

# WAI THROUGH KĀNĀWAI: WATER FOR HAWAII'S STREAMS AND JUSTICE FOR HAWAIIAN COMMUNITIES

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## I. INTRODUCTION: WAI THROUGH KĀNĀWAI<sup>1</sup>

Kaulana Nā Wai 'Ehā: "Famous are the Four Great Waters" of Waihe'e River, and Waiehu, 'Īao, and Waikapū Streams in the heart of Central Maui.<sup>2</sup> Since time immemorial, Kānaka Maoli (Native Hawaiians)<sup>3</sup> revered the abundance of fresh water<sup>3</sup> in Hawai'i's rivers

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1. Wai means "water" in the Hawaiian language. MARY KAWENA PUKU'I & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 377 (1986) [hereinafter HAWAIIAN DICTIONARY]. Kānāwai refers to a "[l]aw, code, rule, statute, act, regulation, ordinance, decree, [or] edict." *Id.* at 127. For a detailed discussion of the relationship between fresh water and the law in Hawai'i, see *infra* Part II.A.

2. Kaulana Nā Wai 'Ehā, or "famous are the four great waters," is a well-known saying about the Nā Wai 'Ehā region of Central Maui that encompasses Waikapū, 'Īao, Waiehu, and Waihe'e Streams and communities. TY P. KĀWIKĀ TENGAN, REPORT ON THE ARCHIVAL, HISTORICAL AND ARCHAEOLOGICAL RESOURCES OF NĀ WAI 'EHĀ, WAILUKU DISTRICT, ISLAND OF MAUI 1–2 (2007) [hereinafter TENGAN REPORT] (explaining the historical significance of Nā Wai 'Ehā, including the saying "Kaulana Nā Wai 'Ehā"). Nā Wai 'Ehā was and is historically and culturally significant due, in large part, to the abundance of fresh water flowing in its rivers and streams. *Id.* at 1; see also E.S. CRAIGHILL HANDY & ELIZABETH GREEN HANDY WITH THE COLLABORATION OF MARY KAWENA PUKU'I, NATIVE PLANTERS IN OLD HAWAII: THEIR LIFE, LORE, & ENVIRONMENT 496–97 (1972) [hereinafter HANDY & HANDY].

3. Kānaka Maoli or Maoli refers to the Indigenous population inhabiting Hawai'i at the time of Western contact in the late 1700s. HAWAIIAN DICTIONARY, *supra* note 1, at 127 (noting that Kānaka Maoli historically referred to a "full-blooded Hawaiian person"). In the context of this article, however, these terms refer to Indigenous Hawaiians without reference to blood quantum and may be used interchangeably with native Hawaiian, Native Hawaiian, or Hawaiian. Some scholars use "native Hawaiian" to refer to individuals with 50% or more blood quantum and "Native Hawaiian" to refer to individuals with less than 50% blood quantum. Native and Indigenous are also capitalized to acknowledge the unique legal and political status of these groups. See, e.g., Kimberlé Williams Crenshaw, *Race, Reform, and*

and streams, including Nā Wai 'Ehā, as a physical embodiment of Kāneikawaiola, a gift from the gods that brought life to the earth.<sup>4</sup> Traditional songs about this area, such as “Nā Wai Kaulana” by Alice Namakelua, beckon listeners to “e ‘ike i nā wai ‘ehā . . . ‘o nā wai kaulana ia a o ku‘u ‘āina,” “behold the four great streams . . . which are the famous waters of my home.”<sup>5</sup>

Today, Nā Wai 'Ehā's legendary waters are a mere trickle of their former selves. For the last 150 years, massive diversion systems have drained these streams almost completely dry to subsidize plantation agriculture—and sugar cane in particular—on Maui's Central Plain, devastating the natural ecosystems and cultures that relied upon free-flowing streams.<sup>6</sup> Plantation agriculture's wholesale appropriation and redirection of surface water in this region physically and spiritually disemboweled Kānaka Maoli communities, whose Indigenous culture is heavily dependent on natural resources, including fresh water.<sup>7</sup> These diversions thus imposed significant cultural harms, many of which remain unaddressed to this day.<sup>8</sup>

As the heyday of plantation agriculture comes to a close, however, and all but one sugar plantation has left the islands, some on Maui have dared to dream of a different future.<sup>9</sup> Kānaka Maoli are banding

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*Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988).

4. Kāneikawaiola, or “Kāne of the life-giving waters,” refers to one of the four principal akua (gods or ancestors) in the Maoli pantheon who is associated with fresh water resources. See HANDY & HANDY, *supra* note 2, at 63 (“Water, whether for irrigation, for drinking, or other domestic purposes, was something that ‘belonged’ to Kane-i-ka-wai-ola (Procreator-in-the-water-of-life), and came through the meteorological agency of Lono-makua the Rain-provider.”); HAWAIIAN DICTIONARY, *supra* note 1, at 128.

Fresh water as a life-giver was not to the Hawaiians merely a physical element; it had a spiritual connotation. . . . [T]he ‘Water of Life of Kane’ is referred to over and over again. Kane the word means ‘male’ and ‘husband’ was the embodiment of male procreative energy in fresh water, flowing on or under the earth in springs, in streams and rivers, and falling as rain (and also as sunshine), which gives life to plants. . . . Regardless of all such distinctions, life-giving waters were sacred.

HANDY & HANDY, *supra* note 2, at 64.

5. See *Nā Wai Kaulana*, in ALICE NAMAKELUA & HEINZ-GUENTHER PINK, AUNTY ALICE NAMAKELUA'S LIFETIME HAWAIIAN COMPOSITIONS (1973); RICHARD HO'OPĪ'I, *Nā Wai Kaulana*, on ULULANI (The Mountain Apple Co. 2003).

6. TENGAN REPORT, *supra* note 2, at 15–18.

7. *Id.*

8. See *id.* at 19.

9. Andrew Gomes, *Sugar Plantation Gets Reprieve*, HONOLULU ADVERTISER

together with environmental groups and others to utilize existing legal tools to return diverted flows to their streams and communities of origin.<sup>10</sup>

In June 2004, the Kānaka Maoli group Hui o Nā Wai ‘Ehā and Maui Tomorrow Foundation, Inc. (collectively, the “Hui”)<sup>11</sup> partnered with the public interest litigation firm Earthjustice<sup>12</sup> to petition Hawai‘i’s water commission<sup>13</sup> to restore continuous mauka to makai flow to Nā

(Jan. 30, 2010), <http://the.honoluluadvertiser.com/article/2010/Jan/30/bz/hawaii1300309.html> (discussing the decline of plantation agriculture in Hawai‘i and community efforts to restore stream flow); Liza Simon, *Streams of Controversy*, KA WAI OLA, March 2010, at 10–11 (detailing community efforts to restore stream flow in the wake of sugar plantation declines); see also *Restore Stream Flow*, EARTHJUSTICE, <http://www.restorestreamflow.org> (last visited Oct. 11, 2011) (discussing more on community efforts to restore diverted stream flows on Maui).

10. See, e.g., Petition to Amend the Interim Instream Flow Standards for Waihe‘e, North and South Waiehu, ‘Īao and Waikapū Streams and Their Tributaries at 5–7, *In re* Petition to Amend Interim Flow Standards (Haw. Water Comm’n June 25, 2004) [hereinafter Hui’s IIFS Petition], available at <http://hawaii.gov/dlnr/cwrm/currentissues/iifsm Maui2/General.pdf> (detailing Petitioners’ interests in the restored resources of local streams and waters); Simon, *supra* note 9, at 11; DVD: *Kaulana Nā Wai ‘Ehā: Restoring Maui’s Famous Streams*, EARTHJUSTICE, available at [http://www.youtube.com/v/NZ2BmMcRBu0&hl=en\\_GB&fs=1&](http://www.youtube.com/v/NZ2BmMcRBu0&hl=en_GB&fs=1&) (detailing recent efforts to restore streams and communities in Nā Wai ‘Ehā, Maui); E-mail from Tricia Kehaulani Watson, President, Honua Consulting, to author (Aug. 29, 2011, 11:34 HAST) (on file with author) (sending the text of an article to the author written by Dr. Watson entitled *It’s Time for Balance in Nā Wai ‘Ehā*, as published on the now-defunct HONOLULU ADVERTISER BLOG, Oct. 12, 2009).

11. Letter from Isaac H. Moriwake et al., Attorneys, Earthjustice and Maui Tomorrow Foundation, Inc., to Laura Thielen, Chairperson, Commission on Water and Resource Management (June 26, 2009), available at <http://hawaii.gov/dlnr/cwrm/swma/swupobjections/20090626HuiNaWaiEha.PDF>. Hui o Nā Wai ‘Ehā is a Kānaka Maoli name that means group or supporters of Nā Wai ‘Ehā, or the Four Great Waters. It is a largely Native, community-based organization established to promote the conservation and management of Hawai‘i’s natural resources and cultural practices that depend on them. See *id.* Maui Tomorrow Foundation is a community-based organization. See generally MAUI TOMORROW FOUNDATION, <http://maui-tomorrow.org/> (last visited Oct. 11, 2011). It is dedicated to sustainable planning, responsible resource management, and preserving the opportunity for rural lifestyles on Maui. *Id.*

12. Earthjustice is the nation’s leading non-profit environmental law firm. See Earthjustice, *About Us*, <http://www.earthjustice.org/about> (last visited Oct. 11, 2011). The Mid-Pacific Office opened its Honolulu doors in 1988 and represents a range of environmental, Kānaka Maoli, and other community organizations. Earthjustice, *Mid-Pacific*, <http://www.earthjustice.org/about/offices/mid-pacific> (last visited Oct. 11, 2011).

13. The Commission on Water Resource Management, or water commission as it is more popularly known, is an administrative agency housed within Hawai‘i’s Department of Land and Natural Resources. The water commission implements article XI, sections 1 and 7 of Hawai‘i’s Constitution as well as Hawai‘i Revised Statutes chapter 174C and is responsible for managing and protecting Hawai‘i’s ground and surface water resources. See HAW. REV. STAT. § 174C-5 (1993) (detailing the Commission’s general powers and duties); *About Us*:

Wai ‘Ehā’s streams and communities.<sup>14</sup> Over seven years of still-ongoing litigation ensued. The Hui and its allies, including the Office of Hawaiian Affairs (OHA),<sup>15</sup> detailed the water commission’s constitutional, statutory, and moral obligations to return flows sufficient to rebuild Native culture and practices, restore ecological balance, and improve social welfare conditions—all set within the broader context of the state’s commitment to reconciliation with and restorative justice for Kānaka Maoli.<sup>16</sup>

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*Law & Regulations*, COMMISSION ON WATER RESOURCE MANAGEMENT, [http://hawaii.gov/dlnr/cwrm/aboutus\\_regulations.htm](http://hawaii.gov/dlnr/cwrm/aboutus_regulations.htm) (last visited Oct. 11, 2011) (detailing the origin of the water commission).

14. Hui’s IIFS Petition, *supra* note 10, at 2. “Mauka to makai flow” refers to continuous stream flow from the upper reaches of the mountains until that stream flows into the ocean. D. Kapua’ala Sproat, *Water*, in *THE VALUE OF HAWAII: KNOWING THE PAST, SHAPING THE FUTURE* 187, 188 (Craig Howes & Jonathan Kay Kamakawiwo’ole Osorio eds., 2010) [hereinafter Sproat, *Water*].

15. The Office of Hawaiian Affairs, or OHA, is a state agency that was established as a result of Hawai‘i’s 1978 Constitutional Convention and is dedicated to the betterment of native Hawaiians and Hawaiians. *Establishment of OHA*, OFFICE OF HAWAIIAN AFFAIRS, [http://www.oha.org/index.php?option=com\\_content&task=blogcategory&id=21&Itemid=125](http://www.oha.org/index.php?option=com_content&task=blogcategory&id=21&Itemid=125) (last visited Oct. 11, 2011). Since its first trustees were sworn-in in 1980, OHA has grown significantly in size and scope and now manages almost 30,000 acres and \$326.89 million in revenues from the “ceded” lands trust. OFFICE OF HAWAIIAN AFFAIRS, 2010 ANNUAL REPORT 30, available at [http://www.oha.org/pdf/OHA\\_Annual\\_Report\\_2010.pdf](http://www.oha.org/pdf/OHA_Annual_Report_2010.pdf). OHA is currently governed by nine trustees elected by the general populace. *Board of Trustees*, OFFICE OF HAWAIIAN AFFAIRS, [http://www.oha.org/index.php?option=com\\_content&task=section&id=6&Itemid=282](http://www.oha.org/index.php?option=com_content&task=section&id=6&Itemid=282) (last visited Oct. 11, 2011). Four of the nine positions are at-large seats that represent the state as a whole. *Id.* The remaining five positions are representatives from geographic districts. *Id.* OHA’s mission is “[t]o mālama (protect) Hawai‘i’s people and environmental resources and OHA’s assets, toward ensuring the perpetuation of the culture, the enhancement of lifestyle and the protection of entitlements of Native Hawaiians, while enabling the building of a strong and healthy Hawaiian people and nation, recognized nationally and internationally.” *OHA Vision and Mission*, OFFICE OF HAWAIIAN AFFAIRS, [http://www.oha.org/index.php?option=com\\_content&task=blogcategory&id=23&Itemid=127](http://www.oha.org/index.php?option=com_content&task=blogcategory&id=23&Itemid=127) (last visited Oct. 11, 2011). The Hawai‘i Constitution limited the right to vote for the nine OHA trustees to “qualified voters who are Hawaiians, as provided by law.” HAW. CONST. art. XII, § 5. The term “Hawaiian” as provided by statute means “any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawai[‘]i.” HAW. REV. STAT. § 10-2 (2009). This limitation was challenged and set aside in *Rice v. Cayetano*, 528 U.S. 495, 517, 524 (2000); see *infra* Part III.A.1. For a more detailed review of the *Rice* case, see Eric Yamamoto & Catherine Betts, *Disfiguring Civil Rights to Deny Indigenous Hawaiian Self-Determination: The Story of Rice v. Cayetano*, in *RACE LAW STORIES* 541 (Rachel F. Moran & Devon W. Carbado eds., 2008).

16. See HAW. CONST. art. XI, § 7 (affirming the State’s “obligation to protect, control and regulate the use of Hawai[‘]i’s water resources for the benefit of its people”); *id.* art. XII, § 7 (declaring that the “State reaffirms and shall protect all rights, customarily and

In particular, OHA and the Hui focused on the commission's directive to "protect, enhance, and reestablish, where practicable, beneficial instream uses of water," to give meaning to traditional and customary Kānaka Maoli rights and environmental protection.<sup>17</sup> More specifically, the groups relied upon constitutional and statutory provisions establishing the state's duty to "reaffirm[] and . . . protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778."<sup>18</sup> The Hawai'i Water Code's pledge that traditional and customary rights "shall not be abridged or denied by this chapter"<sup>19</sup> also

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traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights"); HAW. REV. STAT. § 174C-101 (1993); Closing Brief of Hui o Nā Wai 'Ehā and Maui Tomorrow Foundation, Inc., 'Āao Ground Water Management Area High-Level Source Water Use Permit Applications and Petition to Amend Interim Instream Flow Standards of Waie'e, Waiehu, 'Āao, & Waikapū Streams Contested Case Hearing (*Contested Case Hearing*), No. CCH-MA06-01 (Dec. 5, 2008) [hereinafter Hui's Closing Brief]; Eric K. Yamamoto & Sara D. Ayabe, *Courts in the "Age of Reconciliation"*: Office of Hawaiian Affairs v. HCDCH, 33 U. HAW. L. REV. (forthcoming 2011) (manuscript at 24–27) (on file with author) (describing the State's commitment to reconciliation with and restorative justice for Kānaka Maoli, rooted in the constitution, statutes, and court rulings to redress the harms to Maoli over the last century).

17. HAW. REV. STAT. § 174C-71(4). "Instream use" means "beneficial uses of stream water for significant purposes which are located in the stream and which are achieved by leaving the water in the stream." *Id.* § 174C-3. Instream uses include, but are not limited to,

- (1) Maintenance of fish and wildlife habitats;
- (2) Outdoor recreational activities;
- (3) Maintenance of ecosystems such as estuaries, wetlands, and stream vegetation;
- (4) Aesthetic values such as waterfalls and scenic waterways;
- (5) Navigation;
- (6) Instream hydropower generation;
- (7) Maintenance of water quality;
- (8) The conveyance of irrigation and domestic water supplies to downstream points of diversion; and
- (9) The protection of traditional and customary Hawaiian rights.

*Id.* Maoli traditional and customary rights reliant upon fresh water resources include, but are not limited to, "the cultivation or propagation of taro on one's own kuleana and the gathering of h[ī]h[ī]wai, [ʻō]pae, [ʻ]o'opu, limu, thatch, ti leaf, aho cord, and medicinal plants for subsistence, cultural, and religious purposes." *Id.* § 174C-101(c).

18. HAW. CONST. art. XII, § 7; *see also* HAW. REV. STAT. § 7-1 (2010); *id.* § 174C-101(c) (1993). An "ahupua'a" is a "land division usually extending from the uplands to the sea, so called because the boundary was marked by a heap (ahu) of stones surmounted by an image of a pig (pua'a), or because a pig or other tribute was laid on the altar as tax to the chief." HAWAIIAN DICTIONARY, *supra* note 1, at 9.

19. HAW. REV. STAT. § 174C-101(c) (1993) (protecting and delineating some traditional and customary Maoli rights regarding fresh water resources); Yamamoto & Ayabe, *supra* note 16, at 16–17.

figured prominently in the case.

Through protracted litigation, the Hui and its allies established that restoring water to each of Nā Wai 'Ehā's streams and communities was not merely a constitutional and statutory mandate, but also a necessity in light of restorative justice principles.<sup>20</sup> The hearings officer, in his April 2009 Proposed Decision and Order, agreed with the Hui and OHA that stream restoration was "critical to the perpetuation and practice of Hawaiian culture in Nā Wai 'Ehā."<sup>21</sup> He also relied upon the specific history of agricultural and spiritual practices in this area in rendering his proposed decision: "In particular, cold, free-flowing water is essential for kalo cultivation, which in turn is integral to the well-being, sustenance, and cultural and religious practices of native Hawaiians and Hawaiians."<sup>22</sup> The hearings officer, the most experienced water commissioner and former director of the State Department of Health, understood that "[k]alo cultivation provides not only a source of food, but also spiritual sustenance, promotes community awareness and a connection to the land, and supports physical fitness and mental well-being."<sup>23</sup> With these and other findings and in light of the applicable legal language, the hearings officer's Proposed Decision and Order recommended restoring about half the

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20. See, e.g., Hearings Officer's Proposed Findings of Fact, Conclusions of Law, and Decision and Order at 11–12, *Contested Case Hearing*, No. CCH-MA06-01 (Apr. 9, 2009) [hereinafter Hearings Officer's Proposed D&O], available at <http://www.state.hi.us/dlnr/cwrm/currentissues/cchma0601/CCHMA0601-01.pdf>; *Nā Wai 'Ehā: Restoring Maui's Famous Streams*, *supra* note 10; *Restore Stream Flow*, *supra* note 9. Restorative justice is grounded in notions of "social healing through justice." Eric K. Yamamoto et al., *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1, 41 (2007).

21. Hearings Officer's Proposed D&O, *supra* note 20, at 12.

22. *Id.*; see also Crenshaw, *supra* note 3, at 1332 n.2 (discussing the use of specific terms, such as "Black," that can be used as proper nouns to refer to a heritage or cultural group and not just people of a particular skin pigmentation). One Kānaka Maoli creation story explains that Papa and Wākea, the Earthmother and Skyfather, came together and gave birth to most of the major Hawaiian Islands. ROY KĀKULU ALAMEIDA, *STORIES OF OLD HAWAII* 1 (1997). Wākea then had a child with Ho'ohōkūkalanani, but it was stillborn. HANDY & HANDY, *supra* note 2, at 80. Where they buried that child, a kalo plant grew. *Id.* The food that kalo produced became the staple for Kānaka Maoli, providing both physical and spiritual sustenance. *Id.* Wākea and Ho'ohōkūkalanani's second child was the first Native born in Hawai'i. *Id.*

23. Hearings Officer's Proposed D&O, *supra* note 20, at 12. For background on the education and experience of the hearings officer, Dr. Miike, including information about his medical and law degrees, and scholarship regarding Hawai'i water issues, see *About the Author*, in LAWRENCE MIIKE, *WATER AND THE LAW IN HAWAII* (2004), and Dissenting Opinion of the Hearings Officer and Commissioner Lawrence H. Miike at 3–6, *Contested Case Hearing*, No. CCH-MA06-01 (June 10, 2010) [hereinafter Hearings Officer's Dissent].

diverted flows to Nā Wai ‘Ehā’s four streams and communities.<sup>24</sup>

Despite extensive findings regarding the negative impacts of over a century of stream diversions on Maoli culture and people and the importance of restoration, in June 2010, a majority of the water commission, while ostensibly applying the “law,” overturned the proposed decision, restoring only 12.5 million gallons per day (mgd) to two of Nā Wai ‘Ehā’s four streams in its Final Decision and Order.<sup>25</sup> Rather than follow the hearings officer’s lead and consider the history of Indigenous practices unique to this area, in the face of intense political pressure, the commission majority employed a-contextual analysis to interpret the same laws and evidence but arrived at a drastically different outcome.<sup>26</sup> That final decision undermined Kānaka Maoli cultural survival, perpetuated the subjugation of ancestral rights and resources, and prolonged dismal social welfare conditions caused by the plantation’s misappropriation of free-flowing streams for over a century.<sup>27</sup> The commission’s decision also subverted the value accommodation crafted by the laws’ framers as a reflection of the larger society’s balancing of the needs of the general populace, business interests, and Kānaka Maoli.

The majority’s ultimate decision was an apparent response to explicit lobbying by agribusiness.<sup>28</sup> In this setting, comparing the proposed and final decisions provides valuable insight into the influence

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24. Hearings Officer’s Proposed D&O, *supra* note 20, at 187–89. In his Proposed Decision and Order, the hearings officer recommended that the water commission amend the IIFs above the uppermost diversions to restore a total of 34.5 mgd to Nā Wai ‘Ehā’s streams and communities. *Id.* The hearings officer would have restored a minimum flow of 14 mgd to Waihe’e, 2.2 mgd to North Waiehu and 1.3 mgd to South Waiehu, 13 mgd to ‘Īao, and a temporary release of 4 mgd to Waikapū. *Id.*; Teresa Dawson, *Hearing Officer Issues Recommendations for Na Wai ‘Eha Contested Case Hearing*, ENVIRONMENT HAWAII (Environment Hawaii, Hilo, Haw.), June 2009, at 2, available at [http://hawaii1000friends.org/nmwa/docs/maui\\_county/200906\\_EH\\_NaWaiEha.pdf](http://hawaii1000friends.org/nmwa/docs/maui_county/200906_EH_NaWaiEha.pdf).

25. Compare Hearings Officer’s Proposed D&O, *supra* note 20, at 187–89, with Commission on Water Resource Management’s Findings of Fact, Conclusions of Law, and Decision and Order at 185–87, *Contested Case Hearing*, No. CCH-MA06-01 (June 10, 2010) [hereinafter Final D&O], available at <http://www.state.hi.us/dlnr/cwrm/currentissues/cchma0601/CCHMA0601-02.pdf>. The majority ordered 10 mgd for Waihe’e River, 1.6 mgd for North Waiehu, and 0.9 mgd for South Waiehu. *Id.* at 185–86. The majority decided not to restore any water to ‘Īao or Waikapū Streams. *Id.* at 186–87.

26. See *infra* Part IV.

27. See *infra* Part V.

28. See Teresa Dawson, *Parties Conclude Debate over Impacts of Stream Restoration in Central Maui*, ENV’T HAWAII (Environment Hawaii, Hilo, Haw.), Nov. 2009, at 3–4; see also *infra* Part V.B.

of politics on adjudicatory decision-making, especially in controversial and politically charged environmental cases like this one.<sup>29</sup> Led by former Chair Laura Thielen, the water commission majority dramatically altered the hearings officer's outcome and reinterpreted the law to favor agribusiness—particularly Hawaiian Commercial and Sugar Company (HC&S).<sup>30</sup> A-contextual—that is, formalist<sup>31</sup>—analysis of relevant legal mandates, including how much water was necessary to return to the streams after “weigh[ing] the importance of the present or potential instream values with the importance of the present or potential uses of water for noninstream purposes”<sup>32</sup> and determining what alternative water sources were “practicable”<sup>33</sup> for offstream users like HC&S, enabled the majority to focus on present commercial uses and to largely ignore or dismiss crucial Maoli cultural and historical facets of the controversy. It also allowed the majority to disregard the impacts of its decision on present-day Maoli efforts to reclaim land, resurrect culture, and restore natural resources essential to traditional practices, subverting a myriad of contextual factors that are embodied in Hawai'i water law. The commission majority, therefore, claimed that it “followed the mandates of the law as described in the Constitution, state

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29. For example, HC&S—one of the largest companies in Hawai'i—uses the lion's share of the diverted water and repeatedly threatened to close all operations if the Commission did not award it the bulk of the water it was taking. See, e.g., Chris Hamilton, *Na Wai Eha: HC&S Speaks*, MAUI NEWS (Oct. 9, 2009), <http://www.mauinews.com/page/content.detail/id/524576/Na-Wai-Eha—HC-S-speaks.html> (explaining how HC&S workers and executives questioned the basis for the proposed decision).

30. See, e.g., Teresa Dawson, *Commission's Order on Na Wai 'Eha Baffles Its Most Experienced Member*, ENVIRONMENT HAWAII (Environment Hawai'i, Hilo, Haw.), July 2010, at 1, available at [http://www.maui-tomorrow.org/pdf/EH\\_201007.pdf](http://www.maui-tomorrow.org/pdf/EH_201007.pdf). (“After all the evidence and expert testimony presented during the Na Wai 'Eha contested-case hearings in 2007 and 2008 on the minimum flows necessary to protect stream habitats and other instream values, which numbers did the state Commission on Water Resource Management finally go with? The ones that were never intended to be used for that purpose . . .”).

31. See *infra* Part III.A.1; see also BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 2* (2009). Legal formalism is a “theory of adjudication according to which ‘(1) the law is rationally determinate, and (2) judging is mechanical. It follows, moreover, from (1), that (3) legal reasoning is autonomous, since the class of legal reasons suffices to justify a unique outcome; no recourse to non-legal reasons is demanded or required.’” *Id.* (quoting Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1145–46 (1999) (reviewing ANTHONY SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* (1998))).

32. HAW. REV. STAT. § 174C-71(2)(D) (1993).

33. *In re Water Use Permit Applications (Waiāhole II)*, 93 P.3d 643, 661 (Haw. 2004); see also Final D&O, *supra* note 25, at 116.



statutes and the Hawai'i Supreme Court decisions.”<sup>34</sup> The majority also maintained that “[a]t the end of the deliberative process, [c]ommissioners reached agreement on instream flow standards which the majority felt represented the best balance of the [legally] mandated values and trust responsibilities”<sup>35</sup> even though its decision disserved restorative justice principles and continued the subjugation of Kānaka Maoli communities and culture.

Contextual legal analysis, discussed below, tells a starkly different story about the commission's final decision. It reveals the impact of politics on “legal interpretation” and “fact finding” in controversial cases. It demonstrates also that the majority's ruling is impossible to reconcile with the underlying values of Hawai'i's Constitution and Water Code, which prioritize public trust purposes, including the protection and restoration of natural resources and Indigenous rights and practices.<sup>36</sup> Contextual legal analysis starts with the premise (verified by socio-legal studies) that even though decision-makers may feel constrained to follow the legal rules to appear legitimate, they do not actually do so in a “neutral” or “objective” manner, especially in controversial cases. Contextual analysis then focuses on the actual dynamics of decision-making, paying special attention to the value choices and interests implicated in adjudicatory decisions. This analysis exposes a crucial tension in complex cases like Nā Wai 'Ehā: decisional outcomes according to legal language are not “objectively determined” but are instead a matter of value choices influenced by decision-makers’

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34. Final D&O, *supra* note 25, at 191.

35. *Id.*

36. *See, e.g.*, HAW. REV. STAT. § 174C-101(c) (1993) (“Traditional and customary rights of ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 shall not be abridged or denied by this chapter.”); *id.* § 174C-63 (“Appurtenant rights are preserved. Nothing in this part shall be construed to deny the exercise of an appurtenant right by the holder thereof at any time. A permit for water use based on an existing appurtenant right shall be issued upon application.”). Appurtenant rights appertain or attach to parcels of land that were cultivated, usually in the traditional staple kalo, at the time of the Māhele when private property was instituted in Hawai'i. *See* Reppun v. Bd. of Water Supply, 656 P.2d 57, 78 (Haw. 1982). Māhele land awards to maka'āinana (people of the land or “commoners”) are called kuleana (to have an interest). LILIKALĀ KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LA E PONO AI? HOW SHALL WE LIVE IN HARMONY? 295 (1992). The Land Commission received claims from maka'āinana over a period of several years prior to the 1848 Māhele. *Id.* Claimants did not have to pay a commutation fee (except for lots in Honolulu, Lāhainā, and Hilo), but did have to pay for the survey of their kuleana lands. *Id.* At the end of the Māhele process, kuleana awards totaled 28,658 acres of land (less than one percent of the total acreage of land in Hawai'i). *Id.*

political and economic ideologies in construing legal terms, selecting “relevant” facts, and assessing impacts.

Having lifted the veil of necessarily neutral legal decision-making, how can Kānaka Maoli, the government, the courts, and the community at large realistically assess these Indigenous environmental justice<sup>37</sup> claims and the water commission’s adjudicatory ruling? Might these assessments illuminate justice, or injustice, for Native Peoples generally? Most important, how might contextual legal analysis contribute to envisioning and realizing “justice through law,” particularly for Indigenous Peoples struggling to rebuild culture, spirituality, and some form of self-governance?

By interrogating the water commission’s decision-making in Nā Wai ‘Ehā, this article offers a developing contextual legal framework applicable to Native Peoples’ claims and adjudicatory rulings.<sup>38</sup> It does so not by conceptualizing the legal process as the inevitable march toward justice, but rather by acknowledging that law, as it intersects with politics, can be both subordinating and, at times, an opening toward restoration and self-determination.<sup>39</sup>

Part II.A examines water’s cultural and historical significance in Hawai‘i nei (this beloved Hawai‘i) and how that was impacted by the rise of sugar plantations. Part II.B delves into the role of abundant fresh water and mauka to makai flow in Nā Wai ‘Ehā,<sup>40</sup> and analyzes the sugar plantations’ negative impacts on Indigenous culture and identity, especially in the context of water appropriation.

Part II.C reviews the legal regime for water resource management in Hawai‘i, which embodies contextual factors. Although ultimately expressed in somewhat general terms, these values safeguard the public trust nature of Hawai‘i’s water resources while prioritizing certain purposes, including resource protection and Maoli rights and practices. These factors recognize and attempt to redress the harms of

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37. In the context of this Article, environmental justice means “fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” Kristina G. Fisher, *The Rhino in the Colonia: How Colonias Development Council v. Rhino Environmental Services, Inc. Set a Substantive State Standard for Environmental Justice*, 39 ENVTL. L. 397, 422 (2009) (quoting N.M. ADMIN. CODE § 20.9.2.7(E)(2)).

38. See *infra* Part IV.

39. See *infra* Part IV.

40. See Sproat, *Water*, *supra* note 14, at 188 (defining mauka to makai flow).

colonization, and stream diversions in particular, on both Kānaka Maoli and the community at large by mandating the protection and restoration of streams and the uses they support. Part II.C also explains the process for establishing Interim Instream Flow Standards (IIFs), the key legal tool employed by the Hui and its allies to restore Nā Wai ‘Ehā streams and communities.

Part III approaches Indigenous Peoples’ claims and relevant court rulings through different lenses including legal formalism, legal realism, critical legal analysis, and critical race theory.

Part IV flows from legal realism’s critique of formalism and the insights of critical race theory, particularly its revelation regarding the indeterminacy of rules, with an acknowledgement of limitations. Part IV describes a developing contextual legal framework for environmental justice claims that accounts for two adjudicatory realities: (1) decision-makers feel constrained by concerns of legitimacy to try to follow legal rules; and (2) in controversial cases, decision-makers are also influenced by political ideology and economic interests in construing and applying the relevant legal language. Contextual legal analysis brings to light these realities to make decision-making more compellingly reflect principles of equality and fairness within a larger framework of social justice.<sup>41</sup>

This contextual legal analysis, while revealing, is itself incomplete for Indigenous Peoples, particularly where specific laws—such as Hawai‘i’s Water Code—accommodate their interests and values. The analysis requires extension and refinement to more explicitly account for key aspects of Native Peoples’ struggles for self-determination through varying forms of environmental justice.<sup>42</sup> Tailoring this framework entails attention to four realms: (1) cultural integrity; (2) lands and other natural resources; (3) social welfare and development; and (4) self-government. These realms provide a starting point for analysis by synthesizing international human rights notions of self-determination for formerly colonized peoples.<sup>43</sup> The proffered analysis thus addresses

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41. See Courtenay W. Daum & Eric Ishiwata, *From the Myth of Formal Equality to the Politics of Social Justice: Race and the Legal Attack on Native Entitlements*, 44 LAW & SOC’Y REV. 843, 866–67 (2010) (defining social justice as “a strategic alternative to formal equality” that “allows for those communities that have been historically oppressed to place claims on the political and legal systems to overcome a legacy of discrimination and institutionalized racism”).

42. See *infra* Parts IV.A–B.

43. See *infra* Parts IV.C–D.

a wide range of legal controversies involving Native Peoples' environmental values and claims

Part V employs this analysis, revealing that the commission majority's final decision in Nā Wai 'Ehā, while embracing formalist methodology, is not actually "grounded in the facts or law," thereby undermining restorative justice for Kānaka Maoli and larger community interests. This contextual legal analysis also underscores the importance of an adjudicatory body giving full consideration to land, culture, social welfare, and self-governance in assessing Indigenous Peoples' environmental claims to restorative justice—particularly claims rooted in legal directives to "reaffirm[] and . . . protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes."<sup>44</sup> At bottom, contextual legal analysis highlights the uncertain yet potentially potent opening for the legal process, when appropriately linked to political organizing and other change agents, to create opportunities for liberation and justice—first at the administrative adjudication level and later in courts of law.<sup>45</sup> In doing so, the analysis brings an expanded kind of realism to issues of environmental justice for Indigenous Peoples.

The water commission's final ruling is already percolating up through the courts of appeal and is currently pending before the Hawai'i Supreme Court.<sup>46</sup> Prophesying how the high court will likely rule is risky business, particularly in light of the multifaceted nature of the evidence marshaled and the legal arguments advanced. By specifically considering history and current socio-economic conditions in the context of cultural integrity, lands and other resources, social welfare, and self-governance, contextual legal analysis of Native Peoples' claims offers courts a compelling analytical method for assessing cases involving Native Peoples' claims for justice.<sup>47</sup> This framework also reveals the necessity of employing contextual legal analysis of Native Peoples'

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44. HAW. CONST. art. XII, § 7.

45. *See infra* Part V.

46. On July 12, 2010, the Hui and OHA appealed the water commission's June 2010 Final Decision and Order to Hawai'i's Intermediate Court of Appeals. *See Community Groups Appeal Na Wai Eha Ruling*, MAUI NEWS (July 13, 2010), <http://www.mauinews.com/page/content.detail/id/533350.html>. The appeal was recently transferred to the Hawai'i Supreme Court, upon the Hui's motion, where briefing is ongoing. *See Order Accepting Application for Transfer, Appeal from the Commission on Water Resource Management, Contested Case Hearing*, No. SCAP-3063 (Haw. June 23, 2011).

47. *See infra* Part V.

claims because, as demonstrated here, even when the law itself embodies broader interests and values, formalist methodology can still be deployed to subvert both full and proper consideration of those interests and values and the possibility of “justice through law.”

## II. HISTORICAL SETTING AND THE LITIGATION

### A. *Fresh Water’s Historical and Cultural Significance in Hawai’i Nei*

Before Westerners stumbled onto Hawai’i’s shores in the late 1700s, fresh water was a principal source of life in the islands.<sup>48</sup> Streams and springs supplied drinking water for substantial populations of Kānaka Maoli,<sup>49</sup> sustained healthy ecosystems that linked mountain flows to nearshore marine waters, enabled abundant estuaries and fisheries in the streams and oceans, and supported Native agriculture and aquaculture, including lo’i kalo—the wetland cultivation of kalo that was made into the Native staple poi—and loko i’a—traditional fishponds.<sup>50</sup> Ola i ka wai: fresh water was the source of all life for

48. D. Kapua’ala Sproat, *From Wai to Kānāwai: Water Law in Hawai’i*, in NATIVE HAWAIIAN LAW: SECOND EDITION OF THE NATIVE HAWAIIAN RIGHTS HANDBOOK 9-1, 9-3 (MacKenzie, Serrano, & Sproat eds., 2d ed. forthcoming 2012) [hereinafter Sproat, *From Wai to Kānāwai*]; see also HANDY & HANDY, *supra* note 2, at 64 (detailing the importance of fresh water to the Native Hawaiian people); Emma Metcalf Nakuina, *Ancient Hawaiian Water Rights: And Some of the Customs Pertaining to Them*, in HAWAIIAN ALMANAC & ANNUAL FOR 1894, at 79, 79–84 (Thomas G. Thrum ed., 1893) (describing Kānaka Maoli customs associated with fresh water). For an analysis of the arrival of Westerners in Hawai’i and resulting impacts, see KAME’ELEIHIWA, *supra* note 36, at 67.

49. See generally DAVID E. STANNARD, *BEFORE THE HORROR: THE POPULATION OF HAWAII’I ON THE EVE OF WESTERN CONTACT* 78–80 (1989) (providing detailed population estimates of Kānaka Maoli at the time of Western contact); KAME’ELEIHIWA, *supra* note 36, at 81 (explaining that Stannard’s conservative methodologies underestimate the number of people inhabiting Hawai’i at the time of Western contact and a figure of “at least one million Hawaiians in 1778” is more appropriate); ROBERT C. SCHMITT, *DEMOGRAPHIC STATISTICS OF HAWAII: 1778–1965*, at 36–38 (1968) (discussing the decline of Hawai’i’s Indigenous population in the nineteenth century).

50. Sproat, *From Wai to Kānāwai*, *supra* note 48, at 9-3 to 9-5. Lo’i kalo refers to the wetland cultivation of the staple crop kalo (taro, or *Colocasia esculenta*), which was traditionally raised in irrigated paddies. See generally JOSEPH M. FARBER, *ANCIENT HAWAIIAN FISHPONDS: CAN RESTORATION SUCCEED ON MOLOKA’I?* 6–8 (2d ed. 2001) (analyzing the significance of loko i’a and current restoration efforts); HANDY & HANDY, *supra* note 2, at 71–118 (detailing the practices and culture of kalo cultivation in ancient Hawai’i, including the role of kalo and poi in Maoli society); HAWAIIAN DICTIONARY, *supra* note 1, at 209 (defining lo’i); Wayne Tanaka, *Loko i’a—Hawaiian Fishponds*, in NATIVE HAWAIIAN LAW, *supra* note 48, at 11-2 to 11-8 (detailing the history and cultural significance of loko i’a in ancient Hawai’i).

Hawai'i's Indigenous People.<sup>51</sup> In fact, fresh water was so important that it was revered as a kinolau, or the physical embodiment of Kāne, one of the four principal akua of the Maoli pantheon.<sup>52</sup> Given fresh water's significance to Indigenous communities and culture, it was shared by all and managed as a public trust resource for the benefit of present and future generations.<sup>53</sup>

Water's vital role in Maoli society is better understood when considering the interconnection of significant terms. In 'Ōlelo Hawai'i, the islands' Native language, the word for fresh water is wai.<sup>54</sup> Waiwai, or water repeated twice, means valuables or wealth.<sup>55</sup> The term for law is kānāwai, because Hawai'i's early laws evolved around the management and use of fresh water.<sup>56</sup> Given that wai, or water, is at the heart of each of these concepts, it is no coincidence that both wealth and the law were and continue to be defined by access to and appropriate management of Hawai'i's fresh water.<sup>57</sup>

Not long after the arrival of foreigners, Hawai'i became a magnet for

51. D. KAPUA'ALA SPROAT, *OLA I KA WAI: A LEGAL PRIMER FOR WATER USE AND MANAGEMENT IN HAWAII* 3–5 (2009) [hereinafter SPROAT, *OLA I KA WAI*] (detailing the role that fresh water played in pre-European contact Hawai'i and why it was a foundation for life in the islands).

52. HANDY & HANDY, *supra* note 2, at 65; *see also supra* note 4 and accompanying text (discussing Akua Kāne's significance).

53. *McBryde Sugar Co. v. Robinson*, 504 P.2d 1330, 1338 (Haw. 1973) (holding that “the right to water is one of the most important usufruct of lands, and it appears clear . . . [that] the right to water was specifically and definitely reserved for the people of Hawai[i] for the common good in all of the land grants”); Sproat, *From Wai to Kānāwai*, *supra* note 48, at 9–5; *see also* HAW. CONST. of 1840, translated in TRANSLATION OF THE CONSTITUTION AND LAWS OF THE HAWAIIAN ISLANDS, ESTABLISHED IN THE REIGN OF KAMEHAMEHA III 10–11 (photo. reprint 1994) (1842) (acknowledging the public trust nature of Hawai'i's water resources); HANDY & HANDY, *supra* note 2, at 63–64 (conceptualizing water as a public trust resource); KA LAMA KŪ O KA NO'EAU: THE STANDING TORCH OF WISDOM vi–vii (2009) (discussing how William S. Richardson, the former chief justice of the Hawai'i Supreme Court, helped to reincorporate Native Hawaiian tradition and custom into state law).

54. HAWAIIAN DICTIONARY, *supra* note 1, at 377. For a more in-depth discussion of the range of terms associated with fresh water, *see* HANDY & HANDY, *supra* note 2, at 57–58.

55. HAWAIIAN DICTIONARY, *supra* note 1, at 380.

56. *Id.* at 127–28; *see also* LORRIN ANDREWS, A DICTIONARY OF THE HAWAIIAN LANGUAGE 257 (2003) (“The ancient system of regulations for water courses contained almost everything the ancient Hawaiians formerly had in common in the shape of laws; hence the name *Kanawai* has in more modern times been given to laws in general.”); HANDY & HANDY, *supra* note 2, at 58 (“The word *kanawai*, or law, also tied back to water. *Ka-na-wai* is literally ‘belonging-to-the-waters.’”).

57. *See* HANDY & HANDY, *supra* note 2, at 57–58.

plantation agriculture, including the cultivation of sugar cane.<sup>58</sup> Hawai'i's favorable climate and year-round growing season were perfect for cane; all the sugar barons needed was water to irrigate their fields.<sup>59</sup> On Maui, like the other Hawaiian islands, miles of extensive ditch systems were constructed to capture free-flowing streams for the sugar planters' benefit.<sup>60</sup> Contrary to Native traditions and laws, newcomers to the islands viewed water as a commodity for private use.<sup>61</sup> They gave little thought to the cultural harms that resulted from taking the entire flow of streams and depriving natural and human communities of this physical and spiritual life force.<sup>62</sup>

Despite Maoli laws and customs that managed water as a public trust, plantations increasingly diverted streams and springs for their private use.<sup>63</sup> Conflicts over fresh-water resources erupted, first between plantation interests and Kānaka Maoli and later between

58. The history of plantations in Hawai'i is difficult and complex. For more information regarding Hawai'i's plantation history, see NOEL KENT, *HAWAII ISLANDS UNDER THE INFLUENCE* 35–55 (2d ed. 1993). See generally HANAHANA: AN ORAL HISTORY ANTHOLOGY OF HAWAII'S WORKING PEOPLE (Michi Kodama-Nishimoto et al. eds., 1984) (featuring oral history narratives of twelve laborers and how they felt working on the sugar plantations in the twentieth century); RONALD TAKAKI, *PAU HANA: PLANTATION LIFE AND LABOR IN HAWAII 1835–1920*, at 3–21 (1983) (describing the impact of plantation owners on Maoli); TENGAN REPORT, *supra* note 2, at 15–18; CAROL WILCOX, *SUGAR WATER: HAWAII'S PLANTATION DITCHES* 9–11 (1996) (detailing Hawai'i's plantation history of water appropriation).

59. WILCOX, *supra* note 58, at 1–2; D. Kapua'ala Sproat & Isaac H. Moriwake, *Ke Kalo Pa'a o Waiāhole: Use of the Public Trust as a Tool for Environmental Advocacy*, in CREATIVE COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT 247, 251–53 (Clifford Rechtschaffen & Denise Antolini eds., 2007).

60. See, e.g., WILCOX, *supra* note 58, at 114–37; Sproat, *From Wai to Kānāwai*, *supra* note 48, at 9–8 to 9–10. For more specific information on the various ditches and distribution systems on Maui, see Final D&O, *supra* note 25, at 25–32.

61. Sproat, *From Wai to Kānāwai*, *supra* note 48, at 9–6 to 9–10.

62. See, e.g., WILCOX, *supra* note 58, at 9–11 (acknowledging that “[o]ne can admire the vision and initiative of the early sugar planters while at the same time mourning the loss of water resources and authentic Hawaiian lifestyle”); TENGAN REPORT, *supra* note 2, at 15–18 (chronicling the impacts of sugar plantation diversions in Nā Wai 'Ehā on Kānaka Maoli and their culture); Elizabeth Ann Ho'oipo Kāla'ena'auao Pa Martin et al., *Cultures in Conflict in Hawai'i: The Law and Politics of Native Hawaiian Water Rights*, 18 U. HAW. L. REV. 71, 95 (1996) (explaining that sugar plantations withdrew “unlimited quantities of water regardless of the consequences to the environment and other water users,” ignoring “the basic precept that Hawaiians' traditional life support systems depended upon the integrity of ma[u]ka-makai (mountain to sea) resources”).

63. See TENGAN REPORT, *supra* note 2, at 15–18 (detailing the history of plantation owners taking public trust water without consulting Maoli communities).

competing plantations.<sup>64</sup> In fact, some of the *Hawai'i Reporter's* earliest published decisions on water rights involved disputes over flows taken from Nā Wai 'Ehā streams.<sup>65</sup> Court decisions under both the Kingdom of Hawai'i and later the Territory of Hawai'i began to reflect increasingly Western notions of private property, and soon both the physical resource and the law of water in Hawai'i were appropriated to suit plantation needs.<sup>66</sup>

After about a century of plantation rule, a movement resurfaced in the 1960s and 1970s to return public resources to public management and control.<sup>67</sup> As detailed in Part II.C, below, this created the regime for water resource management in Hawai'i today.<sup>68</sup>

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64. See, e.g., *Territory v. Gay*, 31 Haw. 376, 377 (1930); *Hawaiian Commercial & Sugar Co. v. Wailuku Sugar Co.*, 14 Haw. 50, 52 (1902); *Horner v. Kumuliili*, 10 Haw. 174, 175 (1895).

65. See *Lonoaea v. Wailuku Sugar Co.*, 9 Haw. 651, 652–53 (1895); *Peck v. Bailey*, 8 Haw. 658, 659–62, 673–74 (1867) (denying sugar company's claim to paramount rights to water in the Wailuku (or 'Īao) Stream, holding that both parties were limited to their appurtenant rights to use water for their lands, neither party having exceptional rights and further holding that the defendant had the right to use taro water); *WILCOX*, *supra* note 58, at 33 (explaining that “from 1900 to 1959, the Hawai'i Supreme Court was composed of lawyers drawn from the prominent business interests whose commercial philosophy they upheld”).

66. D. Kapua'ala Sproat, *Where Justice Flows Like Water: The Moon Court's Role in Illuminating Hawai'i Water Law*, 33 U. HAW. L. REV. (forthcoming 2011) (manuscript at 7–8) (on file with author) [hereinafter Sproat, *Where Justice Flows Like Water*]; see also SPROAT, *OLA I KA WAI*, *supra* note 51, at 6.

67. Sproat, *Where Justice Flows Like Water*, *supra* note 66, at 8–9.

68. *Id.* at 9; see also *KA LAMA KŪ O KA NO'EAU*, *supra* note 53, at vi–vii.

Hawai'i has a unique legal system, a system of laws that was originally built on an ancient and traditional culture. While that ancient culture had largely been displaced, nevertheless many of the underlying guiding principles remained. During the years after the illegal overthrow of the Hawaiian Kingdom in 1893 and through Hawai'i's territorial period, the decisions of our highest court, reflected a primarily Western orientation and sensibility that wasn't a comfortable fit with Hawai'i's indigenous people and its immigrant population. We set about returning control of interpreting the law to those with deep roots in and profound love for Hawai'i. The result can be found in the decisions of our Supreme Court beginning after statehood. Thus, we made a conscious effort to look to Hawaiian custom and tradition . . .—and consistent with Hawaiian practice, our court held that beaches were free to all, that access to the mountains and shoreline must be provided to the people, and that water resources could not be privately owned.

*Id.* (quoting Chief Justice William S. Richardson).



*B. Fresh Water's Historical and Cultural Significance in Nā Wai 'Ehā*

As detailed in Part I, above, Nā Wai 'Ehā was “famed in song and story.”<sup>69</sup> Even the water commission majority recognized that the abundance of natural and cultural resources, especially fresh water, made Nā Wai 'Ehā “the primary ritual, political, and population center of Maui.”<sup>70</sup> “Due to the profusion of fresh-flowing water in ancient times, Nā Wai 'Ehā supported one of the largest populations and was considered the most abundant area on Maui; it also figured centrally in Hawaiian history and culture in general.”<sup>71</sup> Moreover, “[t]he four ahupua'a of Nā Wai 'Ehā and their streams comprised the largest continuous area of wetland taro cultivation in [all of] the [Hawaiian] [I]slands.”<sup>72</sup> “Nā Wai 'Ehā was a prime location not only for fertile kalo lands that helped sustain Hawaiian culture for over 1,000 years, but also the creation of a complex irrigation system that the Hawaiian people properly managed and used to support robust communities.”<sup>73</sup> The abundant fresh water in this region thus physically and spiritually nurtured its Indigenous People, enriching lands and other resources, promoting a vibrant culture, enhancing the overall quality of life, and enabling political independence and cultural sovereignty.<sup>74</sup>

These natural riches also attracted sugar barons who diverted Nā Wai 'Ehā's fresh water for their commercial use.<sup>75</sup> Beginning in 1862, sugar interests began to construct and use ditches to take stream flows for plantation irrigation in the area.<sup>76</sup> “Historically, an average of about

69. HANDY & HANDY, *supra* note 2, at 272; see also *supra* note 5.

70. TENGAN REPORT, *supra* note 2, at 1.

71. Final D&O, *supra* note 25, at 8.

72. *Id.* For a definition of ahupua'a see *supra* note 18 and accompanying text.

73. TENGAN REPORT, *supra* note 2, at 15.

74. “Cultural sovereignty” is the effort of Native Peoples to “exercise their own norms and values in structuring their collective futures.” Rebecca Tsosie, *Engaging the Spirit of Racial Healing Within Critical Race Theory: An Exercise in Transformative Thought*, 11 MICH. J. RACE & L. 21, 45 (2005) (quotations omitted) (quoting Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 196 (2001)).

75. See generally TENGAN REPORT, *supra* note 2, at 15–18.

76. Final D&O, *supra* note 25, at 27. Construction on the companies' current surface water systems—the Spreckels, 'Āao and Waiehu, and Waihe'e ditch systems—began in 1882, 1900, and 1905, respectively, and built on and expanded the companies' initial irrigation systems. Hearings Officer's Proposed D&O, *supra* note 23, at 160. Today, “[t]he primary distribution systems receive stream waters via nine active diversions, two on Waihe'e River, one on North Waiehu Stream, one of South Waiehu Stream, two on 'Āao Stream and three on Waikapū Stream.” Final D&O, *supra* note 25, at 26. In addition there are a number of

67 mgd was diverted from the four streams for sugar cane irrigation: 40 mgd from Waihe'e, 3 mgd from North Waiehu, 3 mgd from South Waiehu, 18 mgd from 'Īao, and 3 mgd from Waikapū," leaving the streams bone-dry below the ditch intakes.<sup>77</sup> These diversions took the lion's share of Nā Wai 'Ehā's fresh water with significant, negative impacts on Kānaka Maoli resources, cultural integrity, social welfare conditions, and self-governance. Unfortunately, "Native Hawaiian communities and agricultural systems felt the burden of the plantations almost immediately, and the rise of sugar initiated a period of great transformation in Nā Wai 'Ehā and in Hawai'i."<sup>78</sup> As one example, on January 13, 1866, S.D. Haku'ole chronicled the effects of the sugar plantations in Nā Wai 'Ehā via the Hawaiian language newspaper *Nūpepa Kū'oko'a*:

DESPAIR! WAILUKU IS BEING DESTROYED BY THE SUGAR PLANTATION—A letter by S.D. Haku'ole, of Kula, Maui arrived at our office, he was declaring that the land of Wailuku is being lost due to the cultivation of sugarcane. Furthermore, he states the current condition of once cultivated taro patches being dried up by the foreigners, where they are now planting sugarcane. Also, he fears that Hawaiians of that place will no longer be able to eat poi, and that there will probably only be hard crackers which hurt the teeth when eaten, a cracker to snack on but does not satisfy the hunger of the Hawaiian people. Although, let it be known that the Hawaiian people were accustomed to eating poi.<sup>79</sup>

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"kuleana" intakes directly on the streams, which historically provided water to Kānaka Maoli for household and other uses, including the cultivation of kalo. *Id.*

77. Final D&O, *supra* note 25, at 32.

78. TENGAN REPORT, *supra* note 2, at 15.

79. *Id.* at 16 (quoting S.D. Haku'ole, *Despair! Wailuku Is Being Destroyed by The Sugar Plantation*, NŪPEPA KŪ'OKO'A, Jan. 13, 1866).

The words of Haku'ole remind us that Native Hawaiian culture is intimately tied to the land and the water, and the inability to access these resources threatens the life of a people. Yet it is also here that one might find hope, for in the water is life, and the return of the streams will promote a vigorous and healthy regeneration of land and people.

*Id.* at 18; see also HANDY & HANDY, *supra* note 2, at 71–115 (detailing the practices and culture of kalo cultivation in ancient Hawai'i, including the role of kalo and poi in Kānaka Maoli society); *supra* note 22 and accompanying text.

Over a century later, those impacts continue: “Cultural experts and community witnesses provided uncontroverted testimony regarding limitations on Native Hawaiians’ ability to exercise traditional and customary rights and practices in the greater Nā Wai ‘Ehā area due to the lack of fresh water flowing in Nā Wai ‘Ehā’s streams and into the nearshore marine waters.”<sup>80</sup>

For over 150 years, sugar plantations arose, merged, and closed in Nā Wai ‘Ehā, although the principal plantation interests remained Wailuku Sugar Company (which later became Wailuku Agribusiness and is now Wailuku Water Company (WWC))<sup>81</sup> and HC&S.<sup>82</sup> Despite many changes, including significant reductions in the amount of land in cane cultivation, plantation diversions on Nā Wai ‘Ehā streams continue apace, maintaining the subordination of Maoli people, culture, and resources.<sup>83</sup>

### C. Hawai‘i’s Legal Regime for Water Resource Management

In light of Hawai‘i’s unique history (including the United States’ role in the illegal overthrow of the sovereign Hawaiian Kingdom in 1893), issues impacting Kānaka Maoli implicate restorative justice principles that underscore the importance of respecting Indigenous rights in partial redress for the harms of American colonialism.<sup>84</sup> Justice for Hawai‘i’s

80. Final D&O, *supra* note 25, at 10; *see also* TENGAN REPORT, *supra* note 2, at 15–19 (noting the negative effects of plantation irrigation systems on Kānaka Maoli).

81. *Background on Nā Wai ‘Ehā*, EARTHJUSTICE, <http://earthjustice.org/features/background-on-na-wai-eha> (last visited Oct. 11, 2011) (“Wailuku Sugar Company has reinvented itself as Wailuku Water Company. It maintains its water diversions to turn a profit by selling that water to the private development projects built on the former plantation lands.”).

82. HC&S is a subsidiary of Alexander & Baldwin (A&B) and the major user of Nā Wai ‘Ehā water to irrigate about 5,000 acres of its 36,000-acre plantation. Koa Kaulukukui, *Maui: In Water We Trust*, THE HAWAII INDEPENDENT (June 16, 2011) (on file with law review). HC&S’s plantation consists of sugar cane, although it leases some land to Monsanto, an agricultural biotechnology corporation, to grow seed corn. *Id.* “Historically, HC&S supplemented the stream water systems with 16 wells tapping underground water beneath its plantation with the capacity to pump over 240 million gallons per day.” *Id.* A&B is the last of the “Big Five” companies—the original five plantations started by colonists—still dominant in Hawai‘i’s economy. Allison Schaefer, *Among the Big 5, A&B Still Reigns*, HONOLULU STAR-BULLETIN (Oct. 22, 2009), [http://archives.starbulletin.com/content/20091025\\_among\\_the\\_big\\_5\\_ab\\_still\\_reigns](http://archives.starbulletin.com/content/20091025_among_the_big_5_ab_still_reigns).

83. *See Background on Na Wai ‘Ehā*, *supra* note 81; *Four Waters of Maui Removed From Private Control*, ENV’T NEWS SERV. (Mar. 21, 2008), <http://www.ens-newswire.com/ens/mar2008/2008-03-21-091.html>.

84. Pub. L. 103-150, 107 Stat. 1510 (1993) [hereinafter *Apology Resolution*] (“Joint

Indigenous People, however, also benefits all of Hawai'i's people, many of whom are not "Hawaiian" by ethnicity or nationality.<sup>85</sup>

As described below, Hawai'i currently has a detailed legal regime for the management of fresh water, including constitutional provisions, statutes, and other legal tools that have the potential to yield just results.<sup>86</sup> Although framed generally, much of the legal language appears favorable to both Hawai'i's Indigenous People<sup>87</sup> and the community at large.<sup>88</sup> Establishing this regime was both its own struggle and a direct response to years of repressive colonial interests that seized Native lands and took massive quantities of stream water for plantation agribusiness while decimating agrarian Maoli communities reliant on continuous mauka to makai flow.<sup>89</sup>

Today, in light of acknowledged wrongful land confiscation, cultural destruction, and the devastation<sup>90</sup> of Maoli communities, both the

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Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii."); *see also* Eric K. Yamamoto and Jen-L W. Lyman, *Racializing Environmental Justice*, 72 U. COLO. L. REV. 311, 344 (2001).

85. *See* Yamamoto & Lyman, *supra* note 84, at 316–17.

86. *See* HAW. CONST. art. XI, §§ 1, 7; HAW. REV. STAT. § 174C (1993); HAW. ADMIN. R. §§ 13-167-1 to 13-171-60.

87. *See, e.g.*, HAW. REV. STAT. § 174C-101(c) ("Traditional and customary rights of ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 shall not be abridged or denied by this chapter. Such traditional and customary rights shall include, but not be limited to, the cultivation or propagation of taro on one's own kuleana and the gathering of h[ī]h[ī]wai, [ʻō]pae, [ʻ]o'opu, limu, thatch, ti leaf, aho cord, and medicinal plants for subsistence, cultural, and religious purposes."); *id.* § 174C-101(d) ("The appurtenant water rights of kuleana and taro lands, along with those traditional and customary rights assured in this section, shall not be diminished or extinguished by a failure to apply for or receive a permit under this chapter.").

88. *See, e.g.*, *In re Wai'ola O Moloka'i, Inc.*, 83 P.3d 664, 680 (Haw. 2004) ("The Code mandates consideration of the large variety of public interests. The definition of 'public interest' in the Code broadly encompasses the protection of the environment, traditional and customary practices of native Hawaiians, scenic beauty, protection of fish and wildlife, and protection and enhancement of the waters of the State.").

89. Hawai'i's citizens came together in a constitutional convention and crafted amendments to Hawai'i's constitution to elevate the management of natural and cultural resources to a constitutional mandate, while also centralizing management of fresh water under a single state agency to minimize political influence at the county level. *See* HAW. CONST. art. XI, §§ 1, 7. In 1978, Hawai'i's voters ratified those amendments and in 1987 Hawai'i's State Water Code, Hawai'i Revised Statutes chapter 174C, was implemented as a comprehensive management tool for Hawai'i's water resources. *See* Sproat, *Where Justice Flows Like Water*, *supra* note 66, at 11–12; *supra* note 68 (discussing the evolution of Hawai'i law, including water, and its roots in Maoli culture).

90. *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 295 F. Supp. 2d 1141, 1150–51 (D. Haw. 2003), *aff'd in part, rev'd in part*, 416 F.3d 1025 (9th Cir. 2005), *reh'g en*

federal government and state legislature have separately committed to reconciling with Kānaka Maoli.<sup>91</sup> Hawai‘i’s people embraced restorative justice principles and ratified those obligations, even though the state as a whole has struggled to actualize that commitment.<sup>92</sup> On the ground in the community, however, the law has produced limited salutary results.<sup>93</sup>

The State’s commitment to reconciliation with Kānaka Maoli is particularly relevant in the context of Hawai‘i’s management of its natural and cultural resources—especially the plantation history of water appropriation.<sup>94</sup> With these restorative justice goals in mind, Hawai‘i’s Constitution was amended and the Water Code adopted with directives requiring the water commission to take the initiative to protect and preserve the *public’s* interest in fresh water resources, with specific provisions for Maoli rights and interests.<sup>95</sup> Article XI, section 1

*banc granted*, 441 F.3d 1029 (9th Cir. 2006), *rev’d en banc*, 470 F.3d 827 (9th Cir. 2006).

91. See, e.g., Apology Resolution, *supra* note 84, at 1; 1997 Haw. Sess. Laws 956, § 1; 1993 Haw. Sess. Laws 1009, § 1(9); H.R. 1627, 26th Leg. (Haw. 2011); H.R. Con. Res. 179, 17th Leg. (Haw. 1993). The Apology Resolution, for example, apologized for and acknowledged the significance of the illegal overthrow of the Kingdom of Hawai‘i and agreed to support reconciliation efforts. See Apology Resolution, *supra* note 84, at 8–9. It commits Congress to provide a proper foundation for reconciliation between the United States and Kānaka Maoli. *Id.* In 2011, Hawai‘i’s State Legislature reaffirmed its commitment to Kānaka Maoli by passing a new law acknowledging a special trust relationship between the United States and Maoli. H.R. 1627, 26th Leg. (Haw. 2011).

92. See, e.g., *Kamehameha Sch.*, 441 F.3d at 1174–75; *Office of Hawaiian Affairs v. Housing and Cmty. Dev. Corp. of Haw.*, 177 P.3d 884, 900 (Haw. 2008) (noting that “the ‘Apology Resolution by itself does not require the State to turn over the lands to the Native Hawaiian people, but it puts the State on notice that it must carefully preserve these lands so that a subsequent transfer can take place when the political branches reach an appropriate resolution of this dispute”); Haw. H.R. Con. Res. 179.

93. See, e.g., *The Water Commission: An Idea Whose Time Has Passed*, ENV’T HAWAI‘I (Env’t Haw., Hilo, Haw.), July 2010, at 2, 3 [hereinafter *An Idea Whose Time Has Passed*] (“[T]he only purpose that the [w]ater [c]ommission seems to serve these days, so far as stream restoration is concerned, is to give diverters years, even decades, of water as the challenges to their use drags through the commission’s unwieldy . . . . Even after it issues its milquetoast orders, it lacks the staff—to say nothing of the will—to enforce them.”).

94. For example, in 1993, the legislature established the Hawaiian Sovereignty Advisory Commission to advise the legislature on how to “facilitate efforts of native Hawaiians to be governed by an indigenous . . . nation of their . . . choosing” as “the indigenous people of Hawai[i]’i denied the mechanism for expression of their inherent sovereignty . . . and self-determination, their lands, and their ocean resources.” 1993 Haw. Sess. Laws 1009, 1010.

95. In a path-breaking decision, the Hawai‘i Supreme Court opined that the state water commission “must not relegate itself to the role of a mere umpire passively calling balls and strikes for adversaries appearing before it, but instead must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process.” *In re Water Use Permit Applications (Waiāhole I)*, 9 P.3d 409, 455 (Haw. 2000) (internal quotations omitted); see also HAW. REV. STAT. §§ 174C-63, -101

of Hawai'i's Constitution provides that "[a]ll public natural resources are held in trust by the State for the benefit of the people."<sup>96</sup> Article XI, section 7 of Hawai'i's Constitution makes explicit reference to water, including the directive "to protect, control and regulate the use of Hawai'i's water resources for the benefit of its people." Significantly, "article XI, section 1 and article XI, section 7 adopt the public trust doctrine as a fundamental principle of constitutional law in Hawai'i."<sup>97</sup>

Many trace the public trust's origin to English and Roman law.<sup>98</sup> Yet, long before the existence of the constitutional provisions described above, cases and laws of the Hawaiian Kingdom, along with Maoli custom and tradition, firmly established the principle that natural resources (including water) were not private property, but were held in trust by the government for the benefit of the people.<sup>99</sup> Today under Hawai'i's Constitution, Water Code, and common law, the "water resources trust" applies to "all water resources without exception or distinction."<sup>100</sup> The public trust establishes "a dual mandate of (1) protection and (2) maximum reasonable and beneficial use."<sup>101</sup> The water commission, therefore, has an "affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible."<sup>102</sup>

Thus far, the Hawai'i Supreme Court has identified only a handful of "public trust purposes," including environmental protection, traditional

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(1993); *supra* note 89 and accompanying text (reviewing the 1978 Constitutional Convention and its impacts).

96. HAW. CONST. art. XI, § 1. Some text here and for the next two paragraphs previously appeared in SPROAT, OLA I KA WAI, *supra* note 51, at 3–5.

97. *Waiāhole I*, 9 P.3d at 444 (citations omitted) (citing *Payne v. Kassab*, 361 A.2d 263, 272 (1976)).

98. For a detailed analysis of common and Roman law development of the public trust doctrine, see Joseph L. Sax, *The Public Trust Doctrine in the Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475–76 (1970).

99. See, e.g., HAW. CONST. of 1840, *supra* note 53, at 10–11 (noting that the first constitution of the Kingdom of Hawai'i declared that the land and its resources "belonged to the chiefs and people in common, of whom [the King] was the head and had the management of the landed property"); Hawai'i Kingdom Laws of 1839, *reprinted and translated in TRANSLATION OF THE CONSTITUTION AND LAWS OF THE HAWAIIAN ISLANDS*, *supra* note 53, at 33 (reprinting an 1839 law respecting water for irrigation, which sought to manage water resources for the common good); see also Sproat, *Where Justice Flows Like Water*, *supra* note 66, at 5–6.

100. *Waiāhole I*, 9 P.3d at 445.

101. *Id.* at 451.

102. *Id.* at 453 (emphasis removed) (quoting *Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty. (Mono Lake)*, 658 P.2d 709, 728 (Cal. 1983)).

and customary Kānaka Maoli rights, appurtenant rights, domestic water uses, and reservations for the Department of Hawaiian Home Lands.<sup>103</sup> Public trust purposes have priority over private commercial uses, which do not enjoy the same protection.<sup>104</sup> The public trust dictates that “any balancing between public and private purposes [must] begin with a presumption in favor of public use, access, and enjoyment” and “establishes use consistent with trust purposes as the norm or ‘default’ condition.”<sup>105</sup> Offstream diverters who seek water for their private commercial gain have the burden of justifying proposed uses in light of protected rights in the resources, including traditional and customary Maoli practices. Many of the Water Code’s provisions were purposefully crafted to rectify the monopoly of resources by a handful of business interests (e.g., sugar plantations owned by descendants of American colonists) to ensure that water supplies supported the entire range of public uses and to prioritize certain uses, including Indigenous rights and practices.<sup>106</sup>

In addition to the Water Code, constitutional and statutory

103. *Id.* at 448–50; *In re Wai’ola o Moloka’i*, 83 P.3d 664, 694 (Haw. 2004). Appurtenant rights appertain or attach to parcels of land that were cultivated, usually in the traditional staple kalo, at the time of the Māhele. See *Reppun v. Bd. of Water Supply*, 656 P.2d 57, 78 (Haw. 1982). The Department of Hawaiian Home Lands was established through the enactment of the Hawaiian Homes Commission Act, 42 Stat. 108 (1921). The HHCA provides “rehabilitation of the native Hawaiian people through a government-sponsored homesteading program” intended to “provide for economic self-sufficiency of native Hawaiians through the provision of land.” *Laws/Rules*, DEP’T OF HAWAIIAN HOMELANDS, <http://hawaii.gov/dhhl/laws> (last visited Oct. 12, 2011).

104. *Waiāhole I*, 9 P.3d at 454.

105. *Id.*

106. See HAW. REV. STAT. § 174C-2 (1993); see also *Waiāhole I*, 9 P.3d at 449–50. In *Waiāhole*, the court explained its position as follows:

[W]e continue to uphold the exercise of Native Hawaiian and traditional customary rights as a public trust purpose. . . .

....

Although its purpose has evolved over time, the public trust has never been understood to safeguard rights of exclusive use for private commercial gain. . . .

....

. . . [I]f the public trust is to retain any meaning and effect, it must recognize enduring public rights in trust resources separate from, and *superior to*, the prevailing private interests in the resources at any given time.

*Id.* (emphasis added); see also *Wai’ola*, 83 P.3d at 680 (“The definition of ‘public interest’ in the Code broadly encompasses the protection of the environment, traditional and customary practices of native Hawaiians, scenic beauty, protection of fish and wildlife, and protection and enhancement of the waters of the State.”).

provisions also safeguard Indigenous rights and practices. For example, Hawai'i's Constitution "reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants" of Hawai'i's Indigenous People.<sup>107</sup> Moreover, Hawai'i Revised Statutes sections 1-1 and 7-1 provide independent protections for traditional and customary Maoli practices, and water rights in particular.<sup>108</sup>

The Water Code's basic structure for water resource management in Hawai'i, however, has not achieved the law's stated purpose of protecting and restoring fresh water resources, leaving the vast majority of those resources in the hands of plantation or former-plantation interests.<sup>109</sup> The law gives water commissioners and communities a false sense that the mere passage of a statute is sufficient and that nothing more needs to be done. After all, because the Water Code is in place, many assume that qualified water commissioners will be appointed, sufficient funding will be sought and provided, and that commission staff will implement constitutional and statutory mandates.<sup>110</sup> In the pursuit of justice through law, however, a more in-depth contextual examination of the current state of water resource management in Hawai'i reveals an unsavory political and economic reality.<sup>111</sup> The longstanding failure to establish scientifically based Interim Instream Flow Standards (IIFSs) provides one example.

IIFSs are critical tools for water management in Hawai'i because

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107. HAW. CONST. art. XII, § 7.

108. HAW. REV. STAT. § 1-1 (1993) (noting the common law of England is "declared to be the common law of the State of Hawai'i in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage"); *id.* § 7-1 ("[P]eople 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, but they shall not have a right to take such articles to sell for profit; further, t]he people shall also have a right to drinking water, and running water, and the right of way.").

109. Compare HAW. REV. STAT. § 174C-5 (detailing the water commission's general powers and duties), with *An Idea Whose Time Has Passed*, *supra* note 93, at 3 ("If the Legislature had tried to invent a means of paying lip service to streams while leaving status quo diversions intact and flourishing, it would have been hard pressed to come up with a better solution than the water commission.").

110. Sproat, *Water*, *supra* note 14, at 191-94.

111. See, e.g., *id.*; *An Idea Whose Time Has Passed*, *supra* note 93, at 3 ("[T]he fact remains: the [w]ater [c]ommission, as a tool for resolving stream disputes, is utterly, hopelessly broken.").



they underpin the entire instream use and protection program.<sup>112</sup> An IIFS establishes the minimum amount of water that must remain in a stream, or a particular reach of a stream, to support beneficial instream uses such as the maintenance of ecosystems and wildlife habitats, water quality, and traditional and customary Native Hawaiian practices.<sup>113</sup> The Hawai'i Supreme Court deemed IIFSs "the primary mechanism by which the commission is to discharge its duty to protect and promote the entire range of public trust purposes dependent upon instream flows."<sup>114</sup> Given this vital role, the Water Code requires the commission to set IIFSs "on a stream-by-stream basis whenever necessary to protect the public interest in the waters of the State."<sup>115</sup> The commission also outlined an investigation and fact-finding process and mandated that any IIFS or IFS<sup>116</sup> "shall be adopted by the commission not later than July 1, 1990."<sup>117</sup> Nevertheless, the water commission did not approve standards that were based on the Code's rigorous requirements for scientific analysis and consultation with expert agencies.<sup>118</sup> Instead, the commission simply adopted as IIFSs whatever amount of water, if any, happened to be flowing in certain streams on a particular date.<sup>119</sup> This

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112. See *Waiāhole I*, 9 P.3d 409, 460 (Haw. 2000).

113. See HAW. REV. STAT. § 174C-3 (defining all beneficial instream uses of stream water).

114. *Waiāhole I*, 9 P.3d at 460.

115. HAW. REV. STAT. § 174C-71(1) (providing an overview of requirements for the protection of instream uses, including the establishment of IIFS).

116. An IFS or Instream Flow Standard is a "quantity or flow of water or depth of water which is required to be present at a specific location in a stream system at certain specified times of the year to protect fishery, wildlife, recreational, aesthetic, scenic, and other beneficial instream uses." *Id.* § 174C-3. An IFS is permanent, whereas an IIFS is temporary. In establishing an IIFS, the Commission must adhere to many of the same standards established for an IFS. SPROAT, OLA I KA WAI, *supra* note 51, at 22–23. The IIFS process is supposed to be expedited, however, and the standard is more flexible in terms of how broadly it may be imposed, when compared to a permanent IFS. *Id.*

117. HAW. ADMIN. R. § 13-170-2(e) (1988). The initial deadline was roughly three years after the Water Code was enacted. Shortly thereafter, administrative rules specified that IIFSs must be set for streams on the various Hawaiian Islands on a schedule ranging from a July 31, 1987 deadline for Windward O'ahu to a December 31, 1988 deadline for West Maui and Leeward O'ahu. *Id.* § 13-169-42 ("The commission shall adopt interim instream flow standards as follows: (1) Windward O'ahu by July 31, 1987; (2) East Maui and Kaua'i by December 31, 1987; (3) Hawai'i and Moloka'i by July 1, 1988; and (4) West Maui and Leeward O'ahu by December 31, 1988.").

118. See, e.g., HAW. REV. STAT. § 174C-71(1)(E).

119. See, e.g., HAW. ADMIN. R. §§ 13-169-44 to -49; see also *An Idea Whose Time Has Passed*, *supra* note 93, at 2 (explaining the process of establishing "non-quantified 'interim' flow standards, reflecting the status quo.").

was done without assigning any actual numbers to these standards, making them practically impossible to enforce.<sup>120</sup>

The water commission claimed that this action satisfied the legal requirement of “protect[ing] the public interest”<sup>121</sup> by identifying the “flows of water necessary to protect adequately fishery, wildlife, recreational, aesthetic, scenic, or other beneficial instream uses in the stream,”<sup>122</sup> while considering the “economic impact”<sup>123</sup> of taking water out of the stream for other “noninstream purposes.”<sup>124</sup> These status quo IIFSs, however, left the streams and their communities with little to no protection and no immediate prospects of restoration, despite the Water Code’s intent and admonitions to the contrary.<sup>125</sup> As the Hawai‘i Supreme Court recognized,

The [c]ommission, obviously, cannot “implement” or “protect” standards that do not exist. In order for the “instream use protection” regime to fulfill its stated purpose, therefore, the [c]ommission must designate instream flow standards as early as possible, during the process of comprehensive planning, and particularly before it authorizes offstream diversions potentially detrimental to public instream uses and values.<sup>126</sup>

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120. *See An Idea Whose Time Has Passed*, *supra* note 93, at 2–3.

121. HAW. REV. STAT. § 174C-71(1)(C).

122. *Id.*

123. *Id.* § 174C-71(1)(E).

124. *Id.*

125. *See An Idea Whose Time Has Passed*, *supra* note 93, at 3 (“Protection and restoration of streams and the customary and traditional uses associated with them are among the commission’s primary purposes, as set forth by law. Over the last two decades, however, the zeal with which it has pursued these goals has undergone a slow transformation.”).

126. *Waiāhole I*, 9 P.3d at 409, 461 (citations omitted); *see also Waiāhole II*, 93 P.3d 643, 654 (Haw. 2004). In *Waiāhole II*, the Court also admonished the Commission for the delay in setting instream flow standards:

We take this opportunity, however, to remind the [w]ater [c]ommission that seventeen years have passed since the Water Code was enacted requiring the [w]ater [c]ommission to set permanent instream flow standards by investigating the streams. In addition, four years have passed since this court held that “the Commission shall, with utmost haste and purpose, work towards establishing permanent instream flow standards for windward streams.’ The fact that an IIFS is before this court evinces that this mandate has not yet been completed as of the [w]ater [c]ommission’s D&O II.

*Id.* (citations omitted). Temporary IIFSs and permanent IIFSs “are the [w]ater [c]ommission’s principal mechanisms to ensure that surface water rights and interests, including resource

To this day, almost twenty-five years after the Water Code was passed, the water commission has yet to issue even one permanent IFS and the only IIFSs based on some actual information, rather than status-quo diversions, have been established as a result of litigation.

As detailed in Part V, below, as the Hui experienced first-hand, even with seemingly favorable legal language that embodies key contextual factors, decision-makers continue to wield tremendous power to render dubious and even retrogressive outcomes, under the guise of objectively applying “neutral” laws. As this article demonstrates, in the broad array of Native Peoples’ claims, contextual legal analysis must be employed to do the heavy lifting of unpacking political and economic influences that shape how rights and obligations are actually determined on the ground.<sup>127</sup> A more contextual legal analysis is vital to illuminate the specific claims of Kānaka Maoli and the meaning of “justice” through law in this dispute.

### III. AN APPROACH TO INDIGENOUS PEOPLES’ CLAIMS AND COURT RULINGS

#### A. *The Limits of Legal Formalism and Emergence of Legal Realism*

To earnestly grapple with Indigenous issues in the context of water and beyond, legal analysis cannot focus solely on “traditional” notions

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protection, are adequately considered.” SPROAT, OLA I KA WAI, *supra* note 51, at 22. The Water Code required the establishment and administration of an “instream use protection program” when the Code was passed in 1987; however, the only standards that are based on actual information have been set as a result of litigation, with the first such IIFSs established in *Waiāhole*. See HAW. REV. STAT. § 174C-71 (1993) (detailing the requirements of the instream use protection program).

127. See *An Idea Whose Time Has Passed*, *supra* note 93, at 2.

It was widely thought that, as commission staff gained knowledge of the demands made of stream resources, the commission would on its own adopt more permanent flow standards and even identify and protect streams having high value for recreation or resources. That, too, was a dream, undercut by the harsh realities of insufficient information and, frankly, a complete failure of nerve in the face of the political and economic juggernaut represented by the [sugar] planters.

*Id.* As one example of how political and other influences shape decision-making, the water commission’s composition is the direct result of the political process with all of its members appointed by the governor, after confirmation by the Senate. *The Commission*, COMMISSION ON WATER RESOURCE MANAGEMENT, [http://hawaii.gov/dlnr/cwrm/aboutus\\_commission.htm#selection](http://hawaii.gov/dlnr/cwrm/aboutus_commission.htm#selection) (last visited Oct. 12, 2011).

of rights because many such notions are grounded in Western concepts of property that are not universally applicable, especially in Hawai'i.<sup>128</sup> There is a need to go beyond the limited application of narrowly drawn legal rules to the selectively shaped facts of cases.<sup>129</sup> The formalist approach to Native Peoples' claims, history shows, legitimized colonialism, the confiscation of land, the destruction of culture, and the destabilization of self-government.<sup>130</sup>

### 1. The Limits of Legal Formalism

In the 1800s, legal formalism evolved in an attempt to deem the law a neutral tool that produced justice by mechanistically applying legal rules to cases.<sup>131</sup> Classic legal formalism is a "theory of adjudication according to which (1) the law is rationally determinate, and (2) judging is mechanical. It follows, moreover, from (1), that (3) legal reasoning is autonomous, since the class of legal reasons suffices to justify a unique outcome; no recourse to non-legal reasons is demanded or required."<sup>132</sup>

Formalism, therefore, "holds that the law is an internally consistent and logical body of rules that is independent from the variable forms of

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128. See, e.g., Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm'n, 903 P.2d 1246, 1268 (Haw. 1995) ("Our examination of the relevant legal developments in Hawaiian history leads us to the conclusion that the western concept of exclusivity is not universally applicable in Hawai'i."); Reppun v. Bd. of Water Supply, 656 P.2d 57, 63 (Haw 1982) (clarifying that Hawai'i's system of water rights is "based upon and is an outgrowth of ancient Hawaiian customs and methods of Hawaiians in dealing with the subject of water" (quoting Territory v. Gay, 31 Haw. 376, 395 (1930))).

129. See Yamamoto & Lyman, *supra* note 84, at 311 (noting that for racialized communities and Indigenous Peoples, "environmental justice is mainly about cultural and economic self-determination and belief systems that connect their history, spirituality, and livelihood to the natural environment").

130. See, e.g., Rennard Strickland, *Genocide-At-Law: An Historic and Contemporary View of the Native American Experience*, 34 U. KAN. L. REV. 713, 735-39 (1986); Tsosie, *supra* note 74, at 27-33; Robert A. Williams, Jr., *Columbus's Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples' Rights of Self-Determination*, 8 ARIZ. J. INT'L & COMP. L. 51, 53-55 (1991); Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 239-50 (1989).

131. See generally Joseph Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465 (1988) (providing an in-depth discussion of legal formalism).

132. TAMANAHA, *supra* note 31, at 2 (internal quotations omitted) (quoting Brian Leiter, *supra* note 31, at 1145-46); Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 639 (1999) ("Formalism therefore entails an interpretive method that relies on the text of the relevant law and that excludes or minimizes extratextual sources of law.").

its surrounding social institutions.”<sup>133</sup> Given these theoretical underpinnings, the “law was objective, unchanging, extrinsic to the social climate, and, above all, different from and superior to politics.”<sup>134</sup>

Although the prevailing view for many years<sup>135</sup>—and still embraced by some scholars and many law school curricula<sup>136</sup>—legal formalism’s failure to fully consider social and historical context, politics, culture, and a myriad of other social factors impedes both the courts’ capacity to render just decisions and the general public’s understanding of the law’s role in shaping society. Legal formalism also constrains many groups’ ability to achieve any semblance of justice. “The message the formalist model conveys is that existing power relations in the real world are by definition legitimate and must go unchallenged.”<sup>137</sup>

Formalist analysis, however, can neither explain nor predict how the legal process actually works for Indigenous Peoples. History indicates that legal formalism’s narrow lens employs rules (for example, the

133. TAMANAHA, *supra* note 31, at 2 (internal quotations omitted) (quoting MATHIEU DEFLEM, *SOCIOLOGY OF LAW: VISIONS OF A SCHOLARLY TRADITION* 98 (2008)); *see also* Peer Zumbansen, *Law After the Welfare State: Formalism, Functionalism, and the Ironic Turn of Reflexive Law*, 56 AM. J. COMP. L. 769, 782 (2008) (noting that legal formalism may be understood by “extrapolating a logical structure of a confined set of norms from a small set of higher-order principles”).

134. Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 731 (2009) (internal quotations omitted) (quoting WILLIAM M. WIECEK, *LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE* 187 (1988)). Tamanaha also raises questions about whether the formalist–realist divide has been accurately framed: “Legal theory discussions of legal formalism are irrelevant, misleading, or empty. Debates about judging are routinely framed in terms of antithetical formalist–realist poles that jurists do not actually hold.” TAMANAHA, *supra* note 31, at 3; *see also* Edward Rubin, *The Real Formalists, The Real Realists, and What They Tell Us About Judicial Decision Making and Legal Education*, 109 MICH. L. REV. 863, 866 (2011) (reviewing TAMANAHA, *supra* note 31). For a more in-depth discussion of legal formalism, *see* Daniel Farber, *The Ages of American Formalism*, 90 NW. U. L. REV. 89 (1995).

135. *See* TAMANAHA, *supra* note 31, at 4. According to Tamanaha, some jurists abandoned formalism much earlier than the realist revolution in the 1920s: “Jurists in the late nineteenth century, it turns out, took substantial pride in the progress they had made in *overcoming* formalism in law. They thought formalism was a primitive legal stage beyond which they had evolved.” *Id.*; *see also* Steven C. Papkin, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy*, 16 HARV. J.L. & PUB. POL’Y 565, 569 (1993) (reviewing MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960* (1992)).

136. Not just conservative scholars embrace legal formalism; it remains the primary method of teaching in law schools. *See* Singer, *supra* note 131, at 473 (“It is correct to conclude that in certain ways, little changed by 1960. Even today, we still rely almost entirely on appellate decisions in law school classes.”).

137. Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 376 (1992).

“intent of the framers”) and methods of reasoning (for example, *stare decisis*)<sup>138</sup> in ways that treat Native Peoples as inferior to Europeans and, therefore, unworthy of self-governance; it also fails to provide either a balanced perspective or a genuine vehicle to address legal and cultural harms.<sup>139</sup>

Consider the seminal case of *Johnson v. M'Intosh*, where the Supreme Court analyzed whether Native Americans had lawful title to their lands and could sell property to parties other than the countries that colonized them.<sup>140</sup> At issue was whether Johnson, who purchased land directly from the Illinois and Piankeshaw nations in 1775, had superior title to M'Intosh, a war veteran who obtained title in 1818 from the United States government.<sup>141</sup> In crafting the Court's opinion, Chief Justice John Marshall relied on the doctrine of discovery, which assumed European superiority over “fierce savages”<sup>142</sup> and, thus, “gave title to the government by whose subjects, or by whose authority, it was made.”<sup>143</sup> The Court recognized Native rights of occupancy only, as

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138. *Stare decisis* is Latin for “stand by things decided” and is a legal term that refers to a court's obligation to abide by former court decisions. BLACK'S LAW DICTIONARY 1537 (9th ed. 2009).

139. See ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 315–17 (1990); JONATHAN KAY KAMAKAWIWO'OLE OSORIO, DISMEMBERING LĀHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887, at 44–73, 250–60 (2002). See generally KAME'ELEIHIWA, *supra* note 36 (detailing cultural harms to Native Hawaiians).

140. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 571–72 (1823). This complex case requires a detailed discussion to truly understand the impacts of the doctrine of discovery on Native Americans. For a more thorough inquiry, see Blake A. Watson, *John Marshall and Indian Land Rights: A Historical Rejoinder to the Claim of “Universal Recognition” of the Doctrine of Discovery*, 36 SETON HALL L. REV. 481, 483–86 (2006) (discussing the significance of *Johnson v. M'Intosh*).

141. See *M'Intosh*, 21 U.S. at 555–56, 560, 572; see also David E. Wilkins, *Johnson v. M'Intosh Revisited: Through the Eyes of Mitchel v. United States*, 19 AM. INDIAN L. REV. 159, 161–62 (1994).

142. *M'Intosh*, 21 U.S. at 590–92. The Court justified the doctrine of discovery using racism and ethnocentrism, for example, the decision characterized

the tribes of Indians inhabiting this country [as] fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

*Id.*

143. *Id.* at 573. The Court did, however, recognize the inherent right of Indigenous

subordinate to the perceived superiority of European ownership.<sup>144</sup> The decision used Western laws and practices to justify “the exclusive right of the discoverer to appropriate the lands occupied by the Indians.”<sup>145</sup> After all, “[c]onquest gives a title which the Courts of the conqueror cannot deny.”<sup>146</sup>

As demonstrated by *M’Intosh*, the narrow lens of legal formalism deployed established methods (*stare decisis* or precedent) to embrace regressive rules (for example, the “doctrine of discovery”) in light of selected facts (Natives as uncivilized “savages”) to award the United States “lawful” title to all Native American lands.<sup>147</sup> The Court’s decision fundamentally limited the ability of Indigenous Peoples within the United States to control their own homelands and resources.<sup>148</sup> Most importantly, this was ostensibly accomplished under the “rule of law”—the application of law to facts—while “respecting the original justice”<sup>149</sup>

Peoples as

rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

*Id.* at 574. The Court went on to explain that “[t]he history of America, from its discovery to the present day, proves, we think, the universal recognition of these principles.” *Id.*

144. *Id.* at 587–92; see also Tsosie, *supra* note 74, at 31 (“Under this colonial doctrine, the Native American Nations were divested of their political right to cede lands or enter political alliances with other sovereigns. The sovereigns transferred title to their successors in interest. The right of occupancy entitled the Indians to continue their physical use and occupancy of the lands until the right was extinguished by the sovereign through ‘purchase or conquest.’” (quoting *M’Intosh*, 21 U.S. at 587))

145. *M’Intosh*, 21 U.S. at 584.

146. *Id.* at 588.

147. See *id.*, 571–605; Tsosie has discussed the *M’Intosh* decision and its application (or rather lack thereof) to Native Hawaiians as follows:

[T]he Kingdom of Hawai[‘i] was never subjected to the “Doctrine of Discovery” that was used to subordinate Native American rights to land and sovereignty with the legal fiction that, upon discovery and settlement of lands in the New World, the Europeans and their successors in interest (e.g., the United States) received the full title to the land, except for the Indian’s “right of occupancy.”

Tsosie, *supra* note 74, at 31.

148. Watson, *supra* note 140, at 485–86 (discussing the significance of *Johnson v. M’Intosh*).

149. *M’Intosh*, 21 U.S. at 588.

of M'Intosh's claim to land through the United States' colonization of the Americas.

For disenfranchised groups, however, legal formalism's reach was not limited to the nineteenth century. It continues to be utilized in contemporary times to perpetuate the status quo while restricting Native Peoples' right to control their destinies. *Rice v. Cayetano* provides a chilling example.<sup>150</sup> In *Rice*, courts wrestled with whether the election of trustees for OHA<sup>151</sup>—a state agency established to combat the lingering effects of colonization on Hawai'i's Indigenous People and to create better conditions for them—could be limited to Maoli.<sup>152</sup>

The lead plaintiff, Freddy Rice, was a White rancher whose ancestors came to Hawai'i in the mid-1800s as Christian missionaries and eventually built a ranching empire on land that had formerly belonged to Native Hawaiians.<sup>153</sup> Despite having benefitted personally (including accumulating land and other resources) as a direct result of his family's role in colonizing Hawai'i, Rice sued the State of Hawai'i for not allowing him to vote in OHA elections, claiming this restriction contravened the Voting Rights Act of 1965<sup>154</sup> as well as the Fourteenth<sup>155</sup> and Fifteenth Amendments.<sup>156</sup> Although each of those laws was

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150. 963 F. Supp. 1547 (D. Haw. 1996), *aff'd*, 146 F.3d 1075, 1076 (9th Cir. 1998), *rev'd*, 528 U.S. 495, 498–99, 524 (2000); *see also* Yamamoto & Betts, *supra* note 15, at 545–48 (deconstructing *Rice* and how the case was solicited and pursued by conservatives to roll back protections for Kānaka Maoli). The majority opinion ignored the present-day sovereignty and self-determination movements and presented a sanitized retelling of Hawai'i's history. *Id.* at 558. “Nor did the majority opinion acknowledge specifically the destruction of Hawaiian culture through the banning of Hawaiian language or the current effects of homelands dispossession, including poverty, low levels of education and health, and high levels of homelessness and incarceration.” *Id.*

151. *See supra* note 15 and accompanying text (providing a more detailed explanation of OHA and its mission and objectives).

152. *Rice*, 528 U.S. at 498–99. During the 1978 Constitutional Convention, Hawai'i amended its constitution to create the Office of Hawaiian Affairs. *See* HAW. CONST. art. XII, § 5. OHA's mission is the “betterment of conditions of native Hawaiians” and “Hawaiians.” HAW. REV. STAT. § 10-3(1) to -3(2) (2009); *see also* note 15 (describing OHA and its mission)

153. Yamamoto & Betts, *supra* note 15, at 545–48.

154. 42 U.S.C. § 1973 (2006). This Act prohibits any state or political subdivision from imposing or applying any “voting qualification or prerequisite . . . or [any] standard, practice, or procedure . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.” *Id.* § 1973(a).

155. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits states from treating citizens unequally on the basis of race. U.S. CONST. amend. XIV.

156. The Fifteenth Amendment to the United States Constitution mandates that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United



specifically crafted to protect historically disadvantaged groups, Rice turned the laws on their heads, wielding them against a historically disadvantaged group to challenge the group's ability to elect trustees for an agency designed to manage Indigenous resources in partial redress for the devastation imposed by American colonialism.

Judge David Alan Ezra of the District Court for the District of Hawai'i employed contextual analysis to reject Rice's claims and rule in favor of the State of Hawai'i.<sup>157</sup> Judge Ezra examined Hawai'i's history, including Westerners' role in fundamentally altering the Native system of land use and management and eventually overthrowing the sovereign Hawaiian Kingdom.<sup>158</sup> He recognized Maoli as the Indigenous People of Hawai'i whose continuing relationship with the state and federal government was analogous to other Native Peoples.<sup>159</sup> Judge Ezra ruled that OHA's voting requirements were rationally tied to state and congressional trust obligations to Kānaka Maoli.<sup>160</sup> On appeal to the Ninth Circuit, a three-judge panel affirmed.<sup>161</sup>

The United States Supreme Court reversed, relying on formalist analysis.<sup>162</sup> The majority, led by Justice Anthony Kennedy, selectively framed Hawaiian history:<sup>163</sup> it blurred the lines between Indigenous Maoli and Rice's ancestors (American colonists),<sup>164</sup> and it ruled that ancestry was a "proxy for race."<sup>165</sup> Ironically, although the majority invalidated the State's voting process for OHA trustees because the "use of racial classifications is corruptive of the whole legal order democratic elections seek to preserve,"<sup>166</sup> it effectively used the rule of

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States or by any state on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

157. *Rice v. Cayetano*, 963 F. Supp. 1547, 1548, 1553–58 (D. Haw. 1997). For more discussion on contextual analysis, see *infra* Part IV.A.

158. *Rice*, 963 F. Supp. at 1551–52.

159. *Id.* at 1553–54.

160. *Id.* at 1554–55.

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

162. *Rice v. Cayetano*, 528 U.S. 495, 498–99, 524 (2000).

163. Colonization and the Americans' role in overthrowing Hawai'i's sovereign government is explained away. As one example: "The United States was not the only country interested in Hawai[']i and its affairs, but by the later part of the century the reality of American dominance in trade, settlement, economic expansion, and political influence became apparent." *Id.* at 504.

164. *See id.* at 507–11.

165. *Id.* at 514 ("Ancestry can be a proxy for race. It is that proxy here.").

166. *Id.* at 517.

law to allow non-natives to once again attempt to direct the management of Indigenous Hawaiian land and other resources, which the establishment of OHA had specifically sought to rectify.<sup>167</sup>

Justice John Paul Stevens' dissent criticized the majority's holding, insisting that it rested "largely on the repetition of glittering generalities that have little, if any, application to the compelling history of the State of Hawaii."<sup>168</sup> The majority failed to acknowledge the effects of annexation, the influx of infectious diseases, and the displacement of Native Hawaiians from their lands, all of which continue to take a toll on Native Hawaiians.<sup>169</sup>

The Supreme Court's majority decision reveals how legal formalists pick and choose their method of analysis, such as applying a certain line of cases to select facts to serve their own purpose. Formalist analysis is often deployed to achieve a desired result, while appearing "neutral" and as if the decision-makers were simply applying the "rule of law." *Rice* demonstrates that legal scholars and practitioners must examine the values and interests that form the lens through which a decision-maker will view and rule on evidence if they hope to rectify historic wrongs.

## 2. The Emergence of Legal Realism

Legal realism emerged in the 1920s to "challenge[] the basic understanding of the law as a formula that produces 'correct' or 'just' results when mechanically applied to specific cases."<sup>170</sup> Legal realism is an approach to legal decision-making that recognizes that "[s]ocial context, the facts of the case, judges' ideologies, and professional consensus critically influence individual judgments and patterns of decisions over time."<sup>171</sup> Realists contended that the so-called rule of law "created an illusion of certainty that masked the unspoken social and political assumptions guiding much judicial decision making. The exposure of this illusion of certainty led to [r]ealist pronouncements of

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167. See *supra* note 15 and accompanying text (discussing OHA's mission).

168. *Rice*, 528 U.S. at 527–28 (Stevens, J., dissenting).

169. See *id.* at 532, 534.

170. Isaac Moriwake, Comment, *Critical Excavations: Law, Narrative, and the Debate on Native American and Hawaiian "Cultural Property" Repatriation*, 20 U. HAW. L. REV. 261, 287 (1998). For an in-depth analysis of Legal Realism and related theories, see Singer, *supra* note 131, and Bell, *supra* note 137, at 365.

171. Singer, *supra* note 131, at 470.

the indeterminate nature of the law.”<sup>172</sup> Legal realists worked to “develop new kinds of general rules that would be useful in predicting legal outcomes and in shaping the law better to serve the needs of society.”<sup>173</sup> In doing so, legal realists inspired a host of other movements, including law and society, critical legal studies, feminist legal theory, law and economics, and critical race theory.<sup>174</sup>

More recently, empirical research has documented the role and degree of philosophical influences on judicial decisions.<sup>175</sup> “Judges routinely admit the presence of ideological influence on decisions, but they also insist that it comes into play in a relatively small proportion of cases.”<sup>176</sup> “More dramatic differences tend to show up in areas in which judges have a greater discretion and the issues at stake have strong

172. Emily M.S. Houh, *Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law*, 88 CORNELL L. REV. 1025, 1055–56 (2003) (citations omitted); see also John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument*, 45 DUKE L.J. 84, 88–89 (1995).

173. Singer, *supra* note 131, at 471.

174. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 326–28 (1987); see also Bell, *supra* note 137, at 363–68. Critical legal studies and critical race theory are discussed in more detail in Parts III.B and III.C, respectively. For additional information on critical legal studies, see Duncan Kennedy & Karl E. Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461, 461–62 (1984). For more background on the law and society movement see Austin Sarat, *Vitality Amidst Fragmentation: On the Emergence of Postrealist Law and Society Scholarship*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 1 (Austin Sarat ed., 2004). For insight on feminist legal theory, see Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 586–90 (1990). For a more detailed discussion of law and economics see generally Richard A. Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757 (1975).

175. TAMANAHA, *supra* note 31, at 8 (“Balanced realism recognizes the inevitability of various political influences on judging, but it also identifies the appropriate role and limits of this influence.”); see also Orley Ashenfelter et al., *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 261 (1995) (“Evidence also exists of a correlation between the president appointing a judge and case outcomes.”); Michael R. Dimino, *Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL’Y REV. 301, 347–54 (2003). See generally Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965 (2007).

176. TAMANAHA, *supra* note 31, at 144. Individual judges have also conceded that “their different backgrounds, experiences, perceptions, and former involvements” are all “part of the intellectual capital they bring to the bench.” *Id.*; see also Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743, 754 (2005); Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CALIF. L. REV. 1457, 1476–79 (2003).

ideological or personal overtones.”<sup>177</sup> Yet judges are not “free agents” doing as they please: “[J]udges are subject to very significant constraints,” including public perceptions of their legitimacy.<sup>178</sup>

Discussed in depth in Part IV.A, below, contextual analysis establishes that in order to understand how the law operates both generally and for Native Peoples in particular, the legal community and the community at large must know: Who crafts the laws? Who interprets the laws? Who benefits from the laws? Who is hurt by the laws? What is at stake when the laws are “blindly” applied? And, what institutional and public constraints limit judges in their decision-making?<sup>179</sup>

### B. *The Evolution of Critical Legal Analysis*

Like other jurisprudential schools, critical legal analysis emerged from the shadows of legal realism in the 1980s to “critique[] the ostensible objectivity and neutrality of the law and the legal process.”<sup>180</sup> Critical legal scholars agreed with many of the realists’ fundamental insights, including that institutional practices and political views heavily influenced the judicial process.<sup>181</sup> Similar to the realists, critical legal scholars expressed “skepticism that law can produce determinate results

177. TAMANAHA, *supra* note 31, at 141 (internal quotations omitted). “The differences on specific issues can rise to shocking levels: Carter-appointed judges upheld minority claims in race discrimination cases 78 percent of the time, whereas Reagan appointees did so 18 percent (this extreme difference was almost double the next largest disparity).” *Id.* at 140 (citing C.K. ROWLAND & ROBERT A. CARP, *POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS* 49 (1996)). See generally Joel B. Grossman, *Social Backgrounds and Judicial Decision-Making*, 79 HARV. L. REV. 1551 (1966).

178. TAMANAHA, *supra* note 31, at 144 (quotations omitted); see Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1833 (2005) (“Justices who defy aroused public opinion risk, and they know that they risk, provoking a political backlash that ultimately could cause their doctrinal handiwork to collapse.”). Following *Bush v. Gore*, 533 U.S. 98 (2000), the Supreme Court justices’ motives and integrity were criticized by the public. JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 178 (2007). Their decision was deemed “a sham, a political fix, a putsch.” *Id.* In response, Scalia said, “[w]e had to do something, because countries were laughing at us.” *Id.*

179. See JUAN PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* 3–4 (2000) (articulating tools of critical inquiry, including the questions identified here); Scholar Advocacy Workshop #1 with Eric K. Yamamoto, Professor of Law, William S. Richardson School of Law, in Honolulu, Haw. (June 1, 2011) (same).

180. Eric K. Yamamoto et al., *Race, Rights and Reparation: An Overview*, in *RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT* 3, 12 (2001) [hereinafter Yamamoto et al., *Race, Rights and Reparation*].

181. *Id.*

free from reference to value, politics, or historical conditions.”<sup>182</sup>

Critical Legal Studies is characterized by skepticism toward the liberal vision of the rule of law, by a focus on the role of legal ideas in capturing human consciousness, by agreement that fundamental change is required to attain a just society, and by a utopian conception of a world more communal and less hierarchical than the one we know now.<sup>183</sup>

Importantly, critical legal scholars moved beyond legal realism to challenge the power structure that underpins society. For example, scholars pointed out that law and the judicial process were in difficult cases often a function of “hidden politics” that used the guise of neutral decision-making to maintain the social and legal status quo and benefit those in power.<sup>184</sup> These scholars questioned the ability of the law to level the playing field and instead viewed the legal process as a tool to distract underrepresented groups with the notion of rights while continuing to marginalize them.<sup>185</sup> Over time, different schools of thought emerged within critical legal analysis, and the movement became fractionalized.<sup>186</sup>

Despite its insights, critical legal analysis was challenged as elitist and out of touch with the majority of society.<sup>187</sup> This “ivory tower” discourse made for interesting debates, but did not go far enough to bring about real change on the ground in the communities that needed it the most.<sup>188</sup> Critical legal studies also failed to resonate completely with people of color and other marginalized groups who recognized the law’s ability to subordinate, but who also refused to abandon the legal system wholesale due to its potential to liberate when applied in the right context.<sup>189</sup>

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182. Matsuda, *supra* note 174, at 326–27, 332 (citations omitted).

183. *Id.* at 326–27.

184. Yamamoto et al., *Race, Rights and Reparation*, *supra* note 180, at 12.

185. *Id.*

186. *See infra* notes 198–199 and accompanying text.

187. Matsuda, *supra* note 174, at 342–45.

188. *Id.* at 345–49.

189. *See* Eric Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 869 (1997) [hereinafter Yamamoto, *Critical Race Praxis*] (“[Marginalized groups] understand the limits of ‘rights talk’ and the ways in which civil rights laws can be used to reinforce the racial status quo. They also, however, perceive potentially transformative value in law and rights assertion for

### C. Insights of Critical Race Theory

Critical race theory emerged in the late 1980s<sup>190</sup> and altered critical legal theory by infusing the voices and experiences of people of color.<sup>191</sup> Much of this theory arose out of concern “over the slow pace of racial reform in the United States” as well as the notion “that the civil rights movement of the 1960s had stalled, and indeed that many of its gains were being rolled back.”<sup>192</sup> It also developed as a reaction to critical legal studies’ “trashing” of civil rights discourse.<sup>193</sup> To address these setbacks, critical race scholars challenged institutionalized racism and sought to remedy injustice for a host of marginalized groups.<sup>194</sup> Critical

disempowered groups, and they embrace modernist notions of hope and justice through reconceived ideas of law and political struggle.”); *see also* Crenshaw, *supra* note 3, at 1356 (critiquing critical legal studies’ “failure to analyze the hegemonic role of racism”). Conservatives also criticized critical legal studies, claiming that it completely abandoned the rule of law, which amounted to nihilism. Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984) (calling critical legal studies scholars “nihilists” and asking them to leave the legal academy); *see also* Owen M. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 13–16 (1986) (contending that the critical legal studies field was dangerous because it “mean[s] the death of the law, as we have known it throughout history, and as we have come to admire it”).

190. Some trace the evolution of critical race theory to the 1970s. *Compare* Introduction to CRITICAL RACE THEORY: THE CUTTING EDGE xv, xvi (Richard Delgado & Jean Stefancic eds., 2d ed. 2000) [hereinafter Delgado & Stefancic] (“Critical [r]ace [t]heory sprang up in the mid-1970s with the early work of Derrick Bell (an African American) and Alan Freeman (a white) . . .”), with Francisco Valdes et al., *Introduction: Battles Waged, Won, and Lost: Critical Race Theory at the Turn of the Millennium*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 1, 1 (Francisco Valdes, et al. eds., 2002) (pinpointing critical race theory’s emergence in the legal academy in “the late 1980s”), and Crenshaw, *supra* note 3.

191. *See, e.g.*, DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 355–80 (1987); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2323–26 (1989); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1392–1406 (1991); Tsosie, *supra* note 74, at 43 (finding that critical race theory “enables us to transcend formal equality and, building on the truth of the political, social, economic and spiritual conditions experienced by a people, to analyze alternative possibilities to achieve justice”); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 409–410 (1987).

192. Delgado & Stefancic, *supra* note 190, at xvi.

193. PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 158 (1991); Robert L. Hayman, Jr., *The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism*, 30 HARV. C.R.-C.L. L. REV. 57, 61 (1995); Yamamoto, *Critical Race Praxis*, *supra* note 189, at 869.

194. *See, e.g.*, Tsosie, *supra* note 74, at 22. Critical race theory “is a jurisprudence of

race scholars, like the critical legal scholars before them, viewed the law and legal rules as indeterminate. At the same time, as Mari Matsuda observed, “[t]he minority experience of dual consciousness accommodates both the idea of legal indeterminacy as well as the core belief in a liberating law that transcends indeterminacy.”<sup>195</sup> Critical race theory thus “illuminates and offers a beginning response to the limitations of legal justice for racial minorities. It does so by employing critical pragmatic tools to examine racial justice in connection with the interplay of law, race, culture, and social structure.”<sup>196</sup>

Grounded in critical theory, critical race scholars explored how the law excluded certain groups and benefitted others; in doing so, these scholars helped to “reveal the social construction of legal concepts presented as fixed and natural, challenge the efficacy of both liberal legal theory and communitarian ideals as vehicles for racial progress, destabilize the supposedly neutral criteria of meritocracy and social order, and call for a re-examination of the very concept of ‘race.’”<sup>197</sup>

Critical race theorists have not placed their faith in neutral procedures and the substantive doctrines of formal equality; rather, critical race theorists assert that both the procedures and substance of American law, including American antidiscrimination law, are structured to maintain white privilege. Neutrality and objectivity are not just unattainable ideals; they are harmful fictions that obscure the normative supremacy of whiteness in American law and society.<sup>198</sup>

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possibility precisely because it rejects standard liberal frameworks and precisely because it seeks to be inclusive of different groups and different experiences.” *Id.*

195. Matsuda, *supra* note 174, at 341.

196. Yamamoto, *Critical Race Praxis*, *supra* note 189, at 867.

197. *Id.* at 868 (internal quotation marks omitted); *see also* Delgado & Stefancic, *supra* note 190, at xvi.

198. Valdes et al., *supra* note 190, at 1. Charles R. Lawrence III, Mari Matsuda, Richard Delgado and Kimberlè Williams Crenshaw identify the “defining elements” of critical race theory. *See* MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 6-7 (1993). Critical race theory “recognizes that racism is endemic to American life.” *Id.* at 6. It is skeptical about “dominant legal claims of neutrality, objectivity, color blindness, and meritocracy” and “challenges ahistoricism and insists on a contextual/historical analysis of the law.” *Id.* It “insists on recognition of the experiential knowledge of people of color . . . in analyzing law and society” and “is interdisciplinary and eclectic.” *Id.* Finally, it “works toward the end of eliminating racial oppression as part of the broader goal of ending all forms of oppression.” *Id.*

Critical race theory has come a long way since its inception. The focus on anti-discrimination law and the larger goal of equality opened doors for a new civil rights legal analysis. Different schools of thought have evolved<sup>199</sup> and offshoots and methodologies<sup>200</sup> have grown and changed over time. Together, “[c]ritical race theorists demand not only simple legal reform but also actual social transformation; the prize has become social, economic, and political equity, not formal equality.”<sup>201</sup>

#### IV. CONTEXTUAL LEGAL INQUIRY INTO INDIGENOUS PEOPLES’ CLAIMS AND ADJUDICATORY RULINGS

Critical race theory’s insight, particularly its identification of institutional or systemic roots of subordination and proactive emphasis on social transformation, provides an apt foundation for contextual inquiry into Indigenous Peoples’ legal claims by Western courts and decision-making bodies. At the same time, just as critical legal studies failed to acknowledge the persistence of racism and significance of civil rights claims for communities of color, critical race theory does not fully illuminate legal controversies for Native Peoples.<sup>202</sup> Although Mari

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199. One example of the different schools of thought that have evolved are idealists who combat discrimination by seeking to eliminate negative images versus realists or materialists who believe that material factors are more decisive. Tsosie, *supra* note 74, at 22–29. For another in-depth discussion of a different school of thought within critical race theory, see Rachel F. Moran, *The Elusive Nature of Discrimination*, 55 STAN. L. REV. 2365 (2003).

200. See Adrien Katherine Wing, *Introduction to CRITICAL RACE FEMINISM* 4–8 (Adrien Katherine Wing ed., 2003) (describing various feminist canons having grown out of Critical Race Theory). See generally HARLON L. DALTON, *RACIAL HEALING: CONFRONTING THE FEAR BETWEEN BLACKS AND WHITES* 147–170 (1995); Delgado & Stefancic, *supra* note 199, at xvii–xviii (identifying some of critical race theory’s unique methodologies, including different forms of legal writing, such as storytelling, satire, etc.); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2435–41 (1989); Harris, *supra* note 174, at 590–601; Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 438–49 (1990); Francisco Valdes, *Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self Empowerment*, 2 HARV. LATINO L. REV. 1, 52–58 (1997); Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities & Inter-Connectivities*, 5 S. CAL. REV. L. & WOMEN’S STUD. 25, 46–64 (1995). The use of narrative in feminist and critical race scholarship has been criticized by some. See generally Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay On Legal Narratives*, 45 STAN L. REV. 807 (1993).

201. See Valdes et al., *supra* note 190, at 4.

202. Yamamoto & Lyman, *supra* note 84, at 344; see also Robert A. Williams, Jr., *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theories for Peoples of Color*, 5 LAW & INEQ. 103, 122 (1987) (“Among the perils of [critical legal studies] for



Matsuda<sup>203</sup> and Eric Yamamoto<sup>204</sup> opened the critical race theory door to Indigenous Peoples' claims through their key works, the larger body of critical race theory does not expressly integrate Indigenous Peoples' inimitable histories, cultural factors, and present day goals.<sup>205</sup> For Native Peoples, the pursuit of justice is less about equality and more about self-determination, including the return and restoration of traditional lands and other resources.<sup>206</sup> Although critical race theory offers an important starting point for contextual legal inquiry into Native Peoples' claims, there are "often substantial differences among immigrant racial populations in America, imported slaves, and conquered indigenous peoples."<sup>207</sup> Given these dissimilarities, contextual legal inquiry into Native claims must "focus[] on the effects of land dispossession, cultur[al] destruction, loss of sovereignty, and, in turn, on claims to self-determination and nationhood (rather than equality and integration)."<sup>208</sup>

#### A. Contextual Legal Analysis: A Synthesis

Flowing from legal realism's critique of formalism and the key insights of critical race theory, contextual legal analysis synthesizes the most important insights of the "new realism" and critical inquiry. This is especially important in highly complex and controversial cases such as Nā Wai 'Ehā, where decision-makers often employ formalist language to shroud the actual dynamics of their rulings. As quantitative studies

peoples of color is its tendency to abandon and marginalize reliance upon what it regards as a false vision. . . . It is far too easy for someone on a law professor's salary to offer open-ended reconstructive projects which may bring immense benefits to a future generation.").

203. Matsuda wrote the seminal article on reparations for Kānaka Maoli. Matsuda, *supra* note 174, at 368–88; *see also* Tsosie, *supra* note 74, at 41–43 (calling for the development of critical race theory in the realm of Native Peoples' environmental justice claims).

204. Eric Yamamoto established the need for critical race theorists to modify their analysis to account for the unique interests and values of Native Peoples in *Racializing Environmental Justice*, *supra* note 84, at 344.

205. *Id.* A number of scholars have examined Native issues using critical race theory methodologies. *See, e.g.*, Coffey & Tsosie, *supra* note 74, at 197–99; Darren Lenard Hutchinson, *Progressive Race Blindness?: Individual Identity, Group Politics, and Reform*, 49 UCLA L. REV. 1455, 1475–78 (2002). *See generally* Gerald Torres & Kathryn Milun, *Translating Yonnonidio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625 (1990).

206. *See, e.g.*, 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, 342 (1994) [hereinafter Anaya, *Native Hawaiians and International Human Rights Law*]; Tsosie, *supra* note 74, at 42–43; Yamamoto & Lyman, *supra* note 84, at 311.

207. Yamamoto & Lyman, *supra* note 84, at 344.

208. *Id.*

have demonstrated, however, contextual factors and political perspectives play a significant role in shaping adjudicatory outcomes, even though decision-makers may feel constrained to follow the rules to appear legitimate.

“A recent study of the Supreme Court found ‘strong evidence that legal principles are influential.’ But it cannot be denied that the ideological views of justices have some impact on their legal decisions.”<sup>209</sup> This is particularly applicable in difficult cases like *Nā Wai ‘Ehā* that have tremendous cultural, economic, legal, and political ramifications because “judges have admitted for decades that personal values can have an influence on their decision in uncertain or *hard cases*.”<sup>210</sup> Empirical studies have also “suggest[ed] that judges care[] about getting the correct legal result.”<sup>211</sup> Despite the pressure to appear legitimate, every decision requires judgment calls that are influenced by individual perspectives. “[J]udges’ personal philosophies enter into their decision-making when statute or precedent does not point their discretion in one direction or constrain it in another. . . . In such cases personal philosophies may well play a significant role in judging.”<sup>212</sup> For

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209. TAMANAHA, *supra* note 31, at 132 (quoting Michael J. Bailey & Forrest Maltzman, *Does Legal Doctrine Matter? Unpacking Law and Policy Preferences on the U.S. Supreme Court*, 102 AM. POLI. SCI. REV. 369, 381 (2008)); *see id.* (noting that despite the role of precedent, “the ideological views of Supreme Court justices have a measurable influence on their legal decisions”); VIRGINIA A. HETTINGER ET AL., *JUDGING ON A COLLEGIATE COURT* 30–32 (2006); Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 238 (1999) (“[P]robing all civil rights and liberties and economics decisions by the Supreme Court between 1969 and 1985, finds unanimous decisions distinctly more liberal than nonunanimous decisions . . . [and] concludes that ideology clearly affects unanimous civil rights and liberties decisions.”); Gregory C. Sisk, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making*, 93 CORNELL L. REV. 873, 879 (2008) (reviewing FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURT OF APPEALS* (2007)).

210. TAMANAHA, *supra* note 31, at 146 (emphasis added); *see also* Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 972 (2003) (“A hard case is hard because fleshing out ambiguous legal text calls for a controversial moral judgment.”).

211. TAMANAHA, *supra* note 31, at 136; *see* Frank B. Cross, *What Do Judges Want?*, 87 TEX. L. REV. 183, 224 (2008) (reviewing RICHARD A. POSNER, *HOW JUDGES THINK* (2008)) (“Judge Posner recognizes that the crucial test for pragmatism is not whether it gets an individual case ‘right’ (in an equitable or other sense) but instead whether it produces the best overall systemic effects.”).

212. TAMANAHA, *supra* note 31, at 143 (quotations omitted) (quoting Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 236 (1999)); *see also* Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1437–38 (2001).

example, “conflicting lines of precedent often exist, allowing judges to ‘follow those precedents which they like best.’”<sup>213</sup> Given the role of personal philosophies in decision-making, it is crucial to interrogate what the rules say, who the decision-makers are (and what political views and ideologies guide them), and what the consequences of a decision are. Without resolving these and other questions, a-contextual analysis will continue to hide what is really going on behind the guise of impartiality.

With this backdrop, socio-legal empirical studies have exposed dual realities of legal adjudication: (1) decision-makers do not follow formalist analysis in controversial cases, but (2) decision-makers nevertheless feel constrained to try to follow the rules to appear legitimate. Although experts disagree on the precise impact of ideological influence, “[m]ore dramatic differences tend to show up in areas in which judges have greater discretion and the issues at stake have strong ideological or personal overtones.”<sup>214</sup> David E. Klein’s study, for example, scrutinized decision-makers’ behavior in legally uncertain cases with broad implications (including political implications).<sup>215</sup> This included “environmental law cases, [and other] subjects that are thought to have particular political salience.”<sup>216</sup> “The key lesson of the ideology effects is quite clear: Judges prefer to adopt policies they agree with.”<sup>217</sup> In other words, the study “found a statistically significant correlation between political preferences and the rules adopted: liberal judges preferred liberal rules, whereas

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213. TAMANAHA, *supra* note 31, at 143–44 (quoting Patricia M. Wald, *Changing Course: The Use of Precedent in the District of Columbia Circuit*, 34 CLEV. ST. L. REV. 477, 481 (1986)); see also Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 271 (1997).

214. TAMANAHA, *supra* note 31, at 141; see also ROBERT A. CARP & C. K. ROWLAND, *POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS* 60 (1983). See generally Grossman, *supra* note 177, at 1556–58.

215. DAVID E. KLEIN, *MAKING LAW IN THE UNITED STATES COURT OF APPEALS* 40–41 (2002); see also TAMANAHA, *supra* note 31, at 136 (discussing Klein’s methodology and results); Sisk, *supra* note 209, at 892 (noting that “empirical studies certainly have confirmed that judges, at the margins and in the difficult cases, are influenced by their background, experiences, and, yes, even ideology”).

216. TAMANAHA, *supra* note 31, at 136 (discussing KLEIN, *supra* note 215).

217. KLEIN, *supra* note 215, at 81; see also TAMANAHA, *supra* note 31, at 136 (citing KLEIN, *supra* note 215, at 81–85). See generally Howard Gillman, *What’s Law Got to Do with It? Judicial Behaviorists Test the “Legal Model” of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465 (2001).

conservative judges preferred conservative rules.”<sup>218</sup>

As detailed herein, contextual legal analysis accounts for both realities. It starts with the language of rules, while acknowledging that in complex or controversial cases, rule language alone does not dictate the formal legal result.<sup>219</sup> As developed in Part III.A, realists and critical legal theorists have conclusively demonstrated that the language of most substantive rules (or case holdings) is malleable enough to afford legal decision-makers a range of choices, each potentially supporting different values and interests.<sup>220</sup> Contextual legal analysis interrogates the rule-related choice made (measured against rejected choices), the values and interests served by that choice, and its short and long-term consequences.

Contextual legal analysis reveals that in complex cases such as *Nā Wai ‘Ehā*, the decisional outcome was not necessarily “objectively determined,” as formalist analysis would imply, but rather a matter of choices partially influenced by the interests and values accommodation undergirding the law and by decision-makers’ political and economic perspectives. This contextual analysis<sup>221</sup> helps judges fully and accurately assess both the “legal” and “justice” impacts of their

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218. TAMANAHA, *supra* note 31, at 136.

The novelty of Klein’s study is that, while it confirmed that political influences matter in precisely the situations one would expect—legally uncertain cases raising politically fraught issues—it also demonstrated that even in these contexts judges do not care only about politics but continue to be moved by legal considerations.

*Id.* at 136–37; see also Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1566–79 (2010).

219. See *supra* Part III.A.

220. See *supra* Part III.A.

221. For a discussion of approaches to contextual analysis in law, see Bell, *supra* note 137, 364–68; Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1602–06 (1990) (describing the ways that context matters in decision-making); Eric K. Yamamoto, Carly Minner & Karen Winter, *Contextual Strict Scrutiny*, 49 HOW. L.J. 241 (2006) (advancing contextual analysis for the Equal Protection Clause’s strict scrutiny standard of review). Without expressly saying so, the Hawai‘i Supreme Court has employed a version of contextual legal analysis that has been especially attentive to politics, economics, and culture, both historically and in terms of current conditions. See *Waiāhole I*, 9 P.3d 409 (Haw. 2000) (addressing water rights); *Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm’n*, 903 P.2d 1246 (Haw. 1995) (addressing traditional and customary Native Hawaiian rights of access and gathering); *Pele Def. Fund v. Paty*, 87 P.2d 1247, 1271–72 (Haw. 1992) (addressing traditional and customary Native Hawaiian rights of access and gathering); *Robinson v. Ariyoshi*, 658 P.2d 287, 310–11 (Haw. 1982) (addressing water rights); *McBryde Sugar Co. v. Robinson*, 504 P.2d 1330, 1345 (Haw. 1973) (addressing water rights).

decisions on the people and communities involved, as well as society at large. This reflects the first reality described above (judges do not blindly follow precedent).

The decision-maker is not, however, simply a “free agent” ruling in whatever way she prefers.<sup>222</sup> The language of the law is important, although malleable, because it imposes some degree of constraint upon decision-makers who are concerned about legitimacy: the decision-maker must interpret and apply the law so the result appears at least plausible enough to maintain that the judge “followed the rule of law.” This assertion reflects the second reality described above. Again, contextual legal inquiry assesses and reveals the range of options available to a decision-maker in light of the law’s language and focuses on the decision-maker’s choice.

Having removed the cloak of inevitable neutrality and objectivity, contextual legal analysis inquires into and reveals the legitimacy or illegitimacy of a decision under the rule of law by asking about and assessing the context.<sup>223</sup> What values and interests are being furthered by the rule and according to what policy preference? What values and interests are being disserved? How would the selection of a competing “choice” serve values and interests differently? How do history and current cultural and economic conditions and larger policy concerns shed light on whether a decision was appropriate or inappropriate (especially when measured against other available choices)?

In this way, contextual legal analysis integrates both “realities” of decision-making in complex or controversial cases, and exposes for participants and the public “what is really going on” and “what the decision really means.” Yet, for Indigenous Peoples who are differently situated than others because of the long-term impacts of colonialism, contextual legal inquiry itself needs further refinement<sup>224</sup> to explicitly

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222. See Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753, 1757–58 (2004) (“A judge’s place in the constitutional structure and judicial hierarchy, a judge’s relationship with litigants and lawyers, and a judge’s stature in the legal community and broader polity help to explain both why judges tend to limit themselves to the cases before them and why judges are constrained by existing legal materials in the course of deciding those cases.”).

223. See PEREA ET AL., *supra* note 179, at 3–4 (articulating tools of critical inquiry, including the questions identified here); Scholar Advocacy Workshop #1 with Eric K. Yamamoto, Professor of Law, William S. Richardson School of Law, in Honolulu, Haw. (June 1, 2011) (same).

224. Given the importance of contextual legal inquiry (with roots in legal realism and critical race theory), a developing contextual legal analysis of Native Peoples’ claims must be

integrate Native Peoples' unique history and cultural values into a larger analytical framework that accounts for restorative justice and the key dimensions of self-determination.<sup>225</sup>

*B. Contextual Legal Analysis of Indigenous Peoples' Claims and Adjudicatory Rulings*

Contextual legal inquiry for Native Peoples' claims employs the analytical tools of contextual legal analysis, as just described, in assessing how the law operates and should operate and in exposing the shortcomings of formalism. At the same time, this evolving framework embraces unique features to discern what justice looks like for Indigenous Peoples, particularly where restorative justice is among the aims of the legal regime. Those features often include restoring self-governance, rebuilding suppressed culture, and returning natural and cultural resources upon which culture depends to enable renewed spiritual and other connections to the natural environment through traditional practices.<sup>226</sup> From a broader perspective, this developing framework does not focus on "equal treatment," but instead encompasses a restorative justice approach informed by principles of self-determination that are particularly apt in light of the ravages of colonization.<sup>227</sup>

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specifically tailored to more incisively interrogate government decisions and rulings, particularly where the claims are controversial and implicate land, culture, economic development, or governance. *See infra* Part IV.C. In unraveling the fundamental struggle over water and power in Nā Wai 'Ehā, for example, contextual legal inquiry provides a framework to understand what justice truly means for Kānaka Maoli and Hawai'i's community at large. This analysis also exposes how a mechanistic approach to the law often prevents participants and society from discerning the actual injustice of an action or decision.

225. Applying Hawai'i's Constitution or Water Code without the necessary historical or cultural context, for example, can ignore the fundamental importance of water to Maoli people and culture and the significance of cultivating the staple crop, kalo, both as an important source of food and as the symbolic act of caring for an elder sibling—not to mention specific legal provisions enacted to protect these rights and interests. *See supra* Part II. Too formalistic of an approach also dismisses deep cultural harms that colonialism in general and the relatives of plantation owners in particular imposed on Kānaka Maoli throughout Hawai'i for over a century both within and beyond Nā Wai 'Ehā. HONOLULU BD. OF WATER SUPPLY, WATER FOR LIFE: THE HISTORY AND FUTURE OF WATER ON O'AHU, available at [http://www.boardofwatersupply.com/files/Wfl\\_Website.pdf](http://www.boardofwatersupply.com/files/Wfl_Website.pdf) (explaining that the sugar industry created a huge demand for water, and "[d]iverting the water ultimately meant diverting everything"); TENGAN REPORT, *supra* note 2, at 15–19 (detailing the specific impacts of plantations on Nā Wai 'Ehā).

226. *See infra* Part IV.C.

227. *See supra* Part II.A; *see also* Lorie M. Graham, *Reparations, Self-Determination,*

More specifically, tailoring this 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.<sup>228</sup> Indigenous Peoples have been damaged by the forces of colonialism in each of these four realms, which are both customarily significant and recognized by international human rights principles as salient dimensions of restorative justice.<sup>229</sup>

As detailed herein, each of the four values of self-determination and restorative justice for Native Peoples is significant because they are inextricably intertwined. 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.<sup>230</sup> In turn, Native communities’ social welfare is defined by cultural veracity and access to, and the health of, natural resources.<sup>231</sup> 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).<sup>232</sup>

Colonization imposed significant cultural harms on Native Peoples, especially in the realms of cultural integrity, lands and natural resources, social welfare, and self-government.<sup>233</sup> In the context of Kānaka Maoli,

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*and the Seventh Generation*, 21 HARV. HUM. RTS. J. 47, 89–102 (2008); R. Hōkūlei Lindsey, *Native Hawaiians and the Ceded Lands Trust: Applying Self-Determination as an Alternative to the Equal Protection Analysis*, 34 AM. INDIAN L. REV. 223, 257 (2009–2010).

228. See Anaya, *Native Hawaiians and International Human Rights Law*, *supra* note 206, at 342–60. Jim Anaya coalesced international human rights principles of self-determination to identify the four analytical categories utilized in this developing framework. *Id.*; see also United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

229. See Anaya, *Native Hawaiians and International Human Rights Law*, *supra* note 206, at 342–60; United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

230. See Anaya, *Native Hawaiians and International Human Rights Law*, *supra* note 206, at 346–47.

231. See *id.* at 348–49.

232. Coffey & Tsosie, *supra* note 74, at 197 (“[T]he central challenge of cultural sovereignty is to reach an understanding of sovereignty that is generated from *within* tribal societies and carries a cultural meaning consistent with those traditions.”).

233. See *supra* Part II. As one example,

for example, the documented arrival of Westerners in Hawai‘i, beginning in 1778 led to physical and cultural genocide, as was the case with Indigenous Peoples the world over.<sup>234</sup> Living in the most isolated island chain in the world made the Native population particularly susceptible to introduced diseases.<sup>235</sup> Kānaka Maoli were decimated, with the pre-European contact population going from about a million to less than 40,000 within the first century of contact.<sup>236</sup> Foreigners also employed other tools of colonialism; for example, foreigners imposed English as the language of instruction in schools and banned cultural activities, including traditional hula dancing.<sup>237</sup> Principal among these was the displacement of Kānaka Maoli from their homelands.<sup>238</sup> Over a period of years beginning in about 1845, a system of private property was imposed.<sup>239</sup> Despite best intentions, this resulted in stripping most Natives of title to ancestral lands.<sup>240</sup> In the end, less than half of one percent of Hawai‘i’s total land area was distributed to maka‘āinana (the people of the land) via this Māhele process and land quickly passed to foreign and largely American interests.<sup>241</sup> In addition to severely

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many Hawaiians found they no longer could farm or gain access to the traditional gathering areas in the mountains and the ocean that once supported them. Other Hawaiians were left landless. As a result, many were forced to move to urban areas to seek employment. They abandoned traditional subsistence living, which had supported the Hawaiian culture for centuries.

Anaya, *Native Hawaiians and International Human Rights Law*, *supra* note 206, at 315–16 (quoting NATIVE HAWAIIAN RIGHTS HANDBOOK 44 (Melody Kapilialoha MacKenzie ed., 1991)).

234. See O.A. BUSHNELL, *THE GIFTS OF CIVILIZATION: GERMS AND GENOCIDE IN HAWAI‘I* 132–54 (1993) (detailing the impact of foreign diseases on the Maoli population); see also Anaya, *Native Hawaiians and International Human Rights Law*, *supra* note 206, at 315 (quoting NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 233, at 44). See generally STANNARD, *supra* note 49.

235. See BUSHNELL, *supra* note 234, at 134–54 (detailing the impact of foreign diseases on the Maoli population). See generally STANNARD, *supra* note 49.

236. See *supra* note 49; BUSHNELL, *supra* note 234, at 134–54 (detailing the impact of foreign diseases on the Maoli population).

237. See Richard R. Day, *The Ultimate Inequality: Linguistic Genocide*, in *LANGUAGE OF INEQUALITY* 163, 166–67 (Nessa Wolfsman & Joan Manes eds., 1985).

238. See generally KAME‘ELEIHIWA, *supra* note 36, at 8–16; JON M. VAN DYKE, *WHO OWNS THE CROWN LANDS OF HAWAI‘I?* 30–53 (2008).

239. For a detailed explanation of the Māhele process, which “transformed the traditional Land system from one of communal tenure to private ownership on the capitalist model,” see KAME‘ELEIHIWA, *supra* note 36, at 8–16.

240. *Id.* at 9–11.

241. See *supra* note 36; DAVIANNA PŌMAIKA‘I MCGREGOR, *NĀ KUA‘ĀINA: LIVING HAWAIIAN CULTURE* 37–40 (2007). *But see* Donovan C. Preza, *The Emperical Writes Back:*



restricting Kānaka Maoli's ability to continue subsistence lifestyles, alienation from land and water resources had a devastating psychological effect given Kānaka Maoli's strong spiritual and familial connection to the land.<sup>242</sup> Ultimately, these harms culminated in the 1893 overthrow of Hawai'i's independent Kingdom by a handful of missionary descendants assisted by the United States military.<sup>243</sup> This is just one example; many other Indigenous Peoples have similarly heart-wrenching stories.<sup>244</sup>

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Re-Examining Hawaiian Dispossession Resulting from the Māhele of 1848 138–43 (May 2010) (unpublished M.A. thesis, University of Hawai'i at Mānoa) (on file with author) (explaining that the overthrow of the Hawaiian Kingdom ultimately led to the dispossession of Maoli from traditional homelands as non-Maoli disproportionately benefitted from government land sales.).

242. Martin et al., *supra* note 62, at 72–73 (“Just as a plant wilts and loses strength in the absence of water, Hawaiian life has suffered as access to water diminished through the dominance of foreign beliefs, values, practices and concepts of private property.”).

243. Apology Resolution, *supra* note 84. Maoli today face many social challenges as a result of the harms of colonization. Kānaka Maoli are disparately impacted by morbid obesity, substance abuse, depression, and other mental illnesses, diabetes, respiratory illness, heart disease, and cancer mortality. BROOKE S. EVANS, OBESITY IN HAWAII: HEALTH POLICY OPTIONS 3, 6, available at <http://www.publicpolicycenter.hawaii.edu/images/PDF/Obesity%20White%20Paper.pdf>. Further, Maoli are disadvantaged socioeconomically. S.M. KANA'IAUPUNI ET AL., INCOME AND POVERTY AMONG NATIVE HAWAIIANS: SUMMARY OF KA HUAKA'I FINDINGS 1 (Sept. 2005), available at [http://www.ksbe.edu/spi/PDFS/Reports/Demography\\_Well-being/05\\_06\\_5.pdf](http://www.ksbe.edu/spi/PDFS/Reports/Demography_Well-being/05_06_5.pdf). For example, Kānaka Maoli families in Hawai'i have the lowest mean family income of all major ethnic groups in the state. *Id.* at 2. In addition, Maoli are overrepresented and disparately treated in the criminal justice system in Hawai'i. See generally OFFICE OF HAWAIIAN AFFAIRS, THE DISPARATE TREATMENT OF NATIVE HAWAIIANS IN THE CRIMINAL JUSTICE SYSTEM 10–13 (2010), available at [http://www.oha.org/images/stories/files/pdf/reports/ir\\_final\\_web\\_rev.pdf](http://www.oha.org/images/stories/files/pdf/reports/ir_final_web_rev.pdf). The study found that Maoli are disproportionately represented at every stage of the criminal justice system in Hawai'i. *Id.* at 17. Further, this disparate impact increases as Maoli navigate deeper into the system. *Id.* Taken as a whole, the study's findings explain “how an institution, fueled by tax payers' dollars, disparately affects a unique indigenous group of people, making them even more vulnerable than ever to the loss of land, culture, and community.” *Id.* at 10.

244. Native Americans were also forcibly assimilated and stripped of their lands with lingering effects. Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 60–63 (1999). “[S]ome facts, figures and demographics remain deeply troubling: 31% of the total American Indian population, and 51% of Indians residing on reservations, live below the official government poverty level; while only 13% of the total United States population is in this predicament.” *Id.* at 65. Similarly, after annexation by the British, New Zealand's Maori were also dispossessed of their ancestral homelands and although some gains have been made, much remains to be resolved. See *id.* at 70–71. More recently, the Yanomami of the Amazon are being driven from their lands by miners, who destroy the forest and bring epidemic diseases. *Id.* at 76–77. “Some Yanomami are killing themselves, committing the

For these reasons, international human rights principles of self-determination recognize each of the four realms as salient dimensions of restorative justice for Indigenous Peoples, which are necessary to begin to address longstanding physical, cultural, and other harms. “The notion of respect for cultural determinism has long been a feature of bilateral as well as multilateral treaties.”<sup>245</sup> In much the same way, Indigenous Peoples’ rights and relationships to ancestral lands and other resources have also been recognized and upheld by a host of international protections, including the Declaration on the Rights of Indigenous Peoples, which the United States recently signed.<sup>246</sup> Entitlements regarding social welfare and development are “also grounded in the U.N. Charter and adjoined to the principle of self-determination.”<sup>247</sup> “In the particular context of indigenous peoples, notions of democracy (including decentralized government) join with precepts of cultural integrity to create a *sui generis* self-government norm.”<sup>248</sup> This norm “upholds the accommodation of spheres of

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first known suicides in Yanomami history.” *Id.* at 77.

245. Anaya, *Native Hawaiians and International Human Rights Law*, *supra* note 206, at 343; *see also, e.g.*, Declaration of the Principles of International Cultural Cooperation, Proclaimed by the General Conference of the United Nations Educational, Scientific, and Cultural Organization, 14th Sess., Nov. 4, 1966, art. I (declaring that “[e]ach culture has a dignity and value which must be respected and preserved”); The Convention Against Discrimination in Education, Dec. 14, 1960, art. 5, 429 U.N.T.S. 93, 100 (acknowledging “the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the education policy of each State, the use or the teaching of their own language”); Convention on the Prevention of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 280 (defining genocide as “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such”); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (upholding rights of freedom of expression, religion, and “association with a national minority”).

246. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; *see also* Coffey & Tsosie, *supra* note 74, at 198 (“Emerging principles of international human rights law recognize the distinctive relationship of indigenous peoples to their lands and resources, and attempt to define certain rights of self-government and cultural protection.”).

247. Anaya, *Native Hawaiians and International Human Rights Law*, *supra* note 206, at 350. *See* U.N. Charter arts. 55–56 (declaring the U.N.’s support of the proposition that “the creation of conditions of stability and well-being are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”).

248. Anaya, *Native Hawaiians and International Human Rights Law*, *supra* note 206, at

governmental or administrative autonomy for indigenous communities, while at the same time upholding measures to ensure their effective participation in all decisions affecting them left to the larger institutions of government.”<sup>249</sup>

For Indigenous Peoples, contextual legal analysis entails examining history and current socio-economic conditions in the context of the four realms related to Native Peoples’ self-governance. Each of these values is customarily significant and recognized by international human rights principles of self-determination as salient dimensions of restorative justice for Indigenous Peoples.<sup>250</sup> “Thus, our challenge today is to reach back into the past and locate the core elements which will play a role in the development of our collective future.”<sup>251</sup>

### C. Four Indigenous Values for Contextual Legal Analysis

#### 1. Cultural Integrity

Contextual legal analysis of Indigenous claims highlights cultural integrity because of its salience to Native Peoples.<sup>252</sup> As Ty Kāwika Tengan explained, “[c]ulture, place, and gender are deeply intertwined and cannot be separated from one another.”<sup>253</sup> For example,

355. *Sui generis* means “of its own kind or class; unique or peculiar.” BLACK’S LAW DICTIONARY 1572 (9th ed. 2009).

249. Anaya, *Native Hawaiians and International Human Rights Law*, *supra* note 206, at 355; *see also* Siegfried Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*, 41 VAND. J. TRANSNAT’L L. 1141, 1174–75 (2008).

250. Anaya, *Native Hawaiians and International Human Rights Law*, *supra* note 206, at 342–60; *see also* W. Michael Reisman, *International Law and the Inner Worlds of Others*, 9 ST. THOMAS L. REV. 25, 35 (1996) (“Political self-determination and economic self-determination may be important, but it is the integrity of the inner worlds of peoples—their rectitude systems or their senses of spirituality—that is their distinctive humanity. Without an opportunity to determine, sustain, and develop that integrity, their humanity—and ours—is denied.”); Wiessner, *supra* note 249, at 1175 (explaining that Indigenous Peoples should have the right to self-determination and to establish a restorative framework).

251. Coffey & Tsosie, *supra* note 74, at 196.

252. *See, e.g., id.* at 202 (“[P]ast and future generations [are] related to the present generation by core elements of cultural existence which may not be destroyed or removed. This is the essence of cultural sovereignty, which posits that culture is the living basis for the survival of Indian nations as distinct political and cultural groups.”); *see also* Marina Hadjioannou, *The International Human Right to Culture: Reclamation of the Cultural Identities of Indigenous Peoples Under International Law*, 8 CHAP. L. REV. 201, 226–27 (2005).

253. TY P. KĀWIKĀ TENGAN, *NATIVE MEN REMADE: GENDER AND NATION IN CONTEMPORARY HAWAII* 5 (2008).

Hawaiian men in general have lost their place and role in society. Often they linked this to the loss of the old ways—the religious formations, political systems, cultural practices, and relationships to the land that our ancestors knew. With the arrival of colonialism, Christianity, and modernization, all of these configurations of knowledge and power were radically transformed; some say there were lost to the Pō [darkness].<sup>254</sup>

Given this central role, weighing cultural impacts is a necessary starting point for any contextual legal inquiry involving Indigenous Peoples. “The right of indigenous peoples to maintain the integrity of their cultures is a simple matter of equality, of being free from historical and ongoing practices that have treated indigenous cultures as inferior to the dominant cultures.”<sup>255</sup> Moreover, this “right to equality and its mirror norm of non-discrimination are at the core of the contemporary international human rights regime.”<sup>256</sup> “While in principle the cultural integrity norm can be understood to apply to all segments of humanity, the norm has developed remedial aspects particular to indigenous peoples in light of their historical and continuing vulnerability.”<sup>257</sup> Over time, as outsiders have “come to consider indigenous cultures as equal in value to all others, the cultural integrity norm has developed to entitle indigenous groups like the Native Hawaiian people to affirmative measures to remedy the past undermining of their cultural survival and to guard against continuing threats in this regard.”<sup>258</sup>

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254. *Id.* at 5–6.

255. S. James Anaya, *International Human Rights and Indigenous Peoples: The Move toward the Multicultural State*, 21 ARIZ. J. INT’L & COMP. L. 13, 16 (2004) [hereinafter Anaya, *International Human Rights and Indigenous People*]; see also Graham, *Reparations, Self-Determination, and the Seventh Generation*, *supra* note 227, at 103.

256. Anaya, *International Human Rights and Indigenous People*, *supra* note 255, at 16; see also Megan Mooney, *How the Organization of American States Took the Lead: The Development of Indigenous Peoples’ Rights in the Americas*, 31 AM. INDIAN L. REV. 553, 556–70 (2007) (detailing the development of the collective and individual rights of Indigenous Peoples); Ruti Teitel, *Human Rights Genealogy*, 66 FORDHAM L. REV. 301, 315–17 (1997) (discussing contemporary human rights).

257. Anaya, *Native Hawaiians and International Human Rights Law*, *supra* note 206, at 345. This norm applies to “all aspects of an indigenous group’s survival as a distinct culture, understanding culture to include economic or political institutions, land use patterns, as well as language and religious practices.” *Id.* at 343–44; see also Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 YALE J. INT’L L. 127, 159 (1991).

258. Anaya, *Native Hawaiians and International Human Rights Law*, *supra* note 206, at

Indigenous Peoples are in a constant struggle to maintain culture and traditional lifestyles due to a myriad of factors, including colonization and other pressures of a quickly changing world.<sup>259</sup> “From an ethical standpoint, the destruction and abuse indigenous heritage has suffered at the hands of modern society is simply unwarranted and merits reparation.”<sup>260</sup> The United Nations affirmed, in its Declaration on the Rights of Indigenous Peoples, that Natives maintain the right to “practise 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.”<sup>261</sup>

Critical legal analysis into Native rights, therefore, must explicitly analyze history and socio-economic conditions in the context of cultural integrity and whether actions or decisions support and restore cultural integrity as a partial remedy for past harms, or perpetuate conditions that continue to undermine cultural survival.<sup>262</sup> As Rebecca Tsosie and Wallace Coffey explain, “[T]radition provides the critical constructive material upon which a community rebuilds itself.”<sup>263</sup> Exploring impacts to Native culture and tradition are, thus, vital to understanding past harms and shaping meaningful redress because, “only by delving into the inquiry of how our Ancestors saw the world can we truly understand the significance of our communities as they are currently constituted, appreciating both the strengths and continuities that exist, as well as the

345. See generally Comm. on the Elimination of Racial Discrimination, Rep., Annex V ¶3, U.N. Doc. A/52/18, GAOR, 52d Sess., Supp. No. 18 (1997) (detailing the measures to be taken to protect Indigenous Peoples).

259. Kristin Ann Mattiske, *Recognition of Indigenous Heritage in the Modern World: U.S. Legal Protection in Light of International Custom*, 27 BROOK. J. INT'L L. 1105, 1109 (2002).

260. *Id.* at 1111.

261. United Nations Declaration on the Rights of Indigenous Peoples, Art. 11, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007); see also Mattiske, *supra* note 259, at 1120 (discussing a draft of the declaration).

262. Anaya, *Native Hawaiians and International Human Rights Law*, *supra* note 206, at 346. Diversity among Indigenous People,

however, does not undermine the strength of the cultural integrity norm as much as it leads to an understanding that the norm requires diverse applications in diverse settings. In all cases, the operative premise is that of securing the survival and flourishing of indigenous cultures through mechanisms devised in accordance with the preferences of the indigenous peoples concerned.

*Id.*

263. Coffey & Tsosie, *supra* note 74, at 199 (quotations omitted).

pathologies that destroy community.”<sup>264</sup>

## 2. Land and Resources

“The importance of lands and resources to the survival of indigenous cultures is widely acknowledged.”<sup>265</sup> As one example, “[l]ike many other native people, [Kānaka Maoli] believed that the cosmos was a unity of familial relations. [Their] culture depended on a careful relationship with the land, [their] ancestor, who nurtured [them] in body and spirit.”<sup>266</sup>

Recognizing and respecting this sacred relationship between Native Peoples and other natural and cultural resources, including land, is a necessary “response to the historical processes that have afflicted indigenous peoples, including the Native Hawaiians, by trampling on their cultural attachment to ancestral lands, disregarding or minimizing their legitimate property interests, and leaving them without adequate means of subsistence.”<sup>267</sup> Considering this value is also required because “[p]roperty has been affirmed as an international human right.”<sup>268</sup> Consequently,

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264. *Id.*

265. Anaya, *Native Hawaiians and International Human Rights Law*, *supra* note 206, at 346; *see also* JULIAN BURGER, REPORT FROM THE FRONTIER: THE STATE OF THE WORLD’S INDIGENOUS PEOPLES 13–16 (1987) (detailing Indigenous philosophies on land); Coffey & Tsosie, *supra* note 74, at 205 (“This relationship between land and the Native people transcends the idea of land as a means of physical survival or subsistence. Land also ensures the cultural survival of the Indian people as distinct groups and nations.”).

266. *Preface to HAUNANI-KAY TRASK, LIGHT IN THE CREVICE NEVER SEEN* (1994). Likewise, this perspective is shared by other Native Peoples. *See* Yamamoto & Lyman, *supra* note 84, at 337–38. Yamamoto and Lyman note that “Native communities in the United States tend to share general cultural value and belief systems that are distinguishable from those of the Western world.” *Id.* For example, in many American Indian belief systems, there exists “an intimate relation between the spiritual world, the physical world, and the social world.” *Id.* at 336 (quoting Robert A. Williams, Jr., *Large Binocular Telescopes, Red Squirrel Piñatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World*, 96 W. VA. L. REV. 1133, 1153 (1994)); *see also* MCGREGOR, NĀ KUA‘ĀINA, *supra* note 241, at 4–6.

267. Anaya, *Native Hawaiians and International Human Rights Law*, *supra* note 206, at 348; *see also* Lee Swepston, *A New Step in the International Law of Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989*, 15 OKLA. CITY U. L. REV. 677, 696–705 (1990) (detailing a concurring analysis of land rights).

268. Anaya, *Native Hawaiians and International Human Rights Law*, *supra* note 206, at 347; *see also* Hari M. Osofsky, *Learning from Environmental Justice: A New Model for International Environmental Rights*, 24 STAN. ENVTL. L. J. 71, 128 (2005).

[i]n light of the acknowledged centrality of lands and resources to indigenous cultures and economies, the requirement to provide meaningful redress for indigenous land claims implies an obligation on the part of states to provide remedies that include for indigenous peoples the option of regaining lands and access to natural resources.<sup>269</sup>

The appropriation of ancestral homelands and resources facilitates Indigenous Peoples' loss of identity and culture.<sup>270</sup> For example, Kānaka Maoli had an "intricate land system [that] mirrored and sustained the complexity of Native Hawaiian spiritual and physical relationships."<sup>271</sup> Lands also provided and continue to offer a means of self-determination because a land base allows Indigenous Peoples to live and develop freely<sup>272</sup> to pursue their cultural and political sovereignty.<sup>273</sup>

A developing contextual framework for Native Peoples therefore must directly analyze history and current socio-economic conditions with the intent of understanding whether a particular action perpetuates the subjugation of ancestral lands, resources, and rights, or attempts to redress historical injustices in a significant way. This is especially important given that "the histories that have been constructed about Native people are often inaccurate and have been used to justify the dispossession of Native peoples from their lands, resources, and even their cultural identity."<sup>274</sup>

### 3. Social Welfare and Development

The concepts of social welfare and development are also integral to any contextual legal inquiry into Indigenous claims because these values

269. Anaya, *Native Hawaiians and International Human Rights Law*, *supra* note 206, at 348–49; *see also* Sweptson, *supra* note 267, at 696–705; Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95, 97–98 (1998) ("The Native Hawaiians belong to the only native group in the United States that has never been allowed to utilize a claims commission or other mechanism to seek redress for its losses from the federal government.").

270. Sweptson, *supra* note 267, at 705.

271. Lindsey, *supra* note 227, at 243.

272. *Id.* at 238.

273. Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1063 & n.79 (2007) ("[T]erritorial and political sovereignty are inextricably linked with cultural sovereignty[,] and . . . cultural devastation is [a] likely consequence if tribes lose [the] ability to live in separate, self-governing communities.").

274. Coffey & Tsosie, *supra* note 74, at 200.

are aimed at remedying two distinct but related historical phenomena that result in most indigenous communities living in an economically disadvantaged condition. The first such phenomenon entails the progressive plundering of indigenous peoples' lands and resources over time, processes that have impaired or, as in the case of Native Hawaiians, devastated indigenous economies and subsistence life and left indigenous people among the poorest of the poor. The second corresponds with patterns of discrimination that have tended to exclude members of indigenous communities from enjoyment of the social welfare benefits generally available in the states within which they live.<sup>275</sup>

During the colonization of Hawai'i, many Kānaka Maoli did not obtain Western title to their ancestral homelands and became members of the "floating population crowding into the congested tenement districts of the larger towns and cities of the Territory under conditions which many believed would inevitably result in the extermination of the race."<sup>276</sup> Today, Maoli "comprise the most economically disadvantaged and otherwise ill-ridden sector of the Islands' population. . . . Native Hawaiians are overrepresented among the ranks of welfare recipients and prison inmates and are underrepresented among high school and college graduates, professionals, and political officials."<sup>277</sup>

Given the importance of "health, education, an adequate standard of living,"<sup>278</sup> and other social welfare measures to the continued survival of any group, contextual inquiry into Native claims must examine history and socio-economic considerations. Hopefully, this will expose whether a given action or decision improves social welfare conditions or perpetuates the status quo of Natives bringing up the bottom of most, if

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275. Anaya, *Native Hawaiians and International Human Rights Law*, *supra* note 206, at 352–53 (citations omitted); *see also* Note, *International Law as an Interpretive Force in Federal Indian Law*, 116 HARV. L. REV. 1751, 1760–61 (2003).

276. Anaya, *Native Hawaiians and International Human Rights Law*, *supra* note 206, at 315 (quoting NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 233, at 44).

277. *Id.* at 317; *see also* Graham, *supra* note 227, at 92 ("There is little doubt that centuries of land dispossession, cultural and political oppression, and discrimination have led to many of the social welfare challenges facing Native American nations today.").

278. Anaya, *Native Hawaiians and International Human Rights Law*, *supra* note 206, at 351. For a detailed explanation on social welfare rights, *see* William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1855–67 (2001).



not all, socio-economic indicators.<sup>279</sup> Put simply: does a decision have the potential to improve health, education, and living standards, or not?

#### 4. Self-governance

Finally, Native Peoples' contextual legal inquiry should address Indigenous groups' ability to manage their political and cultural sovereignty. Because years and generations of colonization around the world facilitated

their non-dominant positions within the states where they live, indigenous communities and their members typically have been denied full and equal participation in the political processes that have sought to govern them. [Moreover, e]ven as indigenous individuals have been granted full rights of citizenship and overtly racially discriminatory policies have diminished, the persistent condition of indigenous groups is typically that of economically disadvantaged numerical minorities. This condition, shared by Native Hawaiians, is one of political vulnerability.<sup>280</sup>

Throughout what is now considered the United States, the systematic dispossession of Indigenous Peoples from their lands and other resources facilitated the loss of political autonomy, leaving many Native populations dependent upon the federal government. In response, international human rights law recognizes Indigenous Peoples' unique relationship to their lands and resources and has attempted to define rights of self-government and cultural protection.<sup>281</sup> Cultural and political sovereignty is essential for Indigenous Peoples' self-determination. Unfortunately, however, "the nation-states (including the United States) have refused to recognize indigenous peoples' rights to self-determination—the realization of a separate autonomous political existence that would limit or constrain the ability of the

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279. See *supra* notes 243–244 and accompanying text (detailing social welfare impacts on Indigenous Peoples).

280. Anaya, *Native Hawaiians and International Human Rights Law*, *supra* note 206, at 356; see also Angela (Riya) Kuo, *Let Her Will Be Done: The Role of the Kamehameha Schools' Admissions Policy in Promoting Native Hawaiian Self-Determination*, 13 *ASIAN PAC. AM. L.J.* 72, 73–78 (2008); Van Dyke, *supra* note 269, at 96 ("Native Hawaiians are now at the bottom of the socio-economic scale in their own lands."). See generally Forbath, *supra* note 278.

281. Coffey & Tsosie, *supra* note 74, at 198.

colonizing nations to control the political existence of indigenous peoples.”<sup>282</sup>

For example, not dissimilar from other places around the world, 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, t]he 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 Kānaka Maoli as surely as leprosy and smallpox claimed their limbs and lives.<sup>283</sup>

Although scholars disagree about the implications of the United States’ role in the illegal overthrow of the Hawaiian Kingdom,<sup>284</sup> it is difficult to deny the deplorable social welfare conditions and political vulnerabilities that continue to plague the Maoli community.<sup>285</sup> The United States has thus far refused to “federally recognize” the inherent sovereignty of Kānaka Maoli. Remedial measures to redress the health, educational, and other disparate impacts of colonialism continue to be challenged, circularly, using laws that were specifically crafted to protect historically disadvantaged groups, leaving Maoli physically and politically vulnerable.<sup>286</sup>

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282. *Id.*

283. OSORIO, *supra* note 139, at 3.

284. See, e.g., Julian Aguon, *The Commerce of Recognition (Buy One Ethos, Get One Free): Toward Curing the Harm of the United States’ International Wrongful Acts in the Hawaiian Islands*, ‘OHIA (forthcoming 2012) (deconstructing Kānaka Maoli international law claims); Anaya, *Native Hawaiians and International Human Rights Law*, *supra* note 206, at 314–15 (“United States troops invaded Hawaii and helped depose the King’s successor, Queen Liliuokalani, and replace her with a provisional government. American residents subsequently established the short-lived ‘Republic of Hawai‘i’ and forced the imprisoned Queen to abdicate officially. The United States formally annexed Hawaii in 1898, despite the fact that the only expression of indigenous Hawaiian opinion on the issue was a petition to Congress, signed by about 29,000 Hawaiians, protesting the annexation.”); Tsosie, *supra* note 74, at 32 (quoting Matsuda, *supra* note 174, at 370) (“[T]he overthrow was accomplished by the use of ‘American military intervention against the will of a majority of Hawaiian citizens, in violation of international law as well as American foreign policy.’”).

285. See, e.g., *supra* note 277 and accompanying text.

286. See *supra* Part III.A.1 (deconstructing the *Rice* litigation and its impact on Kānaka Maoli); *infra* Part IV.D (analyzing the *Doe v. Kamehameha Schools* litigation).

Given this painful history, a developing contextual legal framework for Native claims must consider whether a decision perpetuates historical conditions imposed by colonizers or will attempt to redress the loss of self-governance. Time and again, “the law often replicates the same script portrayed in American history.”<sup>287</sup> This is especially important because histories written by non-Native “people to justify the colonial conquest and dispossession of Native people continue to provide the truth in cases where Native testimony is perceived as biased and non-Native experts are seen as biased purveyors of truth.”<sup>288</sup>

Together, these four realms—(1) cultural integrity; (2) lands and natural resources; (3) social welfare and development; and (4) self-government—inform the contextual legal analysis of history and current socio-economic conditions necessary to discern the true impacts of actions or decisions on Native Peoples.

*D. Brief Illustration of Contextual Legal Analysis of Indigenous Peoples’ Claims and Adjudicatory Rulings*

One recent case offers insight into how differing modes of analysis—formalist and contextual—yield starkly contrasting assessments of court rulings in a Kānaka Maoli legal controversy. The differing appraisals underscore the importance of contextual legal analysis for Indigenous Peoples’ claims, especially in politically-charged cases.

In *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*,<sup>289</sup> the federal courts wrestled with whether a post-civil war reconstruction statute required a private school, created to educate Kānaka Maoli children, to change its admission policy and admit non-natives.<sup>290</sup> The Kamehameha Schools is a “charitable testamentary trust established by the last direct descendent 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.”<sup>291</sup> Plaintiff, a non-native applicant, challenged the school’s admissions policy on the grounds that he was denied entry because of his race, violating a civil

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287. Coffey & Tsosie, *supra* note 74, at 201.

288. *See id.*

289. 295 F. Supp. 2d 1141 (D. Haw. 2003), *aff’d in part, rev’d in part*, 416 F.3d 1025 (9th Cir. 2005), *reh’g en banc granted sub nom.*, *Doe ex rel. Doe v. Kamehameha*, 441 F.3d 1029 (9th Cir. 2006), *rev’d en banc sub nom.*, *Doe v. Kamehameha*, 470 F.3d 827 (9th Cir. 2006).

290. *See, e.g., Kamehameha*, 470 F.3d at 829.

291. *Id.* at 831 (quoting *Burgert v. Lokelani Bernice Pauahi Bishop Trust*, 200 F.3d 661, 663 (9th Cir. 2000)).

rights law that bans racial discrimination when making or enforcing contracts.<sup>292</sup>

At the outset, Judge Alan Kay of the District Court for the District of Hawai'i faced a United States Supreme Court case (where a University denied African Americans admission to maintain a white student body) that interpreted the civil rights law and held that private schools cannot employ race to exclude applicants.<sup>293</sup> The formalist analysis urged by plaintiff would have deemed the case "binding" and invalidated Kamehameha's admissions policy without attention to the historical setting, current conditions, or larger consequences for Hawai'i's Indigenous People.<sup>294</sup> The one exception to the civil rights law's racial differentiation prohibition rested on a judicial finding that the underlying policy addressed a "legitimate remedial purpose."<sup>295</sup> "Precedent" interpreting that language, however, focused on affirmative action in private businesses, which was inapplicable in *Doe*.<sup>296</sup> Formalist analysis thus appeared to dictate rejection of Kamehameha's arguments.

Judge Kay focused on the same legal language of the exception but deeply contextualized the interpretation. He found that history linked to current socio-economic conditions rendered the school's admissions policy both "remedial" and "legitimate," and he granted summary judgment in favor of Kamehameha.<sup>297</sup>

Judge Kay acknowledged the "exceptionally unique circumstances involving a private school, which receives no federal funding, with a remedial race-conscious admissions plan to rectify socioeconomic and educational disadvantages resulting from the influx of western civilization."<sup>298</sup> He determined that Hawai'i's history of colonization, the United States' role in the overthrow of the Indigenous Hawaiian monarchy, and the harms resulting in daily consequences for Hawai'i's Indigenous People—including educational deprivation, loss of lands, homelessness, poor health, and high incarceration rates—provided "a legitimate justification for Kamehameha Schools' . . . admissions policy

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292. *Id.* at 834.

293. *Id.*

294. *Kamehameha*, 295 F. Supp. 2d at 1174.

295. *Id.* at 1146.

296. *Id.* at 1164–65.

297. *Id.* at 1165–72, 1174–75.

298. *Id.* at 1147.

and education program, which serves a legitimate remedial purpose.”<sup>299</sup> Indeed, as Judge Kay determined, Pauahi Bishop created a school for Maoli children as a pro-active response to the ravages of “Westernization”—a self-determination driven remedial measure by Kānaka Maoli for Kānaka Maoli.

On appeal to the Ninth Circuit, the majority of a three-judge panel reversed.<sup>300</sup> The Ninth Circuit panel turned a blind eye to Hawai‘i’s history. In considering whether Kamehameha had “legitimate nondiscriminatory reasons” for its admissions policy, the Ninth Circuit panel ignored Judge Kay’s historical analysis and restricted its inquiry to affirmative action in employment.<sup>301</sup> Through this a-contextual, formalist analysis, the panel concluded that the school’s policy was not “remedial” but rather “preferential” and not “legitimate” but impermissibly “racial.”<sup>302</sup>

Critical legal analysis reveals that in controversial cases like *Doe*, even if decision-makers feel constrained by legal rules, the language of rules alone will not dictate the end result. Instead, the language of most substantive rules—such as whether “legitimate nondiscriminatory reasons” exist—is malleable enough to offer decision-makers a range of options and an ultimate choice influenced by their own political and economic philosophies. Judge Kay’s contextual legal analysis, which was attentive to Hawai‘i’s Indigenous history and its linkage to current socio-economic conditions, more openly surfaced the social and political dimensions of judicial decision-making in contentious cases that are often hidden by formalist analysis. In doing so, he gave meaning to the relevant legal language in ways consistent with Hawai‘i’s history, current socio-economic conditions, and values of Indigenous self-determination.

*Doe* thus underscores both the promise and limits of legal justice for Native Peoples.<sup>303</sup> The decision also highlights the significance of

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299. *Id.*

300. *Doe v. Kamehameha*, 416 F.3d 1025, 1048 (9th Cir. 2005).

301. *Id.* at 1030–39.

302. *Id.* In 2006, the Ninth Circuit reviewed the case *en banc* and reversed the three-judge panel. *Doe v. Kamehameha*, 470 F.3d 827, 829 (9th Cir. 2006).

303. For an example of how employing contextual legal analysis could also benefit Native Peoples, see *Morton v. Mancari*, 417 U.S. 535, 541–42 (1974). In *Morton*, the United States Supreme Court considered a class action brought by non-Indian employees of the Federal Bureau of Indian Affairs (“BIA”) who challenged the BIA’s policy of first hiring and promoting Indians, alleging that it discriminated against them on racial grounds. *Id.* at 537. The lower court deployed a formalist tool of viewing the law broadly to hold “that the Indian preference was implicitly repealed by § 11 of the 1972 Act proscribing racial discrimination in

contextual legal analysis of Native claims—an analysis that explicitly considers history and current socio-economic conditions in the context of the four values of Indigenous self-determination.<sup>304</sup>

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most federal employment.” *Id.* at 540.

On appeal, the Supreme Court employed contextual legal inquiry to more comprehensively examine the impact of the United States’ history on Native Americans. In dramatic contrast to *Johnson*, this framework revealed a new understanding of the “settlement” of the Americas that considered history to discern the impacts of colonization on Native Peoples (including impacts on cultural integrity, lands and resources, social welfare, and self-governance) and the federal government’s resulting trust obligations. *Id.* at 541–43. The Court contemplated who crafted the laws that were being challenged and why those laws and their preference policy was necessary, asserting as follows: “The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.” *Id.* at 554. The Court acknowledged that such action was necessary to repair the harms of colonization, the confiscation of Native lands, the suppression of Indigenous culture, the imposition of dismal social welfare conditions, and to remedy the denial of self-governance. *Id.* at 541–42. “The purpose of these preferences, as variously expressed in the legislative history, has been to give Indians a greater participation in their own self-government; to further the Government’s trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life.” *Id.* The Court conceded that such laws were “[o]ne of the primary means by which self-government would be fostered and the Bureau made more responsive was to increase the participation of tribal Indians in the BIA operations.” *Id.* at 543. After considering who claimed to be hurt by the hiring policy (Whites), the Supreme Court reversed and remanded, ruling that “[a]ny other conclusion can be reached only by formalistic reasoning that ignores both the history and purposes of the preference and the unique legal relationship between the Federal Government and tribal Indians.” *Id.* at 550.

By utilizing contextual legal inquiry to incorporate new understandings and more accurate history, the Supreme Court in *Morton* upheld government acts aimed at repairing the long-standing damage of American colonization. History, when combined with cultural values and current social welfare concerns, sheds light on the necessity of the BIA’s preference policy. By respecting that policy, the Court sought to restore cultural integrity, attempt to redress historic injustices, and improve social welfare conditions, all of which resulted from the denial of self-governance, suppression of Native culture, seizure of ancestral lands, and imposition of dismal social welfare conditions. Importantly, the Hawai’i District Court relied on *Morton* to rule in favor of the State of Hawai’i in *Rice v. Cayetano*. See *Rice v. Cayetano*, 963 F. Supp. 1547, 1550–51 (1997). The district court thoroughly examined Hawai’i’s history before ruling that allowing Maoli to elect trustees to manage their land and other resources was rationally related to the government’s interest in repairing the damage of American colonialism in Hawai’i. *Id.*

304. For example, first, the Ninth Circuit’s decision in *Doe* would maintain disparate social welfare conditions instead of allowing a private educational trust to focus resources on closing educational gaps for Kānaka Maoli. Second, contextual legal analysis reveals that *Doe* would prolong historical conditions imposed by colonizers as opposed to allowing a Native institution to make independent educational and other self-governance decisions necessary to care for its own people. Third, forcing an Indigenous institution to open its doors to non-native students reduces cultural learning opportunities for Kānaka Maoli, undermining cultural survival as opposed to restoring cultural integrity. Fourth, by disallowing

## V. THE WATER COMMISSION'S NĀ WAI 'EHĀ RULING: CONTEXTUAL LEGAL ANALYSIS OF NATIVE PEOPLES' CLAIMS

These contextual insights also help to refine what justice means for Nā Wai 'Ehā's people and communities, and how legal rights should be interpreted and applied.<sup>305</sup> For the Hui and its allies, restoring water to Nā Wai 'Ehā is about more than legal victory, or even the actual restoration of water to streams; this struggle is about something far deeper. The groups seek na'au pono: a deep sense of justice that one can feel in his or her gut; that, hopefully, will breathe new life into dormant constitutional and statutory provisions while returning the physical and spiritual resources necessary to restore Native ecosystems and cultural practices and improve social welfare conditions.<sup>306</sup> Through this shifted framework, legal norms can realistically engender a more just result.

As detailed more specifically in Part V.B, below, na'au pono for Kānaka Maoli and their allies cannot be achieved through litigation alone, or even through new legislation. This deep sense of justice must be sustained through initiatives grounded in reparatory justice; that is, a series of collaborative projects and programs, backed by laws and community organizing that are aimed less at achieving "legal rights" on paper and more on repairing the persistent damage of colonization to Kānaka Maoli.<sup>307</sup> This developing framework starts with the language of rules but acknowledges that, in complex or controversial cases, rule language alone will not determine the final outcome. Although decision-makers may feel constrained to follow legal rules to appear "legitimate," they do not consistently do so in a "neutral" or "objective" manner.<sup>308</sup> Instead, decisional outcomes are often a matter of value choices influenced by the decision-makers' political and economic

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Kamehameha's admissions policy, *Doe* perpetuates the subjugation of Native lands and resources. Instead of allowing the revenues from an Indigenous land base to educate its own people, *Doe* requires those resources to be used for the benefit of non-Maoli as well. This decision highlights the importance of culture and history in developing a contextual legal framework for Native Peoples in general and Kānaka Maoli in particular.

305. See *supra* Parts III–IV.

306. HAWAIIAN DICTIONARY, *supra* note 1, at 257.

307. See Eric K. Yamamoto & Ashley Kaiāo Obrey, *Reframing Redress: A "Social Healing Through Justice" Approach to the United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 ASIAN AM. L.J. 5, 32–36 (2009).

308. See *supra* Part IV.A.

ideologies.<sup>309</sup> To strive for na‘au pono, contextual legal analysis must consider impacts on the four realms of cultural integrity, lands and resources, social welfare and development, and self-government, with the special political and cultural circumstances of Native Peoples and, in this context, Kānaka Maoli in particular.<sup>310</sup> By examining, for example, Indigenous Peoples’ physical and spiritual relationship to natural and cultural resources and the impacts of colonization, legal and other analysis can begin to conceptualize the deep desire for justice that Native Peoples maintain.<sup>311</sup> As demonstrated here, contextual legal analysis of Native Peoples’ claims is vital to any quest for justice; otherwise, decision-makers will be free to deploy formalist methodology to maintain the current state of affairs.

#### A. *Life and the Law in Nā Wai ‘Ehā*

Some never accepted the social contract that had evolved in Nā Wai ‘Ehā during the late 1800s and early 1900s where plantations drained streams, but provided jobs and other income for the community.<sup>312</sup> This arrangement became even less palatable when Wailuku Agribusiness ceased agricultural operations and implemented a liquidation plan, transforming itself into Wailuku Water Company, LLC (“WWC”) and selling contracts for water delivery.<sup>313</sup> By 2003, community members began rallying in opposition.<sup>314</sup> They questioned the propriety of continuing to drain Nā Wai ‘Ehā’s streams at maximum levels when only HC&S still cultivated cane and only about one fifth of the original plantation acreage that these waters had previously irrigated.<sup>315</sup>

As detailed in Part I, above, in June 2004, Maoli group, Hui o Nā

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309. See *supra* Part IV.A.

310. See *supra* Parts IV.B–C.

311. See *supra* Part IV.B.

312. See TENGAN REPORT, *supra* note 2, at 15–16; Martin et al., *supra* note 62, at 90–102.

313. See, e.g., Letter from Kent T. Lucien, Chief Exec. Officer, C. Brewer and Co., to the Shareholders of Wailuku Agribusiness and C. Brewer and Co. (Oct. 3, 2005) (on file with author) (explaining the history of and evolution from Wailuku Agribusiness to Wailuku Water Company, LLC, as well as plans to market 27.5 mgd to new customers); Final D&O, *supra* note 25, at 36.

314. See *supra* note 10.

315. See *No Be Lolo! Get the Facts*, EARTHJUSTICE, <http://earthjustice.org/sites/default/files/library/factsheets/fiction-v-fact.pdf> (last visited Oct. 14, 2011); *Restore Stream Flow*, EARTHJUSTICE, [http://earthjustice.org/our\\_work/campaigns/restore-stream-flow](http://earthjustice.org/our_work/campaigns/restore-stream-flow) (last visited Oct. 14, 2011).



Wai ‘Ehā, and environmental nonprofit, Maui Tomorrow Foundation, partnered with the environmental litigation firm Earthjustice to petition the water commission to restore continuous mauka to makai flow to Nā Wai ‘Ehā’s communities, by amending the Interim Instream Flow Standards (IIFs) for the streams at issue.<sup>316</sup> The Hui and its allies, especially OHA, deeply contextualized the issues within the broader context of restorative justice for Kānaka Maoli, detailing the water commission’s constitutional, statutory, and moral obligations to restore stream flows necessary to support Indigenous culture, communities, lands and other resources, and to begin to redress the effects of 150 years of stream diversions.<sup>317</sup>

WWC and HC&S (collectively, the Companies) objected to the restoration of the streams, and an extended contested case (administrative trial) ensued.<sup>318</sup> Over the course of ten months of adjudicatory hearings, Water Commissioner and Hearings Officer Miike received testimony from 77 witnesses and accepted over 600 exhibits into evidence.<sup>319</sup> After closely reviewing all of the submissions, on April 9, 2009, the hearings officer issued Proposed Findings of Fact, Conclusions of Law, and Decision and Order recommending that the water commission restore 34.5 mgd to Nā Wai ‘Ehā’s four streams and communities.<sup>320</sup>

Despite extensive findings regarding the cultural significance of mauka to makai flow, the negative impacts of diversions on Maoli culture, and the need for restoration,<sup>321</sup> in June 2010, a majority of the commission applied the same laws to the same evidence but arrived at a dramatically different result that returned only 12.5 mgd to two of Nā

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316. See *supra* notes 10–14 and accompanying text.

317. See generally TENGAN REPORT, *supra* note 2 (detailing the impacts of stream diversions on Maui for the water commission).

318. See, e.g., Final D&O, *supra* note 25, at 6–8; see also HAW. ADMIN. R. § 13-167-2 (2011) (defining contested case as “a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for an agency hearing”); *id.* §§ 13-167-51 to -65 (establishing rules governing contested cases before the water commission).

319. Final D&O, *supra* note 25, at 7.

320. Hearings Officer’s Proposed D&O, *supra* note 20, at 187–89; see *supra* note 24.

321. See, e.g., Final D&O, *supra* note 25, at 12 (finding that testimony confirms that the restoration of streamflow is critical for the perpetuation of Maoli culture, to support kalo cultivation, and enable a connection to the land); see also *supra* note 14 (defining mauka to makai flow).

Wai ‘Ehā’s four streams.<sup>322</sup> Rather than respecting the hearings officer’s recommendation—as the most experienced commissioner and the only one who participated in all of the hearings and reviewed all of the evidence<sup>323</sup>—a majority of the water commission, led by former Chair Laura Thielen, deployed formalist analysis to benefit the sugar company at the expense of Maoli rights, resources, and cultural survival.<sup>324</sup>

Hearings Officer Miike authored a scathing dissent.<sup>325</sup> He detailed the commission’s mandate to protect the public trust, including traditional and customary Maoli rights and the environment, before noting that “[t]he majority now turns all of these responsibilities on their heads,” which in turn provided “the least protection feasible or no protection at all to the waters of Nā Wai ‘Ehā.”<sup>326</sup> He concluded that “[b]y its decision, the majority has failed in its duties under the Constitution and the State Water Code as trustee of the state’s public water resources.”<sup>327</sup>

### *B. Contextual Legal Analysis of the Water Commission’s Final Decision and Order in Nā Wai ‘Ehā*

This section employs contextual legal analysis of Kānaka Maoli claims to deconstruct two aspects of the majority’s final order. In doing so, it reveals the actual dynamics of the commission’s decision-making with an emphasis on the value choices and interests implicated in complex decisions like this one. This interrogation exposes that the majority’s final decision was not “objectively determined” but a series of value choices that consistently benefitted the Companies at the expense of Native communities, resources, and culture.

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322. Final D&O, *supra* note 25, at 185–87 (detailing IIFs).

323. See Hearings Officer’s Dissent, *supra* note 23, at 7 (“This is my sixteenth year involved in state water resources issues, first as a [c]ommissioner in the original Waiāhole Contested Case, then as a hearings officer for the two remands from the Hawai‘i Supreme Court, and now again as a [c]ommissioner and the hearings officer in this contested case, where I was the only [c]ommissioner to have heard and reviewed all the evidence.”).

324. Compare Hearings Officer’s Proposed D&O, *supra* note 20, at 179–82, with Final D&O, *supra* note 25, at 179–80.

325. Hearings Officer’s Dissent, *supra* note 23.

326. *Id.* at 2.

327. *Id.* at 7.

## 1. Contextual Legal Analysis of Native Peoples' Claims Exposes the Injustice of Restoring Only Two of Nā Wai 'Ehā's Four Great Waters

In Nā Wai 'Ehā, the principal issue involved IIFSs, which as detailed in Part II.C., above, are the minimum amount of water that must remain in a stream to restore and preserve Kānaka Maoli and other beneficial instream uses, including “[t]he protection of traditional and customary Hawaiian rights” and the “maintenance of fish and wildlife habitats.”<sup>328</sup> Consistent with the Hawai‘i Supreme Court’s ruling that IIFSs are “the primary mechanism by which the commission is to discharge its duty to protect and promote the entire range of public trust purposes dependent upon instream flows,”<sup>329</sup> the Hui and its allies utilized this legal tool, with the hope of restoring continuous mauka to makai flow to each of Nā Wai 'Ehā's four communities.

Of the almost 70 mgd that the companies historically took from Nā Wai 'Ehā streams for over a century, the Hui and OHA jointly requested 53.4 mgd to support a range of rights and uses reliant upon mauka to makai flow, including traditional and customary Maoli practices and environmental protection.<sup>330</sup> The companies, on the other hand, advocated a minimalist approach.<sup>331</sup> In its final decision, the commission majority rejected key aspects of the hearings officer’s recommendations, slashed the proposed IIFSs by two-thirds, and

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328. HAW. REV. STAT. § 174C-3 (1993) (defining IIFS and instream use). See *supra* Part II.C for an in-depth discussion of IIFSs.

329. *Waiāhole I*, 9 P.3d 409, 460 (Haw. 2000).

330. Final D&O, *supra* note 25, at 158 (noting that the Hui and OHA recommended restoring 25.5 mgd to Waihe'e River, 2.5 mgd to North Waiehu and 2.5 mgd to South Waiehu Streams, 18.8 mgd to 'Īao Stream, and 4.1 mgd to Waikapū Stream); see also Hui's Proposed Decision and Order at 3–6, *Contested Case Hearing*, No. CCH-MA06-01 (Dec. 5, 2008) [hereinafter Hui's Proposed D&O].

331. WWC recommended restoring a total of 4.2 mgd divided among the four streams, which would have kept the vast majority of water available for offstream use. See Final D&O, *supra* note 25, at 155–56 (observing that the WWC would have restored 1.4 mgd to Waihe'e River below all diversions, .5 mgd to North Waiehu and 0.5 mgd to South Waiehu Stream below all diversions, 1.4 mgd to 'Īao Stream below all diversions, and 0.4 mgd to Waikapū Stream below all diversions); see also WWC's Proposed Findings of Fact, Conclusions of Law and Decision, and Order of Wailuku Water Co. at 79, 101, 116, and 131, *Contested Case Hearing*, No. CCH-MA06-01 (Dec. 5, 2008) [hereinafter WWC's Proposed D&O]. WWC's proposed IIFSs “would be less than even the lowest flow” ever recorded in the streams above all diversions. See Final D&O, *supra* note 25, at 155–56. HC&S initially suggested that the Commission split between 2.3 and 3.5 mgd amongst Waihe'e River and Waiehu Stream only, with no water for 'Īao and Waikapū. Final D&O, *supra* note 25, 161. HC&S later increased its “offer” after the hearings officer issued the Proposed Decision and Order. See *infra* note 332.

embraced HC&S's initial proposal of restoring flow to Waihe'e and Waiehu only, with no water for 'Īao and Waikapū Streams.<sup>332</sup> Practically speaking, this maintained the status quo for 'Īao and Waikapū, leaving those streams completely dewatered below the Companies' diversions and disregarding both the Native values and practices dependent upon restored stream flows and legal directives to protect those interests.<sup>333</sup> This final order also allowed the Companies to continue plundering Indigenous resources for their own profit in direct contravention of the Constitution and Water Code.

The majority justified its actions by finding that 'Īao and Waikapū did not merit restoration after comparing "the importance of present or potential instream values with the importance of present or potential offstream uses of water for noninstream purposes, including the economic impact of restricting such uses."<sup>334</sup> As the Final Decision and Order made sure to note: "*The law does not prescribe a specific method for weighing that economic impact.*"<sup>335</sup>

The majority, therefore, reasoned that assessing whether Waikapū Stream flowed continuously to the ocean "can be deferred until some future time when the balancing of instream values and offstreams uses might be more favorable."<sup>336</sup> The majority also concluded that 'Īao did

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332. Final D&O, *supra* note 25, at 161. HC&S would have restored 2–3 mgd to Waihe'e River below all diversions and 0.15 to 0.25 mgd to both North and South Waiehu Streams below all diversions, but urged the Commission not to return any water to 'Īao or Waikapū because they are "not viable candidates for restoration" and, therefore, the Commission "should deny the requests for amendment of their IIFS." *Id.*; see also Hawaii Commercial & Sugar Co. Proposed Decision and Order at 113–14, *Contested Case Hearing*, No. CCH-MA06-01 (Dec. 5, 2008) [hereinafter HC&S Proposed D&O]. At the final oral argument before the water commission after the Proposed D&O was issued, HC&S upped its initial offer, suggesting that the Commission restore 16.5 (from its initial offer of 2–3 mgd) to the four streams. Transcript of Closing Argument at 23–24, *Contested Case Hearing*, No. CCH-MA06-01 (Oct. 15, 2009) [hereinafter Transcript of Closing Argument]. HC&S would have restored 5 mgd to Waihe'e River, 3.5 mgd to Waiehu Stream, 4 mgd to 'Īao Stream, and 4 mgd to Waikapū Stream. *Id.*

333. The majority elected to restore flows at the "controlled release" rates proposed by the United States Geological Survey ("USGS") as part of a 2007–2008 scientific study to, among other things, measure the amount of water the streams contribute to the underground aquifer. Final D&O, *supra* note 25, at 180. USGS's estimates neither comport with the language of the law nor were they intended to be used as IIFSs. See *supra* note 30. By comparison, USGS's "controlled releases" are about one-third of the amount that the hearings officer recommended restoring. Final D&O, *supra* note 25, at 180.

334. Final D&O, *supra* note 25, at 179 (citing HAW. REV. STAT. § 174C-71(2)(D)).

335. *Id.* at 142 (emphasis added).

336. *Id.* at 179. Although the majority did not say when this future time would be, it

not deserve restoration because channelization in the stream's lower reaches posed challenges to the recruitment of native stream animals.<sup>337</sup> The majority characterized its decision as “follow[ing] the mandates of the law as described in the Constitution, state statutes, and the Hawai‘i Supreme Court decisions” and adopting “standards which the majority felt represented the *best balance* of the mandated values and trust responsibilities.”<sup>338</sup> After all, “[a]s in any difficult decision, reasonable minds may reach different conclusions.”<sup>339</sup>

In contending that its “balancing” complied with the law, the majority sought refuge in formalist methodology, attempting to make its outcome seem minimally plausible even though it was unsustainable on the facts and law as highlighted by contextual legal analysis of Native Peoples’ claims. Given this formalist approach, the range of contextual factors—including impacts on cultural integrity, lands and other resources, social welfare conditions, and self-governance—were either deemed irrelevant or less relevant and the majority was free to disregard strong evidence bolstering those values while still maintaining, circularly, that it followed “the law.”

As demonstrated in this controversial case, the formalist method of analysis hides the political and economic interests that influenced the majority’s “balancing,” while also subverting the values that law was designed to protect.<sup>340</sup> For example, during the final oral argument, HC&S’s newly appointed Manager—and Alexander and Baldwin’s (A&B’s) Chief Financial Officer (CFO)—assured the commissioners

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suggested that the water commission’s separate process for issuing water use permits would help to provide more information and protect environmental interests:

While the IIFS for [‘Īao] and Waikapū Streams are not amended, in the future permitting process, permittees will have to measure or gauge the amounts they are diverting to comply with their permits. Present diversion structures that disrupt stream flows will have to be modified, in order to allow recruitment of stream life past the diversions.

*Id.* at 188. The majority’s reasoning again failed to adequately consider the impacts on Native culture, resources, and rights.

337. *Id.* at 180. The majority’s ruling contradicted expert and kama‘āina (lay) testimony, as well as its own findings, which “documented substantial amphidromous migration when flow connected to the ocean for more than three or four days and thus anticipated that with continuous flow, [native] species would reestablish into the upper reaches of ‘Īao Stream.” *Id.* at 149–50 (Conclusion of Law 167(4)).

338. *Id.* at 191 (emphasis added).

339. *Id.* (emphasis added).

340. *See infra* Part V.B.2.

that while “[they] do not believe that there was any intent to shutdown HC&S through the proposed IIFS[,] . . . [it] will be the end result if [the commissioners] adopt the recommended decision.”<sup>341</sup> After reciting the claimed economic impacts of a shutdown,<sup>342</sup> the CFO referenced HC&S’s last ditch proposal to restore 16.5 mgd to Nā Wai ‘Ehā streams, “an alternative IIFS that [they] believe *better balances* the offstream and instream values of these four streams to the better benefit of the people of Maui and of the state.”<sup>343</sup> Those political drivers, especially the claimed economic impact of restricting HC&S’s practically free use of Nā Wai ‘Ehā water, served the interests of Maui County’s largest employer—and possibly the economy in general—and disserved Indigenous needs and values.<sup>344</sup> The majority’s one-sided “balancing” provided a critical foundation for its final decision.<sup>345</sup>

Contextual legal analysis of Native Peoples’ claims, however, reveals the impropriety of formalist analysis, especially in “difficult” cases like this one.<sup>346</sup> By broadening and deepening the analysis, the developing framework establishes that the majority’s final IIFSs were “wrong on the facts and law” because the underlying formalist analysis ignored the

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341. Transcript of Closing Argument, *supra* note 332, at 24. For more information on the potential economic impact of an HC&S shutdown, see *infra* Part V.B.2. In Nā Wai ‘Ehā and other contested cases before the water commission, the practice has been to issue a proposed decision, allow the parties to file written “exceptions” to that decision, hold oral argument on the parties’ “exceptions” to the proposed decision, then issue a final decision and order. See, e.g., Final D&O, *supra* note 25, at 7–8.

342. “HC&S employs about 800 full-time workers” on Maui and one of its subsidiaries employs about another 17. Final D&O, *supra* note 25, at 137. As Maui County’s largest employer, HC&S claimed “immediate impacts [of its shutdown] would include lost jobs and in excess of \$100 million of spending on Maui, generating approximately \$250[ million] annually to the County of Maui and State of Hawai‘i economies.” Final D&O, *supra* note 25, at 137.

343. Transcript of Closing Argument, *supra* note 332, at 23–24 (emphasis added). Interestingly enough, the Commission majority restored even less water to the streams than HC&S requested at the final oral argument. Compare *id.*, with Final D&O, *supra* note 25, at 185–87 (detailing amended IIFSs).

344. See *supra* note 342 and accompanying text; HAWAIIAN COMMERCIAL & SUGAR CO., <http://www.hcsugar.com/> (last visited Oct. 14, 2011) (noting that HC&S is one of the largest employers on Maui).

345. See Final D&O, *supra* note 25, at 155–80.

346. Compare Final D&O, *supra* note 25, at 12 (“Restoring streamflow to Nā Wai ‘Ehā ‘would enormously benefit’ Native Hawaiians and other communities who seek to reconnect with their culture and live a self-sustaining lifestyle, and more people would be able to engage in traditional and customary practices with more water.”), with Final D&O, *supra* note 25, at 188 (the Commission majority dismissed these and other cultural impacts and neglected to restore water to ‘Īao and Waikapū streams).

most significant factors for properly interpreting the relevant legal language—impacts on cultural integrity, lands and other resources, social welfare conditions, and self-governance. By twisting the legal language, formalist analysis disguised the bare-knuckled political and economic interests at play as well as the resulting “unjust” consequences, which are measured by both Maoli values and interests, and the larger community’s desires as reflected in the evolution of water law in Hawai‘i (including the development of the Constitution and Water Code and the contextual factors they embody).<sup>347</sup>

Contrary to the majority’s characterization, Commissioner Miike observed in his dissent that “[t]he amended IIFS were the amounts of water remaining after *all* offstream requirements were met; i.e., a residual—not a balanced—approach.”<sup>348</sup> Commissioner Miike proposed returning 14 mgd to Waihe‘e, 3.5 to Waiehu, 13 mgd to ‘Īao, and 4 mgd to Waikapū,<sup>349</sup> with the remainder available for offstream use.<sup>350</sup> This would have reduced the amount of water previously available for HC&S, WWC, and other offstream diverters to about half their historic rates and would have required HC&S to use one of its wells to supplement the stream water it takes during summer months when flows are lower.<sup>351</sup>

In issuing his proposed ruling, the hearings officer examined the evidence and employed contextual legal analysis of Native Peoples’ claims, consistent with the “justice principles” embodied in Hawai‘i water law.<sup>352</sup> The hearings officer’s analysis specifically considered the context of Hawai‘i water law, such as Maoli rights and interests that

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347. See *supra* note 68; see also Final D&O, *supra* note 25, at 12 (“Restoration of mauka to makai flow to the streams is critical to the perpetuation and practice of Hawaiian culture in Nā Wai ‘Ehā.’ ‘If we are not able to maintain our connection to the land and water and teach future generations our cultural traditions, we lose who we are as a people.” (internal quotations omitted)).

348. Hearings Officer’s Dissent, *supra* note 23, at 4 (emphasis in original).

349. Hearings Officer’s Proposed D&O, *supra* note 20, at 180.

350. *Id.* Hearings Officer Miike recommended an almost even split of water between the Hui and its allies who sought stream restoration and the Companies who wanted to continue taking water for their private use. *Id.*

351. *Id.* at 180–81; see also *infra* Part V.B.2 (analyzing the majority’s decision regarding the practicability of alternate sources of water). Hearings Officer Miike also recommended approving the following water use permits: 2.4 mgd to Maui County for municipal uses and 0.1 mgd to HC&S for agricultural water uses. Hearings Officer’s Proposed D&O, *supra* note 20, at 191. Hearings Officer Miike recommended denying WWC’s water use permit applications. *Id.* at 191–92.

352. See *supra* Part II.

were subverted by the majority's formalist methodology. He considered the history of this area and the plantation industry's prior and continuing impacts on Kānaka Maoli cultural integrity, social welfare conditions, lands and other resources, and other Indigenous values; specifically, he considered the contextual factors of Hawai'i water law, such as Maoli rights and interests, that were subverted by the majority's formalist methodology. The hearings officer's deeper contextualization informed his balancing of instream values versus offstream needs, and he proposed a decision that revealed the true impacts of the outcome on Hawai'i's Indigenous People and resources while also seeking to redress the harms of colonization through stream diversions in particular, consistent with the evolution and intent of Hawai'i water law.

The hearings officer examined the Companies' 150-year history of stream diversions in Nā Wai 'Ehā and the impact on natural resources and Indigenous culture. He gave credence to the "uncontroverted testimony regarding limitations on Native Hawaiians' ability to exercise traditional and customary . . . practices in the greater Nā Wai 'Ehā area due to the lack of freshwater flowing in Nā Wai 'Ehā's streams and into nearshore marine waters,"<sup>353</sup> and took that into account in seeking to fulfill the state's public trust obligations toward stream resources and Kānaka Maoli in particular.

The hearings officer also considered the cultural benefits of restored stream flows and the importance of beginning to rectify past harms to lands and other resources. He found that "Nā Wai 'Ehā continues to hold the potential to once again support enhanced traditional and customary rights and practices if sufficient water is restored,"<sup>354</sup> and that the "[r]estoration of mauka to makai flow to the streams is critical to the perpetuation and practice of Hawaiian culture in" this area.<sup>355</sup> He understood that if Native practitioners "are not able to maintain [their] connection to the land and water and to teach future generations [their] cultural traditions, [they] lose who [they] are as a people."<sup>356</sup>

The hearings officer contemplated improved social welfare conditions that would result from restored flow, especially for Kānaka

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353. Hearings Officer's Proposed D&O, *supra* note 20, at 10.

354. *Id.* at 11.

355. *Id.* at 12.

356. *Id.* Regarding impacts to lands and other resources, Hearings Officer Miike also recognized that "[a]n overriding factor impairing the biological and ecological integrity of diverted Central Maui streams, compared to their non-diverted counterparts, is the disruption of natural flow via large-scale offstream diversions." *Id.* at 14.



Maoli. He found that returning water to the streams to support cultural practices “will result in the betterment of the conditions of native Hawaiians and Hawaiians by restoring spiritual well-being and a state of ‘pono’ (goodness, righteousness, balance) to the people and communities of Nā Wai ‘Ehā.”<sup>357</sup> He also acknowledged that the rejuvenation of cultural practices, especially “[k]alo cultivation[,] provides not only a source of food, but also spiritual sustenance, promotes community awareness and a connection to the land, and supports physical fitness and mental well-being.”<sup>358</sup> The Final Decision and Order included these same findings while diluting others, and yet the majority’s “balancing” effectively negated the hearings officer’s findings in favor of the Companies.

The hearings officer’s proposed order did not explicitly address self-governance issues for Kānaka Maoli. It did, however, give meaning to the relevant legal language in ways that were consistent with Indigenous self-determination and would have significantly redressed the historical conditions of completely dewatered streams imposed by colonizers.<sup>359</sup>

On its face, the language of the law governing IIFSs promotes stream protection and restoration, while also giving credence to the same values considered in contextual legal analysis of Native Peoples’ claims.<sup>360</sup> The Constitution and Water Code direct the commission to protect and restore instream uses to the extent practicable.<sup>361</sup> The law’s expansive language reflects a broad accommodation of interests and values, including specific safeguards for Indigenous interests. For example, the Code makes clear that traditional and customary Kānaka Maoli rights, along with appurtenant rights<sup>362</sup> “shall not be abridged or denied.”<sup>363</sup> Despite this underlying accommodation and the explicit protections and preferences for “public trust purposes,” such as Kānaka Maoli cultural

357. *Id.* at 12.

358. *Id.*; *see also id.* at 11–12.

359. *See, e.g., id.* at 112 (emphasizing that Maoli traditional and customary rights may not be abandoned and are enforceable even if a practice has not been continuously exercised, which supports self-determination and cultural sovereignty).

360. *See, e.g., HAW. REV. STAT. § 174C-71(2)(D).*

361. *Waiāhole I*, 9 P.3d 409, 467 (Haw. 2000); *see also HAW. CONST. art. XI, § 7; HAW. REV. STAT. § 174C-71(4)* (requiring the Commission to “[e]stablish an instream flow program to protect, enhance, and reestablish, where practicable, beneficial instream uses of water”). The Code identifies nine beneficial instream uses. *See HAW. REV. STAT. § 174C-3; supra* note 17 and accompanying text.

362. *See supra* note 36 (defining appurtenant rights).

363. *HAW. REV. STAT. § 174C-101(c)–(d)* (1993).

practices and environmental protection,<sup>364</sup> the actual language of the law (such as “to the extent practicable”) is general enough to enable formalist analysis to generate legal outcomes that might initially appear plausible but that actually disserve the intended accommodation of these interests and values.<sup>365</sup>

As demonstrated by the analysis above, even when armed with the protective language of the law, the legal process has the potential to yield a wide range of outcomes as decision-makers are influenced by a broad spectrum of explicit and implicit forces—including personal values and economic interests—that shape how decision-makers interpret and apply the law broadly or narrowly depending upon the select facts of any case.<sup>366</sup> Contextual legal analysis of Native Peoples’ claims reveals a far more appropriate interpretation and application of the relevant legal language, which is also consistent with the law’s initial framing. The hearings officer’s proposed decision, even with shortcomings,<sup>367</sup> would have achieved a more just result for Kānaka

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364. *Waiāhole I*, 9 P.3d at 448–49; *see also id.* at 448 (“acknowledg[ing] resource protection, with its numerous derivative public uses, benefits, and values, as an important underlying purpose of the reserved water resources trust”); *id.* at 449 (“uphold[ing] the exercise of Native Hawaiian and traditional and customary rights as a public trust purpose”); *id.* at 454 (“[T]he constitutional requirements of ‘protection’ and ‘conservation,’ the historical and continuing understanding of the trust as a guarantee of public rights, and the common reality of the ‘zero-sum’ game between competing water uses demand that any balancing between public and private purposes begin with a presumption in favor of public use, access, and enjoyment.”).

365. *Id.* at 467. In this case, instream values include the environmental and cultural benefits advocated by the Hui and its allies and noninstream purposes include WWC and HC&S’s use of diverted stream water for their private commercial profit. *See* HAW. REV. STAT. § 174C-3 (defining instream and noninstream uses); *see also supra* note 17 and accompanying text (defining instream uses).

366. *See, e.g., Singer, supra* note 131, at 470 (“[L]egal rules were often vague and therefore ambiguous. Since these rules often combined abstract and contestable concepts, . . . they were subject to broad interpretation. Reasonable persons could disagree about what these concepts meant; thus judges could not apply them mechanically.”).

367. Although significantly more balanced than the majority’s Final Decision and Order, both the Hui and OHA objected to various aspects of the hearings officer’s Proposed Decision and Order. In the context of Maoli rights and interests, for example, both parties took issue with the hearings officer’s treatment of kuleana or appurtenant rights, which attach to land that was in cultivation, often in the traditional staple kalo, when private property was instituted in Hawai‘i. *See, e.g., Hui o Nā Wai ‘Ehā and Maui Tomorrow Foundation, Inc.’s Exceptions to Proposed Findings of Fact, Conclusions of Law, and Decision and Order at 19–26, Contested Case Hearing, No. CCH-MA06-01 (May 11, 2009) [hereinafter Hui’s Exceptions to Proposed D&O].* In particular, both the Hui and OHA raised concerns about the hearings officer’s refusal to make determinations on undisputed appurtenant rights, disinclination to require the Companies to continue supplying water to kuleana right holders, and

Maoli, agribusiness, and the Hawai‘i community at large.

## 2. Contextual Legal Analysis of Native Peoples’ Claims Uncovers the Economic Interests at Play in Determining the “Practicability” of Alternate Water Sources

A second example of the dangers presented by the majority’s formalist methodology involves the assessment of alternate sources of water.<sup>368</sup> Because fresh water in Hawai‘i is part of a public trust, no one can own the resource; instead, the water commission balances rights and priorities of water use.<sup>369</sup> If individuals or companies want to use water, they bear the burden of demonstrating both actual water needs and the absence of practicable alternatives, such as using another source of water or making their current use more efficient.<sup>370</sup> Because the public trust establishes certain beneficial instream uses—such as Native practices and environmental protection—“as the norm or ‘default’ condition,” it creates a higher level of scrutiny for private commercial uses and places the burden of justifying those uses on the water commission and commercial users (as opposed to the public trust purposes).<sup>371</sup> In this way, both the Constitution and Water Code embody restorative justice principles, including the contextual factors vital to any legal analysis of Native Peoples’ claims.

Enforcing this legal burden of proof was an onerous task in Nā Wai ‘Ehā because the parties bitterly disagreed about how much water the

miscalculation of the amount of water necessary to enable and restore these constitutionally and statutorily guaranteed interests. *Id.* Compare Hearings Officer’s Proposed D&O, *supra* note 20, at 33–36, 118–20, with HAW. REV. STAT. § 174C-63 (“Appurtenant rights are preserved. Nothing in this part shall be construed to deny the exercise of an appurtenant right by the holder thereof at any time.”).

368. The analysis regarding the practicability of alternatives also includes making uses more efficient, e.g., lining ditches and reservoirs, in addition to using other sources of water, e.g., ground water wells or reclaimed wastewater. *See, e.g.*, Final D&O, *supra* note 25, at 107–110, 134 (regarding reclaimed wastewater); *id.* at 134 (regarding lining ditches and reservoirs). Although the water commission addressed these issues, they will not be discussed here due to space constraints. *See, e.g., id.* at 134.

369. *Waiāhole I*, 9 P.3d at 453–54.

370. *Id.* at 473–74; Final D&O, *supra* note 25, at 112–13. The Commission has defined practicable as “available and capable of being used after taking into consideration cost, existing technology, and logistics.” Final D&O, *supra*, at 116 (citing *Waiāhole II*, 93 P.3d 643, 661 (Haw. 2004)).

371. Final D&O, *supra* note 25, at 112–13 (quoting *Waiāhole I*, 9 P.3d at 454). Moreover, “[t]he Commission ‘is not obligated to ensure that any particular user enjoys a subsidy or guaranteed access to less expensive water sources when alternatives are available and public values are at stake.’” *Id.* at 116 (citing *Waiāhole I*, 9 P.3d at 484–85).

Companies actually needed and whether alternate sources of water, especially ground water wells, were practicable.<sup>372</sup> The commission focused its attention on HC&S because prior to the administrative trial, that company alone was using roughly eighty percent of the water diverted from the streams, significantly more than all other users combined.<sup>373</sup>

After considering the evidence in light of the relevant legal language, the commission majority determined that Well No. 7 was a practicable alternative and that HC&S could pump up to 9.5 mgd of ground water from that source during summer months instead of taking stream water.<sup>374</sup> By deeming less than half of Well No. 7's past use "practicable" for only several months each year, the majority allowed HC&S to continue using Nā Wai 'Ehā streams as its main irrigation source for the West Maui Fields<sup>375</sup> and relieved HC&S of the obligation to pump Well No. 7 at previous rates.<sup>376</sup> This enabled HC&S to avoid using internally generated electricity to pump its well (fueled by burning a byproduct of its sugar production) and instead, keep selling that electricity to the local utility for windfall profits.<sup>377</sup>

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372. *Id.* at 119–30 (discussing actual water needs and the majority's ultimate decision).

373. *Id.* at 210. This analysis focuses on HC&S only. For more information on WWC, Maui County, or any of the other uses, see *id.* at 32–38. For general background, in 2006, HC&S used roughly 41.92 mgd, WWC used 2.37 mgd, and Maui Department of Water Supply used 2.84. *Id.* at 210.

374. *Id.* at 171. HC&S argued that "as currently configured, Well No. 7 can supply only 14 mgd to the Waihe'e-Hopoi Fields." *Id.* at 85, 130–31. Hearings Officer Miike recommended and the majority agreed, however, that "HC&S's records do not indicate that Well No. 7 was ever configured differently than its current configuration." *Id.* at 85.

375. "Approximately 5,300 acres of HC&S's sugar plantation, or about 15 percent of the roughly 35,000 acres HC&S uses for sugar cane cultivation, are located in HC&S's 'West Maui Fields,'" which are irrigated with Nā Wai 'Ehā stream water. Proposed D&O, *supra* note 20, at 66. The West Maui Fields consist of: (1) the Waihe'e-Hopoi Fields (3950 acres) that HC&S owns and irrigates with water from Waihe'e River and 'Āo and Waiehu Streams via the Wai'ale reservoir; and (2) the 'Āo-Waikapū fields (1350 acres), former WWC lands, most of which HC&S now leases and currently irrigates with water from 'Āo, Waikapū, and Waiehu Streams and Waihe'e River. Final D&O, *supra* note 25, at 38–40; Hearings Officer's Proposed D&O, *supra* note 20, at 66–68. HC&S irrigates the rest of its plantation—about 30,000 acres—with stream water that it diverts from rural, predominantly Maoli communities in East Maui. See Summer Sylva, *Indigenizing Water Law in the 21st Century: Na Mokuaupuni o Koolau Hui, A Native Hawaiian Case Study*, 16 CORNELL J.L. & PUB. POL'Y 563, 564 (2007) (overviewing the East Maui water issue).

376. Final D&O, *supra* note 25, at 171 (regarding prior pumping rates). Despite the historical average of 19 mgd, "[b]etween 1927 and 1985, HC&S pumped an average of about 21 mgd from Well No. 7." *Id.* at 84 (internal citations omitted); see also *id.* at 130.

377. Final D&O, *supra* note 25, at 171. The majority's determination would "not

The majority's ruling was difficult to justify using even formalist methods because neither HC&S nor the majority could meet the legal burden of demonstrating the "absence of practicable alternatives" when HC&S had historically used only one-third of the water diverted from Nā Wai 'Ehā streams and maintained a battery of 16 non-potable agricultural wells to irrigate its fields.<sup>378</sup> In fact, the majority itself determined that "[f]rom 1927 until additional Nā Wai 'Ehā water became available in the 1980s, HC&S's primary source of irrigation water for its Waihe'e-Hopoi Fields was Well No. 7," not Nā Wai 'Ehā streams.<sup>379</sup> Despite its own findings regarding HC&S's longtime alternatives, the majority employed a narrow interpretation of the term "practicable" to reach its desired outcome. The majority concluded that "[a]n alternative is practicable if it is available and capable of being used after taking into consideration cost, existing technology, and logistics."<sup>380</sup> It then acknowledged that "Well No. 7 historically had pumped approximately 19 mgd,"<sup>381</sup> but justified its determination of only 9.5 mgd as a "practicable" alternative by citing potential costs that HC&S might be forced to incur to install new pumps<sup>382</sup> and lost profits from selling electricity to the power company,<sup>383</sup> and ultimately focusing on the

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require capital costs, only the costs of pumping." *Id.* Moreover, HC&S historically used electricity generated at its mill to pump its wells. Andrew Gomes, *HC&S, Last Sugar Cane Plantation, on Track toward More Financial Losses*, HONOLULU ADVERTISER, Nov. 15, 2009, available at <http://the.honoluluadvertiser.com/article/2009/Nov/15/In/hawaii911150370.html>. Since the 1980s when Nā Wai 'Ehā water became "available," HC&S has sold that electricity for private profit. Final D&O, *supra* note 25, at 89.

378. Final D&O, *supra* note 25, at 41–42 (documenting prior sharing of Waihe'e and Spreckels Ditch flows with WWC's predecessor in interest); *see also id.* at 39 (regarding HC&S's sixteen non-potable wells). "Since the additional Nā Wai 'Ehā flows became available, HC&S has minimized its use of Well No. 7," but used it heavily in 1996 and 2000 when it pumped an average of 25 and 19 mgd, respectively. *Id.* at 84. Non-potable water is not suitable for drinking, but may still be used for other purposes depending on its quality, including agricultural irrigation.

379. Final D&O, *supra* note 25, at 84. Moreover, "[b]etween 1927 and 1985, HC&S pumped an average of about 21 mgd from Well No. 7." *Id.* at 84 (internal citations omitted); *see also id.* at 130.

380. *Id.* at 116 (citing *Waiāhole I*, 9 P.3d 409, 661 (Haw. 2000)).

381. *Id.* at 171; *see supra* note 376 and accompanying text (noting historical rates of pumpage).

382. *Id.* at 171 (acknowledging that Well No. 7 has two pumps and one booster pump, but that "[a]n additional 14 mgd booster pump would incur costs of \$1 million, and \$475,000 in infrastructure costs").

383. *Id.* (noting that "HC&S also claims that there would be constraints on the power to run the pumps on a consistent and sustained basis because of its power contract with" Maui Electric Company).

possible impacts on the ground water source if the well was again pumped at historic rates that exceed the aquifer's nominal sustainable yield.<sup>384</sup> In doing so, the majority was able to conclude that "the practical alternative from Well No. 7 is lower than historic rates."<sup>385</sup>

The majority employed a formalist approach to determine that it was "practicable" for HC&S to periodically pump only 9.5 mgd from Well No. 7 even though that was unsustainable on the facts and the law, as demonstrated here. Such a flattened construction of the relevant legal term and an application that focused on pumping exceeding the aquifer's sustainable yield (which the commission knew about and allowed for years without any alleged adverse effect) was possible only if the majority ignored key aspects of the controversy (such as HC&S's history of using this well in addition to the four values of contextual legal analysis of Native Peoples' claims).<sup>386</sup> Despite these inherent contradictions, the majority zeroed in on this issue to protect the company's interests rather than the Hui's or the resources' rights. The majority, therefore, employed formalist methodology to attempt to impart an air of minimal plausibility to its inordinately narrow view of the pertinent legal language and "relevant" facts. This rationale also masked the majority's apparent economic motivation, which in turn silenced the larger historical context of Hawai'i history and Indigenous Peoples' claims in particular.

As demonstrated here, the formalist method and its focus on sustainable yield attempted to obscure the political interests that were the actual drivers of the majority's ruling. For example, throughout the extensive hearings, HC&S decried the economic impacts of restricting

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384. *Id.* The majority observed that

The combined facts that the current sustainable yield of the aquifer is already being exceeded; that increased pumping from Well No. 7 may exacerbate that strain; and that the historically higher levels of pumping occurred during a period where furrow irrigation methods were affecting recharge rates for the aquifer, the practical alternative from Well No. 7 is lower than historic rates.

*Id.* Sustainable yield is the maximum rate at which water can be pumped from an aquifer while still maintaining the integrity of that ground water source. *See* HAW. REV. STAT. § 174C-3.

385. Final D&O, *supra* note 25, at 171.

386. *See supra* Part II.A.1 (overviewing legal formalism). Since formalist analysis assumes that the law is rationally determinate, judging is mechanical, and the legal process itself is sufficient to mete out "justice," decision-makers use that methodology to minimize contextual factors. *Id.*

its free access to Nā Wai ‘Ehā water, arguing “[i]f reductions in HC&S’s use of stream waters were of such a magnitude as to force HC&S not to cultivate the 5300 acres that comprise the West Maui Fields, HC&S would not be a viable plantation.”<sup>387</sup> In particular, HC&S claimed that “its *survival* hinges on the [1350-acre] ‘Īao-Waikapū fields having sufficient Nā Wai ‘Ehā water to irrigate them.”<sup>388</sup>

These threats were not without political weight; “HC&S employs about 800 full-time workers” on Maui and one of its subsidiaries employs about another 17.<sup>389</sup> As Maui County’s largest employer, HC&S claimed “immediate impacts [of its shutdown] would include lost jobs and in excess of \$100 million of spending on Maui, generating approximately \$250[ million] annually to the County of Maui and State of Hawai‘i economies.”<sup>390</sup>

HC&S’s pressure tactics escalated once the hearings officer recommended restoring about half of the water the Companies usually take from the streams.<sup>391</sup> At the closing oral argument before the full commission, A&B’s CFO emerged on HC&S’s behalf.<sup>392</sup> Though he had never previously appeared in the case and professed a lack of familiarity with the administrative record, the CFO announced that he expected “a

387. Final D&O, *supra* note 25, at 136–37. Along the same lines, HC&S also argued “that maintaining the number of acres it has in sugar cultivation is necessary to remain economically viable.” *Id.* at 140. It also claimed the “West Maui Fields provide the most productive yields of all of HC&S’s cultivated lands,” making them “critical” to HC&S’s continued existence. *Id.* at 137.

388. *Id.* at 140 (emphasis added). HC&S claimed that reductions in its use of Nā Wai ‘Ehā stream water would result in

lost jobs and in excess of \$100[ million] of spending on Maui, closure of HC&S will have a deleterious effect on efforts to promote agriculture and curb urbanization in Hawai‘i. The withdrawal of HC&S’ 35,000 acres of prime agricultural lands from sugar would vastly increase the agricultural lands in the State of Hawai‘i and on Maui that are idle.

*Id.* at 90. At the same time that it was arguing that it needed every last drop of Nā Wai ‘Ehā Water for its very “survival,” HC&S’s parent company Alexander and Baldwin was discussing the possibility of a plant to treat up to 9 mgd from Waihe‘e and ‘Īao Streams for use by A&B and Maui County in various urban development initiatives. *Id.* at 47.

389. *Id.* at 137.

390. *Id.*

391. See *supra* note 341 and accompanying text (explaining the water commission’s contested case hearing process whereby the parties view the proposed decision and present oral and written argument on issues they would like changed before the Commission issues a final decision).

392. Transcript of Closing Argument, *supra* note 332, at 28.

decision and determination on the future of HC&S” within a few months.<sup>393</sup> Threats of an HC&S shutdown and the potential impacts of ordering HC&S to once again use its longtime non-potable well that was the actual source of water for its fields, influenced the majority’s determination of the “practicability” of alternate sources. Those threats also outweighed the impacts of the majority’s factual findings on Indigenous efforts to reclaim land, resurrect culture, and restore natural resources essential to traditional practices in Nā Wai ‘Ehā, subverting both these contextual factors and the law’s original design to protect and restore those interests.<sup>394</sup>

Critical legal analysis reveals that the language of most substantive rules (such as whether an alternative is “practicable”) may be manipulated and applied selectively to specific facts (for example, the safety of pumping Well No. 7 at historic rates) so that the decision-makers’ ultimate choice furthers his or her own political and economic philosophies.<sup>395</sup> Here, the hearings officer and majority applied the same facts to the same legal principles but arrived at starkly different conclusions. In Nā Wai ‘Ehā, the “boogeyman of an HC&S shutdown”<sup>396</sup> weighed heavily on the commission majority. Despite its own findings that HC&S had historically used only a fraction of the water it was currently banking,<sup>397</sup> had voluntarily reduced its own acreage,<sup>398</sup> and had not attempted to acquire the leased fields it now claimed were vital to its very “survival,”<sup>399</sup> in the end, claimed economic

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393. *Id.* at 21.

394. *See, e.g.*, Final D&O, *supra* note 25, at 67, 174–75.

395. *Id.* at 116 (defining practicable alternative).

396. Transcript of Closing Argument, *supra* note 332, at 21.

397. Final D&O, *supra* note 25, at 44–45, 124–25.

398. The hearings officer proposed a finding and the majority agreed that although HC&S claimed it needed to maintain its cultivated acreage to “remain economically viable,” records from HC&S’ parent company A&B revealed that “from 2000 through 2005, HC&S decreased its cultivated acreage by more than 2000 acres . . . . Moreover, A&B ha[d] development plans that would remove almost 3500 additional acres from cultivation.” *Id.* at 140.

399. Regarding HC&S’s claims that Nā Wai ‘Ehā water for the leased, 1350-acre ‘Īao-Waikapū Fields was vital to the survival of its 35,000-acre plantation, the hearings officer proposed and the Commission majority ruled that HC&S “made no apparent attempt to acquire those lands when they became available. HC&S had no written agreement with WWC after July 2003, when WWC refused to extend the land lease and announced HC&S was ‘no longer entitled to any water allocation’” under the Companies’ water sharing agreement. *Id.* at 140; *see also id.* at 93 (discussing HC&S’s claims that “its survival hinges on the ‘Īao-Waikapū Fields” but making no apparent attempt to acquire them when they were



impacts carried the most weight with the commission majority, informing its determination of practicability and other issues and overshadowing the law's original design and specific mandate to protect and restore Indigenous rights and interests.<sup>400</sup> Contextual legal analysis of Native Peoples' claims uncovers these and other limitations of formalist analysis. Broadening the analysis to alternatives that are truly "practicable" for HC&S from a historical and cultural perspective demonstrates that the majority's ruling on this issue was unduly narrow and motivated by economic interests and small town politics—not the safety of pumping the well at prior rates, as formalist analysis claimed.<sup>401</sup>

Contextual legal analysis exposes who truly benefits from the majority's decision that largely maintained the status quo in Nā Wai 'Ehā streams and communities (interests who have monopolized water resources for over a century). It also reveals who is harmed by the status quo (disenfranchised communities, including Kānaka Maoli and other people of color), who interprets the status quo (a commission of political appointees, not elected officials), and what is really at stake if the rules are "formalistically" applied (Hawai'i's water future). When the framework is shifted and the right questions are incorporated into how the language of the law is construed and applied, then the law creates the potential to achieve its original intent of realizing justice for Kānaka Maoli and all of Hawai'i's people.

Commissioner Miike sharply dissented, noting that his "most

available for sale.).

400. Compare HAW. REV. STAT. § 174C-71(2)(D) (outlining Commission's duty to balance instream values and offstream uses), with HAW. REV. STAT. § 174C-101(c)–(d) (maintaining that Native rights, including "traditional and customary rights . . . shall not be abridged or denied by this chapter"), HAW. REV. STAT. § 174C-63, Final D&O, *supra* note 25, at 10 (finding that "[c]ultural experts and community witnesses provided uncontroverted testimony regarding limitations on Native Hawaiians' ability to exercise traditional and customary rights and practices in the greater Nā Wai 'Ehā area due to the lack of freshwater flowing in Nā Wai 'Ehā's streams and into the nearshore marine waters"), and Final D&O, *supra* note 25, at 185–87 (restoring no water to 'Īao and Waikapū Streams).

401. See *An Idea Whose Time Has Passed*, *supra* note 93, at 2.

In the end, the route taken did not matter. The result was the same. Streams and the wildlife they support, and those seeking their restoration, whether for customary stream uses or for environmental reasons, lost out. A&B[, HC&S], Wailuku Water Company, and Maui County, which has come to rely on HC&S as a kind of wholesale provider of water to the county municipal system, won out. To be sure, some streams will see a bit more water in their lower reaches, but the total amount restored to streams is embarrassingly small.

*Id.*

significant difference” from the majority “is the assignment of 9.5 mgd to HC&S’s Well No. 7 as a practicable alternative.”<sup>402</sup> Both Commissioner Miike and the majority “agree[d] that Well No. 7 should be used only during dry-weather conditions, when available stream flows are insufficient to meet offstream requirements, but then *the majority arbitrarily reduce[d] Well No. 7’s capacity in half.*”<sup>403</sup> He charged that “the majority, without any credible foundation chose 9.5 mgd as the practicable alternative from Well No. 7 *to protect HC&S’s interests, to the detriment of the stream resources.*”<sup>404</sup> Further, Commissioner Miike’s dissent concluded that “[b]y reducing Well No. 7 as a practical alternative from approximately 19 mgd to 9.5 mgd, [‘Īao] Stream’s restoration gave way to HC&S’s irrigation requirements.”<sup>405</sup>

As detailed in Part V.B.1, above, the hearings officer attempted to contextualize the issues, considering the practicability of HC&S’s alternate sources in light of over a century of stream diversions and their continued impact on cultural integrity, lands and other resources, social welfare conditions, and self-governance.<sup>406</sup> He understood that over 150 years of almost zero flow in Nā Wai ‘Ehā streams subjugated ancestral lands, resources, and rights, while at the same time creating deplorable

402. Hearings Officer’s Dissent, *supra* note 23, at 2. After weighing all of the evidence, Hearings Officer Miike recommended that “fourteen mgd from Well. No. 7 is a reasonable alternative for the Waihe‘e-Hopoi Fields.” Hearings Officer’s Proposed D&O, *supra* note 20, at 168.

403. Hearings Officer’s Dissent, *supra* note 23, at 2 (emphasis added).

404. *Id.* at 4 (emphasis added). The hearings officer also pointed out that “[a]bsent an economic analysis by HC&S, the Commission cannot assume that HC&S’s doomsday scenario would result from an occasional 10.5 to 13.4 percent decrease in its irrigation requirements for 15 percent of its entire operations.” *Id.* at 6. Especially since HC&S strategically neglected to include an economic analysis so that it could “leap to its doomsday scenario—the drastic consequences to Maui county and the state if it were to close its entire sugar operations.” *Id.* Commissioner Miike determined that

if reductions in its use of Nā Wai ‘Ehā stream water were of such a magnitude as to force HC&S not to cultivate the 5300 acres that comprise the West Maui Fields, HC&S would not be a viable operation. But rather than providing an analysis of the magnitude of reductions that would lead to that result, HC&S instead outlined the consequences if its entire 35,000 acre sugar operations were ended.

*Id.* (citations omitted). Furthermore, “[i]n the absence of any information supporting its doomsday scenario, the Commission could not assume that HC&S’s assertions overcame the presumption in favor of the public trust resource, the streams of Nā Wai ‘Ehā.” *Id.* at 6–7.

405. *Id.* at 2.

406. See *supra* Part V.B.1 (considering the four Indigenous values for contextual legal analysis in the context of stream restoration in Nā Wai ‘Ehā); Hearings Officer’s Proposed D&O, *supra* note 20, at 83.

social welfare conditions for Kānaka Maoli in particular.<sup>407</sup>

In addition, the hearings officer grasped that, although requiring HC&S to continue to utilize its “primary source” of irrigation water that it had used without complaint for almost 100 years would impose some financial costs, failing to do so would continue to require Hawai‘i’s natural resources and Indigenous culture to subsidize HC&S’s private commercial business; it would also perpetuate the historical stream diversions and resulting conditions imposed by colonizers, their descendants, and, now, shareholders.<sup>408</sup> The hearings officer considered these larger policy concerns in light of the commission’s duty to Kānaka Maoli, including the fact that “restoration of Nā Wai ‘Ehā waters is of importance for traditional and customary purposes,” and that, “in addition to its duty to resolve uncertainty in favor of resource protection, the commission has a duty to take feasible actions to reasonably protect native Hawaiian rights.”<sup>409</sup> In doing so, the hearings officer gave meaning to the relevant legal language in ways that were consistent with Hawai‘i’s history, current socio-economic conditions, and the values of Indigenous self-determination—all of which shaped, and to some extent are already reflected in, the law itself. Although less than perfect,<sup>410</sup> the hearings officer’s proposed decision better balanced the four values of restorative justice for Native Peoples in a manner that moved the commission closer to providing na‘au pono for the Hui, its allies, and all of Hawai‘i’s people.

## VI. CONCLUSION

The water commission majority highlighted the challenges that it faced in Nā Wai ‘Ehā: “Mark Twain’s witticism that ‘whiskey is for drinking and water is for fighting’ is apropos, given the immense task of establishing instream flow standards in regions where there is insufficient surface water to meet the cumulative needs of resources and uses.”<sup>411</sup> But the commission’s ultimate chore in Nā Wai ‘Ehā was no more difficult or complex than the host of other legal controversies

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407. Final D&O, *supra* note 25, at 1 (acknowledging the importance of Maoli traditional and customary rights, including water rights); *see also* sources cited *supra* note 243 (detailing Maoli social welfare conditions).

408. Hearings Officer’s Proposed D&O, *supra* note 20, at 128.

409. Hearings Officer’s Dissent, *supra* note 23, at 3.

410. *See supra* note 367 (highlighting some of the shortcomings of the hearings officer’s Proposed Decision and Order).

411. Final D&O, *supra* note 25, at 191.

around the world that involve Native Peoples' struggle for self-determination through varying forms of environmental justice. And like those cases, perhaps the most significant challenge for the water commission was to meaningfully consider the rights and interests of Indigenous groups, who seek *na'au pono*—that deep sense of justice people can feel in their gut, in the midst of a political firestorm.

In *Nā Wai 'Ehā*, Hawai'i's comprehensive legal regime for water resource management embodied the necessary factors for the contextual legal analysis of Native Peoples' claims. As detailed herein, state constitutional provisions, Hawai'i's Water Code, and the common law, provide specific protections for the environment and Native rights and practices, even though the ultimate expression of those values is broad. By employing formalist methodology and minimizing those contextual factors, the commission majority took that more general legal language and applied it to select facts to generate an outcome that appeared minimally plausible, but was ultimately unsustainable on the facts and the law.

By contrast, contextual legal analysis of Native Peoples' claims surfaced those necessary factors—particularly *Kānaka Maoli* values and interests and the public trust—in a way that breathed new life into dormant constitutional and statutory provisions and that was also consistent with the law's initial framing. This analytical framework was critical in illuminating more informed conceptions of water in the law as well as unpacking the political and economic influences that shaped how rights were actually determined. In this way, contextual legal analysis of Native Peoples' claims provides a discrete method for ascertaining a more just result for Indigenous Peoples and an outcome that is consistent with how Hawai'i law was intended to accommodate competing rights and interests.

Given these complexities, at the outset, Indigenous and other advocates must ensure that legal rules acknowledge and embody the key values of cultural integrity, lands and other resources, social welfare, and self-governance. In addition, when controversies arise, these same communities and groups must rally to ensure that advocates and decision-makers employ contextual legal analysis for Native Peoples' claims rather than formalist methodologies. Advocates must actively pursue dual strategies of shaping and enforcing the law. Otherwise, as demonstrated here, even when the law itself embodies contextual factors, formalist methods can still be deployed to undermine both those values and the larger quest for *na'au pono*.

Contextual legal analysis of Native Peoples' claims, especially in the

context of Nā Wai ‘Ehā, reveals the promise and potential of the legal process, when appropriately linked to community organizing and other change agents, to create opportunities for liberation and justice. Because even when armed with the protective language of the law, contextual legal analysis is necessary to begin to contemplate the deep sense of justice that Native Peoples seek. Without this important tool, decision-makers will continue to deploy formalist methodologies to subvert Indigenous values and claims in Nā Wai ‘Ehā and beyond. Contextual legal analysis of Native Peoples’ claims, therefore, is vital for those pursuing justice through law. In Nā Wai ‘Ehā, the Hui and its allies will continue to seek wai through kĀnāwai, employing legal and other available tools until they are successful in restoring water to Hawai‘i’s streams and justice to Maoli communities.

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