HOW TO SAY SORRY: FULFILLING THE UNITED STATES' TRUST OBLIGATION TO NATIVE HAWAIIANS BY USING THE CANONS OF CONSTRUCTION TO INTERPRET THE APOLOGY RESOLUTION

IAN FALEFUAFUA TAPU[∞]

ABSTRACT

The Marshall Trilogy—a series of U.S. Supreme Court cases that became the legal foundation of the unique, government-to-government relationship between Indian tribes and the U.S. federal government—established a special doctrine known as the "Indian Canons of Construction." The Canons became a powerful tool in treaty and statutory construction, providing that (1) the courts must interpret laws liberally and construe ambiguities in favor of tribes and (2) congressional intent must be clear if tribal rights and sovereignty are to be impinged in any way. In tracing the evolution of the doctrine, this Article argues that the Canons do not necessitate the narrow classification of federally recognized tribes. Instead, the Canons are rooted in the recognition of a special, government-to-government trust relationship equally applicable to all Indigenous groups—including Native Hawaiians and other Pacific Islanders—and should, therefore, be reclassified as the "Indigenous Canons." Had the Supreme Court utilized the more broadly construed "Indigenous Canons" when it interpreted the 1991 Apology Resolution, it would have rightly created a strong framework to better protect Native Hawaiian claims to self-determination.

∞ J.D., University of Hawai'i William S. Richardson School of Law, 2020; A.B., Dartmouth College, 2008. *Mahalo nui* to Professors Susan Serrano, Troy J.H. Andrade, and Lorinda Riley, who have opened my eyes to the power of legal scholarship—especially for Indigenous peoples. *Mahalo* to *N.Y.U. Review of Law & Social Change*, and in particular to the meticulous and professional work of Samantha Osaki, Nicolas Shump, and Maggie Lamb. Lastly, I would like to express my gratitude to Grace Liava'a, who has always been my source of inspiration.

I. INTRODUCTION 446
II. THE CANONS OF CONSTRUCTION AND THE DEVELOPMENT OF THE INDIAN LENS 452
A. The Historical Foundations of Federal Indian Law: Doctrine of Discovery and the Canons of Construction 453
B. Canon Case Law Guides the Court's Interpretation in Indian Affairs 456
C. The Canons Are Rooted in the Special Trust Relationship Between the Federal Government and its Indigenous Peoples 458
III. A CONTEXTUAL LEGAL FRAMEWORK AND ITS APPLICABILITY TO INDIGENOUS PEOPLES 461
A. The Battle Between Legal Formalism and Legal Realism 462
B. Contextual Legal Analysis and the Need to Fully Capture Indigenous People's Claims to Self-Determination 465
IV. THE HISTORICAL AND SPECIAL TRUST RELATIONSHIPS BETWEEN THE UNITED STATES AND NATIVE HAWAIIANS AND THE STATE OF HAWAI'I AND NATIVE HAWAIIANS 468
A. Understanding the Native Hawaiian Government: A Historical and Contextual Basis 468
B. Apology Resolution 475
V. THE CANONS OF CONSTRUCTION IN A NATIVE HAWAIIAN CONTEXT 478
A. Avenues for Native Hawaiians to Assert Self-Determination are Limited 479
B. Applying the Canons in a Native Hawaiian Context 482
C. The Apology Resolution as Viewed through the Indigenous Canons 484
VI. CONCLUSION 487

I.
INTRODUCTION

As a child, one of the first lessons you learn—whether in the home, on the playground, or at school—is how to say "sorry." According to one dictionary definition, an apology is "an admission of error or discourtesy accompanied by an expression of regret."[1] As we age, and as our life experiences expand, so too does our understanding of the concept of an apology. In whatever permutation "sorry" may take, it is a fixture of the human experience.[2] If love is considered to be the

1. *Apology*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/apology [https://perma.cc/HT9P-H96H] (last updated Dec. 23, 2019).

2. *See, e.g.*, ROY L. BROOKS, THE AGE OF APOLOGY, *in* WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE 3 (Roy L. Brooks ed.,

architect that helps to build healthy connections in a complex social system, then apologies are the doctors that heal damaged, fragile, and broken relationships.

Traditionally, apologies have been utilized in all cultures and societies as a means to facilitate dispute resolution and reconstruction,[3] affirm human relationships,[4] and diffuse conflict.[5] Saying "sorry" at recess for cutting someone in line at the swings, apologizing for an accident that occurred while in surgery, and issuing a presidential declaration apologizing to a population for their abhorrent mistreatment illustrate varying forms of the same act.[6] In a legal setting, statistics have shown that apologies can facilitate settlement and dissuade victims from bringing a lawsuit, especially in the field of medical malpractice, which in turn saves money and time for both parties.[7] A nation's apology represents a formal attempt to acknowledge and redress "a severe and long-standing harm against an innocent group."[8]

Yet not all apologies have the same meaning and import. Leading attorneys and legal scholars have framed apologies under a legal lens as "not synonymous with an admission of guilt or fault,"[9] and, in fact, have advised parties to exploit the ambiguities of apologetic language to their advantage.

"[C]orporate executives and directors of institutions have resisted apologizing for fear of personal exposure to liability, but also because they risk breaching fiduciary duties to their constituencies."[10] And, as this Article makes clear, the complexities and intricacies inherent to the act of apologizing are especially

---

1999); Richard B. Bilder, *The Role of Apology in International Law and Diplomacy*, 46 VA. J. INT'L L. 433, 437 (2006).

3. Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1267–68 (2006). White argues that while "apologies undoubtedly occupy a central role in resolving disputes in modern American culture," apologies differ depending on whether they are public or private. According to White, public apologies teach important public lessons and highlight the community's collective values. *Id*. at 1267.

4. Jennifer Gerada Brown, *The Role of Apology in Negotiation*, 87 MARQ. L. REV. 665, 667 (2004).

5. Bilder, *supra* note 2, at 437.

6. *See generally* Erik K. Yamamoto, *Race Apologies*, 1 J. GENDER RACE & JUST. 47, 53–55 (1997) (arguing that apologizing, especially to a large group, is performative and that it "means acting upon acknowledgments about disabling group constraints and constrained, yet extant, group agency and responsibility").

7. *See generally* Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 485–90 (2003) (recognizing that apologies can be beneficial in facilitating settlement negotiations).

8. Craig Blatz, Karina Schumann & Michael Ross, *Government Apologies for Historical Injustices*, 30 POL. PSYCHOL. 219, 221 (2009).

9. Nick Smith, *Just Apologies: An Overview of the Philosophical Issues*, 13 PEPP. DISP. RESOL. L.J. 35, 45 (2013).

10. *Id.* at 38.

pronounced in a nation's apology to a large class of people, such as its Indigenous[11] population.[12]

In the United States, while colonization has impacted all Indigenous peoples, the federal government has established a hierarchy that legally situates groups differently.[13] The principles of Federal Indian Law guide and inform the rights of those Native peoples who are able to meet the narrow requirements of federal recognition.[14] As one example, the Supreme Court concluded in *Morton v. Mancari* that federally recognized tribes have a "unique legal status"[15] and that the Bureau of Indian Affairs' employment preference for Indians constitutes a *political* preference rather than one that is "racial in nature."[16] Unlike Native Americans, however, the Indigenous peoples who inhabit the unincorporated territories of the United States exist within the legal fiction created by the *Insular Cases*, which dictates Congress' plenary role in choosing how the Constitution is to apply to the territories.[17] Native Hawaiians,[18] however, fall under a legal gray area: on

11. The terms "Indigenous" and "Native" are capitalized in this Article to denote that these groups are proper nouns and have a unique place in historical, legal, and political language. *See, e.g.*, D. Kapua'ala Sproat, Wai *Through* Kānāwai*: Water for Hawai'i's Streams and Justice for Hawaiian Communities*, 95 MARQ. L. REV. 127, 127 n.3 (2011) [hereinafter Sproat, Wai *Through* Kānāwai].

12. *See* Francesca Dominello, *Protecting the Right to be a Bigot in the Wake of the Apology to Australia's Indigenous Peoples*, 14 MACQUARIE L.J. 47, 53–54 (2014) ("The effects could be far-reaching: in the best cases, the negotiation of apology works to promote dialogue, tolerance, and cooperation between groups knitted together uncomfortably (or ripped asunder) by some past injustice.").

13. Rose Cuison Villazor, *Problematizing the Protection of Culture and the Insular Cases*, 131 HARV. L. REV. F. 127, 131 ("[C]ourts have upheld laws that furthered the rights of members of federally recognized American Indian tribes because they viewed such laws as having political goals. By contrast, courts have struck down laws that were designed to promote the rights of Native Hawaiians and other non-American Indian [I]ndigenous groups because such laws were deemed to have had a racially discriminatory purpose."). Federally recognized tribes are legally treated as political entities, while "all other [I]ndigenous groups are considered racial groups." *Id*. at 141.

14. *See generally* Mark D. Wyers, *Federal Recognition of Indian Tribes in the United States*, 12 STAN. L. & POL'Y REV. 271 (2001) (tracing the history of the federal recognition process and the benefits and challenges of being recognized). For more information regarding the administrative guidelines for recognition, as well as on those tribes that have petitioned for recognition, see *Office of Federal Acknowledgment*, BUREAU OF INDIAN AFFAIRS, https://www.bia.gov/as-ia/ofa/guidelines-precedent-manual-and-sample-narrative [https://perma.cc/Q9KK-R7NQ] (last visited Feb. 16, 2020).

15. Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974).

16. *Id.* at 555.

17. Susan K. Serrano, *Elevating the Perspectives of U.S. Territorial Peoples: Why the* Insular Cases *Should be Taught in Law School*, 21 J. GENDER RACE & JUST. 395, 396 (2018). Seminal cases include Armstrong v. United States, 182 U.S. 243 (1901); Delima v. Bidwell, 182 U.S. 1 (1901); Dooley v. United States, 182 U.S. 222 (1901); and Downes v. Bidwell, 182 U.S. 244 (1901).

18. This Article defines "Native Hawaiians" as "any descendant[s] of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778" without reference to blood quantum. *See* § 7; HAW. REV. STAT. § 10-2 (2002) (current through 2018); Apology Resolution, Pub. L. No. 103-150, § 2, 107 Stat. 1510, 1513 (1993)

the one hand, they are not federally recognized and, on the other, Hawai‘i is not a territory of the United States.[19]

In 1993, the United States federal government passed the Apology Resolution "to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawai‘i"[20] and to express a commitment "to provid[ing] a proper foundation for reconciliation between the United States and the Native Hawaiian people."[21] The Joint Resolution garnered sweeping bipartisan support in both Houses, passing the Senate by a roll call vote of 65 to 34.[22] While the historic moment marked "the first step in the healing process,"[23] the

---

[hereinafter Apology Res.]. This is contrary to the definition set forth under the Hawaiian Homes Commission Act of 1920, which defines "native Hawaiians" as "persons with at least 50 percent Hawaiian blood." Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, 42 Stat. 108 § 201(a)(7) (1921); 25 U.S.C. § 4221; *see* J. KĒHAULANI KAUANUI, HAWAIIAN BLOOD: COLONIALISM AND THE POLITICS OF SOVEREIGNTY AND INDIGENEITY 152–61 (2008); JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI‘I? 237 n.2 (2007) [hereinafter VAN DYKE, CROWN LANDS]. Additionally, this Article will use the terms "Hawaiian," "Native Hawaiians," and "Kanaka Maoli" interchangeably. "Kanaka maoli has been popularized as the appropriate [I]ndigenous term for Native Hawaiians by advocates of Native Hawaiian sovereignty and independence." Davianna Pōmaika'i & Melody Kapilialoha MacKenzie, Moʻolelo Ea O Nā *Hawai'i History of Native Hawaiian Governance in Hawai'i* 4 (Aug. 19, 2014) (emphasis omitted), https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/Mo%CA%BBolelo%20Ea%20O%20N%C4%81%20Hawai%CA%BBi(8-23-15).pdf [https://perma.cc/SE59-WMQZ]. *But see* HAW. CONST. art. XII ("A proposal of the 1978 Constitutional Convention adding a section 7 defining the terms 'Hawaiian' and 'native Hawaiian' was not validly ratified.").

19. *Compare* Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 94, 101 (1998) (arguing that Native Hawaiians should "be evaluated under the same 'rational basis' standard of judicial review . . . [as] applied to other [N]ative groups" as long as Indigenous only programs are "designed to protect or promote self-governance, self-sufficiency, or native culture.") [hereinafter Van Dyke, *Political Status*], *with* Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537 (1996) (contending that programs benefitting Native people are racial and therefore subject to strict scrutiny unless the Indigenous group is classified as an Indian tribe). The U.S. territories' Indigenous communities and Native Hawaiians are unable to attain federal recognition through the administrative process because it is explicitly limited to "only those American Indian groups indigenous to the continental United States which are not currently acknowledged as Indian Tribes." 25 C.F.R. § 83.3(a) (2007). The "continental United States" is defined as "the contiguous 48 states and Alaska." *Id.* at § 83.1.

20. Apology Res., *supra* note 18, at 1510. Words in ʻōlelo Hawai‘i, or the Hawaiian language, are given their proper diacritical marks as an official language of Hawai‘i. Const. art. XV, § 4. Honoring such formalities aligns with the very intent behind the Hawai‘i constitutional provision, which was "to give full recognition and honor to the rich cultural heritage that Hawaiians have given to all ethnic groups of this State . . . [and] to overcome certain insults of the past where the speaking of [ʻōlelo Hawai‘i] was forbidden in the public school system . . . ." Comm. of the Whole, Rep. No. 12, *reprinted in* 1 PROC. CONST. CONVENTION 1978 1000, 1016 (Haw. 1980) (emphasis added).

21. Apology Res., *supra* note 18, at 1513, § 1(4).

22. DEP'T OF INTERIOR AND DEP'T OF JUSTICE, FROM MAUKA TO MAKAI: THE RIVER MUST FLOW FREELY 13 (Oct. 23, 2000) [hereinafter MAUKA TO MAKAI].

23. *Id.*

Apology Resolution became a hollow expression of reconciliation that failed to materialize into institutional changes—like the rights to self-determination and self-governance—for Native Hawaiians.[24]

Using the Apology Resolution as a case study, this Article will analyze how government-issued apologies to Indigenous peoples that are not treated as legitimate in judicial interpretation amount to nothing short of empty rhetoric that undermine concrete and substantive reconciliation efforts. Currently, the Federal Indian Law principles of the Canons of Construction ("the Canons")[25] have been narrowly utilized by the U.S. Supreme Court to interpret legislation and treaties involving only federally recognized Indian tribes.[26] This Article contends that the

---

24. *See* Julian Aguon, *Native Hawaiians and International Law, in* NATIVE HAWAIIAN LAW: A TREATISE 383–401 (Melody Kapilialoha MacKenzie eds., 2015). In 2007, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples, which "formally and unequivocally recognized the world's Indigenous peoples as 'peoples' under international law, with the same human rights and freedoms as other 'peoples.'" Julian Aguon*, On Loving the Maps Our Hands Cannot Hold: Self-Determination of Colonized and Indigenous Peoples in International Law*, 16 ASIAN PAC. AM. L.J. 47, 57 (2010–2011). In particular, Article 3 of the Declaration on the Rights of Indigenous Peoples states that "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." G.A. Res 61/295, annex, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007). While the United Nations provides a framework in which Native Hawaiians can potentially seek self-determination, some scholars argue that Hawai'i was never legally annexed into the United States and that acknowledging this is vital to formulating the next step for asserting Native Hawaiian rights. *See* Williamson Chang, *Darkness Over Hawai'i: The Annexation Myth is the Greatest Obstacle to Progress*, 16 ASIAN-PAC. L. & POL'Y J. 70, 71–72 (2015). While the Apology Resolution set forth a clear intent to repair the harms that are a direct result of the overthrow, "the federal government failed . . . to pass laws or take action that would fully repair past damage and reflect the Native Hawaiian community present-day demands for self-determination." Troy J.H. Andrade, *Legacy in Paradise: Analyzing the Obama Administration's Efforts of Reconciliation with Native Hawaiians*, 22 U. MICH J. RACE & L. 273, 318 (2017) [hereinafter Andrade, *Legacy in Paradise*].

25. As the cases in Part II will discuss, there are four principal canons developed by the Supreme Court in interpreting legislation and treaties that involve Indians:

- Treaties are interpreted based on how the Indians understood them at the time of signing.
- Treaties, statutes, agreements, and executive orders should be liberally construed in the favor of Indians.
- Ambiguities in treaties, statutes, agreements, and executive orders are to be resolved in the favor of Indians.
- Congressional intent must be clear in order to divest Indians of rights and sovereignty.

See FELIX S. COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02 (2012 ed.).

26. *See, e.g.*, *id.*; Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766–67 (1985) (demonstrating that the distinct and unique nature of Federal Indian Law requires a different set of statutory construction principles). The Bureau of Indian Affairs defines a federally recognized tribe as an "American Indian or Alaska Native tribal entity that is recognized as having a government-to-government relationship with the United States, with the responsibilities, powers, limitations, and obligations attached to that designation, and is eligible for funding and services from the Bureau of Indian Affairs. Furthermore, federally recognized tribes are recognized as possessing certain inherent rights of self-government (i.e., tribal sovereignty) and are entitled to receive certain federal

Canons should be expanded in scope to include legislation and treaties on behalf of those Indigenous peoples who are not and cannot be classified as "Native American."[27] The Supreme Court's use of the Canons in interpreting the Apology Resolution would neither dilute nor alter established precedent under Federal Indian Law, but would in fact more directly align our country's jurisprudence with the goals of restorative and reparative justice for formerly colonized Indigenous peoples.[28] And more importantly, it would lead to the kinds of reconciliation efforts sought by Native Hawaiians and the Hawai'i Supreme Court, based on the legislative language and intent of the Apology Resolution.[29]

Part II of this Article sheds light on the complex and "schizophrenic"[30] nature of Federal Indian Law and, more specifically, analyzes the historical evolution of the Canons of Construction. While the Canons have been utilized by the Court as a tool to preserve tribal sovereignty, their applicability and scope may be limited when competing canons are at play. Moreover, this Part will illustrate that the judicial interpretation mechanism is not based on Indian status or the special designation of federal recognition, but instead on the federal government's historical trust relationship with its Indigenous population, which includes Native Hawaiians and the Indigenous peoples of the Pacific.

---

benefits, services, and protections because of their special relationship with the United States. At present, there are 573 federally recognized American Indian and Alaska Native tribes and villages." BUREAU OF INDIAN AFFAIRS, *FAQ*, https://www.bia.gov/frequently-asked-questions [https://perma.cc/K67H-Z29P] (last visited Feb. 26, 2020).

27. In this Article, I use the term "Native American" and "Indian" interchangeably. Both terms refer to the Indigenous peoples of the contiguous 48 states—notably excluding Native Hawaiians and the Indigenous peoples of the territories. *See* 25 C.F.R. §§ 83.1–83.3(a) (2007).

28. "Restorative" and "reparative justice" are used throughout this Article to refer to a type of justice in which the communities that experience harms rooted in historical, cultural, and political injustice decide how to address and repair the damage through self-determination. Professor Erik K. Yamamoto, through the "Social Healing through Justice" analytical framework, posits that the "Four R's"—recognition, responsibility, reconstruction, and reparation—are needed to establish reparative justice for systemic and historical harms. *See* Erik K. Yamamoto & Ashley Kaiao Obrey, *Reframing Redress: A "Social Healing Through Justice" Approach*, 16 ASIAN AM. L.J. 5, 8 (2009). Professor Sproat expanded upon this framework with a special focus on environmental justice for Indigenous peoples. D. Kapua'ala Sproat, *An Indigenous People's Right to Environmental Self-Determination: Native Hawaiians and the Struggle Against Climate Change Devastation*, 35 STAN. ENVTL. L.J. 158, 181–83 (2016) [hereinafter Sproat, *Environmental Self-Determination*]. According to Sproat, restorative justice for Native peoples is not founded in equal treatment, but on restoration for historical and ongoing harms resulting from colonialism. *Id.* at 159–63.

29. This Article does not contend that expanding the Canons to be inclusive of Native Hawaiians and other Indigenous peoples who cannot be classified as Native American or as a federally recognized tribe is the ultimate end goal. Instead, the Canons represent a legal placeholder to protect Native Hawaiian programs and rights in the courts until Native Hawaiians have determined how self-government is to be effectuated. Even after a recognized government-to-government relationship between Native Hawaiians and the United States is established, the use of the Canons can be a supplemental layer in the protection of self-determination, similar to its use by tribes.

30. *See, e.g.*, United States v. Lara, 541 U.S. 193, 219 (2004) (Thomas, J., concurring).

Part III will explore and critique the conflict between two schools of jurisprudential thinking—legal formalism and legal realism. In particular, this Part will explore the limitations of traditional legal theories in capturing the full gravamen of the continuing and systemic impacts of colonization on Indigenous peoples. It argues that courts can and should better align their decision-making values with the international human rights principle of self-determination by leveraging the "contextual legal analysis" developed by University of Hawai'i law professor Kapua'ala Sproat.[31]

Part IV will specifically elucidate the historical and special trust relationship between the United States and Native Hawaiians and make the case that this relationship demands that the Court apply the same Canons for Native Hawaiians as it does for Indians.

Finally, Part V of this Article describes the historical underpinnings of the Apology Resolution and illustrates its potential to cement true reconciliation efforts for Native Hawaiians if viewed through the lens of the Canons. This Article posits that the Canons of Construction directly comport with a restorative justice framework that embodies self-determination for Indigenous peoples, including Native Hawaiians.[32]

II.
THE CANONS OF CONSTRUCTION AND THE DEVELOPMENT OF THE INDIAN LENS

The heavy-handed principle of Manifest Destiny guided the United States' western expansion and subsequent colonization and dispossession of Native American tribes during the eighteenth and nineteenth Centuries.[33] The relationship between the United States and Indians was governed by treaties, which often dealt with the exchange of lands to the federal government for the promise of protection of tribal sovereignty and rights.[34] Acknowledging the unequal bargaining powers at play and the special trust relationship woven into the treaties, the Supreme Court developed the Canons of Construction as a legal lens to contextualize Indian treaties and statutes in a way that promotes fairness and protects Indigenous sovereignty.[35]

---

31. Sproat, Wai *Through* Kānāwai, *supra* note 11, at 138.

32. "[T]his contextual legal framework for Native Peoples requires attention to four realms (or "values") of restorative justice embodied in the human rights principle of self-determination: (1) cultural integrity; (2) lands and natural resources; (3) social welfare and development; and (4) self-government." Sproat, Wai *Through* Kānāwai, *supra* note 11, at 173.

33. Robert J. Miller, *American Indians, The Doctrine of Discovery, and Manifest Destiny*, 11 WYO. L. REV. 329, 332–36 (2011) (arguing that "American Manifest Destiny, and its application of the Doctrine of Discovery, was not intended to benefit the [I]ndigenous peoples of North America and their governments, societies, and economic interests.").

34. *See* COHEN, *supra* note 25, at § 1.03.

35. Jill De La Hunt, *The Canons of Indian Treaty and Statutory Construction: A Proposal for Codification*, 17 U. MICH. J.L. REFORM 681, 683 (1984).

A. The Historical Foundations of Federal Indian Law: Doctrine of Discovery and the Canons of Construction

The *Marshall Trilogy*,[36] named after Chief Justice John Marshall, refers to a triumvirate of cases that established the Federal-Indian trust relationship and articulated the underlying principles of what is known as Federal Indian Law.[37] While the Court acknowledged that tribes pre-date the formation of the United States, it nonetheless established the Doctrine of Discovery, a colonial tool that gave the federal government "superior title" to land and relegated Indians' rights to that of mere occupancy.[38] The implications and applicability of the doctrine have not been solely confined to the boundaries of the United States, but have been utilized globally, including in New Zealand and Australia.[39]

In 1832, the Supreme Court established the foundation of the Indian lens in a case invalidating a Georgia law requiring non-Indian individuals living on Cherokee land to obtain a permit or license from the state.[40] The Court closely analyzed the Treaty of Hopewell and liberally interpreted it to determine that the Cherokee Nation did not lose its right to self-govern.[41] In fact, the Court posited that Indian nations have "always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial."[42] Additionally, Justice McLean in his concurrence stated, "The language used in treaties with the Indians should never be construed to their prejudice" and, "[h]ow the words of the treaty were understood by [Indians], rather

36. *See, e.g.*, Worcester v. Georgia, 31 U.S. 515, 557 (1832) ("All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied [sic] by the United States."); Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831) ("It may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may more correctly, perhaps, be denominated domestic dependent nations."); Johnson v. M'intosh, 21 U.S. 543, 587 (1823) ("[The United States] maintain[s], as others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.").

37. COHEN, *supra* note 25, at § 1.01, 6 ("The centuries-old relationship between the United States and Indian nations is founded upon historic government-to-government dealings and a long-held recognition of Indians' special legal status."); Ann E. Tweedy, *Connecting the Dots Between the Constitution, the* Marshall Trilogy*, and* United States v. Lara*: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J.L. 651, 664 (2009).

38. *See Worcester*, 31 U.S. at 520; *Cherokee Nation*, 30 U.S. at 2; *M'intosh*, 21 U.S. at 566.

39. Miller, *supra* note 33, at 330.

40. *Worcester*, 31 U.S. at 561–62.

41. *Id.* at 519.

42. *Id.*

than their critical meaning, should form the rule of construction."[43] As a result of *Worcester v. Georgia*, one of the seminal cases of the *Marshall Trilogy*, two tenets of the Canons of Construction were established. First, treaties are to be interpreted based on how Indians understood them; and second, treaties are to be liberally construed in favor of Indians.[44]

The Court then expanded the Canons in 1908 through *Winters v. United States*.[45] The parties in conflict were two groups of settlers along the Milk River: the Gros Ventre and Assiniboine bands of Indians, who were allocated land known as the Fort Belknap Indian Reservation through an 1888 agreement with the United States, and the non-Indian settlers who purchased property through the State of Montana.[46] For both parties, the river was necessary to irrigate the "dry and arid"[47] land; without the use of Milk River, the land was "valueless."[48] The Court determined that the case turned on the interpretation of the 1888 agreement

43. *Id.* at 582 (McLean, J., concurring). While Justice McLean explicitly set forth the Canons in his concurrence, his reasoning was adopted by the majority in subsequent cases. *See* Minnesota v. Hitchcock, 185 U.S. 373, 396 (1902) ("Can it be said that the Indians making the cession for a moment supposed that the lands ceded were not to be used for the purposes named, and if the language carries upon its face one obvious meaning, and would naturally be so understood by the Indians, that construction, within all the rules respecting Indian treaties, must be enforced."); Choctaw Nation v. United States, 119 U.S. 1, 28 (1886) ("The rules to be applied in the present case are those which govern public treaties, which, even in case of controversies between nations equally independent, are not to be read as rigidly as documents between private persons governed by a system of technical law, but in the light of that larger reason which constitutes the spirit of the law of nations."); *In re* Kansas Indians, 72 U.S. 737, 760–61 (1866) (interpreting the treaty to contain words—"levy, sale, and forfeiture"—that are "susceptible of meaning" and therefore should be interpreted to "preserve [lands] for the permanent homes of the Indians.").

44. Scott C. Hall, *The Indian Law Canons of Construction v. the* Chevron *Doctrine: Congressional Intent and the Unambiguous Answer to the Ambiguous Problem*, 37 CONN. L. REV. 495, 505 (2004); *see Worcester*, 31 U.S. at 553–54 ("To construe the expression 'managing all their affairs,' into a surrender of self-government, would be, we think, a perversion of their necessary meaning, and a departure from the construction which has been uniformly put on them."). While they may overlap, the two tenets of the Indian Canons have independent force. Bryan H. Wildenthal, *Federal Labor Law, Indian Sovereignty, and the Canons of Construction*, 86 OR. L. REV. 413, 444 (2007). The ambiguity canon deals with the statute itself while the congressional intent canon primarily deals with the potential conflicts between tribal rights and statutory language. *Id.*

45. Wyatt M. Cox, *A Reserved Right Does Not Make a Wrong*, 48 TULSA L. REV. 373, 379 (2012) ("The courts have made it common practice to consider additional factors outside of treaties, such as the events leading up to the treaty, when determining a treaty's meaning and authority . . . . As early as the 1908 decision in *Winters v. United States*, the Court has made certain to strongly consider the notions of fairness in light of the treatment of the Tribal Nations before and at the time a treaty was entered into."); Hall, *supra* note 44, at 513 ("After *Winans* and *Winters*, the Indian law canons seemed revitalized and powerful."); Wildenthal, *supra* note 44, at 494 n.254 ("The *Winters* Court, advanc[ed] the development of the canons at the early stage of the Court's modern Indian law jurisprudence, [and] was considerably more explicit than the *Winans* Court in applying them[.]").

46. Winters v. United States, 207 U.S. 564, 565–66 (1908).

47. *Id.* at 565.

48. *Id.* at 565, 576.

between the tribes and the United States.[49] Non-Indian settlers asserted that the 1888 agreement did not enumerate or reserve any rights to Milk River for the tribes, therefore divesting the Gros Ventre and Assiniboine Indians of their access to the necessary water supply.[50] The Court granted the tribes full and exclusive rights to the water and, in doing so, articulated what would be known as the third Canon.[51] "By a rule of interpretation of agreements and treaties with the Indians," the Court instructed, "ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it."[52]

In the 1941 case *United States v. Santa Fe Pacific Railroad Company*, the Supreme Court introduced what would be the final Canon—ascertaining a "clear and plain" showing of congressional indication to extinguish Indian rights.[53] The United States, as "guardians" of the Walapai Indians, sought to enjoin the defendants from interfering with the tribe's possession and occupancy of certain land in northwestern Arizona.[54] Because the federal government established a reservation for the tribe in a different area, the railroad company asserted that the Indian title to land had been extinguished by the United States.[55] The Court disagreed and found "no indication that Congress, by creating that reservation, intended to extinguish all of the rights which the Walapais had in their ancestral home."[56] While the Court reemphasized Congress' plenary authority in Indian affairs,[57] it nonetheless established the principle that "an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its

49. *Id.* at 577.

50. *Id.*

51. *Id.* at 578; Hall, *supra* note 44, at 512 ("Winans also applies a third Indian law canon, later more clearly articulated in Winters v. United States, that ambiguities are to be construed in favor of the Indians.").

52. *Winters*, 207 U.S. at 576–77.

53. United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 353 (1941).

54. *Id.* at 343.

55. *Id.* at 349.

56. *Id.* at 353–54.

57. While Indians are only expressly mentioned in the Constitution three times, Congress' plenary power in Indian affairs can be traced to the Indian Commerce Clause. The Court has interpreted the Indian Commerce Clause as the source of its plenary power. "[I]t is now generally recognized that the power derives from federal responsibility for regulating Commerce with Indian tribes and for treaty making." *See* U.S. CONST. art. I, § 8, cl. 3; McClanahan v. State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973).

Indian wards."[58] Simply put, the fourth Canon requires that any treaty abrogation or diminishment of Indian rights must be the result of clear congressional intent.[59]

B. Canon Case Law Guides the Court's Interpretation in Indian Affairs

The Canons are principles of interpretation that the Supreme Court has developed over the years. The general rule "of the [C]anons is to encourage narrow construction against invasions of Indian interests and broad construction favoring Indian rights."[60] However, the Canons have not always been invoked, especially when competing, non-Indian canons or other doctrines are deemed relevant to judicial interpretation.

The Court has acknowledged the limitations of the Canons, especially when it directly conflicts with other legal doctrines. For example, in *Choate v. Trapp*, the State of Oklahoma attempted to tax allotted lands held by the Choctaw and Chickasaw tribes.[61] While the Curtis Act, which granted the allotments at issue, contained a provision that tribal lands were to be nontaxable for a limited time, Oklahoma nonetheless argued that the tax canon should be applied.[62] In particular, it is "the general rule that tax exemptions are to be strictly construed and are subject to repeal unless the contrary clearly appears."[63] The Court extended the principles articulated by Chief Justice Marshall by expanding the Indian lens beyond the original application of interpreting treaties with tribal nations.[64] The *Choate* Court utilized the Canons to interpret federal statutes and found that the Indian Canons displaced the tax exemption canon. In the majority opinion, Justice Joseph Rucker Lamar stated:

> But in the Government's dealing with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation . . . . This rule of

58. *Santa Fe R.R.*, 314 U.S. at 354 (1941).

59. Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2031 (2014) ("[A] congressional decision [to abrogate tribal immunity] must be clear . . . .That rule of construction reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to undermine Indian self-government."); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59–60 (1978) (federal legislation will be interpreted in a way so as not to "interfere[] with tribal autonomy and self-government . . . in the absence of clear indications of legislative intent").

60. Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1137, 1141 (1990).

61. Choate v. Trapp, 224 U.S. 665, 667 (1912).

62. *Id.*

63. *Id.* at 674.

64. *Id.* at 675.

> construction has been recognized, without exception, for more than a hundred years and has been applied in tax cases.[65]

The Judiciary has also looked at the conflict that may arise between the Canons and the *Chevron* Doctrine. In *Chevron v. Natural Resources Defense Council*, the Court determined that if congressional intent is clear, then judicial decisions must directly comport with that intent.[66] If the language is ambiguous, then the courts should not apply their own construction.[67] Instead, the courts should give deference to the applicable agency's interpretation because it is viewed as a delegation of congressional authority, either explicitly or implicitly, to have the agency clarify any relevant ambiguous provision.[68] The *Chevron* Doctrine dictates that courts "may not substitute [their] own construction of a statutory position for a reasonable interpretation made by the administrator of an agency."[69] There may be times when an agency's interpretation under the *Chevron* Doctrine and tribal deference under the Canons can work coextensively in favor of Indians. However, what happens when statutory language is ambiguous, and both the Canons and the *Chevron* Doctrine come into play? Which interpretation mechanism should the courts employ?

The Supreme Court has yet to address the conflict, leaving the circuit courts fragmented and inconsistent in determining which canon should prevail.[70] For example, the Ninth Circuit has, in reviewing legislation such as the Alaska Native Claims Settlement Act (ANCSA), expressed a preference for the *Chevron* doctrine over the Canons.[71] The D.C. and Tenth Circuits, by contrast, have ruled in the opposite direction, displacing *Chevron* deference for the Canons.[72] Meanwhile,

---

65. *Id.*

66. Chevron v. Nat. Res. Def. Council, 467 U.S. 837, 842–43 (1984).

67. *Id.* at 843.

68. *Id.* at 843–45.

69. *Id.* at 844.

70. Hall, *supra* note 44, at 544.

71. Haynes v. United States, 891 F.2d 235, 239 (9th Cir. 1989) ("They buttress this claim with a canon of construction that construes ambiguous statutes in favor of the Indians or Natives. While this court has recognized this canon of construction, it has also declined to apply it in light of competing deference given to an agency charged with the statute's administration.") (citing Shields v. United States, 698 F.2d 987, 991 (9th Cir. 1983)) (citation omitted).

72. E.E.O.C. v. Cherokee Nation, 871 F.2d 937, 939 (10th Cir. 1989) ("While normal rules of construction would suggest the outcome which the district court adopted, the court overlooked the fact that normal rules of construction do not apply when Indian treaty rights, or even nontreaty matters involving Indians, are at issue."); Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439 (D.C. Cir. 1988) ("'[T]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians.' . . . [S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit. If there is any ambiguity as to the inconsistency and/or the repeal of the Curtis Act, the OIWA *must* be construed in favor of the Indians, i.e., as repealing the Curtis Act and permitting the establishment of Tribal Courts. The

the Eighth Circuit avoided making a determination altogether as to which doctrine should carry greater weight.[73]

While the Supreme Court may be silent on the issue, Federal Indian Law principles developed over the course of 180 years inform the courts on how laws involving Indian country must be contextualized. The historical and political relationships tribes have with the federal government illustrate that when other doctrines compete with the Canons legislation should be viewed in favor of greater Indian rights, absent clear congressional intent to the contrary.[74] Indeed, the Court explained that:

> [t]he Indian sovereignty doctrine is relevant…because it provides a backdrop against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government.[75]

C. The Canons Are Rooted in the Special Trust Relationship Between the Federal Government and its Indigenous Peoples

The Canons were originally developed to acknowledge the unequal bargaining powers and translation challenges tribal nations had in treaty-making with the federal government.[76] They directly comport with the notions of "superior

---

result, then, is that if the OIWA can reasonably be construed as the Tribe would have it construed, it *must* be construed that way.") (citation omitted).

73. Hall, *supra* note 44, at 554.

74. *See* Solem v. Bartlett, 465 U.S. 463, 472 (1984) ("When both an Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for Indian tribes to rule that diminishment did not take place."); COHEN, *supra* note 25, at § 2.02 ("In some instances, the Indian law canons clash with competing canons based on other values. The Indian law canons may point to a result different from that reached by courts applying ordinary canons of statutory interpretation. In those cases, the Indian law canons, which are rooted in structural, normative values, usually should displace other competing canons.").

75. McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 172 (1973).

76. In some instances, the Court used paternalistic rhetoric common during the time period. *See* Jones v. Meehan, 175 U.S. 1, 11 (1899) ("[N]egotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed . . . in the sense in which they would naturally be understood by the Indians."); *see* David M. Blurton, *Canons of Construction, Stare Decisis and Dependent Indian Communities: A Test of Judicial Integrity*, 16 ALASKA L. REV. 37, 41–47 (1999).

justice," which considers a substantive right without being limited to the technicalities inherent in common statutory and treaty interpretation.[77] Additionally, due to Congress' plenary authority in Indian affairs and the abhorrent treaty violations committed by the United States government, the Canons became "virtually the *only* check on Congress that Indians could invoke."[78] As the principles of Federal Indian Law developed over the years, so too did the basis for the Canons of Construction.

The former paternalism inherent in the original intent behind the Canons is no longer applicable today.[79] The Court expressed this shift in *County of Oneida v. Oneida Indian Nation* in 1985. There, the Court held that the Oneida Indian Nation's right to sue to enforce its aboriginal land title rights is a federal common-law right.[80] Additionally, the relevant hook for Indigenous peoples who are not and cannot be defined as Indian is that "[t]he canons of construction applicable in Indian law are rooted in the *unique trust relationship* between the United States and the Indians."[81] Three months later, the Court reiterated the trust relationship as the foundation to the Canons in *Montana v. Blackfeet Tribe of Indians*.[82]

The trust relationship is a doctrine of Federal Indian Law that has not been defined in a static and isolated way. Similar to the Canons, the trust doctrine has evolved over time. It was first proclaimed by the Marshall Court as being akin to that of a "ward to his guardian" because the tribes "look to our government for protection."[83] The Court viewed treaties as more than mere contracts; in fact, because the United States developed treaty agreements with tribal nations, it has "charged itself with moral obligations of the highest responsibility and trust."[84] This trust relationship was recognized as extending beyond treaties to include "agreements, executive orders, and statutes."[85]

---

77. United States v. Winans, 198 U.S. 371, 380–81 (1905) (citation omitted).

78. Russel Lawrence Barsh & James Youngblood Henderson, *Contrary Jurisprudence: Tribal Interests in Navigable Waterways Before and After* Montana v. United States, 56 WASH. L. REV. 627, 653 (1981) (emphasis added).

79. *See* COHEN, *supra* note 25, at § 2.02 ("The implementation and force of the canons do not turn on the ebb and flow of judicial solicitude for powerless minorities, but instead on an understanding that the canons protect important structural features of our system of governance."); Hall, *supra* note 44, at 541 ("Many of the early cases and some of the more recent cases discuss the purpose of the canons as simply protecting the Indians from their own inadvertent loss through misunderstood agreements. If this were the only purpose or application of the canons, however, it would indeed seem odd to continue to apply them currently to statutes unilaterally passed by Congress.") (footnote omitted).

80. Oneida County v. Oneida Indian Nation of New York, 470 U.S. 226, 235–36 (1985).

81. *Id.* at 247 (emphasis added).

82. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985) (quoting *Oneida*, 470 U.S. at 247).

83. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

84. Seminole Nation v. United States, 316 U.S. 286, 297 (1942).

85. *See* COHEN, *supra* note 25, at § 1.01.

In the late nineteenth and twentieth centuries, however, Congress and the courts used the trust doctrine as a sword to justify broad assertions of authority to abrogate treaties and dispossess tribes of their property instead of utilizing it as a shield to protect Indians.[86] For example, in *Lone Wolf v. Hitchcock*, the Supreme Court declared that Congress has the unilateral power to "abrogate the provisions" of treaties with Indian tribes.[87] According to the Court, while "a moral obligation rested upon Congress to act in good faith," the legislative branch nonetheless may pass laws that directly conflict with Indian treaties, in turn dispossessing tribes of their land and abrogating Indian rights.[88] This legislative philosophy may be especially troublesome when the courts presume Congress' dealings with Indians to be done with benevolent intent.[89]

In recent years, Congress and the courts have shifted away from the previous application of the trust doctrine. The modern understanding of the trust responsibility has shifted from the racist and outmoded view of tribes as wards of the United States to one that "obliges the federal government to support and revitalize tribal governments and even advocate and protect tribal sovereign powers."[90] Congress has incorporated this application of the trust doctrine into modern-day legislation.[91] Its recent acts affirm tribal inherent sovereignty, reaffirm the special government-to-government relationship between tribes and the United States, and reflect the self-determination era of today.[92]

The Supreme Court's interpretation of the doctrinal basis for the Canons underwent a "complete transition," and the Indian lens was used in such a way as to force the government to look beyond the tone-deaf and paternalistic ward relationship intrinsic to the *Marshall Trilogy*.[93] Instead, the Court found the Canons to be more aligned with supporting Indian systems of government and promoting tribal

86. COHEN, *supra* note 25, at § 1.04.

87. Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903).

88. *Id.*

89. COHEN, *supra* note 25, at § 2.02.

90. Kevin K. Washburn, *What the Future Holds: The Changing Landscape of Federal Indian Policy*, 13 HARV. L. REV. F. 200, 201 (2019); *see* COHEN, *supra* note 25, at 923.

91. COHEN, *supra* note 25, at § 5.04. For examples of statutory language, *see* 20 U.S.C. § 7401 ("It is the policy of the United States to fulfill the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children."); *see also* 25 U.S.C. § 3701 ("[T]he United States has a trust responsibility to protect, conserve, utilize, and manage Indian agricultural lands consistent with its fiduciary obligation and its unique relationship with Indian tribes.").

92. The self-determination era—the period between 1961 and today—is marked by the federal government's acknowledgement of the termination era's failures and problems. Policies in this present era are premised on the principle of tribal self-governance and the notion that tribes should have a hand in directing their own affairs. *See* COHEN, *supra* note 25, at § 1.07.

93. *See* Blurton, *supra* note 76, at 44.

self-determination.[94] Understanding the Canons in this context can help shield potential challenges that require an Indigenous people to be a politically powerless, "discrete and insular" minority in order to claim the Indian lens interpretation.[95] It is vital to note that the contemporary basis for the Canons and the contextual legal analysis explained later in this Article frame Indigenous peoples not as minorities but as political structures.[96] As such, courts should acknowledge and continue to strengthen government-to-government relationships between Indigenous peoples and the United States federal government.

III.
A CONTEXTUAL LEGAL FRAMEWORK AND ITS APPLICABILITY TO INDIGENOUS PEOPLES

The outcomes of asserting Indigenous rights or litigation involving Indigenous claims turn on how courts conceptualize Native peoples within a legal framework. Judges' understanding of history necessarily shapes their understanding of justice, especially for Indigenous peoples.[97] For Native Hawaiians, for example, "[w]ho we were and what happened are integrally connected to how Hawaiians" were portrayed as "savages and pagans" by white missionaries, "incompetents" by businessmen, and "lazy and uneducated" by racial immigrant groups.[98] It should come as no surprise, then, that the courts' limited and often skewed views of non-tribal Indigenous peoples have led to the unfortunate recognition that

94. *See* Barsh & Henderson, *supra* note 78, at 654 (1981) ("[R]esolving ambiguities in tribes' favor has operated to slow state and federal encroachment on tribal lands and jurisdiction. The doctrine of liberal construction was, in practical effect, the tribes' tenth amendment.").

95. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938); Rose Cuison Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 CALIF. L. REV. 801, 823 (2008) ("Despite the goals of the Hawaiian Home Land Program to protect Native Hawaiian rights and interests to their lands, *Rice v. Cayetano* suggests that it would be analyzed under strict scrutiny analysis because of its use of a blood quantum requirement. In particular, the deployment of blood quantum requirements by non-American Indian groups could invoke precisely what troubled the Supreme Court in *Rice*.").

96. Despite the Canons' paternalistic history, it is used not because there is power "exerted by the strong over those to whom they owe care and protection" but is instead grounded as a "matter of parity." *See* Blurton, *supra* note 76, at 42 (quoting United States v. Winans, 198 U.S. 371, 380–81 (1905)). It is important to recognize that this racial versus political conflict is a direct result of jurisprudential doctrines governing different Indigenous groups. *See* Rose Cuison Villazor, *Reading Between the (Blood) Lines*, 83 S. CAL. L. REV. 473, 487 (2010) ("The *Mancari* and *Rice* cases have thus produced two types of identities—racial and political—that appear to be mutually exclusive."); *see also*, *infra* Part V 0.

97. *See* Susan K. Serrano, *Collective Memory and the Persistence of Injustice: From Hawai'i's Plantations to Congress – Puerto Ricans' Claims to Membership in the Polity,* 20 S. CAL. REV. L. & SOC. JUST. 353, 360 (2011); Erik K. Yamamoto & Catherine Corpus Betts, *Disfiguring Civil Rights to Deny Indigenous Hawaiian Self-Determination: The Story of* Rice v. Cayetano*, in* RACE LAW STORIES 563, 565 (Rachel F. Moran & Devon M. Carbado, eds. 2008).

98. Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History and Social Justice*, 47 UCLA L. REV. 1747, 1760 (2000) (internal quotation marks omitted).

"efforts to restore self-determination [are viewed] not as 'political' restorative measures but as simple racial preferences."[99] In fact "only federally-recognized American Indian tribes may ever constitutionally rely on blood quantum rules to promote the right of self-government."[100] Because the way in which judges frame Indigenous issues is determinative of the legal outcome, it is important to understand what judicial philosophies are available and which theory best captures the principle of self-determination that Indigenous peoples so rightfully demand.

A. The Battle Between Legal Formalism and Legal Realism

Legal formalism and legal realism have often been framed as two opposing poles on the spectrum of jurisprudential decision-making, with formalism being categorized as the thesis and realism as the antithesis.[101] Formalism, originally coined as "mechanical jurisprudence"[102] in 1908, has been categorized as a legal theory that insists on the law being "logically self-evident, objective, *a priori* valid, and internally consistent."[103] At the root of this school of thought is an attempt to limit the discretion of judges by removing considerations of moral or political values from the deliberation process while emphasizing the mechanical application of the law.[104] More specifically, formalism seeks to prevent judges from "injecting their value judgments into their judicial decision-making" through such canons of interpretation as "textualism (in the statutory realm) and originalism (in the constitutional realm)."[105]

Judge Richard Posner once highlighted that formalism's rigidity "enables a commentator to pronounce the outcome of the case as being correct or incorrect, in approximately the same way that the solution to a mathematical problem can be

---

99. Susan K. Serrano, *A Reparative Justice Approach to Assessing Ancestral Classifications Aimed at Colonization's Harms*, 27 WM. & MARY BILL RTS. J. 501, 503 (2018) [hereinafter Serrano, *Reparative Justice*]; *see generally* Rice v. Cayetano, 528 U.S. 495 (2000).

100. Villazor, *supra* note 95, at 814.

101. *See* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 2–3 (1983). Professor Brian Tamanaha critiques the framing of formalism and realism as contrary legal theories. "Debates about judging are routinely framed in terms of antithetical formalist-realist poles that jurists do not actually hold." BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 2–3 (2009).

102. *See generally* Roscoe Pound, *Mechanical Jurisprudence,* 8 COLUM. L. REV. 605 (1908).

103. Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 365 (1992).

104. *See* Cass R. Sunstein, *Must Formalism Be Defined Empirically?*, 66 U. CHI. L. REV. 636, 638–39 (1999).

105. Ofer Raban, *Between Formalism and Conservatism: The Resurgent Legal Formalism of the Roberts Court*, 8 N.Y.U. J. L. & LIBERTY 343, 368 (2014). According to Raban, a new formalism has made "a comeback—straight into the heart of American legal practice[.]" *Id.* at 346. This new formalism is "[j]ustified as a preserver of democracy, executed via methodologies more simple [sic] and straightforward than those of old formalism, and coming at an opportune moment in the history of legal theory, this new legal formalism fell on fertile ground." *Id.* at 390.

pronounced correct or incorrect."[106] Yet this interpretation method and mechanical application relies on the text of a law while excluding or minimizing outside sources of the law, such as context and history.[107] Formalism's pedagogy of systematic application and the underlying principles of objectivity and value-neutral judgment continues to be the "primary method of teaching in law schools."[108]

When applied to Indigenous peoples, legal formalism has been used by courts to legitimize colonialism and its longstanding impacts.[109] *Johnson v. M'Intosh*, one of the seminal Federal Indian Law cases in the *Marshall Trilogy*, is illustrative of the Court's history of framing Native peoples in a way that justifies disparate treatment.[110] Indeed, the Court cemented the narrative of Indians as "heathens,"[111] and "fierce savages, whose occupation was war."[112] In doing so, the Court was later able to rely on *stare decisis* to dispossess Native peoples from their land, all under the guise of the Doctrine of Discovery.[113] Formalism creates a culture of blame and disconnect, placing full responsibility on Native peoples themselves for the consequences they experience as individuals and as groups, while simultaneously absolving colonizers from their part in the destruction of lives and culture and the dispossession of Native land.[114]

In the 1920s, legal realism or "pragmatism" emerged as a countervailing principle to the mathematical approach of formalism and the notion that such rigid judicial interpretation produces "correct" or "just" results.[115] According to legal realists, because the law is "made, not found," it must be "based on human experience, policy, and ethics, rather than formal logic."[116] Unlike formalism, legal realism frames the law within its historical and social context as a way to unearth

106. Richard Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 181 (1986).

107. *See* Sunstein, *supra* note 104, at 639; Edward A. Purcell, Jr., *American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory, in* AMERICAN LAW AND THE CONSTITUTIONAL ORDER 359, 360 (Lawrence M. Friedman & Harry N. Scheiber eds., enlarged ed. 1988) ("The old legal theory claimed that reasoning proceeded syllogistically from [mechanical] rules and precedents through the particular facts of a case to a clear decision.").

108. Sproat, Wai *Through* Kānāwai, *supra* note 11, at 155 n.136.

109. Sproat, Wai *Through* Kānāwai*, supra* note 11, at 157–58.

110. *See generally* Johnson v. M'Intosh, 21 U.S. 543 (1823); *see also* Serrano, *Reparative Justice*, *supra* note 99, at 504–05.

111. *M'Intosh*, 21 U.S. at 577.

112. *Id.* at 590.

113. *Id.* at 567.

114. *See* Raban, *supra* note 105, at 379.

115. *See generally* Bell, *supra* note 103, at 364; Elizabeth Mensch, *The History of Mainstream Legal Thought, in* THE POLITICS OF LAW (David Kairys ed., 1990).

116. Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 474 (1988).

the economic and political power struggles and imbalances for a particular group or event.[117]

Legal realism became the impetus for other theoretical movements such as feminist legal theory, critical race theory, and critical legal studies, which all sprouted from the same suspicions of legal formalism and the attempts to separate the law from context.[118] In particular, these schools of legal thought critique the formalistic approach to using abstract concepts such as equal protection to mask legislation and personal values rooted in sexism and racism.[119] Realism, and its jurisprudential branches, assert that formalism gives the courts the opportunity to "ignore historical patterns, to ignore contemporary statistics, and to ignore flexible reasoning."[120]

While realism has expanded our legal imagination to be more inclusive of the complexity of the human experience and has brought about substantial change, especially in the civil rights realm, it nonetheless has narrowly defined justice in such a way as to be exclusive of Indigenous peoples.[121] Framing injustice within an anti-discrimination framework, for example, "relegates history and community agitation to back-up roles," which in turn ignores the ever-present ramifications of colonization for Native populations.[122] Additionally, attempts at political restorative measures for certain Indigenous peoples, such as Native Hawaiians, have been framed by the Court as racial preferences and therefore unconstitutional.[123]

---

117. Mensch, *supra* note 115, at 23–24.

118. *See* Singer, *supra* note 116, at 504.

119. *See* Bell, *supra* note 103, at 369. Bell uses the example of the Supreme Court case *Regents of the University of California v. Bakke* to illustrate the Court's use of formalism to ignore "social questions about which race in fact has power and advantages and which race has been denied entry for centuries into academia" to strike down an affirmative action policy that denied white applicants based on their race. *Id.*

120. Bell, *supra* note 103, at 369.

121. *See* Hom & Yamamoto, *supra* note 98, at 1757; Eric K. Yamamoto & Jen-L W. Lyman, *Racializing Environmental Justice*, 72 U. COLO. L. REV. 311, 323 (2011) (There is an underlying assumption "that all racial and [I]ndigenous groups, and therefore racial and [I]ndigenous group needs, are the same. In general, it assumes that in terms of cultural needs and political-legal remedies, one size fits all. This simplifying assumption is rooted in the longstanding perception of many disciplines that race is fixed and biologically determined rather than socially constructed and that it is, therefore, largely devoid of cultural content.").

122. *See* Hom & Yamamoto, *supra* note 98, at 1757.

123. *See, e.g.*, Rice v. Cayetano, 528 U.S. 495, 516–17 (2000). ("The ancestral inquiry mandated by the State implicates the same grave concerns as a classification specifying a particular race by name . . . . The ancestral inquiry mandated by the State is forbidden by the Fifteenth Amendment for the further reason that the use of racial classifications is corruptive of the whole legal order democratic elections seek to preserve."); *see also* Addie C. Rolnick, *The Promise of* Mancari: *Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 967–68 (2011) ("That is, Indians belong to a group that has been racialized, and that has a particular political and historical relationship with the United States government that is inextricably related to this history of racialization. While

Legal formalism's failure to fully consider social and historical context as well as socio-economic factors, and realism's limited approach to Indigenous claims, illustrate the pressing need for a framework that recognizes and acknowledges the full panoply of Native experiences. While "[t]here is no 'uniform' theory of reparations that can fit all cultures, all nations, and all peoples," what Native populations generally seek, which may manifest differently depending on the group, is a normative framework of justice that is aimed at repairing the historical and systemic harms experienced as a result of colonialism.[124] This justice is shaped by the Indigenous groups' experience and, as a result, their notion of what reparations look like and, more precisely

, how to repair the damage of centuries of injustice.[125]

An Indigenous framework challenges formalism and stretches realism to account for the complex interplay between Native peoples and the United States. More importantly, a framework that takes into consideration the historical context and the colonialism that underpins the Native experience will "remind us of the destructive power of the racial stereotypes and popular myths about Indians that persist today and that have obscured not only how Native nations and communities see themselves but also what they have surmounted to sustain themselves as peoples."[126]

B. Contextual Legal Analysis and the Need to Fully Capture Indigenous People's Claims to Self-Determination

The contextual legal framework developed by Professor Kapua'ala Sproat acknowledges that claims by Native peoples, and the very circumstances that give rise to them, will be substantially different from other racialized populations and immigrant groups.[127] More precisely, the path towards justice for Indigenous peoples is less concerned about "equal treatment," which is often the goal for feminist and critical race theorists, and instead more focused on the international human rights principle of self-determination.[128] In light of these differences, "the

---

recognizing and privileging this unique political relationship, an integrated framework would acknowledge that these two statuses (political and racial) are hopelessly intertwined . . . .").

124. *See* Rebecca Tsosie, *Indigenous Peoples and the Ethics of Remediation: Redressing the Legacy of Radioactive Contamination for Native Peoples and Native Lands*, 13 SANTA CLARA J. INT'L L. 203, 253–54 (2015).

125. *See* Serrano, *Reparative Justice*, *supra* note 99, at 504.

126. AMY E. DEN OUDEN & JEAN M. O'BRIEN, RECOGNITION, SOVEREIGNTY STRUGGLES, AND INDIGENOUS RIGHTS IN THE UNITED STATES 2 (2013).

127. *See* Sproat, Wai *Through* Kānāwai, *supra* note 11, at 167; Yamamoto & Lyman, *supra* note 121, at 3

128. Sproat, Wai *Through* Kānāwai, *supra* note 11, at 167; *see also* Singer, *supra* note 116, at 474 ("Law therefore is, and must be, based on human experience, policy, and ethics, rather than formal logic. Legal principles are not inherent in some universal, timeless logical system; they are social constructs, designed by people in specific historical and social contexts for specific purposes

challenge . . . is to reach back into the past and locate the core elements which will play a role in the development of our collective future."[129]

In the search for these "core elements," contextual legal analysis for Native claims draws attention to four "realms" or "values" that have particularly been impacted by the throes of colonization which manifest even today.[130] Those four realms are: "(1) cultural integrity; (2) lands and natural resources; (3) social welfare and development; and (4) self-government."[131] A consistent focus on these values is key because they move beyond the "traditional" notions of rights—which are typically grounded in Western ideologies and incompatible with Indigenous thinking—and instead elevate "historical context, politics, culture, and a myriad of other social factors."[132]

As Professor Kapua'ala Sproat explains, the four realms are "salient dimensions of restorative justice for Indigenous peoples, which are necessary to begin to address longstanding physical, cultural, and other harms."[133] More specifically, she highlights the importance of each value and its interconnectedness:

> Culture cannot exist in a vacuum and its integrity is linked to land and other natural and cultural resources upon which Indigenous Peoples depend for physical and spiritual survival. In turn Native communities' social welfare is defined by cultural veracity and access to, and the health of, natural resources. Finally, cultural and political sovereignty determine who will control Indigenous Peoples' destinies (including the resources that define their cultural integrity and social welfare) and whether that fate will be shaped internally or by outside forces (including colonial powers).[134]

A contextual inquiry (perhaps self-evidently) takes into consideration the full context in order to more accurately paint the picture of what happened, how it happened, and why it was wrong.[135] By relying on context, this legal framework acknowledges that Native experiences and identities are neither static nor exist in isolation—and that in fact, there is an inextricable and living connection between natural resources, culture, self-government, and colonization.[136] The contextual

---

to achieve specific ends. Law and legal reasoning are a part of the way we create our form of social life.").

129. Wallace Coffey & Rebecca Tsosie, *Rethinking Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 196 (2001).

130. Sproat, Wai *Through* Kānāwai, *supra* note 11, at 173.

131. Sproat, Wai *Through* Kānāwai, *supra* note 11, at 173.

132. Sproat, Wai *Through* Kānāwai, *supra* note 11, at 153–55.

133. Sproat, Wai *Through* Kānāwai, *supra* note 11, at 176.

134. Sproat, Wai *Through* Kānāwai, *supra* note 11, at 173.

135. *See* Hom & Yamamoto, *supra* note 98, at 1757.

136. *See* Sproat, Wai *Through* Kānāwai, *supra* note 11, at 173–74.

legal analysis is critical to "interrogate[] the rule-related choice made (measured against rejected choices), the values and interests served by that choice, and its short and long-term consequences."[137] Additionally, a contextual inquiry has the potential to reach beyond the court system because it reorients history in a way that may "become[] a catalyst for mass mobilization and collective action aimed at policymakers, bureaucrats, and the American conscience."[138]

In the District Court for the District of Hawai'i, Judge David Ezra utilized the contextual legal analysis and reframed Harold "Freddy" Rice's claims in *Rice v. Cayetano*.[139] The plaintiff, Rice, who was born and raised in Hawai'i but does not fit the definition of Native Hawaiian, asserted that his exclusion from voting in the Native Hawaiian-only election for the Office of Hawaiian Affairs (OHA)[140] trustees violates the Fourteenth and Fifteenth Amendments.[141] Judge Ezra, after analyzing the history of Native Hawaiians and their relationship with the United States, rightly decided that the voting restriction was "not based on race, but upon a recognition of the unique status of Native Hawaiians."[142] He further clarified that "[t]his classification derives from the trust obligations owed and directed by Congress and the State of Hawai'i."[143] On appeal, a three-judge panel of the Ninth Circuit affirmed Judge Ezra's opinion.[144]

Contextual legal analysis is an effective tool for carving the law to be more representative of Native claims. Through contextual inquiry, advocates can tailor the law to encompass Indigenous experiences and move the needle toward reparative and restorative justice.

---

137. Sproat, Wai *Through* Kānāwai, *supra* note 11, at 170.

138. *See* Hom & Yamamoto, *supra* note 98, at 1757.

139. Rice v. Cayetano, 963 F.Supp. 1547, 1550–53 (D. Haw. 1997) (concluding that *Morton v. Mancari* should be applicable to Native Hawaiians for the same legal, historical, and special trust relationship with the United States that Indian tribes also have).

140. The Office of Hawaiian Affairs, "a semi-autonomous 'self-governing body,'" was the product of the 1978 Hawai'i Constitutional Convention and mandated as a "public trust . . . to better the conditions of both Native Hawaiians and the Hawaiian community in general. OHA was to be funded with a pro rata share of revenues from state lands designated as ceded." OFFICE OF HAWAIIAN AFFAIRS HISTORY, https://www.oha.org/about/abouthistory/ [https://perma.cc/WKG8-V8ES] (last visited Jan. 14, 2020). For direct legal language about the establishment of the Office of Hawaiian Affairs, see HAW. CONST. art. XII, § 5 (current through 2019).

141. *Rice*, 963 F. Supp. at 1548.

142. *Id.* at 1554.

143. *Id.*

144. Rice v. Cayetano, 146 F.3d 1075, 1076 (9th Cir. 1998).

IV.
THE HISTORICAL AND SPECIAL TRUST RELATIONSHIPS BETWEEN THE UNITED STATES AND NATIVE HAWAIIANS AND THE STATE OF HAWAI'I AND NATIVE HAWAIIANS

The applicability of the Canons should not rest on the classification of Indian status or the ability for a group to undergo the narrowly tailored process of federal recognition, but rather be based on an Indigenous population's special historical and trust relationship with the federal and state government. Here, it is necessary to examine the historical context that shapes the Native Hawaiian experience of today. Demands for self-determination and self-governance are rooted in this complex history—a history that reflects long-term detrimental effects for Native Hawaiians, evidenced by high rates of poverty, criminalization, and health disparities.[145]

A. Understanding the Native Hawaiian Government: A Historical and Contextual Basis

For Native Hawaiians and other Indigenous peoples elsewhere, there is an inextricable link between land, culture, and the environment that is at the heart of both the individual and communal identity.[146] This deep relationship is evident in how Hawaiians have traditionally understood land as a shared and interconnected resource—a sharp contrast to the western conception of land as private, alienable,

145. *See* HAWAI'I DEP'T OF BUS., ECON. DEV. & TOURISM: RESEARCH & ECON. ANALYSIS DIV., *Demographic, Social, Economic, and House Characteristics for Selected Race Groups in Hawai'i* 16, http://files.hawaii.gov/dbedt/economic/reports/SelectedRacesCharacteristics_HawaiiReport.pdf [https://perma.cc/MD5D-6ZBD]. According to a study conducted by the Office of Hawaiian Affairs, the criminal justice system disproportionately impacts Native Hawaiians at every stage. *See generally* OFFICE OF HAWAIIAN AFFAIRS, *The Disparate Treatment of Native Hawaiians in the Criminal Justice System* (2010), http://www.justicepolicy.org/uploads/justicepolicy/documents/10-09_exs_disparatetreatmentofnativehawaiians_rd-ac.pdf [https://perma.cc/96NX-T88K]. Additionally, Native Hawaiians experience higher unemployment rates, higher rates of public assistance, higher rates of poverty, lower incomes, and lower levels of educational attainment than the general population in the State of Hawai'i. HUD, *Housing Needs of Native Hawaiians: A Report from the Assessment of American Indian, Alaska Native, and Native Hawaiian Housing Needs* 13–16 (May 2017), https://www.huduser.gov/portal/sites/default/files/pdf/HNNH.pdf [https://perma.cc/P8KV-K2Z5]; *see generally* LINDSAY HIXSON, BRADFORD B. HEPLER, & MYOUNG OUK KIM, U.S. CENSUS BUREAU *Native Hawaiian and Other Pacific Islander Population: 2010 Census Briefs* (May 2012), https://www.census.gov/prod/cen2010/briefs/c2010br-12.pdf [https://perma.cc/T78F-45RN] (detailing the geographical distribution of Native Hawaiians and Pacific Islanders across the United States).

146. *See* 20 U.S.C.A. § 7512(12)(a) (Westlaw through Pub. L. No. 115-231) ("Native Hawaiians have a cultural, historic, and land-based link to the [I]ndigenous people who exercised sovereignty over the Hawaiian Islands, and that group has never relinquished its claims to sovereignty or its sovereign lands."); Melody Kapilialoha MacKenzie, Ke Ala Pono – *The Path of Justice: The Moon Court's Native Hawaiian Rights Decisions*, 33 U. HAW. L. REV. 447, 449 (2011).

and exclusive.[147] The arrival of Captain James Cook in 1778 marked the advent of western colonialism in Hawai'i, which shook "the vibrant life Native Hawaiian people had created . . . to the core,"[148] bringing Christianity, capitalism, and destructive diseases that decimated the Native Hawaiian population from an estimated one million to less than 40,000.[149]

While their population dramatically plummeted, Native Hawaiians underwent key political changes. High Chief Kamehameha I united the once-separate Hawaiian Islands under single rule in 1810.[150] Soon after, the *ali'i* (chiefs) adopted western structures to "legitimize" traditional political and cultural sovereignty.[151] The Constitution of 1840, approved by then-reigning monarch King Kamehameha III, contained provisions for a dual-chamber legislature, a hierarchy of central and local powers, and enumerated rights reserved to the people.[152] The constitutional Hawaiian monarchy was recognized internationally as a nation—"as evidenced by treaties governing friendship, commerce, and navigation"—by the United States, Britain, France, and Japan, among others.[153]

---

147. LILIKALĀ KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? 24 (1992). Pre-western contact, Native Hawaiians enjoyed a highly complex and integrated land system. Each of the eight islands was divided into districts known as *'okana*, then subdivided into distinct *ahupua'a*, or lands running from the mountains to the sea. Within the *ahupua'a* land was parceled the *'ili*; there, *'ohana* (or extended families) cultivated and lived on the land.

> The *'ohana* was the core economic unit in Hawaiian society. As in most [I]ndigenous societies, there was no money, no idea or practice of surplus appropriation, no value storing, and no payment deferral because there was no notion of financial profit from exchange. In other words, there was no basis for economic exploitation in pre-*haole* [pre-western] Hawai'i.

HAUNANI K. TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI'I 4 (rev. ed. 1999).

148. Lane Kaiwi Opulauoho, *Trust Lands for the Native Hawaiian Nation: Lessons from Federal Indian Law Precedents*, 43 AM. INDIAN L. REV. 75, 77 (2018).

149. TRASK, *supra* note 147, at 6. The estimate provided by Trask could be considered a conservative number. In 2015, Congress articulated the finding that "[b]y 1919, the Native Hawaiian population had declined from an estimated 1,000,000 in 1778 to an alarming 22,600 . . . ." 20 U.S.C.A. § 7512(7) (Westlaw).

150. Melody Kapilialoha MacKenzie, Ke Ala Loa – *The Long Road: Native Hawaiian Sovereignty and the State of Hawai'i,* 47 TULSA L. REV. 621, 624 (2011) [hereinafter Mackenzie, Ke Ala Loa].

151. *Id.* Wallace Coffey and Rebecca Tsosie describe political sovereignty as externally defined (i.e., by U.S. statute or case law) and cultural sovereignty as internally defined (i.e., by tribal custom). They argue that courts' and Indian nations' disproportionate focus on political over cultural sovereignty has limited the resulting body of scholarship. *See generally* Coffey & Tsosie, *supra* note 129.

152. *See* Ralph S. Kuykendall, *Constitutions of the Hawaiian Kingdom: A Brief History and Analysis, in* ISLANDS IN CAPTIVITY: THE RECORD OF THE INTERNATIONAL TRIBUNAL ON THE RIGHTS OF INDIGENOUS HAWAIIANS 45–46 (Ward Churchill & Sharon H. Venne eds., 2004).

153. 20 U.S.C.A. § 7512(1) (Westlaw); *see generally* Melody Kapilialoha MacKenzie, *Historical Background, in* NATIVE HAWAIIAN RIGHTS HANDBOOK (Melody Kapilialoha MacKenzie ed.,

Political and religious foreign influencers took advantage of the decline of the Hawaiian populace. In 1842, President Tyler announced what has since been called the Tyler Doctrine, asserting opposition to "any attempt by another power . . . to take possession of the islands, colonize them, and subvert the native Government" because Hawai'i is under the sphere of influence of the United States.[154] Other nations, such as Britain and France, also attempted to annex Hawai'i illegally.[155]

Faced with increasing foreign encroachment, King Kamehameha III sought to protect his vulnerable nation.[156] In the mid-nineteenth century, the Hawaiian monarch began the process of converting the Hawaiian rights system based on communal tenure into private ownership based on capitalism.[157] Known as the *Māhele* or the "Great Divide," the process of privatization also grouped land into three different categories: (1) one million acres were reserved to the king, which would later be known as crown land, (2) approximately 1.5 million acres were designated as government lands, and (3) the remaining half was given to the *ali'i* and *konohiki* (headman of a land division).[158] This foreign-enforced division "dispossessed Native Hawaiians of *hānau* [rights], their birth sands, and divested them of cultural rights in those lands."[159] Additionally, the *Māhele* eventually and unfortunately led to most of the land being controlled by foreigners by 1888.[160]

1991) (detailing the legal, social, and political development of the Hawaiian monarchy and its recognized place in the international community). The Kingdom of Hawai'i was recognized as a "full member of the family of nations," with numerous treaties with the United States and other countries. Van Dyke, *Political Status*, *supra* note 19, at 102.

154. Edward P. Carpol, *John Tyler and the Pursuit of National Destiny*, 17 J. OF THE EARLY REPUBLIC 467, 481–82 (1997).

155. *See* Melody Kapilialoha MacKenzie & D. Kapua'ala Sproat, *A Collective Memory of Injustice: Reclaiming Hawai'i's Crown Land Trust in Response to Judge James S. Burns*, 39 U. HAW. L. REV. 481, 503, 507 (2017); JEAN IWATA CACHOLA, KAMEHAMEHA III: KAUIKEAUOLI (1995); *see also* TRASK, *supra* note 147, at 6–7. There were two instances of illegal annexation. In 1843, British Captain Lord George Paulet threatened Hawai'i with the force of the British Royal Navy by pointing canons at Honolulu. The Hawaiian Kingdom was restored five months later. Later, in 1849, France issued ten demands to Kamehameha III, who discarded the list and reaffirmed his allegiance with his Native people. *Id*.

156. According to the Privy Council, an advisory circle to the *mō'ī* or chiefs that assisted in determining policies for the Hawaiian Kingdom, '"it has become necessary to the prosperity of our kingdom and the proper physical, mental, and moral improvement of our People that the undivided rights, at present existing in the lands of our kingdom, shall be separated and distinctly defined."' Kamanamaikalani Beamer & N. Wahine'aipohaku Tong, *The* Māhele *Did What? Native Interest Remains*, 10 HŪLILI: MULTIDISCIPLINARY RES ON HAWAIIAN WELL-BEING 125, 129–30 (2016). The *Māhele* established a "hybrid trust and socialistic kind of land tenure that offered special habitation, access, and resource rights to Native Hawaiian subjects." *Id.* at 131.

157. KAME'ELEIHIWA, *supra* note 147, at 8.

158. VAN DYKE, CROWN LANDS, *supra* note 18, at 40–42, 54, 89–92, 111–17.

159. Lahela Hiapola'ela'e Farrington Hite, Maka'ala Ke Kanaka Kahea Manu*: Examining a Potential Adjustment of Kamehameha Schools' Tuition Policy*, 32 U. HAW. L. REV. 237, 240 (2009).

160. TRASK, *supra* note 147, at 7.

The *Māhele* and the reciprocity treaty signed with the United States by King David Kalākaua, Hawai'i's second elected monarch, opened Hawai'i to substantial economic changes.[161] This included increased investments in large agricultural crops, such as sugar, which were grown on American-owned plantations.[162] The increasing economic interests were a driving force for the United States presence and power and culminated in 1887 when a group of white businessmen threatened the King and forced him at gunpoint to relinquish all his powers to the legislature by signing the Bayonet Constitution.[163] One of the significant changes implemented under this constitution was that the voting requirements insulated the electorate from Hawaiian participation by restricting eligibility to those with property and income.[164] Unsurprisingly, the result was an electorate comprised mostly of wealthy white men.[165]

Queen Lydia Kamaka'eha Lili'uokalani, who succeeded her brother, Kalākaua, sought to reverse many of the changes forced on her people by the Bayonet Constitution.[166] A group of American businessmen who called themselves "The Committee of Safety," however, blocked the Queen's efforts and, with the

161. *See* Melody Kapilialoha MacKenzie, *Historical Background*, *in* NATIVE HAWAIIAN RIGHTS HANDBOOK 9 (Melody Kapilialoha MacKenzie, ed., 1991) ("The 50-year period after the *Māhele* brought the growth of large-scale plantation agriculture, especially sugar, and the steady loss of lands from Hawaiian control.").

162. MacKenzie, Ke Ala Loa*, supra* note 150, at 625; *see also* GEO S. BOUTWELL, THE RECIPROCITY TREATY WITH HAWAI'I: SOME CONSIDERATIONS AGAINST ITS ABROGATION: WITH OFFICIAL DOCUMENTS RELATING TO THE TREATY (Judd & Detweiler Printers and Publishers 1886) (illustrating the treaty's impact and effects from an American perspective).

163. VAN DYKE, CROWN LANDS*, supra* note 18, at 120 ("The American-missionary-planter group regrouped and regained their dominant role in the Kingdom in 1887 when they required the Mō'i at gunpoint to support the 'Bayonet Constitution,' which reduced the power of the Monarchy significantly."); Melody Kapilialoha MacKenzie, *Historical Background*, *in* NATIVE HAWAIIAN RIGHTS HANDBOOK 11 (Melody Kapilialoha MacKenzie, ed., 1991); *see generally* JONATHAN KAY KAMAKAWIWO'OLE OSORIO, DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887 (2002) (describing the legal and physical forces that led to the Bayonet Constitution and the suppression of Native Hawaiian rights, such as voting).

164. CONST. KINGDOM OF HAWAI'I OF 1887, art. 59 (repealed through cession to the United States), http://www.alohaquest.com/archive/constitution_1887.htm [https://perma.cc/U6DA-TVQR] (last visited Nov. 6, 2019) (requiring, among other qualifications, that a male resident "shall be entitled to vote," provided he "own and be possessed, in his own right, of taxable property in this country of the value not less than three thousand dollars over and above all encumbrances, or shall have actually received an income of not less than six hundred dollars during the year next preceding his registration for such election").

165. *See, e.g.*, Melody Kapilialoha MacKenzie, *Historical Background*, *in* NATIVE HAWAIIAN RIGHTS HANDBOOK 11 (Melody Kapilialoha MacKenzie, ed., 1991) ("Property qualifications for voting were so high that many Native Hawaiians were disenfranchised."); Lauren L. Basson, *Fit for Annexation but Unfit to Vote? Debating Hawaiian Suffrage Qualifications at the Turn of the Twentieth Century*, 29 SOC. SCI. HIST. 575, 578 (2005).

166. TOM COFFMAN, NATION WITHIN: THE HISTORY OF THE AMERICAN OCCUPATION OF HAWAI'I 119–20 (2003).

aid and presence of U.S. military troops, abolished the Hawaiian monarchy.[167] As a replacement, the Committee created a provisional government that was quickly recognized by John Stevens, U.S. Minister to the Hawaiian Kingdom.[168] To avoid bloodshed and protect her people, and driven by a well-founded fear that her supporters would be condemned to death, the Queen relinquished her authority to the United States.[169] She did so under protest while also expecting that the United States would support her claims and repudiate Minister Stevens' actions.[170] In response, President Grover Cleveland sent Special Commissioner James Blount to investigate the events and circumstances leading to the overthrow of the Hawaiian Kingdom.[171] His findings, known as the Blount Report, recounted in great detail the United States' actions and role in dispossessing the Queen and was sent to the United States House of Representatives Foreign Relations Committee.[172]

No doubt influenced by the Blount Report's findings, President Cleveland called for the restoration of the Hawaiian Kingdom.[173] President Cleveland admitted "that a substantial wrong has thus been done which a due regard for our

167. Apology Res., *supra* note 18, at 1510 ("Whereas, on the afternoon of January 17, 1893, a Committee of Safety that represented the American and European sugar planters, descendants of missionaries, and financiers deposed the Hawaiian monarchy and proclaimed the establishment of a Provisional Government."); Alan Murakami, *The Hawaiian Homes Commission Act*, *in* NATIVE HAWAIIAN RIGHTS HANDBOOK 44 (Melody Kapilialoha MacKenzie ed., 1991).

168. Apology Res., *supra* note 18, at 1510 ("Whereas, on January 14, 1893, John L. Stevens, the United States Minister assigned to the sovereign and independent Kingdom of Hawai'i conspired with a small group of non-Hawaiian residents of the Kingdom Hawai'i, including citizens of the United States, to overthrow the [I]ndigenous and lawful Government of Hawai'i.").

169. *See* LILIUOKALANI, HAWAII'S STORY BY HAWAI'I'S QUEEN 273–76, 354 (1990). ("Because that protest and my communication to the United States Government immediately thereafter expressly declare that I yielded my authority to the forces of the United States in order to avoid bloodshed, and because I recognized the futility of a conflict with so formidable a power.").

170. MacKenzie, Ke Ala Loa*, supra* note 150, at 626; *see also* Liliuokalani v. United States, 45 Ct. Cl. 418, 435 (1910).

171. 26 CONG. REC. 309-12 (1893) (message from President Cleveland).

172. THE BLOUNT REPORT, http://libweb.hawaii.edu/digicoll/annexation/blount.php [https://perma.cc/J8VL-P7Y7] (last visited Nov. 14, 2019). This report emphasized the illegality of the overthrow. The report even illustrated the process in which annexationists limited the right to vote because "the undoubted sentiment of the people is for the Queen, against the Provisional Government and against annexation. A majority of the whites, especially Americans, are for annexation." *Id.* at 599. The Blount Report opened the United States to the possibility of liability. Milner S. Ball, *Introduction*, 28 GA. L. REV. 299, 303 (1994) (The "report was clear and straightforward: the United States was to be blamed."); Mark A. Inciong, *The Lost Trust: Native Hawaiian Beneficiaries Under the Hawaiian Homes Commission Act*, 8 ARIZ. J. INT'L & COMP. L. 174, 191 n.34 (1991) ("The Blount Report . . . found that the overthrow . . . had been illegal . . . and that Liliuokalani [should] be restored to power."); *see Liliuokalani*, 45 Ct. Cl. at 435.

173. Apology Res., *supra* note 18, at 1511 ("Whereas President Cleveland further concluded 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 we should endeavor to repair' and called for the restoration of the Hawaiian monarchy.").

national character as well as the rights of the injured people requires that we should endeavor to repair," because in fact "the government of a peaceful and friendly people was overthrown."[174] President Cleveland's well-placed sympathies failed to result in action, as he was not up for re-election.[175] Successor President William McKinley, who did not share President Cleveland's stance, viewed the acquisition of Hawai'i as demonstrative of American military conquest in the Pacific.[176] The McKinley Administration attempted to negotiate a treaty of annexation but failed due to overwhelming opposition, evidenced by over 21,000 signatures demanding the restoration of the Queen's authority.[177] To bypass public opposition, Congress passed a joint resolution annexing Hawai'i to the United States on July 6, 1898.[178] The Joint Resolution, which "made no provision for a vote by Native Hawaiians or other citizens," required that the Republic of Hawai'i "cede" 1.8 million acres of Government and Crown Lands.[179] President McKinley signed it into law the next day.[180]

---

174. Apology Res., *supra* note 18, at 1513 (internal quotation marks omitted).

175. *See* Gerald N. Magliocca, *Constitutional False Positives and the Populist Moment*, 81 NOTRE DAME L. REV. 821, 876 (2006) ("The nomination of [William Jennings] Bryan shattered the party that President Cleveland represented."); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383, 1391 n.27 (2001) ("[T]he Populists chose the Democratic candidate William Jennings Bryan as their standard-bearer in the 1896 election[.]"); COFFMAN, *supra* note 166, at 245–50 (discussing the events leading up to the signing of the 1897 Annexation Treaty); THOMAS J. OSBOURNE, ANNEXATION HAWAI'I: FIGHTING AMERICAN IMPERIALISM 85 (1998).

176. *See* WILLIAM MCKINELY & SIDNEY M. BAILOU, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE REPORT OF THE HAWAIIAN COMMISSION 8 (1898) (Pearl Harbor "is many times larger than . . . Honolulu, and it offers to the United States facilitates for the increase of Pacific and Oriental commerce the value of which can not [sic] be estimated. If the United States shall develop this desirable place, as it may easily do, it will afford the American Navy the most advantageous spot for a coaling station and naval depot to the obtained anywhere."); *see also Hawaiian Sugar in Caucus*, N.Y. TIMES, June 13, 1897.

177. NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM 157–59 (2004); Lorinda Riley, *Native Hawaiians and the New Frontier of the Indian Civil Rights Act*, 26 ASIAN AM. L.J. 168, 181 (2019).

178. VAN DYKE, CROWN LANDS, *supra* note 18, at 209. It is important to note that the process in which Hawai'i was annexed was controversial and raises additional red flags. Previously, no annexation occurred through joint resolution. While annexationists point to the acquisition of Texas in 1845 as precedent, Texas was in reality admitted under Congress' power to admit new states. Additionally, a Texas plebiscite approved of the resolution. This did not happen in Hawai'i. *See* Williamson Chang, *Darkness over Hawai'i: The Annexation Myth is the Greatest Obstacle to Progress*, 16 ASIAN-PAC. L. & POL'Y J. 70, 74–75 (2015) (describing the legal anomaly of annexing a new territory, and in particular a sovereign such as Hawai'i, through the process of a joint resolution as opposed to the constitutional mandate of treaty); MacKenzie, Ke Ala Loa*, supra* note 150, at 627.

179. *See* Melody Kapilialoha MacKenzie, *Self-Determination and Self Governance*, *in* NATIVE HAWAIIAN RIGHTS HANDBOOK 79 (Melody Kapilialoha MacKenzie, ed., 1991); An Act Relating to the Lands of His Majesty the King and of the Government, 2 Revised Laws of Hawai'i (1925) at 2152–76.

180. VAN DYKE, CROWN LANDS, *supra* note 18, at 209.

In 1921, acknowledging the abhorrent economic and social conditions that Native Hawaiians faced, Congress passed the Hawaiian Homes Commission Act (HHCA).[181] Pursuant to the new statute, 203,000 acres of Government and Crown Lands were converted to Hawaiian Home Lands, a homesteading program available only to those of 50% or more Hawaiian ancestry.[182] 28 years later, 1.4 million acres of Government and Crown Lands, including HHCA lands, were transferred to the State of Hawai'i under the Admission Act.[183] While the law "transferred responsibility for the administration of the Hawaiian Home Lands to the State of Hawai'i," it "reaffirmed the trust relationship between the United States and the Hawaiian people by retaining the exclusive power to enforce the trust, including the power to approve land exchanges and amendments to such Act affecting the rights of beneficiaries under such Act."[184]

Additionally, the Admission Act outlined the State's trust responsibility, which was incorporated into the Constitution of the State of State of Hawai'i.[185] This trust responsibility is illustrative of the unique relationship Native Hawaiians have with the State of Hawai'i and the United States. As Section 5(f) of the Admission Act states:

> The lands granted to the State of Hawai'i . . . together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by State as a *public trust . . . for the betterment of the conditions of native Hawaiian, as defined in the Hawaiian Homes Commission Act, 1920, as amended . . . .* Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of *trust* for which suit may be brought by the United States.[186]

Section 5(f) represented a codified commitment mandating the State of Hawai'i to hold the lands in trust to be used for the five enumerated purposes.[187] In

181. Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, 42 Stat. 108 § 101(a) (1921) ("The Congress of the United States and the State of Hawai'i declare that the policy of this Act is to enable native Hawaiians to return to their lands in order to fully support self-sufficiency for native Hawaiians and the self-determination of native Hawaiians in the administration of this Act . . ."); *see* H.R. Rep. No. 108-742, at 4 (2004) (The Hawaiian Homes Commission Act "reflect[s] Congress' determination of the need to address the conditions of Native Hawaiians.").

182. Hawaiian Homes Commission Act § 208.

183. Admission Act of 1959, Pub. L. No. 86-3, § 5, 73 Stat. 4, 5–6; Office of the Legislative Auditor, State of Hawai'i, Report No. 86-17, Final Report on the Public Land Trust 25 (1986).

184. 20 U.S.C.A. § 7512(10) (Westlaw through Pub. L. No. 115-231).

185. *Id.*

186. Admission Act § 5(f) (emphasis added).

187. *See id.* (The five purposes are to support "public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian

fact, failure to utilize the lands, proceeds, and generated income in a way that is consistent with the State Constitution or laws "shall constitute a breach of trust for which suit may be brought by the United States."[188] It is this trust relationship that provides the legal and historical landscape to understand the federal and state governments' responsibility—and consequently their failure—to fulfill their duties to Native Hawaiians.

B. Apology Resolution

The federal government's failure to fulfill its trust relationship with Native Hawaiians and the United States' role in the overthrow of the Hawaiian Kingdom prompted landmark legislation.[189] In 1993, the United States passed the Apology Resolution with overwhelming bipartisan support during the 103rd Congress.[190] In an address to Congress, Senator Daniel Inouye remarked that "we all know that the history and actions of our great country have been less than honorable in dealing with native peoples of this Nation. But . . . this fact should not prevent us from acting to recognize and rectify these wrongs."[191] According to one government report, the Apology Resolution represented a historic moment and provided the foundation for reconciliation efforts between the United States and Native Hawaiians.[192] One of the two underlying goals of the Apology Resolution was to "set the record straight" by displacing the false conclusions set forth by the 1983 Native Hawaiians Study Commission's majority report, which concluded that the U.S. federal government was not liable for the overthrow of the Hawaiian

Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible[,] for the making of public improvements, and for the provision of lands for public use"); Melody Kapilialoha MacKenzie, *Public Land Trust, in* NATIVE HAWAIIAN LAW: A TREATISE 86 (MacKenzie et al. eds., 2015).

188. *See* Admission Act § 5(f).

189. According to Professor Eric Miller, "[T]he Hawai'i case might be the first where an [A]pology [R]esolution received legal weight." Jess Bravin & Louise Radnofsky, *Regrets Only? Native Hawaiians Insist U.S. Apology Has a Price*, WALL ST. J., Mar. 12, 2009, at A12. "[I]n the *landmark* 1993 Apology Resolution, the United States Congress 'acknowledged the historical significance of' the illegal overthrow of the sovereign Hawaiian nation, 'which resulted in the suppression of the inherent sovereignty of the Native Hawaiian People.'" Sproat, *Environmental Self-Determination*, *supra* note 28, at 185–86 (emphasis added). The Apology Resolution for Native Hawaiians was not the first time that the United States government has apologized to a racial group. In fact, five years prior, the United States passed the Civil Liberties Act of 1988, awarding reparations for the World War II internment of thousands of Japanese Americans. Pub. L. No. 100-383, 102 Stat. 903 (1988).

190. MAUKA TO MAKAI, *supra* note 22, at 13 ("The Apology Resolution . . . passed in the Senate by a roll call vote of 65 to 34").

191. 139 Cong. Rec. 14477, 14480 (1993).

192. HAWAI'I ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, RECONCILIATION AT A CROSSROADS: THE IMPLICATIONS OF THE APOLOGY RESOLUTION AND RICE V. CAYETANO FOR FEDERAL AND STATE PROGRAMS BENEFITING NATIVE HAWAIIANS 17 (2001) [hereinafter RECONCILIATION AT A CROSSROADS].

Kingdom and subsequent loss of sovereign lands.[193] The Resolution's second stated goal was to acknowledge and "educate the American public and the Congress on the history of U.S. involvement in the overthrow and its aftermath."[194] Congress recognized that Native Hawaiians were neither compensated nor consented to the taking of Government, Crown, and public lands of Hawai'i and that in fact, "the [I]ndigenous Hawaiian people never directly relinquished their claims . . . over their national lands to the United States."[195]

While the Apology Resolution marked a significant point in Hawaiian history, its application has never been consistent. The Hawai'i and U.S. Supreme Courts forcefully clashed on how the Apology Resolution should be interpreted and weighed. In 2008, the Office of Hawaiian Affairs and four individual plaintiffs took collective action to prevent the Housing Finance and Development Corporation, a state-created corporation, from transferring two parcels of trust land to private developers.[196] In a 2008 unanimous decision, the Hawai'i Supreme Court agreed with the plaintiffs and asserted that the Apology Resolution had the force of law because it was the direct result of legislative deliberations.[197] More specifically, because of the trust relationship between the State of Hawai'i and Native Hawaiians, the state could not alienate lands held in trust.[198] The Apology Resolution and other state laws, when read together, "give rise to the State's fiduciary duty to preserve the corpus of the public lands trust, specifically, the ceded lands, until such time as the unrelinquished [sic] claims of the native Hawaiians have been resolved."[199]

The U.S. Supreme Court also issued a unanimous decision, but one that was in sharp contrast to the Hawai'i Supreme Court's, in *Hawaii v. Office of Hawaiian Affairs*. The Court examined the Apology Resolution's two substantive provisions and determined that the language was merely a declaration of political sentiment.[200] The U.S. Supreme Court rejected the Hawai'i Supreme Court's proclamation that the Resolution was to be the basis for reconciliation and provided a

193. *Id.*

194. *Id.*

195. Apology Res., *supra* note 18, at 1512.

196. Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp (HCDCH 1), 177 P.3d 884, 897–98 (Haw. 2008).

197. *Id.* at 901; *see* ROBERT U. GOEHLERT & FENTON S. MARTIN, CONGRESS AND LAW-MAKING: RESEARCHING THE LEGISLATIVE PROCESS 42 (2d ed. 1989) ("In reality there is little difference between a bill and a joint resolution, as a joint resolution goes through the same procedure as a bill and has the force of law."); L. Harold Levinson, *Balancing Acts:* Bowser v. Synar, *Gramm-Rudman-Hollings, and Beyond*, 72 CORNELL L. REV. 527, 545 (1987) ("Courts have consistently held that the legal effect of a joint resolution is identical to that of an enacted bill.").

198. *Office of Hawaiian Affairs*, 177 P.3d at 927.

199. *Id*.

200. Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163, 172–75 (2009).

statutory initiation of a settlement process with Native Hawaiians.[201] The Court instead found that there was "no justification for turning an express disclaimer of claims against one sovereign into an affirmative recognition of claims against another."[202]

The Court also analyzed the thirty-seven "whereas" clauses of the Apology Resolution.[203] While the Hawai'i Supreme Court interpreted the clauses as a statutory acknowledgment of Native Hawaiians' claims to trust lands, the U.S. Supreme Court determined that they had no operative effect, finding that "'[w]e must have regard to all the words used by Congress, and as far as possible to give effect to them,' but that maxim is not a judicial license to turn an irrelevant statutory provision into a relevant one."[204] According to the Court, absent clear congressional intent, the Apology Resolution does not change Hawai'i's rights and obligations.[205]

The Court's unanimous decision in *Hawaii v. Office of Hawaiian Affairs* came as a surprise, given its previous decision in *Rice v. Cayetano*.[206] Though the *Rice* decision was not a victory for Native Hawaiians, it was also not a unanimous court.[207] Justice Stevens' dissent, joined in part by Justice Ginsburg, acknowledged the weight the Apology Resolution carries.[208] Establishing that "[t]he nature of and motivation for the special relationship between the [I]ndigenous peoples and the United States Government was articulated in explicit detail in 1993, when Congress adopted a Joint Resolution,"[209] the dissent argued that even absent the Apology Resolution, "a well-established federal trust relationship with the native Hawaiians" nonetheless exists.[210] Unfortunately, while the *Rice* decision gave the Court the opportunity to apply the Resolution in a manner that comported with the federal and state governments' obligations under their special trust relationship, it failed to refer to it as historical authority.[211] Instead, the Court used its own historical inquiry, directly undercutting the extensive legislative process that resulted in the Apology Resolution.[212]

---

201. *Hawaii*, 556 U.S. at 174.
202. *Id.*
203. *Id.* at 175.
204. *Id.* at 174 (internal citation omitted).
205. *Id.* at 174–75.
206. *See generally id.*; Rice v. Cayetano, 528 U.S. 495 (2000).
207. *See generally Rice*, 528 U.S. 495.
208. *Id.* at 527–47 (Stevens, J., dissenting).
209. *Id*. at 533.
210. *Id.*
211. *See* Paul Sullivan, *Seeking Better Balance: A Proposal for Reconsideration of the 2006 ABA Resolution of the Akaka Bill*, 10 HAW. B.J. 70, 72 (2006).
212. *See id.*

The inconsistent interpretations of the Apology Resolution are troubling and illustrative of the courts' differing views on the status of Native Hawaiians. The Hawai'i Supreme Court was correct in interpreting the Apology Resolution liberally and resolving ambiguities in favor of Native Hawaiians. It utilized the interpretation mechanism cemented by over 180 years of Supreme Court precedent—the Indian Canons of Construction—without ever realizing it or even expressly articulating it.

V.
THE CANONS OF CONSTRUCTION IN A NATIVE HAWAIIAN CONTEXT

Federal Indian Law scholar Charles Wilkinson argues that the appropriate starting point for any analysis of claims implicating Indigenous rights demands the following process:

> If Indians are involved, you should infuse all federal laws, old and new, with the policy of the special Indians trust relationship and read those laws with a heavy bias in favor of Indians . . . . If the first reading does not produce a result in favor of the Indians, you should read the document again. And once again – with an inventive mind.[213]

Wilkinson's guidance is at the heart of the Canons. And because the applicability and use of the Canons turn on whether a special trust relationship exists between the United States and the group in question, one could replace "Indian" with "Native Hawaiian," "Samoan,"[214] or "Chamorro"[215]—all of which similarly have a trust relationship with the United States—and the Canons would apply.

Current jurisprudence, however, has failed to extend the legal "inventive mind" to these other Native groups.[216] As a result, Native Hawaiians (and subsequently the Indigenous peoples of the unincorporated territories of the United States) are excluded from the benefits afforded to federally recognized tribes,

---

213. *See* CHARLES F. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW 52 (1987) (emphasis and replacements added).

214. Samoans are the Indigenous people of American Samoa, an unincorporated United States Territory. Indeed, "American Samoa is the only unorganized United States territory with any substantial [I]ndigenous population." Stanley K. Laughlin, Jr., *The Constitutional Structure of the Courts of the United States Territories: The Case of American Samoa*, 13 U. HAW. L. REV. 379, 441 (1991).

215. The Chamoru or Chamorro are the Indigenous people of United States Territory of Guam. According to legal scholar Julian Aguon, "[b]ecause the [I]ndigenous Chamoru people are not recognized under U.S. domestic law as a distinct legal entity, i.e., as an [I]ndigenous people privy to certain collective rights such as the rights to preserve and protect our cultural integrity and practices, we lack the legal standing necessary to assert rights as an [I]ndigenous people." Julian Aguon, *Other Arms: The Power of a Dual Rights Legal Strategy For the Chamoru People of Guam Using the Declaration on the Rights of Indigenous Peoples in U.S. Courts*, 31 U. HAW. L. REV. 113, 114 (2008).

216. *See* WILKINSON, *supra* note 213, at 52.

particularly the legal presumption that tribal governments act in the interest of self-determination.[217] Our legal imagination should reconstruct "traditional" and often narrowly construed legal principles to be inclusive and "more accommodating to the political needs of *all [I]ndigenous peoples*."[218]

A. Avenues for Native Hawaiians to Assert Self-Determination are Limited

The pathways which Native Hawaiians can pursue to protect cultural and education programs, ensure land ownership, and move toward self-governance are extremely limited. Native Hawaiians can utilize the courts as one method, but as *Rice v. Cayetano* and *Hawaii v. Office of Hawaiian Affairs* indicate, as a non-federally recognized tribe, Native Hawaiians cannot evoke the same protections as those Indigenous peoples who are able to meet the narrow, and often difficult demands, of federal recognition.[219] Without federal recognition, programs for Indigenous groups like Native Hawaiians will be subject to strict scrutiny because their type of indigeneity is viewed racially, while federally recognized tribes' indigeneity is viewed as a political classification.[220]

As the Supreme Court concluded in *Morton v. Mancari*, because Indians occupy a "unique legal status," the hiring preferences for the Bureau of Indian Affairs (BIA) did not constitute racial discrimination—and as a result, application of a strict scrutiny analysis was inapposite.[221] The "employment criterion" was instead found to be "reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups."[222] Thus, federally recognized tribes are considered a political group and discrimination claims against them trigger rational basis, not strict scrutiny, review.

---

217. *See* Villazor, *supra* note 95, at 818–19. Villazor aptly pushes that laws which privilege Indigenous peoples should not be examined "from a racial lens informed only by the history of racial discrimination in the United States, but through a perspective that appreciates the connections among indigeneity, property, and sovereignty." *Id.* at 824.

218. *See* Villazor, *supra* note 95, at 824 (emphasis added).

219. *See generally* Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009); Rice v. Cayetano, 528 U.S. 495 (2000).

220. *Rice*, 528 U.S. at 519–22. The *Mancari* Court recognized the plenary power of Congress over Native Americans as well as the fiduciary character of the special federal relationship between the United States Federal Government and federally recognized tribes. *See* Morton v. Mancari, 417 U.S. 535, 551 (1974). The *Rice* decision had lasting ramifications, concluding that "only federally-recognized American Indian tribes may ever constitutionally rely on blood quantum to promote the right of self-government." Villazor, *supra* note 95, at 814.

221. *Mancari*, 417 U.S. at 553–55 (1974). The *Mancari* case has been acknowledged as "one of the most important Indian cases of the modern era." Gavin Clarkson & Jim Sebenius, *Leveraging Tribal Sovereignty for Economic Opportunity: A Strategic Negotiations Perspective*, 76 MO. L. REV. 1045, 1056 (2011).

222. *Mancari*, 417 U.S. at 554.

Unfortunately, the Court has failed to extend the *Mancari* doctrine to other non-federally recognized Indigenous groups, exposing Native Hawaiian programs to strict scrutiny review.[223] While "[s]trict scrutiny must not be 'strict in theory, but fatal in fact,'" [224] the constitutionality of Hawaiian-only programs and any movement to establish a government-to-government relationship will continue to be undermined by overly exacting standards, with detrimental results.

Additionally, Native Hawaiians have sought and may continue to seek redress through federal legislation. At the genesis of the *Rice* decision, United States Senator Daniel Akaka introduced what became known as the Akaka Bill. The purpose of the bill was to "express the policy of the United States regarding the United States' relationship with Native Hawaiians, and for other purposes[,]" such as to formally recognize Hawaiians' right to self-determination under the framework of Federal Indian Law.[225] While there were multiple permutations of the bill over the course of a decade, opposition to the Akaka Bill grew both within and outside the Native Hawaiian community as tides shifted towards a more conservative political regime.[226] The Akaka Bill never achieved the votes necessary for introduction on the Senate floor, and when Senator Akaka announced his retirement, it effectively marked the end of the bill.[227]

In 2016, the Obama Administration announced a process by which the Native Hawaiian Governing Entity (NHGE) would reestablish a government-to-government relationship with the United States.[228] This process, codified in 43 C.F.R. part 50 (hereinafter referred to as the "Rule"), resulted from many hours of testimony across Hawai'i and the continental United States before the Justice and Interior Departments.[229] While the Rule marked a commitment by the executive branch to recognize a Native Hawaiian government, the process was still fraught with challenges and to this day has not materialized into the kind of self-determination anticipated by both proponents and opponents.[230]

In addition to federal law, Native Hawaiians may invoke international law to rectify the harms endemic to colonization—particularly, the illegal overthrow of

223. *See Rice*, 528 U.S. at 514 ("Ancestry can be a proxy for race. It is that proxy here.").

224. The phrase "strict in theory, fatal in fact" originated in Gerald Gunther*, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

225. S. 2899, 106th Cong. (2000); H.R. 4904, 106th Cong. (2000).

226. S. 2899, 106th Cong. § 10 (2000); Andrade, *Legacy in Paradise*, *supra* note 24, at 284–85 ("Because of the elimination of the protective disclaimers, some Native Hawaiians vigorously opposed the Akaka Bill as it would foreclose Native Hawaiians from pursuing independence under international law.").

227. Andrade, *Legacy in Paradise*, *supra* note 24, at 290–92.

228. *See* Procedures for Reestablishing a Formal Government-Government Relationship with the Native Hawaiian Community, 43 C.F.R. § 50 (2016).

229. Andrade, *Legacy in Paradise*, *supra* note 24, at 296–97.

230. Andrade, *Legacy in Paradise*, *supra* note 24, at 300–305.

the formerly independent Hawaiian monarchy.[231] In structuring their arguments, Native Hawaiians can leverage three helpful frameworks: occupation/deoccupation, colonization/decolonization, and indigenization/Indigenous rights. Within an occupation/deoccupation framework, Native Hawaiians can assert that the United States is illegally occupying Hawai‘i and that under international law, "the international personality of the occupied state [is protected] by presuming, as a matter of law, the continuance of a recognized state."[232] Advocates of the colonization/decolonization narrative assert that Hawai‘i should be reinscribed onto the United Nations decolonization list, which would then require a plebiscite on the political status to determine which one of the three internationally recognized options to implement: independence, integration into another sovereign state, or free association with another state.[233] Lastly, Native Hawaiians can assert their individual and collective rights, including the right to self-determination under the 2007 U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP).[234] Under the UNDRIP, Indigenous peoples were formally and categorically recognized as "peoples" under international law.[235]

Until Native Hawaiians achieve self-determination through one of the national or international regimes, the Indigenous Canons present a unique means

---

231. For a more in-depth and thorough analysis of the international regimes available to Native Hawaiians along with each systems' advantages and disadvantages, see Julian Aguon, *Native Hawaiians and International Law*, *in* NATIVE HAWAIIAN LAW: A TREATISE 355–424 (MacKenzie et al. eds., 2015).

232. *Id.* at 369; *see generally* David Keanu Sai, The American Occupation of the Hawaiian Kingdom: Beginning the Transition from Occupied to Restored State (Dec. 2008) (unpublished Ph.D. dissertation, University of Hawai‘i – Mānoa) (challenging the legal assumption of plenary authority of the federal government over Indigenous peoples by analyzing U.S. annexation of Hawai‘i through international norms). Some have argued that the 1959 plebiscite vote was illegitimate because the only option given to voters was to become a state or remain a territory—effectively leaving out the option of independence or becoming a freely associated state. John Van Dyke, Carmen Di Amore-Siah, & Gerald W. Berkley-Coats, *Self Determination for Nonself-governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawai‘i*, 18 U. HAW. L. REV. 623, 624 n.3 (1996). Additionally, it is contended that the United States violated international law by diluting the Native Hawaiian vote in the 1959 plebiscite by allowing large numbers of non-Hawaiians to immigrate to Hawai‘i, thereby undercutting any attempt for Indigenous self-determination. *See id.*

233. *See* S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 331–36 (1994); *see also* U.N. Charter art. 73.

234. G.A. Res. 61/295, Annex, art. 3, Declaration on the Rights of Indigenous Peoples (Oct. 2, 2007) ("Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."). Opulauoho, *supra* note 148, at 80 ("Under international law, these rights are afforded to Native Hawaiians as '[I]ndigenous peoples' as defined in the United Nations' Declaration on the Rights of Indigenous Peoples.").

235. Catherine J. Iorns, *Indigenous Peoples and Self-Determination: Challenging State Sovereignty*, 24 CASE W. RES. J. INT'L L. 199, 251–52, 287–93 (1992).

through which jurisprudential decision-making may better align with Indigenous values and context.

B. Applying the Canons in a Native Hawaiian Context

Federal Indian Law has often been viewed as a key avenue for Native Hawaiians to achieve self-determination.[236] This is a body of law that has developed since the *Marshall Trilogy* and, more importantly, has acknowledged that the Indigenous peoples of the continental United States are political entities that enjoy the right to self-government. Until Native Hawaiians are able to invoke the Rule's process or some other avenue towards federal recognition, Indigenous legal advocates and scholars should pressure the courts to expand the Canons. This lens of interpretation should not be known as the Indian Canons, but as the Indigenous Canons of Construction.[237]

Native Hawaiians should not have to fit the specific and narrowly tailored construction of "Indian" or "Indian tribe" in order to invoke the Canons. Professor Troy Andrade makes the case that even under a strict constructionist view of the Constitution, Native Hawaiians can still fit the definition of "Indians."[238] The Indigenous Canons, however, would not need to lean on the textual and historical definitions, but would instead derive its authority from the government's well-established trust relationship with its Indigenous population.[239] Reliance on the trust relationship sheds light on the historical, social, cultural, and political context

236. Five months after the Court's detrimental decision in *Rice v. Cayetano*, U.S. Senator Daniel K. Akaka convened a Task Force on Native Hawaiian issues, along with the remaining members of the Hawai'i congressional delegation. Melody Kapilialoha MacKenzie, *Native Hawaiians and U.S. Law*, in NATIVE HAWAIIAN LAW: A TREATISE 312 (MacKenzie et al. eds., 2015). The work of the Task Force led to the introduction of what has been known as the Akaka Bill, which sought to grant Native Hawaiians federal recognition akin to federally recognized tribes under Federal Indian Law. *See id*.; A Bill to Express the Policy of the United States Regarding the United States' Relationship with Native Hawaiians, and for Other Purposes, S. 2899, 106th Cong. (2000).

237. Classifying the Canons as "Indian Canons" is too narrow and restrictive. Re-classifying them as "Indigenous Canons" will start to dismantle the hierarchal and distinct treatment of Indigenous peoples across the United States. *See supra* Part II 0.

238. Andrade, *Legacy in Paradise, supra* note 24, at 314–15 ("First, Native Hawaiians could, even under a strict constructionist view of the Constitution, be defined as 'Indians' and 'tribes' for purposes of federal law. Under the terms of the United States Declaration of Independence, the term 'Indian' referred to the aboriginal inhabitants of our Frontiers. The term 'Indian' is also commonly used in this country to mean 'the aborigines of America.' In addition, Native Hawaiians would also, under a strict constructionist view of the Constitution, be defined as a 'tribe.' To be clear, at the time of the founding of the country, 'tribe' meant a 'distinct body of people as divided by family or fortune, or any other characteristic.' Native Hawaiians are ancestrally distinct people with a deeply rooted connection to the land, a distinct culture, a distinct religion, and a distinct language.") (internal citations omitted).

239. *See* Andrade, *Legacy in Paradise, supra* note 24, at 314–15.

in which colonialism has impacted Native peoples, especially Native Hawaiians, even today.[240]

Native Hawaiians have a historical and trust relationship that is evidenced in how the federal government views and treats Native Hawaiians. The Hawai'i Advisory Committee to the United States on Civil Rights reported that "more than 150 federal laws, including the Hawaiian Homes Commission Act and the Admission Act, explicitly acknowledge and describe the *unique political relationship* between the United States and the Native Hawaiian people."[241] In fact, the Hawaiian Homes Commission Act was promulgated as an "attempt to rectify the devastating effects of colonization; to restore the Hawaiians' severed ties to homelands; and to rehabilitate what Congress called a 'dying race.'"[242] Through the HHCA, "Congress could not [have been] any more specific than it has been in affirming the existence of a 'special relationship' between the United States and the Native Hawaiian people."[243] Additionally, the federal government "has exercised its plenary authority" over Native communities "[s]ince the beginning of our republic" and has fostered "special political and trust relationships with . . . the Native Hawaiian community."[244]

On a state level, the Hawai'i Supreme Court has continually reiterated the existence of a special trust relationship between Native Hawaiians and the United States. The court ascertained congressional intent by analyzing legislative history and found that there was an implied "intent to establish a trust relationship between the government and Hawaiian persons."[245] In fact, the court highlighted Secretary of Interior Franklin K. Lane's testimony before the House Committee on the Territories in which he described Native Hawaiians as "our wards . . . and for whom in a sense we are trustees."[246] Secretary Lane's statements and the collective remarks provided in the legislative history "strongly suggest[] that the federal

240. *See* Sproat, Wai *Through* Kānāwai, *supra* note 11, at 190. The history of Hawai'i is

> a story of violence, in which that colonialism literally and figuratively dismembered the lāhui (the people) from their traditions, their lands, and ultimately their government. [In Hawai'i] the mutilations were not physical only, but also psychological and spiritual. Death came not only through infection and disease, but through racial and legal discourse that crippled the will, confidence, and trust of the Kanaka Maoli as surely as leprosy and smallpox claimed their limbs and lives. OSORIO, *supra* note 163, at 3.

241. RECONCILIATION AT A CROSSROADS, *supra* note 192, at 18 (emphasis added).

242. Eric K. Yamamoto & Kanoelani Pu'uohau, *A Modest Proposal for Determining Class Member Damages: Aggregation and Extrapolation in the* Kalima v. State *Breach of Homelands Trust Class Action*, 34 U. HAW. L. REV. 1, 8 (2012).

243. Van Dyke, *Political Status*, *supra* note 19, at 104.

244. Brief for the United States as Amicus Curiae Supporting Defendants at 10, Akina v. State, 141 F. Supp. 3d 1106, (D. Haw. 2015).

245. Ahuna v. Dep't of Hawaiian Home Lands, 640 P.2d, 1161, 1167 (Haw. 1982).

246. *Id.*

government stood in trustee capacity to the aboriginal people."[247] The court confirmed that that through HHCA, the United States had undertaken "a trust obligation benefitting the aboriginal people" and that once Hawai'i was admitted into the union, the State "assumed fiduciary obligation."[248]

As this Article makes clear, this special relationship has been acknowledged by the State of Hawai'i and all three branches of the U.S. federal government. Given this foundation, American courts must utilize the Indigenous Canons to interpret key legislation affecting Native Hawaiians and other Indigenous peoples who also have a special trust relationship with the federal government. The Indigenous Canons, used correctly, would direct the Court to interpret legislation liberally and resolve ambiguities in favor of Indigenous groups. If the joint resolution annexing Hawai'i has the force of law, though contrary to treaty precedent that requires a two-thirds vote by the Senate, then the Apology Resolution—which is itself a joint resolution acknowledging the United States' participation in the overthrow of the Hawaiian monarch and a commitment to reconciliation—should have equal effect.[249]

C. The Apology Resolution as Viewed through the Indigenous Canons

Since its inception, the Apology Resolution has been hotly contested. On one end, it has been viewed as a binding legal document;[250] on the other, it has been framed as a policy statement with no legal teeth.[251] This Section makes the case that the Apology Resolution should be interpreted through the lens of the Indigenous Canons and contextual legal analysis, in a manner that is consistent with both the federal trust relationship and the international law principle of self-determination.

The U.S. Supreme Court in *Rice v. Cayetano* wrongly approached the Apology Resolution with skepticism and "pointedly ignored" its "historical authority."[252] Instead, the Court relied on its own "historical inquiry," to the detriment

247. *Id.*

248. *Id.* at 1162.

249. MacKenzie & Sproat, *supra* note 155, at 521; *see* U.S. CONST. art. II, § 2, cl. 2 (The President shall have the power "to make Treaties, provided two thirds of the Senators present concur . . . .").

250. Judge Sabrina McKenna opined that the Apology Resolution "is binding upon this court," and while it may not "itself create a claim, right, or cause of action, it confirms the factual foundation for claims that previously had been asserted." Brian Duus, *Reconciliation Between the United States and Native Hawaiians: The Duty of the United States to Recognize a Native Hawaiian Nation and Settle the Ceded Lands Dispute*, 4 ASIAN-PAC. L. & POL'Y J. 469, 488–89 (2003) (citing Office of Hawaiian Affairs v. HCDCH, Civ. No. 94-0-4207, slip op. at 26–27, 29 (1st Cir. Dec. 5, 2002)).

251. *See generally* Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009); Rice v. Cayetano, 528 U.S. 495 (2000).

252. Sullivan, *supra* note 211, at 72.

of Native Hawaiians.[253] Additionally, in *Hawaii v. Office of Hawaiian Affairs*, the Court employed its own interpretation mechanism and found that the "Apology Resolution reveal[ed] no indication . . . that Congress intended to amend or repeal the State's rights and obligations under the Admission Act."[254]

Following the Court's narrow analysis of the Apology Resolution, the Hawaii Advisory Committee in a 2001 report to the United States Commission on Civil Rights emphasized the underlying principles of the contextual legal analysis.[255] The Committee advocated that how the "cultural, political, historical, and economic context within which Native Hawaiians are situated" should orient how judicial and legislative decisions are determined and interpreted.[256] It is this inquiry that is vital to placing the Apology Resolution in its proper context.

The Indigenous Canons are not constrained by the traditional analyses of congressional statutes and as a result mandate a different treatment of the Apology Resolution than previously handled by the Court.[257] In fact, the Supreme Court declared that because of the Indigenous Canons, "the standard principles of statutory construction do not have their usual force in cases involving Indian law. As we said earlier this Term, '[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians.'"[258] It is because of this historical and ongoing relationship that the Court mandates the reading of all "relevant treaty and statutes . . . with this tradition of sovereignty in mind."[259]

The Indigenous Canons guide interpreters to avoid reading the Apology Resolution and other relevant Native Hawaiian laws in isolation. The Apology Resolution does not represent a singular attempt by Congress to recognize that the "[I]ndigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum."[260] In fact, Congress has promulgated over 150 statutes that recognize the detrimental effects of colonization on Native Hawaiians and the existence of a special trust

253. Sullivan, *supra* note 211, at 72.

254. *Hawaii,* 556 U.S. at 175–76.

255. RECONCILIATION AT A CROSSROADS, *supra* note 192, at 32 ("In rendering its opinion, the High Court chose to apply the law as though entirely separate from the cultural, political, and economic context within which OHA's voting process was created. That context largely is the result of America's misdeeds and the Hawai'i's electorate's desire to make amends."). The *Rice* Court invoked a doctrine "that any race consciousness is discrimination, that race is biological and thus a concept devoid of historical, cultural, or social content, and that a group is either racial or it is not." *Id.*

256. *See* RECONCILIATION AT A CROSSROADS, *supra* note 192, at 44.

257. *See* Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766–67 (1985).

258. *See id.* at 766 (citing Oneida County v. Oneida Indian Nations, 470 U.S. 226, 247 (1985)).

259. *See* McClanahan v. State Tax Commission of Arizona, 411 U.S. 164, 173 (1973).

260. *See* Apology Res., *supra* note 18, at 1512.

relationship.[261] These "[f]ederal programs, services, and benefits specifically for Native Hawaiians run the gamut from education to economic assistance to health care."[262] The dissent in *Rice* correctly and accurately did not limit its analysis to the 1993 Apology when it ascertained the existence of a historical and dynamic relationship between Native Hawaiians and the United States.[263] As the Indigenous Canons mandate, relevant laws like the Apology Resolution should be read collectively and liberally. Doing so adheres to the federal government's clear intent to reconcile with the Hawaiian community and protect "unrelinquished [sic] claims of Native Hawaiians" to ceded lands.[264]

The Indigenous Canons have the potential to imbue the Apology Resolution with the legal force to give Native Hawaiians the ability to successfully enforce the federal and state governments' trust responsibility. In *Doe v. Mann*, for example, the Ninth Circuit interpreted the Indian Child Welfare Act (ICWA) through the Indigenous Canons lens and determined that Indians have a federal cause of action to challenge court rulings that violate the Act.[265] The court noted:

> To the extent there is any uncertainty about the scope of federal authority to invalidate state court child custody proceedings, a proposition we do not embrace, one of the Indian canons of construction resolves the issue. It provides that federal courts will liberally construe a federal statute in favor of Indians, with ambiguous provisions interpreted for their benefit. The purpose of ICWA

---

261. *See* Rice v. Cayetano, 528 U.S. 495, 533 (2000) (Stevens, J., dissenting) ("Among the many and varied laws passed by Congress in carrying out its duty to [I]ndigenous peoples, more than 150 today expressly include native Hawaiians as part of the class of Native Americans benefited."); Rice v. Cayetano, 963 F. Supp. 1547, 1554–55 (D. Haw. 1997) ("[T]here is abundant evidence that the guardian-ward relationship existed, and currently exists, between the federal Government and Native Hawaiians and between the State of Hawaii [sic] and Native Hawaiians."); *see, e.g.*, 20 U.S.C.A. § 7512 (Westlaw through Pub. L. No. 115-231); Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, 42 Stat. 108 (1921). According to current research, the figure of 150 statutes demonstrating a unique relationship between the federal government and Native Hawaiians may be a conservative estimate. Riley, *supra* note 177, at 184.

262. Brief for the United States as Amicus Curiae Supporting Defendants at 1, Akina v. State, 141 F. Supp. 3d 1106, (D. Haw. 2015) (internal citations omitted).

263. *See generally* Rice v. Cayetano, 528 U.S. 495, 528 (Stevens, J., dissenting).

264. Brief of the Hawai'i Congressional Delegation as Amicus Curiae in Support of Respondents at 11, Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009) (No. 07-1372) ("The legislative history of the Act reaffirms Congress' intention to acknowledge the United States culpability in connection with the illegal overthrow of the Hawaiian monarchy; to recognize the ramifications of those actions, including the unrelinquished [sic] claims of Native Hawaiians to their lands; and to support the ongoing reconciliation process."); *see* Troy Andrade, *(Re)righting History: Deconstructing the Court's Narrative of Hawai'i's Past*, 39 U. HAW. L. REV. 631, 660 (2017) ("[T]he Hawai'i Supreme Court took a step where no other court had gone before; it recognized that the words of the Apology Resolution created a direct acknowledgment and acceptance by the United States of a commitment to a reconciliation with Native Hawaiians.").

265. *See generally* Doe v. Mann, 415 F.3d 1038 (9th Cir. 2005).

> was to rectify state agency and court actions that resulted in the removal of Indian children from their Indian communities and heritage. Resolving any ambiguity in favor of the Indians yields a conclusion that Indians have a forum in federal courts to challenge state child custody decisions.[266]

The Apology Resolution, with its intent for reconciliation, should be construed with as much ferocity and legal weight through the Indigenous lens.

The Supreme Court's current formalistic application to discount and discredit the Apology Resolution illustrates the glaring need for a countervailing jurisprudential theory aligned with Indigenous claims and experiences. "History indicates that legal formalism's narrow lens employs rules (for example, the 'intent of the framers') and methods of reasoning (for example, *stare decisis*) in ways that treat Native Peoples as inferior to Europeans and, therefore unworthy of self-governance."[267] The Indigenous Canons give judges the opportunity to step away from this formalistic framework and analyze the law in a way that more robustly protects Indigenous communities' rights.

A contextual legal analysis and the Indigenous Canons can be used as collective and interwoven tools by and for Native peoples. A contextual framework looks to the effects of "land dispossession, cultural destruction, [and] loss of sovereignty . . . on claims to self-determination and nationhood."[268] As outlined earlier, the Canons instruct the Court to liberally interpret statutes and resolve ambiguities in favor of those Indigenous communities who can illustrate a special trust relationship similar to that between the U.S. federal government and Native Americans.[269] Taken together, these tools give the courts the language, process, and Federal Indian Law precedent to repair and heal the damages of historical injustice.

VI.
CONCLUSION

There is a "degree of consensus on the modern Supreme Court supporting the overall force and applicability"[270] of the Indian Canons of Construction in our present judicial system. These Canons recognize that Native peoples today are the product of colonialism and that self-determination is at the root of any Indigenous movement. The scope of the Canons can and should be expanded to include those Indigenous populations that may not have the ability, resources, or political capital

266. *Id.* at 1047 (citations omitted).

267. Sproat, Wai *Through* Kānāwai, *supra* note 11, at 155–56.

268. Sproat, Wai *Through* Kānāwai, *supra* note 11, at 167 (citation omitted).

269. *See supra* Part II 0.

270. *See* Bryan Wildenthal, *Indian Sovereignty, General Federal Laws, and the Canons of Construction: An Overview and Update*, 6 AM. INDIAN L.J. 98, 103 (2017). "The 1992 *Yakima* case . . . stands as a resounding and unanimous modern reaffirmation of the classical canons." *Id.*

to gain federal recognition. Expansion of the Canons to include *all* Indigenous peoples has the potential to catalyze lasting protections for Native Hawaiian claims.

The Indigenous Canons comport and align with the contextual legal analysis framework by supporting Native Peoples' path toward self-determination. Through the Canons' tenets—a liberal interpretation with ambiguities resolved in favor of Indigenous groups—Native peoples will be able to achieve any one of the four realms or values articulated by Professor Sproat: cultural integrity, lands and natural resources, social welfare and development, and self-government. The re-envisioned *Indigenous* Canons would—alongside contextual legal analysis—yield lasting results for Native Hawaiian and other Indigenous peoples, especially those from the United States territories.