FEDERALISM & NATIVE HAWAIIAN CLAIMS:
Toward an Equitable and Just Solution

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Abstract

This article discusses a hypothetical case: on behalf of the Native Hawaiian People as a whole, a group of Native Hawaiians has petitioned a Hawai'i State court seeking two declaratory rulings. First, a declaration that Native Hawaiians have not lost their inherent sovereignty as an indigenous people. Second, a declaration that Native Hawaiians collectively retain a beneficial interest in the former Crown Lands of Hawai'i. The article responds affirmatively to those requests, in the form of a draft opinion by a fictional Justice of the Hawai'i Supreme Court. Citing long settled U.S. federalism doctrine, the text explains that the State of Hawai'i possesses concurrent power with the United States to recognize the inherent sovereignty of Native Hawaiians, and to define the legal scope of that sovereignty as a matter of Hawai'i law. Relying upon exisiting Hawai'i legislation, existing Hawai'i Supreme Court precedent, and a similar doctrine developed by the Supreme Court of Canada, the text concludes that Native Hawaiians collectively retain a usufructary right in the remaining publicly-owned Crown Lands. Finally, this article envisions only incremental steps. It is intended and respectfully submitted without prejudice of any kind, conceptual or otherwise, to other, further theories of Native Hawaiian sovereignty and restorative justice.

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Ali'iolani Hale & Honolulu Harbor, 1888

On February 19, 1872, the cornerstone of Honolulu's Ali'iolani Hale was laid by the Hawaiian Kingdom's reigning monarch, Kamehameha V. Its moderately ornate architectural style was called Italian Renaissance Revival. Originally commissioned as a royal palace, the King chose instead to give the building to his people as a new suite of government offices.

Today, on its upper floor, it houses the judicial chambers and paneled courtroom of the Hawai'i Supreme Court. On the ground floor are the Court's administrative offices and the Kamehameha V Judiciary History Center.

This evening a Court extern has stopped outside at the northeast corner on her way home. Chatting with staff, she learned about the time capsule buried there by Kamehameha V with the cornerstone, containing an original copy of the Constitution of 1864 conceived by him and promulgated at the start of his reign, together with Hawaiian Kingdom postage stamps, coins, newspapers, and books of the time.

Curious why the capsule has never been retrieved, she learned present day engineers have concluded it cannot be unearthed without a risk of serious structural damage. Interested, and wishing these items, artifacts of an altogether different era, could somehow be recovered and displayed, she leaves, wondering if one day they will be.

Half a world away, it is already the morning of the next day. One of the Hawai'i Supreme Court's Justices, James Soares, is thinking of his wife, speaking to her in his thoughts:

The trip was as grueling as ever. I am so tired now that I can barely recall how I came to be sitting here, at a café table in the center of Brussels. To live in this city, they say you must speak three languages. To work in an administrative position, it must be four. We have only the one, you and I, English. The loss of most of our Portuguese ancestors' language and traditions is something we have both regretted. I still think about reclaiming them, even now.

The Hawaiian language is also largely unknown to us, but for a few words and phrases everyone learns. For decades, the American leaders pressed against it so hard, so relentlessly, that it nearly faded away completely. It seems a strange thing now, doesn't it, to try to suppress a language?

A waiter is asking what more he can bring me. Nothing, I tell him, and I cannot pay fast enough, cannot stand and leave quickly enough. I need to walk to clear my head.

As I move through the narrow streets, I hear your voice: "My dear James," you say. "You must look to the future, my love." And I do, my love, I promise. They speak here of a plan of moving forward, all together, toward a more just and prosperous society. And why not, you've always asked me, why can't there be? The ongoing difficulties, perhaps with still more to come, may suggest a different future. Yet why shouldn't they try, you've always insisted, and why can't we also try, in our own country? Isn't it a worthy enough goal, something to work toward earnestly?

I have made my decision Aida, I must chart a new course for the Court, in hopes that my colleagues will join me, that I can persuade them to do what I believe is right.

When he has walked enough, he returns to his hotel and sleeps a deep and dreamless sleep. When he wakes, he sits down again to the draft opinion he is writing, in a case that lately seems to have occupied his mind, to the exclusion of almost everything else:

In re Hui Mālama

Hui Mālama, a group of Native Hawaiians, defined as lineal descendants of persons inhabiting the Hawaiian Islands at the time of first Western contact in 1778, petitions this Court to declare, as a matter of Hawai'i law, that the Native Hawaiian People continue to possess residual inherent sovereignty, and that as an incident thereof, collectively continue to possess an equitable beneficial interest in the former Crown Lands of Hawai'i.

For the reasons that follow, we deem these issues questions of first impression, hold them justiciable, and conclude, as a matter of Hawai'i law, that within the scope of internationally recognized standards, the Native Hawaiian People continue to possess legal, as opposed to politically recognized sovereignty, and a collective usufructary interest in the remaining publicly owned Crown Lands, permanently encumbering title to those lands.

I

In 2008, two years before his death at the age of ninety, our Court's former Chief Justice, William S. Richardson, wrote of a need to "resolv[e] the claims of the Native Hawaiian People, which continue to haunt and divide our community" and of a "struggl[e] to find an equitable and just solution to these issues." *See* Jon M. Van Dyke, *Who Owns the Crown Lands of Hawai'i?* vii-viii (University of Hawai'i Press 2008). Our decisions have long acknowledged this issue. *E.g.*, *Pele Defense Fund v. Paty*, 73 Haw. 578, 614 (1992) ("It is undisputed that the rights of [N]ative Hawaiians are a matter of great public concern in Hawai'i.") The Chief Justice continued, "[t]his process will be a difficult one, because it is hard to meld the legal concepts employed by Hawaiian communities before Western contact with the very different legal values that were brought to the Islands." Van Dyke, *supra*, at viii (citing, *inter alia*, prior decisions of this Court that "offered approaches to address this challenge[.]"). In keeping with the sentiments of our late colleague, we reiterate for the present context that "[t]he issues presented in this case have their genesis in the historical events that led to the overthrow of the Kingdom of Hawai'i [and] the surrender of 1.8 million acres of crown, government, and public lands to the United States[.]" *Office of Hawaiian Affairs (OHA), et al. v. Housing and Community Development Corporation of Hawai'i (HCDCH)*, 117 Haw. 174, 181 (2008) (hereinafter "*Community Development I"*).

At the threshold, this appeal requires us to decide whether the State of Hawai'i, coextensive with the United States, possesses plenary authority to provide redress to the Native Hawaiian People, thereby resolving "broader moral and political claims for compensation for the wrongs of the past[,]" which the National Government, including the Supreme Court of the United States, has thus far been unwilling or unable to accomplish. *Hawaii v. Office of Hawaiian Affairs (OHA), et al.*, 556 U.S. 163, 177 (2009) (vacating our judgment in *Community Development I*). We hold the State possesses such authority.

Given the significance of that conclusion, we are impelled to also make clear at the outset certain matters that our judgment in this case will not entail. First, responding to the ruling cited above, which instructed us that "[w]hen a state supreme court incorrectly bases a decision on federal law, the court's decision improperly prevents the citizens of the State from addressing the issue in question through processes provided by the State's constitution[,]" *id.* at 176–177, we provide a "plain statement" in accord with the strictures announced in *Michigan v. Long*, 463 U.S. 1032 (1983), that our holding in this case is not in any way compelled by federal law:

> Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground. . . . If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached. In this way, both

> justice and judicial administration will be greatly improved. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

463 U.S. at 1040–1041. Our judgment rests on the substantial body of decisional law pertaining to Native Hawaiian Rights developed by this Court, and upon the Constitution and statutes of the State of Hawai'i that have similarly recognized and protected such rights. To the extent federal law is cited in this opinion, we make clear that we "merely [] rely on federal precedents as [we] would on the precedents of all other jurisdictions [and] that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that [this Court] has reached." *Id.* at 1041.

Moreover, to dispel any notion that adherence to federal law may be required in addressing issues pertaining to Native Hawaiians, it has long been settled in this country that the States are themselves, like the National Government, sovereign entities, which must be accorded the esteem due them as joint participants in the federal system:

> Congress has vast power but not all power. When Congress legislates in matters affecting the States, it may not treat these sovereign entities as mere prefectures or corporations. Congress must *accord* States the esteem due to them as joint participants in a federal system, one beginning with the premise of sovereignty in both the central Government and the separate States. Congress has ample means to ensure compliance with valid federal laws, but it must respect the sovereignty of the States.

Alden v. Maine, 527 U.S. 706, 758 (1999); *cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995):

> Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it. It is appropriate to recall these origins, which instruct us as to the nature of the two different governments created and confirmed by the Constitution.

514 U.S. at 838–839 (Kennedy, J., concurring). Within its proper place in the federal scheme, this State is duly empowered to address a diverse core of constitutional and fundamental rights claims, separate and apart from the body of federal law developed nationally. *Cf. Pele Defense Fund,* 73 Haw. at 601 ("We have held, in a variety of contexts, that this court is not precluded from finding that the Hawai'i Constitution affords greater protections than required by similar federal constitutional or statutory provisions.") (collecting cases). A preeminent constitutional scholar has articulated a similar view, with which we agree:

> New constitutional rights not only require the articulation of a new constitutional theory. They also require the management of a new constitutional right. Most judges worry about the next case when they think about identifying a new constitutional right. But the U.S. Supreme Court Justices

> have more to worry about than state court judges in view of the scope of their jurisdiction, the enormous breadth of which ensures that it is "always raining somewhere" and that any new right will face a bundle of varied circumstances. In some settings, the challenge of imposing a constitutional solution on the whole country at once will increase the likelihood that federal constitutional law will be underenforced, that a "federalism discount" will be applied to the right. State courts face no such problem in construing their own constitutions.
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> State courts also have a freer hand in doing something the Supreme Court cannot: allowing local conditions and traditions to affect their interpretation of a constitutional guarantee and the remedies imposed to implement that guarantee. Does anyone doubt that the Wyoming Supreme Court might look at property rights—and takings claims—differently than the New York Court of Appeals. Or that the Alaska and Hawai'i Supreme Courts might look at privacy issues differently than other States, or, for that matter, the U.S. Supreme Court? Might the regulation of weapons generate a different reading in a supreme court of a state with a large rural population from one with a large suburban and urban population? Might the state courts of Utah and Rhode Island and Maryland construe a free exercise clause differently than other state courts given their histories? State constitutional law respects and honors these differences between and among the States by allowing interpretations of the fifty state constitutions to account for these differences in culture, geography, and history.

Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (Oxford University Press 2018) (endnote citations omitted), at 17.

In addition, although we concur in conclusions reached by the United States Congress regarding the patent unlawfulness of the overthrow of the Hawaiian Monarchy, we express no opinion on the legality of Hawai'i's annexation by the United States and political events that followed. *Cf. State v. Fergerstrom*, 106 Haw. 43, 55 (Haw.App. 2004) ("Whatever may be said regarding the lawfulness of the Provisional Government in 1893, the Republic of Hawai'i in 1894, and the Territory of Hawai'i in 1898, the State of Hawai'i . . . is now, a lawful government"), *aff'd,* 106 Haw. 41 (2004).

II

The evidence presented by the parties as an agreed statement made part of the trial record by stipulation includes a summary of the historical context preceding the 1893 overthrow, recounted in an opinion of the United States District Court for the District of Hawai'i:

> The islands of Hawai'i comprise a geographically isolated archipelago formed by volcanic activity located in the Pacific Ocean. Historians believe that the aboriginal people of the islands, the Native Hawaiians, settled in Hawaii sometime between 0–750 A.D. . . . During their centuries of isolation before western contact, the Native Hawaiians established their own highly structured and successful civilization, which operated under a communal land tenure system and was governed by a system of religious law. . . . They were "a people who were deeply spiritual,

> intellectual, diligent, highly skilled, pragmatic, loyal to their social system, and who made time to seek the pleasures of life." . . . At the time of Captain James Cook's "discovery" of the islands in 1778—the first Western contact—estimates and scientific models place the aboriginal population of the Hawaiians at between 300,000 and 800,000 . . . .
> The Native Hawaiians were brought under a unified monarchial government in 1810 by Kamehameha I, the first King of Hawaii. The United States recognized the Kingdom of Hawaii as an independent sovereign nation from 1826 until its abrupt demise and replacement by a "Provisional Government" in 1893. This Provisional Government subsequently declared itself the "Republic of Hawaii" . . . .
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> . . .
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> Congress has made repeated findings in numerous legislative enactments that the Hawaiian Monarchy was unlawfully overthrown with the aid of the United States. *E.g.*, 20 U.S.C. § 7512 (Supp. I 2002) (Native Hawaiian Education Act (NHEA) (Findings)); 42 U.S.C. § 11701 (2000) (Native Hawaiian Health Care Improvements Act (NHHCIA) (Findings)); S. Joint Res. No. 19, Pub.L. No. 103–150, 107 Stat. 1510 (1993) [hereinafter "Apology Resolution"].

Doe ex rel. Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate, 295 F.Supp.2d 1141, 1147–48, 1151 (D.Haw. 2003) (upholding school admission policy preference for applicants of Native Hawaiian ancestry) (brackets by the court—some internal citations and footnotes omitted), *aff'd* 470 F.3d 827 (9th Cir. 2006) (en banc). The United States Supreme Court has further explained:

> In 1993, Congress enacted a joint resolution "to acknowledge the historic significance of the illegal overthrow of the Kingdom of Hawaii, to express its deep regret to the Native Hawaiian people, and to support the reconciliation efforts of the State of Hawai'i and the United Church of Christ with Native Hawaiians." Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. 103–150, 107 Stat. 1513 (hereinafter Apology Resolution). In a series of the preambular "whereas" clauses, Congress made various observations about Hawaii's history. For example, the Apology Resolution states that "the indigenous Hawaiian people never directly relinquished their claims . . . over their national lands to the United States" and that "the health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land." *Id.*, at 1512. In the same vein, the Apology Resolution's only substantive section—entitled "Acknowledgement and Apology"—states that Congress:
> "(1) . . . acknowledges the historical significance of this event which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people";
> "(2) recognizes and commends efforts of reconciliation initiated by the State of Hawai'i and the United Church of Christ with Native Hawaiians";
> "(3) apologizes to Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawai'i on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination";

> "(4) expresses its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawai'i, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people"; and
> "(5) urges the President of the United States to also acknowledge the ramifications of the overthrow of the Kingdom of Hawai'i and to support reconciliation efforts between the United States and the Native Hawaiian people." *Id.*, at 1513.

556 U.S. at 168–169. We recounted additional background facts in *Community Development I*, noting "[t]the Apology Resolution provides, [in pertinent part], as follows:

> 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;
> Whereas, the United States Minister thereupon extended diplomatic recognition to the Provisional Government that was formed by the conspirators without the consent of the [N]ative Hawaiian people or the lawful Government of Hawaii and in violation of treaties between the two nations and of international law;
> Whereas, soon thereafter, when informed of the risk of bloodshed with resistance, Queen Liliuokalani issued the following statement yielding her authority to the United States Government rather than to the Provisional Government:
> I, Liliuokalani, by the Grace of God and under the Constitution of the Hawaiian Kingdom, Queen, do hereby solemnly protest against any and all acts done against myself and the Constitutional Government of the Hawaiian Kingdom by certain persons claiming to have established a Provisional Government of and for this Kingdom.
> That I yield to the superior force of the United States of America whose Minister Plenipotentiary, His Excellency John L. Stevens, has caused United States troops to be landed at Honolulu and declared that he would support the Provisional Government.
> Now to avoid any collision of armed forces, and perhaps the loss of life, I do this under protest and impelled by said force yield my authority until such time as the Government of the United States shall, upon the facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the Constitutional Sovereign of the Hawaiian Islands.
> Done at Honolulu this 17th day of January, A.D. 1893.

Community Development I, 117 Haw. at 183–184.

We stress that the language of the Apology Resolution is not a basis for our decision. Our judgment is based exclusively on Hawai'i law. The passages quoted above reflect only historical background stipulated by the parties at the trial of this case. Additional findings of fact stipulated by the parties concerning proclamation of the Republic of Hawai'i were entered by the trial court, based on published works of professional historians, documenting the pronounced racial and cultural prejudices of its proponents. The following passages are illustrative:

> The idea of a republic had been discussed for decades as a substitute for monarchy but its advocates had been given pause by contemplation of the population which was to compose it, "Hawaiians, Japanese, Portuguese, Chinese, Americans, and Europeans, who have got to be governed mainly or partly by . . . the majority!" The provisional government, guided by [Lorrin] Thurston, was equal to the task of finding a solution to the problem. A limited and qualified franchise[.]

See R.S. Kuykendall, *The Hawaiian Kingdom: 1874–1893* (University of Hawai'i Press 1967), at 649.

> The well-intentioned revolutionaries of 1893, so Sanford Dole said, had been moved by admiration for American civil liberties. But a glaring problem confronted them. . . . If American liberties were granted to every man at the islands, then the very men who admired liberty most would be swamped at the polls by a rabble of brown men and yellow men who could have no idea of what liberty meant.
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> As always, Lorrin Thurston was full of ideas. He agreed with William Smith that democracy would have to wait. American liberties should be given only to those who appreciated them, and in this connection he drew attention to the constitutional arrangements of the state of Mississippi, where government was carried on successfully even though a large part of the population was politically incompetent. What applied in Mississippi applied in Hawai'i: the will of the majority could not be trusted; unlimited free speech would be dangerous; trial by jury, especially by native jury, would open the way to contempt of law.
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> Other members of the provisional government did not want to suppress freedom totally—just sufficiently. . . . when they got ready to submit their constitution to a convention.. . . . [t]he government made doubly sure of keeping the convention safe by arranging the elected delegates should be in a minority. Eighteen men chosen by ballot sat with nineteen appointed by the government.
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> In the opinion of the provisional government even those few thousand voters who had elected the delegates who had approved the constitution could not be trusted to endorse it, and so the constitution became law not by plebiscite but by proclamation.

See Gavan Daws, *Shoal of Time: A History of the Hawaiian Islands* (University of Hawai'i Press 1968), at 280–281.

> In the finished constitution the qualifications for voting and holding office were so stringent that comparatively few natives, and no Orientals, could vote. Fewer still were eligible to serve in either house of the legislature. . . . With the adoption of the constitution of the Republic of Hawai'i on July 4, 1894, they changed the name but not the substance.

See Kuykendall, *supra*, at 649.

> From our vantage point a century later, some might be inclined to interpret the Provisional Government and its new constitution as comedy, as a banana republic that temporarily existed within our midst. It was much more than that. It set a tone for the future. In the realm of international diplomacy, the fiction of the Republic did the job for which it was intended. . . . The U.S. government immediately granted recognition to the Republic of Hawai'i. Great Britain followed suit, abandoning its

> longstanding special relationship with the Hawaiians. The other European nations quickly fell in step as well.

See Tom Coffman, *Nation Within: The History of the American Occupation of Hawai'i* (Koa Books 2009), at 163; *cf.* W. R. Russ, Jr., *The Hawaiian Republic* at 33–34 (Susquehanna Press 1961) ("Native Hawaiians were, perhaps, not extremely sophisticated in governmental matters, but it took no great amount of political insight to perceive that this constitutional system was a beautifully devised oligarchy devoted to the purpose of keeping the minority in control of the Republic.").

III

At the close of evidence—virtually all of which was uncontroverted or submitted by stipulation—the trial court on its own motion raised the issue of justiciability, a "term [which] describes 'a concept of uncertain meaning and scope.'" *Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 169 (1987) (citation omitted), quoting *Baker v. Carr*, 369 U.S. 186 (1962). "'The political question doctrine is certainly the most amorphous aspect of justiciability.'" *Id.*, citing K. Ripple, *Constitutional Litigation* (1984), § 3–7, at 96. "Moreover, the uncertainty surrounding its application has been heightened because justiciability 'has become a blend of constitutional requirements and policy considerations.'" *Yamasaki* at 169 (citation omitted).

Recognizing that the parties agreed it could reach and decide the merits issues, and jointly urged it to do so, the trial court acknowledged our admonition in *Yamasaki,* that "[u]nlike the federal judiciary, 'the courts of Hawai'i are not subject to a "cases and controversies" limitation like that imposed . . . by Article III, Section § 2 of the United States Constitution.'" *Yamasaki*, 69 Haw. at 170 (footnote omitted)), citing, *inter alia*, *Life of the Land v. Land Use Commission*, 63 Haw. 166, 171 (1981). Regarding political questions we have said that "'[w]ithin the framework of the fundamental doctrine respecting the separation of powers of government, some flexibility must be infused.'" *Yamasaki*, at 172, citing *Koike v. Board of Water Supply*, 44 Haw. 100, 114 (1960).

The trial court nevertheless concluded that prudential concerns, see *Yamasaki*, at 170 ("we have admonished our judges that 'even in absence of constitutional restrictions, [they must] still carefully weigh the wisdom, efficacy, and timeliness of an exercise of their power before acting, especially where there may be an intrusion into areas committed to other branches of government'"), precluded it from reaching the first merits issue—whether Native Hawaiians possess a legal form of residual sovereignty. Consequently, because it deemed resolution of the second merits issue dependent on the first, the court dismissed the case on the ground of non-justiciability, without considering a court-supervised accounting of the remaining Crown Lands requested by Hui Mālama as additional relief.

We granted pre-disposition transfer from the Intermediate Court of Appeals pursuant to HRS § 602–58(a)(1) ("upon the grounds that the case involves 'a question of imperative or fundamental public importance'") and

HRS § 602–58(b)(1) ("upon grounds that the case involves 'a question of first impression or a novel legal question'").

We review the order of dismissal *de novo* and hold the trial court erred in applying the political question doctrine in the present context, in light of Hawai'i's unique history and post-Statehood constitutional, statutory, and case law development. We concur with the dictum in *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1275 (9th Cir. 2004), that "[t]he doctrine of which we treat is one of 'political questions,' not one of 'political cases[,]'" and reaffirm that "a case should not be dismissed on the ground it involves a political question without 'discriminating inquiry into the precise facts and posture of the particular case.'" *Yamasaki*, 69 Haw. at 169.

A

The State calls to our attention that determinations of sovereignty in the United States have generally been held to be the province of the political branches. We agree. In American federal law, that general rule at times seems to take on characteristics of an unquestioning article of faith. *E.g.*, *Boumediene v. Bush*, 553 U.S. 723, 753 (2008) ("And in other contexts the Court has held that questions of sovereignty are for the political branches to decide.") (discussing whether the United States exercises sovereignty over Guantanamo Naval Base in Cuba), citing, *inter alia, Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380 (1948) ("[D]etermination of sovereignty over an area is for the legislative and executive departments") (discussing application of U.S. Fair Labor Standards Act to employment in Bermuda), and *Jones v. United States*, 137 U.S. 202 (1890) (also discussing governmental sovereignty over territory). Our federal colleagues have not hesitated to also acknowledge, however,

> "'[s]overeignty' is a term used in many senses and is much abused." *See* 1 Restatement (Third) of Foreign Relations Law of the United States § 206, Comment b, p. 94 (1986). When we have stated that sovereignty is a political question, we have referred not to sovereignty in the general, colloquial sense, meaning the exercise of dominion or power, *see* Webster's New International Dictionary 2406 (2d ed. 1934) ("sovereignty," definition 3), but sovereignty in the narrow, legal sense of the term . . . *see* 1 Restatement (Third) of Foreign Relations, *supra*, § 206, Comment b, at 94 (noting that sovereignty "implies a state's lawful control over its territory generally to the exclusion of other states, authority to govern in that territory, and authority to apply law there").

Boumediene, supra, 553 U.S. at 754 (brackets by the court).

In this case there is no question raised regarding lawful control over the territory that constitutes the State of Hawai'i, nor of authority to govern that territory, or authority to apply law within it. The federal cases and their reasoning are thus distinguishable. The issue is whether Native Hawaiians continue to possess a legal form of inherent residual sovereignty over their collective affairs, as an aboriginal people, and/or as a formerly internationally recognized Nation State. *Cf. National Labor Relations Bd. v. Little River Band of Ottawa Indians Tribal Council*, 788 F.3d 537, 544–546 (6th Cir. 2015) (discussing in

the context of Indian affairs, the "boundary of residual inherent sovereignty" and inherent tribal sovereignty's "core and periphery"); *see also U.S. v. Ushi Shiroma*, 123 F.Supp. 145, 149 (D.Haw. 1954) (discussing "[r]esidual sovereignty" in international relations context).

Although it has long been settled in the United States that the political branches of the National Government have exclusive, plenary authority to define the residual sovereignty of federally recognized Indian Tribes, *see, e.g.*, *Little River Band*, *supra*, at 544 ("the sovereignty of Indian tribes 'exists only at the sufferance of Congress and is subject to complete defeasance'") (citation omitted), the same cannot be said with respect to Native Hawaiians. The federal Constitution, at Art. I, Sec. 8, provides that "The Congress shall have power—To regulate Commerce with foreign Nations, and among the several States, and *with the Indian Tribes*[.]" (emphasis added). The federal Constitution says nothing about the indigenous people of Hawai'i, the Native Hawaiians, nothing about the former Kingdom of Hawai'i established by Native Hawaiians—and none of the three branches of the United States federal government has recognized Native Hawaiians as an "Indian Tribe" within the meaning of the federal Constitution, or for the purposes of federal precedent pertaining to that subject matter. Indeed, although the U.S. Congress and courts have acknowledged a longstanding "special trust relationship" between Native Hawaiians and the United States, *see, e.g.*, *Doe ex rel. Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate, supra*, 407 F.3d at 850 (W. Fletcher, J., concurring), the contrary is true. Federal courts hold Native Hawaiians do not possess the same status as recognized Indian tribes. *E.g.*, *Price v. State of Hawai'i*, 764 F.2d 623, 626 (9th Cir. 1985) ("Congress did not originally intend the statutes governing the organization of new Indian tribes to apply to aboriginal groups in Hawai'i").

The federal cases analyzing the political question doctrine in the context of sovereignty issues generally, and with respect to recognized Indian Tribes particularly, are thus neither controlling, nor persuasive with respect to the inherent rights of Native Hawaiians.

B

In *Yamasaki*, we "adopted the test recited by the United States Supreme Court in *Baker v. Carr*[.]" *Community Development I*, 117 Haw. at 209. We did so not because that test controlled our judgment. We adopted *Baker*'s analysis "merely . . . as [we] would . . . precedents of all other jurisdictions[,] for the purpose of guidance[.]" *Michigan v. Long, supra*, 463 U.S. at 1041. In *Baker*, the court articulated the following formulation:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; a lack of judicially discoverable and manageable standards for resolving it; the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; the impossibility of a court's undertaking independent resolution without expressing lack of respect due co-ordinate branches of government; an

> unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962). In this case, it is clear that none of these factors are even arguably present, let alone prominent on the surface.

Our decision is in harmony with the acts of Hawai'i's political branches of government and does not intrude on exclusively conferred powers of the political branches. The Hawai'i Constitution adopted in the Constitutional Convention in 1978, and thereafter ratified via referendum by the people of this State—specifically Article XII "Hawaiian Affairs" Sections 1–7—contain no textual commitment to a State political department regarding determination of whether Native Hawaiians possess a legal form of residual sovereignty, as opposed to recognized political sovereignty. Nor is there a lack of judicially discoverable and manageable standards for resolving that question. As we demonstrate below, there are a great wealth of such standards. The State has long since made an explicit initial policy determination "to implement the recognition of Native Hawaiian people by means and methods that will facilitate their self-governance[,]" HRS § 10H-2, and far from expressing lack of respect, this Court addressing the question of residual sovereignty, as a legal issue, directly aligns with that policy.

There is also clearly no unusual need for adherence to that political decision of the State present in this case. We do not disagree with the State's political decision or resist it, we adhere to it explicitly.

As we explained in *Community Development I*, there is no risk of "multifarious pronouncements by various departments on one question." 117 Haw. at 209. Like the plaintiff-appellants in that case, Hui Mālama in this case is "not seeking a judicial resolution of the underlying claim for a return of lands[,]" *id.,* nor is it seeking a judicial declaration of sovereignty in the ultimate political sense. As in *Community Development I*, we hold, and Hui Mālama agrees, that "ultimate resolution of the [N]ative Hawaiian claims must be through the political processes." *Id.* at 210.

IV

Hawai'i's constitutional history is relevant to the merits issues we address below. In considering that history, "this [C]ourt may take judicial notice of historical facts, upon which the [parties'] agreed statement is silent, including official records of the Republic of Hawai'i, Provisional Government and Kingdom of Hawai'i[.]" *In re Bishop*, 35 Haw. 608, 624 (1940). The Court may, "therefore, take judicial notice of what it ought to know of the principal facts of Hawaiian history, upon which the submission is silent, not inconsistent or in conflict with the facts contained in the agreed statement[.]" *Id.*, *accord*, *Calder, et al. v. Attorney-General of British Columbia*, [1973] SCR 313, 346 ("The Court may take judicial notice of the facts of history whether past or contemporaneous [] and the Court is entitled to rely on its own historical knowledge and researches[]" (Hall, J., dissenting) (citations omitted). Accordingly, we take judicial notice of the following summary of Hawaii's

constitutional history prior to the U.S. annexation, which is supported by citations to archival sources and accepted historiography, and is consistent with the parties' stipulated submission of facts:

> Prior to Western contact, Hawaiians developed a complex culture and stable land tenure system[.] The success of this system can be explained [partly] on the cooperative arrangements which bound Hawaiian society[.] [T]he [first] Constitution of 1840 formally declared that the land belonged to the chiefs and the people, with the king as trustee for all[.]

See Melody Kapilialoha MacKenzie (ed.), *Native Hawaiian Rights Handbook* (Native Hawaiian Legal Corporation 1991), at 3, 5.

> The origin of the present government, and system of polity, is as follows: KAMEHAMEHA I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had the management of the landed property. Wherefore, there was not formerly, and is not now any person who could or can convey away the smallest portion of land without the consent of the one who . . . has the direction of the kingdom.

In re Robinson, 49 Haw. 429, 439 (1966).

> While the 1840 Constitution had set forth some basic principles, it provided only the rough outlines of government structure. In 1852, Kamehameha III proclaimed a new constitution drafted in the main by Justice William Lee, reflecting his American and democratic point of view. That document gave the vote to male taxpayers over the age of 20 who had resided in Hawai'i for more than a year, provided that the legislature should meet every year, and made most of the acts of the king subject to approval of the privy council and kuhina nui [Premier].
>
> When Kamehameha IV took the throne in 1855, he felt the Constitution of 1852 placed unacceptable limitations on his royal prerogatives. Throughout his reign he fought to have the constitution amended to reflect his own views.
>
> Kamehameha V, who came to the throne in 1863, refused to take an oath to maintain the constitution. Instead, a constitutional convention was convened. When the convention became deadlocked over the question of universal suffrage, which the king opposed, the convention was dissolved and the constitution abolished. For a week, Hawai'i was without a constitution, until Kamehameha V signed the Constitution of 1864, which reasserted the monarch's powers.
>
> William Lunalilo, Hawai'i's first elected king, made no changes to the Constitution of 1864 although he did advocate eliminating property qualifications for voters. Lunalilo died and David Kalakaua was elected to the throne in 1874. Kalakaua also supported an amendment abolishing voter property qualifications, which subsequently was adopted.
>
> In 1887, however, Kalakaua yielded to demands by Western interests to appoint a new cabinet whose foremost task was to write the Constitution of 1887 which reduced him to the status of a ceremonial figure, made his military powers subject to legislative control, placed executive powers in the hands of a cabinet appointed by him but responsible to the legislature, and made the house of nobles an elective office. Under this so-called

> "Bayonet Constitution," the privilege of voting was extended to American and European males regardless of citizenship, and two classes of voters were created: (1) those who could vote only for representatives and (2) those who could vote for both representatives and nobles. Property qualifications were so high that many Native Hawaiians were disenfranchised.

See MacKenzie, *supra*, at 10–11, citing, *inter alia*, R. Kuykendall, *Constitutions of the Hawaiian Kingdom*, 21 (Hawaiian Historical Society 1940) (other citations omitted).

> [I]n January 1887, the first meetings of the Hawaiian League were held. [Lorrin] Thurston drew up a constitution, and the [League's] founders memorized it and then destroyed the written version; it was too dangerous to keep, so they thought. . . . By the middle of 1887 the League had more than four hundred members. . . . Dr. [S.G.] Tucker [credited with the idea of forming the League] had spoken of admitting "all nationalities."
>
> What he meant was white men of all nationalities. No Orientals need apply, and no Hawaiian names appeared on the list Thurston kept in a notebook; a handful of part Hawaiians with Western names did join, but they were far outnumbered by Americans, Britishers, Germans and Portuguese.
>
> The question of how to deal with Kalakaua was discussed at length. . . . Volney [Ashford], who had the wildest and spikiest military mustache in the kingdom and a mind to match, wanted to kill the king and have done with it, then fill government offices with members of the League.
>
> Volney Ashford's political ideas were frightening, but his martial skills were an asset. Early in 1887 he took command of the Honolulu Rifles, an all-white volunteer company, drilled them into a high state of efficiency and put them at the service of the League.
>
> Lorrin Thurston and the other constitution makers had a draft ready to show the king on July 6. . . . "The King argued, protested . . . and for considerable periods appeared to be gazing into space and weighing the probabilities of success in the event of a refusal. . . . But, at the end . . . the King reached for a pen and attached his signature[.]

See Daws, *supra*, at 243–244 (endnote citations omitted).

> In 1892, Lili'uokalani succeeded to the throne upon [her brother] Kalakaua's death. She, like her brother, felt the 1887 Constitution not only limited the monarch's prerogatives but resulted in too much power being placed in the hands of Westerners. On January 14, 1893, Lili'uokalani was on the verge of declaring a new constitution limiting the vote to Hawaiian-born or naturalized citizens and making cabinet ministers subject to removal by the legislature. Knowing the opposition such changes would face, Lili'uokalani was persuaded by her advisors to postpone the action.

See, MacKenzie, *supra*, at 11, citing in endnotes, Kuykendall, *supra*, at 585–586 . Subsequently, "[a] royal proclamation was issued on Monday, January 16, signed by Queen Liliuokalani and members of her cabinet, in the following words: . . . 'Authority is given for the assurance that any changes desired in the fundamental law of the land will be sought only by methods provided in the Constitution itself.'" *See* L. A. Thurston, *Memoirs of the Hawaiian Revolution* (1936) at 256.

Nevertheless, "Thurston and the members of the Annexation Club believed that the time had come for them to act." *See* Daws, *supra,* at 272. "A committee

of safety was formed (Thurston was thinking . . . about the French Revolution and the Jacobin Committee of Public Safety that ruled during the Terror)." *Id.*

In the afternoon of January 16, 1893, a mass meeting was called by those supporting the newly formed Committee of Safety. Attendee J. Emmeluth's remarks captured the mood: "If the Queen had succeeded last Saturday, myself and you would have been robbed of the privileges without which no white man can live in this community." *See* Thurston, *supra,* at 266. The proposal of the Committee of Safety to overthrow the Hawaiian Monarchy, by force, if necessary, was unanimously approved by those present and was implemented the next day, January 17, 1893.

V

Native Hawaiians have historically possessed inherent sovereignty as a people. The U. S. Congress has acknowledged this fact. *See*, *e.g.*, the only "substantive section" of the Apology Resolution, quoted in *Hawai'i v. OHA, supra*, 556 U.S. at 168 ("Congress . . . acknowledges the historical significance of this event which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people"); 20 U.S.C. § 7512(12)(A) ("The United States has recognized and reaffirmed that Native Hawaiians have a cultural, historic, and land-based link to the indigenous people who exercised sovereignty over the Hawaiian Islands, and that group has never relinquished its claims to sovereignty or its sovereign lands").

The United Nations General Assembly has addressed the inherent sovereignty of indigenous peoples: "*Recognizing* the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources." United Nations Official Records of the General Assembly, Sixty-first Session, Supplement No. 53 (A/61/53), Part one, Chap. II, Sect. A, *United Nations Declaration on the Rights of Indigenous Peoples* (Resolution Adopted September 13, 2007) at Preamble (emphasis original) (hereinafter "UNDRIP").

The State of Hawai'i has also specifically recognized the aboriginal, inherent sovereignty of Native Hawaiians. Hawaii Rev. Stat. ("HRS") § 10H-1 ("The Native Hawaiian people are hereby recognized as the only indigenous, aboriginal, maoli [native] people of Hawaii"); *State v. Lorenzo*, 77 Haw. 219, 221 (Haw. App. 1994) ("[A]s a result of the overthrow and the events that followed thereafter, the indigenous people of Hawai'i were denied the mechanism for expression of their inherent sovereignty through self-government and self-determination, their lands, and their ocean resources. Act 359, § 1, 1993 Haw. Sess. Laws 1009, 1010"); HRS § 10–2 (Supp. 2008) (defining "Hawaiian" as a "descendant of the aboriginal people inhabiting the Hawaiian Islands which exercised sovereignty . . . in 1778").

In our post-remand decision in *OHA et al. v. HCDCH*, 121 Haw. 324, 334 (2009) ("*Community Development II"*), we observed and reaffirmed that "Customary and traditional rights in these islands flow from [N]ative Hawaiians' preexisting sovereignty[,]" quoting *Public Access Shoreline Hawai'i v.*

Hawai'i County Planning Commission, 79 Haw. 425, 449 (1995). The initial question presented in this case is thus not whether contemporary Hawai'i law recognizes that Native Hawaiians once possessed inherent sovereignty as a people. That question is settled.

The issue here is whether the Native Hawaiian People continue to possess today a residual, legally definable form of that sovereignty. Stated differently, as a matter of Hawai'i law, we decide, as a question of first impression, whether the extralegal acts of the so-called Committee of Safety in January 1893, proclaiming, with unconcealed threats of violence, the abrogation of the Hawaiian Monarchy, were effective to legally extinguish inherent rights exercised by the Native Hawaiian People for many centuries preceding.

We hold they did not. Whatever the thinking and legal constructions may have been in Hawai'i a century ago—and we note that the members of the Committee of Safety themselves never claimed their actions were legal—we are not bound by them, and we are persuaded to adopt contemporary perspectives. *Kamau Cushnie v. Hawai'i County*, 41 Haw. 527, 552 (1957) ("Conditions change with the times and our decisions must meet changing conditions. The law is not static but consists of fundamental principles and reasons and the substance of rules as illustrated by the reasons on which they are based rather than the mere words in which they are expressed. It must adapt itself to various conditions as interpreted in the light of modern experience, reason and the furtherance of justice") (citations omitted); *cf. Calder et al. v. Attorney-General of British Columbia*, *supra*, at 347 ("Chief Justice Davey in the judgment under appeal, with all the historical research and material available since 1823 . . . said of the Indians of the mainland of British Columbia: . . . 'They were undoubtedly at the time of [European] settlement a very primitive people with few institutions of civilized society, and none at all of our notions of private property.' In so saying this in 1970, he was assessing the Indian culture of 1858 by the same standards that the Europeans applied to the Indians of North America two or more centuries before") (Hall, J., dissenting).

Since 1893 much new knowledge has been gained and much has changed. The following precepts have been declared to have worldwide application:

> United Nations Declaration
> on the Rights of Indigenous Peoples
>
> The General Assembly,
>
> *Guided* by the purposes and principles of the Charter of the United Nations, and good faith in the fulfillment of the obligations assumed by States in accordance with the Charter,
>
> *Affirming* that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,
>
> *Affirming* further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Concerned that indigenous peoples have suffered from historic injustices as a result of, *inter alia*, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard: . . .

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples[.]

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:

(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned.

Article 11

1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have

> traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
>
> 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.
>
> Article 33
>
> 1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.
>
> 2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.
>
> Article 43
>
> The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

UNDRIP, *supra*, (excerpts) (emphasis original).

In *Community Development I*, we observed that "the ultimate resolution of the [N]ative Hawaiian claims must be through the political processes[.]" 117 Haw. at 209.

We hold to that view, and notwithstanding that view, today adopt the United Nations Declaration excerpts quoted above as the law of Hawai'i, as the legal standards articulating the residual sovereignty that Native Hawaiians as a people continue to possess. *Cf.* Jack G. Day, Why Judges Must Make Law, 26 Case W. Rsrv. L. Rev. 563, 592–593 (1976) ("If a single generalization could be formulated to sum up, it might be that courts must make law because they are the legal delegates of duties, both implicit and explicit, which require it . . . . We must not take lightly the objection to indiscriminate delegation . . . . But neither should we insist that 'lawmaking' as such is the exclusive province of the legislature. . . . the nature of the judicial process simply makes courts the best available instrument for fairly fitting law to necessity") (footnotes omitted).

As the political process of resolution continues, Native Hawaiians will thus have the right, among the others enumerated above, "to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities," "to determine their own identity or membership in accordance with their customs and traditions," and "to determine the structures and to select the membership of their institutions in accordance with their own procedures." UNDRIP, *supra*, at Arts. 20, 33. If and when a future political settlement is concluded, entailing political recognition of Native Hawaiian sovereignty by this State, and perhaps but not necessarily also the United States, it shall not be inconsistent with the above standards.

VI

We have traced pertinent elements of Hawaiian history, albeit in succinct summary form, citing archival sources and accepted historiography admitted into evidence by the trial court. Other scholars and professional historians, too numerous to catalogue here, as well as those already cited, have cogently compiled the many more complex factors that document and describe how "[d]uring the nineteenth century, Hawai'i was transformed from an isolated Polynesian culture into a multiethnic military outpost of the United States." Van Dyke, *supra*, at 1. Hawai'i's path from a U.S. Territory controlled by the National Government to Statehood has also been extensively discussed elsewhere. *E.g.*, Roger Bell, *Last Among Equals: Hawaiian Statehood and American Politics* (University of Hawaii Press 1984); Gustavo A. Gelpí, *The Constitutional Evolution of Puerto Rico and Other U.S. Territories, 1898-Present* (Inter American University of Puerto Rico 2017).

We cannot, and need not, recount the whole of that historical record here. Our focus is necessarily narrower and the requisite historical elements for our decision regarding the continued equitable interest claimed in the former Crown Lands are clearly recognizable. First among these elements is the undisputed nature of the Native Hawaiians' traditional land tenure system:

> While the fee simple ownership instituted by the Mahele [Division] and the laws that followed drastically changed Hawaiian land tenure, the Government and, subsequently, the Crown Lands were held for the benefit of the people of Hawai'i. For Hawaiians, the Government and Crown Lands marked a continuation of the concept that lands were held by the ali'i [ruling chiefs] on behalf of the gods and for the benefit of all.

See, Van Dyke, *supra*, at 379, quoting Melody K. MacKenzie, The Ceded Lands Trust*,* Haw. Bar J. (June 2000), at 6; Jonathan Kay Kamakawiwo'ole Osorio, *Dismembering Lahui: A History of the Hawaiian Nation to 1887* (University of Hawaii Press 2002), at 48 ("The *Ali'i* were not landlords who owned the land and its produce. They were *konohiki* [stewards of the land] who had responsibilities to administer the land and whose responsibilities extended above and below them"); Lilikala Kame'eleihiwa, *Native Land and Foreign Desires: Pehea Lā E Pono Ai? How Shall We Live in Harmony?* (Bishop Museum Press 1992) at 31 ("Hence, to *Mālama 'Āina* [care for the land] was by extension to care for the *maka'āinana* [people of the land] and the *Ali'i*, for in the Hawaiian metaphor, these three components are mystically one and the same").

Second, we take judicial notice of the well-documented historical fact that each of the Hawaiian Kingdom's reigning monarchs, from the Kingdom's founder Kamehameha I through its last monarch, Lili'uokalani, held and administered the lands under the monarch's direct control not only for the benefit of the Hawaiian Crown as an institutional arm of government, but also for the benefit of the Native Hawaiian People as a whole. An illustrative example of this policy in the historical literature notes that "[s]hortly after she became Mō'ī [Monarch], Queen Lili'uokalani instructed the Crown Land Commissioners to 'set aside choice sections of Crown Lands for homestead subdivision in 10 acre lots on a 30-year term for lease and cultivation; first

5 years to be rent free, balance at a nominal yearly rent of $1.00 per acre.' Her hope was that these lands would go primarily to Hawaiians." Van Dyke, *supra*, at 117 (citation omitted); *accord Doe ex rel. Doe v. Kamehameha Schools, supra*, 295 F.Supp.2d at 1154 ("'[T]he Bishop Trust is a charitable testamentary trust established by the last direct descendant of King Kamehameha I, Princess Bernice Pauahi Bishop, who left her property in trust for a school dedicated to the education and upbringing of Native Hawaiians.'") (citations omitted); Avis Kuuipoleialoha Poai & Susan K. Serrano, *Ali'i Trusts: Native Hawaiian Charitable Trusts in Native Hawaiian Law: A Treatise* (Kamehameha Publishing, a division of Kamehameha Schools 2015) at 1171:

> In fulfilling the traditional role of Hawaiian ali'i (chiefs), certain ali'i established perpetual trusts to benefit the Native Hawaiian people. These ali'i trusts are Kamehameha Schools/Bernice Pauahi Bishop Estate, the Queen Lili'uokalani Trust, the King William Charles Lunalilo Trust, and the Queen Emma Trust. The trusts were established by will or deed of trust and, at least initially, were all supported by an endowment of land . . . to support their programs and services. Each of the ali'i trusts was intended to address a specific social need: Kamehameha Schools/Bernice Pauahi Bishop Estate, education; the Queen Lili'uokalani Trust, care for orphans and indigent children; the King William Charles Lunalilo Trust, care for indigent and elderly Hawaiians; and the Queen Emma Trust, medical care.

Against this historical background, the second merits issue before us, again, as a question of first impression, reduces to whether the extralegal, revolutionary actions of the so-called Committee of Safety proclaiming a Provisional Government, which in turn proclaimed the misnomered, undemocratic Republic of Hawai'i, were effective to divest the Native Hawaiian People of their traditional beneficial interest in lands controlled and administered by their successive monarchs. We hold, as a matter of Hawai'i law, that such extralegal acts, accompanied as they were by overt threats of violence to enforce them, can have no such effect.

Whatever the thinking and legal constructions in other courts may have been a century ago, *e.g., Liliu'okalani v. United States*, 45 Ct. Cl. 418 (1910) (holding with overthrow of Hawaiian Monarchy Crown Lands passed to 1893–1894 revolutionary governments in unencumbered fee simple), we are not bound by them. *Cf. Robinson v. Ariyoshi*, 65 Haw. 641, 667 n.25 (1982) ("In 1959 Hawaii became a state . . . . And it is from our authority as a *state* that our present common law springs[.]") (discussing public water rights) (emphasis original). Moreover, it has long been a rule of equity in this Court that "for every wrong there is a remedy". *Kamau Cushnie, supra*, 41 Haw. at 539; *Dana v. Angel*, 1 Haw. 347, 350 (1855) ("[I]f Courts of law, from any defect of power, are unable to afford an adequate remedy . . . then we must turn to the Court of Chancery, and look for aid from thence. . . . 'It would be a matter of surprise as well as regret, if in a system of jurisprudence that has been matured by the wisdom of ages, adequate remedies were not provided for the violation of every important civil right'").

As a state court of last resort within the scheme of separate state and federal sovereignties, we are authorized to exercise independent, equitable judgment, and do so, based on the unique culture, geography, and history of Hawai'i.

Our holding is in harmony with applicable provisions of the Hawai'i State Constitution, *see* Haw. Const. Art. XII, § 7 ("The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a [district] tenants who are descendants of [N]ative Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights"), is consistent with prior decisions of this Court, *e.g., Ching v. Case*, 145 Haw. 148, 152 (2019) ("[T]he public lands ceded to the United States following the overthrow of the Hawaiian Monarchy and returned to Hawai'i upon its admission to the Union hold a special status under our law. These lands are held by the State in trust for the benefit of Native Hawaiians and the general public[]"), *Pele Defense Fund, supra*, 73 Haw. at 617 n. 31 ("HRS § 7–1(1985), a statute initially passed in 1851, provides: "Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use[]"), and with the United Nations standards we have adopted, *e.g.*, UNDRIP at Art. 8, par. 2(b) ("States shall provide effective mechanisms for prevention of, *and redress for*: . . . Any action which has the aim or effect of dispossessing [indigenous peoples] of their lands territories or resources[]") (emphasis added).

In fashioning this remedy, we do not provide a "judicial resolution of the underlying claim for a return of lands[.]" *Community Development I*, 117 Haw. at 209; *cf. Calder, supra*, at 352 ("This is not a claim for title in fee but is in the nature of [a claim for] an equitable title or interest, [] a usufructuary right and right to occupy the lands and to enjoy the fruits of the soil, the forest and of the rivers and streams which does not in any way deny [Canada's] paramount title[]") (Hall, J., dissenting) (citation omitted).

We recognize that the ultimate disposition of lands will be made through ongoing political processes. *Cf.* Hamar Foster, Heather Raven, & Jeremy Webber (eds.), *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (UBC Press Vancouver 2007) (charting legal and political rights development over time).

We hold today only that the right of Native Hawaiians to dwell again and subsist again upon the resources of those portions of the former Crown Lands not already alienated may not be denied them and must be fairly taken into account, under the supervision of the trial court upon remand, during the ongoing processes of political resolution:

> Indigenous peoples *have the right to redress*, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed

> consent. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

UNDRIP, *supra*, at Art. 2 (emphasis added).

VII

In *Rice v. Cayetano*, 528 U.S. 495 (2000), the United States Supreme Court concluded in part with respect to Native Hawaiians that "[w]hen the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations[.]" *Id.* at 524. With due respect to that Court, the Native Hawaiian People were not engulfed by history. In January 1893, they were subjected to a militarily supported coup, orchestrated by a small group of disproportionately powerful, non-native men, who were imbued with distastefully anachronistic notions of racial and cultural superiority.

In 1993, the United States promulgated an Apology Resolution, acknowledging the myriad harms inflicted upon the Native Hawaiian People by the 1893 overthrow of the Hawaiian Monarchy with the aid of the United States. In 2009, the United States Supreme Court, in *Hawai'i v. OHA*, *supra*, construed the Apology Resolution as having no substantive effect, vacated our judgment in *Community Development I* on that basis, and held, *inter alia*, that the Court "had no authority to decide questions of Hawaiian law or to provide redress for past wrongs[.]" 556 U.S. at 177.

We are authorized to determine questions of Hawai'i law. It is indeed emphatically our "'duty to say what the law is.'" *Del Rio v. Crake*, 87 Haw. 297, 304 (1998), citing *Marbury v. Madison*, 5 U.S. 137 (1803). We fulfill that obligation today.

This matter is remanded to the trial court for further proceedings consistent with this opinion.

Before leaving Brussels, Justice Soares has emailed the finished draft of his opinion to his judicial colleagues at Ali'iolani Hale. This afternoon, on the Island of Madeira, in a quiet suburb of the island's capital, Funchal, he feels both lighter in having completed it, and sorrowful in the sad duty that has brought him here from such a long distance.

He has just placed the urn he has carried to Europe containing the ashes of his wife, Aida Delgado-Soares, in the large columbarium niche where several generations of her family also reside. Trying his best to compose his feelings, he walks slowly through the surrounding memorial park to a veranda restaurant located nearby, across a wide, tree-lined avenue. To fortify himself, he has ordered the Madeiran brandy he and Aida shared together in happier days.

Beloved, we thought we had so much more time.

He raises his glass.

Until we meet again.