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Re-Building a Native Hawaiian Nation: Base Rolls, Membership, and Land in an Effective Self-Determination Movement

Linda Zhang*

INTRODUCTION

Native Hawaiians are at a crossroads to decide whether they will form a new Native Hawaiian nation and how that nation will be formed. Professor Angela Riley argues, “Without self-rule, tribes will not only disappear as political entities within the United States, they may cease to exist altogether.”¹ For decades, based on a strong commitment to the `āina, or land “that which feeds us,” Native Hawaiian activists, community leaders, organizations, and state and federal governments have tried in a myriad of ways to begin a nation-building process for Native Hawaiians, from attempts at federal recognition to grassroots efforts to protect the lands, culture, and resources of the Native Hawaiian people. Recently, Native Hawaiian advocates for self-determination have also turned to the international human rights framework.²

One of the fundamental questions in the nation-building process that has created contention both within and outside the Native Hawaiian community is determining who will be included in and excluded from the nation and the nation-building process. Membership issues span from eligibility requirements to vote in Native Hawaiian elections as exposed in *Rice v. Cayetano*³ to the completion and accuracy of a recently created Native Hawaiian base roll by the Native Hawaiian Roll Commission.⁴ Like the Dawes Roll,⁵ the formation of a base roll

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1. Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1063 (2007).

2. Haunani-Kay Trask, *From a Native Daughter: Colonialism and Sovereignty in Hawaii* 38 (rev. ed. 1999).

3. *Rice v. Cayetano*, 528 U.S. 495, 504 (2000).

4. The Native Hawaiian Roll Commission, or Kana`iolowalu, was passed in Act 195 (2011) to prepare and maintain a membership roll of Native Hawaiians for the government reorganization. See *Kana`iolowalu Act 195*, KANAILOWALU.ORG, www.kanaiolowalu.org/about/act195.

5. See Part II.B. for discussion on the Dawes Roll. See also Kevin N. Maillard, *Redwashing History: Tribal Anachronisms in the Seminole Nation Cases*, THE INDIAN CIVIL RIGHTS ACT AT FORTY 96 (Kristen A. Carpenter et al. eds., 2012).

under the Native Hawaiian Roll Commission and formation of a constitution by the nonprofit organization Na'i Aupuni⁶ have strong links to land.

Part I introduces the history and background from which the issue of membership for self-determination arises in the Native Hawaiian context. I outline the constitutional challenge to the Office of Hawaiian Affairs (OHA)⁷ trustee elections that set the stage for the over decade-long and ongoing push for federal recognition through the Native Hawaiian Government Reorganization Act, more commonly known as the Akaka Bill. Part II narrows on the creation of a base roll for building a Native Hawaiian Nation, specifically in the recent efforts and difficulties of the state-enacted Native Hawaiian Roll Commission to gather a complete and accurate list of names. I analyze the membership criteria, the process for forming the list, and the role it plays in the process of forming the new Constitution of the Native Hawaiian Nation by Na'i Aupuni in February 2016 and implications for good Native governance.

Shifting away from process, Part III analyzes the content of the newly adopted Constitution. I argue that the articulation of rights in the new Constitution with its focus on individual and collective rights of the Native Hawaiian people is compatible with an international human rights advocacy theory and therefore should take on this approach, rather than the alternative decolonization or de-occupation theories. Finally, I conclude by linking the right of the Nation to amend membership criteria in the new Constitution to good Native governance to emphasize the importance of the creation of accurate base rolls today.

I. HISTORY AND BACKGROUND OF NATIVE HAWAIIANS AND MEMBERSHIP CRITERIA

Up until the late nineteenth century, the Hawaiian Kingdom was an independent government “recognized by all the major powers of the world.”⁸ It established over ninety consulates and legations in several cities around the globe.⁹ In 1778, Captain James Cook first arrived in Hawai‘i, accompanied with foreign systems of economy, religion, and disease.¹⁰ Foreign diseases, including small pox, led to the death of many Native Hawaiians and reduced the population by 90 percent, from an estimated one million at the point of contact to less than 100,000 people by the 1840s.¹¹ Then, in 1893, American troops seized I‘olani Palace, the home of Queen Lili‘uokalani and the center of the Hawaiian monarchy, in an illegal overthrow of

6. Na'i Aupuni is an independent organization that would conduct the process of electing delegates, facilitate a constitutional convention, and ratification vote for a Native Hawaiian Nation. *About Na'i Aupuni*, NAIAPUNI.ORG, <http://www.naiapuni.org/about.html>.

7. The Office of Hawaiian Affairs is a public agency “with a high degree of autonomy” that has a “responsibility for improving the well-being of Native Hawaiians.” See OFFICE OF HAWAIIAN AFFAIRS, <http://www.oha.org/about>.

8. Noelani Goodyear-Kaopua, *Hawai‘i: An Occupied Country*, 35(3) HARV. INT’L REV. (2014), <http://hir.harvard.edu/goodyear-kaopua-hawaii-an-occupied-country>.

9. *Id.*

10. TRASK, *supra* note 2, at 5–6.

11. *Id.* at 6.

the Hawaiian Kingdom.¹² This eventually paved the way for the formal annexation of Hawai‘i to the United States in 1898, which included the taking of about 1.8 million acres of Hawaiian lands.¹³ Since then, studies have shown that Kanaka Maoli, or Native Hawaiians, continue to have some of the highest rates of poverty, incarceration, school drop-out rates, and display several negative indicators of health.¹⁴ According to the 2000 U.S. Census, there are about 402,000 self-identified Native Hawaiians, of which 142,000 claimed only Native Hawaiian ancestry.¹⁵ In 2010, the U.S. Census reported about 527,000 self-identified Native Hawaiians.¹⁶ Native Hawaiians make up 21 percent of the total population in Hawai‘i.¹⁷

A. *RICE v. CAYETANO*:¹⁸ ATTACK ON DEFINING NATIVE HAWAIIAN MEMBERSHIP FOR ELECTION PURPOSES

The Office of Hawaiian Affairs (OHA), founded in 1978, is a public agency charged with the “responsibility for improving the well-being of Native Hawaiians.”¹⁹ OHA also holds title to “all real or personal property set aside or conveyed to native Hawaiians” and holds in trust the “income and proceeds from . . . the trust established for lands granted to the state.”²⁰ OHA is governed by an elected board of nine trustees.²¹ When OHA was established, only Hawai‘i residents defined as “native Hawaiian” with at least 50 percent Hawaiian blood quantum, or “Hawaiian,” with any percentage less than 50 percent blood quantum, could vote in the trustee elections.²²

In *Rice v. Cayetano*,²³ Harold F. Rice challenged these voting requirements under the Fifteenth Amendment of the U.S. Constitution. Rice was a fourth-generation white resident of Hawai‘i who was not Hawaiian “by any statutory definition” because he was neither native Hawaiian, nor Native Hawaiian.²⁴ In 2000,

12. Gretchen Kelly, *Hui Pu: Hawaiians Unifying for Independence*, HAWAIIAN INDEPENDENCE BLOG (Sept. 22, 2005, 12:38 PM), <http://www.hawaiiankingdom.info/C1126750129/E20050922123842>.

13. Goodyear-Kaopua, *supra* note 8.

14. *Id.*

15. Samuel L. Kealoha, Jr., Letter to the Editor, Maui News (Apr. 22, 2005) in J. Kēhaulani Kauanui, *Hawaiian Blood: Colonialism and the Politics of Sovereignty and Indigeneity* 171 (2008).

16. Valerie Richardson, *Obama Urged to Use Executive Order to Recognize Native Hawaiians*, WASH. TIMES (Aug. 22, 2013), <http://www.washingtontimes.com/news/2013/aug/22/obama-urged-to-use-executive-order-to-recognize-na/?page=all>.

17. *Id.*

18. *Rice v. Cayetano*, 528 U.S. 495 (2000).

19. The Office of Hawaiian Affairs is a public agency “with a high degree of autonomy” that has a responsibility “for improving the well-being of Native Hawaiians.” Among its responsibilities, it provides scholarships for Native Hawaiians, loans to Native Hawaiians to start businesses, funds research, and provides grants to the Department of Hawaiian Home Lands. See OFFICE OF HAWAIIAN AFFAIRS, <http://www.oha.org/about>.

20. KAUANUI, *HAWAIIAN BLOOD*, *supra* note 15, at 178–79.

21. OFFICE OF HAWAIIAN AFFAIRS, <http://www.oha.org/about> (last visited Apr. 8, 2017).

22. Kauanui, *Hawaiian Blood*, *supra* note 15, at 178.

23. *Cayetano*, 528 U.S. 495 (2000).

24. Under the 1920 Hawaiian Homes Commission Act (HHCA), the federal government defined “native Hawaiian” as individuals who have 50 percent or more blood quantum. In comparison, Native Hawaiians were defined as individuals of any Native Hawaiian ancestry. See J. Kehaulani Kauanui,

voting qualifications at the time made Rice ineligible to vote in the OHA trustees election. Rice argued that the voting qualification was race-based and that the denial of his right to vote in the election “on account of race” violated the Fifteenth Amendment of the U.S. Constitution.²⁵ In response, the state of Hawai‘i argued that the limitation on voter eligibility was not based on race, but rather on the “unique status of Hawaiian people in light of the state’s trust obligations,” which amounted to a “legal classification determined by the beneficiaries of the trust managed by OHA.”²⁶ The state argued that the voting requirement was rationally related to maintaining a congressional requirement²⁷ because its “special relationship” to the United States was “analogous to the federal government’s relationship with American Indian tribes.”²⁸

The U.S. Supreme Court held that conducting a state election exclusive to Native Hawaiians violated the Fifteenth Amendment of the U.S. Constitution.²⁹ The Court reasoned that since OHA is state agency and OHA administered the election, the trustee elections were “elections of the State, not of a separate quasi-sovereign,” and thus were subject to the Fifteenth Amendment.³⁰ It concluded that permitting the elections under *Morton v. Mancari*³¹ “would be to permit a State, by racial classification, to fence out whole classes of its citizens from decision-making in critical state affairs.”³² Today, OHA trustees are elected statewide to serve four-year terms, without a restriction limiting voting eligibility to Native Hawaiians.³³

When the Court in *Rice* held that Hawaiians were not entitled to the same “political protection Native American tribes held,” a number of subsequent challenges were made to federal and state-supported Native Hawaiian funding programs for education, health, and housing.³⁴ These programs were mainly granted through congressional legislative acts, and they included both Native Hawaiian-specific programs and programs targeting Native Americans that also included Native

Resisting the Akaka Bill, in NOELANI GOODYEAR-KA‘OPUA, IKAIKA HUSSEY, AND ERIN KAHUNAWAIKA‘ALA WRIGHT, *A NATION RISING* 315 (2014).

25. Kauanui, *Hawaiian Blood*, *supra* note 15, at 179.

26. *Id.*

27. The congressional requirement was for Hawai‘i to carry out the OHA trust and accept the definition of “native Hawaiian” according to the Hawaiian Homes Commission Act. *Id.* at 180.

28. *Id.* at 179.

29. *Rice v. Cayetano*, 528 U.S. 495, 524; Trisha Kehaulani Watson, *Roll of Thunder: Lifting the Veil on Na‘i Aupuni*, CIVIL BEAT (Oct. 27, 2015), <http://www.civilbeat.com/2015/10/roll-of-thunder-lifting-the-veil-on-nai-aupuni>.

30. *Rice*, 528 U.S. at 522.

31. *Morton v. Mancari*, 417 U.S. 535, 555 (1974) (holding that employment preferences for Indian applicants for positions in the Bureau of Indian Affairs was “reasonable and rationally designed to further Indian self-government.”).

32. *Rice*, 528 U.S. at 522.

33. *About*, OFFICE OF HAWAIIAN AFFAIRS, <http://www.oha.org/about> (last visited Apr. 8, 2017).

34. See KAUANUI, *HAWAIIAN BLOOD*, *supra* note 15, at 183 (citing *Arakaki v. Lingle*, 477 F.3d 1048 (2007) as an example of a relevant lawsuit).

Hawaiians.³⁵ The potential constitutional threat to the very existence of these programs led to a frantic rush to attain federal recognition for Native Hawaiians.³⁶

B. THE AKAKA BILL AND THE EFFORTS FOR FEDERAL RECOGNITION THROUGH THE FORMAL LEGISLATIVE PROCESS

Federal recognition is the primary top-down approach in the Native Hawaiian self-determination movement. Unlike Indian tribes and Alaska Natives, Native Hawaiians have not yet been federally recognized by the United States. In 2000, then-Senator Daniel Akaka introduced the Native Hawaiian Government Reorganization Act³⁷, or more commonly known as the Akaka Bill,³⁸ “to express the policy of the United States regarding the United States relationship with Native Hawaiians and to provide a process for the recognition by the United States of the Native Hawaiian governing entity.”³⁹ The bill was proposed to recognize Hawaiians as “indigenous people who have a special relationship with the United States and thus a right to self-determination under federal law acknowledging tribal governance.”⁴⁰ Specifically, the bill provided recognition of a Native Hawaiian governing entity but did not articulate the specific rights of that entity, as those rights would be negotiated between the federal government, Hawai‘i state government, and the Native Hawaiian governing entity.⁴¹

Following the Akaka Bill’s introduction, opinion polls showed a mixed reaction among the public. One public opinion poll found that 34 percent of people supported the Akaka Bill while 51 percent of people opposed it.⁴² Another poll by Ward Research, paid for by OHA, found that 70 percent of Hawai‘i residents supported federal recognition of Native Hawaiians similar to the federal recognition of American Indians and Alaska Natives. In the same poll, 51 percent of residents believed a Hawaiian governing entity should be formed to deal with the state and federal government. The Ward Research results also showed that 83 percent of residents supported the continued federal funding for Hawaiian programs in health, education, employment, economic development, and housing.⁴³

The Akaka Bill also elicited mixed reactions in Congress. The primary motivation for federal recognition was to protect over 160 federal programs that provide Native Hawaiians access to health, education, labor, and housing resources against potential challenges following *Rice*.⁴⁴ Supporters of federal recognition claimed

35. *Id.*

36. Watson, *supra* note 29.

37. S. 675, 112th Cong. (2012) (enacted), <https://www.govtrack.us/congress/bills/112/s675/text>.

38. The Akaka bill is named after the former Senator Daniel Akaka who introduced the bill. The “Akaka bill” will be used instead of the “Native Hawaiian Government Reorganization Act” for the rest of this Comment.

39. S. REP. NO. 112-251, at 1.

40. Kauanui, *Resisting the Akaka Bill*, *supra* note 24, at 315.

41. *Id.*

42. Richardson, *supra* note 16.

43. Gordon Y.K. Pang, *Most Back Akaka Bill: OHA Poll*, HONOLULU ADVERTISER (Sept. 5, 2007), <http://the.honoluluadvertiser.com/article/2007/Sep/05/ln/hawaii709050386.html>.

44. Kauanui, *Resisting the Akaka Bill*, *supra* note 24, at 316–17; Derrick DePledge, *OHA Lobbies*

that the Akaka Bill would “stave off court challenges to Hawaiian programs and entitlements by providing for the formation of a Hawaiian ‘nation within a nation’ similar to the status of Native American tribes.”⁴⁵ In opposition, Republican critics called the bill a “plan for a race-based government” and opposed it numerous times in the Senate. The bill has never been set to a vote in Congress.⁴⁶ The bill was continually amended in order to appease the Republican critics, delayed by filibusters, and delayed by several national events and natural disasters.⁴⁷ After its initial introduction in 2000, Senator Akaka presented various versions in five subsequent Congresses.⁴⁸ In 2010, the Akaka Bill passed the House with a 245–164 vote, but did not move forward for a Senate vote.⁴⁹ By 2013, President Obama expressed his support for the Akaka Bill and a willingness to use an executive order to bypass Congress and federally recognize Native Hawaiians.⁵⁰ No such order has yet been signed.

As a step toward self-determination, the Akaka Bill, as introduced in its 2011 version, provided a process for Native Hawaiians to reorganize the Native Hawaiian governing entity, establish the Office of Hawaiian Relations within the Department of Interior, and create a Native Hawaiian Interagency Coordinating Group to administer Native Hawaiian programs.⁵¹ The Akaka Bill also had its limits: it did not allow Hawai‘i to secede from the United States, private lands to be taken, authorize gaming in the state, or create a reservation in Hawai‘i.⁵² The act, if approved, would allow the new Native Hawaiian governing entity to enter negotiations with the state of Hawai‘i and the federal government, and any agreement regarding the transfer of land would require the state Legislature to approve the deal.⁵³ The latest revision, reported by the Senate Committee on December 12, 2012, however, guts the 2011 full version and removes much of the above language.⁵⁴

In addition, the 2012 version also removes language guaranteeing that the Native Hawaiian governing entity may enter into negotiations with the federal

for Akaka Bill, HONOLULU ADVERTISER, June 6, 2003, <http://the.honoluluadvertiser.com/article/2003/Jun/06/ln/ln27a.html> (outlining several examples of challenges to preferences given to Native Hawaiians in certain bills and federal programs).

45. Gretchen Kelly, *Hui Pu: Hawaiians Unifying for Independence*, HAWAIIAN INDEPENDENCE BLOG (Sept. 22, 2005, 12:38 PM), <http://www.hawaiiankingdom.info/C1126750129/E20050922123842>.

46. Kauanui, *Resisting the Akaka Bill*, *supra* note 24, at 313.

47. Kauanui, *Hawaiian Blood*, *supra* note 15, at 186.

48. After his initial presentation to the Senate of the 106th Congress, Senator Akaka presented versions in the 107th, 108th, 109th, 110th, and 111th Congress. AKAKA BILL, CIVIL BEAT, <http://www.civilbeat.com/topics/akaka-bill> (last visited Apr. 8, 2017).

49. Erin Kelly, *Native Hawaiian Bill Passed by U.S. House, Awaits Senate Vote*, HONOLULU ADVERTISER (Feb. 24, 2010), <http://the.honoluluadvertiser.com/article/2010/Feb/24/ln/hawaii2240339.html>.

50. Richardson, *supra* note 16.

51. *Akaka Bill*, CIVIL BEAT, <http://www.civilbeat.com/topics/akaka-bill> (last visited Apr. 8, 2017).

52. *Id.*

53. Erin Kelly, *Native Hawaiian Bill Passed by U.S. House, Awaits Senate Vote*, HONOLULU ADVERTISER (Feb. 24, 2010), <http://the.honoluluadvertiser.com/article/2010/Feb/24/ln/hawaii2240339.html>.

54. S. 675, 112th Cong. (Dec 17, 2012), <https://www.govtrack.us/congress/bills/112/s675/text>. See Part II for a more detailed discussion of the revision.

government and state of Hawai‘i. Rather, the new version maintains that the United States recognizes and reaffirms “the special political and legal relationship between the United States and the Native Hawaiian people by:

- (B) ceding to the State of Hawaii title to the public land formerly held by the United States, and mandating that those lands be held as a public trust for 5 purposes, 1 of which is the betterment of the conditions of the Native Hawaiian people; and
- (C) transferring the responsibility of the United States for the administration of the Hawaiian Home Lands to the State of Hawaii, but retaining the exclusive right to consent to any actions affecting the lands included in the trust and any amendment to the Hawaiian Homes Commission Act, 1920 (42 Stat. 108, chapter 42), that are enacted by the legislature of the State of Hawaii affecting the beneficiaries under that Act

The ability to make agreements between the Native Hawaiian governing entity and other sovereigns, however, is articulated clearly in the newly adopted Native Hawaiian Constitution by Na‘i Aupuni.⁵⁵

Despite the urgency to protect Native Hawaiians programs, the Akaka Bill never passed. Aside from concerns about a race-based government by Republican critics, opposition remains strong among Native Hawaiian activists and non-Hawaiian constituents alike. One of the major concerns is the fate of 1.8 million acres of a total of 4 million acres of Hawaiian land that were taken by the U.S. government during the 1898 annexation of Hawai‘i.⁵⁶ In 1921, Congress set aside 200,000 acres of this land for the class of Native Hawaiians with 50 percent blood quantum.⁵⁷ In 1959, the federal government allocated the remainder of the land to the state of Hawai‘i to hold in trust.⁵⁸ Other Native Hawaiian opponents such as the activist group Hui Pu claim that the Akaka Bill does not extend far enough to address the assault against Native Hawaiians, so legislation like the Akaka Bill is not the appropriate remedy.⁵⁹ These opponents fear that the Akaka Bill would halt any efforts by and for Hawaiians to claim a sovereign state outside of the United States.⁶⁰ Some of these pro-independence activists adamantly oppose the “nation-within-a-nation status”⁶¹ and prefer sovereign independence, “possibly requiring secession from the

55. See Part III.B. for a more detailed discussion on this provision and analysis of the new constitution.

56. Goodyear-Kaopua, *Hawai‘i: An Occupied Country*, *supra* note 8.

57. *Id.*

58. *Id.*

59. Hui Pu was the “most persistent, vocal, and visible group organized to expose the role of the state in containing the full Hawaiian claim.” Kauanui, *Resisting the Akaka Bill*, *supra* note 24, at 314. Members consisted of “leaders in the area of Hawaiian-rights activism, cultural practice and protocol, farming, academics and other fields, as well as sovereignty groups.” *Id.* at 322.

60. Akaka Bill, *supra* note 51.

61. This type of status is akin to “the status of Native Americans and Alaskan indigenous peoples in the [U.S.] currently.” Under this model, the new nation would not be part of the State of Hawai‘i, but

United States.”⁶² Overall, there is still a lack of consensus among Native Hawaiians, Hawai‘i residents, and members of Congress for federal recognition.

II. THE CREATION OF A MEMBERSHIP BASE ROLL UNDER THE AKAKA BILL

Forming a membership base is one of the most fundamental building blocks of forming the new government. Membership criteria for the Native Hawaiian governing entity under the Akaka Bill is based on lineage, and does not rely on blood quantum, which the Hawaiian Homes Commission Act (HHCA) of 1920 requires. Specifically, in its 2011 bill introduction to Congress, the Akaka Bill defined qualified Native Hawaiians as those who were (1) “direct lineal descendants of the aboriginal, indigenous population residing in the islands prior to 1893” and (2) have expressed that they “wish to participate in the governmental reorganization.”⁶³ In a drastic move, on December 17, 2012, a new version was introduced to the Senate Committee that cut the proposal from sixty pages to fifteen pages, removing and replacing significant language including the section on membership criteria.⁶⁴ This new shortened version, which did not make it to a vote in Congress, assigns the role of forming a membership roll to the new state-created Native Hawaiian Roll Commission, or Kana‘iolowalu,⁶⁵ authorized by the Hawai‘i Legislature under Act 195 (2011).⁶⁶ The goal of the Commission was to create a voter registry of Hawaiians for an election in the formation of a sovereign government.⁶⁷

A. NATIVE HAWAIIAN ROLL COMMISSION AND ANALYSIS OF MEMBERSHIP CRITERIA

Act 195 created the Native Hawaiian Roll Commission, a five-member commission tasked with creating an online registry of a base roll of Native Hawaiians for the purpose of creating and maintaining a list of individuals who would be “eligible to participate in the formation of a governing entity.”⁶⁸ This process “arguably would create the first documented evidence of collective acquiescence to the U.S. government or its subsidiaries.”⁶⁹ When it became clear that the Akaka Bill would not be passed, Hawaii Governor Neil Abercrombie appointed former

rather have “normally exercised by [nations].” UNIVERSITY OF HAWAII‘I, Sovereignty: Outline 1, http://www2.hawaii.edu/~manicas/pdf_files/courses/Sovereignty.pdf (describing four models of sovereignty that have been advocated).

62. *Id.*

63. *Id.*

64. S. 675, 112th Cong. (Dec. 17, 2012), <https://www.govtrack.us/congress/bills/112/s675/text>. See also *Full Text: New Version of Akaka Bill*, HAWAII FREE PRESS (Sept. 13, 2012), <http://www.hawaii-freepress.com/ArticlesMain/tabid/56/ID/7699/Full-Text-New-Version-of-Akaka-Bill.aspx>.

65. The Native Hawaiian Roll Commission, or Kana‘iolowalu, was passed in Act 195 (2011) to prepare and maintain a membership roll of Native Hawaiians for the government reorganization. See Kauanui, *Resisting the Akaka Bill*, *supra* note 24, at 314.

66. S. 675, 112th Cong. (Dec. 17, 2012), <https://www.govtrack.us/congress/bills/112/s675/text>. See also *Full Text: New Version of Akaka Bill*, HAWAII FREE PRESS (Sept. 13, 2012), <http://www.hawaii-freepress.com/ArticlesMain/tabid/56/ID/7699/Full-Text-New-Version-of-Akaka-Bill.aspx>.

67. *Kana‘iolowalu Launches Online Registry for Native Hawaiians*, KANA‘IOLOWALU.ORG (July 20, 2012), <http://www.kanaiolowalu.org/news/story/?id=2>; Watson, *supra* note 29.

68. Kauanui, *Resisting the Akaka Bill*, *supra* note 24, at 314.

69. *Id.* at 314.

Governor John Waihe'e to lead the new commission.⁷⁰ OHA, which funds the Commission,⁷¹ provided \$4 million to create the registry.⁷² The program aimed to register 200,000 Native Hawaiians.⁷³ The roll would later form the voting base for Na'i Aupuni to elect forty candidates to write the Constitution of the Native Hawaiian Nation.⁷⁴

The Commission is responsible for certifying that the individuals on the roll meet the requirements of "qualified Native Hawaiians." A qualified Native Hawaiian is:

- (A) (i) "An individual who is a descendant of the aboriginal peoples who, prior to 1778, occupied and exercised sovereignty in the Hawaiian Islands, the area that now constitutes the State of Hawaii, or
- (ii) An individual who is one of the indigenous, native people of Hawai'i and who was eligible in 1921 for the programs authorized by the Hawaiian Homes Commission Act, 1920, or a direct lineal descendant of that individual;
- (B) Has maintained a significant cultural, social, or civic connection to the Native Hawaiian community and wishes to participate in the organization of the Native Hawaiian governing entity; and
- (C) Is eighteen years of age or older.

Part A(i) of the membership criteria is based on the lineage model. The criterion is broad enough to include "non-Hawaiians who were citizens of the Hawaiian Kingdom and therefore have a rightful place in the citizenry,"⁷⁵ thereby avoiding a potential constitutional challenge under *Rice v. Cayetano*. On the other hand, Part A(ii) of the membership criteria which includes beneficiaries of the HHCA⁷⁶ may be unnecessary because these individuals are already included in Part A(i). For comparison, J. Kehaulani Kauanui analyzes a former version of the Akaka bill (S. 310) that defines "Native Hawaiian" with a similar criteria except with a different year of required residency in Hawai'i:

70. *Id.* at 314.

71. *Act 195*, KANAIOLOWALU.ORG, <http://www.kanaiolowalu.org/about/act195> (last visited Apr. 8, 2017).

72. Trisha K. Watson, *Where Do We Go From Here? The Future of Native Hawaiian Self-Determination Hanging in the Balance*, HUFF. POST HAW. (Feb. 8, 2014), http://www.huffingtonpost.com/trisha-kehaulani-watson/where-do-we-go-from-here-_1_b_4409370.html.

73. Kana'iowalu Launches Online Registry for Native Hawaiians, *supra* note 67.

74. Na'i Aupuni is an independent organization that would conduct the process of electing delegates, facilitate a constitutional convention, and ratification vote. *About Na'i Aupuni*, NAIAUPUNI.ORG, <http://www.naiaupuni.org/about.html>. See also Press Release, Na'i Aupuni, Election-America Releases List of Hawaiian Election Delegate Candidates (Sept. 30, 2015), NAIAUPUNI.ORG, <http://www.naiaupuni.org/docs/NewsRelease-ElectionAmericaReleasesListOfHawaiianElectionCandidates-093015.pdf>.

75. See KAUANUI, HAWAIIAN BLOOD, *supra* note 15, at 188.

76. These members qualified for the HHCA by having a fifty percent or more blood quantum.

- (i) an individual who is 1 of the indigenous, native people of Hawaii and who is a direct lineal descendant of the aboriginal, indigenous, native people who-
 - (I) resided on the islands that now comprise the State of Hawaii on or before January 1, 1893; and
 - (II) occupied and exercised sovereignty in the Hawaiian archipelago, including the area that now constitutes the State of Hawaii; or
 - (III) an individual who is 1 of the indigenous, native people of Hawaii and who was eligible in 1921 for the programs authorized by the Hawaiian Homes Commission Act (42 Stat. 108, Chapter 42) or a direct lineal descendant of that individual (12-13).

Kauanui posits that the section on individuals who qualified for the HHCA or was a lineal descendent of an eligible individual is “unnecessary because if it includes those residents in the islands on or before January 1, 1893, that would, by definition, already include those who were eligible for the HHCA program in 1921 (and their descendants).”⁷⁷ She argues that the author of this bill version most likely included the HHCA list to “assert that there is already a trust relationship between the United States government and the Hawaiian people.”⁷⁸ Likewise, the authors of the Native Hawaiian Roll Commission membership guidelines likely included the HHCA reference to suggest that there is a trust relationship between the federal government and the Hawaiian people, since this Act is directly referenced in the latest Akaka Bill version. This trust relationship would help support the goal of federal recognition.

Defining membership criteria is one of the first steps in nation-building. While the Akaka Bill cited 1893, the year of the illegal overthrow of the Hawaiian Kingdom, as its residency requirement for lineal descendants, the Native Hawaiian Roll Commission instead used the point of contact by Captain Cook in 1778 as its reference point. Likewise, the Native Hawaiian Nation Constitution states that “a citizen of the Native Hawaiian Nation is any descendant of the aboriginal and indigenous people who, prior to 1778, occupied and exercised sovereignty in the Hawaiian Islands and is enrolled in the nation.”⁷⁹ The Native Hawaiian Roll Commission defines membership using the Native Hawaiian Roll Commission’s 1778 reference point, indicating a coordinated effort between the Native Hawaiian Roll Commission and the proponents of the newly adopted Constitution of the Native Hawaiian Nation by Na’i Aupuni.⁸⁰ Once membership criteria is clearly demarcated, those members can then move forward to the next steps in the self-determination movement.

77. KAUANUI, HAWAIIAN BLOOD, *supra* note 15, at 187.

78. *Id.*

79. Const. of the Native Hawaiian Nation ch. I, art. 2(1).

80. See Anne K. Kelly, *How to Steal a Nation—Twice*, INDIAN COUNTRY TODAY MEDIA NETWORK (Nov. 23, 2015), <http://indiancountrytodaymedianetwork.com/2015/11/23/how-steal-nation-twice>; Press Release, Na’i Aupuni, Na’i Aupuni Terminates Election Process (Dec. 15, 2015), <http://www.naiaupuni.org/docs/NewsRelease-NaiAupuniTerminatesElectionProcess-121515.pdf>. See Part III for analysis of the new constitution.

B. ANALYSIS OF THE PROCESS OF COLLECTING NAMES FOR THE NATIVE HAWAIIAN BASE ROLL

Though a base roll formation is fundamental to building a nation, historically, such a process has been problematic. In the late nineteenth century, U.S. government officials decided that the perceived solution to the “Indian problem” was the allotment of land under the General Allotment Act.⁸¹ The federal government hoped that land ownership would “eradicate the Native culture.”⁸² Yet, in order to receive the “spoils of assimilation,” federal officials had to first determine who was Indian.⁸³ U.S. government officials, not Native peoples, created the Dawes Rolls, membership rolls that named who was entitled to land allotments under the General Allotment Act. As a result, “racial identity was not determined by each individual, but rather withstood review by a government agent.”⁸⁴ The “institutionalization of Indian blood” by this external identification produced major problems, for example, for later generations of Freedman having to “prove” Indian blood when they were denied this identity by the government agent based on the color of their skin.⁸⁵

In seeking membership with the Native Hawaiian Roll Commission, an applicant must prove Native Hawaiian ancestry based on a paper trail.⁸⁶ For example, voting eligibility for the originally scheduled election⁸⁷ for delegates to the Na‘i Aupuni ‘aha, or constitutional convention, required proof of Hawaiian ancestry on one of the following:

- (1) on a birth certificate of if it lists Hawaiian, or birth certificate of the applicant’s parent and/or grandparent to trace the applicant’s Hawaiian ancestry,
- (2) a letter from the Ho‘oulu Data Center,⁸⁸
- (3) proof that the applicant is a Department of Hawaiian Home Lands Lessee,⁸⁹ or

81. Kevin N. Maillard, *Redwashing History: Tribal Anachronisms in the Seminole Nation Cases*, THE INDIAN CIVIL RIGHTS ACT AT FORTY 111 (Kristen A. Carpenter et al. eds., 2012).

82. *Id.*

83. *Id.* at 112.

84. *Id.*

85. *Id.*

86. Though the process is tracking a paper trail now, the concern about external identification still exists in the Native Hawaiian context; however, this history reaches beyond the scope of this paper.

87. The election was originally scheduled for October 15, 2015, and then eventually canceled because of litigation challenges. See Part III for more detail discussion on the election. See also Register Now, KANA‘IOWALU.ORG, <https://www.kanaiolowalu.org/registernow> (last visited Apr. 8, 2017).

88. For description of three steps to apply for Hawaiian Ancestry Verification through this center, see Educational Opportunities Await You and Your ‘Ohana, HO‘OULU HAWAIIAN DATA CENTER, <https://apps.ksbe.edu/datacenter> (last visited Apr. 8, 2017).

89. See Applying for Hawaiian Home Lands, HAWAII.GOV, <http://dhh.hawaii.gov/applications/applying-for-hawaiian-home-lands> (describing program established by the Hawaiian Homes Commission Act of 1920 that provides eligible native Hawaiians with residential, agricultural, and pastoral homestead leases) (last visited Apr. 8, 2017).

(4) proof of graduation from Kamehameha Schools.⁹⁰

All four options require documentation of Native Hawaiian ancestry. The Ho'oulu Data Center, part of the Kamehameha Schools,⁹¹ verifies Native Hawaiian eligibility with birth certificates and in the alternative, marriage certificates, death certificates, or certificates of baptism.⁹² The fourth option is a derivative of the second option; graduation from Kamehameha Schools proves Native Hawaiian ancestry because the graduate has already been verified by the Ho'oulu Data Center. Each of these eligibility options are based on lineage, except for the third criteria which relies on blood quantum since anyone who is a Department of Home Lands Lessee (DHHL) by definition has 50 percent blood quantum, or is native Hawaiian.⁹³ The DHHL also relies on birth certificates that the applicant can trace back to a full Hawaiian ancestor.⁹⁴

The goal of the Native Hawaiian Roll Commission was to collect 200,000 names. In the first two years, only 19,000 Hawaiians had voluntarily enrolled, or less than four percent of the global Native Hawaiian population of about 500,000.⁹⁵ In efforts to expand the number of enrollees, Congress passed Act 77 (2013), which forcibly merged the list of names from three other OHA registries: Operation 'Ohana (1990s), the Hawaiian Registry (2002), and Kau Inoa (2004) into the list collected by the Native Hawaiian Roll Commission.⁹⁶

Overall, critics shed light on the misuse of combining these separate roles and the inaccuracy of the finished product. Of these three lists, only Kau Inoa promoted itself as a list to be used for political reasons. The translation of the Hawaiian word "kau" is "to place" and "inoa" is "name," literally encouraging Native Hawaiians to "sign up" or "register" to build a Native Hawaiian nation.⁹⁷ In contrast, Operation 'Ohana purported to identify the global population of Native Hawaiians, and the Native Hawaiian Registry aimed to aid access to Native Hawaiian programs.

90. For more information on Kamehameha Schools, see *About Kamehameha Schools*, KAMEHAMEHA SCHOOLS, http://www.ksbe.edu/about_us/about_kamehameha_schools (last visited Apr. 8, 2017) (describing the mission of Kamehameha Schools as "to improve the capability and well-being of Hawaiians through education.").

91. Kamehameha Schools is a K-12 private school that prefers applicants with Hawaiian ancestry. Applicants are required to register with the Ho'oulu Hawaiian Data Center to verify their Native Hawaiian ancestry.

92. *Step 2: Gathering Documents*, HO'OU LU HAWAIIAN DATA CENTER, KAMEHAMEHA SCHOOLS, <https://apps.ksbe.edu/datacenter/3-step-process/step-2-gathering-documents> (last visited Apr. 8, 2017).

93. See KAUANUI, HAWAIIAN BLOOD, *supra* note 15, at 187.

94. Applying for Hawaiian Home Lands, HAWAII.GOV, <http://dhhl.hawaii.gov/applications/applying-for-hawaiian-home-lands> (last visited Apr. 8, 2017).

95. Watson, *Where Do We Go From Here?*, *supra* note 72.

96. *Id.*; Noelani Arista & Randall Akee, *Manufacturing Consent for the Living AND the Dead in Hawaii 'i*, INDIAN COUNTRY TODAY MEDIA NETWORK (Nov. 20, 2015), <http://indiancountrytodaymedianetwork.com/2015/11/20/manufacturing-consent-living-and-dead-hawaii> (adding dates of each OHA registry).

97. Kau Inoa (Nov. 7, 2007), <http://pw1.netcom.com/~halkop/kauinoa.html> (providing a translation of Hawaiian terms); see Arista & Akee, *supra* note 96 (providing that Kau Inoa "consists of Native Hawaiians who signed up to be part of a Native Hawaiian nation.").

The Native Hawaiian Registry supplied an identification card to Native Hawaiians to “access Native Hawaiian programs without providing birth certificates and other paperwork to prove they are Hawaiian.”⁹⁸ Indeed, some of the individuals who signed up for scholarship requirements did not intend to participate in nation-building.⁹⁹ Furthermore, the OHA Administrator for the Native Hawaiian Registry had told enrollees that it was not the intention of the process “to use the list as a political tool” and that the law guarantees that the names would be confidential.¹⁰⁰

Another problem with the base roll collected by the Native Hawaiian Roll Commission is that it includes names of individuals who did not consent to being part of the effort. The base roll includes deceased Native Hawaiians, whom the commissioners did not remove from the updated roll.¹⁰¹ According to some counts, there are at least 604 names of dead individuals that should have been removed.¹⁰² The additional lists raised the total number of names collected to about 125,000.¹⁰³ Under a court order, the Native Hawaiian Roll Commission publicly released a certified list of 95,000 names.¹⁰⁴ Individuals did not have the option to “opt-in” and “removal of one’s name was burdensome and that burden was placed on the individual.”¹⁰⁵ While there was an option to opt-out of being added to other lists, very few people exercised this option.¹⁰⁶ The use of registries of names and the difficulty in removing one’s name from the roll created an “illusion of robust support for Kanaiolowalu [the project of the Native Hawaiian Roll Commission to enroll Native Hawaiians] where there was none.”¹⁰⁷

C. IMPLICATIONS OF THE BASE ROLLS FOR THE NA‘I AUPUNI ELECTION AND NATIVE GOVERNANCE

Founded in December 2014, Na‘i Aupuni’s mandate was to establish the “path to ‘Aha, or constitutional convention, where Hawaiians can discuss and explore various options of self-determination.”¹⁰⁸ The election would select forty delegates “apportioned based on the current geographic distribution of population within the Roll Commission’s current registry.” Specifically, O‘ahu had twenty delegates, Hawai‘i Island had seven delegates, Maui had three delegates, Kaua‘i and Ni‘ihau had two delegates combined, Moloka‘i and Lana‘i together had one delegate, and out-of-state Hawaiians had seven delegates.¹⁰⁹ Thus, the extent to

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. Kelly, *supra* note 80.

104. *Id.*

105. Watson, Roll of Thunder, *supra* note 29.

106. Arista, *supra* note 96.

107. Watson, Roll of Thunder, *supra* note 29.

108. Press Release, *supra* note 80.

109. *Nai Aupuni Delegate Candidate Information*, ELECTION-AMERICA, <https://vote.election-america.com/naiaupuni/allbios.htm> (last visited Apr. 8, 2017). Election-America is the name of the elections contractor that Nai Aupuni hired for this process.

which the base rolls were complete and accurate would directly impact the proportional representation in the discussion of self-determination and how the Constitution would be shaped.

The process of selecting attendees for the constitutional convention was subject to a quick timeline. Voting certification was due October 15, 2015, and ballots for the delegates were scheduled to be collected from November 1 to November 30, 2015. Those elected would attend a constitutional convention two months later. About two hundred individuals submitted their campaigns and voters submitted their ballots in November; however, the process was stalled because of constitutional challenges by an outside party.¹¹⁰ In an attempt to stop the election, some including Keli'i Akina, president of the nonprofit group Grassroot Institute, sued the state of Hawai'i. They contended that the Na'i Aupuni election violated the Fifteenth Amendment, "arguing that it violates the ban on federal and state governments from using race . . . to deny a citizen the right to vote" as the election would excluded Hawai'i residents who were not Native Hawaiian from voting.¹¹¹ On December 3, 2015, the U.S. Supreme Court granted an injunction request by Grassroot Institute, blocking the counting of votes and preventing the certification of any winners, pending the outcome of an appeal to Ninth Circuit.¹¹² Some of the plaintiffs argued that they did not give consent to their names on the membership roll.¹¹³ The non-Native Hawaiian plaintiffs argued that the election results would have an impact on them and therefore they should be included in the vote.¹¹⁴ Further, the plaintiffs added that the "state shouldn't be involved in a race-based election," although the state denied that it was involved in the election.¹¹⁵ In turn, pressured by the litigation, Na'i Aupuni canceled the election process.¹¹⁶ Rather than delay, the organization allowed all delegate candidates¹¹⁷ to attend the constitutional convention,¹¹⁸ which took place in February 2016.¹¹⁹ On January 19, the Supreme Court denied a request by the challenges to hold Na'i Aupuni in civil contempt.¹²⁰

110. The deadline was extended to December 21 because of ongoing litigation challenges.

111. Todd Simons, *Nai Aupuni Election Halted, But All Candidates Invited to Aha*, HONOLULU CIVIL BEAT (Dec. 15, 2015), <http://www.civilbeat.com/2015/12/nai-aupuni-election-terminated-but-all-candidates-are-invited-to-aha>.

112. To view and download the original court filings relevant to the litigation, see Malia Hill, *Akina v. Hawaii—The Documents*, GRASSROOTS INSTITUTE (Oct. 22, 2015), <http://new.grassrootinstitute.org/2015/10/akina-v-hawaii-the-documents>.

113. Kelleher, *supra* note 12.

114. *Id.*

115. *Id.*

116. Press Release, *supra* note 80.

117. For list of candidates and their biographies, see *Na'i Aupuni Delegate Candidates Information*, *supra* note 109.

118. For the official notice that Na'i Aupuni sent all candidates, see Letter from Na'i Aupuni to Candidates, <http://www.naiaupuni.org/docs/Candidates%20Letter%2012-15-15.pdf> (last visited Apr. 8, 2017).

119. Press Release, *supra* note 80.

120. *Supreme Court Declines to Hold Native Hawaiian Election Group in Contempt*, LEXIS LEGAL NEWS (Jan. 19, 2015, 2:19 PM), http://www.lexislegalnews.com/mealeys-native-american-law/articles/5319?nl_pk=75ec4cec-0559-4304-8a76-d7e955132088&utm_source=newsletter&utm_medi

In just over a year, without an election, Naʻi Aupuni was able to attract over 150 community members, complete a four-week constitutional convention, and adopt a Constitution by a vote of 88–30.¹²¹

The decision to move forward with the constitutional convention without the election results undermines the fairness¹²² that underlies the population-based distribution of delegate numbers. The election process originally distributed the number of delegates based on the size of the Native Hawaiian population in that geographic location. As a result, allowing all candidates to attend would disproportionately advantage the regions with more candidates, rather than the regions with higher populations of Native Hawaiians. For example, Molokai and Lanai combined had three candidates running for one delegate spot, while forty-three individuals ran for seven spots from outside of Hawaii and thirty-three candidates for seven spots for Hawaii Island. If all of the candidates attended, then the groups of representatives from these larger applicant pools will greatly outnumber the bases with smaller applicant pools, rather than remain proportional to their respective population sizes.

The stark divide in the various levels of support for the elections draws out a key question: Is Naʻi Aupuni a grassroots movement?¹²³ More fundamentally, in this nation-building process, who is included and who is excluded? On the one hand, Naʻi Aupuni posts on its website that it is an “independent organization made up of volunteer board of directors from the Hawaiian community.”¹²⁴ The site further clarifies that “Naʻi Aupuni is separate and independent from OHA and the State of Hawaiʻi.”¹²⁵ The 151 ‘aha participants came from variety of backgrounds, including “attorneys, cultural practitioners, retired jurists, laborers.”¹²⁶ In order to qualify to run for the delegate election, each of the candidates were required to secure ten nominations from qualified voters.¹²⁷ The emergence of over one hundred individuals from the Native Hawaiian community to step forward to discuss self-determination is a grassroots movement in itself.

On the other hand, a closer look at the foundation of the organization suggests some potential state ties. OHA provides grants to the Akamai Foundation, the nonprofit organization that serves as a fiscal sponsor for Naʻi Aupuni under Article

um=email&utm_campaign=mealeys-native-american-law.

121. Chad Blair, *Native Hawaiian Constitution Adopted*, CIVIL BEAT (Feb. 27, 2016), <http://www.civilbeat.com/2016/02/native-hawaiian-constitution-adopted>.

122. This argument finds that potential unfairness to eliminating the require delegate distribution is created to the extent it was fair when the distribution was made.

123. I define a “grassroots” movement as one that is driven by local community members without involvement by the state or federal government.

124. *About Nai Aupuni*, NAIAPUNI.ORG, <http://www.naiaupuni.org/about.html>.

125. *Id.*

126. Blair, *supra* note 121; *Naʻi Aupuni Delegate Candidates Information*, *supra* note 109 (providing a full list of candidates through Election-America, the name of the contractor hired to conduct the election process).

127. See, e.g., *Oʻahu Delegate Candidate Information*, NAʻI AUPUNI, <https://vote.election-america.com/naiaupuni/oahu.htm> (listing all candidates for twenty Oʻahu delegate seats and their biographies including list of required ten nominators).

XII, Section 6 of the Hawai‘i Constitution. Na‘i Aupuni sets out provisions to articulate independence from OHA:

- (1) OHA agrees that Na‘i Aupuni has no obligation to consult with OHA or Akamai Foundation on its decisions regarding the performance of the Scope of Services,
- (2) Na‘i Aupuni hereby agrees that the decisions of Na‘i Aupuni and its directors, paid consultants, election monitors, contractors, and attorneys regarding the performance of the Scope of Services will not be directly or indirectly controlled or affected by OHA.”
- (3) Scope of Services comprises an election of delegates, election and referendum monitoring, a governance ‘Aha, and a referendum to ratify any recommendation of the delegates arising out of the ‘Aha.

Na‘i Aupuni calls itself a “private, nonprofit organization” so board meetings are not open to the public. To form its leadership, according to Na‘i Aupuni, OHA reached out to “ali‘i¹²⁸ trusts, royal societies, and other Hawaiian organizations to discuss reorganization of a Native Hawaiian government and nation building.”¹²⁹ The five board members of Na‘i Aupuni are volunteers with ties to Hawaiian royalty.¹³⁰ James Kuhio Asam, President of Na‘i Aupuni, is the executive director of the King William Charles Lunalilo Trust.¹³¹ Pauline Nako‘olani Namu‘o, Vice-President, and Geraldine Abbey Miyamoto are from the royal women’s society Ahahui Ka‘ahumanu Society.¹³² Naomi Kealoha Ballesteros and Selena Lehua Schuelke’s ties are with the royal organization Hale O Na Ali‘i O Hawai‘i.¹³³ These individuals come from organizations with aims to preserve the monarchy and monarchical ties.

128. The translation of ali‘i is “royal,” referring to the Hawaiian monarchy.

129. See *Native Hawaiian community leaders to take helm of nation building process*, OHA.ORG, <http://www.oha.org/news/native-hawaiian-community-leaders-to-take-helm-of-nation-building-process> (last visited Apr. 8, 2017); *About Nai Aupuni*, *supra* note 6.

130. Board of Directors, NA‘I AUPUNI, <http://www.naiaupuni.org/directors.html> (listing the five members of the Board of Directors “who are associated with three respective Hawaiian alii-founded organizations.”); Timothy Hurley, *OHA Hands off the Final Tasks for Nation-Building*, HONOLULU STAR-ADVERTISER (May 29, 2015), <http://www.pressreader.com/usa/honolulu-star-advertiser/20150529/281509339787181/TextView>.

131. *Id.* at 134 (describing Asam’s role in “overseeing the trust left by the sixth monarch of the Hawaiian Kingdom . . . King Lunalilo”). A description of each Board of Directors’ background can be viewed by clicking on their names on the site. *Id.* The Lunalilo Trust funds the Lunalilo Home, a nursing home for disadvantaged elderly with Hawaiian ancestry; see LUNALILO HOME, <http://lunalilo.org> (last visited Apr. 8, 2017).

132. *Id.* (describing Namu‘o’s background). Ahahui Ka‘ahumanu Society is a civic club formed in 1864 to honor the life of the Queen and “preserve the monarchy in Hawaii.” See Ahahui Ka‘ahumanu Society String Lei for Kamheameha, VIMEO (July 20, 2009), <https://vimeo.com/5674811>; see also Yasmin Anwar, *Sisterhood Keeps Old Traditions Alive*, HONOLULU ADVERTISER (June 11, 2011), <http://the.honoluluadvertiser.com/article/2001/Jun/11/lh/lh06a.html> (describing the traditions and history of the exclusive royal society).

133. *Id.* (describing the backgrounds of Ballesteros and Schuelke).

The ongoing question of nation-building is: which community should take the lead on forming a new government? While individuals from three royal societies are taking the lead, other royal entities have not joined in the process of nation-building through Na‘i Aupuni. For example, the Royal Order of Kamehameha does not support the Native Hawaiian Constitution formed by Na‘i Aupuni.¹³⁴ In its letter to the CEO of OHA, the Order claimed that the Na‘i Aupuni movement is “in conflict with the last approved (1864) Constitution of Our Kingdom” and so cannot be “drafted by a system that claims to have overthrown our Kingdom and then apologizes for its wrong doing.”¹³⁵

Another group of Hawaiians, the Aha Aloha Aina 2016, also opposes the Na‘i Aupuni convention and held parallel meetings the same week, drawing an estimated 350 people.¹³⁶ This group was not funded or supported by OHA or the state or federal government, and was grassroots.¹³⁷ Walter Ritte, one of the leaders of the new group, had initially run for a delegate position in Na‘i Aupuni, but withdrew from the election. He questioned the alleged independence of Na‘i Aupuni since it receives funding from OHA through the nonprofit organization Akamai Foundation.¹³⁸ Andre Perez, also an active member of Hui Pu, spoke before the Aha Aloha Aina 2016, arguing that though there were “many good people” participating in Na‘i Aupuni, the process leading to the movement has been “manipulated, controlled, politicized without our involvement.”¹³⁹ Like Hui Pu, which gained momentum by reacting strongly in opposition of the Akaka Bill in 2005, ‘Aha Aloha Aina 2016, gained traction in reaction to “Na‘i Aupuni’s claims to be the representative voice” of the Native Hawaiian people.¹⁴⁰

The question of who is included and who is excluded from the Native Hawaiian nation-building process among Native Hawaiians continues to cause stagnation in the nation-building process, preventing a cohesive Hawaiian self-determination movement up till today. As exhibited by the two examples opposing Na‘i Aupuni, much of the opposition now is against how the convention is formed and whom it excludes rather than the content of the convention or constitution. The main concerns of those opposing Na‘i Aupuni are that it (1) was funded by the state and (2) that it excluded the input of many Native Hawaiians. Both of these concerns center on the proper inclusion or exclusion of certain people. Thus, defining

134. Letter to Kamanaopono Crabbe, CEO of the Office of Hawaiian Affairs, on Opposition of the Native Hawaiian Nation Constitution, ‘Aha Aloha ‘Aina (Mar. 16, 2016) <https://ahaalohaaina.com/endorsements>.

135. *Id.*

136. Chad Blair, *The Other Aha: Hawaiian Independence Backers Make Their Case*, CIVIL BEAT (Feb. 25, 2016), <http://www.civilbeat.org/2016/02/the-other-aha-hawaiian-independence-backers-make-their-case>.

137. See definition of “grassroots,” *supra* note 123.

138. Blair, *supra* note 136.

139. *Id.*

140. ‘AHA ALOHA ‘AINA, <https://ahaalohaaina.com> (stating that one of the coalition’s other goals is to “reject the current [Department of Interior] endeavor to Federally Recognize na Kanaka Maoli as a Native Hawaiian Tribe.”).

membership can undermine a self-determination movement, even if the content of the movement is supported.

III. USING AN INTERNATIONAL FRAMEWORK TO UNDERSTAND THE NATIVE HAWAIIAN CONSTITUTION AND MEMBERSHIP ROLLS

I next turn to examine the content of the Native Hawaiian Nation Constitution created by Na'i Aupuni. First, I review the three advocacy theories in contemporary international law outlined by the leading international law scholar on indigenous issues, S. James Anaya that have framed the articulation of Native Hawaiian self-determination movements.¹⁴¹ Within the contemporary international understanding of the “indigenous rubric,” Native Hawaiians qualify as an indigenous people.¹⁴² From my initial analysis, I find that the articulation of rights in the Constitution comports with the indigenous rights advocacy theory. Finally, I analyze the role of membership and processes to amend membership in the Constitution and what it suggests for good Native governance.

A. OVERVIEW OF THREE INTERNATIONAL ADVOCACY THEORIES CURRENTLY USED IN NATIVE HAWAIIAN SELF-DETERMINATION MOVEMENTS

There are three international law theories used in Native Hawaiian self-determination movements: indigenous rights regime, decolonization approach, and “de-occupation” approach.¹⁴³

The indigenous rights regime, which is widely accepted by international law, recognizes indigenous peoples as having “the right to self-determination and related collective rights that stem from their distinct identities and historical characteristics.”¹⁴⁴ Unlike other theories, the objective of the indigenous rights regime is the “protection and expansion of Native Hawaiian cultural, land, resource and self-governance rights within the U.S. legal system.”¹⁴⁵ The framework also extends to collective rights “in relation to . . . development, education, social services, and traditional territories; . . . and it mandates respect for indigenous-state historical treaties and modern compacts.”¹⁴⁶ This theory’s source of authority is the UN Declaration on the Rights of Indigenous Peoples (UN Declaration) as well as other international human rights instruments and related jurisprudence.¹⁴⁷ In December 2010, the United States signed onto the UN Declaration through an announcement

141. S. James Anaya, *Study on the International Law and Policy Relating to the Situation of the Native Hawaiians People*, INDIGENOUS PEOPLES LAW AND POLICY PROGRAM, THE UNIVERSITY OF ARIZONA, JAMES E. ROGERS COLLEGE OF LAW, June 2015, at i-v.

142. *Id.* at 2; S. JAMES ANAYA, INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES I (2009) (including Native Hawaiians and other Pacific Islanders in a list of “diverse Indian and aboriginal societies in the Western Hemisphere”).

143. Anaya, *supra* note 141, at ii-iii.

144. *Id.* at 2.

145. *Id.* at iii.

146. *Id.* at i.

147. *Id.* at iii.

by President Barack Obama, reversing the previous U.S. vote against it.¹⁴⁸ Though the UN Declaration is not legally binding, it still represents an “authoritative synthesis of the human rights principles found in various treaties, beginning with the United Nations Charter, and their application to indigenous peoples.”¹⁴⁹

The decolonization approach relies on article 73 of the UN Charter, which concerns “territories whose people have not yet attained a full measure of self-government.”¹⁵⁰ While both the indigenous rights approach and the decolonization approach concern the right of self-determination, the decolonization regime aims to do “away with conditions of classical colonialism in the administration of entire territories that are deemed non-self-governing.”¹⁵¹ In contrast, the indigenous rights regime concerns the rights of indigenous peoples themselves, whether or not territories are still colonized or self-governing.¹⁵²

Up until statehood, Hawai‘i was included on the General Assembly’s list of non-governing territories.¹⁵³ Hawai‘i officially became a state after voters chose statehood over status quo in a plebiscite administered by the United States in 1959.¹⁵⁴ At that point, the United States and the General Assembly agreed to remove Hawai‘i from the list of non-self-governing territories because the United States’ obligation to report under article 73e had expired following the plebiscite.¹⁵⁵ Some Hawaiian advocates are skeptical of the validity of the vote because it did not include the option of independent statehood and voters included all Hawai‘i residents under U.S. law, even non-Hawaiians.¹⁵⁶ These advocates call for re-adding Hawai‘i to the list of non-self-governing territories and for conducting a new plebiscite under a decolonization framework.¹⁵⁷

In reality, a new plebiscite would require the administrative cooperation of the U.S., which will be nearly impossible to obtain given that the U.S. has “staunchly maintained” that the statehood remedy in 1959 was “valid and sufficient.”¹⁵⁸ For comparison, Anaya gives several examples including Guam which has been on the General Assembly’s list of non-self-governing territories list since 1946.¹⁵⁹ While the UN has monitored conditions and encouraged the federal government toward a decolonization process, the U.S. has refused to take action under the de-colonization framework, arguing that the “political status of Guam is an internal matter.”¹⁶⁰

148. See, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples—Initiatives to Support the Government-Government Relationships & Improve the Lives of Indigenous People, U.S. Dept. of State (Dec. 16, 2010), at 4.

149. Anaya, *supra* note 141, at 4.

150. *Id.* at 15.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 15–16.

156. *Id.* at 16.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

Even if the U.S. approves a new plebiscite in Guam, defining voter eligibility to Chamorro citizens could face constitutional challenges under *Rice v. Cayetano* for excluding non-Chamorro citizens who are residents of Guam.¹⁶¹ Yet, expanding voter eligibility to include all residents may “frustrate the Chamorros’ ability to control the plebiscite’s outcome.”¹⁶² Anaya also compares this situation to the French territory, New Caledonia, where the indigenous Kanak people have struggled with defining who would be eligible to vote in a decolonization referendum.¹⁶³ France rejected Kanak independence activists’ proposal to limit voter eligibility to only indigenous Kanak, arguing that this would disenfranchising the white settler population would violate guarantees of equality and democratic development in the French Constitution as well as article 1 of the United Nations Charter which guarantees ‘equal rights and self-determination’ of all peoples.”¹⁶⁴ As a result, the Kanak had to “compromise on their demands for a Kanak-only referendum, agreeing to a voting formula that allows non-Kanak residents with roots in New Caledonia for over a generation to vote in any plebiscite elections.”¹⁶⁵ In the Hawaiian context, not only would a decolonization referendum be unlikely because of the constitutional challenge and rare likelihood that the U.S. would administer the vote, Anaya argues that self-determination for the Native Hawaiians extends beyond the formal status of territories to other rights such as to “land, culture and self-governance.”¹⁶⁶ While the formal status of territory is crucial to Native Hawaiians, the decolonization framework may not be the most effective way of good Native governance.

The de-occupation approach calls for the restoration of the Hawaiian monarchy and full independent statehood.¹⁶⁷ Several pro-independent Native Hawaiian activists refer to the to the United States’ 1993 Congressional Apology which recognized the illegal overthrow of the Hawaiian Kingdom, as grounds for the reversal of federal action.¹⁶⁸ Anaya expresses concern as to whether restoration of the monarchy is the “appropriate, much less required, remedy for the conceded historical wrongs.”¹⁶⁹ Though some have argued that the U.S.’s “assertion of sovereignty over Hawai‘i today is invalid as a matter of international law because of its illegal origins,” Anaya points out that countries nonetheless “recognize U.S. sovereignty over Hawaii in their diplomatic relations.”¹⁷⁰

Further, the “ramifications of the overthrow for the Kingdom of Hawai‘i” and “reconciliation between the United States and the Native Hawaiian people”¹⁷¹ acknowledged in the 1993 Congressional Apology have remedies within international

161. *Id.* at 16–17.

162. *Id.*

163. *Id.* at 17.

164. *Id.*

165. *Id.*

166. *Id.* at 18.

167. *Id.* at 18–19.

168. *Id.* at 19.

169. *Id.*

170. *Id.*

171. PL 103–150, preamble, Nov. 23, 1993, 107 Stat. 1510.

human rights and the indigenous rights regime.¹⁷² Anaya clarifies that the apology and reconciliation promise was addressed to the Native Hawaiian *people*, and not the nation of Hawaii or the citizens of the Hawaiian monarchy, and so the indigenous rights regime is most appropriate for redress.¹⁷³ In turn, Anaya concludes that though the indigenous rights regime does not “readily support full restoration of the Hawaiian monarchy within an independent Hawaii,” it could support a “Native Hawaiian-led process toward restoration of the monarchy with some level of authority and shared sovereignty,” drawing authority from the rights of self-determination and self-governing from the UN Declaration, for example.¹⁷⁴ Ultimately, the indigenous rights framework is most appropriate because it addresses related concerns for the Native Hawaiian people that the decolonization and de-occupation framework do not such as the loss of “land and resources, threats to culture and religion, and disparities in health and education.”¹⁷⁵

B. COMPATIBILITY OF THE NATIVE HAWAIIAN NATION CONSTITUTION BY NA‘I AUPUNI TO THE INDIGENOUS RIGHTS APPROACH

The Na‘i Aupuni Constitutional Convention, which lasted four weeks, started with one week of educating participants on constitution-building drawn from federal Indian law, international law regarding all three theories as described by Anaya, and U.S. Constitution issues that relate to Native Hawaiian self-governance, ceded lands, and Kingdom law.¹⁷⁶ The Native Hawaiian Constitution, as drafted, draws from the indigenous rights regime, an effective approach to good Native governance. The indigenous rights regime is also a more unifying framework for Native Hawaiians. In addition, the Constitution itself contains important provisions regarding land and territory, which have deep implications for the importance of the formation of accurate and complete base rolls.

Overall, the Constitution of the Native Hawaiian Nation comports with the indigenous rights approach in a number of ways. First, the Constitution frames the rights of the Nation broadly in Chapter II Article 4: “The Nation has the right to self-determination, including but not limited to, the right to determine the political status of the Nation and freely pursue economic, social, cultural, and other endeavors.” More clearly comporting with the indigenous rights regime, the Constitution provides for the collective rights of the Nation Hawaiian people in Chapter II Article 5 “Collective Rights” which states:

- (1) The Native Hawaiian people shall have the right to honor our ancestors; maintain, protect, and repatriate iwi kūpuna, funerary, and

172. Anaya, *supra* note 141, at 19.

173. *Id.*

174. *Id.* at 21.

175. *Id.*

176. Press Release, Nai Aupuni, Nai Aupuni Releases List of 152 Participants to February ‘Aha (Dec. 23, 2015), <http://www.naiaupuni.org/docs/RevisedNewsRelease-NaiAupuniReleasesListOf-152Participants-122315.pdf>.

cultural objects; protect sacred places; and protect the knowledge and wisdom from traditional and customary sources.

- (2) The rights of Native Hawaiian tenants in the ‘Āina (land, water, air, ancestor) and ahupua‘a, shall not be abridged.
- (3) The Native Hawaiian people have the right to maintain, control, protect, and develop their intellectual property over cultural heritage, traditional knowledge, and traditional cultural expressions.

In addition, Chapter II Article 6: “Rights of the Individual” provides fourteen separate provisions of individual rights similar to those found in the U.S. Constitution,¹⁷⁷ along with additional rights such as the right to “traditional medicines and to maintain their health practices” and the right for child citizens to “basic nutrition, shelter, basic health care services, and social services; and to be protected from maltreatment, neglect, abuse, or degradation.”¹⁷⁸ Relatedly, Chapter II devotes a section to Customary Rights which protects “all rights and responsibilities customarily and traditionally exercised for subsistence, cultural, medicinal, and religious purposes,” along with provisions providing that the Native Hawaiian people “shall exercise traditional and customary stewardship of water.”¹⁷⁹

This focus on individual rights and expansion of protections for culture, health, social services, traditional knowledge, and land fall in line with the indigenous rights approach and the UN Declaration. In addition, on a broader scale, the Constitution does not at all mention the state of Hawai‘i. This can be interpreted that the Constitution views itself as a sovereign nation with a nation-to-nation relationship to all other foreign nations.¹⁸⁰

On territory and land, the Constitution articulates under Chapter I Article 1:

- (2) The Native Hawaiian people have never relinquished their claims to their national lands. To the maximum extent possible, the Government shall pursue the repatriation and return of the national lands, together with all rights, resources, and appurtenances associated with or appertaining to those lands, or other just compensation for lands lost.

This language leaves open the door to land repatriation, specifically for the remaining of the 1.8 million acres “ceded” to be held in trust by the state of

177. For example, it provides for the right to due process, guaranteed equal protection of the law, against unreasonable search and seizure, against double jeopardy, and the right to trial for a criminal defendant. *See* CONST. OF THE NATIVE HAWAIIAN NATION ch. II, art. 6(1-5). Note that the Constitution of the Native Hawaiian Nation has not yet been codified and does not yet have binding authority.

178. Const. of the Native Hawaiian Nation ch. II, art. 6(15).

179. Const. of the Native Hawaiian Nation ch. II, art. 7.

180. Alternatively, since there were state actors in the delegation, that the state interests were already incorporated into the language of the Constitution. For example, the delegates included an OHA Trustee as well as several others with experience working at OHA in various capacities. *See O‘ahu—Delegate Candidate Information*, *supra* note 127.

Hawai‘i. Chapter III Article 10 repeats the right to land repatriation, which belongs to the government: “The Government shall pursue the repatriation and return of the national lands, together with all rights, resources, and appurtenances associated with or appertaining to those lands, or other just compensation for lands lost.”¹⁸¹ The Executive Power additionally provides that the President “shall pursue the acquisition of lands for the Nation to meet the needs and aspirations of the citizenry.”¹⁸² The Constitution also protects against any diminishment or impairment of the rights of beneficiaries of the Hawaiian Homes Commission Act of 1920.¹⁸³

Through these several provisions, the Constitution provides space for the return of national lands to the Nation. Perhaps driving the urgency of the creation of this Constitution is the need for an entity to exercise treaty power with the United States to settle land claims. Article 13 of Chapter III of the Constitution confirms this by providing: “The President shall have the power to conduct negotiations and enter into treaties, compacts, and other agreements with other sovereigns, political sub-divisions of such sovereigns, or other organizations and entities for the benefit of the Nation.”¹⁸⁴ This articulation of treaty power fills in the gap that is missing in the latest 2012 version of the Akaka Bill, which removed clear language regarding the power to negotiate and make agreements for the Native Hawaiian governing entity.¹⁸⁵

The Preamble of the Constitution not only reaffirms the national sovereignty of the Nation, but also “reserve[s] all rights to sovereignty and self-determination, including the pursuit of independence.”¹⁸⁶ Once the Constitution is ratified and President is elected, then the President would be able to form land treaties with the state of Hawai‘i over the “ceded” lands. These treaties, however, would be subject to a two-thirds ratification vote by the Legislative Authority,¹⁸⁷ making the formation of the base roll extremely important because it could determine whether or how land is transferred between the Nation and the state of Hawai‘i.

C. ROLE OF MEMBERSHIP IN THE CONSTITUTION AND IMPLICATIONS FOR NATIVE GOVERNANCE

Regarding membership enrollment, the Constitution provides that the Vice President will establish an Office of Citizenship and Elections that will “enroll, manage, and maintain the list of citizens of the Hawaiian Nation.”¹⁸⁸ There is no mention of Act 195 or Act 77, or how those existing rolls will be transferred to the Nation’s list of citizens, but the Elections provision establishes that the Office will “establish and execute a process to enroll, create, and maintain a list of

181. Const. of the Native Hawaiian Nation ch. III, art. 10(9).

182. Const. of the Native Hawaiian Nation ch. V, art. 34(4).

183. Const. of the Native Hawaiian Nation ch. II, art. 9(5).

184. Const. of the Native Hawaiian Nation ch. III, art. 13(1).

185. See S. 675, 112th Cong. (Dec 17, 2012), <https://www.govtrack.us/congress/bills/112/s675/text>; see also Part I.B.

186. Const. of the Native Hawaiian Nation, Preamble.

187. Const. of the Native Hawaiian Nation ch. III, art. 13(2).

188. Const. of the Native Hawaiian Nation ch. III, art. 23(1).

Nation citizens,” keeping the requirement for process broad enough for the Nation to have discretion to not use the base roll generated from the Native Hawaiian Roll Commission.

As for membership, beyond what has already been discussed,¹⁸⁹ the Constitution provides that the Nation has the “inherent power to establish the requirements for citizenship in the Nation” and the “Nation reserves the right to modify or change citizenship requirements solely through a constitutional amendment.”¹⁹⁰ Though it is unlikely that the Nation will change its membership criteria from lineage back to blood quantum, which currently only applies to the Hawaiian Homes Commission Act, 1920, the reserved right to change membership criteria opens the door to potential problems in the future. The provision as it stands would allow a modification to the citizenship requirement by a constitutional amendment. Chapter VII Article 49 governs the procedures for making amendment proposals, but falls short of determining how amendments should be adopted, the process of which is left to the Legislative Authority’s discretion.¹⁹¹ Chapter IV delineates the legislative authority, specifically that it will be comprised of forty-three land-based and population-based representatives who are elected “at-large” from legislative districts.¹⁹² Therefore, the determination of any changes to membership criteria is subject to the decision of forty-three representatives who are elected by eligible voters in the Nation. Thus, the formation of a base role is not only crucial to build a nation, but as the constitution draft reads now, the base role determines who can be excluded from the nation in the future.¹⁹³

Riley argues that in the context of requirements for membership enrollment in Indian tribes, “any deprivation of citizenship by the tribe is more directly related to the right of entry, not exit.”¹⁹⁴ Under the Constitution, the Nation rightfully can modify membership requirements because the “freedom to decide who is or out of the group is a fundamental attribute of sovereignty.”¹⁹⁵ Yet, given the small size of the base roll today, this flexibility in membership criteria could also lead to a drastic reduction, or expansion, of the Nation that the framers did not envision. Native Hawaiian should retain this right to membership, but this right is only properly implemented in the long-term if the base roll, which determines who can elect representatives to make these amendments, is complete and accurate.

189. See Part IIA for discussion on basic membership criteria.

190. Const. of the Native Hawaiian Nation ch. II, art. 9(2).

191. Const. of the Native Hawaiian Nation ch. IV, art. 49.

192. Const. of the Native Hawaiian Nation ch. IV, art. 31.

193. This concern arose during our class debate over whether the Cherokee tribe should be able to exclude the Cherokee Freedman from their tribe. See Angela Riley, Professor, Law 637: Good (Native) Governance at UCLA School of Law, Class 4: Membership Continued: Indian Identity, Ancestry, and Race (Feb. 9, 2016).

194. Riley, *supra* note 1, at 1072.

195. *Id.* at 1073.

CONCLUSION

Native Hawaiians are again at a major crossroads in the self-determination movement. Reacting to legal challenges to its legitimacy to conduct elections, on March 16, 2016, Na'i Aupuni announced it will not conduct a ratification vote on the Constitution; instead, it will allow 'aha participants to take the lead on the ratification process, which could take place by the end of 2016.¹⁹⁶ A new collective action fund campaign, AlohaLāhui, made of 'aha participants, has already launched to raise funds to educate Native Hawaiians on the newly adopted constitution and try to move forward with a ratification process.¹⁹⁷

Many questions remain unanswered in this process. Based on the text of the Constitution, it is not clear where AlohaLāhui will draw its base roll. As demonstrated in this paper, base rolls define whose voices are heard in shaping how a Native nation will self-govern. They determine who is included and who is excluded from the nation and from the nation-building process. In turn, good Native governance should require that the creation and maintenance of an inclusive and accurate base roll be at the forefront of this and any Native Hawaiian self-determination movement.

196. Chad Blair, *Nai Aupuni Won't Pursue Vote on Native Hawaiian Constitution*, CIVIL BEAT (Mar. 16, 2016), <http://www.civilbeat.com/2016/03/nai-aupuni-wont-pursue-vote-on-native-hawaiian-constitution>.

197. See ALOHALĀHUI, <http://www.alohalahui.com>.