Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue

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PROLOGUE

"Police Seize 25 in Hilo Protest: Hawaiian Confrontation at Mall." So read the news headline in September, 1993.[1] One hundred twenty Native Hawaiians in Hilo protested the State Department of Hawaiian Homelands' lease of 39 acres of trust Homelands to a non-Hawaiian commercial entity for the Prince Kuhio Plaza shopping mall. The protesting group, Aupuni O Hawai'i, demanded that the mall be bulldozed and that the land be used for Native Hawaiian farms and housing. Those Native Hawaiians arrested and later prosecuted for trespassing defended on the grounds of their "right" to occupy Hawaiian Homelands. Members of Aupuni O Hawai'i had earlier been "evicted" as squatters on nearby Homelands in the Keaukaha area of Hilo.

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[1] Hugh Clark, *Police Seize 25 in Hilo Protest: Hawaiian Confrontation at Mall.* HONOLULU ADVERTISER, October 6, 1993, at A-1. *See infra* note 32 for a discussion of the Hawaiian Homelands trust.

"[Mayor] Fasi Vetoes Homestead Tax Exemption."[2] The Honolulu mayor vetoed City Council legislation exempting Hawaiian Homelands lessees from paying real property taxes after the first seven years of their leases. The mayor's office reportedly observed that the exemption would amount to a form of city-sponsored affirmative action, and thus, would constitute "reverse racial discrimination against non-Hawaiians."[3] Lawsuits were threatened in support of and against a City Council override of the exemption.

"Hawaiians Sue to Stop OHA From Attempting to Settle Overthrow Claims."[4] The Office of Hawaiian Affairs (OHA), a state-created agency, sought to resolve Native Hawaiian claims against the state and federal governments for, among other things, breaches of the Hawaii Ceded Lands Trust.[5] Samuel Kealoha and three other Native Hawaiian trust beneficiaries filed suit to forestall a $100 million settlement until the Hawaiian people themselves created a sovereign entity that could undertake or direct negotiations. They asserted a violation of "the right of self-determination protected under international law."[6]

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[2] Pat Omandam, *Fasi Vetoes Homelands Tax Exemption*, HONOLULU STAR BULLETIN, December 11, 1993, at A-3.

[3] *Id.*

[4] Bill Meheula and Kawika Liu, *Hawaiians Sue to Stop OHA From Attempting to Settle Overthrow Claims*, KE KIA'I, March 1, 1994, vol. 5, no. 3, at 19.

[5] *See infra* note 18 for a discussion of the Hawaiian Ceded Lands trust which targets Hawaiians, among others, as trust beneficiaries.

[6] First Amended Complaint at 2, Kealoha v. Hee, Civil No. 94-0188-01 (1st Cir. Haw., filed Feb. 2, 1994). Samuel L. Kealoha, Jr., Charles Ka'ai'ai, Jonathan Kamakawiwo'ole Osorio, and Lahela Jarrett Holmwood sought to enjoin negotiations, settlement and the execution of a release by trustees of OHA "concerning claims against the United States for the overthrow of the Hawaiian government in 1893, and the redress of breaches of the ceded lands trust committed by the United States and the State of Hawaii (excluding OHA's right to revenues under Chapter 10)." *Id.* Their complaint asserted: "(a) the trustees are or would be in a conflict of interest and lack statutory authority to attempt to resolve these claims; (b) it would violate the right to self-determination protected under international law; and (c) a Hawaiian sovereign nation is the only entity that can conduct such negotiations with the United States and the State of Hawaii." *Id.*

Count V of the Amended Complaint specifically addressed the alleged "Violation of International Law." It located Native Hawaiians' rights of self-determination in, among other things: the International Covenant on Civil Political Rights, Articles I, II and XXVII, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) (ratified by United States on Sept. 8, 1992); the Draft Declaration on the Rights of Indigenous Peoples, dated August 21, 1993, prepared by the Working Group on Indigenous Populations and submitted to the United Nations Sub-Commission on Human Rights; the Universal

I. INTRODUCTION

Across the country strident debates continue about multiculturalism in education, diversity in government, and affirmative action in workplaces. Those debates, heightened by the Columbus quincentennial, have expanded popular discourse to include the effects of Euro-American colonialism on America's indigenous peoples. Grand narratives about society's treatment of outsiders—slavery, *Brown v. Board of Education*,[7] the internment,[8] and the statue of liberty immigrant experience—have been challenged as incomplete and exclusionary. They ignore the physical and cultural domination of America's indigenous peoples, including American Indians, Native Hawaiians, Eskimos and Aleuts. Stories of native peoples are now reconfiguring public discourse about race and culture, and infusing concepts of neo-colonialism, nationalism, and self-determination into discussions of equality and diversity.[9]

These dynamic debates, along with international movements discussed later, are influencing American legal discourse, albeit at the periphery. For America's indigenous peoples, rights are no longer framed entirely by the provisions of the Constitution and legislative enactments. Indigenous peoples' demands are increasingly asserted within dual frameworks. One framework is narrow. It consists of rights claims recognized by the American legal system (e.g., due process violations or breaches of trust), even though the rights, as framed, may not accurately embody the cultural, spiritual, and political experience of the group involved.[10] A second framework is expansive. It

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Declaration of Human Rights; and general principles of international law. Amended Complaint, at 20-26.

[7] 347 U.S. 483 (1954).

[8] Korematsu v. United States, 323 U.S. 214 (1944) (upholding the criminal conviction of an Japanese-American citizen who refused to be interned). *See also*, Hirabayashi v. United States 320 U.S. 81 (1943) (upholding the conviction of an Japanese-American citizen who refused to obey a racially-based curfew).

[9] *See generally* ROBERT WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1980); Joseph W. Singer, *Sovereignty And Property*, 86 NW. U. L. REV. 1 (1991); Joseph W. Singer, *Property And Coercion In Federal Indian Law: The Conflict Between Critical And Complacent Pragmatism*, 63 S. CAL. L. REV., 1821 (1990); Williamson B. C. Chang, *The "Wasteland" In The Western Exploitation Of "Race" And The Environment*, 63 U. COLO. L. REV. 849 (1992).

[10] For a discussion of the employment of a civil rights statute to advance a breach of trust claim by the Native Hawaiian community group concerned about control over

consists of claims of transnational moral authority cast in the language of international human rights (e.g., right to self-determination).[11] Those rights claims are rooted historically in the conquest of indigenous peoples and morally in the colonizing power's confiscation of land and suppression of culture.[12] Indigenous peoples' assertion of claims within this expanded framework performs two functions: it challenges the legitimacy of an "occupying" government's employment of its own established legal norms to decide the political and cultural rights of indigenous peoples, and it provides a beginning basis for understanding how indigenous peoples might reinterpret or transform those established norms to reflect justice under their circumstances.[13]

Employing these dual frameworks, narrow and expansive, America's indigenous peoples' are asserting claims of right in American courts.[14] *Kealoha v. Hee*,[15] described in the Prologue, is a current example. But

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homelands in its neighborhood, *see infra* notes 82-110 and accompanying text, addressing Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission, 739 F.2d 1467 (9th Cir. 1984).

[11] *See* Rosen, *Law and Indigenous Peoples*, 27 LAW AND SOC. INQ. 363, 365 (1992). Rosen describes recent efforts to adopt viewpoints of indigenous peoples in addressing "rights" claims.

> (I)nternational bodies have pressed ahead with efforts to codify the rights of indigenous peoples and to distinguish their situation from that of national minorities. The result is a body of work that has proceeded on at least three vital fronts: (1) the examination of the current state of indigenous peoples and the variety of political and cultural contexts within which they operate; (2) the historical context—now much re-interpreted—that has led to the current legal status of native properties and native governments; and (3) specific proposals for re-configuration of indigenous rights within a revised set of international conventions.

Id. at 365; *see also* Mabo v. Queensland, 66 AUSTRALIAN L. J. 408 (1992) (describing the High Court's social-historical analysis and its rejection of the doctrine of terra nullius and acceptance of the doctrine of native title).

[12] *See* Chang, *supra* note 9. Professor Chang insightfully critiques the inappropriateness of standard anti-discrimination discourse to the situations of indigenous peoples, contrasting circumstances attendant to voluntary migration of a racial group with those of conquest of a once sovereign people.

[13] *See infra* note 292 (describing Ka'ai'ai v. Drake, Civ. No. 92-3742-10 (1st Cir. Haw., filed Oct. 1992) which asserted the principle of self-determination as a means for comprehending Hawaiian Homesteaders' breach of trust claims against the state to reconstitute a state-created Trust Claims Resolution Task Force that excluded independent participation by homesteaders).

[14] *See supra* note 6, *infra* notes 15-19, and 279 and accompanying text.

[15] *See supra* note 6 and accompanying text for the discussion of this case.

for what purpose? Federal courts in particular have tended to reject indigenous peoples' political-moral claims framed in the language of established rights (such as equal protection).[16] Federal and state courts also have professed lack of authority to apply international human rights norms to decide matters of what is called "domestic" law.[17] For many indigenous groups, harsh experience undermines the popular image of American courts as expositors of fundamental rights and thus agents of social justice.[18]

So why worry about federal and state court access for indigenous peoples? Why worry about Native Hawaiians' uncertain right to sue? One response, posited here, is that access to court process for indigenous peoples may have potential social-political value on multiple levels.[19]

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[16] *See, e.g.*, Gila River Pima-Maricopa Indian Community v. United States, 427 F.2d 1194 (Ct. Cl. 1970), *cert. denied*, 400 U.S. 819 (1970) (dismissing the tribe's claims under the "fair and honorable dealing" clause of the Indian Claims Commission Act as merely "moral" claims beyond the scope of the Act); Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) (Court recognized aboriginal title to Indian lands but also asserted the power of the federal government to extinguish native title to non-treaty land without compensation); Han v. Department of Justice, 824 F. Supp. 1480, 1486 (D. Haw. 1993) (on appeal) ("First, as a matter of law, the federal defendants have no trust responsibility to plaintiffs or other native Hawaiians under statutory or case law." *Id.* at 1486.). *See generally* WILLIAMS, DISCOURSES OF CONQUEST, *supra* note 9, at 227-232.

[17] *See generally* WILLIAMS, DISCOURSES OF CONQUEST, *supra* note 9.

[18] Professor Nell Jessup Newton observes that "[o]ne of the great contributions to the tribal rights movements of the 1960s was the development of a cause of action seeking equitable relief for breach of trust." Nell Jessup Newton, *Indian Claims In The Courts Of The Conqueror*, 41 AMERICAN U. L. REV. 753, 784 (1992) (*Indian Claims*). Newton also observes, however, that "despite the promise of [United States v. Mitchell, 463 206 (1983), commonly referred to as "Mitchell II," which recognized jurisdictional and substantive grounds for breach of trust suits against the federal government], Indian tribes have been remarkably unsuccessful in breach of trust claims in the Claims Court and the Federal Circuit." *Indian Claims* at 789. The "claimants have succeeded in only two instances of the twenty. . .cases. . .in the last ten years" primarily because the courts have dismissed most claims on statute of limitations grounds or for "lack of jurisdiction under the [Mitchell II]. . .standards." *Id.* at 790. *See infra* Part II concerning the federal court's restrictive jurisdictional rulings concerning Native Hawaiian breach of trust claims. *See generally* WILLIAMS, DISCOURSES OF CONQUEST, *supra* note 9.

[19] Eric Yamamoto, *Efficiency's Threat To The Value Of Accessible Courts For Minorities*, 25 HARV. C.R.-C.L. L.REV. 341 (1990) (*Efficiency's Threat*) (describing traditionally and critically viewed values of court access). One perspective is that Native Hawaiian rights claims in federal court have had a "useful consciousness-raising" effect. The "recent willingness of the executive, legislative, and judicial branches of the State of

The right to sue—to gain system entry and develop, define and present claims—may have value even in the absence of favorable court declarations of rights. It may have value even though favorable court declarations of rights rarely lead directly or immediately to fundamental structural and attitudinal changes.[20] Vantage point is key.

From one view, courts are simply deciders of particular disputes involving specific parties according to established norms. From another view, courts in addition are integral parts of a larger communicative process. Particularly in a setting of indigenous peoples' claims, court process is a "cultural performance."

This article, drawing on Critical Race Theory, cultural anthropology, and dispute transformation theory, offers a new look at federal courts, civil rights and civil procedure jurisprudence. As will be described, indigenous groups are using the federal and state courts not solely to establish and enforce rights, but also to help focus cultural issues, to illuminate institutional power arrangements and to tell counter-stories in ways that assist larger social-political movements. Examining indigenous peoples' use of courts as sites and generators of cultural performances sheds light on uses of law in what might be called the "post-civil rights era." It also highlights the substantive importance of "procedural rights."

In this context, the community protest in Hilo, the vetoed city tax-exemption in Honolulu and the international law challenge to the OHA settlement described in the Prologue are tied with common threads. They involve Native Hawaiians.[21] They involve lands "ceded" to the

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Hawai'i to address such issues [may] stem from a recognition, after *Keaukaha II* (*see infra* notes 108-113 and accompanying text), that a *failure* to provide a state forum would lead to increasing interference by the federal courts in the management of State lands. . . ." Letter from attorney Carl Christensen, Native Hawaiian Legal Corporation to Eric Yamamoto (November 5, 1993) (on file with authors).

[20] *See* DEREK BELL, AND WE ARE NOT SAVED (1987) (describing how court declarations of rights are narrowed, subverted and transformed).

[21] We use "Native Hawaiian" as an encompassing term. In doing so, we acknowledge its racially and politically constructed dimensions (see infra note 36) and our selection among a range of other possible terms. Among other terms are "native Hawaiian" (used by governmental bodies legally to denote people of at least fifty percent Hawaiian blood, people who are thereby deemed beneficiaries of the Hawaiian Homelands Trust), or "Hawaiian" (used popularly to describe people whose ancestors were the original inhabitants of the islands; also used by governmental bodies legally to denote people of some Hawaiian blood who are thereby eligible for certain entitlements), or "Kanaka Maoli" (preferred by several pro-sovereignty groups and

United States following the United States-aided overthrow of the Hawaiian government in 1893—lands now held in two trusts by the State of Hawai'i as trustee for the benefit of Native Hawaiians. They involve responses to a history of culture destruction and land dispossession.[22]

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scholars as a self-defining, non-Westernized term), or "Hawaiian native people" or "indigenous people of Hawaii" (used to emphasize culture and ancestral origin). We have selected the term "Native Hawaiian" because most readers will recognize it, because it emphasizes through the term "Native" that Hawaiian people are indigenous to the islands, and because the capital "N" in Native distinguishes the term from the term "native Hawaiian" which has been given its legal construction by the federal and state governments.

We acknowledge that our use of the term is in some respects overly broad. The term could be misleadingly construed to imply a singular Native Hawaiian group or perspective. There is no one Native Hawaiian group, or community, or perspective. There is no singular Native Hawaiian identity. Culture, class, lineage, historical memory, geography and gender are among the many factors contributing to vast differences in lifestyles, group relations, cultural practices and political outlooks. Despite these differences, we believe the use of the broad term Native Hawaiian is appropriate for this article for two reasons. First, many people with ancestral ties to the original inhabitants of the Hawaiian archipelago self-define their identity racially, culturally and politically in terms of being Hawaiian. Second, while many meaningful differences among Native Hawaiian people exist, governmental institutions, including the courts, historically and currently have tended to address Native Hawaiians as a group. This article's analytical approach addresses, in part, that collective treatment.

[22] Describing traditional Native Hawaiian social structure and culture is a problematic undertaking. *See* Davianna McGregor, Kupa'a I Ka 'Aina: Persistence on the Land, 92-94 (1989) (unpublished Ph.D. dissertation, Hawaiian Pacific Collection, Hamilton Library, University of Hawaii at Manoa). *See generally* MARTIN CHANOCK, LAW, CUSTOM AND SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA (1985) (cautioning that the concept of indigenous tradition is a colonialist construct). According to generally acknowledged Hawaiian-centered accounts, Native Hawaiian social structure was organized around a belief in the unity of people, gods and nature. Respect for nature translated into respect for, and a spiritual-familial relationship with, the land and ocean. *See* McGregor, *supra*; MELODY KAPILIALOHA MACKENZIE, NATIVE HAWAIIAN RIGHTS HANDBOOK, 3-5 (1991) (describing relationships among Hawaiian people and the land and the resulting land tenure system). *See also* LILIKALA KAME'ELEHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LA E PONO AI?, 23-25 (1992) (describing the spiritual-familial relationship that Hawaiians had with the land). A sizeable tract of land, "ahupua'a," stretching from mountain (mauka) to sea (kai), was farmed and fished by commoners (maka'ainana—literally, eyes of the land) who were overseen by a chief (ali'i). A commoner worked for a chief; he could, however, move to another ahupua'a if he was unfairly treated by the chief. This land-people relationship and the cultural-economic structure it supported were shaken in the early 1800s by the demise of the Hawaiian spiritual-legal "kapu" system, by Western contact, through the sandalwood and whaling industries, and by the arrival of Christian

They involve, in varying ways, present group-based claims of self-determination. And they involve, or are likely to involve, courts as forums for processing contemporary social-cultural conflicts with deep historical roots. In each situation, courts will likely be called upon to serve not only as adjudicators of claims or as expositors of law, but also as mediators among complex, often dissonant cultural narratives.[23]

These connecting threads raise questions about the judicial function—questions with descriptive and normative dimensions. How are the courts functioning as performance sites in the context of increasingly frequent and intensifying native peoples' land controversies? And how will decisions about court process, including courthouse entry, mediate or transform the often conflicting cultural messages underlying those controversies?

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"Native Hawaiians demand right to sue." So read many a news

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missionaries. Western diseases soon decimated the Hawaiian population. An expanding United States agricultural market, a coterie of American religious and political advisors to the Hawaiian King, a need for governmental capital and the existence of fertile land combined to introduce to Hawaii the concept of private fee simple property ownership. *See generally* LINDA S. PARKER, NATIVE AMERICAN ESTATE: THE STRUGGLE OVER INDIAN AND HAWAIIAN LANDS 8-10 (1989). The Mahele of 1848 and the Kuleana Act of 1850 legalized this concept of private fee simple land ownership, and, over a short period of time, ultimately led to American citizens' ownership of vast quantities of prime land in Hawaii. *See* KAME'ELEIHIWA, *id.* (describing the Mahele and its impact upon Hawaiians and their relationship to the land); Marion Kelly, *Land Tenure in Hawaii*, 7 AMERASIA J. 57 (1980) (describing the Mahele and Kuleana Act); Maivan C. Lam, *The Kuleana Act Revisited*, 64 WASH. L. REV. 233 (1989) (describing the Kuleana Act, in which fee title to land was to be distributed to commoners, and arguing that despite long-term dispossession, traditional Hawaiian land rights remain available to Hawaiians); Charles F. Wilkinson, *Land Tenure in the Pacific: The Context for Native Land Rights*, 64 WASH. L. REV. 227 (1989); Neil M. Levy, *Native Hawaiian Land Rights*, 63 CALIF. L. REV. 848 (1975). Most Hawaiian commoners, dispossessed of land, were left with a badly damaged cultural-economic structure. The United States-aided overthrow of the Hawaiian monarchy in 1893 and the annexation of Hawaii as a territory in 1898 transferred Hawaiian government and crown lands to the United States. The early 1900s found Hawaiians, as a race, landless and devastated by poverty, disease and social alienation. MACKENZIE, NATIVE HAWAIIAN RIGHTS HANDBOOK, at 3-44. *See also* DAVID E. STANNARD, BEFORE THE HORROR: THE POPULATION OF HAWAII ON THE EVE OF WESTERN CONTACT (1989) (discussing dramatic decline in Hawaiian population through western contact); NOEL J. KENT, HAWAII: ISLANDS UNDER THE INFLUENCE (1983); Haunani-Kay Trask, *Coalition-Building Between Natives and Non-Natives*, 43 STANFORD L. REV. 1197, 1198-1205 (1991).

[23] *See infra* Part II.

headline in the late 1980s. Continuing disenfranchisement of Native Hawaiians in their homeland and long-standing federal and state governmental misuse of Hawaiian trust lands fueled Native Hawaiian movements aimed at long-term cultural resurrection and political self-determination.[24] Access to courts for redress of governmental land trust breaches became a focal point of Native Hawaiian strategies.

This article addresses ways in which legal process is transforming Native Hawaiian land trust controversies and the cultural messages underlying them. Theoretically, it frames the discussion in terms of courts' "cultural performances" in rephrasing rights and in constructing socio-legal narratives about a group's situation and relationships with others.[25] Doctrinally, it frames the discussion in terms of procedural obstacles to Native Hawaiians' right to sue.

New procedural obstacles have been erected in recent years; others fortified; still others dismantled. After fits and starts, ambiguity and inconsistency, the Ninth Circuit Court of Appeals now recognizes federal jurisdiction over Native Hawaiian breach of land trust claims cast as civil rights claims and recognizes Native Hawaiian standing to assert those claims. The court also, however, has constructed formidable civil rights immunity barriers and other procedural hurdles which preclude, in most instances, maintenance and development of claims for structural relief.[26] It has thus translated volatile, deeply-rooted cultural and political indigenous land trust controversies into civil rights issues and then largely stripped those issues of cultural and political content through the limiting language of legal process. Hawai'i's federal district courts, in entertaining these controversies, are wrestling with appellate procedural mandates.[27]

From one perspective, the federal courts appear to be struggling with process doctrines and procedural rules that are applied ordinarily in more traditional civil rights litigation settings. From another perspective, the federal courts, for a variety of possible reasons, appear to be ceding substantial power over Native Hawaiian land trust controversies to state courts.[28]

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[24] *See infra* note 32 for a description of the Native Hawaiian land trusts.

[25] *See infra* Part II.

[26] *See infra* Part III. The term "structural relief" here means judicial remedies that compel state officials to make decisions or alter decisions in ways that directly impact upon the management or use of Hawaiian trust lands, as distinguished from purely compensatory damage remedies.

[27] *See infra* Part III.

[28] *Id.*

The approach of Hawai'i state courts is mixed. In 1982 the Hawai'i Supreme Court broadly and clearly defined the nature and scope of the state's Hawaiian Homelands trust obligations.[29] It did not, however, accord Native Hawaiians access to state courts to enforce those obligations. The state legislature's 1988 Native Hawaiian Trusts Judicial Relief Act opened only the slimmest crack to the courthouse door.[30] In 1992, the Hawai'i Supreme Court, without additional legislation, appeared to swing that door wide open. *Pele Defense Fund v. Paty*,[31] in important respects, is a landmark decision. In a finely-crafted, visionary section of its *Pele* opinion, the court recognized Native Hawaiian land trust beneficiaries' implied right to bring breach of trust actions against the State in state court. It located that court access right under the provisions of the Hawai'i Constitution establishing the Homelands and Ceded Lands trusts.[32] Recognizing the restrictiveness of federal law,

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[29] Ahuna v. Department of Hawaiian Home Lands, 64 Haw. 327, 640 P.2d 1161 (1982).

[30] *See infra* Part V.

[31] 73 Haw. 578, 837 P.2d 1247 (1992), *cert. denied*, 113 S.Ct. 1277 (1993).

[32] Congress in 1920 passed the Hawaiian Homes Commission Act. The Act set aside in trust almost 200,000 acres of "government-owned" land that had been ceded to the United States upon annexation of Hawai'i as a territory. The Act's purpose was to "rehabilitate" the Hawaiian people and their culture by returning Hawaiians to the land. "[N]ative Hawaiians," defined by the Act to mean people of at least fifty percent Hawaiian blood, became eligible to lease homestead lots for 99 years at $1.00 a year for residential, pastoral, and agricultural purposes. Hawaiian Homes Commission Act of 1920 (Pub. L. No. 67-34, ch. 42 §§ 207(a), 208(2), 42 Stat. 108 (1921) ("HHCA"). The United States served as the Homelands trustee until it transferred responsibility for Homelands to the State of Hawai'i upon statehood. Hawai'i became a state in 1959 when Congress passed the Hawai'i Admissions Act. The Admissions Act constituted a compact between the United States and the newly created State. As part of that compact, the State covenanted to accept title to and trust responsibility over the Hawaiian Homelands. The Department of Hawaiian Home Lands ("DHHL"), guided by the Hawaiian Homes Commission, is responsible for administration of the Act — that is, for managing and using trust assets to place native Hawaiians on trust lands. HHCA § 202. The Act permits the DHHL to lease "surplus" lands to the public generally, by way of general leases. HHCA § 204(2). *See generally* MacKenzie, *supra* note 22, at 49-50. *See also* Federal-State Task Force on the Hawaiian Homes Commission Act, Report to the U.S. Secretary of the Interior (1983).

In the Admissions Act compact, the State also assumed title to and trust responsibility over nearly two million acres of Ceded Lands. Ceded Lands are lands formerly belonging to the Hawaiian government and monarch which, upon annexation of Hawai'i as a United States territory in 1898, were "ceded" to the United States. Admission Act of 1959, Pub L. No. 86-3 §§ 5, 73 Stat. 4 (1959). Specifically, § 5(f)

the Court declared that it would not leave Native Hawaiians "without the [state law] means to hold" the State to its "fiduciary duties and obligations as trustee."[33] Apparently concerned about the absence of a clear constitutional or statutory waiver of the State's sovereign immunity, however, the *Pele* court also transposed onto state court process federal Eleventh Amendment immunity principles and appeared to construe those principles restrictively. It thereby sharply limited the number and type of eligible state court breach of trust claims, creating uncertainty about court access.[34]

For these general reasons, developed later, this article is titled in part "Native Hawaiians' Uncertain Federal and State Law Rights to Sue." Native Hawaiian claimants must warily plan their approach to courthouse entry. The article addresses salient procedural dimensions to the assertion of Native Hawaiian land claims and the manner in which legal process handles and, in important instances, transforms those claims and their underlying cultural messages. It focuses on Hawaiian Homelands and Ceded Lands breach of trust claims.[35] Other

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of the Admissions Act provided that the Ceded Lands, and any income and proceeds therefrom must be used for (1) the support of the public schools and other public educational institutions; (2) the betterment of the conditions of Native Hawaiians, as defined in the Hawaiian Homes Commission Act of 1920; (3) the development of farm and home ownership on as widespread a basis as possible; (4) the making of public improvements; and (5) the provision of lands for public use. Until the State Constitutional Convention of 1978, the State as Ceded Lands trustee construed § 5(f) to mean that proceeds and income from the trust could be expended to serve any one of those five purposes. In fact, the State chose to expend all Ceded Lands proceeds and income on public education and nothing directly for the betterment of conditions for Hawaiian people. The State's 1978 Constitutional Convention addressed the Admissions Act's express trust provision concerning Hawaiian people. It added three new sections to the Constitution. The first explicitly named two categories of trust beneficiaries of the Ceded Lands trust—Hawaiians (defined as any person with Hawaiian blood) and the general public. HAW. CONST., art. XII, § 4. The second section created the Office of Hawaiian Affairs which became the state agency primarily responsible to Hawaiians as beneficiaries of the Ceded Lands trust. *Id.* § 5. The third section mandated, among other things, that the Office of Hawaiian Affairs receive and administer in trust a pro rata share (twenty percent) of all income from the sale or use of Ceded Lands. *Id.* § 6. *See also* 1980 HAW. SESS. LAWS 273, codified at HAW. REV. STAT. § 10-13.5 (1985).

[33] *Pele*, 73 Haw. at 601, 837 P.2d at 1261-62.

[34] *See infra* Part IVB.

[35] Both the Hawaiian Homelands Trust and the Ceded Lands Trust were created in response to the serious consequences visited upon Hawaiians and their culture by

types of Native Hawaiian claims are important. Homelands and Ceded Lands breach of trust claims nevertheless provide an appropriate focal point because they reflect a coalescence of Native Hawaiian ancestry, culture and politics and because they embody an essential aspect of expressed Native Hawaiian concerns—control over Native Hawaiian lands.[36]

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the imposition of Western culture and law. *See supra* note 32.

To date, only 38,000 acres of the nearly 200,000 acres set aside by the Hawaiian Homes Commission Act have been leased to Native Hawaiians. This comprises less than twenty percent of the "available" lands. FEDERAL TASK FORCE REPORT ON THE HAWAIIAN HOMES COMMISSION ACT, REPORT TO THE UNITED STATES SECRETARY OF THE INTERIOR AND THE GOVERNOR OF THE STATE OF HAWAII, Appendix 15 (August 1983). Much of the available land is currently unsuitable for homesteading purposes. Several Homelands areas are arid, covered by lava, or of poor soil quality. Much of the land that is inhabitable lacks infrastructure — roads, water delivery systems and the like. By one estimate, 20,000 eligible Hawaiians remain on a Homelands waiting list while many non-beneficiaries hold Homelands leases for a variety of private and public uses. *See* MACKENZIE, *supra* note 22, at 51-52. For example, 295 acres of trust land at Pohakuloa, Hawai'i is currently used by the United States Army for training exercises. The Navy continues to occupy 25 acres of trust land in Kekaha on the island of Kaua'i for storage purposes. Each paid $1.00 for 65 year leases. HAWAII ADVISORY COMMITTEE TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS, A BROKEN TRUST, REPORT OF THE HAWAII ADVISORY COMMITTEE TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS, 19 ("A BROKEN TRUST")(citing DEPARTMENT OF HAWAIIAN HOME LANDS, ANNUAL REPORT, 38 (1989)) (1991). *See generally* GEORGE COOPER & GAVAN DAWS, LAND AND POWER IN HAWAII (1985); ELEANOR C. NORDYKE, THE PEOPLING OF HAWAII, 134-72, 256-57 (2d ed. 1989).

On the island of Hawai'i, Parker Ranch, the country's second largest private ranching enterprise, leases 27,000 acres of Homelands at $3.33 an acre while eligible Hawaiians who desire ranch lots have waited sometimes decades for a homestead award. Susan C. Faludi, *Broken Promise: How Everyone Got Hawaiians' Homelands Except the Hawaiians*, WALL ST. J., Sept 9, 1991, at A-2. A former trustee of a major private land trust, and non-beneficiary, reportedly lived on a 9,370 acre ranch situated on Homelands. *Id.* at A-4. Other non-beneficiaries have profited from Homelands general leases while sometimes paying less than $6 per acre per year. *Id.* Meanwhile, nearly 200 beneficiaries on the island of Hawai'i already awarded lots have been unable to move onto them due to lack of infrastructure improvements. *Id.* In December 1985, State officials traded nearly 28,000 acres of ceded lands in Puna on the island of Hawai'i, for 26,000 acres of private Campbell Estate land covered by lava. The trade was made to facilitate the State's development of a geothermal plant. MACKENZIE, *supra* note 22, at 38-39. *See infra* Part IV for a discussion of the suit by Native Hawaiians to invalidate the exchange. These situations provide foundational sources for many Native Hawaiian breach of land trust claims.

[36] For many Native Hawaiians, the return of and control over Native Hawaiian trust lands is essential to Native Hawaiian self-determination. *See generally* Haunani-

II. COURTS AND THE CULTURAL PERFORMANCE: INDIGENOUS PEOPLES' CLAIMS IN AMERICA'S POST-CIVIL RIGHTS ERA

A. The International Setting

For this article we rely upon the historical accounts of other articles

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Kay Trask, *The Birth of the Modern Hawaiian Movement: Kalama Valley, Oahu*, 21 HAW. J. HIST. 126 (1987). Native Hawaiian movements to gain control over trust lands have ancestral, cultural and political-structural dimensions. These dimensions presently coalesce in constructing Native Hawaiians as a race. *See generally* MICHAEL OMI & HOWARD WIGANT, RACIAL FORMATION IN THE UNITED STATES, 66-69 (1986) (describing racial formation and the creation of racial meanings); Ian Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994) (describing the coalescence of ancestry, social-historical context and self-identification in the social construction of a racial group). Claims under federal and state law are ancestrally categorized. Statutorily-recognized beneficiaries of the Homelands trust are people with at least fifty percent Hawaiian blood. *See supra* notes 21 and 32. This statutory blood quantum construction of Hawaiianness draws arbitrary and highly divisive lines, irrespective of culture or identity. It separates "native Hawaiians" eligible for trust lands (fifty percent blood or more) from ineligible "Hawaiians" (less than fifty percent). Ancestral or blood categorizing also frames the discourse about "special" governmental treatment of Homelands beneficiaries vis-a-vis other groups. The Prologue briefly recounts the former Honolulu mayor's reported legal stance on property tax exemptions for Hawaiian Homesteaders. The Homelands program, which Congress created in partial response to the United States-aided illegal overthrow of the sovereign Hawaiian nation, is now viewed by powerful actors such as the former mayor as a "racial preference" that violates the civil rights of other racial groups. *See infra* note 104 (United States Justice Department's position that special funding for Native Hawaiians is an illegal racial preference.)

The struggle for control over trust lands also has a cultural dimension. For some, the continuing spiritual and cultural harm Native Hawaiians suffered from their separation from the land, see *supra*, can only be repaired through the creation of a land base for Native Hawaiians to foster the rejuvenation of essential aspects of Hawaiian culture. The struggle also has a political-structural dimension. For many Native Hawaiians, some form of self-governance is the best response to the continuing effects of colonial conquest. Without land, there can be no economic base. Without an economic base, there can be no self-governance. Recognition of rights of self-governance without land is practically meaningless. *See* ROBERT BLAUNER, RACIAL OPPRESSION IN AMERICA (1972) (linking land reclamation and resistance to cultural domination in theory of internal colonialism); OMI AND WIGANT, *supra*, at 49, 161 (critiquing the application of internal colonialism theory). In these ways, current Native Hawaiian breach of land trust claims, undergirded by political self-governance movements, reflect the social construction of Native Hawaiians as a race, coalescing ancestral, cultural and political-structural concerns.

and law reviews for specific descriptions of Hawai'i's social-political setting and current movements toward Native Hawaiian sovereignty and for general descriptions of Native American law and self-determination efforts.[37] Dramatic and sometimes explosive social structural changes throughout the world provide the broader context. Those changes warrant brief discussion as part of the framework for focused inquiry on federal and state courts and Hawaiian lands claims.

Internationally, two seemingly contradictory geo-political trends have emerged—unification and separatism. Some situations reflect separatism within unification. East and West Germany merged, with sometimes violent repercussions against "outsiders" within Germany's borders.[38] The multi-country European Community lurches toward a unified economic system in the face of increasing resistance linked in part to complex political and cultural diversity. Other situations reflect separatist movements as responses to the oppression of indigenous or minority groups. The Palestinian self-determination movement matured into an agreement with Israel over control over the Left Bank and Gaza Strip. The Soviet Union splintered into separate republics following the dissolution of the "unifying" communist party. Individual republics, such as Georgia, themselves face secessionist movements by ethnic minorities. The former Yugoslavia and Czechoslovakia in Central Europe, Spain in Western Europe, Canada in North America, and Ethiopia in Africa, among other countries, are experiencing intensifying separatist challenges to dominant powers.[39]

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[37] *See* Leslie K. Friedman, *Native Hawaiians, Self-Determination, And The Inadequacy Of The State Land Trusts*, 14 U. HAW. L. REV. 519 (1992); Mia Y. Teruya, *The Native Hawaiian Trust Judicial Relief Act*, 14 U. HAW. L. REV. 889 (1992); Williamson B. C. Chang, *Reversals of Fortune: The Hawaii Supreme Court, the Memorandum Decision, And The Realignment Of Political Power in Post-State-Hood Hawaii*, 14 U. HAW. L. REV. 17 (1992); Melody Kapilialoha MacKenzie, *The Lum Court And Native Hawaiian Rights*, 14 U. HAW. L. REV. 377 (1992); *Hawaii's Ceded Lands*, 3 U. HAW. L. REV. 101 (1981). *See also* Haunani-Kay Trask, COALITION-BUILDING, *supra* note 22. *See supra* notes 9, 16 and 18, and *infra* notes 44, 46, 50, 55, 59-60 and 64 for discussions of Native Americans and legal process.

[38] *Germans' Bitterly Divided About Unification*, HONOLULU STAR BULLETIN, October 1, 1993, at A-11.

[39] *See generally* HURST HANNUM, SOVEREIGNTY AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS (1990) (addressing problems and possibilities of subgroup autonomy within nation-states); Adeno Addis, *Individualism, Communitarianism, And The Rights Of Ethnic Minorities*, 67 NOTRE DAME L. REV. 615-16 (1991);

The Pacific is experiencing similar movements. Integral to these movements are formerly colonized indigenous peoples' demands, cast in the language of rights, for political, economic and cultural self-determination, and for reclamation of homeland territory. Indigenous groups making such demands include the Native Hawaiians, or Kanaka Maoli, of Hawai'i, the Maoris of New Zealand, the Chamorros of Guam and the aborigines of Australia.[40] For these and other indigenous groups, 1993 marked the "Year of Indigenous Peoples Rights."[41] The United Nations Subcommission on Prevention of Discrimination and Protection of Minorities is investigating the impact of countries' laws

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Rosen, *supra* note 11.

Olara Otunnu, director of the International Peace Academy, observes two strains of separatism, or self-determination, challenges.

> One is principally a European phenomenon. There we are witnessing a resurgence of claims for self-determination in their classical form: Peoples demanding their own nation-state, their own territory, their own government. This is the kind of self-determination that colonial peoples claimed in the 1950s and 1960s.***In other parts of the world—especially Africa—I see demands not for classical self-determination but for what one might call a second generation of self-determination. Despite appearances, most of those troubles are not about redrawing boundaries. They are about having political participation, about being given economic opportunities, about being given space for expression of identity: in other words, they are about people seeking to have a better deal within existing boundaries. These two kinds of situations require different strategies.

Joshua Cohen, *An Interview with Ambassador Olara Otunnu*, BOSTON REVIEW, Vol. XVIII (June 1993).

[40] *See* DONNA AWATERE, MAORI SOVEREIGNTY (1984); Stewart Firth, *Sovereignty And Independence In The Contemporary Pacific*, 1 CONTEMP. PAC. 75 (1989); Haunani-Kay Trask, *Politics In The Pacific Islands: Imperialism And Native Self-determination*, 16 AMERASIA J. 1 (1990). For a general description of the Australian Aboriginal people's movement, *see Aborigines Strive to Find Rightful Place*, HONOLULU STAR BULLETIN, June 16, 1992, at A-6; *Blunders Depict Aborigine Struggle*, HONOLULU STAR BULLETIN, June 16, 1992, at A-6. Significantly, these movements tend to be politically rather than legally driven. International law norms address "rights" to self-determination and independence. *See* S. James Anaya, *A Contemporary Definition Of The International Norm Of Self-determination*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 131 (1993); Lea Brillmayer, *Secession And Self-determination: A Territorial Interpretation*, 16 YALE J. INT. L. 177 (1991); the United Nations Working Group on Indigenous Peoples' draft "Declaration on the Rights of Indigenous Peoples," U.N. Doc. E/CN.4/Sub.2/AC.4/CRP.4 (1993). No court, however, has universally accepted jurisdiction to recognize and enforce those politically volatile rights.

[41] The United Nations General Assembly designated 1992-1993 as the "Year of Indigenous People's Rights." HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI'I 41 (1993).

on particular indigenous groups, including Native Hawaiians.[42] The United Nations Working Group on Indigenous Peoples, starting with the foundational principle of self-determination, is finalizing its proposed "Declaration on the Rights of Indigenous Peoples."[43] Cast as

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[42] Those groups include Native Hawaiians, aboriginal Australians, the Gitksan, Wet'suwet'en and Lubicon Cree tribes of Canada, the Yanomami tribe of Brazil, various Guatemalan tribes, the San or Bushmen tribe of Southern Africa and the Ainu of Japan. *U.N. Group Will Do Study on Hawaiians*, HONOLULU ADVERTISER, August 5, 1993, A-3. *See also*, U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities, STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS, Vol. V, U.N. Doc. G/CN. 4/Sub. 2 (1986).

[43] Draft Declaration on the Rights of Indigenous Peoples, E/CN.4/Sub.2/1993/29. International law may provide protection to Native Hawaiians in a general sense and, more specifically, as an indigenous people through the norms of decolonization and self-determination. Article 1 of the United Nations Charter provides that there shall be "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." U. N. CHARTER, art. 1. Article 73 of the United Nations Charter specifies a process through which non-self-governing territories, which Hawai'i was officially prior to 1959, may determine their future political status. Article 73 also mandates that states having jurisdiction over non-self-governing territories have a "sacred trust . . . to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its people and their varying stages of development." U.N. CHARTER, art. 73.

The Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948), and the International Covenant on Civil and Political Rights also give recognition to the right to self-determination. Article 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights, which is not yet ratified by the U.S. Senate, declares that, "[a]ll 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 Civil and Political Rights, art. 1, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967), ratified by the United States on Sept. 8, 1992; International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966); *see generally* American Declaration of the Rights and Duties of Man, Pan American Union, Final Act of the Ninth Conference of American States 38-45 (1948); American Convention on Human Rights, in force July 18, 1978, signed by United States June 1, 1977.

Self-determination as a legal norm is thus recognized in the international agreements cited above. International agreements that lack the status of treaties may nevertheless be binding on the courts of the United States through the Supremacy Clause, Article VI of the United States Constitution. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES, § 111(1) (1987); *see also*, United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820)(courts may determine the status of the international common law by "consulting the works of jurists, writing professedly on public law;

rights, some indigenous peoples' political, cultural and homelands demands are receiving legislative attention and some are emerging in national and local courts.

B. Court Process and Cultural Performance in Post-Civil Rights America

As Gerald Torres observes, "[w]ithin a society, there are specific places where most of the activities making up social life within that society simultaneously are represented, contested, and inverted. Courts are such places."[44] This observation is reinforced by the studies of socio-legal scholars which conclude that case handling by courts can be viewed as "cultural performances, events that produce transformations in socio-cultural practices and in consciousness."[45] Especially where rights are asserted, those transformations may tend to be re-

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or by the general usage or practice of nations; or by judicial decisions recognizing and enforcing that law") (citations omitted).

Because of the "international consensus" concerning basic human rights, "international law confers fundamental rights upon all people vis-a-vis their governments," subject to further "refinement and elaboration." Filartiga v. Pena-Irala, 630 F.2d 876, 883-84, 85 (D.C. Cir. 1980). The courts of the United States thus have grounds for considering international norms of decolonization and self-governance in assessing Native Hawaiians' claims of self-determination. *See also* TRASK, COLONIALISM AND SOVEREIGNTY IN HAWAI'I, *supra* note 41 at 40-47 (describing the "growing perception that indigenous peoples should occupy a different [legal] status", and the draft Declaration codifying indigenous peoples' rights. *Id.* at 41).

[44] Gerald Torres, *Translating Yonnondio: By Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L. J. 625, 628. While we acknowledge the existence and importance of tribal courts, our focus is on federal and state courts and their handling of indigenous peoples' claims.

[45] Sally E. Merry, *Law and Colonialism*, 25 LAW AND SOCIETY REV. 889, 892 (1991). Cultural and legal anthropologists in particular are developing theoretical insights into courts in colonial and post-colonial settings as cultural performers. *See* ANTHONY GIDDENS, CENTRAL PROBLEMS IN SOCIAL ANALYSIS (1993) (methods of dispute handling can be viewed as embedded in cultural practices); JOHN COMAROFF AND SIMON ROBERTS, RULES AND PROCESSES: THE CULTURAL LOGIC OF DISPUTES IN AN AFRICAN CONTEXT (1981); *infra* note 50 addressing the meaning of the term "cultural performance." *See generally* JUNE STARR AND JANE COLLIER, HISTORY AND POWER IN THE STUDY OF LAW: NEW DIRECTIONS IN LEGAL ANTHROPOLOGY (1989) (conceiving of institutions as forms of cultural expression illuminating the dynamics of struggle for change among elites and others); John Conley, William O'Barr and E. Allen Lind, *The Power Of Language: Presentation Style In The Courtroom*, 78 DUKE L. REV. 1375 (1978); Barbara Ygnvesson, *Making Law At The Doorway: The Clerk, The Court And The Construction Of Community In A New England Town*, 22 LAW & SOC. REV. 410 (1988); SALLY E. MERRY, GETTING JUSTICE AND GETTING EVEN (1990).

pressive, legitimating harsh imbalances of power in existing social relationships; they may tend to be liberatory, opposing or reconfiguring entrenched group images and relationships; or they may reflect some complex, shifting combination of the two. Those transformations may occur as accretions over time, little noticed; or they may emerge in the jolt of a singular case-event. Of course, relatively few court cases singularly produce transformations in socio-cultural practices and in consciousness. Those that do tend to occur when the legal dispute is reflective of a larger on-going social-political controversy. Other factors—location, media attention, community organizing, related lawsuits, or legislative initiatives—are significant.[46]

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[46] A classic example of a federal court's cultural performance involving Native Americans is described by James Clifford in his account of the Mashapee Indians land claims. JAMES CLIFFORD, THE PREDICAMENT OF CULTURE: TWENTIETH-CENTURY ETHNOGRAPHY, CULTURE AND ART (1988). The Mashapee Indians filed suit under a federal statute to reclaim valuable lands their ancestors once possessed. The court transformed the contemporary political-legal land dispute with deep historical roots into an issue of standing—finding that according to distinctly western definitions the Mashapee Indians did not constitute a "tribe" and therefore accrued no right to sue. *See also* MARTHA MINOW, MAKING ALL THE DIFFERENCE (1991) (describing the court's construction of Mashapee identity); Torres, *supra* note 44 (describing the way the court's performance inverted the Mashapee Indians claims and view of themselves). *See generally* ARNOLD KRUPAT, ETHNO-CRITICISMS: ETHNOGRAPHY, HISTORY AND LITERATURE (1992) (examining early Native American federal court cases and the submerged voices of Native American leaders).

Recent notable examples of courts' cultural performances include the initial Rodney King police brutality trial in California state court in Simi Valley. Court process and trial, including the venue and peremptory juror challenges, portrayed a largely white, middle class jury and the legal system as uncomprehending of the milieu surrounding Rodney King's beating. The *Mabo II* ruling of the Australian High Court jettisoned the doctrine of *terra nullius* and recognized historical-cultural bases for native land title, fostering far-reaching political and legal responses. *See supra* note 11. *See also* Peter Kar Yu Kwon, Facts & Fiction, Narratives & Myths (manuscript on file with authors) (discussing High Court of Australia's decision in Mabo v. Queensland). Other recent examples particular to Hawaii include the *Marcos* class action civil trial against Imelda Marcos and others in the Hawaii federal district court on grounds of torture and murder of political dissidents in the Philippines; the State v. Ganal murder prosecution in state court in which the Filipino male defendant asserted a "amok" cultural defense to the murder and attempted murder of his spouse, children, parents and others. *See* Belinda A. Aquino, A Filipino Tragedy In Hawaii (unpublished manuscript on file with authors); the Ka'ai'ai v. Drake class action litigation in state court to compel appointment of an independent representative of Hawaiian Homelands Trust beneficiaries to participate in Department of Hawaiian Homelands negotiations against the State for past misuse of Homelands. *See infra* notes 278-79.

The view of courts as dynamic sites of cultural performances is supported generally by dispute transformation theory. According to this theory, each stage of the court process in varying ways contributes to a "rephrasing" of the dispute.[47] Decisions concerning initial claim assertion followed by decisions concerning pretrial discovery, sanctions and overall case management (including motions and settlement maneuvering and legal issue formulation) redefine the claimant's understanding and framing of the controversy. The interactions among parties, attorneys, judge, court personnel, community groups and general public, through the media, and the trial itself, further contribute to this rephrasing at the trial court level. Decisions by appellate courts, more detached and, yet in some respects, more far-reaching, further solidify the court system's dispute rephrasing performance. As Professors Mather and Ygnvesson observe, a legally phrased claim is a "social construct which orders 'facts' and invokes 'norms' in particular ways—ways that reflect the personal interests and values" of the describer.[48] Concerns critical to the rephrasing process thus arise: Who has court access; who controls claim development and presentation; according to what standards; from what perspectives; who reports on the contextual facts; and according to what selection criteria? What

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[47] Drawing upon anthropology, sociology, critical theory, among other disciplines, socio-legal scholars have identified dispute transformation as an integral part of legal process. The transformation of disputes is described, in part, in terms of a contextual "rephrasing" of disputes. *See* William Felstiner, Richard Abel & Austin Sarat, *The Emergence And Transformation Of Disputes: Naming, Blaming, Claiming. . . .*, 15 LAW & SOC. REV. 631 (1980-81) (foundational socio-legal research into the ways in which disputes are transformed as they are processed through a legal system); Lynn Mather and Barbara Ygnvesson, *Language, Audience and The Transformation of Disputes*, 15 LAW & SOC. REV. 775, 780 (1980-81) (describing legal claims as social constructs). *See also* Bryant Garth, *Power And Legal Artifice: The Federal Class Action*, 26 LAW & SOC. REV. 237, 240 (1992) ("the process of moving from a social relationship of conflict to a lawsuit inevitably entails a translation into legal language. . . .The dispute [also] changes form, expands or contracts or changes in focus in response to numerous contextual factors" *Id.* at 240.); Starr and Collier, *supra* note 45.

James Boyd White provides an insightful temporal view of textual "translation" in legal process that enriches socio-legal research conclusions. He observes that the legal text, or the formally written right, "remains the same, but its translation—its being carried over—to our own time locates it in a new context of particularities which will, and should, give it a transformed meaning." JAMES BOYD WHITE, JUSTICE AS TRANSLATION, XIII (1990).

[48] Mather & Ygnvesson, *supra* note 47, at 780. *See also* Judith Resnik, *On The Bias: Feminist Reconsiderations of The Aspirations For Our Judges*, 61 S. CAL. L. REV. 1877 (1988).

cultural values collide and emerge in the interactions of judges, parties, attorneys, communities and media?[49] These concerns shape the contours and content of a court system's overall cultural performance.[50] From this view, courts in important instances not only decide disputes, they

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[49] *See* Elizabeth Schneider, *The Dialectic of Rights And Politics: Perspectives From The Women's Movement*, 61 N.Y.U. L. REV. 589 (1986) (describing ways in which legal theory can inform the interactions of litigants, attorneys, judge, community groups and media and in turn be re-formed by that interaction to further social-political movements).

[50] Differing communities, of course, will view the same performance differently. Audiences vary in time, space and composition. A particular performance will thus be viewed and interpreted by multiple, overlapping communities, and will generate multiple, varying messages. *See* JAMES SCOTT, DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS (1990) (examining narratives of those of differing positions on the social hierarchy and identifying differing constructed meanings of events viewed in the "theatre of power"). In this sense, interpretive communities will be interactively constructing meaning not so much concerning legal texts as concerning legal events. Those events, or performances, will comprise a complex array of legal and non-legal texts, media images, word of mouth stories, and flesh and blood people, among other things. *See generally* Jo Carrillo, The American Indian And The Problem Of History (Book Review), 33 ARIZ. L. REV. 281 (1991) (observing that "every telling of a story, whether it be a general story or a self-referential story, is subject to change, to memory, to interpretation. And every single voice may, in effect, be a compilation of many voices, past and present." *Id.* at 283).

Our use of the term "performance" here is modified by the term "cultural." In using the term cultural we mean something more specific than the collective practices and values of mainstream American society. We also mean something particularized to groupings of people (whether those groups are circumscribed by race, ethnicity, language, gender, geography, history or other similar factors), but something still less tangible than the customs, religious practices and relational forms of those particular groups. We draw upon anthropological approaches. By "culture" we mean a given community's system of constructed or "inherited conceptions expressed in symbolic forms by means of which [people] communicate, perpetuate, and develop their knowledge about attitudes toward life." CLIFFORD GERTZ, THE INTERPRETATION OF CULTURES, at 89 (1973). For Renato Rosaldo, those forms provide structure "through which people make sense of their lives." RENATO ROSALDO, CULTURE AND TRUTH: THE REMAKING OF SOCIAL ANALYSIS, at 26 (1989). Although in crucial respects multi-dimensional, shifting and regenerating, a group member's culture "provides the framework, the anchor, within which a range of choices and values can be considered and evaluated." Adeno Addis, *supra* note 39, at 658.

Thus a "cultural performance," and more specifically "a court's cultural performance," as we use the term, addresses a performance (actions, interactions) that in some fashion impacts upon the ways in which often differing communities construct their frameworks, however shifting and regenerating, "within which a range of choices and values [about the subject or event portrayed] can be considered and evaluated." *Id.*

also transform particular legal controversies and rights claims into larger public messages.

Those messages can be thought of as socio-legal or cultural narratives, or stories, about groups, institutions, situations and relationships.[51] The shaping and then retelling of stories through court process can help either to reinforce or counter a prevailing cultural narrative in a given community. A prevailing, or master, narrative provides a principal lense through which groupings of people in a community see and interpret events and actions.[52] It provides a set of basic assumptions

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[51] *See* JEAN-FRANCOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE (1984) (describing the functioning of societal "grand narratives"); Kathryn Abrams, *Hearing The Call Of Stories*, 79 CAL. L. REV. 971 (1991) (critiquing the use of narratives in legal scholarship as means for raising silenced voices and challenging the notion of objectivity in decisional process). The term "narrative" varies in meaning and usage. Briefly stated, Lyotard's "narrative" refers to words or images that reflect a collective understanding of a situation, relationship, or event. Those words or images construct for their holders a lense through which other social situations, relationships, or events are viewed and interpreted. Abrams' "narrative" refers to the use of storytelling by legal scholars as a means for comprehending legal rules and processes, for identifying vantage points and power relations, for raising voices silenced by those rules and processes and for offering normative foundations for remaking the socially oppressive dimensions of law. Lyotard's and Abram's usages are connected. Scholars writing about law's oppression of minorities, for example, have embraced legal storytelling in part to construct oppositionist lenses (or larger counter-narratives) for destablizing and altering dominant social narratives. *See* Richard Delgado, *Storytelling For Oppositionists And Others: A Plea For Narrative,* 87 MICH L. REV. 2411 (1989) (*Storytelling For Oppositionists*). Narrative in legal scholarship has been the subject of sharp debate. *See* Daniel Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay On Legal Narratives*, 45 STAN. L. REV. 807 (1993) (criticizing the use of narratives by feminist and critical race scholars without evidence of the existence of different voices); Richard Delgado, *On Telling Stories In School: A Reply To Farber And Sherry*, 46 VAND. L. REV. 665 (1993) (responding). The term "cultural narrative," as we use it, is similar to the term "social or societal narrative." We use "cultural," as defined *infra* note 50, to emphasize the context in which these narratives are produced, enhanced, contested and transformed—indigenous peoples' land claims in American courts.

[52] *See* Lyotard, *supra* note 51; Richard Delgado, *Storytelling For Oppositionists*, *supra* note 51. Addressing perceptual mechanisms for "understanding others," historian Greg Dening uses the term "model" to describe what are in essence grand narratives—prevailing language and imagery that translate perceptions and experiences of others into dominant cultural understandings, whether or not those understandings reflect the perceptions and experiences of those "others." Dening uses the term "metaphor" to describe what are in essence counter-narratives—"entry into the experience of

for evaluating social-political controversies and the relationships of the groups involved.

A counter-narrative challenges those assumptions and the vantage point from which they are made. By offering a "framework not previously accepted," the counter-narrative challenges "established categories for classifying events and relationships by linking subjects or issues that are typically separated" or by elevating previously suppressed voices, thus "stretching or changing accepted frameworks for organizing reality."[53] It thereby undermines the clarity and strength of the master narrative, infusing complexity and providing a competing perspective.[54]

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others" through language and imagery to enlarge cultural understandings.

> Understanding others, then, can have two meanings. It can mean entry into the experience of others in such a way that we share the metaphors that enlarge their experience. Or it can mean that we translate that experience into a model that has no actuality in the consciousness of those being observed but becomes the currency of communication amongst the observers. . . [M]odels are schizoid: they belong to two systems, the one they describe and the one that constructs them.

GREG DENING, ISLANDS AND BEACHES, at 93 (1980).

[53] Mather & Yngvesson, *supra* note 47, at 778-79. Mather and Yngvesson describe the concept of "expansion" in dispute transformation theory in terms that are generally applicable to the discussion of master and counter-narratives. Richard Delgado observes that oppositionist stories in a legal forum can create space for "expansion" by helping to develop counter-narratives that are "powerful means for destroying mindset — the bundle of presuppositions, received wisdom, and shared understanding against a background in which legal and political discourse takes place." Delgado, *Storytelling For Oppositionists*, *supra* note 51, at 2413.

[54] *See* RICHARD DELGADO, NARRATIVE AND THE LEGAL DISCOURSE: A READER IN STORYTELLING AND THE LAW, at 289 (David Ray Papke ed. 1991):

> For stories create their own bonds, represent cohesion, shared understandings, and meanings. The cohesiveness that stories bring is part of the strength of the outgroup. An outgroup creates its own stories, which circulate within the group as a kind of counter-reality.

Id. at 289.

> The dominant group creates its own stories, as well. The stories or narratives told by the ingroup remind it of its identity in relation to outgroups, and provide it with a form of shared reality in which its own superior position is seen as natural.

Id.; *see also* Newton, *Indian Claims*, *supra* note 18, at 760 (describing Euromyths and counter-narratives by Native Americans in legal process); Scott, *supra* note 50 (describing hidden transcripts of Native American resistance). *See generally* GERALD LOZEZ, REBELLIOUS LAWYERING 39-44 (1992) (describing legal storytelling by lay people and lawyers as a method for challenging subordinating narratives).

Historically, for example, master socio-legal narratives about indigenous groups have tended to characterize their subordinated situations as inevitable, due to the groups' inferiority, or insignificant, due to the passage of time and past remedial efforts. Nell Jessup Newton observes in the context of Native American legal claims that, "[t]he Euromyths of the dominant group . . . justify and rationalize the dispossession of Native Americans from their lands and blame them for continuing to refuse the full benefits of membership in the dominant culture."[55] Similarly, subordinating socio-legal narratives concerning Native Hawaiians have long fixed blame for their physical and cultural destruction on Native Hawaiians' inferiority and "semi-barbarous face."[56] The Congressional Record of the annexation debates following the overthrow of the Hawaiian government provides insight into how these narratives were embodied in and reproduced by law — or, as one United States Senator put it, the "legalization of the great destiny for Hawai'i."[57]

> Side by side on their islands were two civilizations, higher and a lower civilization. On the side of the higher civilization were ranged the intelligence, the progress, the thrift, the aspirations for enlarged liberty

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[55] Newton, *Indian Claims*, *supra* note 18 at 760-761. *See also* Robert A. Williams, Jr. *Encounters On The Frontiers Of International Human Rights Law: Redefining The Terms Of Indigenous Peoples' Survival In The World*, 1990 DUKE L. J. 660 (describing how earlier international law norms, particularly the doctrine of discovery, and the narratives engendered by those norms operated to destroy, or at least subordinate, American Indians); S. James Anaya, *The Rights Of Indigenous Peoples And International Law In Historical And Contemporary Perspective*, 1989 HARV. INDIAN L. SYMP. 191 (1990). *See generally* CHARLES WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW (1986).

For Native Hawaiians, the question arises, what groups, or interests, have generated and continue to generate dominant societal narratives about Native Hawaiians? A response to that question requires a complex, social-historical account of Hawai'i intergroup relations that is beyond the scope of this article. That account would trace the socio-political shift from the Hawaiian monarchy of the mid 1880s, to the white American oligopoly that controlled Hawai'i economics and politics from the late 1880s through the early 1950s, to Pearl Harbor and the United States military, to the "democratic revolution" of the mid 1950s, engineered by labor and a coalition of ethnic groups, to statehood in 1959 and a booming economy and rapidly expanding state government and an emergent middle class of predominantly Japanese, Chinese and Caucasian Americans, to the present. *See generally* KAME'ELEIHIWA, *supra* note 22; LAWRENCE FUCHS, HAWAII PONO (1970).

[56] 53 CONG. REC. 1885 (1894) (recording a statement by United States Senator Johnson from Indiana in which he argues for annexation of Hawaii as a territory of the United States).

[57] *Id.*

> and for the legalization of a great destiny for Hawai'i. On the other side was ranged the monarchy, with its narrow, contracted view of human rights, with its semibarbarous face turned toward the past, unwilling to greet the dawning sun. . . From the very nature of things these two civilizations could not exist together forever. One was to survive and the other would have to perish.[58]

Court rulings have reinforced such master narratives, and harsh societal actions have been justified by them.[59] Many indigenous groups,

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[58] *Id. See* WILLIAMS, DISCOURSES OF CONQUEST, *supra* note 9 (discussing the doctrine of discovery and the master narrative concerning uncivilized Indians that justified confiscation of lands).

Where, for example, cultural-legal controversies about an indigenous group's homeland "rights" are channeled into the legal process and then disposed of consistently on procedural grounds without full story development (discovery), performance (trial) or elaboration (appellate review), a collective story is narrowly shaped and told. The story is that the group not only lacks homeland rights worthy of full institutional consideration; the story is also that the "law" deems the group's own messages about those controversies, its voice, insignificant. Several larger narratives might be supported by these stories. One might be that the legal system is ill-suited for, or at least uncomfortable with, deciding controversies of this type. Resort must be to the purely political branches of state and federal government. Another, and from the group's perspective, more invidious narrative might be subtly supported by these stories: The past is past, and, given the judicially recognized insignificance of these claims, the group's difficulties are probably linked to its own deficiencies and inability to lift itself up by its bootstraps.

In contrast, where an indigenous group is accorded access to the judicial forum and cultural-legal controversies are afforded full opportunity for development, airing and review in the judicial forum, whether cast as traditional or non-traditional rights claims, an indigenous group may look to the court process as part of its larger efforts to tell its story with complexity and humanity. It may use the power of governmental court process to help counter what it perceives to be an inaccurate, harmful prevailing master narrative—to tell a story in a formal institutional setting, for example, that counters the narratives described in the preceding paragraph; to offer a narrative about past cultural destruction and present cultural and economic resurrection and the pivotal role of homelands to actualizing the international human rights principle of self-determination. From this view, described only briefly here, master narratives and counter-narratives are lenses that shape societal perceptions of a group's actions and situations. *See supra* notes 51-55. A court's cultural performances can contribute to reinforcing prevailing narratives or to elevating countering ones. Those performances sometimes aid in the transformation of indigenous peoples' disputes into public messages, discounting or highlighting the perspective, and silencing or enhancing the voice, of the group.

[59] *See* WILLIAMS, DISCOURSES OF CONQUEST, *supra* note 9 (describing the Supreme Court's acceptance of the European doctrine of discovery concerning rights to "dis-

including Native Hawaiians, are now countering master cultural narratives with narratives of their own—not only telling stories of historical and contemporary victimization but also offering normative precepts for future social structural change.[60] These counter-narratives are rooted in history and culture.[61] And they are rooted in law.[62]

There is growing recognition of the power of legal storytelling in the construction of counter-narratives in legal process.[63] Professor Newton describes how "claims stories [by Native Americans], when broken from the dry legal recitation of the facts in the cases and placed in context, reveal powerfully the inadequacies of the dominant group's stories."[64] In this setting, indigenous groups are both asserting rights

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covered" land and the way in which the doctrine legally erased the existence of American Indians). *See also* Rennard Strickland, *Genocide-At-Law: An Historic And Contemporary View Of The Native American Experience*, 34 KAN. L. REV. 713 (1986) (describing legal mechanisms in the 18th and 19th centuries allowing United States citizens to kill American Indians, appropriate their land and destroy tribal culture); 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 (1989)

[60] *See supra* note 6 discussing Kealoha v. Hee and its argument for resort to international law to guide the state and federal governments in dispute resolution proceedings involving Native Hawaiians; Frank Pommersheim, *Liberation, Dreams, And Hard Work: An Essay On Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411, 445 ("International law not only provides legal insight into the struggle of indigenous people for voice and recognition, but it also helps to illuminate the constraints on that development which find their roots in certain *foundational* Indian law principles") (emphasis original). *See also* Thorstenson v Cudmore, 18 I.L.R. 6051, 6053 (1991) (in arguing the structural illegitimacy of the Bureau of Indian Affairs role in imposing particular constitutions on tribes, the Cheyenne River Sioux Tribal Court of Appeals carefully detailed how "this [restrictive jurisdictional] oddity in the Cheyenne River Sioux Tribal [Constitution]. . .does not have its roots in any considered decision of the Cheyenne River Sioux people, but rather in some gross B.I.A. oversight or self-imposed legal concern to tread cautiously when potential non-Indian interests are involved"); Pommersheim, *Liberation, Dreams, and Hard Work*, at 430 (describing Thorstenson and the "intrusive role of the Bureau of Indian Affairs in the original drafting and preparation of the tribal constitution").

[61] *See infra* note 279.

[62] *See supra* notes 18 and 279.

[63] *See* Charles Lawrence, III, *The Word And The River: Pedagogy As Scholarship As Struggle*, 65 S. CAL. L. REV. 2231 (1992); Jane Baron, *The Many Promises Of Storytelling In Law*, 23 RUTGERS L. J. 79, 97 (1991) (describing litigators' use of story-telling techniques).

[64] Newton, *Indian Claims*, *supra* note 18, at 760. *See also* Frank Pommersheim, *supra* note 60, at 429 ("Federal Indian law doctrines are grounded in 'stories' of conquest,

claims within narrow and expansive frameworks and rethinking and recasting the "cultural performance" role of federal and state courts.[65] Rethinking and recasting the role of courts for indigenous groups, described below, parallels shifting perceptions of the judicial role in civil rights litigation. It reflects in part the transformation from the civil rights activity of the mid-1960s to what some now call the "post-civil rights" era. Some at one extreme maintain that civil rights struggles are passe. They point to civil rights legislation of the 1960s and 70s and a societal mandate against overt discrimination.[66] They see the roots of current minorities' problems in preference programs, failed victim-oriented economic policies and useless discrimination litigation.[67] Some at the other extreme "trash" civil rights as safety valves controlled by society's dominant interests to relieve momentary pressure from those at the bottom, perpetuating status quo social-power relationships.[68] For them, meaningful social structural change only occurs through radical political action outside the prevailing legal system. Others view civil rights litigation with great caution, taking care not to misperceive judicial "rights" victories necessarily as harbingers of meaningful societal change, and yet viewing legal rights claims as sometimes potent vehicles for outsider challenges to en-

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cultural superiority, and a guardian/ward mentality. Tribal court narratives may seek to unravel such stories that contain a 'mindset' justifying the world as it is with tribal existence beholden to federal benevolence" *Id.* at 429).

[65] *See supra* notes 6, 46, 47, 50 and *infra* note 279 and accompanying text.

[66] Washington v. Davis 426 U.S. 229 (1976) (finding a "racially neutral" test given to police officer applicants which measured verbal ability, vocabulary, and reading comprehension rationally related to the Government's interest in upgrading the communicative skills of its employees. *Id.* at 245). The United States Supreme Court had "difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies 'any person . . . equal protection of the laws' simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups." *Id.* at 245.

[67] Thomas Sowell 139 (1984); Shelby Steele, *The New Sovereignty*, HARPERS MAGAZINE, July 1992, pp. 47.; WILLIAM JULIUS WILSON, DECLINING SIGNIFICANCE OF RACE ( ) and THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (1935).

[68] Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 303-04 (1987) (summarizing certain Critical Legal Studies views: "Rights legitimize society's unfair power arrangements, acting like pressure valves to allow only so much injustice. With much fanfare, the powerful periodically distribute rights as proof that the system is fair and just, and then quietly deny rights through narrow construction, nonenforcement, or delay" (footnotes omitted) *Id.* at 303-04).

trenched authority in language that compels explanation and justification—as oppositional cultural practices that can collectivize and express the experiences and visions of outsider groups.[69]

At the risk of oversimplification, the current post-civil rights era in America might thus be generally characterized by a reconceptualizing of the role of rights litigation as part of, rather than as the pinnacle of, political strategies for social structural change; the movement away from principal reliance on narrow judicial remedies toward the additional use of courts as forums for the development and expression of counter-narratives and for the promotion of local empowerment and community control; and a rising importance of state or other local legal forums for hearing outsiders' claims.[70] The post-civil rights era might also be characterized as reflecting a significant tension about values of court process for indigenous peoples—recognizing that indigenous peoples' histories and claims to homelands often fall outside the framework of accepted civil rights principles of non-discrimination and diversity, and yet acknowledging that court challenges and rights claims sometimes help focus issues, illuminate institutional power arrangements, and tell counter-stories in ways that assist larger social-political movements.[71]

For indigenous peoples and established governments, "the times they are a changing."[72] Federal and state courts in the post-civil rights era are facing indigenous peoples' claims cast within dual frameworks. As revealed by Sam Kealoha's challenge to OHA, described in the Prologue, the evolving language of indigenous rights bespeaks both traditional legal claims and claims cast according to customary and international rights norms.[73] And state courts in particular may be, in

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[69] *See* Kimberle Crenshaw, *Race, Reform And Retrenchment: Transformation And Legitimation In Anti-discrimination Law*, 101 HARV. L. REV. 133 (1988).

[70] Mari Matsuda, *Looking To The Bottom: Critical Legal Studies And Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (describing "outsider" positioning in law).

[71] *See* John Calmore, *Critical Race Theory, Archie Shepp, And Fire Music: Securing An Authentic Intellectual Life In A Multicultural World*, 65 S. CAL. L. REV. 2129 (1992) (describing a post-civil rights era).

[72] BOB DYLAN, *The Times They Are a Changing*, on HIGHWAY 61 REVISITED (Warner Bros. Inc., 1964).

[73] In 1993, the Hawaii State Legislature acknowledged the relevance of international human rights norms in the preamble to legislation creating the Native Hawaiian Sovereignty Advisory Commission.

> The purpose of this Act is to acknowledge and recognize the unique status the native Hawaiian people bear to the State of Hawaii and to the United States

small but significant ways, faced with the task of transforming themselves in the handling of those multi-dimensional, multi-storied claims. The Hawaii Supreme Court in *Pele* embarked on the beginnings of this task indicating that it would, "in this case, clarify the role of Hawaii's courts in enforcing the terms of the public lands trust."[74] This nascent role transformation lends additional breadth to the setting for our inquiry into court process and Native Hawaiians' right to sue.

III. Native Hawaiians and Federal Court Breach of Trust Actions[75]

The Native Hawaiian federal court breach of trust cases examined here are interrelated. They involve claims by, or on behalf of, the same cultural group against the same institutional defendants. They arise out of the same historical and geographical setting and assert similar legal claims. The federal courts' procedural rulings in these cases are thus appropriately viewed collectively. They are connected culturally through social-historical context. They are connected theoretically through procedural rhetorical constructs that tend to belie value judgments about social relations. And they are connected functionally through the collective guidance they provide to those contemplating future engagement with federal legal process on behalf of Native Hawaiians specifically and America's indigenous peoples generally.

Native Hawaiians looked to the federal courts from the late 1970s through the early 1990s. In varying, though related fashions, Native Hawaiians sought the aid of federal judicial power both to reclaim wrongfully alienated or used Hawaiian Homelands and Ceded Lands and to communicate an emerging narrative about the centrality of those lands to Native Hawaiians' cultural and political resurrection.

> and to facilitate efforts of native Hawaiians to be governed by an indigenous sovereign nation of their own choosing. In the spirit of self-determination and by this Act, the Legislature seeks counsel from the native Hawaiian people on the process of:
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> (1) holding a referendum to determine the will of the native Hawaiian people to call a democratically convened convention for the purpose of achieving consensus on an organic document that will propose the means for native Hawaiians to operate under a government of their own choosing; . . .

1993 Haw. Sess. Laws 359.

[74] *Pele*, 73 Haw. at 591, 837 P.2d at 1257.

[75] Portions of Part III are drawn from substantially the same material to be published by co-author Yamamoto in another law review's article.

The legal claims—governmental breaches of trust. The source of the legal claims—the Statehood Admissions Act,[76] which explicitly recognizes the state's trust obligations to Native Hawaiians concerning management of Hawaiian Homelands and Ceded lands, and the Hawaiian Homes Commission Act (HHCA),[77] which delineates specific state responsibilities for homelands. The cultural claims—restoration of Native Hawaiians socially and economically by enabling them to regain control over the land and, for many, cultural and economic self-determination.[78]

Despite numerous case filings, the federal district courts rarely have reached the "merits" of claims involving governmental breaches of trust or fully explored the relationships in controversy.[79] Furthermore, the federal appellate courts have never affirmed a lower court finding of a trust breach. Native Hawaiians' stories, and the cultural messages underlying their claims, have rarely emerged as part of the courts' cultural performances about those claims.[80] Procedural maneuvers by governmental parties and rulings by the courts eventually blocked avenues for full development and consideration of those Native Hawaiian stories and messages. What follows is a description of those procedural maneuvers and the rhetorical constructs employed, especially

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[76] Admissions Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4 [hereinafter Admissions Act].

[77] 42 Stat. 108, *reprinted in* 1 HAW. REV. STAT. 167-205 (1985, Supp. 1992) [hereinafter HHCA], originally Hawaiian Homes Commission Act of 1920 (Pub. L. No. 67-34, 42 Stat. 108 (1921)).

[78] *See supra* notes 35, 36 and 40 and accompanying text. *See also* Friedman, *supra* note 37, at 526. Friedman observes:

> Native Hawaiian dignity, health, and cultural survival cannot be secured through the existing trust mechanisms. Even if the trusts functioned perfectly, state or federal government ownership and control of indigenous peoples' lands presents insoluble philosophical problems. As a first step Native Hawaiians should recover a land base, where Hawaiian self-governance would be recognized by the state and federal governments. Ultimately, they should be accorded a measure of self-determination. Native Hawaiians must be permitted to pursue the greater good of their community in their own time-tested and unique way(emphasis omitted) (citations omitted).

Id. at 526.

[79] In one instance a federal district court found a breach of trust. That decision was reversed on appeal for procedural reasons. *See infra* notes 82-101 and accompanying text.

[80] *See supra* notes 44-65 and accompanying text (concerning courts' cultural performances).

by the federal appellate courts, in reshaping the Native Hawaiian land trust controversies.

Federalism and separation of powers concerns often undergird procedural rulings that appear to demonstrate federal court reluctance to regulate state government affairs. As developed below, however, the federal courts' apparent resistance to Native Hawaiian breach of trust claims seems to extend deeper than ordinary federalism concerns about the role of federal courts.[81]

The Ninth Circuit's sweeping, largely a-contextual subject matter jurisdiction rulings erected initial barriers with long-term social consequences. The foundational case is *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Commission*[82] (*Keaukaha I*). This Ninth Circuit opinion is discussed at some length because it sets the tone and establishes the rhetorical framework for decisions that followed.

Keaukaha I said next to nothing about the actual controversy. The opinion recited the following story. The Hawaiian Homes Commission and the County of Hawaii agreed to exchange county lands for trust lands the county needed for a flood-control project. The Hawaiian Homes Commission transferred title to twenty acres of Homelands and received nothing in return. The Keaukaha-Panaewa Community Association sued the Commission, alleging breaches of trust under the Homelands Act and the Admissions Act. Beyond doubt, and the district court so found, the Commission had violated its obligations under both acts.[83]

The Ninth Circuit reversed without considering the merits of the Community Association's claims. First, it ruled that the federal courts lacked subject matter jurisdiction over claims under the federal Homelands Act. Despite the Act's wholly federal origins and continuing federal oversight of the Homelands Trust, the court ruled that the Community Association's claims did not "arise under" federal law.[84] The court stated that, when Hawai'i acquired principal trust administration responsibility upon statehood, the rights created under the Homelands Act lost their federal "nature."[85] The "facts make it clear

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[81] *See infra* notes 102-122, 147-162 and accompanying text for a discussion about federal courts jurisprudential concerns.

[82] 588 F.2d 1216 (9th Cir. 1978).

[83] Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Commission, Civ. No. 75-0260 (D. Haw., Sept. 1, 1976).

[84] *Keaukaha I*, 588 F.2d at 1226-27, n. 11.

[85] *Id.* at 1226 (emphasis omitted).

that the rights plaintiffs seek to vindicate are state rights by nature . . ." and might thus be "most appropriate for Hawaii's laws and judicial system to deal with."[86] The court ignored the historical and continuing relationships of the United States and Native Hawaiians when it found that "facts . . . made it clear that only state rights by nature" were involved.[87]

Congress enacted the Homelands Act to return Native Hawaiians to land illegally obtained by the United States. The legislation generated a homelands base and established a federal program for administration. The program was dreadfully administered.[88] As a condition of statehood in 1959, Hawai'i incorporated the federal Homelands Act into its constitution, received title to the Homelands in trust, and assumed trust management responsibilities. The United States retained trust enforcement and program supervisory responsibilities,[89] requiring, among other things, federal approval of certain state amendments to the Homelands Act. The original federal Homelands Act has not been repealed.[90] The court nevertheless found it "clear" that legal process barred consideration of the Community Associations' claims under the Homelands Act.[91]

Next, the court held that although the Community Association's claims arose under the federal Admissions Act,[92] triggering federal court jurisdiction, the Association could not maintain those claims.[93] The Admissions Act, the court said, did not imply a private right of action in favor of trust beneficiaries.[94] The Admissions Act authorizes the United States to sue to enforce state trust obligations.[95] It is silent as to enforcement by trust beneficiaries.

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[86] *Id.* at 1227 (emphasis omitted).

[87] *Id.*

[88] *See, e.g.*, A BROKEN TRUST, *supra* note 35, at 43.

[89] Admission Act §§ 4 & 5.

[90] The original Act was deleted from the United States Code, but was never repealed by Congress.

[91] *See also* Price v. Hawaii, 764 F.2d 623 (9th Cir. 1985) (*Price I*) (self-described Native Hawaiian tribe lacks status as an "Indian tribe or band with a governing body recognized by the Secretary of the Interior" to trigger federal subject matter jurisdiction under 28 U.S.C. § 1362. *Id.* at 626).

[92] *Keaukaha* I, 588 F. 2d at 1220 (citing Admissions Act § 5(f)).

[93] *Id.*

[94] *Id.* at 631.

[95] Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission, 739 F.2d 1467 (9th Cir. 1984).

The court tortuously justified its "no-right-to-sue" conclusion. It did so largely by resort to a sterile principle of statutory interpretation—*expressio unius est exclusio alterius*, or what is expressly provided for in legislation negatives what is not included.[96] That principle, taken literally, means that a court can never construe a statute with specific provisions to imply anything. The Ninth Circuit panel found that principle to reflect a "presumption" against private enforcement actions, while struggling to distinguish a recent Supreme Court decision[97] undermining its analytical approach.

The court also distinguished in a brief footnote a seemingly controlling Supreme Court case and a series of its own cases that established the "co-plaintiff" doctrine in Native American trust cases.[98] That doctrine enables trust beneficiaries to sue for trust enforcement of a federally-created trust where the United States, the designated enforcer, fails to do so.[99]

Most revealing, in foreclosing private enforcement of breach of trust claims, the court appeared to contradict itself on critical points. It first

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Section 4 of the Admissions Act provides that:

> [a]s a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State, as provided in section 7, subsection (b) of this Act, subject to amendment and repeal only with the consent of the United States and in no other manner.

Admission Act of March 18, 1959, Pub. L. No. 86-3, § 4, 73 Stat. 4 (1959).

[96] 588 F.2d at 1221.

[97] Cort v. Ash, 422 U.S. 66 (1975) undermined Keaukaha I's reliance upon National Railroad Passenger Corp. v. National Association of Railroad Passengers, 414 U.S. 453 (1974), as the basis for its presumption against implied rights of action absent specific evidence of legislative intent to create such implied rights. In *Cort*, the Supreme Court signaled the opposite presumption concerning legislative intent—a presumption in favor of an implied right of action absent legislative intent to the contrary. 422 U.S. at 82-83 n.14. The Ninth Circuit in *Keaukaha I* did not reconcile the analytical approach it adopted concerning legislative intent with the contrary directive of *Cort*, stating only "[w]hatever the impact of *Cort* may be. . ." 588 F.2d at 1222. The court also acknowledged the significance of the "general scheme and purposes" of the Admissions Act but failed to address them in social-historical context. *Id.* at 1224.

[98] *Id.* at n. 7.

[99] *See, e.g.*, Agua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d 1184, 1186 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972) ("An Indian, as the beneficial owner of lands held by the United States in trust has a right acting independently of the United States to sue to protect his property interest," *id.* at 1186, relying on Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 369 (1968) (the purposes of the trust "would be frustrated unless both the Indian and the United States were empowered to seek judicial relief to protect" the trust. *Id.* at 369)).

found Homelands Trust enforcement to be "purely" a state matter, thereby depriving the federal court of jurisdiction under the Homelands Act.[100] It later focused on the Admissions Act's designation of the federal government as sole trust enforcer, thereby precluding private enforcement actions by Native Hawaiian beneficiaries.[101]

In sum, the Ninth Circuit found no federal jurisdiction to consider Native Hawaiian breach of trust claims under the Homelands Act, even though that statute arguably conferred private enforcement power upon trust beneficiaries. It then found federal jurisdiction to consider those Native Hawaiian claims under the Admissions Act, but found no private right of enforcement by beneficiaries under the same statute. Catch 22. Native Hawaiian Homeland claims dismissed without further discussion.

Of special significance, the Ninth Circuit sharply rephrased this and future Homelands controversies. It did so quietly by casting its rulings in the language of process and ignoring, implicitly as irrelevant, the likely sweeping practical, political and cultural consequences.

Practically, the court's rulings left Native Hawaiians without any available legal forum despite, as the district court had found, clear trust violations, the loss of additional trust land, and the continuing harm to the 20,000 Native Hawaiians on the Homelands waiting list.[102] Politically, the court's subject matter jurisdiction ruling ("no federal involvement") laid the foundation for the United States' sharp retreat

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[100] *Keaukaha I*, 588 F.2d at 1224.

[101] *Id.*

[102] In Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), the United States Supreme Court held that federal courts could not imply a private right of action under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (1982). *Id.* at 72. A Pueblo woman and her daughter challenged the Santa Clara Pueblo's gender discriminatory membership ordinance on equal protection grounds under the Act, which provided no express private federal right of action. The Court declined to imply a right of action in deference to Congress' policy of sovereignty for and self-government by Native American tribes. 436 U.S. at 62-64. The *Santa Clara Pueblo* case raises significant issues about the role of federal courts and "how the United States' government conceives of its citizens as holding simultaneous membership in two political entities." Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, And The Federal Courts*, 56 U. CHI. L. REV. 671, 673 (1989). *See also* Robert Laurence, *Thurgood Marshall's Indian Law Opinions*, 27 HOWARD L. J. 3 (1984). *Keaukaha I* apparently did not rely on *Santa Clara Pueblo* because Native Hawaiians have not been recognized by Congress as a self-governing entity and because, unlike the Santa Clara Pueblo who had a recognized tribal court system, Native Hawaiians had at the time no other available legal forum (state or "tribal") in which to bring their claims.

on Native Hawaiian matters: former President Bush's administration later relied on *Keaukaha I* to disavow any current federal trust obligations to Native Hawaiians under the Homelands Act[103] and, ultimately, to challenge the legality of federal funds and programs for Native Hawaiians.[104]

Culturally, the court's procedural rulings scripted out of existence the identity, struggles and messages of the people of the Keaukaha Community Association. The court's opinion said nothing about those Native Hawaiians concentrated in one economically struggling area of Hilo, Hawai'i, attempting to survive and preserve a culture and a community without adequate available land and housing despite designated Homelands in the area, unoccupied by Native Hawaiians. It said nothing about the spiritual harm arising from the county's use of Hawaiian Homelands amidst the Keaukaha-Panaewa community for a major flood drainage project to protect the non-Homelands property

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[103] Just hours before the expiration of the Bush Administration's tenure, the Department of the Interior issued a formal opinion declaring that the United States owed no trust responsibility to Native Hawaiians. *See* THOMAS L. SANSONETTI, SOLICITOR, UNITED STATES DEPARTMENT OF THE INTERIOR, MEMORANDUM: THE SCOPE OF FEDERAL RESPONSIBILITY FOR NATIVE HAWAIIANS UNDER THE HAWAIIAN HOMES COMMISSION ACT 3 (Jan. 19, 1994); A BROKEN TRUST, *supra* note 35, at 9-11. The Department of the Interior recently rescinded that earlier opinion. The Clinton administration's views are not as yet clearly articulated.

[104] The Justice Department, during former President Bush's administration, declared that special federal program funding for Native Hawaiians constituted an illegal "racial" preference. This declaration rested upon the administration's position that the federal government owed no trust responsibility to Native Hawaiians. Morton v. Mancari, 417 U.S. 535 (1974), upheld the constitutionality of Congressional legislation favoring Native Americans because of the trust relationship between the United States and the Native American beneficiaries of the legislation. If, as the Hawaii federal district court held in Han v. Department of Justice, 824 F. Supp. 1480 (D. Haw. 1993) (on appeal), the federal government owes no trust obligations to Native Hawaiians, then Morton v. Mancari is inapplicable and, according to the Justice Department, federal programs for Native Hawaiians may be constitutionally vulnerable. The pillar in this syllogism is the Han case. Its key holding of "no federal trust responsibility," however, is seemingly contradicted by the Hawaii federal district court's earlier ruling in Naliielua v. State of Hawaii, 795 F. Supp. 1009, 1012-13 (D. Haw. 1990), *aff'd* (mem.), 940 F.2d. 1535 (9th Cir. 1991), which upheld the constitutionality of the Hawaiian Homes Commission Act, citing Morton v. Mancari.

The resolution of this apparent puzzle will have significant social and political consequences. However it is resolved, one aspect of it is clear: *Keaukaha I's* procedural ruling concerning subject matter jurisdiction provided the foundational building block for the Bush administration's substantive position.

of others. It said nothing about Native Hawaiians' intensifying resentment toward those viewing Native Hawaiians as second-rate citizens in their homeland and nothing about the growing sentiment among many Native Hawaiians about the need to gain control of Homelands and the Homelands program. That kind of resentment and sentiment gave rise to one of the incidents described in the Prologue—Aupuni O Hawai'i's recent angry confrontation over the Department of Hawaiian Homelands continued lease of Homelands for a shopping mall just one mile from the Keaukaha area.[105] What the court's *Keaukaha I* opinion did say, in effect, reinforced a master socio-legal narrative about Native Hawaiians: Native Hawaiian claims concerning the land trusts debacle are unworthy of federal consideration, even though the United States participated in the overthrow of the sovereign Hawaiian government and later created trust rights as a partial response, even though the State in important ways continues to breach its inherited Homelands trust obligations, and even though no other forums exist to enforce Native Hawaiian land trust rights.[106]

After remand of *Keaukaha I* to the district court, but before dismissal, the Community Association sought to amend its complaint to assert a federal section 1983 civil rights claim against Hawaiian Homes Commission officials, relying on an intervening Supreme Court decision.[107]

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[105] That confrontation in the fall of 1993 occurred less than a mile from the Keaukaha homestead area. As described in the Prologue, Aupuni O' Hawai'i led a protest of 120 Hawaiians by holding a demonstration in the Prince Kuhio Plaza shopping mall in Hilo. The group protested the Department of Hawaiian Homelands' lease of a prime 39-acre Homelands site to a private business while many Native Hawaiians in the area still awaited homestead lot awards. The demonstration turned into a physical confrontation when police arrived to arrest demonstrators for trespassing. Hugh Clark, *Police Seize 25 in Hilo Protest: Hawaiian Confrontation at the Mall*, HONOLULU ADVERTISER, October 6, 1993, p. A-1. *See generally*, Davianna McGregor-Alegado, *Hawaiians: Organizing In The 1970s*, 7 AMERASIA J. 229 (1980) (describing dynamics of political organizing in Hawaiian communities).

[106] *See* Newton, *Indian Claims*, *supra* note 18 at 765-768. Professor Newton describes the federal government's complicity in efforts by the State of Georgia to "destroy the Cherokee Nation" and then later in efforts by the new State of Oklahoma to deprive the Cherokee Nation of valuable tribal lands held in trust by the United States. The Cherokee Tribe filed suit in 1990 against the federal government in Claims Court for "breach of fiduciary duty by mismanagement and nonfeasance." Reminiscent of *Keaukaha I*, the court dismissed the principal claims on jurisdictional grounds without reaching the merits or fully addressing the historical-cultural context of the claims. Cherokee Nation v. United States, No. 218-89L, (Cl. Ct. Mar. 5, 1992).

[107] Maine v. Thiboutot, 448 U.S. 1 (1980) (allowing a section 1983 action for

The district court allowed the amendment and nevertheless dismissed the complaint for lack of subject matter jurisdiction. On appeal, the Ninth Circuit in *Keaukaha II* reversed.[108] Judge Schroeder's opinion provided an initial glimmer of possibility for Native Hawaiians. The opinion acknowledged that the "trust obligation is rooted in federal law, and power to enforce that obligation is contained in federal law."[109] At seeming odds with *Keaukaha I*, it concluded that Congress did not in the Admissions Act itself foreclose private civil rights actions seeking injunctive relief to enforce the Act's trust provisions.[110] Subsequent Native Hawaiian section 1983 claims have relied upon *Keaukaha II*.[111]

Keaukaha II's apparent strength—its specific declaration and its short, precedent-based opinion—is also its weakness. Like *Keaukaha I*, the case essentially adopted an a-historical frame of analysis and narrowly employed a-contextual language of process to reach its result. In locating Native Hawaiian claims within a civil rights framework, *Keaukaha II* acknowledged neither the compelling historical and socio-cultural bases for Native Hawaiians land claims nor the on-going political struggle among Native Hawaiians, the state Homelands Commission and the United States concerning control over and responsibility for Homelands. Nor did the opinion recognize the failure of traditional civil rights discourse — addressing inequality of treatment of minority racial groups — to capture the self-determination and nationalism underpinnings of native peoples' homelands claims. Finally, the opinion did not address the manner in which the type of requested relief would limit the availability of section 1983 civil rights claims for Native Hawaiians.

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deprivation of a federal statutory right despite the statute's silence about a private cause of action). *Cf.* Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1 (1981) and Middlessex County, Sewerage Auth. v. National Sea Clammers Association, 453 U.S. 1 (1981).

[108] Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n, 739 F.2d 1467 (9th Cir. 1984) [*Keaukaha II*]. In 1984 the Ninth Circuit also reversed the district court's dismissal of a Native Hawaiian suit on qualified immunity grounds. Hoohuli v. Ariyoshi, 741 F.2d 1169 (9th Cir. 1984).

[109] 739 F.2d at 1472.

[110] *Id.* at 1471 (holding that the statute provides only for public enforcement, and this alone does not foreclose private enforcement pursuant to 42 U.S.C. § 1983).

[111] *See* Ulaleo v. Paty, 902 F.2d 1395 (9th Cir. 1990); Price v. Akaka, 3 F.3d 1220 (9th Cir. 1993) ("Akaka II"); *Price I*, 764 F.2d 623, 629 (9th Cir. 1985) (viewing § 5(f) of the federal Admissions Act as the "compact" between the United States and the State of Hawai'i giving rise to the State's trust responsibilities); *cf.* Price v. Akaka, 928 F.2d 824, 826 n.1 (9th Cir. 1990), *cert. denied*, 112 S.Ct. 436 (1991) ("Akaka I") (citing § 4 of the Hawaiian Homes Commission Act as the compact).

Keaukaha II's court access implications have been directly and indirectly whittled into oblivion. Sharp limitations on naming defendant parties, remedies, the timing of suit and the re-adjudication of administratively-found facts have blocked Native Hawaiian section 1983 civil rights claim development and presentation at practically every turn.[112] The procedural dismantling of *Keaukaha II* is reflected in the fact that since the decision ten years ago no appellate opinion has reported on the merits of a Native Hawaiian civil rights breach of trust claim. The ostensibly neutral rhetoric of legal process has enabled the courts to adopt or employ restrictive procedural rules while foregoing meaningful analysis of the content of Native Hawaiian claims and their cultural context as well as the likely social impacts of court rulings.[113]

Ulaleo v. Paty[114] is illustrative. There, the Ninth Circuit dismissed a Native Hawaiian's section 1983 civil rights suit seeking the return of trust land allegedly transfered improperly to a private geothermal power company for development in ways that desecrated Native Hawaiian religious beliefs. The suit also sought the establishment of procedures for future land transfers. The court announced that the Eleventh Amendment "bars citizen suits [in federal courts] against states, institutional arms of the state, and state officials in their official capacity when the relief requested is *retrospective* in nature."[115] The court then, in excruciating fashion, defined the type of federal court "retrospective" relief disallowed under section 1983.

Twisting a 1986 Supreme Court decision,[116] the court ruled that since the government officials' action complained of—the land transfer—occurred in the past, Ulaleo's injunctive relief request was retrospective "in nature" and therefore barred.[117] Injunctive relief is prospective only if it prevents or stops on-going legal violations by governmental officials and therefore does not possibly entail the re-

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[112] *See infra* notes 114-149 and accompanying text.

[113] *See* ROBERT COVER AND OWEN FISS, THE STRUCTURE OF PROCEDURE (1976) (discussing "substance-sensitive" procedure and the ways in which procedure impacts upon the social relationships and substantive norms in controversy); Yamamoto, *Efficiency's Threat*, *supra* note 19, at 396-398 (discussing "procedural neutrality" and the use of procedure as an "instrument of power").

[114] 902 F.2d 1395 (9th Cir. 1990).

[115] *Id.* at 1398.

[116] *Papasan v. Allain*, 478 U.S. 265, at 279 (1986). *See infra* notes 220-224 and accompanying text for a description and brief discussion of this case.

[117] *Ulaleo*, 902 F.2d at 1400.

medial expenditure of public funds.[118] The court declined to characterize Ulaleo's requested injunction as relief to stop an "ongoing violation,"[119] even though the officials' initial wrongful action in transferring land and continuing inaction in refusing to recover it meant for trust beneficiaries' ongoing deprivation. Viewed most restrictively, the court deemed "retrospective," and impermissible, all possible relief addressed to administrative decisions already made.[120]

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[118] *Id.* at 1399.

[119] The court appeared to rely rigidly on a pleading rule that is supposed to be liberally construed, indicating that Ulaleo's complaint had not specifically stated that the requested injunction sought to stop an on-going trust violation. *Id.* at 1400.

[120] Whether *Ulaleo*'s holding will be consistently viewed and applied in a restrictive fashion in the future is an open question. *See* KARL LEWELLYN, THE BRAMBLE BUSH (4th prtg. 1973) (describing how a case holding can be construed narrowly or broadly depending on the circumstances of the case to which it is being applied and the vantage point of the decisionmakers in the subsequent case). *Ulaleo* itself recognized that the distinction between retrospective and prospective relief is not always clear. 902 F.2d at 1399 (relying on Edelman v. Jordan 415 U.S. at 667).

The Hawaii federal district court's most recent ruling, in Han v. Dept. of Justice, 824 F. Supp. 1480 (D. Haw. 1993), reflects a restrictive application of *Ulaleo*. *See supra* notes 104-14 and accompanying text. Napeahi v. Paty, 921 F.2d 897 (9th Cir. 1990) appears to present a more expansive application. In *Napeahi*, the plaintiff claimed that the State had breached its duty under the Ceded Lands trust by certifying a shoreline boundary that appeared to create private land out of Ceded Land. *Id.* at 898. Plaintiff's complaint sought "injunctive and declaratory remedies." *Id.* at 899. Finding an inadequate record on which to rule, the Ninth Circuit remanded to the district court for further findings.

On remand, the State raised numerous procedural objections. In its Motion to Dismiss or For Entry of Judgment the State argued, among other things, that *Ulaleo*'s Eleventh Amendment immunity holding required dismissal of *Napeahi*. In both cases, there was a loss of land due to the action of a state official. The main issue, according to the State, was "when" the state violated its trust duty. In *Napeahi*, the State argued, the State violated its trust obligations, if at all, in the past. The relief sought by plaintiff was to restore the trust corpus—impermissible retrospective relief. Memorandum in Support of Motion for Dismissal or Entry of Judgment After Remand, or, In the Alternative, for 28 U.S.C. section 1292(B) Certification at 19-22, Napeahi v. Paty, No. 85-1523 (D. Haw. Sept. 8, 1992). The district court rejected the State's argument. According to the court, the proper focus under *Ulaleo* was not necessarily when the alleged breach occurred, but whether the relief sought is prospective or retrospective. Order at 9. *Ulaleo* had determined that the relief sought there would have required the use of state funds to replenish the trust, which, the district court agreed, was a forbidden retrospective relief. By contrast, in *Napeahi* the relief sought was an injunction to force the state to attempt to recover the property through initiation of a lawsuit against the private property owner — prospective relief even though the State would have to pay the costs of the lawsuit. Order at 9-10. The district court's fine distinctions

In practical doctrinal effect, the Ninth Circuit's *Ulaleo* ruling and supporting ruling in *Price v. State of Hawaii*[121] all but closed the door *Keaukaha II* cracked opened. *Keaukaha II* allowed section 1983 civil rights actions asserting breaches of trust by state officials. *Ulaleo* implied that once state officials have acted, any possible legal relief for Native Hawaiians will be deemed retrospective in nature and therefore beyond the permissible bounds of the Eleventh Amendment.

Viewed in this restrictive fashion, the procedural labyrinth created by *Keaukaha I and II* and *Ulaleo* left two procedural options for Native Hawaiians. Those options, however, appear to be available in theory and largely illusory in practice. One remaining option is filing a federal section 1983 suit before official state action, seeking prospective injunctive relief. That option, however, runs headlong, in most instances, into the ripeness doctrine.[122] In addition, since many administrative

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in *Han* and *Napeahi*, in an effort to wrestle with the restrictive implications of *Ulaleo*, are difficult to reconcile and operationalize.

[121] 921 F.2d 950 (9th Cir. 1990) ("Price II"). Although the relief sought in *Price II*—a declaration that the State was to be held to the high fiduciary standard of a private trustee in managing the ceded lands trust—was deemed by the court to be prospective in nature, *Price* agreed with *Ulaleo* that had the relief been retrospective, suit would have been barred. *Id.* at 958 n.4. *See also* Price v. Hawaii, 939 F.2d 702, 706 (9th Cir. 1991) ("Price III") (citing *Ulaleo*, 902 F.2d at 1398-1400, for the proposition that a suit seeking retrospective relief against state officials in their official capacity is barred by the Eleventh Amendment).

Price II also recognized another barrier to federal breach of trust suits against state officials—qualified immunity. State officials sued in their individual capacities for damages must be shown to have acted in bad faith. Officials performing "discretionary functions . . . are entitled to qualified immunity if their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" 921 F.2d at 958 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). *Price II* determined that where defendant officials' alleged trust breach was based on an obligation not reasonably known at the time, the officials were entitled to immunity. *Id.* at 959. *See also* Akaka I, 928 F.2d 824, 828 (section 1983 action against state officials in their *individual* capacity is not barred by the Eleventh Amendment but is limited by doctrine of qualified immunity); Akaka II, 3 F.3d at 1220.

[122] Even though section 1983 does not require an exhaustion of administrative remedies, the ripeness doctrine and the Constitution's case or controversy requirement pose substantial hurdles to pre-agency-action filing. Edwards v. District of Columbia, 628 F. Supp. 333 (D.D.C. 1985). One argument for circumventing the ripeness hurdle exists where it can be shown that the state has engaged in a general repeated practice applicable to a class of similar actions. In that instance a declaratory relief challenge could be launched before agency action, not on grounds of likely improper agency assessment of facts, but on grounds of the agency's erroneous view of its legal obligations underlying its pattern of decisionmaking. *See generally* Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975).

actions are taken without or with minimal prior community notice, there is often little time for community organization of a prior legal challenge. Catch 22 again.

A second option, in the relatively rare event of a trial-type agency hearing, is filing suit and seeking prospective relief after agency adjudication but before agency action on its decision. This option, too, is illusory. *University of Tennessee v. Elliott*[123] held that determinations of factual issues by a state agency acting in a quasi-judicial capacity—even determinations unreviewed by a state court—preclude relitigation of those issues in a subsequent federal section 1983 suit.[124] The recently-adopted administrative estoppel doctrine precludes federal court adjudication as long as the party estopped from litigating had an adequate opportunity to litigate before the agency.[125] Thus, under that estoppel doctrine, the unsuccessful assertion of breach of trust claims in the administrative hearing process is likely to foreclose the one legal vehicle available to Native Hawaiians after the *Keaukaha* cases—the federal court section 1983 action for prospective relief.[126]

The apparent procedural dead-ends created by these labyrinthine rulings are buttressed by other federal court rulings in Native Hawaiian cases. For example, in *Price I*, the court rejected a Native Hawaiian

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[123] 478 U.S. 788 (1986).

[124] *Id.* at 799.

[125] *Id.* See also Butler v. City of North Little Rock, Arkansas, 980 F.2d 501 (8th Cir. 1992) (res judicata precludes litigation of a section 1983 racial discrimination claim even though Civil Service Commission excluded evidence of discrimination at the hearing since additional evidence might have been offered during appeal to state court). *Cf.* Astoria Federal Savings and Loan Ass'n v. Solimino, 501 U.S. 104 (1991) (qualifying *Elliot* and holding agency estoppel doctrine inapplicable where Age Discrimination Act scheme plainly contemplated federal suit after agency action).

[126] A slim additional option for Native Hawaiians seeking entree into federal court is to not participate in a trial-type administrative hearing, in the rare event one occurs, and file suit after agency decision but before agency enforcement action. This tact's disadvantages are several. By not participating, Native Hawaiians give up their first and most direct chance to influence the original decision and collectively confront frontline public decisionmakers. And suit might still be blocked. The federal court might well conclude that since the agency already "decided," the relief sought is still impermissibly retrospective. Or the court might apply the "virtual representation" doctrine to preclude litigation by the second suit's plaintiff even though she was not party to the first action, as long as her interests were virtually represented in the prior proceeding. *See* MacArthur v. Scott, 113 U.S. 340 (1985); Los Angeles Branch NAACP v. Los Angeles Unified Sch. Dist., 750 F.2d 731 (9th Cir. 1984) (virtual representation doctrine).

group's standing as a Native American tribe to invoke the jurisdictional reach of 28 U.S.C. § 1362.[127] In *Price II*, the federal district court imposed sanctions for frivolous filings by Native Hawaiians.[128] In another case, the court relied upon the political question doctrine to block a Native Hawaiian challenge to Ceded Lands revenue allocations.[129] In the only state suit against the United States for recovery of federally misappropriated Homelands, the court denied the state claims as time-barred.[130] The court also dismissed one case for failure to join indispensable parties and cited the Eleventh Amendment to preclude section 1983 breach of trust actions against state agencies in another.[131]

In each of these cases, the courts' "cultural performance" transformed the controversy, rephrasing Native Hawaiian claims about physical and spiritual harm to real cultural communities arising out of particularized breaches of fiduciary duty and systemic land trust failure into technical questions of jurisdiction, indispensable parties, remedy limitations and the like. The rhetorical framework of procedural neutrality established by those collective rulings largely silenced Native Hawaiian stories about culture destruction through collective separation from the land and about future Native Hawaiian self-determination

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[127] *Price I*, 764 F.2d 623 (9th Cir. 1985) (court disallowed "tribal" jurisdiction under section 1362 because the Hou Hawaiians group did not meet statutorily prescribed criteria).

[128] The district court in *Price II* imposed sanctions upon plaintiffs' counsel after denying plaintiffs' motion for reconsideration, 921 F.2d 950, 958 n.3 (9th Cir. 1990) (repetitive filing without clear grounds).

[129] Price v. Ariyoshi, Civ. No. 85-1189 (D. Haw. Feb. 23, 1987), Order Granting Defendants' Motion to Dismiss, at 6-8 (dismissing challenge to allocation of only 20 percent of Ceded Lands revenues for the benefit of Native Hawaiians, observing "[a]ny recommendation for change must be addressed solely to the Hawaii legislature"); *see also* Trustees of the Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 737 P.2d 446 (1987) (political question doctrine applied by Hawaii Supreme Court).

[130] Hawaii v. United States, 676 F. Supp. 1024 (D. Haw. 1988), 866 F.2d 313 (9th Cir. 1989) (claim under Quiet Title Act time barred). It would seem, however, that an action in Claims Court under the Tucker Act for prospective rents might not be time barred. The argument would be that the United State's continued possession and use of the trust asset constitutes a continuing trust breach that in effect tolls the state of limitations.. One problem with this argument is that the plaintiff State might be deemed to have split its cause of action in the initial litigation and therefore have its Tucker Act claim barred under the doctrine of res judicata.

[131] Ulaleo v. Paty, No. 88-00320 (D. Haw. 1988) (dismissing on the ground of a FED. R. CIV. P. 19 failure to join indispensable parties, among other grounds); Hoohuli v. Ariyoshi, 741 F.2d 1169, 1173 (9th Cir. 1984) (applying established section 1983 principles in precluding suit against state agencies).

through control of the trusts land base. That framework also quietly distanced the United States from its historical role and legal obligations. Not one reported opinion in the numerous Native Hawaiian federal breach of trust cases fully reached these stories of power and culture. In short, the courts' cultural performances rescripted Native Hawaiians' phrasing of their claims and thereby eviscerated the stories giving life to those claims.

The story of Native Hawaiians in federal court continues. Recent United States Supreme Court cases may permanently close the remaining crack in the courthouse door. According to arguments by the Hawaii Attorney General in recent cases, *Suter v. Artist M.*[132] forecloses Native Hawaiian section 1983 civil rights claims under the Admissions Act, and *Lujan v. Defenders of Wildlife*[133] deprives Native Hawaiian plaintiffs of standing to sue for breaches of trust.[134]

In *Price v. Akaka*[135] (*"Akaka II"*), the federal district court rejected the State's *Suter* argument.[136] On interlocutory appeal, the Ninth Circuit

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[132] 112 S. Ct. 1360, 118 L. Ed.2d 1 (1992).

[133] 112 S. Ct. 2130, 119 L. Ed.2d 351 (1992).

[134] *Suter* involved a section of the federal Adoption Assistance and Child Welfare Act of 1980. That Act made a state eligible for reimbursement of certain foster care expenses if the state submitted a plan to the Secretary of Health and Human Services which provided that "reasonable efforts" would be made to keep children in their homes and to facilitate reunification of separated families. Plaintiffs, beneficiaries under the Act, filed a class action seeking declaratory and injunctive relief, claiming the state of Illinois failed to make the requisite "reasonable efforts." Federal jurisdiction was premised on section 1983 and on an implied right of action under the federal Adoption Act. Both the district court and court of appeals found federal subject matter jurisdiction.

The Supreme Court reversed. Ignoring its established section 1983 framework of analysis, the Court announced a new approach. Whether plaintiffs could bring a section 1983 claim against state officials to enforce the Adoption Act turned upon one question: "Did Congress, in enacting the Adoption Act, unambiguously confer upon the child beneficiaries of the Act a right to enforce the requirement that the State make 'reasonable efforts' to prevent a child from being removed from his home, and once removed to reunify the child with his family?" *Id.* at 1367. The *Suter* majority deemed irrelevant its acknowledgement that the Adoption Act "may not provide a comprehensive enforcement mechanism so as to manifest Congress' intent to foreclose (private) remedies under section 1983." *Id.* at 1368. The Court focused on the opportunity for public enforcement. The term "reasonable efforts" in this context is "at least as plausibly read to impose only a rather generalized duty on the State, to be enforced not by private individuals, but by the Secretary." *Id.* at 1370.

[135] 3 F.3d 1220 (9th Cir. 1993).

[136] Order Granting in Part and Denying in Part Motion for Judgment on the

affirmed, observing that *Keaukaha II* and *Akaka I* were not inconsistent with *Suter*. The court maintained a slim crack in the federal courthouse door for Native Hawaiians, holding that the Admissions Act is a federal public trust "which by its nature creates a federally enforceable right for its beneficiaries to maintain an action [section 1983] against the trustee in breach of the trust."[137]

The State in its subsequent brief in the pending *Han v. Department of Justice*[138] appeal nevertheless continued to argue that *Suter* overruled *Keaukaha II*, asserting that *Akaka II* was restricted from overruling *Keaukaha II* by the law of the case doctrine and therefore made no *de novo* determination on the impact of *Suter*.[139] Thus, despite several rulings, an air of uncertainty still surrounds the one federal jurisdictional avenue available to Native Hawaiians to enforce trust obligations.

Additional uncertainty surrounds the issue of Native Hawaiian standing.[140] The State recently argued that, based on *Lujan*, Native Hawaiians lack federal court standing to challenge improper uses of trust

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Pleadings or in the Alternative for Summary Judgment, Price v. Akaka, No. 88-773 (D.Haw. June 12, 1992), at 10. "[I]n the absence of an overruling of prior precedent, this court cannot disregard the Ninth Circuit's ruling in *Keaukaha II*, and the direct mandate to this court that plaintiffs in this case have stated a claim under § 5(f) of the Admission Act that is enforceable via § 1983." The State raised the same *Suter* argument in its Memorandum in Support of Motion for Dismissal or Entry of Judgment After Remand, or, in the Alternative, For 28 U.S.C. § 1292(B) Certification, in Napeahi v. Paty, No. 85-1523 (D. Haw. filed Oct. 26, 1992). The district court there also rejected the State's claim that *Suter* overruled *Keaukaha II*. Noting that *Suter* did not apply the same test that had been used in earlier decisions, the court stated that *Suter* did not overrule the old test, and was in harmony with that test.

[137] *Id.* at 1225.

[138] 824 F. Supp. 1480 (D. Haw. 1993) (appeal pending). *See supra* note 120.

[139] Respondents Answering Brief, Han v. Department of Justice.

[140] The Ninth Circuit has consistently recognized Native Hawaiian standing to sue to enforce trust obligations under both the Homelands trust and the Ceded Lands trust. *See* Price I, 764 F.2d 623 (9th Cir. 1985); Akaka I, 928 F.2d 824 (9th Cir. 1990); Price III, 939 F.2d 702 (9th Cir. 1991). Despite apparently settled federal standing law, the State recently argued that a 1992 Supreme Court case, *Lujan v. Defenders of Wildlife*, deprives Native Hawaiians of federal court standing to sue to enforce the Ceded Lands Trust. *Lujan* involved an environmental group's challenge to a new regulation enacted under the Endangered Species Act limiting its geographic scope. The plaintiffs' injury for purposes of standing was indirect; it rested in part on the actions of a third person. In rejecting plaintiffs' standing, the Court observed that if plaintiffs' asserted injury resulted from the government's allegedly unlawful regulation "of *someone else*" standing is difficult to achieve.

funds or lands unless they show a direct injury to themselves.[141] The State's argument amounted to a contention that Native Hawaiians almost never have standing to sue for land trust breaches. Since Native Hawaiians usually cannot establish a State duty to act for the benefit of any *particular* Native Hawaiian group or to use or manage *particular* land for the benefit of a specific group, under the State's view of *Lujan*, Native Hawaiian plaintiffs rarely if ever would be able to establish the requisite "direct injury"[142].

In 1992, the Hawaii federal district court on remand in *Price v. Akaka*[143] rejected the State's argument. The court concluded that *Lujan* did not overrule the Ninth Circuit's past decisions conferring Native Hawaiian standing.[144] Nevertheless, in *Napeahi v. Paty*,[145] the State reiterated its lack of standing argument. Again, the district court refused to deny standing to Native Hawaiians challenging the disposition of Ceded Lands. The court, however, in both *Price* and *Napeahi*, certified interlocutory appeals. Certification suggests the district court's lingering uncertainty on the issue and the State's persistence in attempting to erect insurmountable procedural obstacles to federal court process for Native Hawaiians.[146]

Why might the State, as the acknowledged Native Hawaiian lands trustee, persist in efforts to close even the slimmest of openings in the federal courthouse doors? Some grounded speculation about State interests is in order. One answer, perhaps misleadingly simple, is that the State is acting as would any fiduciary: it is attempting to shield itself from liability. It might be doing so for economic reasons or to

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[141] Price v. Akaka, No. 88-773 (D. Haw. filed July 31, 1992) (order granting in part and denying in part motion for reconsideration, or in the alternative, for certification).

[142] *Lujan*, 112 S. Ct. at 2144, 119 L. Ed.2d at 373.

[143] Price v. Akaka, No. 88-733 (D. Haw. filed July 31, 1992). *See infra* note 146 for discussion.

[144] *Id.*

[145] No. 85-1523 (D. Haw. filed Oct. 26, 1992) (order denying defendant's motion for dismissal or entry of judgment after remand, or, in the alternative, for 28 U.S.C. § 1292(B) certification).

[146] Recently, the Ninth Circuit in Price v. Akaka, 3 F.3d 1220 (9th Cir. 1993) (*Akaka II*), upheld the district court's standing decision. The court determined that, in contrast with *Lujan*, *Akaka II* did not "involve a suit against government for promulgating an unlawful regulation or for failing to promulgate a regulation." *Id.* at 1224. Since the plaintiff was "among the class of § 5(f) beneficiaries whose welfare is the object of the action at issue[.], . . . the [trustees'] action or inaction has caused him injury, and . . . a judgment preventing or requiring action will redress it." *Id.*

assure maximum flexibility under constraining political circumstances.[147] Another answer might lie in the State administration's efforts to minimize entanglement in federal court remedial efforts while mounting its own political campaign to address Native Hawaiian demands for sovereignty and return of Hawaiian lands.[148] A third and related answer might lie in State actors' implicit concerns about control over socio-legal narratives regarding foundations for the Native Hawaiian sovereignty initiatives. Those actors might be concerned about the federal courts' "cultural performance" in rephrasing volatile Native Hawaiian land disputes.[149] Why might the federal courts, and especially the Ninth Circuit, have opened the procedural door for Native Hawaiians with one hand and all but closed it with the other? Why might the federal courts have employed procedural tools to rephrase Native Hawaiian land controversies by blocking or sharply limiting their development and telling within the judicial process? More grounded speculation is in order.

One answer simply might be the federal courts' displeasure with several factually under-developed or poorly litigated cases—cases which called for early disposition on procedural grounds. Another answer might lie in the federal courts' fealty to established procedural doctrines that are ordinarily applied in social-cultural civil rights situations markedly different, both historically and presently, from the situation of Native Hawaiians. This possibility raises the issue of the appropri-

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[147] In his legislative testimony against Native Hawaiian right-to-sue bills in 1987, the former State Attorney General stated that an expansive right to sue would bankrupt the State. Hearings on [H.R. 37 (H.D. 1), Relating to the Right to Sue by Native Hawaiian Individuals and Organizations], 14th Leg., Reg. Sess. (1987) (testimony of the Honorable Warren Price, III, Attorney General of the State of Hawaii).

[148] Former Governor John Waihee created the Hawaiian Sovereignty Advisory Commission pursuant to Act 359 of the 1993 State Legislative Session. The Act mandated that the Commission consult with the Native Hawaiian community on its concerns with respect to sovereignty. 1993 HAW. SESS. LAWS 359. The Commission held a series of statewide community meetings. A recurring theme at nearly every meeting was the concern over the state government's efforts to perhaps control the process of self-determination. As a result, the Commission took the position that the State must support the sovereignty efforts of Hawaiians while being careful not to impose any particular form of sovereignty upon them. In response, the Administration sought, through draft legislation, to transform the Commission into the "authoritative body on conducting the Hawaiian sovereignty elections." Bill Meheula, *Hawaiian Sovereignty (Advisory) Commission Report*, KE KIA'I, December 1, 1993, vol.4, no. 9, at 16-17.

[149] *See supra* note 46.

ateness of the "trans-substantivity" of procedure. The Federal Rules' drafters contemplated a single set of process rules that would be applied in similar fashion to all types of controversies and parties. Procedure was to be trans-substantive. Most judges have followed that approach. Current procedural debate questions whether this approach is insensitive to the widely varying contexts of disputes.[150]

Another answer might lie in notions of separations of power and judicial competence—a reluctance of federal courts to intervene in what is perceived by many to be a wide-ranging political dispute that should be addressed through administrative or legislative action.[151] Since the early 1980s federal courts have hesitated to fashion complicated equitable remedies in "structural governmental reform" cases, suggesting instead the appropriateness of legislative correctives.[152]

Another related answer might lie in federalism concerns—at a deep level, the inappropriateness of entangling the federal government (as adjudicator and as possible litigant) in a social-political struggle that focuses now on an indigenous group's conflicts with a state. These concerns raise the federal courts jurisprudential issue of sovereignty—that is, the "relationships among the governmental entities in the United States, and specifically, between the federal courts and the states."[153] The more commonly addressed questions about state autonomy versus federal control are complicated by Native Hawaiian claims of rights of self-governance. Those claims ambiguously introduce consideration of a third entity into the federal courts sovereignty calculus. Consideration is ambiguous because Native Hawaiian self-governance claims are both inchoate and vaguely-defined. They are inchoate because, in contrast with Native American claims of limited tribal sovereignty, Native Hawaiian claims have never received Congressional or federal executive branch recognition. Native Hawaiian claims are

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[150] *See* COVER AND FISS, *supra* note 113; Yamamoto, *Efficiency's Threat*, *supra* note 19. Trans-substantivity proponents believe that differing sets of rules should not be preshaped to fit differing types of claims, parties or controversies. Indeed, the FRCP's drafters opted for a single set of flexible trans-substantive procedural rules to address all types of civil litigation. Despite recent calls for substance-tailored sets of procedures, federal district courts have adhered to the Rules' drafter's philosophical approach.

[151] *See* Resnik, *supra* note 102, at 675. (describing judicial reticence sometimes as a product of separation of powers notions, and describing the "power" theme of federal court jurisprudence in terms of "allocation and constraint by separation of functions" among branches of government).

[152] *See generally* Paul Gewirtz, *Remedies And Resistance*, 92 YALE L. J. 585 (1983).

[153] Resnik, *supra* note 102, at 675.

vaguely-defined because Native Hawaiian groups have advanced widely-diverging positions and because in recent years the federal executive branch has evinced a desire to relinquish any remaining federal control over and responsibility for Native Hawaiians as a group without vesting control in Native Hawaiians themselves.[154] The federal government's apparent move to diminish relational ties with Native Hawaiians without recognizing any form of Native Hawaiian self-governance stands in stark contrast with the government's acknowledged plenary power over its "dependent sovereigns"—Native American tribes.[155]

In this setting the question arises—are the federal court's at some deep level ceding power over Native Hawaiian issues to the state generally and state courts particularly?[156] And if so, are they doing this

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[154] *See supra* note 103 and accompanying text discussing then-President Bush's administration's declaration of no federal trust responsibility to Native Hawaiians. The current administration has apologized for the United States' participation in the overthrow of the Hawaiian government in 1893. 107 STAT. 1510 (1993). However, it has at best hedged on any further federal involvement.

How to achieve self-governance, and in what form, is a continuous source of controversy and debate among Hawaiian groups. Ka Lahui Hawai'i, the largest and most widely recognized sovereignty group, has held a constitutional convention and adopted a constitution. The group's platform calls for a land base consisting of Hawaiian Homelands and Ceded Lands and federal recognition of Hawaiians as a "nation within a nation." Ka Lahui's sovereignty model is patterned after the relationship between the United States and American Indian tribes. MACKENZIE, *supra* note 8, at 92. Other groups such as Ka Pakaukau see total independence as the ultimate goal but appear willing to accept a transitional "nation within a nation" period. Still other groups seek total and immediate independence.

During its 1993 session, the Hawai'i legislature passed a state Administration bill to create the Hawaiian Sovereignty Advisory Commission. 1993 Haw. Sess. Laws 359. The Act established the Advisory Commission to advise the legislature on ways to foster Native Hawaiian self-determination. *See also* NATIVE HAWAIIANS STUDY COMMISSION REPORT ON THE CULTURE, NEEDS AND CONCERNS OF NATIVE HAWAIIANS (1983) (discussing self-governance possibilities).

[155] *See* Resnik, *supra* note 102 (describing American Indian tribes as "dependent sovereigns"); *See generally* Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, And Limitations*, 132 U. PA. L. REV. 195, 197-98 (discussing sources of and limits to Congress' "plenary power" over Indian tribes).

[156] Judith Resnik poses the question in terms of "[w]hat animates [occasional federal court] support for other decision centers?" Resnik, *supra* note 102, at 746. Professor Resnik sets this question within the observation that,

> [w]ith fluctuations over time, the federal government and its courts have consistently permitted other (lesser) power centers to function and sometimes even to flourish. Federal courts have crafted doctrines of comity and deference, and

for reasons of comity (deferring to state court resolutions of complex

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have ceded jurisdiction and authority to other court systems — state and tribal. *Id.* at 746-47.

That federal court deferral to state courts is "occasional" is illustrated by the *McBryde/Robinson* line of cases. In McBryde Sugar Company v. Robinson, 54 Haw. 174, 504 P.2d 1330 (1973), sugar growers brought a Hawai'i state court suit to determine their water rights to storm and freshet water in Kauai's Hanapepe River. The trial court determined the parties' private water rights and allocated water accordingly. The Hawai'i Supreme Court, *sua sponte*, appeared to rewrite state water law, which had previously recognized private water ownership. It held that the State owned all waters of the river, subject only to appurtenant and riparian rights. It also held that the waters could not be diverted outside the river's watershed. *See also* McBryde Sugar Company v. Robinson, 55 Haw. 260, 517 P.2d 26 (1973) (on rehearing reaffirming its pronouncements).

Angry sugar growers then brought suit in federal district court to enjoin enforcement of the McBryde decision on the grounds that the Hawai'i Supreme Court's decisions denied the growers federal procedural and substantive due process. Robinson v. Ariyoshi, 441 F. Supp. 559 (D. Haw. 1977). Without addressing the propriety of federal court review, the district court held that the Hawai'i Supreme Court had, in effect, "taken" the property of the parties without just compensation when it retroactively converted private property rights in water to public property rights. The district court harshly criticized the Hawai'i Supreme Court, calling *McBryde* "one of the grossest examples of unfettered judicial construction used to achieve the result desired—regardless of its effect upon the parties, or the state of the prior law on the subject." 441 F. Supp. at 568.

The Ninth Circuit held that the Hawaii Supreme Court was "well within its judicial power" when it overruled earlier Hawai'i cases. Robinson v. Ariyoshi, 753 F.2d 1468, 1474 (9th Cir. 1985). The state court could not, however, divest prior private rights without just compensation. The Ninth Circuit nevertheless dissolved the district court injunction, noting that state officers had not as yet taken steps to interfere with the parties' formerly private water rights. *Id.* Concerning the propriety of reviewing the Hawai'i Supreme Court's decision, the Ninth Circuit observed that "horizontal appeals will not lie to the United States District Courts to overturn allegedly erroneous decisions on federal constitutional questions by the highest court of a state." *Id.* at 1471. The court determined, however, that the federal constitutional questions were not (and could not have been) addressed by the Hawai'i Supreme Court in the *McBryde* cases and were therefore appropriate for federal court consideration. *Id.* at 1472 (citing Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983).

The federal district court's "intervention" into state court prerogatives, according to one commentator, implies that "there would be no judicial hierarchy and no finality in appellate systems." Williamson B. C. Chang, *Unraveling Robinson v. Ariyoshi: Can Courts "Take" Property?*, 2 U. HAW. L. REV. 57, 91 (1979). Another commentator criticized the district court and Ninth Circuit for attempting to assess independently Hawai'i water law. Bradford H. Lamb, *Robinson v. Ariyoshi: A Federal Intrusion Upon State Water Law*, 17 ENVTL. L. 325, 353 (1987). For subsequent history in the *Robinson*

and controversial land-sovereignty based disputes between the State and Native Hawaiians), for reasons of social policy (distancing the federal government from "special" treatment of Native Hawaiians, a move generally reminiscent of the government's earlier "termination" policy concerning Native American tribes[157]), or for other reasons? No clear answers emerge.

One possible "other reason" might be that the federal courts' recognize a state's "ability to maintain different modes from those [individualistic and atomistic modes] of the federal government."[158] Implicit in this recognition might be a sense that in smaller, community-based decisional centers "there are social ties, there is a shared history, there is a network of relatedness."[159] As Judith Resnik observes, when federal courts defer to state or tribal courts on matters concerning indigenous peoples, "[s]ome deep-seated emotional respect for group governance may be at work here, some sense that these self-contained communities are 'jurisgenerative' [communally law creating]. . .and that their traditions and customs must sometimes be respected and preserved."[160] In this speculative light, a final question arises. Are the Hawaii state courts willing to serve, and do they have the capacity to serve, in such a jurisgenerative capacity for Native Hawaiians? This question is addressed in preliminary fashion in the next section.

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cases, see Ariyoshi v. Robinson, 477 U.S. 902 (1986) (granting certiorari and vacating judgment of Ninth Circuit, and remanding for further consideration in light of Williamson County Regional Planning Comm'n. v. Hamilton Bank, 473 U.S. 172 (1985)); Robinson v. Ariyoshi, 796 F.2d 339 (9th Cir. 1986) (remanding to district court in light of Supreme Court directive); Robinson v. Ariyoshi, 676 F. Supp. 1002 (D. Haw. 1987) (upholding the district court's original finding of a ripe controversy); and Robinson v. Ariyoshi, 887 F.2d 215 (9th Cir. 1989) (vacating the district court's decision).

[157] The federal government in the 1950s adopted a policy of "termination" concerning Indian tribes, seeking to strip tribes of special status in relationship to the government and to "mainstream" them into American society. *See* H.R. CON. RES. 108, 83rd Cong., 1st Sess. (1953), in 67 Stat. B.132 (identifying termination of distinct status of Indian tribes, and the dissolution of tribes, as the long-term goals of federal Indian policies).

[158] Resnik, *supra* note 102, at 751.

[159] *Id.*

[160] *Id.* The term "jurisgenerative," along with its antinomic counterpart, "jurispathic," were coined by Robert Cover to describe the ways in which courts through language and procedure can destroy or affirm law created by communities. Robert M. Cover, *The Supreme Court, 1982 Term —Foreward: Nomos And Narrative*, 97 HARV. L. REV. 4 (1983).

Whatever the federal and state interests involved, whatever the perspectives of key actors or their underlying rationales, the federal court's process rulings in Native Hawaiian cases can be viewed cumulatively from at least two critical vantage points. Doctrinally, those rulings have all but closed federal courthouse doors for Native Hawaiians seeking injunctive or structural relief in land trust controversies. For Native Hawaiians contemplating engagement in the federal judicial process to effectuate personal claims or to further larger legal-political claims, the rulings have been prohibitory.[161] Conceptually, in terms of communicative process, those rulings have transformed the specific stories of Native Hawaiian claimants and larger narratives of Native Hawaiian movements into narrow questions of legal process and procedure. In doing so, they have generated sharply limited, and from the perspective of claimants, distorted cultural performances concerning the heart of many Native Hawaiian land trust controversies. An attorney for a Native Hawaiian law collective recently expressed this view in his comment, "We definitely avoid federal court. We get tied up in procedural knots there and the community never fully gets to say its piece."[162]

IV. Native Hawaiian State Court Breach of Trust Actions: *Pele Defense Fund v. Paty*

The procedural door to federal court appears to be all but closed for Native Hawaiian breach of trust claimants. In comparison, Hawai'i's state courts offer both considerable promise and uncertainty. The appellate courts appear to be engaged in a process of partial self-transformation. That process evinces a rethinking of the performance role of state courts in addressing Native Hawaiian rights claims. In terms of historical comparisons, the Hawai'i Supreme Court's citation to customary cultural practices to inform and transform established legal norms[163] is reminiscent of the earlier *Richardson* Court. That court, under the guidance of former Chief Justice William S. Richardson,

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[161] *See infra* Part IV for description of prohibitory effects.

[162] Interview with Alan Murakami, litigation director for the Native Hawaiian Legal Corporation (NHLC). (Interview with co-authors on December 15, 1993). Mr. Murakami and the NHLC served as counsel for plaintiffs in *Pele Defense Fund v. Paty* and co-counsel for plaintiffs in *Ka'ai'ai v. Drake* (*see infra* notes 167 and 279), among other cases.

[163] *See infra* note 179.

was noted for its contextual historical and cultural analysis.[164] In terms of current practice, the court's recent Hawaiian land pronouncements are set within accelerating Hawaiian self-determination movements.[165] Those pronouncements reveal a court uniquely poised to scrutinize prevailing views, or narratives, about the meaning of Native Hawaiians rights claims.[166] The focal point of this section is the Hawai'i Supreme Court's recent right-to-sue decision, *Pele Defense Fund v. Paty*.[167]

A. The Federal Court Suit

Pele involved a land exchange on the island of await' between the State of Hawai'i and the private Estate of James Campbell. On December 23, 1985 the State swapped 27,800 acres of Ceded Land for 25,800 acres of Campbell Estate land to allow geothermal development of that portion of the Ceded Land designated as a geothermal resource zone. Relying on *Keaukaha-II*,[168] the Pele Defense Fund (PDF)[169] and

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[164] In Justice William J. Brennan Jr.'s address during the tenth anniversary of the William S. Richardson School of Law, Justice Brennan spoke of the Richardson Court's progressiveness citing, "the noteworthy constitutional contribution of the Hawaii Supreme Court under Chief Justice Richardson's leadership." Justice William J. Brennan, Jr., *Address Of Justice William J. Brennan, Jr.*, 6 U. HAW. L. REV. 1, 3 (1984). *See, e.g.*, Reppun v. Board of Water Supply, 65 Haw. 531, 656 P.2d 57 (1982) (describing and accommodating customary Native Hawaiian values in its decisions concerning control over surface water); Ahuna v. Department of Hawaiian Homelands, 64 Haw. 327, 640 p.2d 1161 (1982) (defining the scope of the State's fiduciary duty to manage Hawaiian Homelands).

[165] Act 359 relating to the creation of the Hawaiian Sovereignty Advisory Commission is the State Administration's effort to help facilitate some form of native Hawaiian self-determination:

> (1) Holding a referendum to determine the will of the native Hawaiian people to call a democratically convened convention for the purpose of achieving consensus on an organic document that will propose the means for native Hawaiians to operate under a government of their own choosing; . . .

1993 HAW. SESS. LAWS 359.

[166] For a discussion of Kealoha v. Hee and the plaintiff's assertion of international human rights legal norms in state court, *see* Prologue. *See also supra* note 6.

[167] 73 Haw. 578, 837 P.2d 1247 (1992), *cert. denied.*, 113 S. Ct. 1277 (1993).

[168] 739 F.2d 1467 (9th Cir. 1984) *See supra* notes 107-113 and accompanying text.

[169] PDF is an organization comprised of Native Hawaiians who have as their purpose the revitalization and preservation of their nearly extinct culture. Their mission in this instance was to focus attention on not merely the impact land exchanges have on section 5(f) trust purposes but also on Hawaiian culture. In *Pele*, they claimed the exchange took land having religious and cultural value for Native Hawaiians and

Kaolelo Lambert John Ulaleo filed a federal section 1983 civil rights action in the United States District Court for the District of Hawai'i seeking to invalidate the land exchange. For them, private geothermal development on those specific Ceded Lands would desecrate sacred land believed to be the home of the "aumakua" (god) Pele and would harm Hawaiian cultural and religious values and practices.[170] The district court dismissed their claims.[171] The Ninth Circuit affirmed.[172] Before the Ninth Circuit's affirmance, PDF filed related claims in state circuit court.[173]

B. The State Court Suit

In state court, PDF advanced a federal law claim and a state law claim. PDF claimed, among other things,[174] (1) breach of the Ceded

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substituted it with Campbell Estate land substantially covered with lava having little or no such significance. PDF members therefore sought access denied them by defendants into undeveloped areas of Wao Kele 'O Puna for traditional subsistence, cultural, and religious purposes. *Pele*, 73 Haw. at 584-85, 837 P.2d at 1253-54.

[170] Interview with Alan Murakami, March 15, 1993. Mr. Murakami, as litigation director for the Native Hawaiian Legal Corporation, represented PDF and Mr. Ulaleo in Ulaleo v. Paty, No. 88-00320 (D. Haw. 1988), and PDF in Pele Defense Fund v. Paty, 73 Haw. 578, 837 P.2d 1247 (1992), *cert. denied*, 113 S. Ct. 1277 (1993).

[171] *Id.* The court dismissed on grounds that plaintiffs' claims were barred by the State's immunity under the Eleventh Amendment. The court also ruled that the State was an indispensable party to the breach of trust claims against defendants. The Hawai'i Supreme Court in *Pele* agreed and held that the State's absence as a party resulted in "no adequate remedy available for the alleged breaches." *Pele*, 73 Haw. at 613, 837 P.2d at 1268.

[172] Ulaleo v. Paty, 902 F.2d 1395 (9th Cir. 1990). The Ninth Circuit held that the suit requested retrospective relief and was therefore barred. *See supra* notes 114-120 and accompanying text.

[173] PDF filed its claims in state court on March 10, 1989. In early 1990, while the appeal was pending in the Ninth Circuit, Ulaleo died. Emily 'Iwalani Naeole, a Native Hawaiian and resident of the ahupua'a (division of land from ocean to mountain) adjoining Wao Kele 'O Puna, moved to intervene as a plaintiff. Her motion was denied on the premise that PDF adequately represented her interests. The case proceeded in the Third Circuit Court for the State of Hawai'i as *Pele Defense Fund v. Paty*. *Pele*, 73 Haw. at 588-89, 837 P.2d at 1255-56.

[174] Other claims alleged: (1) a violation of due process under the fourteenth amendment of the U.S. Constitution and article I, section 5 of the Hawai'i Constitution; (2) a violation of the right to free association under the first amendment to the U.S. Constitution and article I, section 4 of the Hawai'i Constitution; (3) a violation of article XII, section 7 of the Hawai'i Constitution by the relinquishment of state lands

Lands trust on the part of the Board of Land and Natural Resources under § 5(f) of the Admissions Act, in violation of 28 U.S.C. § 1983,[175] and (2) breach of trust by the State under Article XII, § 4 of the Hawai'i Constitution.[176] PDF requested that the court find "Campbell . . . h[e]ld the exchanged lands subject to a constructive trust for the beneficiaries of the public lands trust."[177] The circuit court granted the State's summary judgment motion for procedural reasons.[178] The Hawai'i Supreme Court affirmed the dismissal of PDF's breach of trust claims.[179] The court's decision turned on its analysis of issues of process and procedure without reaching the substantive claims.

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on which native Hawaiians customarily and traditionally exercised subsistence, cultural, and religious practices and continued denial of access into Wao Kele O' Puna to native Hawaiian PDF members who sought access for customarily and traditionally exercised subsistence, cultural and religious practices; (4) violations of HRS subsection 171-26 and 171-50; and (5) a violation of HRS chapter 195. *Pele*, 73 Haw. at 589-90, 837 P.2d at 1256.

[175] The Board of Land and Natural Resources is the executive board for the Department of Land and Natural Resources (DLNR). DLNR is charged with the administration of public lands. Public lands include those under the § 5(f) trust. Prior to the land swap, Wao Kele 'O Puna was part of the Natural Area Reserves System (NARS) which HAW. REV. STAT. § 195 defines as land containing "'unique natural resources,' [that] should be preserved 'in perpetuity.'" *Pele* 73 Haw. at 587, 837 P.2d at 1254-55. As the result of (1) an amendment to HAW. REV. STAT § 195 which, in effect, "allow[ed] alienation of NARS land for 'another public use upon a finding by the [DLNR] of an imperative and unavoidable public necessity;'" (2) "the designation of a portion of the Kilauea Middle East Rift Zone . . . , located primarily within Wao Kele 'O Puna, as a geothermal resource subzone;" (3) the affirmance in Dedman v. BLNR, 69 Haw. 255, 740 P.2d 28 (1987), *cert. denied*, 485 U.S. 1020 (1988) of BLNR's designation and "granting of a geothermal development permit;" and (4) legislative inaction, Wao Kele 'O Puna was transferred out of NARS. BLNR's contribution to this result was the basis of PDF's 42 U.S.C. § 1983 suit. *Pele*, 73 Haw. at 587-88, 837 P.2d at 1255 (quoting HAW. REV. STAT. § 195-10 (Supp. 1991)).

[176] The State in Article XII, § 4 of the Hawai'i Constitution affirms its fiduciary obligations under the § 5(f) trust. HAW. CONST. art. XII, § 4. PDF claimed the State had violated the terms of the Ceded Lands trust by permitting the land exchange. *Pele*, 73 Haw. at 601, 837 P.2d at 1261-62.

[177] *Id.* at 590, 837 P.2d at 1256.

[178] The third circuit court held that PDF's federal section 1983 claims were barred by the state's sovereign immunity, PDF's lack of standing, the statute of limitations, and the res judicata effect of *Ulaleo*, 902 F.2d 1395 (9th Cir. 1990). The circuit court dismissed PDF's state breach of trust claim stating there was no private right of action to enforce the terms of the § 5(f) trust under Hawai'i law.

[179] In addition, the court reversed the circuit court's dismissal of PDF's *Kalipi* gathering rights claim. The Court reversed in part and remanded for trial the issue

1. Section 1983 Civil Rights Claims: Federal law breach of trust claims in state court

PDF's federal law claims in state court faced numerous procedural obstacles. As mentioned earlier, the Ninth Circuit ruled in 1978 that no federal private right of action existed under the Admissions Act, although it later recognized a federal law section 1983 civil rights claim to enforce trust rights created under the Admissions Act.[180] PDF sought

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of whether defendants violated Article XII, § 7 of the Hawai'i Constitution by denying access into undeveloped lands to Native Hawaiian PDF members who sought access for customarily and traditionally exercised subsistence, cultural and religious practices. *Pele*, 73 Haw. at 621, 837 P.2d at 1272. In all other respects, the court affirmed the lower court's decision. *Id.* at 622, 837 P.2d at 1273.

Kalipi v. Hawaiian Trust Company, 66 Haw. 1, 656 P.2d 745 (1982) concerned the traditional gathering rights of ahupua'a tenants. Kalipi asserted certain gathering rights enumerated in HAW. REV. STAT. § 7-1. To exercise these rights the court found that three conditions must be met: (1) the tenant must physically reside within the ahupua'a where the activity will be undertaken; (2) the activity must only take place upon undeveloped lands of the ahupua'a; and (3) the activity must entail the practice of Native Hawaiian customs and traditions. *Id.* at 7-8, 656 P.2d at 745-50.

Concerning *Kalipi*'s initial requirement of physical residence within the ahupua'a, *Pele* recognized that access and gathering rights sometimes "extended beyond the boundaries of the ahupua'a. . . ." *Pele*, 73 Haw. at 620, 837 P.2d at 1271. *Pele* modified this requirement by holding that "native Hawaiian rights protected by article XII, section 7 may extend beyond the ahupua'a in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner." *Id.*

The Hawai'i Intermediate Court of Appeals addressed *Pele's* extension of *Kalipi* in the agency decisionmaking setting. Public Access Shoreline Hawaii v. Hawaii County Planning Commission, 1993 W.L. 15605, 1993 Haw. App. LEXIS 2 (Haw. App. Jan. 28, 1993 (No. 15460) (PASH). *PASH* involved the proposed development of a resort complex. The ICA held that "in light of article XII, section 7,. . .all government agencies undertaking or approving development of undeveloped land are required to determine if native Hawaiian gathering rights have been customarily and traditionally practiced on the land in question and explore possibilities for preserving them." 1993 W.L. 15605 at 6. Certiorari to the Hawai'i Supreme Court has been granted.

[180] *See supra* Part III. Congress enacted 42 U.S.C. § 1983 as part of the post-Civil War Reconstruction package of legal reforms. Section 1983 was designed to protect African Americans from racist attacks under color of state law. The law has since been broadened to permit suit against state officials for actions taken under color of state law that violate an individual's federally protected rights, whether constitutional or statutory. Wilder v. Virginia Hospital Association, 496 U.S. 498 (1990). Moreover, the actions violative of federal rights can be undertaken by officials of all branches of government. "The very purpose of § 1983 was to interpose the federal courts between

declaratory and injunctive relief under section 1983 for the alleged violations of the § 5(f) trust.[181]

The Hawai'i Supreme Court in *Pele* first acknowledged plaintiffs' right to assert a substantive federal civil rights claim in state court against state officials acting in their official capacities and to prospectively enjoin alleged violations of § 5(f).[182] The court also found appropriate injury suffered by PDF to confer standing. Specifically, the court addressed PDF's standing to bring the suit as "representatives" of beneficiaries of the Ceded Lands trust, indicating expansively that its analysis would apply equally to beneficiaries of the Homelands trust.[183] The court engaged in two lines of analysis. First, it drew upon Hawai'i standing cases involving members of the public seeking to enforce "rights of the public generally."[184] "The court found that PDF met the "injury in fact" test since PDF "members [w]ere beneficiaries of the public trust who [had] been economically and/or aesthetically injured by a transfer of trust lands in contravention of trust terms;[185] the "injuries [could be traced] to the alleged breach of trust;"[186] and

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the States and the people, as guardians of the people's federal right—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" Mitchum v. Foster, 407 U.S. 225, 242 (1972) (citing Ex Parte Virginia, 100 U.S. 339, 346 (1879).

[181] *Pele*, 73 Haw. at 590, 837 P.2d at 1256.

[182] *Id.*

[183] *Id.* at 592 n. 8 and 604 n. 18, 837 P.2d at 1257 n. 8 and 1263-64 n. 18.

[184] *Id.* at 593, 837 P.2d at 1257.

[185] *Id.* at 594, 837 P.2d at 1258, (citing Akau v. Olohana Corp., 65 Haw. 383, at 388-89, 652 P.2d 1130, at 1134 (1982)). A plaintiff has been injured in fact when she "has suffered an actual or threatened injury as a result of the defendant's wrongful conduct, . . . the injury is fairly traceable to the defendant's actions, and . . . a favorable decision would likely provide relief for plaintiff's injury." *Pele*, 73 Haw. at 593, 837 P.2d at 1257. In Hawaii's Thousand Friends v. Anderson, 70 Haw. 276, 768 P.2d 1293 (1989), the Hawai'i Supreme Court found that Hawaii's Thousand Friends (HTF) lacked standing. The injuries sustained were not similarly suffered by the group as a whole. Individual members of HTF "would have relied differently on the alleged misrepresentation and would have suffered different injuries, necessitating different remedies." *Pele*, 73 Haw. at 593, 837 P.2d at 1258 (citing *Hawaii's Thousand Friends*). *Pele* indicated that PDF's standing depended upon whether the injury alleged was suffered by the group in general or was personalized such that other group members suffered different injuries requiring different remedies. The court viewed the alleged § 5(f) breaches as "'generalized' injuries for which relief granted to the organization would provide a remedy to any individual member." *Pele*, 73 Haw. at 594, 837 P.2d at 1258.

[186] *Id.*

"the requested relief would be likely to remedy the injuries by giving beneficial use of the exchanged land to trust beneficiaries."[187]

The court also undertook a second line of analysis. It briefly, and perhaps more significantly, discussed PDF's standing according to public trust principles citing *Kapiolani Park Preservation Society v. City & County of Honolulu*.[188] *Pele* concluded that, "unless members of the public and native Hawaiians, as beneficiaries of the trust, have standing, the State would be free to dispose of the trust res without the citizens of the State having any recourse."[189] This statement was perhaps the necessary prelude to the court's subsequent declaration, discussed later, that Article XII, § 4 of the Hawai'i Constitution creates a private right of action in state court for breach of the ceded lands trust.

Pele thus acknowledged PDF's federal section 1983 right of action in state court and recognized PDF's standing to sue. The court, without considering the merits, then deemed applicable a two-year statute limitations (rather than a six-year statute) and found PDF's section 1983 claim time-barred.[190]

The court also located other procedural grounds for dismissal. It found that PDF had "a full and fair opportunity to litigate the relevant [sovereign immunity] issues"[191] in the earlier federal court action and

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[187] *Id.* The court also found that a "multiplicity of suits" would be avoided by allowing PDF to proceed.

[188] 69 Haw. 569, 751 P.2d 1022 (1988). In *Kapiolani Park*, the City and County attempted to lease a portion of the park for a restaurant. The private Preservation Society sued the City and County as trustee of the charitable public trust owning the underlying fee interest, claiming that the lease was not permitted under the terms of the trust. Addressing the standing issue, the court intimated that the suit should have been brought by the Attorney General as parens patriae. The Attorney General, however, supported the City's action. The court held that the Preservation Society, comprised of neighbors and users of the park, had standing to bring the suit since "the citizens of this State would be left without protection, or a remedy, unless . . . members of the public, as beneficiaries of the trust, have standing to bring the matter to the attention of the court." 69 Haw. at 572, 751 P.2d at 1025.

[189] *Pele*, 73 Haw. at 594, 837 P.2d at 1258. The Intermediate Court of Appeals in *PASH*, 1993 W.L. 15605, 1993 Haw. App. LEXIS 2 (Haw. App. Jan. 28, 1993, following *Pele's* discussion of standing to sue, agreed that "'Hawaii's state courts should provide a forum for cases raising issues of broad public interest [such as the rights of native Hawaiians], and that the judicially imposed standing barriers should be lowered when the "'needs of justice"' would be best served by allowing a plaintiff to bring claims before the court.'' 73 Haw. at 614, 837 P.2d at 1268-69.

[190] *Pele*, 73 Haw. at 595, 837 P.2d at 1259.

[191] *Id.* at 600-601, 837 P.2d at 1261.

that *res judicata* barred PDF "from asserting its breach of section 5(f) trust and Fourteenth Amendment [federal] claims brought under section 1983."[192] The court noted that PDF could not "escape the preclusive effect of the Ninth Circuit's [sovereign immunity] ruling by advancing a different remedial theory;"[193] any alternative theories merged with PDF's originally asserted theories.[194]

2. Breach of Trust Claims Under The Hawai'i Constitution: State law claims in state court

Most important, *Pele* recognized a second, and distinct, PDF breach of trust claim rooted entirely in state law. That claim can be leveled directly against the State. The State's fiduciary obligations as trustee of the public lands trust are delineated in Article XII, § 4 of the Hawai'i Constitution. The Constitution in § 7 of Article XVI also "mandates that the [§] 5(f) trust provisions 'shall be complied with by appropriate legislation[.]'"[195] These constitutional provisions provided the foundation for the Hawai'i Supreme Court's declaration, in a finely-crafted, visionary section of its opinion, that "PDF has a right to bring suit under the Hawai 'i Constitution to prospectively enjoin the State from violating the terms of the ceded lands trust."[196]

a. Right to sue under the Hawai'i Constitution

The court determined, contrary to the State's assertion, that an implied private *state* law right of action exists under the Hawai'i Constitution to enforce the State's § 5(f) trust obligations, notwithstanding the Ninth Circuit's decision that no implied private *federal* law right

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[192] *Id.* The court rejected PDF's argument that *res judicata* was inapplicable because the Ninth Circuit in *Ulaleo* failed to address the merits of its breach of trust claims. 73 Haw. at 600, 837 P.2d at 1261. The Ninth Circuit in *Ulaleo* premised its dismissal on Eleventh Amendment grounds—that PDF sought impermissible retrospective relief for its section 1983 claims. *Pele* held that this Ninth Circuit finding concerning immunity from suit precluded relitigation of the same federal claim in state court. *Id.*

[193] *Id.*

[194] *Id.* at 600, 837 P.2d at 1261. The Court cited *Bolte v. Aits*, Inc., 60 Haw. 58, 60, 587 P.2d 810, 812 (1978) as authority for prohibiting "splitting a cause of action . . . or an entire claim either as to the theory of recovery or the specific relief demanded." *Pele*, 73 Haw. at 600, 837 P.2d at 1261.

[195] *Id.* at 601, 837 P.2d at 1262.

[196] *Id.*

of action emanates from the federal Admissions Act.[197] *Pele*, citing several cases,[198] held that Hawai'i courts are "not precluded from finding that the Hawai'i Constitution affords greater protection than required by similar federal constitutional or statutory provisions."[199] The court, therefore, declared that the Ninth Circuit's *Keaukaha I* [200] decision, finding no implied private right emanating from the federal Admissions Act, did not preclude the Hawai'i Supreme Court from finding such a right under state law.[201] While *Keaukaha I*'s articulated reasons for finding no private federal right "were compelling in the context of the enforceability of a federal statute, they do not support a similar finding with respect to the enforcement of article XII, § 4 of the Hawai'i Constitution."[202]

The Hawai'i Supreme Court observed that Article XII, § 4 was added to the state constitution specifically to recognize the § 5(f) trust and the State's obligations under the trust. Despite the Ninth Circuit's "findings that no purpose would be served by allowing private enforcement of the Ceded Lands trust in federal court, . . . protecting the res of the public lands trust, thereby enforcing the mandates of our constitution, is appropriate in our state courts."[203] The court thus recognized a state law right to sue to protect the corpus of the trust and the beneficiaries' interest in it.

In this respect, *Pele* is a landmark decision. It recognized a state law claim for State breaches of the § 5(f) Ceded Lands trust, and it did so without transforming Native Hawaiian claims into civil rights claims. With bracing clarity, the Hawai'i Supreme Court announced that it

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[197] *Id.* at 601-603, 837 P.2d at 1262-63. The court carefully limited this determination, observing that a private right of action in state court did not constitute "a waiver of sovereign immunity such that money damages are available." *Id.* at 605, 837 P.2d at 1264.

[198] *Id.* at 601, 837 P.2d. at 1262, (citing State v. Kam, 69 Haw. 483, 748 P.2d 372 (1988); Hawaii Housing Authority v. Lyman, 68 Haw. 55, 704 P.2d 888 (1985); State v. Tanaka, 67 Haw. 658, 701 P.2d 1274 (1985); and State v. Russo, 67 Haw. 126, 681 P.2d 553 (1984), *appeal after remand*, 69 Haw. 72, 734 P.2d 156 (1987)).

[199] *Pele*, 73 Haw. at 601, 837 P.2d at 1262.

[200] Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission, 588 F.2d 1216 (9th Cir. 1978).

[201] *Id.* at 1224.

[202] *Pele*, 73 Haw. at 603, 837 P.2d at 1263.

[203] *Id. Cf.* Trustees of the Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 737 P.2d 446 (1987) (political question doctrine bars claim concerning Office of Hawaiian Affairs' allocation of Ceded Lands revenues).

"will not leave the people of Hawai'i without the means to hold" the State to its "fiduciary duties and obligations as trustee."[204] Implicit in its pronouncement was the court's recognition that state courts should be accessible to Native Hawaiians seeking to reconfigure socio-legal narratives about their historical and contemporary situations and to obtain redress for specific land trust breaches by the State.[205]

Pele is additionally significant because its right to sue holding concerning the Ceded Lands trust applies equally to Native Hawaiian claims for breach of the Hawaiian Homelands trust and because it expansively defined the fiduciary duties of the State as trustee. In *Price II*,[206] the Ninth Circuit held that in a federal court section 1983 action concerning the § 5(f) Ceded Lands trust, the State as trustee would not be held to the same high fiduciary standard applicable to private trustees.[207] *Pele*, however, relying on the Hawai'i Supreme Court's decision in *Ahuna v. Department of Hawaiian Home Lands*,[208] held differently. In state court, on a state law claim, the high fiduciary standards of a private trustee apply to the State as trustee for both the Homelands and Ceded Lands trusts.[209]

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[204] *Pele*, 73 Haw. at 601, 837 P.2d. at 1261-62. Homelands Trust beneficiaries first exercised the right to sue for trust breaches under the Hawaii Constitution in Ka'ai'ai v. Drake. *See infra* note 292.

[205] As discussed in Part 2, *supra*, later in the *Pele* opinion, the Hawai'i Supreme Court apparently substantially closed the door it opened with its implied right of action analysis, adopting what appears to be a restrictive sovereign immunity frame of analysis.

[206] Price v. State, 921 F.2d 950 (9th Cir. 1990) (*Price II*).

[207] The Ninth Circuit in *Price II* observed that it was "the apparent decision by the parties involved in the [Admissions] Act that the State and its officials would proceed with a certain degree of good faith and need not be held to strict trust administration standards." *Id.* at 956. The court also cited concern about unnecessary federal involvement in "the micro management of the government of the State." *Id.*

[208] 64 Haw. 327, 640 P.2d 1161 (1982).

[209] 64 Haw. 327, 339 (1982), cited in *Pele*, 73 Haw. at 604-605 n.18, 837 P.2d at 1263-64 n.18. *Ahuna* addressed the extent of the fiduciary duty owed by the trustees of the Hawaiian Homelands to beneficiaries of that trust. The *Ahuna* court held the government trustees to "the same strict standards applicable to private trustees." *Ahuna*, 64 Haw. at 339, 640 P.2d at 1169. This entailed administering the trust solely in the interest of the beneficiaries, using reasonable skill and care to make trust property productive, and acting as an ordinary and prudent person would in dealing with his or her own property. *Id.* at 340, 640 P.2d at 1169. (*Ahuna* did not address the threshold issue of whether trust beneficiaries had a right to sue to enforce the trustee's fiduciary obligations. It found that the defendants waived any no-right-to-sue

Pele's recognition of a state law right to sue under the Hawai'i Constitution, and its expansive definition of the trustee's fiduciary duties, promise future state court actions for state breaches of the Ceded Lands and Homelands trusts. Equally significant, they promise an evolving role of state courts in the adjudication of Native Hawaiian land claims—not only in accepting and maintaining breach of trust claims, but also in acknowledging socio-historical context and recognizing customary and contemporary cultural practices and values and possibly international law norms to inform, and transform, traditional trust law principles.

b. Sovereign Immunity

This promise, however, appears to be partially undermined by *Pele*'s adoption of federal Eleventh Amendment immunity principles as the foundation of its sovereign immunity jurisprudence. Those principles, in practical effect, sharply limit court access in many instances. *Pele* described in general terms the current status of sovereign immunity in Hawai'i's courts. The doctrine of sovereign immunity bars suit against the State for money damages "except where there has been a 'clear relinquishment' of immunity and the State has consented to be sued."[210] This immunity cannot be invoked, however, if the suit seeks only to enjoin state executive department officials from violating either the State constitution or State statutes.[211] In light of the Hawai'i Supreme

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defense by failing to assert it before the lower court. *Id.* at 333, 640 P.2d at 1065).

Pele's application of *Ahuna* to define trustee duties for the Ceded Lands trust was consistent with rulings concerning other native peoples' land trusts. *See* Plateau Mining Co. v. Utah Div. of State Lands and Forestry, 802 P.2d 720, 728-29 (Utah 1990) ("State acts as a trustee and its duties are the same as the duties of other trustees"); Trustees for Alaska v. State, 736 P.2d 324, 331-39 (Alaska 1987), *cert. denied*, 496 U.S. 1032 (1988); Oklahoma Educ. Ass'n, Inc. v. Nigh, 642 P.2d 230, 235-36 (Okla. 1982).

[210] *Pele*, 73 Haw. at 607, 837 P.2d at 1265.

[211] *Id. Pele* quoted from W. H. Greenwell, Ltd. v. Dept. of Land and Natural Resources, 50 Haw. 207, 208-09, 436 P.2d 527 (1968):

> It is the unquestioned rule that the State cannot be sued without its consent [. . .] in matters "involving the enforcement of contracts, treasury liability for tort, and the adjudication of interest [sic] in property [. . . .]" [However,] *sovereign immunity may not be invoked as a defense by state officials who comprise an executive department of government when their action is attacked as being unconstitutional.*

Pele, 73 Haw. at 607, 837 P.2d at 1265 (emphasis added). *Pele* continued, "[N]or will sovereign immunity bar suits to enjoin state officials from violating state statutes." *Id.*

Court decisions so limiting the State's sovereign immunity, PDF's state law breach of trust claim solely for injunctive and declaratory relief against BLNR officials seemed unproblematic. The Hawai'i Supreme Court in *Pele*, however, refined, or arguably reconstructed, the State sovereign immunity doctrine in cases requesting injunctive and declaratory relief.

First, the court in *Pele* acknowledged that "[t]his court has not previously tested the scope" of the sovereign immunity doctrine or its exceptions.[212] Significantly, the court did not address whether the state waived its immunity from breach of trust suits by accepting primary responsibility for the Homelands and Ceded Lands trusts as a condition of Statehood and by incorporating that responsibility into the State Constitution.[213] The court instead focused implicitly on when an injunctive relief suit against state officials would in effect be an impermissible damages suit against the State in disguise. This raised an issue of state law. The court adopted the federal case *Ex Parte Young*[214] as "relevant" authority on state sovereign immunity, observing that "the Eleventh Amendment is the federal constitutional embracement of the common law doctrine of sovereign immunity."[215] *Young* held

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[212] *Pele*, 73 Haw. at 608, 837 P.2d at 1265-66.

[213] This appears to be the initial sovereign immunity issue in *Pele*. *See* generally United States v. Mitchell, 463 U.S. 206, 224-26 (1983) (the United States trust obligation to the Quimult Tribe arose implicitly out of a federal timber management statute and the Tribe could recover damages from the United States for breach of its fiduciary duty in mismanaging trust lands and resources); c.f. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) ("a waiver of sovereign immunity cannot be implied but must be unequivocally expressed").

[214] 209 U.S. 123 (1908). In *Young*, the attorney general of Minnesota was enjoined from enforcing a state statute prescribing certain railroad rates. The attorney general unsuccessfully argued that the federal Circuit Court (now district court) had no jurisdiction over him because the suit was in effect a suit against the State, and thus contrary to the Eleventh Amendment. *Id.* at 132. *Pele* cited *Young* explicitly. *Pele*, 73 Haw. at 608-609, 837 P.2d at 1266. It also quoted from W. H. Greenwell, Ltd. v. Dept. of Land and Natural Resources, 50 Haw. 207, 436 P.2d 527 (1968) which also cited *Young*. *Greenwell*, however, did not discuss *Young* or why the Hawai'i Supreme Court would be citing a federal court Eleventh Amendment case in a state court action to which the Eleventh Amendment did not apply.

[215] *Pele*, 73 Haw. at 606, 837 P.2d at 1264. The meaning of *Pele's* statement concerning the "federal constitutional embracement of the common law doctrine of sovereign immunity" is uncertain. *Pele* cited Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989), in support of that statement, partially paraphrasing and partially quoting from *Will* (the paraphrased portion is italicized, the quoted portion is in

that the Eleventh Amendment[216] does not bar certain *federal* suits to

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quotations):

> *In discussing whether Congress intended to abrogate eleventh amendment immunities in § 1983 actions, the [Will] Court stated that* "members of the 42d Congress were familiar with common-law principles. . .[and t]he doctrine of sovereign immunity was a familiar doctrine at common law."

Pele, 73 Haw. at 606-607, 837 P.2d at 1265. *Pele*'s paraphrased statement concerning *Will* slightly but importantly alters the meaning of the quoted passage from *Will*. The language in *Will* immediately preceding the language quoted by *Pele* indicates that the *Will* opinion was not at that juncture addressing "whether Congress intended to abrogate eleventh amendment immunities in § 1983 actions," nor was it addressing whether the "eleventh amendment is the federal constitutional embracement of the common law doctrine of sovereign immunity . . . [made] applicable to the federal courts." Instead that passage in *Will* was addressing whether the Congressional enactment of § 1983 abrogated *common-law* immunities (as distinguished from Eleventh Amendment constitutional immunities). The passage from *Will* in its entirety reads:

> *[I]n enacting § 1983, Congress did not intend to override well-established immunities or defenses under common law.* 'One important assumption underlying the Court's decisions in this area is that members of the 42d *Congress* were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they *likely intended these common-law principles to obtain*, absent specific provisions to the contrary.'

Will, 491 U.S. at 67 [emphasis added]. This passage does not indicate support for the proposition that the Eleventh Amendment reflects federal constitutional incorporation of common law sovereign immunity principles.

[216] The Eleventh Amendment provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

The amendment was adopted in reaction to Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793). Chisolm had allowed the citizen of one state to invoke the federal court's diversity jurisdiction to sue a different state on a state law claim. As the literal wording of the amendment reveals, the amendment was directly aimed at precluding such exercises of diversity jurisdiction. *See* William A. Fletcher, *The Diversity Explanation Of The Eleventh Amendment: A Reply To Critics*, 56 U. CHI. L. REV. 1261, 1264 (1989); Lawrence C. Marshall, *The Diversity Theory Of The Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372, 1375-78 (1989).

Hans v. Louisiana, 134 U.S. 1 (1890) (*Hans*) recast the literal meaning of the amendment and barred a citizen's suit against her own state in federal court. The Supreme Court in *Hans* located in the amendment a "broad policy against suing states in federal court." *Id.* George D. Brown, *Has The Supreme Court Confessed Error On The Eleventh Amendment? Revisionist Scholarship And State Immunity*, 68 N.CAROLINA L. REV. 867, 872 (1990). *Hans* thus effectively viewed the Eleventh Amendment as providing sweeping sovereign immunity protection for states in federal court. *See* William P. Marshall, *The Eleventh Amendment, Process Federalism And The Clear Statement Rule*, 39

enjoin as unconstitutional a state official's actions.[217] Federal cases following *Young* distinguished permissible from impermissible suits by constructing a dividing line between cases requesting prospective relief and cases requesting retrospective relief. Prospective relief against a state official in federal court is permissible even if the relief is accompanied by a "substantial ancillary effect on the state treasury."[218] If, however, the relief is "tantamount to an award of damages for a past violation" of law, the relief is retrospective and the [federal] suit is barred.[219]

Pele then looked to a more recent United States Supreme Court case for guidance on the meaning of "retrospective injunctive" relief. In *Papasan v. Allain*,[220] the federal government had granted lands to the State of Mississippi to be held in trust for the benefit of public schools. The lands set aside for the school district at issue in *Papasan* had been sold and the proceeds invested in railroads. When the railroads were destroyed during the Civil War and the investment permanently lost, Mississippi compensated the school district with "interest" on the lost

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DEPAUL L. REV. 345, 350 (1989). The *Hans* decision continues to be roundly criticized for its illiteral reading of the constitution and the "doctrinal gymnastics and legal fictions" it has spawned. Brown, 68 N. CAROLINA L. REV. at 873; Vicki C. Jackson, *The Supreme Court, The Eleventh Amendment, And State Sovereign Immunity*, 98 YALE L. J 1 (1988) ("For over a decade, Eleventh Amendment scholarship has sought to demonstrate that the amendment cannot be regarded historically or textually as embodying the doctrines of immunity attributed to it. That task has been substantially accomplished." *Id.* at 72). *See also* Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985); Welch v. Texas Dept. of Highways and Public Transportation, 483 U.S. 468 (1987); Pennsylvania v. Union Gas Co., 491 U.S. 1 (1983) (strong minority opinions calling for rejection of *Hans*).

Despite the general doctrinal confusion and scholarly and judicial dissatisfaction, two alternative theories continue to be viewed as informing the amendment. These two theories are the diversity jurisdiction theory, emanating from the reaction to Chisolm, and the sovereign immunity, theory emanating from Hans. Both theories are rooted in federalism concerns. The limited "ability of federal courts to hear suits against state governments [is an issue] crucial to defining the content of American federalism." Erwin Chemerinsky, *Congress, The Supreme Court And The Eleventh Amendment: A Comment On The Decisions During The 1988-89 Term*, 39 DEPAUL L. REV. 321-322 (1989).

[217] *Ex Parte Young*, 209 U.S. at 130.

[218] *Pele*, 73 Haw. at 609 n. 22, 837 P.2d at 1266 n. 22 and accompanying text (quoting B. H. Papasan v. Allain, 478 U.S. 265, 278 (1985), and citing Edelman v. Jordan, 415 U.S. 651, 667-68 (1974)).

[219] *Pele*, 73 Haw. at 609-10, 837 P.2d at 1266, (quoting *Papasan*, 478 U.S. at 278).

[220] 478 U.S. 265 (1986).

principal acquired from the sale of the trust lands. The amount paid to the school district was grossly inadequate in light of the value of intact trust lands in other school districts.[221] The plaintiffs, school officials and children from the affected school district, sued the State requesting injunctive relief—namely restoration of the lost trust corpus through establishment of a trust fund to pay income to, or designation of trust lands for use by, the plaintiffs.[222]

The United States Supreme Court in *Papasan*, relying on *Young*, observed that federal court relief against state officials is limited by the Eleventh Amendment. The exercise of federal judicial power over state officials is permissible only where the "violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past."[223] The Court then held that plaintiffs' requested relief amounted to a monetary award for a past breach, and "discern[ed] no substantive difference between a not-yet-extinguished liability for a past breach of trust and the continuing obligation to meet trust responsibilities asserted by the petitioners."[224]

After examining both *Young* and *Papasan*, the *Pele* court turned to the particular claims before it. It determined that PDF's request that the Ceded Land be restored by means of a constructive trust upon property held by private party Campbell was "'essentially equivalent' to a nullification of the exchange and the return of the exchanged lands to the trust res."[225] The "effect on the state treasury would be . . . unavoidable," and PDF's requested relief was "in effect, a request for compensation for the past actions of the BLNR members."[226] All PDF's claims premised on state constitutional or statutory grounds were thus deemed "retrospective" and barred by the State's sovereign immunity as defined by federal Eleventh Amendment principles.

This aspect of *Pele* is troublesome. As *Pele* recognized, the Eleventh Amendment to the United State's Constitution does not apply in state courts.[227] The purpose of the Eleventh Amendment is to prevent federal courts from adjudicating claims against states, particularly claims rooted

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[221] *Id.* at 272-73.
[222] *Id.* at 274-75.
[223] *Id.* at 277-78.
[224] *Id.* at 281.
[225] *Pele*, 73 Haw. at 611, 837 P.2d at 1267.
[226] *Id.*
[227] *Id.* at 608 n.20, 837 P.2d at 1265, n.20.

in state law.[228] Federalism concepts provide the foundation: federal courts should not be telling states how to order their affairs according to state law.[229] The Eleventh Amendment thus confers upon states a special and limited type of federal court immunity that is rooted in federal law in light of an accommodation of federal and state prerogatives.[230]

Pele deemed Eleventh Amendment immunity strictures "relevant" to its state law analysis of state immunity in state court on state law claims[231] and "adopted" the Eleventh Amendment rule in *Young* concerning a limited "exception" to state immunity.[232] By deeming Eleventh Amendment immunity strictures relevant and by adopting the rule in *Young*, *Pele* embraced federal Eleventh Amendment jurisprudence for the purpose of redefining or at least refining state officials' immunity from state law injunctive relief suits in state court.

The court's effort in *Pele* at demarcating limits to state liability is understandable as a general matter. Indeed, the court's approach may have been constrained by the absence of clear state constitutional or legislative guidance on the scope of the State's immunity from Native Hawaiian breach of trust suits.[233] *Pele*'s transposition of federal Eleventh Amendment principles nevertheless is problematic for specific reasons. First, Eleventh Amendment principles generally, and the *Young* line of cases particularly, are acknowledged to be "complex, confusing and often inconsistent."[234]

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[228] *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984).

[229] Professor Chemerinsky observes that the Eleventh Amendment "bears directly on federalism, separation of powers, and the protection of fundamental rights. Specifically, because it determines the ability of federal courts to hear suits against state governments, the eleventh amendment is crucial to defining the content of American federalism." Chemerinsky, *supra* note 216, at 322.

[230] *See supra* note 216, discussing the diversity jurisdiction and sovereign immunity theories of the Eleventh Amendment and the federalism concerns underlying both theories.

[231] *Pele*, 73 Haw. at 606, 837 P.2d at 1264.

[232] *Id.* at 609, 837 P.2d at 1266.

[233] *See infra* Part V(A).

[234] Brown, *supra* note 216, at 873 (describing common perceptions of Eleventh Amendment doctrine, in part due to the uncertainties and fictions generated by *Young*.); John J. Gibbons, *The Eleventh Amendment And State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1891 (1983) ("a hodgepodge of confusing and intellectually indefensible judge-made law." *Id.* at 1891); William A. Fletcher, *A Historical Interpretation Of The Eleventh Amendment: A Narrow Construction Of An Affirmation*

Second, *Pele* shielded the State from a range of state law breach of trust suits in state court by employing federal law sovereign immunity principles that are shaped by federalism concerns.[235] Plaintiffs' state law breach of trust claim in *Pele* did not implicate federalism concerns. Plaintiffs asserted their second claim in state court against state officials on the basis of state law.[236] There existed no federalism justification for the application of Eleventh Amendment immunity principles to limit that claim.[237] *Pele*'s sovereign immunity ruling therefore needed to be justified on some other ground.[238]

Grant Of Jurisdiction Rather Than A Prohibition Against Jurisdiction, 35 STAN L. REV. 1033, 1044 (1983) ("a complicated, jerry-built system that is fully understood only by those who specialize in this difficult field." *Id.* at 1044); Akhil Reed Amar, *Of Sovereignty And Federalism*, 96 YALE L. J. 1425, 1480 (1987).

[235] *See supra* notes 215-216, 230 and accompanying text.

[236] The *Pele* plaintiffs' initial state court claim, not the focus of discussion in this section, was a federal section 1983 breach of trust claim, which the court dismissed on *res judicata* grounds. The court did not undertake, or need to undertake, rigorous Eleventh Amendment analysis in light of its conclusion that the *res judicata* doctrine barred that claim. Some discussion here of Eleventh Amendment analysis in state court section 1983 suits, however, is relevant. As indicated, the Eleventh Amendment's purpose is to prevent federal courts from adjudicating claims against states—a federalism concern. Where a federal section 1983 claim is asserted in *state* court, as with the *Pele* plaintiff's initial claim, the Eleventh Amendment is inapplicable. Its federalism concerns, however, may continue to guide the state court. *See* Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989). The state court must still determine if the defendant state officials are "persons" within the meaning of section 1983, and that determination is generally informed by Eleventh Amendment analysis. *Id.* (cited in the *Pele* opinion, 73 Haw. at 608 n.20, 837 P.2d at 1265 n.20, for the proposition that, "Noting that the eleventh amendment does not apply in state courts, the United States Supreme Court [in *Will*] addressed the question of whether a state is a "person" under section 1983").

[237] An exception to a state's Eleventh Amendment immunity from federal court suit exists where the court in a federal section 1983 action is enjoining state officials' violations of plaintiffs' federal rights. "The federal courts are [in that instance] primarily concerned with vindicating federal rights and holding state officials responsible to the supreme authority of the United States." *Pele*, 73 Haw. at 609, n.21, 837 P.2d at 1266, n.21. The supremacy of federal law is vindicated in that setting through the court's injunctive relief order without upsetting the delicate balance of federal and state authority contemplated by our dual system of governance.

That delicate balance of federal and state power is not implicated by the *Pele* plaintiffs' state law breach of trust claim. That claim was brought in state court, against state officials, according to state rights emanating from the state constitution and statutes.

[238] Some speculative reasons might have included the opening of floodgates to de facto damage suits, the public cost of defending numerous injunctive relief suits, a

Pele's reliance upon Eleventh Amendment jurisprudence is problematic for a third related reason. *Pele*, in effect, adopted the federal courts' limited exception to Eleventh Amendment state immunity based on *Young*, *Papasan* and *Ulaleo*, the federal cases discussed earlier.[239] The prospective/retrospective relief distinction drawn by those cases has been sharply criticized by many commentators.[240] As mentioned earlier, those cases can be, and have been, restrictively construed to define narrowly the scope of the immunity exception—only allowing suits that seek to stop state officials from initiating or completing acts constituting breaches of trust.[241] Indeed, *Papasan*, which *Pele* relied upon, observed that permissible prospective relief focused on law violations that are "ongoing as opposed to cases in which . . . law has been violated at one time or over a period of time in the past."[242]

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judicial order's potential undue disruption of executive branch operations, the existence of alternative legislatively-mandated avenues of legal redress—all implicating in one form or another concern about the separation of powers among the state branches of government.

[239] *See supra* notes 171-72, 178, 192, 220-26 and accompanying text.

[240] Professor Jackson addresses the "much-criticized distinction" between prospective and retrospective relief.

> The distinction . . . has been criticized on numerous grounds. First, it is unsupported by the language of the Eleventh Amendment, which does not distinguish between legal and equitable relief. Second, prospective relief requiring future payments can burden the state as much as past due monetary awards. Third, the *Edelman* distinction is unclear whether it is the compensatory purpose of the relief that is to be condemned (which might permit, for example, punitive monetary awards against the state) or whether it is any order to pay funds that is problematic . . . If both elements are required to render the relief prohibited, why does the conjunction of compensation and monetary awards make those cases "against the state" more than others? Finally, some have criticized the distinction on the ground that the dividing line between the two forms of relief is difficult to draw and has not been drawn consistently by the Court.

Jackson, *supra* note 216, at 88 n.353. *See also* Amar, *supra* note 234, at 1478 (the distinction rests on "doctrinal gymnastics and legal fictions"); William Burnham, *Federal Court Remedies For Past Misconduct By State Officials: Notice Relief And The Legacy Of Quern v. Jordan*, 34 AM. U. L. REV. 53, 74 (1984); David P. Currie, *Sovereign Immunity And Suits Against Government Officers*, 1984 SUP. CT. Rev. 149, 160-61; Norman B. Lichtenstein, *Retroactive Relief In The Federal Courts Since Edelman v. Jordan: A Trip Through The Twilight Zone*, 32 CASE W. RES. L. REV. 364 (1982).

[241] *See* Brown, *supra* note 216, at 873-74 ("One view [of *Young* and its progeny in context of overall eleventh amendment analysis] is that the results are simply wrong, that the states get too much immunity. Another view emphasizes the danger of the judiciary's undermining its own legitimacy by 'formal adherence to a doctrine riddled with exceptions designed to counterbalance its evils'" (footnotes omitted)).

[242] *B. H. Papasan v. Allain*, 478 U.S. 265, at 277-78.

Pele acknowledged that the test for retrospectiveness of relief is whether the remedy "would amount to virtual compensation for the past misconduct of state officials" and found that "the effect on the state treasury would be direct and unavoidable, rather than ancillary, because imposing a constructive trust on lands now held by Campbell would require that the State to [sic] compensate Campbell for its property."[243] This language indicates focus upon whether the requested injunction would require substantial expenditures of state funds such that the injunctive relief would actually be monetary compensation in disguise. This focus, however, is rendered uncertain by language in *Papasan* and *Ulaleo* and by the *Pele* court's minimally-explained finding that the state treasury would be directly and unavoidably affected by a nullification or a constructive trust remedy. Consider the following view. If the exchange were nullified, both Campbell and the State would "reacquire their original properties"[244]—a remedy that would not impact on the State treasury. (A separate question would arise as to the improvements.) If a constructive trust were imposed, and the State in effect reacquired the Ceded Lands, the State temporarily would have the return of the Ceded Lands plus the land originally conveyed by Campbell. The State could thus (1) return Campbell's original property, or (2) exchange other state-owned non-Ceded Land property of equivalent value. Whichever option the State selected, the net cost to the State would appear to be zero. Any related state expenses would fall within what *Papasan* classified as permissible ancillary costs. PDF's requested relief could thus be viewed as not constituting "virtual [monetary] compensation."[245]

If this view is at least plausible, then *Pele* did not in actuality focus on the "impact on state treasury," and its emphasis on the "past" nature of the state officials' action becomes determinative—"PDF is not seeking prospectively to enjoin a constitutional violation in this case, but would have us turn back the clock and examine actions already taken by the state."[246]

The Hawai'i federal district court in *Han v. Department of Justice* recently adopted just such a restrictive reading of *Pele* in dismissing Native Hawaiian breach of trust claims for past administrative acts even though the remedy sought would not have impacted upon the

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[243] *Pele*, 73 Haw. at 610-11, 837 P.2d at 1267.
[244] *Id.* at 611, 837 P.2d at 1267.
[245] *Id.* at 610, 837 P.2d at 1266.
[246] *Id.* at 601, 837 P.2d at 1262.

State treasury.[247] In dismissing the plaintiffs' injunctive relief claims against State officials, the district court emphasized the timing-of-breach and not the impact-on-treasury. The court found "all [plaintiffs' allegations against the State officials look to remedy the *past* problem of authorizing [third-party leases] with non-native Hawaiians."[248] The court then cited *Pele* for the proposition that plaintiffs cannot "have us turn back the clock and examine actions already taken by the state."[249] The injunctive and declaratory relief sought in *Han* involved, among other things, the invalidation of the Hawaiian Homes Commission's approval of Homelands awardees' subleases of their lots to non-Hawaiians. Significantly, a remedy of invalidation simply would have nullified the subleases. It would not have entailed any payment from the State treasury. The federal district court nevertheless relied upon the "past" breach language in *Pele*, and found the requested relief impermissibly retrospective, apparently focusing entirely on the fact that the challenged actions were past in the past.[250]

From this restrictive view, once the breaching acts are completed, the relief sought, in whatever form, will likely be deemed retrospective and therefore impermissible, despite continuing harm resulting from the acts. In practical effect, since most ostensible trust breaches occur through administrative agency decision-making, with limited notice, few suits are likely to be researched, prepared, and filed before agency action.[251]

Hawai'i courts are not bound to follow this restrictive Eleventh Amendment view. If they do, however, relatively few breach of trust suits are likely to make it through state courthouse doors.[252] This potential barrier to state courthouse entry is significant. In concert with other procedural restrictions, it could preclude development and

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[247] 824 F. Supp. 1480 (D. Haw. 1993).

[248] *Id.* at 1488.

[249] *Id.*

[250] *Id.* at 1489.

[251] Rule 11 of the Hawaii Rules of Civil Procedure requires that the signer of a court filing certify that the filing is made after reasonable inquiry and is reasonably supported by facts and is warranted by existing law or a plausible argument for change in the law. HAW. R. CIV. P. 11. In light of the sanctions levied for Rule 11 violations and due to the factual and legal complexity of many breach of Hawaiian land trusts claims, the potentially high cost of litigation, the time needed for careful research, investigation, consultation, and drafting, the filing of many breach of trust suits may be precluded before agency action takes place.

[252] *See supra* notes 121-134 and accompanying text.

presentation a wide range of current state law breach of trust claims which *Pele* earlier endorsed through its careful and path breaking implied-right-of-action analysis under Article XII, §§ 2 and 4 of the Hawai'i Constitution.[253] The creation of such a process barrier would seem to clash with *Pele*'s over-arching statements about the necessity of opening state courts for Native Hawaiians to enforce the State's trust obligations. It would also sharply constrain state court cultural performances. Indeed, the story that ultimately emerged in *Pele* muted Native Hawaiian voices on the matters about which the speakers appeared to care most, matters for them at the heart of the Ceded Lands controversy—the historical and continuing spiritual and cultural harm arising out of the desecration of sacred lands. In constraining courts' cultural performances in this fashion, such a process barrier would appear to undermine the court's movement toward reconceptualizing the judicial function in the context of Native Hawaiian land trust controversies. The uncertainty resulting from a range of doctrinal interpretations—with widely varying potential social-cultural impacts—leaves open the possibility of future clarifying judicial statements concerning the apparent restrictiveness of *Pele*'s sovereign immunity discussion.[254]

V. Other Native Hawaiian State Court Breach of Trust Actions: The Apparent Failure of Legislative Reform

Pele's uncertainty is especially significant in light of the apparent failure of the Native Hawaiian Trusts Judicial Relief Act.[255] The Act explicitly waives the State's sovereign immunity from Native Hawaiian breach of trust suits. The Act, however, is peculiarly structured and embodies severe procedural and substantive limitations. The Act's right to sue provisions thus lie dormant—untried by Native Hawaiian litigants and untested by the Hawai'i courts.

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[253] *See supra* Part IV(B)(2)(a).

[254] Clarifying options might include: explicitly awaiting delineation of sovereign immunity parameters via legislation or constitutional amendment; or, declaring that sovereign immunity cannot be invoked if the suit seeks only to enjoin state officials from violating either the State Constitution or statutes, regardless of whether the official's acts are completed or on-going; or, declaring that sovereign immunity cannot be invoked if the suit seeks "prospective" relief, meaning that the plaintiff requests injunctive relief and the State fails to carry its burden of proving with specific facts that the state treasury will be directly, substantially and quantifiably impacted.

[255] Native Hawaiian Trusts Judicial Relief Act, Haw. Rev. Stat. § 673 (1988).

A. The Native Hawaiian Trusts Judicial Relief Act (H.R.S. chapter 673)

Amidst controversy, the 1988 Hawai'i legislature passed the Native Hawaiian Trusts Judicial Relief Act.[256] The Act offers Native Hawaiians a limited right to sue the State in state court for breaches of its fiduciary duties concerning both the Hawaiian Homelands and Ceded Lands trusts.[257] The Act bifurcates the State's waiver of immunity according to two distinct time frames.

1. The right to sue for Homelands and Ceded Lands trust breaches occurring after June 30, 1988

The Native Hawaiian Trusts Judicial Relief Act is codified in Chapter 673 of the Hawaii Revised Statutes. Chapter 673 consists of ten sections defining the State's waiver of sovereign immunity. Chapter 673-1 provides that "[t]he State [of Hawaii] waives its immunity for any breach of trust or fiduciary duty resulting from the acts or omissions of its agents, officers and employees in the management and disposition of trust funds and resources of" the Hawaiian Homelands and Ceded Lands. This waiver, however, is temporally limited. The Chapter authorizes suit only for claims accruing after June 30, 1988.[258] The waiver also is inapplicable to continuing violations of either trust which first arose prior to July 1, 1988.[259]

Chapter 673 claims involving the Hawaiian Homelands trust may be brought by Native Hawaiians as defined in § 201(a)(7) of the

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[256] The Native Hawaiian Trusts Judicial Relief Act was passed by the Hawaii legislature in 1988 and is codified at HAW. REV. STAT. § 673 (1988). *See* Teruya, *supra* note 37 at 890-91. *See also*, *Hawaii's Ceded Lands*, *supra* note 37 at 101.

In 1983 a federal-state task force examined the State's implementation of the Hawaiian Homes Commission Act. It recommended that legislation be crafted to allow beneficiaries access to courts. HAWAII ADVISORY COMMITTEE TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS, A BROKEN TRUST; THE HAWAIIAN HOMELANDS PROGRAM: SEVENTY YEARS OF FAILURE OF THE FEDERAL AND STATE GOVERNMENTS TO PROTECT THE CIVIL RIGHTS OF NATIVE HAWAIIANS 8 (1991). *See* Teruya, *supra* note 37 at 891-904 for a concise account of the historically significant social, political and legal events and circumstances underlying the passage of the Act.

[257] HAW. REV. STAT. §§ 673-1 (1988).

[258] Note, Section 3 following HAW. REV. STAT. Chapter 673 (1988).

[259] Note, Section 4 following HAW. REV. STAT. Chapter 673 (1988) provides that "[n]o action shall be maintained under this Act for any existing projects, programs, or any other governmental activities which are continuing, and which were begun, completed, or established prior to July 1, 1988."

Hawaiian Homes Commission Act, Native Hawaiian organizations, the Office of Hawaiian Affairs, and those Hawaiians deemed eligible to succeed to a homestead lease pursuant to § 209 of the Hawaiian Homes Commission Act, as amended.[260] Chapter 673 claims involving the § 5(f) Ceded Lands trust may be brought by all of the above described claimants except eligible successors to homestead lease.[261] To be deemed a beneficiary for purposes of both trusts and thereby accrue a right to sue, a claimant must prove that she is of at least half Hawaiian blood.[262] Most Hawaiians do not satisfy this fifty percent requirement.

Chapter 673 allows a claimant to file a breach of trust claim in state circuit courts only after exhausting "all administrative remedies available ."[263] The claimant must also, at least sixty days prior to filing a claim, give written notice that unless "appropriate remedial action is taken suit shall be filed."[264] The notice and administrative exhaustion requirements have generated uncertainty. Despite a clear statutory mandate,[265] the Department of Hawaiian Home Lands ("DHHL")

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[260] HAW. REV. STAT. §§ 673-2(a) (1988). A Native Hawaiian is defined in section 201(a)(7) of the Hawaiian Homes Commission Act as one with at least fifty percent Hawaiian blood. An organization is eligible if its "purpose is to protect and uphold the Hawaiian Homes Commission Act and the Admissions Act section 5(f) . . .," and is "controlled by native Hawaiians and a majority of its members receives or can receive benefits from the trust." HAW. REV. STAT. §§ 673-2(c) (1988). A successor to a homestead lease must be a spouse, child, grandchild, brother, sister, widow or widower of a child, grandchild, or sibling, or niece, or nephew of the lessee and at least one-quarter Hawaiian. Hawaiian Homes Commission Act, § 209. As such, Hawaiians not meeting the 50% blood quantum requirement are precluded from asserting a breach of this trust except as an eligible successor or as a member of an eligible organization. Section 201(a)(7)'s legal definition of "Native Hawaiian" is one interpretation of the term. There are other definitions, albeit without current legal force. These other definitions rest on "several criteria including race, self-identification, genealogy, political considerations, culture, and geography." Friedman, *supra* note 37 at 522 n. 2.

[261] Claims involving the Ceded Lands trust may be brought by the Office of Hawaiian Affairs, Native Hawaiians as defined in section 10-2, and Native Hawaiian organizations. HAW. REV. STAT. §§ 673-2(b) (1988).

[262] *See supra* note 260.

[263] HAW. REV. STAT. §§ 673-3 (1988).

[264] HAW. REV. STAT. §§ 673-3 (1988).

[265] HAW. REV. STAT. §§ 673-3 provides, "All executive branch departments shall adopt, in accordance with chapter 91, such rules as may be necessary to specify the procedures for exhausting any remedies available." HAW. REV. STAT. §§ 673-3 (1988). Chapter 91, The Administrative Procedure Act, establishes general administrative

has thus far failed to promulgate administrative procedures for claim initiation.[266] It is therefore unclear whether a contested case hearing is an available administrative remedy that must be "exhausted" as a precondition to suit.[267]

All Chapter 673 claims are subject to a two year statute of limitations period.[268] The Chapter initially extended the limitations period for early claims. It provided that the statute of limitations for claims accruing between July 1, 1988 and July 1, 1990 would begin to run on July 1, 1990, meaning that those claims must have been filed by June 30, 1992.[269]

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procedures one must exhaust prior to invoking circuit court jurisdiction. HAW. REV. STAT. Chapter 91.

[266] One unofficial view is that the Department of Hawaiian Homelands' regular contested case hearing procedures might be applicable. Under this view, beneficiaries would be required to request a contested case hearing and file their claims with the Department of Hawaiian Homelands. The Department would then investigate the claim and submit a report and recommendation to the Hawaiian Homes Commission. If the Commission deems the case ripe for consideration it will hear it. A recommended decision would then be submitted to the Commission. An aggrieved party may then request reconsideration of the Commission's decision or appeal a final decision of the Commission to a circuit court. *Id. See* Teruya, *supra* note 37 at 906-07.

[267] Hawaii's Administrative Procedure Act, HAW. REV. STAT. §§ 91-14(a), provides generally that redress in the circuit courts of the State may not be sought until a claimant receives and is dissatisfied with "a final [administrative] decision and order in a contested case or[,]" a claimant receives "a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief." *Id.* In light of this procedural uncertainty claimants would appear to be justified in filing their claims directly in the circuit courts after complying with the sixty day notice requirement, but without seeking administrative contested case disposition. DHHL's failure to promulgate procedural rules promptly should not jeopardize or postpone a claimant's right to judicial redress.

[268] HAW. REV. STAT. §§ 673-10 ("[e]very claim arising under this chapter shall forever be barred unless the action is commenced within two years after the cause of action accrues." HAW. REV. STAT. §§ 673-10 (1988)).

[269] The running of the limitations period is also tolled when the claim is filed with the proper administrative agency and remains tolled until ninety days after a decision is rendered. *Id.* Determining "when the cause of action accrues" is critical. The Hawaii Supreme Court has determined that a tort action against the State accrues when "the plaintiff knew or in the exercise or reasonable care should have discovered that an actionable wrong has been committed." Waugh v. University of Hawaii, 63 Haw. 117, 127, 621 P.2d 957, 966 (1980). This tort action test will likely also be used to determine whether one has timely filed an actionable claim for breach of the State's fiduciary duty under both the Hawaiian Homelands and Ceded Lands trusts. *See* Teruya, *supra* note 37, at 912-13, stating that a two year statute of limitations will likely force the bringing of questionable claims, "deter" the pursuit of others and "prevent the resolution of many individual claims." *Id.*

Most important, Chapter 673 limits available remedies. Suits may be initiated only to restore the trust corpus depleted by the wrongful alienation or use of trust lands or funds,[270] and to recover actual out-of-pocket damages sustained by individual claimants.[271] Chapter 673 does not authorize consequential damages, punitive damages, land awards or injunctive relief.[272]

2. Negotiated settlements of Department of Hawaiian Homelands claims against the state for state breaches of Homelands Trust from August 21, 1959 to June 30, 1988

Chapter 673 waived the State's immunity for breach of trust claims against the State for the State's unauthorized use of Homelands between August 21, 1959 and June 30, 1988. That waiver, however, only became operative if the governor failed to resolve those claims against the State in a timely fashion.[273] Within the statutorily prescribed three

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[270] If such funds are recovered from the State they are transferred directly to the Department of Hawaiian Home Lands. Individual plaintiffs only receive actual out of pocket damages. The probable effect of this result is to provide plaintiffs with little incentive to pursue their claims. HAW. REV. STAT. §§ 673-4(a) and (b). This section provides:

> (a) In an action under this chapter the court may only award land or monetary damages to restore the trust which has been depleted as a result of any breach of trust duty and no award shall be made directly to or for the individual benefit of any particular person not charged by law with the administration of the trust property; provided that actual damages may be awarded to a successful plaintiff.
> (b) "Actual damages," as used in this section, means direct, monetary, out of pocket loss, excluding noneconomic damages as defined in section 663-8.5 and any consequential damages, sustained by a native Hawaiian or Hawaiian individually rather than the class generally.

HAW. REV. STAT. §§ 673-4(a) and (b) (1988).

[271] *See* HAW. REV. STAT. §§ 673-4(a) and (b) (1988).

[272] HAW. REV. STAT. §§ 673-1(a) and 673-4(a) and (b) (1988).

[273] The Native Hawaiian Trusts Judicial Relief Act 395, subsections 3-5, 14th Leg., Reg. Sess. (1988), reprinted in 1988 HAW. SESS. LAWS 942, 945 provides:

> Section 3. This Act shall not apply to any cause of action which accrued, rights and duties that matured, penalties that were incurred, or proceedings that were begun, prior to July 1, 1988.
>
> Section 4. No action shall be maintained under this Act for any existing projects, programs, or any other governmental activities which are continuing, and which were begun, completed, or established prior to July 1, 1988.
>
> Section 5. The governor shall present a proposal to the legislature to resolve controversies which arose between August 21, 1959 and the date of this Act,

year deadline,[274] the governor presented a proposal entitled, "An Action Plan to Address Controversies Under the Hawaiian Home Lands Trust and the Public Land Trust."[275] The legislature approved the plan by resolution, thereby apparently forestalling any right to sue.[276]

Upon approval, the governor created a Task Force consisting of the heads of the DHHL, the Department of Land and Natural Resources, and the Office of State Planning, all advised by the State Attorney

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relating to the Hawaiian home lands trust under Article XII, sections 1, 2, and 3 of the Constitution of the State of Hawaii implementing sections 4 and 5(f) of the Admission Act (Act of March 18, 1959, Public Law 86-3, 73 Stat. 4), and the Native Hawaiian public trust under Article XII, sections 4, 5, and 6 of the Constitution of the State of Hawaii implementing section 5(f) of the Admission Act. If,

(1) both of the following occur:

(a) The governor fails to present a proposal to the legislature prior to the convening of the 1991 legislature in regular session; and

(b) No other means of resolving such controversies is otherwise provided by law by July 1, 1991; or

(2) All three of the following occur:

(a) The governor presents a proposal;

(b) A resolution calling for the rejection of the governor's proposal is adopted by two thirds vote of the house introducing such resolution; and

(c) No other means of resolving such controversies is otherwise provided by law, by July 1, 1991, then in the event of the occurrence of either (1)(a) and (b) or (2)(a), (b) and (c), notwithstanding sections 3 and 4 of this Act, a claim for actual damages under this Act which accrued between August 21, 1959, and the date of this Act may be instituted no later than June 30, 1993, provided that the filing of a claim for actual damages in an administrative proceeding before June 30, 1993, shall toll the statute of limitations until ninety days after the date the decision is rendered in the administrative proceeding.

1988 HAW. SESS. LAWS 942, 945 (1988).

One state senator who played a major role in the passage of the Act noted his disappointment in limiting the immunity waiver to prospective breaches. Many problems concerning the trusts predate and, therefore are not covered by, the Native Hawaiian Judicial Relief Act. Despite this concern, the senator expressed confidence that the Governor would propose a sufficient resolution of past abuses. Teruya, *supra* note 37, at 904.

[274] *Id.*

[275] OFFICE OF THE GOVERNOR, AN ACTION PLAN TO ADDRESS CONTROVERSIES UNDER THE HAWAIIAN HOME LANDS TRUST AND THE PUBLIC LAND TRUST (1991).

[276] Arguably, the governor's plan did not satisfy the requirements of § 5 of the Act since the plan merely proposed a "process to resolve" past breaches rather than a resolution of those breaches. Teruya, *supra* note 37, at 915.

General.[277] As a result of the first part of its deliberations, the Task Force recommended, and the Hawaii State Legislature approved, payment of $12 million in settlement for the State's illegal use of 29,000 acres of Hawaiian Homelands since statehood. *Ka'ai'ai v. Drake*[278] challenged in state court the propriety of the settlement process. The Native Hawaiian plaintiffs in *Ka'ai'ai* asserted that the Task Force's multiple internal conflicts of interest, and its exclusion of an independent representative of trust beneficiaries in the negotiation settlement process, constituted a breach of trust and a violation of the principle of Native Hawaiian self-determination.[279] As a result of the suit and

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[277] This Task Force is the entity created by the Governor's proposal. It is responsible for resolving claims against the State for the illegal use of Hawaiian home lands from August 21, 1959 to June 30, 1988. The legislature, by resolution, declared that the Task Force satisfied the conditions set forth in HAW. REV. STAT. § 673. However, if the Task Force, for whatever reason, fails in its mission, then DHHL (but not trust beneficiaries) obtains the right to sue the State for breaches occurring during this period. *See* OFFICE OF THE GOVERNOR, *supra* note 275.

[278] Civil no. 92-3742-10 (1st Cir. Haw., October 1992).

[279] Ka'ai'ai v. Drake, initiated by Homeland trust beneficiaries, resulted in an agreement that required the immediate payment of $5 million to DHHL and the appointment of an independent representative for trust beneficiaries in future Task Force negotiations of DHHL's claims against the State. *Ka'ai'ai* involved breach of trust and procedural due process claims by Charles Ka'ai'ai, Alice Aiwohi, Noelani Joy and Robert Asing against the State of Hawai'i and the Hawaiian Homelands commissioners, among others. Those claims were informed by the concept of Native Hawaiian self-determination. Ka'ai'ai, Aiwohi, Joy and Asing, Homelands Trust beneficiaries, challenged the process by which the State had been attempting to resolve DHHL claims against the State for illegal use of Homelands from Statehood to 1984. Pursuant to the Native Hawaiian Trusts Judicial Relief Act, the State administration created a Task Force to negotiate and resolve those and other related claims in lieu of conferring upon DHHL a right to sue the State. *See supra* note 277 and accompanying text. The Task Force was comprised of the Office of State Planning (representing the State as active wrongdoer in the illegal use of Homelands) and the Director of DHHL (arguably a passive wrongdoer in allowing the illegal use), both of whom were advised by the State Attorney General's office. The Task Force denied Native Hawaiian community organizations' explicit request to participate on the Task Force. When the DHHL was poised to receive payment from the State in settlement of claims, based on Task Force "recommendations," and sign a broad release waiving past and future claims, Ka'ai'ai, et. al. sued in federal court asserting the principle of Native Hawaiian self-determination in resolving trust claims against the State, and alleging a breach of trust in the exclusion of Native Hawaiian participation on the Task Force. Plaintiffs' section 1983 claim was vigorously opposed by the State on procedural grounds. See *supra* Part III for a description of the procedural obstacles faced by Native Hawaiians in federal court. During the preliminary injunction hearing, plaintiffs voluntarily

legislation, an independent representative of Homelands beneficiaries has been appointed to the Task Force. Task Force deliberations are continuing.[280]

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dismissed their suit. They then filed suit in state court, relying in principal part on Pele Defense Fund v. Paty (see *supra* Part *IV*) which had been decided by the Hawai'i Supreme Court just a few days earlier. State circuit court Judge Patrick Yim granted plaintiffs' temporary restraining order request, enjoining execution of the release and payment of the settlement amount. The State defendants thereafter, in a partial settlement, agreed to withdraw the release and to pay over the settlement amount without requiring a DHHL waiver of claims. The parties agreed to continue litigation over plaintiffs' claim for court appointment of an independent representative to the Task Force to represent Homelands Trust beneficiaries. The circuit court then granted defendants' motion for summary judgment on that claim on political question grounds. The defendants, however, agreed to defer seeking entry of a final judgment while state legislation was pending concerning authorization of the court's appointment of the independent representative. Ultimately, the legislation passed and the parties agreed to a process for the court's appointment of the independent representative and to convert the case to a class action. The class action was certified with subclasses and subclass counsel (representing beneficiaries on homestead land; beneficiaries with homestead awards who were precluded from occupancy pending infrastructure improvements; and homestead waitlist beneficiaries). On August 13, 1993, Circuit Court Judge Virginia Lea Crandall appointed Edward King as independent representative. Mr. King is the former Chief Justice of the Supreme Court of the Federated States of Micronesia.

Co-authors Yamamoto and Kalama were members of the legal team representing plaintiffs in the litigation. Co-author Haia provided research assistance to independent representative King.

[280] Individual trust beneficiaries' claims arising out of state breaches of the Hawaiian Homelands trust occurring between August 21, 1959 and June 30, 1988 are handled by HAW. REV. STAT. § 674 (1988), *Individual Claims Resolution Under The Hawaiian Home Lands Trust.*

A "beneficiary" is defined as "any person eligible to receive benefits of homesteading and related programs from the Hawaiian Home Lands trust." HAW. REV. STAT. §§ 674-2 (1991). Only "individual beneficiaries" are afforded the § 674 right to panel review and, subsequently, if an "individual beneficiary" becomes an "aggrieved individual claimant," the right to sue. HAW. REV. STAT. §§ 674-1 (1991) and 674-17 (amd. 1993). This class of claimants is more limited than the class described in §§ 673-2(a) which permits actions by native Hawaiian organizations as well as individuals.

Chapter 674 establishes an individual claims review panel to evaluate post-statehood, pre-July 1, 1988 Homelands breach of "actual damage" trust claims by individual beneficiaries. Like Chapter 673, Chapter 674 precludes awards of punitive and consequential damages. All claims must be filed with the panel for review by August 31, 1993. Each individual damage claim, if not consolidated, will be heard before the five member panel. The panel, acting as a advisory body, will then transmit reports to the governor and legislature, "at least twenty days prior to the convening" of the

B. Limited Remedies, Limited Rights to Sue

At first glance Chapter 673's "right to sue" appears to provide Native Hawaiians with a statutory vehicle for redress of past trust breaches, for presently enforcing Native Hawaiian land trust rights, and for deterring future State trust breaches. Chapter 673, however, places formidable stumbling blocks on the path to the state courthouse. A continuing Homelands trust breach that arose between August 21, 1959 and June 30, 1988 is not actionable. As previously discussed, Chapter 673 assigns to the governor the task of resolving those claims.[281] Actionable claims accruing between July 1, 1988 and July 1, 1990, and not filed by June 30, 1992, are time-barred. The notice and exhaustion of administrative remedies requirements, and the immunities delineated in § 673-1(b), erect procedural and substantive defenses for State officials.[282]

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legislative sessions of 1993 and 1994, "regarding the merits of each claim . . ., including an estimate of the probable award of actual damages or recommended corrective action." HAW. REV. STAT. §§ 674-1 (amd. 1993). The legislature, after review of the panel's recommendations, may then make compensatory awards, enact further legislation, or take any other action it deems appropriate. HAW. REV. STAT. §§ 674-1(C) (amd. 1993). Chapter 674 does not mandate that the legislature follow the panel's recommended action in any case.

A claimant who is not satisfied with the action taken by the legislature with regard to his individual claim may then initiate an action in the Hawaii circuit courts. HAW. REV. STAT. §§ 674-1(2) (amd. 1993) and 674-17 (amd. 1993). Such actions must be initiated between October 1, 1994 and September 30, 1996. HAW. REV. STAT. §§ 674-17 (amd. 1993) and 674-19 (amd. 1993).

[281] *See supra* note 273 and accompanying text.

[282] HAW. REV. STAT. §§ 673-1(b) provides that "This waiver shall not apply to the following:

(1)The acts or omissions of the State's officers and employees, even though such acts or omissions may not realize maximum revenues to the Hawaiian home lands trust or native Hawaiian public trust, so long as each trust is administered in the sole interest of the beneficiaries; provided that nothing herein shall prevent the State from taking action which would provide a collateral benefit to non-beneficiaries, but only so long as the primary benefits are enjoyed by beneficiaries, and the collateral benefits do not detract from nor reduce the benefits enjoyed by the beneficiaries

(2) Any claim for which a remedy is provided elsewhere in the laws of the State; and

(3) Any claim arising out of the acts or omissions of the members of the board of trustees, officers and employees of the office of Hawaiian affairs, except as provided in section 10-16.

HAW. REV. STAT. §§ 673-1(b) (1988).

Most significant, Chapter 673 remedies are sharply limited, creating disincentives to sue. Land or monetary damages resulting from trustees' breaches will be awarded only to the trust itself, that is, returned to the control of the possibly breaching trustees, and not to any individually injured beneficiary.[283] A beneficiary will only be allowed to recover "actual" damages sustained, which ordinarily will be minimal, even though that beneficiary has proven that the trust had been badly damaged.[284] Even if the beneficiary proves that the breach precluded her from receiving an award of homestead land or from moving onto land earlier awarded,[285] Chapter 673 appears to leave her remediless. For this person the breach continues. Her incentive to litigate a costly and time-consuming suit is nil.[286] Chapter 673 remedies cannot place her on a homestead lot or order the Hawaiian Homes Commissioners (or State actors as trustees of the Ceded Lands trust) to take specific structural actions for the benefit of trust beneficiaries.

At bottom, the State as trustee risks little under Chapter 673 when it breaches its fiduciary obligations to trust beneficiaries. History reveals why Native Hawaiians and other indigenous peoples in America have been appropriately wary of western-based legal systems.[287] It is perhaps for these reasons that Native Hawaiians' initial "wait and see" attitude toward the "right to sue" Act has changed. That attitude has now turned to one of apparent futility.[288]

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[283] HAW. REV. STAT. §§ 673-4(a) (1988).

[284] HAW. REV. STAT. §§ 673-4(a) and (b) (1988).

[285] Since authorized relief is limited specifically to restorative damages or a return of the illegally taken land, the extent of state court injunctive relief power is uncertain. Can the courts order injunctive relief to stop a trust breach for mismanagement of trust land, for inadequate funding of infrastructure or, for failing to properly award Homelands parcels to beneficiaries? A strong argument can be fashioned that a state court retains an inherent equitable power to issue injunctions even though injunctive relief is omitted from the list of statutory remedies. What remains uncertain, even if injunctive relief power is recognized, is the scope of that power.

[286] HAW. REV. STAT. §§ 673-5(b) (1988) does, however, allow the court, "as it deems just," to award "a prevailing plaintiff . . . a reasonable sum for costs and expenses incurred, including reasonable attorney's fees." HAW. REV. STAT. §§ 673-5(b) (1988).

[287] The Mahele of 1848, which applied private property concepts to Hawaii's communal land base, and the Kuleana Act of 1850 illustrate the consequences visited upon Hawaiians by the imposition of a western legal system. For an excellent analysis and portrayal *see* KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES, *supra* note 22, at 8-16. *See also* MACKENZIE, *supra* note 22, at 3-10, (1990).

[288] Teruya, *supra* note 37, at 920 (observing "after passage of the Native Hawaiian

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Trust Judicial Relief Act in 1988, the Native Hawaiian community adopted a wait and see attitude.") The State's stated purpose in passage of the Native Hawaiian Trusts Judicial Relief Act, to redress past wrongs and discourage present and future abuses, loses much of its force when considered along with the State's seemingly determined litigation efforts to restrict significantly Native Hawaiians' right to sue the State. *See* Teruya, *id.* at 922. To date no claims have been litigated under Chapter 673.

Hawaii Revised Statutes §§ 661-1(1) provides a possible additional avenue for Native Hawaiian breach of trust claims. It waives the State's sovereign immunity for "[a]ll claims against the State founded upon any statute of the State; or upon any regulation of an executive department; or upon any contract, expressed or implied, with the State[.]" Haw. Rev. Stat. §§ 661-1(1) (19). In the Aged Hawaiians v. Hawaiian Homes Comm'n, Civ. No. 89-244 (3rd Cir. 19), Native Hawaiian plaintiffs argued that their claims were founded upon the Hawaiian Homes Commission Act, which is a "statute of the State" within the meaning of §§ 661-1(1), and upon the regulations governing the Hawaiian Homes Commission and Department of Hawaiian Home Lands, which are "regulations of an executive department" also within the meaning of §§ 661-1(1). They further argued that the Homeland Commission Act is a "contract, expressed or implied, with the State" as set forth in §§ 661-1(1) because the State of Hawaii adopted the Act as "a law of the State" and accepted trust provisions imposed thereunder "as a compact with the United States." The plaintiffs therefore asserted in the lower court that the State had waived its immunity from suit for Native Hawaiians' breach of trust (breach of the compact) claims.

The theory underlying the Aged Hawaiians position was that §§ 661-1(1) is analogous to the Tucker Act, 28 U.S.C. § 1491 (1992) and the Indian Tucker Act, 28 U.S.C. § 1505 (1982). In United States v. Mitchell, 463 U.S. 206 (1983), the Supreme Court held that under the latter Act the United States waived its sovereign immunity over certain claims by Indian tribes for money damages for the United States' breach of trust duties. Such a waiver of immunity under §§ 661-1(1), if recognized, would avoid the prospective/retrospective relief conundrum of Eleventh Amendment immunity analysis as well as the numerous procedural obstacles of the Trusts Judicial Relief Act. The Hawaii appellate courts have yet to rule on the possibility of a §§ 661-1(1) right to sue.

Bush v. Hawaiian Homes Commission, Haw. , P.2d (Hawaii April 5, 1994) (Appeal No. 16840) raises related questions concerning the methods under Hawaii law for bringing an after-the-fact challenge to an agency action that is arguably unlawful. *Bush* held that relief is *not* available via an administrative appeal under § 91-14 if the agency was not required, by constitutional provision, statute, or administrative rule, to have held a contested case hearing. *Bush* can thus be seen as, in some ways, the mirror image of *Punohu v. Sunn*, 66 Haw. 489, 666 P.2d 1133 (1983), in which the Hawaii Supreme Court earlier held that, where a "contested case" is mandated under statute,

Birth Sands.'''[291] "Struggle Continues Over Molokai Pipeline [across Homelands].''[292] The news headlines continue. And Native Hawaiian land controversies continue to head toward the courts. How will the courts, federal and state, perform in the context of these increasingly frequent and intensifying controversies? For the foreseeable future, the federal courts, at the State's behest, appear to have all but foreclosed Native Hawaiian breach of trust claims for meaningful structural relief. The Hawai'i Legislature's Native Hawaiian "Right to Sue" Act may now fairly be characterized as a complete failure. The Hawai'i Supreme Court's 1992 *Pele* decision focused on state constitutional provisions concerning the land trusts and opened state courthouse doors. It also signaled sensitivity to customary Native Hawaiian cultural practices by expanding gathering rights outside of the ahupua'a of residence.[293] By adopting federal immunity strictures, however, the Court in *Pele* then appeared to restrict sharply Native Hawaiians' new-found right to sue for land trust breaches.

From one vantage point, the federal courts, for a variety of possible reasons, may be indirectly ceding dispute resolution (and transformation power concerning Native Hawaiian breach of land trust claims) to the state courts. From that same vantage point, the Hawai'i state courts

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a challenge to agency action *must* proceed under § 91-14, and relief under § 632-1 is unavailable. On the other hand, Hawaii's Thousand Friends v. City and County of Honolulu, Haw. , 858 P.2d 726 (Hawaii September 16, 1993) (Appeal No. 15923), indicates that declaratory relief *is* available in an action under § 632-1 where *no* contested case hearing is mandated. Accordingly, it appears that relief under § 91-14 is available only if the agency is mandated to provide a contested case hearing (in which case that remedy *must* be used), whereas relief under §632-1 and/or § 91-7 will be available in other cases.

[289] Mililani Trask, *Hawaiians Must Have Control Over Trust And Ceded Lands*, HONOLULU STAR BULLETIN, March 9, 1994, at A-19 (letter to the editor by Mililani Trask, governor of Ka Lahui Hawaii, reacting to a proposal by the editor of the Star Bulletin, A. A. Smyser).

[290] *Recent Hawaiian Land Occupations*, THE HONOLULU ADVERTISER, February 20, 1994, at B-1.

[291] Lilikala Kame'eleihiwa, *A Hawaiian Point of View: The Beaches Are Our Birth Sands*, THE HONOLULU ADVERTISER, February 20, 1994, at B-1.

[292] *Struggle Continues Over Moloka'i Pipeline*, KE KIA'I, March 1, 1994, vol. 5, no. 3, at 10-11 (describing suit by Molokai homesteaders, residents, groups and Chamber of Commerce to stop private resort developer's installation of a large water pipeline which would deplete available ground water resources that could be used in Homelands development).

[293] *See supra* note 179 (discussing Pele's expansion of Kalipi gathering rights on undeveloped private land).

may now be struggling with reconceptualizing the appropriate state judicial function in light of dramatically changing circumstances. Amidst the accelerating Native Hawaiian self-determination movement, Native Hawaiian claimants have stoked the fires of change by asserting legal claims concerning trust lands in both traditional and expansive frameworks (which include the assertion of the relevance of international human rights norms).

A significant question raised by these changing circumstances is how decisions about court process, including courthouse entry, will mediate or transform the often conflicting cultural messages underlying Native Hawaiian land trust controversies.[294] This question in turn implicates the cultural performances of state courts in handling such controversies. Will the stories developed and told there lift up hidden voices and portray the complexity of history and culture? And with what impacts on decisional outcomes, dominant societal narratives and existing power arrangements? Will the courts be able to serve a jurisgenerative function?[295] Or should Native Hawaiians turn to, or create, some other law center for addressing their historically and culturally-rooted land claims?

Nell Jessup Newton, in writing about the future of Native American stories and the legal process, broadens the context for these questions. We have substituted "Native Hawaiian" for "Indian" in her passage quoted below to emphasize the appropriateness of her observations to Native Hawaiians, without, we believe, changing her meaning.

> [T]he cases represent stories not just of individual persons but of peoples who continue to struggle to maintain their right to exist separately in a

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[294] As Nell Jessup Newton points out, court access alone for indigenous groups assures little over time. How claims are handled and transformed are also salient issues. The

> "single greatest influence on the development of modern Indian law was the opening of the federal courts to Indian tribes in 1965. . .The federal district courts [during the heyday of judicial activism] provided forums willing to listen to new doctrines in Indian law. . .Some of these cases, in turn, had a salutary impact on Indian claims in the claims courts. This impact, however has not been far-reaching enough to result in significant changes for aggrieved tribes. Widening the array of courts to which Indians can bring their claims has simply not erased the rules that, by twists and turns, seem so often to result in no recovery for Indian tribes."

Newton, *Indian Claims*, *supra* note 18, at 851-52.

[295] *See supra* note 160 (describing Robert Cover's use of the term "jurisgenerative," meaning affirming law created by communities, and its antithesis, "jurispathic," meaning destruction of community created law).

> world still waiting for them to assimilate. The claims from which these stories spring represent ancient grievances as well as recent wrongs. By listening to these stories carefully and relating them to those in power, it may be possible to begin to work through to real resolutions of [Native Hawaiian] grievances, resolutions that involve some land and recognition of real power.[296]

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[296] Newton, *Indian Claims*, *supra* note 18, at 854. Newton also poses essential questions about the process and structure of alternative forums.

> "To make these strategic decisions, it is necessary to consider not only the substantive law applied in each court, but also the structure of that court and the process employed within it. . .[I]f the old system appeared biased in favor of the Government. . ., does the new system remove the appearance or reality of bias, either because of the way it has been constituted or because of the procedures adopted? If not, should tribes try to avoid these courts even more than they do now? Or, is the alternative similarly flawed?"

Id. at 839.