysis of what was in the best interest of a child, the Hawai'i Intermediate Court of Appeals did not deny the applicability of the Native Hawaiian traditional and customs relating to 'ohana and instead decided the issue on narrow grounds.[333] In *Nihipali v. Apuakehau*, the maternal grandparents of a child born out of wedlock filed a motion seeking to expand their visitation rights and to appoint a guardian ad litem for the child based upon the the importance of traditional and customary family values that were vital to the Native Hawaiian community.[334] Although the court determined that Native Hawaiian grandparents were not constitutionally entitled to greater visitation rights than non-Native grandparents, Chief Judge James S. Burns quoted extensively from the grandparent's briefs about their argument regarding traditional and customary rights:

> The 'ohana concept is a multi-generational, self-regulating and interdependent lifestyle that will ensure the continuity of our cultural values, beliefs and practices important in keeping our Hawaiian culture alive and, thus, are at the core of what is protected under the state constitution. The decisions and actions that we follow today will determine the survival of our culture.
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> . . .
>
> These "customary and traditional" values and activities are part of their daily lives, not just practiced for the sake of convenience. In addition to the subsistence activities, cultural activities, norms and values in order to maintain order, harmony, balance and respect for resources, deities associated with these resources are taught. Sharing of resources within the 'ohana and respecting others are important values needed to be taught. There are certain teachings

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that hānai children were not recognized heirs because the customary laws of adoption were replaced with codified laws). In *Naiapaakai Heirs of Makeelani*, the hānai children of John Keola Makeelani were denied inheritance to an interest in 13.81 acres of property on the island of Maui belonging to Makeelani. *Id.* The hānai children contended that by ancient Hawaiian custom, as "keiki hānai" of John Keola Makeelani they were "hooilina" or heirs. *Id.* at 568, 751 P.2d at 1021. However, despite the longstanding Hawaiian custom, the court declined to recognize the hānai children as heirs because, by that point, " . . . there were written statutes of adoption which had to be followed in order to constitute the adoptee's legal heirs of the adoptors." *Id.*

[332] *Leong*, 55 Haw. at 411, 520 P.2d at 766.

[333] *See* Nihipali v. Apuakehau, 112 Haw. 113, 125, 144 P.3d 561, 573 (Haw. Ct. App. 2006) ("Assuming, without implying, that Article XII, [section] 7 of the Hawaii Constitution and/or HRS [section] 1–1 have any relevant applicability to such situations, the question is whether Article XII, [section] 7 of the Hawaii Constitution and/or HRS [section] 1–1 authorize native Hawaiian grandparents any more visitation rights than HRS [section] 571–46(7) and HRS [section] 571–46.3 (Supp. 2005) authorize for all grandparents, native Hawaiian and non-native Hawaiian. The answer is no.").

[334] *Id.*

> that are done by the father, the mother, the extended ʻohana such as the uncles and aunties and in this case the tūtū that are important. Learning to gather the medicinal plants, identifying them, preparing them are just as important as building a hale, fishing, weaving the lauhala, learning the stories behind these skills as are the modern contemporary learning of the arts and technology.[335]

In the end, as mentioned *supra*, the court sidestepped the determination of the applicability of the constitutional protection.[336] *Nihipali*, nevertheless, represents a willingness on the part of the court to not foreclose the arguments regarding traditional and customary rights.

In addition to the broad scope of constitutional protections offered to Native Hawaiian traditional and customary practices, the Hawaiʻi Supreme Court created the following "prudential rules" for litigants seeking to prove the meaning of a Hawaiian word or phrase in court, thereby expanding the use of ʻŌlelo Hawaiʻi in the courtroom:[337] first, "the Hawaiian language is not to be regarded as a foreign language but a language of which the courts and judges must take judicial notice";[338] second, the authorities that can be used when a court takes judicial notice, include standard dictionaries, official public documents, encyclopedias, geographers, or "other authorities in aid of its and our memory and understanding as to the meaning of the words under consideration";[339] and third, judicial notice should be limited to the "ordinary, usual, and well-known meaning of Hawaiian words" and that the judge will rely on the testimony of experts in open court.[340] These established principles and precedent evince a judicial system still respectful of Hawaiian knowledge, customs, and traditional practices. When taken together, a court should easily conclude that ʻŌlelo Hawaiʻi is a constitutionally protected traditional and customary right.

Alternatively, it could be argued that speaking ʻŌlelo Hawaiʻi is a protected right under the "Hawaiian usage exception" in section 1–1 of the Hawai'i Revised Statutes.[341] In *Kalipi*, the court created a balancing test in which the retention of a Hawaiian tradition was determined first by deciding if a custom continued in a particular area and second, by balancing the respective interests of the practitioner and harm to the

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[335] *Id.* at 116–17, 144 P.3d at 564–65.

[336] *Id.* at 125, 144 P.3d at 573.

[337] *See* Hapai v. Brown, 21 Haw. 499, 502–03 (Haw. Terr. 1913) (discussing judicial notice of Hawaiian language).

[338] Nāhoa Lucas, A Dictionary of Hawaiian Legal Land-Terms ix (1995) (citing *Hapai*, 21 Haw. at 499). Judicial notice allows a court to "refer directly to resources that exist out of court, which have been generally accepted in a community, without the need to prove the reputability of those references as evidence in court." *Id.*

[339] John Iʻi Estate v. Judd, 13 Haw. 319, 325 (Haw. Terr. 1901); *see also* McCandless v. Waiahole Water Co., Ltd., 35 Haw. 314, 322 (Haw. Terr. 1940).

[340] *John Iʻi Estate*, 13 Haw. at 325.

[341] Haw. Rev. Stat. § 1–1 provides in relevant part: "The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as . . . established by Hawaiian usage[.]"

landowner.[342] When determining whether a specific usage or right is based on custom, seven criteria must be satisfied; the usage or right must be (1) ancient; (2) continued (exercised without interruption); (3) peaceable and free from dispute; (4) reasonable; (5) certain; (6) compulsory (applied uniformly); and (7) consistent with and not repugnant to other customs or laws.[343]

There is a strong case to be made that that the usage or right of speaking ʻŌlelo Hawaiʻi satisfies all seven criteria to qualify as a "custom" entitled to protection. First, the use of the Hawaiian language is ancient, because it was the language that the ancestors were speaking before and at the time of Western contact in 1778.[344] Second, ʻŌlelo Hawaiʻi was exercised without interruption, as evidenced by the current existence of the language and the State Judiciary's subsequent implementation of a policy to address the use of the Hawaiian language in the courtroom.[345] Third, the Hawaiian language is considered peaceable and free from dispute, as there is no longer a language "ban" on the use of ʻŌlelo Hawaiʻi in schools, and it is no longer strongly discouraged to speak it in the home or in public.[346] Fourth, the right to speak the Hawaiian language is reasonable given the State's stated interest in remediating past harms.[347] Fifth, speaking the Hawaiian language is certain as there is only one language and the usage of the language will ensure its survival.[348] Sixth, the right to speak ʻŌlelo Hawaiʻi will be compulsory and applied uniformly throughout all the courts in the State. Finally, such a right would be consistent with other customs and laws that encourage the use of ʻŌlelo Hawaiʻi. Because the right of speaking ʻŌlelo Hawaiʻi satisfies these seven criteria, the second half of the balancing test can be applied.

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[342] Again, in *Kalipi*, the plaintiff filed suit against owners of the ahupuaʻa of Manawai and ʻŌhia when he was denied unrestricted gathering rights in those ahupuaʻa. *Kalipi*, 66 Haw. at 1, 656 P.2d at 751. Kalipi had lived in the ahupuaʻa and worked the taro field until 1975, but moved to a neighboring ahupuaʻa. *Id.* at 3, 656 P.2d at 747. The court ultimately affirmed a jury verdict that found that he did not have gathering rights because he no longer physically resided in that ahupuaʻa, and that gathering rights did not extend to persons who did not reside in that ahupuaʻa. *Id.*

[343] *Id.* at 597, 678.

[344] *See* Native Hawaiians Study Commission, *supra* note 32, at 173, 186.

[345] *See Kalipi*, 66 Haw. at 11–12, 656 P.2d at 751–52 (citing State ex rel. Thornton v. Hay, 254 Haw. at 584, 595, 462 P.2d 671, 677 (1969)); *see also* Hawaiʻi State Judiciary, Press Releases, *Judiciary Announces Hawaiian Language Interpreter Policy*, (Jan. 26, 2018), http://www.courts.state.hi.us/news_and_reports/press_releases/2018/01/judiciary-announces-hawaiian-language-interpreter-policy.

[346] *See Kalipi*, 66 Haw. at 11–12, 656 P.2d at 751–52 (citation omitted).

[347] *See e.g.*, 1991 Haw. Sess. Laws Act 301, § 11 (creating a Sovereignty Advisory Council to develop a plan to discuss and study Hawaiian sovereignty); 1993 Haw. Sess. Laws Act 359, § 2 (creating the Hawaiian Sovereignty Advisory Commission to "acknowledge and recognize the unique status the native Hawaiian people bear to the State of Hawaii and to the United States and to facilitate the efforts of native Hawaiians to be governed by an indigenous sovereign nation of their choosing").

[348] Haw. Const. art. XV, § 4.

The second half of the analysis requires a careful balancing of the respective interests of the practitioner and harm to the affected party.[349] A Hawaiian language speaker who would like to use ʻŌlelo Hawaiʻi in court proceedings would face a judiciary with a limited budget and financial pressures that make the costs of interpreters "inefficient."[350] On one hand, recognizing the Hawaiian language in court would indeed raise the costs of litigation and potentially prolong the judicial process. On the other hand, the failure to allow the Hawaiian language in court stymies the revival and ultimate survival of the language, culture, and identity of Hawaiʻi's indigenous people. Costs should never be the primary rationale for the continued subjugation of a people.[351] If the language dies, the culture dies. All of the music, hula, chants, and other traditional practices will cease to exist, and the Native Hawaiian culture will be lost forever. Because ʻŌlelo Hawaiʻi is the very foundation of the Hawaiian culture, it must be considered a traditional and customary right. It may even be considered the most important traditional and customary right because once it is gone, everything is gone forever.[352]

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[349] *See Kalipi*, 66 Haw. at 9–10, 656 P.2d at 751–52; *see also Pele Def. Fund*, 73 Haw. at 618, 837 P.2d at 1270–71.

[350] *See* William S. Richardson, *Judicial Independence: The Hawaii Experience*, 2 U. Haw. L. Rev. 1 (1979) (discussing the importance of judicial independence); *see also* Sara Hayden, Comment, *Electing the Bench: An Analysis of the Possible Negative Effects of Judicial Elections on Hawai'i's Legal Community*, 18 Asian-Pac. L. & Pol'y J. 114, 142–49 (2016) (critiquing recent attacks on judicial independence by the Hawaiʻi State legislature).

[351] *See* Barbara Kritchevsky, *Is There A Cost Defense? Budgetary Constraints as A Defense in Civil Rights Litigation*, 35 Rutgers L.J. 483, 485–86 (2004) ("Government entities should never be able to excuse their failings by raising a budgetary constraints defense. The Constitution sets minimum standards for governmental conduct. As courts have long recognized, a government that runs a school system or punishes by incarceration must do so constitutionally. Entities that choose to engage in activities that the Constitution regulates must obtain or divert funding to enable them to comply with constitutional standards."); *see also* Watson v. City of Memphis, 373 U.S. 526, 537 (1963) (rejecting the argument that financial constraints justified failure to desegregate city parks); *see also* Stone v. City & Cnty. of San Francisco, 968 F.2d 850, 858 (9th Cir. 1992) (concluding that "financial constraints do not allow states to deprive persons of their constitutional rights"); *see also* Ancata v. Prison Health Services, Inc., 769 F.2d 700, 705 (11th Cir. 1985) ("Lack of funds for facilities cannot justify an unconstitutional lack of competent medical care and treatment for inmates.").

[352] Although not discussed in detail herein, there are State constitutional arguments that could be made to require the State's preservation of ʻŌlelo Hawaiʻi. *See* Clarabal v. Dep't of Educ., 145 Haw. 69, 446 P.3d 986 (2019) (concluding that article X, section 4 of the Hawaiʻi State Constitution "imposes on the State a duty to provide for a Hawaiian education program in public schools that is reasonably calculated to revive the Hawaiian language"). In addition, the first amendment may also protect an individual's right to speak in the language of his or her choice. *See* Eric M. Freedman, *A Lot More Comes Into Focus When You Remove the Lens Cap: Why Proliferating New Communications Technologies Make it Particularly Urgent for the Supreme Court to Abandon its Inside-Out Approach to Freedom of Speech and Bring Obscenity, Fighting Words, and Group Libel Within the First Amendment*, 81 Iowa L. Rev. 883, 916 n.166 (1996) (assessing first amendment jurisprudence and noting that there is an "expressive choice"

Conclusion

This is the story of a people who resisted and fought. It is the story of a people who continue to fight to ensure that their language survives and is not lost to history. ʻŌlelo Hawaiʻi has been a resilient language; it has gone from being the language of the Native Hawaiian ancestors, through generations of oppression, to being revived and appreciated in recent decades. Native Hawaiians fight for the right to speak ʻŌlelo Hawaiʻi every day. From the classroom to the court room, this "official" language is struggling for recognition. When Professor Kaʻeo continues his lawsuit, he would be wise to remember that ʻŌlelo Hawaiʻi can be considered a traditional and customary right. It has been the vehicle that has allowed the Native Hawaiian traditions and customs to be passed on and the reason they still exist today. As Dr. Perreira concluded:

> You learn the language to then inform your being, your being as a person in the world and your being as a Hawaiian person in the world because outside of that you are just another human. If you turn us inside out, we are all the same but what makes us different is our identity and that identity stems from the language because it is how you express yourself and the world around you.[353]

E ola ka ʻōlelo Hawaiʻi; long live the Hawaiian language.

inherent in deciding to speak to a particular hearer using one language rather than another).

[353] *See* Perreira Interview, *supra* note 47.