

Native Hawaiians and the New Frontier of the Indian Civil Rights Act

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INTRODUCTION

Native Hawaiians, similar to Native Americans Indian tribes, are federally confirmed¹ as indigenous people and thus deserving of a trust relationship² with the United States. However, unlike Indian tribes, Native Hawaiians are not federally recognized.³ Federal recognition bestows upon

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1. I use the term "federally confirmed" to mean an entity that has been treated as the indigenous inhabitants of a specified area, now under the control of a larger nation-state, and deserving of special federal protection, rights, or treatment based on its status as indigenous people through a statute, regulation, judicial opinion, or some other legally valid document emanating from the nation-state in question.

2. In contrast, "trust relationship" is a term that stems from the Marshall trilogy, first articulated in *Cherokee v. Georgia*, 30 U.S. 1, 17 (1831) (comparing the relationship of the Cherokee Nation to the US as a "ward to his guardian") and best stated in *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942), as the US "has charged itself with moral obligations of the highest responsibility and trust" toward Indian Tribes. This trust responsibility creates an enforceable fiduciary obligation between the US and the beneficiary tribes.

3. "Federal recognition" refers to an indigenous entity that has an established government-to-government relationship with the US government and is listed on the Department of the Interior's Federally Recognized List published in the Federal Register, as required by the Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791. Tribes can obtain federal recognition in multiple ways: signing and ratifying a treaty with the US government, requesting Congress pass a statute that recognizes the

tribes a government-to-government relationship that serves as an acknowledgment of the political nature of indigenous entities. Indigenous people, who preexisted the formation of the US as sovereign entities, are unique among minorities due to the political nature of their relationship with the US. While Indian tribes negotiated treaties that affirmed their sovereign status within the larger boundaries of the US, Native Hawaiians entered the US when a group of non-Hawaiian businessmen overthrew the Kingdom of Hawai'i with the support of the US military. The act of illegally overthrowing a sovereign monarchy thus brought Native Hawaiians under the fold of the US Constitution whereas Indian tribes exist as largely extra-constitutional entities.⁴

Since the overthrow of the Kingdom of Hawai'i, Native Hawaiians have continued to exist as an indigenous community. Many Native Hawaiians have striven for federal recognition and the same rights and privileges of Indian tribes.⁵ Others have steadfastly opposed any type of assent to the jurisdiction of the United States, believing that the overthrow of the Hawaiian Kingdom was illegal and must be rectified.⁶ In 2015, the Department of the Interior (DOI), recognizing that a process for administratively recognize Native Hawaiians did not exist, proposed a rule titled "Procedures for Reestablishing a Formal Government-to-Government Relationship With the Native Hawaiian Community."⁷ Indian tribal entities already have administrative regulations that provide a parallel process under

sovereignty of the tribal nation, or going through an administrative process outlined in Procedures for Federal Acknowledgment of Indian Tribes, 25 C.F.R. Part 83 (2019) [hereinafter Acknowledgment Procedures]. The judiciary may recognize a tribe for the purposes of resolving a dispute, but they have not attempted to recognize a relationship between the US and a tribal nation beyond the terms of a particular case appearing before the bench.

4. Article I, Section 8, Clause 3 of the US Constitution grants Congress the authority to regulate commerce "with foreign Nations, and among the several States, and with the Indian Tribes." The Constitution mentions Indians in two other places, Article I, Section 2, Clause 3 and the Fourteenth Amendment, both of which exclude Indians not taxed for the purposes of determining representation in the House of Representatives. Each provision supports the proposition that Indian tribes were not considered to be part of the US in the same way as citizens and slaves when the framers drafted the Constitution. See Angela R. Riley, *Native Nations and the Constitution: An Inquiry into "Extra-Constitutionality,"* 130 HARV. L. REV. F. 173 (2017) (providing a discussion of what it means for Indian tribes to be mentioned in the Constitution, but beyond the reach of the Bill of Rights).

5. The so-called Akaka Bill was introduced at the behest of Native Hawaiian constituents by Senator Akaka from the 106th Congress to the 111th Congress. See, e.g., S. 2899, 106th Cong. (2000); H.R. 4904, 106th Cong. (2000); S. 1011, 111th Cong. (2009); H.R. 2314, 111th Cong. (2009).

6. Lorelei Laird, *Native Hawaiians Wage an Ongoing Battle to Organize into a Sovereign Nation*, ABA JOURNAL (Nov. 2017), http://www.abajournal.com/magazine/article/native_hawaiians_wage_an_ongoing_battle_to_organize_into_a_sovereign_nation [<https://perma.cc/93PK-DL6B>]; see Francis A. Boyle, *Restoration of the Independent Nation State of Hawaii Under International Law*, 7 ST. THOMAS L. REV. 723, 732-33, 742 (1995) (providing visceral arguments under international law concepts for the restoration of the Hawaiian Kingdom).

7. Procedures for Reestablishing a Formal Government-to-Government Relationship with the Native Hawaiian Community, Proposed Rule, 80 Fed. Reg. 59,113 (Oct. 1, 2015) [hereinafter Proposed Rule].

the Procedures for Federal Acknowledgment of Indian Tribes.⁸ However, Native Hawaiians are excluded from petitioning for, and thus obtaining, federal recognition under these regulations.⁹

The DOI recognized that the US had a government-to-government relationship with Native Hawaiians in the past. Thus, through the administrative rulemaking process under the Administrative Procedure Act (APA), the DOI sought to reestablish that relationship.¹⁰ Through this rulemaking process, the Indian Civil Rights Act (ICRA) became one facet of debate. The ICRA, originally passed in 1968,¹¹ was a hallmark piece of legislation. In the aftermath of the Civil Rights Movement, non-Indian civil rights groups hailed the ICRA as a law that would ensure that tribal nations respected the inherent civil rights of its citizens.¹² The ICRA imposed most of the Bill of Rights onto tribal nations.¹³ While there was little indication at the time that tribal governments were violating the rights of tribal citizens, Congress deemed this legislation necessary to ensure the protection of all citizens' (including Native American citizens') rights.¹⁴ Fundamentally, the ICRA limits tribal self-determination by imposing a set of principles that may not be traditional to the tribe and providing federal oversight of its implementation.

One new and surprising employ of the ICRA is its use to define the boundaries of the United States' relationship with *all* indigenous people, including Native Hawaiians. A core group of Native Hawaiians have pushed for federal recognition for decades and recently celebrated the finalization of a rule¹⁵ ("Final Rule") establishing a pathway for Native Hawaiians to achieve federal recognition.¹⁶ The ICRA has emerged as a surprising subject

8. Acknowledgment Procedures, *supra* note 3.

9. *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1283 (9th Cir. 2004) (holding exclusion of Native Hawaiians from federal recognition regulation does not violate Fifth Amendment under rational basis review).

10. It is important to note that rather than create a new relationship, which is what the regulations under Acknowledgment Procedures, *supra* note 3, effectively accomplish, the regulations under Procedures for Reestablishing a Formal Government-to-Government Relationship with the Native Hawaiian Community, 43 C.F.R. Part 50 (2018) reestablish a relationship that was already in existence. This may impact, and possibly lessen, the legal authority needed to justify the DOI engaging in this rulemaking because there is a presumption that the relationship already existed.

11. Indian Civil Rights Act, Pub. L. 90-284, 82 Stat. 73 (1968).

12. S. REP. NO. 99-841, at 5 (1967); *see generally* *Constitutional Rights of the Am. Indian: Hearings Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 87th Cong. 117 (1961) (discussing the advantages of including a Bill of Rights in a tribal constitution).

13. 25 U.S.C. § 1302 (2018). The exclusions include the Establishment Clause, right to bear arms, right to be free from mandatory quartering of soldiers, grand jury provisions, freedom from cruel and unusual punishment, etc.

14. Robert Berry, *Civil Liberties Constraints on Tribal Sovereignty After the Indian Civil Rights Act of 1968*, 1 J.L. & POL'Y 1, 20 (1993) (noting that the Senate Subcommittee on Constitutional Rights found abuses by federal, state, and tribal governments but focused exclusively on responding to tribal government abuses).

15. Procedures for Reestablishing a Formal Government-to-Government Relationship With the Native Hawaiian Community, Final Rule, 81 Fed. Reg. 71,278 (Oct. 14, 2016) [hereinafter Final Rule].

16. Melody K. MacKenzie, *Native Hawaiians and Federal Law*, in NATIVE HAWAIIANS AND U.S.

of internal and intergovernmental debate during this rulemaking process. Federal officials have made clear that they are unwilling to accept Native Hawaiians on a government-to-government basis without the express civil rights and civil liberties protections afforded in the ICRA.¹⁷ As a result, as Native Hawaiians build their nation, they will have to determine whether the insistence of the ICRA's mandates correlates with their internal understanding of the duties of their government.

This Article analyzes how the ICRA, a sovereignty-restricting piece of legislation, has become embedded in the foundation of modern indigenous law in the United States and why Native Hawaiians must address the ICRA in their journey for self-determination. Part I provides a brief background on the ICRA, its inception, and its legislative history and discusses the practical benefits and challenges the ICRA has presented to federally recognized tribal nations. Part II provides a historical backdrop from which we can analyze the current drive for Native Hawaiian self-determination. Part III addresses how the ICRA has been applied to Native Hawaiians through the Final Rule and discusses the current legal status of Native Hawaiians as the indigenous people of Hawai'i and the efforts of a diverse group of Native Hawaiians to draft a Native Hawaiian Constitution.

I. THE IMPACT OF THE INDIAN CIVIL RIGHTS ACT

The purported need for a statute that so broadly imposes Western judicial principles and values on federally recognized tribes has never been fully established. Yet, Congress worked to pass the ICRA for several sessions, providing us with a rich legislative record. Analysis of the legislative record and the ICRA's unique birth across two policy eras provides the backdrop for a discussion of whether the ICRA's passage was beneficial or harmful to tribal nations.

A. *Born of Two-Policy Eras*

The ICRA, born out of the civil rights movement and federal politics, was passed in 1968. The actual intent behind the ICRA has always been

LAW IN NATIVE HAWAIIAN LAW: A TREATISE 267–83 (Melody K. MacKenzie et al. eds., 2015) (examining the basis of sovereignty claims and reviewing the evolution of the Native Hawaiian movement for self-determination and self-governance); Davianna P. McGregor, *Recognizing Native Hawaiians: Reality Bites*, in SOVEREIGN ACTS: CONTESTING COLONIALISM ACROSS INDIGENOUS NATIONS & LATINX AMERICA 125–51 (Francis Negron-Muntaner ed., 2017) (discussing movements and strategies pursued to achieve sovereignty for Native Hawaiians).

17. First, the Acknowledgment Procedures, *supra* note 3, at § 83.3, explicitly excluded Native Hawaiians. Even if Native Hawaiians were able to avail themselves of the Acknowledgment Procedures, they would enter into the sphere of federal recognition on the same basis as other federally recognized tribes and therefore be subject to the ICRA. Later, in the administrative rulemaking process from 2014 to 2016 for the Final Rule, *supra* note 15, federal officials made clear orally and then in the final rulemaking that for any Native Hawaiian governing entity to be eligible for federal recognition it would be required to incorporate the same protections found in the ICRA.

shrouded in suspicion.¹⁸ Just four years earlier, the Civil Rights Act of 1964 was passed with much anticipation and fanfare from its supporters.¹⁹ However, most tribal nation opposed the ICRA, the counterpart to the Civil Rights Act.²⁰ Furthermore, the primary sponsor of the ICRA, Senator Sam Ervin, had a limited understanding of indigenous people.²¹ Despite the opposition by Indian groups, the strategic campaign towards general civil rights and equality led by some of our nation's leaders made the ICRA relatively easy to pass.²²

Senator Ervin believed the bill would correct the injustices that the indigenous people of the United States had faced and ensure that they were treated in a constitutional manner.²³ While many Indians testified about civil rights abuses, the majority of these complaints identified federal and state officials as the perpetrators.²⁴ In addition, Senator Ervin was a Southern apologist who opposed the Civil Rights Act of 1964, making his change of heart for Native Americans somewhat suspect.²⁵ At least one scholar has argued that Senator Ervin actually intended the ICRA to be a distraction from the Civil Rights Act implementation and an effort to reestablish a states'-rights-dominated policy agenda.²⁶

The purported need for the ICRA can be traced back to an 1898 US

18. See Donald L. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. ON LEGIS. 557, 605–07 (1972) (providing an in-depth legislative history of the ICRA); see also Bethany R. Burger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 642–44 (2009) (noting that the Senator Ervin was an opponent of other civil rights efforts); Peter W. Birkett, Note, *Indian Tribal Courts and Procedural Due Process: A Different Standard?*, 49 IND. U. L.J. 721, 725 (1974) (noting that the legislative history of the ICRA provides little guidance for determining its intended effect).

19. See RODNEY P. CARLISLE AND J. GEOFFREY GOLSON, AMERICA IN REVOLT DURING THE 1960S AND 1970S 159 (2008) (noting African Americans celebrated passage of 1964 Act and women looked to civil rights movement as model of organization for social change); Joni Hersch & Jennifer B. Shinall, *Fifty Years Later: The Legacy of the Civil Rights Act of 1964*, 34 J. OF POL'Y ANALYSIS & MGMT. 424, 424 (2015) (noting that fifty years later, public opinion around the 1964 Act remains overwhelmingly positive).

20. Carey N. Vicenti, *The Reemergence of Tribal Society and Traditional Justice Systems*, 79 JUDICATURE 134, 136 (1995); Michael D. Lieder, *Navajo Dispute Resolution and Promissory Obligations: Continuity and Change in the Largest Native American Nation*, 18 AM. INDIAN L. REV. 1, 40 n.236 (1993) (noting that the Navajo Nation adopted a Navajo Bill of Rights “in part to try to forestall passage of the ICRA”); see DENNIS DECONCINI, A NEW FEDERALISM FOR AMERICAN INDIANS, S. REP. NO. 101-216 at 57 (1989) (suggesting that Senator Ervin was championing the ICRA to show that the liberals were ignoring Indians in favor of southern race relations).

21. Donald L. Burnett, Jr., *An Historical Analysis of the 1968 'Indian Civil Rights' Act*, 9 HARV. J. ON LEGIS. 557, 576 (1972) (noting Senator Ervin's perspective was limited by trying to duplicate the assimilation experience of the Cherokee and Lumbee in North Carolina on a national level); Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 809 n.61, 840 (2007) (noting Senator Ervin's failure to realize that Indians are different from other citizens and want the freedom to stay that way).

22. Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 469 (1988).

23. Burnett, Jr., *supra* note 21, at 575.

24. JOHN R. WUNDER, “RETAINED BY THE PEOPLE”: A HISTORY OF AMERICAN INDIANS AND THE BILL OF RIGHTS 133, 136 (1994).

25. Burnett, Jr., *supra* note 21, at 575.

26. See, e.g., *id.* at 575, 605–07.

Supreme Court case, *Talton v. Mayes*, which held that tribal nations were not subject to the Constitution because their status as “distinct, independent political communities” placed them outside of the US Constitution.²⁷ Talton, a Cherokee Indian, was convicted in the Cherokee Court of murdering another Cherokee.²⁸ Talton appealed his conviction and death sentence to the Supreme Court on the grounds that he was not afforded his Fifth Amendment right to a grand jury because the Cherokee Nation’s grand jury consisted of fewer jurors than required under federal law.²⁹ However, the Court held that Indian tribes were not required to adhere to the grand jury requirements under the US Constitution.³⁰ Later, when Native Americans became US citizens,³¹ some advocates urged, and Congress agreed, that the ICRA was necessary to ensure the protection of all citizens’ rights.³²

Tribal governments predated the formation of the United States, so their powers of governance are not derived from the US Constitution.³³ Because tribal sovereignty is inherent in tribal governments, tribal nations are considered extra-constitutional polities. Some activists in the civil rights era became concerned that tribal nations were being excused from the universal responsibilities articulated in the US Constitution.³⁴ With the understanding that the Bill of Rights was incorporated to state governments, these individuals began an effort to subject tribal nations to the Bill of Rights as well.³⁵

The ICRA straddles the Termination Era and Self-Determination Era of Indian policy, and elements of its confused birth can be seen throughout the bill. The Termination Era spanned from 1945 to the 1960s, a time when Congress wanted to “get out of the Indian business.”³⁶ The Termination Era was a dark period in Indian policy where, in an effort to rid itself of responsibility for Indians, the federal government used its plenary power to transfer its authority over Indian affairs to certain enumerated states and terminate the government-to-government status of certain tribes.³⁷ During

27. *Talton v. Mayes*, 163 U.S. 376, 383 (1898).

27. *Id.* at 379.

28. *Id.*

29. *Id.*

30. *Id.* at 384.

31. Indian Citizenship Act, 8 U.S.C. § 1401(b) (2018).

32. Albert van der Sandt Centlivres, *Report of the United States Commission on Civil Rights*, 19 ACTA JURIDICA 1, 12–14 (1962) (discussing Commission’s remarks on the position of American Indians); see Note, *The American Indian-Tribal Sovereignty and Civil Rights*, 51 IOWA L. REV. 654, 668–69 (1966) (arguing that there should be federal judicial review on tribal civil rights issues).

33. *Talton*, 163 U.S. at 383; see also *United States v. Wheeler*, 435 U.S. 313, 329 (1978) (relying on *Talton* to hold that tribal sovereignty is distinct from the federal government).

34. *The American Indian*, *supra* note 32, at 665.

35. See *id.* at 669 (arguing that there should be federal judicial review on tribal civil rights issues).

36. STEPHEN E. CORNELL, RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE 131 (1990).

37. DONALD L. FIXICO, TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY, 1945–1960 91–133 (1986) (describing the termination policy and Public Law 280 within the larger context of concurrent events and policies). Public Law 280 created a mandatory transfer of federal criminal

this period, tribes subjected to termination experienced a devastating loss of land, resources, and culture.³⁸ President Nixon's address to Congress in 1970 marked the official end of the Termination Era and ushered in the Self-Determination Era, where tribes were encouraged to take on increasing responsibility for their own futures.³⁹

Scholars disagree on whether the ICRA served to discourage tribal self-determination or promote it. On the one hand, the ICRA is an example of congressional imposition of Western ideology.⁴⁰ This unilateral imposition limited tribal actions to those actions that comported with the United States Constitution, akin to a diminishment or termination of sovereign rights.⁴¹ On the other hand, the recognition that tribes were able to violate the civil rights of their citizens highlighted the fact that Congress recognized their political power.⁴² The ICRA also incorporated several exclusions, such as the Establishment Clause and grand jury provisions,⁴³ showing that Congress was mindful of the unique situation of tribal nations and enacted legislation that respected self-governance.⁴⁴

The exclusions and alterations were largely due to the lobbying efforts of individual tribal nations, tribal interest groups, and other interested parties. This underscores that while the ICRA was passed over tribal objections, the majority of politicians still took tribal interests and culture into consideration.⁴⁵ The resulting statute was a compromise from Senator Ervin's recommendation for the identical application of the Bill of Rights to

jurisdiction over tribal nations to six states where those nations are located: California, Minnesota (except Red Lake Reservation), Nebraska, Oregon (except Warm Springs Reservation), Wisconsin (except Menominee Indian Reservation), and Alaska. It did not, however, alter tribal criminal jurisdiction.

38. See, e.g., Wenona T. Singel & Matthew L.M. Fletcher, *Power, Authority, and Tribal Property*, 41 TULSA L. REV. 21, 26–31 (2005).

39. President Richard Nixon, Special Message to Congress on Indian Affairs (July 8, 1970) (available at http://www.ncai.org/attachments/Consultation_IJaOfGZqYsuxpPUqoSSWlaNTKEJEPXxKLzLcaOiki fwWhGOLSA_12 Nixon Self Determination Policy.pdf) [<https://perma.cc/Z9CR-BHDQ>]; Indian Self Determination and Education Assistance Act, 25 U.S.C. § 5301 et seq. (2018).

40. See, e.g., *ICRA Reconsidered: New Interpretation of Familiar Rights*, 129 HARV. L. REV. 1709, 1715 (2016).

41. See, e.g., Teddy Webb, *Alvarez v. Lopez: The Ninth Circuit Overextends Congress's Intended Use of Plenary Powers with its Interpretation of the ICRA Jury Provision*, 42 AM. INDIAN L. REV. 237, 242–43 (2017) (noting that the ICRA is a sovereignty-restricting statute).

42. See *ICRA Reconsidered*, *supra* note 40, at 1718.

43. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 63 n.14 (1978) (discussing differences between ICRA and Bill of Rights); see also Webb, *supra* note 41, at 250–52 (agreeing with dissent in *Alvarez v. Lopez* that the federal Bill of Rights was not imposed on tribes but instead used via selective incorporation or modification as a model for tribal rights, as evidenced by key distinctions between many provisions of the ICRA and the Bill of Rights).

44. See *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1359–60 (1969) (noting the various exclusions that the Committee considered); see, e.g., Webb, *supra* note 41, at 244 (noting that ICRA selectively incorporated and modified some of the Bill of Rights provisions to fit the unique political, cultural, and economic needs of tribal government).

45. McCarthy, *supra* note 22, at 469–72 (noting ICRA was tempered by respect for tribal sovereignty).

a modified application accounting for tribal concerns.⁴⁶ The final statute was quite a departure from the original bill, which not only fully applied the Bill of Rights, but also required federal appellate courts to provide a trial de novo for tribal ICRA complainants, highlighting the distrust of tribal courts.⁴⁷

The ICRA brought cases originally heard in tribal court under federal oversight. Before the passage of the ICRA, the Supreme Court held in *Worcester v. Georgia* that the laws of a state could have no force within an Indian reservation.⁴⁸ Over a century later, in *Montana v. United States*, the Court reaffirmed that the tribe retained control over internal matters.⁴⁹ Now, Indian citizens who believe that their tribal nation impinged upon their rights can theoretically take their case to federal court for review. On its face, the oversight over tribal cases under the ICRA is broad. At first, the ICRA appeared to grant oversight over nearly all tribal governmental actions. But ten years after the passage of the ICRA, in *Santa Clara Pueblo v. Martinez*, the Supreme Court clarified that the only recourse available under the ICRA is habeas corpus, which severely limits practical federal oversight.⁵⁰

These compromises, along with the implicit recognition that tribal governments have power over their citizens, highlight a shift in how policymakers thought about indigenous nations. Politicians now viewed tribal nations as capable of effectuating self-determination as well as actual power and authority over their citizens. Although this shift highlights the movement into the Self-Determination Era, Congress still has plenary power and the ICRA remains a piece of statutory legislation that Congress can amend.⁵¹ However, whether the ICRA's passage was overall beneficial or harmful to tribal self-determination is still being debated.

B. ICRA: The Good, the Bad, and the Ugly

This section examines the broad array of viewpoints on the ICRA and the impact of federal oversight on tribal nations through habeas corpus review. Despite the disparate opinions held about the ICRA, most scholars agree that its expansive impact on tribal self-determination, tribal justice systems, and tribal independence has been substantial.

The ICRA was controversial from the beginning. Multiple stakeholders,

46. *See id.* at 469 (noting final version of ICRA addresses some of the concerns of tribal members).

47. Berry, *supra* note 14, at 22–23.

48. 31 U.S. 515, 561 (1832).

49. *Montana v. United States*, 450 U.S. 544, 563 (1981) (citing discussion of inherent sovereignty in *United States v. Wheeler*, 435 U.S. 313, 323 (1978)).

50. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978). Notably some tribal citizens who have been banished by their tribe have attempted to use the ICRA to reverse this action only to be told that banishment did not trigger habeas corpus review. *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 879 (2d Cir. 1996); *see generally* Patrice H. Kunesh, *Banishment as Cultural Justice in Contemporary Tribal Legal Systems*, 37 N.M. L. REV. 85 (2007) (providing general information about tribal banishment and noting that the central issue is whether banishment imposes sufficiently significant restraint on liberty to warrant a habeas corpus review).

51. *United States v. Kagama*, 118 U.S. 375, 380 (1886). Thus, Congress need only amend the ICRA's language to provide for additional oversight more akin with Senator Ervin's original bill.

each with their own goals, were involved in its passage. The end result was a compromise bill that left no one truly happy. Some scholars suggest that supporters of the ICRA had more sinister motives, including ensuring that tribes were unable to exercise powers beyond the US Constitution and continuing assimilation efforts by restricting the exercise of tribal self-determination.⁵² However, there is little in the legislative history to suggest either.⁵³

Those analyzing the ICRA tend to fall into two camps. Supporters harboring concerns of inappropriate tribal government action argue that “the ICRA places needed pressure on tribal governments to assure that protections of individual rights are consistent with those afforded by the U.S. Bill of Rights.”⁵⁴ Opponents argued that the ICRA was one of the most egregious forms of meddling into tribal self-determination in the modern era.⁵⁵ While this view may hold much truth, implicit in this meddling is that Congress recognized both the sovereign authority of tribal governments over the lives of their citizens and the status of individual Indians as United States citizens.⁵⁶

Some scholars contend argue that the ICRA did not go far enough in protecting the rights of indigent individual Indians to a fair trial, which may betray a desire for tribal courts to operate much like their federal counterpart.⁵⁷ They note that while the Supreme Court extended the right to public counsel to indigent defendants in *Gideon v. Wainwright*⁵⁸ on the state level, Congress contradictorily expanded tribal sentencing authority from six months to one year without requiring a right to counsel for indigent tribal defendants.⁵⁹ Similarly, the ICRA states that “upon request” a jury trial must

52. See, e.g., Berry, *supra* note 14, at 21–22 (noting that senators were motivated in part by a desire to encourage the assimilation of the tribes).

53. *Id.* at 21.

54. Casey Douma, *40th Anniversary of the Indian Civil Rights Act: Finding a Way back to Indigenous Justice*, 55 FED. LAW 34, 35, 52 (2008).

55. See, e.g., Rob Roy Smith, *Enhancing Tribal Sovereignty by Protecting Indian Civil Rights: A Win-Win for Indian Tribes and Tribal Members*, 4 AM IND. L.J. 41, 55 (2017) (concluding the best way to protect Indian civil rights is within tribal systems to protect tribal sovereignty, promote respect for tribal institutions and eliminate unnecessary federal court review); Berry, *supra* note 14, at 30 (concluding legislators neglected the problem of intrusion on the civil rights of tribal Indians by nontribal authorities); Christina Ferguson, *Martinez v. Santa Clara Pueblo: A Modern Day Lesson on Tribal Sovereignty*, 46 ARK. L. REV. 275, 301 (1993) (concluding the Supreme Court has cut deep into the power of tribal courts and tribal self-determination).

56. See Berry, *supra* note 14, at 1–2 (highlighting that Congress struck the balance between competing interests of protecting individuals from arbitrary and overly intrusive tribal actions and the tribes’ interests in retaining their legal capacity as self-governing entities).

57. See *id.* at 23 (noting that many significant constitutional limits on federal and state governments are not included in the ICRA, including free counsel for an indigent accused).

58. 372 U.S. 335 (1963).

59. Jordan Gross, *Through a Federal Habeas Corpus Glass, Darkly—Who is Entitled to Effective Assistance of Counsel in Tribal Court Under ICRA and How Will We Know They Got it?*, 42 AM. INDIAN L. REV. 1, 40–46 (2017) (arguing that “Congress has conferred broader rights to non-Indian tribal court defendants [through TLOA and 2013 VAWA amendments to ICRA] . . . than those required for Indian tribal court defendants”).

be made available to a defendant facing imprisonment.⁶⁰ Nevertheless, a right that is not known because it is not affirmatively shared with the defendant is of little value. Relatedly, at least one federal court has ruled that a tribal court must go beyond merely providing this information and ensure that the defendant understands that right, further supporting the idea that tribal courts should look even more like federal courts.⁶¹ Although these due process requirements seem reasonable through a Western lens, there is an implicit assumption that tribal courts should be set up in a manner similar to federal courts. There is more than one way to protect civil rights, and tribal nations should be afforded the opportunity to determine the best manner in which they protect their citizens' civil rights in accordance with their values and traditions.

The reality is that the nature of tribal criminal prosecutions is frequently fundamentally different from that of the Western justice system. Many tribal justice systems are restorative, meaning that they focus on making the victim whole and encouraging the reintegration of both the victim and the perpetrator back into society.⁶² Conversely, the US judicial system is based on an adversarial model that largely separates the victim and perpetrator from the process and embraces a punitive focus.⁶³ Thus, the ICRA's application has pushed the remaking of the tribal court system towards an adversarial, punitive model.⁶⁴

Supporters of the ICRA argued that the bill would hold tribes accountable to their citizens.⁶⁵ They suggested that, before the implementation of the ICRA, tribal governments were free to infringe upon the civil rights of tribal citizens and the ICRA was needed to prevent this type of ill-treatment.⁶⁶ Little evidence was provided to support this claim,

60. 25 U.S.C. § 1302(a)(10) (2018).

61. *Alvarez v. Lopez*, 835 F.3d 1024, 1029 (9th Cir. 2016) (holding it does not undermine tribal sovereignty to require that the tribe inform defendant of the nature of their rights, including what must be done to invoke them).

62. See, e.g., James W. Zion, *The Navajo Peacemaker Court: Deference to the Old, and Accommodation to the New*, 11 AM. INDIAN L. REV. 89, 106 (1983) (noting Navajo peace chiefs held power in non-authoritarian, non-coercive role and tried to correct wrongdoers); Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 252 (1997) (noting peacemaking is concerned with justice as it relates to the benefit of the community and one of the most important values for native people is the ability to be integrated within the community).

63. Tony F. Marshall, *Out of Court: More or Less Justice?* in INFORMAL JUSTICE? 46 (R. Matthews, ed., 1988) (noting single most important feature of legal-judicial approach is its alternative character, predicated on separating an offender from the rest of society in a legal punitive approach); see also, Randy E. Barnett, *The Justice of Restitution*, 25 AM. J. OF JURIS. 117, 117 (1980) (noting two predominant theories of justice are retribution and crime prevention).

64. Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH L. REV. 2280, 2308–09 (1989).

65. McCarthy, *supra* note 22, at 469 (noting that ICRA passed due to growing concern for the civil rights of Native Americans); Jane Marx et al., *Tribal Jurisdiction over Reservation Water Quality and Quantity*, 43 S.D. L. REV. 315, 375 (1998) (noting that ICRA provides necessary assurances that tribal governments will not violate due process or equal protection rights).

66. McCarthy, *supra* note 22, at 469

though the mere possibility itself was sufficient for Congressional action. Opponents argued that the ICRA was an unnecessary piece of legislation because tribal nations already respected the civil rights of their citizens.⁶⁷ In fact, at the time, many tribal nations already had civil rights protections outlined in their constitutions.⁶⁸ Even if there were civil rights concerns, tribal self-determination advocates would have argued that the proper manner to address these concerns is to allow tribal nations to innately discover the need for an Indian Bill of Rights on their own. Anything less would amount to an infringement upon tribal self-determination.⁶⁹ True self-determination requires that tribal nations themselves desire to undertake an action. Forcing change, even change as honorable as civil rights protections, results in illegitimacy.⁷⁰

ICRA scholars have noted that Congress took pains to ensure that several provisions of the Bill of Rights were not included in the language of the ICRA, such as the Establishment Clause of the First Amendment, grand jury provisions, and the right to a public defender.⁷¹ Also absent are the right to bear arms, right to be free from quartering of soldiers, right to be free from cruel and unusual punishment, the Privileges and Immunities Clause, voting provisions, and free counsel for the indigent Indians.⁷² Additionally, while the ICRA included the right to a trial by jury in criminal cases, the size of the jury was reduced to six in recognition of the limited resources of tribal nations.⁷³ These scholars argue that Congress, out of an abundance respect for the “unique political, cultural, and economic needs of tribal government,” carved out specific exceptions to the US Bill of Rights.⁷⁴

While many view the statutory exclusions found in the ICRA as evidence of the enlightened nature of the statute, other scholars point out that regardless of the cultural sensitivity shown in excluding certain provisions

67. *Id.* at 470 n.21 (citing *Rights of Members of Indian Tribes: Hearing on H.R. 15419 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 90th Cong. 37 (testimony of Domingo Montoya), 39 (Resolution of All Indian Pueblo Council), 42 (testimony of Tom Olson, attorney for All Indian Pueblo Council) (1968)).

68. See LAGUNA PUEBLO CONST. art. IX §§ 1–2 (1949) (providing in § 1 that all Pueblos have the rights of a citizen and no Pueblo officer shall infringe upon those rights and in § 2 that there is freedom of worship despite the Pueblo being a theocracy); MESCALERO APACHE CONST. (1988) (providing in the original version of 1936 and revised in 1965 that “no member shall be denied freedom of conscience, speech, religion, association or assembly, nor shall he be denied the right to petition the tribal council for the redress of grievances against the tribe”).

69. See Berry, *supra* note 14, at 30–31.

70. STEPHEN E. CORNELL, ACCOUNTABILITY, LEGITIMACY, AND FOUNDATIONS OF NATIVE SELF-GOVERNANCE 10 (1993) (arguing that legitimacy means the people governed have to view political institutions as appropriate for them).

71. See McCarthy, *supra* note 22, at 471; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62–63 (1978).

72. Suzianne D. Painter-Thorne, *If You Build It, They Will Come: Preserving Tribal Sovereignty in the Face of Indian Casinos and the New Premium on Tribal Membership*, 14 LEWIS & CLARK L. REV. 311, 336 n.233 (providing a list of amendments that were not incorporated in the ICRA from the Bill of Rights).

73. 25 U.S.C. 1302(a)(10) (2018).

74. *Martinez*, 436 U.S. at 62.

of the Bill of Rights from the ICRA, the statute still forces tribes into a system that they have no control over.⁷⁵ Others looking towards the intent of the framers note that tribes were largely excluded from the US Constitution for the precise reason that they were not considered part of the United States, suggesting that any development of an Indian Bill of Rights should be done by the tribal government itself.⁷⁶

Ten years after the ICRA's passage, in *Santa Clara Pueblo v. Martinez*, the Supreme Court revealed that the ICRA is largely aspirational. In *Martinez*, tribal leaders were enforcing traditional patrilineal kinship patterns as part of their tribal enrollment laws, resulting in the exclusion of Ms. Martinez's offspring from the tribe.⁷⁷ The Court held that the only remedy explicitly provided for under the ICRA is habeas corpus.⁷⁸ The *Martinez* Court refused to find an implied waiver of tribal sovereign immunity in the ICRA thereby barring Ms. Martinez from relief for her claim for her claim gender discrimination against tribal leaders.⁷⁹

Supporters of the ICRA point to *Martinez* to claim that the ICRA is not producing harmful results against cultural integrity. Because the ICRA only expressly allowed for habeas corpus relief, Congress must have knowingly supported tribal self-determination by limiting the federal court's oversight on internal tribal matters. With this in mind, modern day supporters of the ICRA argue that while the ICRA is a tribal sovereignty-restricting statute, it creates little practical harm to tribal self-determination.⁸⁰ However, opponents of the ICRA, including tribal leaders at the time of enactment, saw the ICRA as a clear overreach into the internal matters of tribes.⁸¹ When

75. See Burnett, Jr., *supra* note 21, at 591–92 (discussing the purposeful exclusion of Sixth Amendment protections); Jennifer S. Byram, *Civil Rights on Reservations: The Indian Civil Rights Act and Tribal Sovereignty*, 25 OKLA. CITY U. L. REV. 491, 504–05 (noting that the ICRA was a “barbari[c]” statute that imposed Western concepts on tribes).

76. See Angela R. Riley, *supra* note 4 (providing a discussion of what it means for Indian tribes to be mentioned in the Constitution, but beyond the reach of the Bill of Rights). The author notes that Congress could have proposed a constitutional amendment to bring tribal nations under the umbrella of the Constitution but opted not to do so.

77. *Martinez*, 436 U.S. at 52. Ms. Martinez was enrolled in Santa Clara Pueblo, who follow a patrilineal kinship model, whereas her spouse was Navajo, who follow a matrilineal kinship model. The result was that Ms. Martinez's children who were full-blooded Native Americans could enroll in neither tribal nation. See Bethany Berger, *After Pocahontas: Indian Women and the Law, 1830 to 1934*, 21 AM. INDIAN L. REV. 1, 19 (1997) (noting that the Navajo were matrilineal); see also Christina Ferguson, *Martinez v. Santa Clara Pueblo: A Modern Day Lesson on Tribal Sovereignty*, 45 ARK L. REV. 275, 289 (1993) (providing an explanation of the Santa Clara membership criteria).

78. See *Martinez*, 436 U.S. at 61.

79. *Id.* at 58–59.

80. See, e.g., Robert C. Jeffrey, Jr., *The Indian Civil Rights Act and the Martinez Decision: A Reconsideration*, 35 S.D. L. REV. 355, 364 (1990) (noting that the Supreme Court in *Martinez* limited remedies for ICRA violations to habeas corpus petitions in an effort to defend tribal sovereignty); see also Carla Christofferson, Note, *Tribal Courts' Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act*, 101 YALE L. J. 169, 169–70 (1991) (noting that ICRA represents congressional decision to limit Native American sovereignty, but the ICRA's practical application has been limited by the *Martinez* decision, which provides no remedy for civil rights violations, except when tribes take members into custody).

81. Byram, *supra* note 75.

stripping away the pragmatic arguments and focusing on the legal theory of the ICRA, the statute unnecessarily impinges on tribal sovereignty. Thus, the question is more how much harm has been produced rather than whether the ICRA has been harmful. Yet, while the ICRA clearly applies to federally recognized tribes, its alleged applicability to Native Hawaiians is unexpected and less certain.

II. NATIVE HAWAIIAN SOVEREIGNTY IN THE MODERN ERA

As an independent nation-state, the Kingdom of Hawai'i held full sovereign powers. This Part explores the mechanisms through which Hawai'i became part of the United States, contrasts this process with that of Indian tribes, and analyzes the obstacles and barriers that Native Hawaiians face in obtaining federal recognition.

A. *From the Kingdom of Hawai'i to Annexation*

Native Hawaiians are the indigenous people of the Hawaiian islands and have occupied the archipelago from time immemorial.⁸² In the late 1700s, four separate chiefdoms existed until Kamehameha I set out to unify the islands under one rule.⁸³ European settlement started in the late eighteenth century, and by the mid-1800s, white settlers were becoming increasingly involved in the politics of the Kingdom of Hawai'i.⁸⁴ As political tension between Native Hawaiians and white settlers intensified, the discontent of some non-Hawaiian settlers escalated, and in 1893, the so-called Committee of Safety overthrew the Kingdom of Hawai'i and imprisoned Queen Lili'uokalani with the assistance of the US military and diplomatic corps.⁸⁵ Following an investigation of the overthrow, President Cleveland refused to annex Hawai'i, stating that the provisional government was an "oligarchy set up without the assent of the [Hawaiian] people."⁸⁶

However, the next President, William McKinley, failed to share

82. Liliakala Kame'elehiwa, Statement Before the Hawai'i Advisory Committee to the US Commission on Civil Rights: The Impact of the Decision in *Rice v. Cayetano* on Entitlements 29–30 (Sept. 29, 2000) (stating that "from time immemorial, Native Hawaiians have had a special genealogical relationship to the Hawaiian Islands. Born from the mating of Earth Mother Papa and Sky Father Wakea, we're the Hawaiian island the Hawaiian people. That's the definition of native."). Cf. D. Kapua'ala Sproat, *Wai Through Kanawai: Water for Hawai'i's Streams and Justice for Hawaiian Communities*, 95 MARQ. L. REV. 127, 127 (2011) (noting that Native Hawaiians have revered fresh water since time immemorial).

83. See DAVIANNA P., MCGREGOR & MELODY K. MACKENZIE, *MO'OLELO EA O NA HAWAII: HISTORY OF NATIVE HAWAIIAN GOVERNANCE IN HAWAII* 27 (2014), https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/McGregor-and-MacKenzie-History_of_Native_Hawaiian_Governance.pdf [<https://perma.cc/H4Q6-M9QD>].

84. RALPH S. KUYKENDALL, *THE HAWAIIAN KINGDOM VOL. I: 1778–1854, FOUNDATION AND TRANSFORMATION* 258–60 (1938).

85. See NOEL KENT, *HAWAII: ISLANDS UNDER INFLUENCE* at 56–63 (1993).

86. President Grover Cleveland, Message about Hawaii to the Senate and House of Representatives (Dec. 18, 1893) (available at <http://www.let.rug.nl/usa/documents/1876-1900/president-clevelands-message-about-hawaii-december-18-1893.php>) [<https://perma.cc/CXP3-J48G>].

President Cleveland's reservations and supported the annexation of Hawai'i.⁸⁷ After early attempts at annexation via treaty ratification were opposed by over 21,000 signatories—most of whom were Native Hawaiians—a joint resolution of annexation was passed over the objections of some members of Congress.⁸⁸ The result was the transposition of an independent Kingdom of Hawai'i into a US territory. Even today, many Native Hawaiians continue to have strong feelings of loss given the tumultuous way in which Hawai'i was annexed.⁸⁹

Because Hawaiians were organized under an independent nation state, they did not enter into the same type of treaty relationship with the United States as the Indian tribes.⁹⁰ Unlike Indian tribes, who were forced to co-exist on a shared territory with the United States, Native Hawaiians controlled their island nation. In addition, there was limited immigration to the Kingdom of Hawai'i by Americans in those early years.⁹¹ Therefore, treaties between the United States and Kingdom of Hawai'i were largely based on trade rather than compromising the territorial integrity of indigenous land in exchange for federal protection, material objects, and other resources.⁹² Treaties with the United States offered Indian tribes protection from encroachment by settlers in exchange for land and helped to form part of the trust responsibility⁹³ that the federal government owes to tribal nations.⁹⁴ Since Native Hawaiians cannot point to their treaty relationship with the US for this type of protectorate trust, there needs to be an additional source of federal recognition.

Native Americans were brought into the fold of the United States through the doctrine of discovery, a legal doctrine first articulated in a papal bull that provided European nations with dominion over lands inhabited by "heathens."⁹⁵ This foundation is based on a legal fiction that Indians cannot

87. KENT, *supra* note 85, at 65.

88. See 55 CONG. REC. 5769-97 (daily ed. June 11, 1898); see generally, MCGREGOR & MACKENZIE, *supra* note 83.

89. See Laurie McCubbin & Anthony Marsella, *Native Hawaiians and Psychology: The Cultural and Historical Context of Indigenous Ways of Knowing*, 15 CULTURAL DIVERSITY AND ETHNIC MINORITY PSYCHOL. 374, 386 (2009). Accord, McCubbin et al., *The Kanaka Maoli: Native Hawaiians and Their Testimony of Trauma and Resilience*, in ETHNOCULTURAL PERSPECTIVES ON DISASTER AND TRAUMA: FOUNDATIONS, ISSUES, AND APPLICATIONS 287 (2008).

90. See also Rebecca A. Tsosie, *Engaging the Spirit of Racial Healing Within Critical Race Theory: An Exercise in Transformative Thought*, 11 MICH. J. RACE & L. 21, 31 (2005) (noting that Native Hawaiians were never subject to the Doctrine of Discovery).

91. See MCGREGOR & MACKENZIE, *supra* note 83, at 288, 378 (listing the countries of immigration in the late 1800s and noting that some political parties ran on a platform of encouraging American immigration).

92. See, e.g., *id.* at 255, 278, 285, 305 (explaining the importance of Reciprocal Trade Treaty and McKinley Tariff between the Hawaiian Kingdom and the US); see e.g. ROBERT WILLIAMS, *LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800* 103-05 (1997) (noting that treaties were a means of obtaining aid and access to resources through trade).

93. See *supra* note 2 for a definition of trust responsibility.

94. See Rebecca A. Tsosie, *The Conflict Between the "Public Trust" and the "Indian Trust" Doctrines: Federal Public Land Policy and Native Nations*, 39 TULSA L. REV. 271, 272-73 (2003).

95. See PRAMOD NAYAR, *THE POSTCOLONIAL STUDIES DICTIONARY* 153 (2015) (defining "terra

own land and, therefore, merely have a right of occupancy to that land.⁹⁶ Further, the simple act of discovery by Europeans necessitated the loss of some tribal sovereignty.⁹⁷ As domestic dependent nations capable of managing their internal affairs, Indian tribes retained much of their self-determination. This status as domestic dependent nations stems from their sui generis description in the US Constitution as neither foreign nations nor states under the Commerce Clause.⁹⁸

Partly because of the rich history of treaty-making and partly because of the tribes' domestic dependent status, the US owes a trust responsibility to these nascent tribes.⁹⁹ Although wrapped in racist language, this wardship has evolved into the trust relationship that the US exercises on behalf of tribal nations.¹⁰⁰ Native Hawaiians lack this body of case law and treaties from which to draw the same principles. Further, because international bodies recognized the Kingdom of Hawai'i, the doctrine of discovery did not apply.¹⁰¹ Therefore, those elements of sovereignty that necessarily were diminished through discovery do not apply to Native Hawaiians.¹⁰²

After Hawai'i was annexed in 1898, Congress seldom took up the issue of the status of Native Hawaiians. It was not until the 1970s that Congress began seriously reconsidering Native Hawaiian legal status in legislation.¹⁰³ In fact, until 2016, Native Hawaiians lacked a pathway to federal recognition. In other words, Native Hawaiians had no process to obtain a government-to-government relationship. Without federal recognition, Native Hawaiians lack a politically-based diplomatic relationship with the

nullius" as a concept from the *Papal Bull "Terra Nullius*, issued in 1095, articulating the policy that land inhabited by non-Christians was "empty"); see also Robert Williams, Jr., *Columbus's Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples' Rights of Self-Determination*, 8 ARIZ. J. INT'L & COMP. L. 51, 56–57 (1991) (discussing Pope Urban II's call for the Crusades and his authorization to displace the infidels); see EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES AND ITS DEPENDENCIES TO 1648 9–24 (Papal Bull "Romanus Pontifex" (1452) provides authority to conquer nations of non-Christians), 71–78 (Papal Bull "Inter-Caetera" (1493) justifies Christian European explorers' claims to land and waterways discovered) (Frances G. Davenport ed., 1917).

96. *Johnson v. M'Intosh*, 21 U.S. 543, 567 (1823).

97. *Id.* at 574.

98. *Cherokee Nation v. Georgia*, 30 U.S. 1, 18 (1831) (noting distinct classes of foreign nations, several states, and Indian tribes).

99. *Id.* at 17 (noting that the relationship between the United States and Indians is that of a guardian to its ward).

100. See Rebecca A. Tsosie, *Indigenous Peoples and the Ethics of Remediation: Redressing the Legacy of Radioactive Contamination for Native Peoples and Native Lands*, 13 SANTA CLARA J. INT'L LAW 203, 254 (2015); see generally ROBERT WILLIAMS, *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* (2005) (providing an in-depth analysis of the racism that still exists in federal Indian law cases).

101. See Melody K. MacKenzie, *Ever Loyal to the Land: The Story of the Native Hawaiian People*, 33 HUM. RTS. 15, 25 (2006).

102. See *id.*

103. See Kawika Riley, *Native Hawaiian Congressional Policymaking and Indigenous Status*, Presentation at the 17th Annual East-West Center International Graduate Student Conference (Feb. 16, 2018) (noting that 20% of Native Hawaiian legislation was passed between 1988 and 1994 and in the early twenty-first century there was a slowdown of legislative activity on Native Hawaiian issues).

United States.¹⁰⁴ While this does not necessarily mean that the Native Hawaiians are illegitimate or unworthy of this relationship, it nonetheless hinders the Native Hawaiians from exercising the degree of self-determination currently exercised by other federally recognized indigenous nations. Federal recognition also imposes upon the federal government a fiduciary duty to the indigenous nation similar to that of a trustee to a beneficiary.¹⁰⁵ The political nature of indigenous people cannot be overstated, and when indigenous people lack this political element, they run the risk of “ceas[ing] to exist altogether.”¹⁰⁶

B. Federal Recognition: The Search for and the Obstacles to Overcome

Native Hawaiians occupy a unique space in the US indigenous law and policy: they are recognized as indigenous but lack a political government-to-government relationship with the US. This section discusses some of the many laws that Congress passed related to Native Hawaiians, the challenges the community has faced in the pursuit of federal recognition, and the potentially shaky authority that the DOI used to justify its Final Rule creating “Procedures for Reestablishing a Government-to-Government Relationship With the Native Hawaiian Community.”

Despite the lack of a government-to-government relationship, Native Hawaiians have been federally confirmed through numerous federal laws and policies as indigenous peoples, and Congress has repeatedly treated Native Hawaiians similarly or identically to federally recognized Indian tribes.¹⁰⁷ Federal confirmation is the acknowledging that indigenous inhabitants of a specified area are now under the control of a larger nation-state and deserve special federal protection, rights, or treatment. Federal confirmation can be traced from a statute, regulation, judicial opinion, or some other legally valid document from the nation-state where the indigenous peoples hail from.

In the case of Native Hawaiians, the Native American Programs Act, Native Hawaiian Education Act, and Native Hawaiian Health Care Improvement Act, among many other federal laws, treat Native Hawaiians in a virtually identical manner as Indian tribes.¹⁰⁸ The Native American Programs Act, for example, in the same act promotes “economic and social

104. Diplomatic relationships are forged through mutual respect and discipline that comes from two countries building and developing lasting friendly relations. These diplomatic relationships are used to bring mutual prosperity and support during times of crises.

105. See FELIX S. COHEN, HANDBOOK ON INDIAN LAW 268–86 (1945); see generally, Brett Stavin, *Responsible Remedies: Suggestions for Indian Tribes in Trust Relationship Cases*, 44 ARIZ. ST. L.J. 1743 (2012).

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

107. See, e.g., Final Rule, *supra* note 15.

108. Native American Programs Act, 42 U.S.C. §§ 2991 et seq. (2018); Native Hawaiian Education Act, 20 U.S.C. §§ 7511 et seq. (2018); Native Hawaiian Health Care Improvement Act, 42 U.S.C. §§ 11701, 11714 (2018).

self-sufficiency for American Indians, Native Hawaiians, . . . and Alaska Natives.”¹⁰⁹ Similarly, Congress passed the Native Hawaiian Education Act (NHEA) as a counterpoint to the Indian Education Act (IEA), but Congress provided for the development of a Native Hawaiian Education Council and grant program in the NHEA in the same manner as it did for Native Americans in the Indian Education Act and Alaska Natives in the Alaska Native Education Act.¹¹⁰ In fact, the NHEA explicitly reaffirmed that Congress extends services to Native Hawaiians “because of their unique status as the indigenous people of a once sovereign nation as to whom the United States has established a trust relationship.”¹¹¹ Finally, the Native Hawaiian Health Care Improvement Act provides the same declaration of policy for Native Hawaiians as the Indian Health Care Improvement Act does for Native Americans.¹¹² Both statutes declare congressional policy to be the “fulfillment of its special responsibilities and legal obligations to the indigenous people of Hawaii” by raising the health status of Native Hawaiians to the highest possible health level and by providing existing programs with all the necessary resources.¹¹³

Therefore, Congress has chosen to show its federal confirmation of Native Hawaiians in a variety of manners providing a recurring confirmation of indigeneity over an extended period of time. In fact, in his dissent in *Rice v. Cayetano*, Justice Stevens argued that there are “more than 150 [statutes] today [that] expressly include native Hawaiians as part of the class of Native Americans.”¹¹⁴ The DOI then drew on this language in the Final Rule and added that these 150 statutes provide evidence that “Congress exercised its plenary power over Indian affairs to recognize that the Native Hawaiian community exists as an Indian tribe within the meaning of the Constitution.”¹¹⁵ Some of these statutes even explicitly recognize a formal fiduciary duty to Native Hawaiians.¹¹⁶ The most current research in this area indicates that 150 statutes may be a conservative figure.¹¹⁷ This federal confirmation of indigenous status cannot be overstated. Federal confirmation

109. Native American Programs Act, 42 U.S.C. §§ 2991 et seq. (2018)

110. See Native Hawaiian Education Act, 20 U.S.C. §§ 7511, et seq. (2018); Indian Education Act, Pub. L. 92-318 (1972); Alaska Native Education Act, 20 U.S.C. §§ 7541, et seq. (2018).

111. 20 U.S.C. § 7512(12)(B) (2018).

112. Native Hawaiian Health Care Improvement Act, 42 U.S.C. § 11702(a) (2018); Indian Health Care Improvement Act, 25 U.S.C. § 1602 (2018). Note that under Pub. L. 93-638, federally recognized tribal governments may enter into contracts and compacts with the federal government to take over control over direct federal services such as health care, education, and law enforcement. Because Native Hawaiians are not federally recognized they are unable to avail themselves of this opportunity.

113. 42 U.S.C. 11702(a) (2018) (noting that the Indian Health Care Improvement Act inserts “trust” before responsibilities and provides for additional intents such as ensuring maximum Indian participation in health care services, increasing Indian health professional degrees, etc. 25 U.S.C. 1602).

114. *Rice v. Cayetano*, 528 U.S. 495, 533 (2000).

115. Final Rule, *supra* note 15, at 71286.

116. 42 U.S.C. § 11701(13) (2018) (summarizing affirmation of trust relationship in 1920 Hawaiian Homes Commission Act (“HHCA”)); see also 42 U.S.C. § 11701(19–21) (2018) (providing a list of statutes).

117. Kawika Riley, *supra* note 103.

is a clear expression of Congress' intent to treat Native Hawaiians as an indigenous people that the US owes a duty of trust.¹¹⁸

Part of why this path towards federal recognition for Native Hawaiians has been so difficult is threefold. First, the Native Hawaiian community itself is not unified. Multiple pro-independence sovereignty groups oppose federal recognition efforts, arguing both that Native Hawaiians have a moral right to have the Hawaiian Kingdom reinstated immediately because of the illegal overthrow in 1893 and a concern for foreclosing future claims before international tribunals for full independence.¹¹⁹ According to the Office of Hawaiian Affairs (OHA), over 75 percent of the comments to the DOI's Advance Notice of Proposed Rulemaking (ANPRM), were in favor of continuing the rulemaking process.¹²⁰ Nonetheless, the opposition to the federal recognition through this rulemaking remains vocal, and until this gap is bridged in the community, it is unlikely that any Native Hawaiian entity will be successful at gaining federal recognition.

Second, although Indian Country¹²¹ has generally been supportive of Native Hawaiian federal recognition, there has been some concern related to funding sources and allocations. Because the Native Hawaiian community consists of over 500,000 potential citizens and because some federal funding allocations are based on a per capita formula, tribal nations are hesitant for new large indigenous groups to become recognized for fear of diminishing their own much-needed resources.¹²² A key provision within all of the Native

118. *Id.* Although these statutes explicitly articulate that the US has some trust responsibility towards Native Hawaiians, it is not clear whether this trust responsibility is identical to that owed to federally-recognized Indian tribes.

119. *See, e.g.*, Public Meeting Regarding Whether the Federal Government Should Reestablish a Government-to-Government Relationship with the Native Hawaiian Community: Transcript of Public Comments at 94-96 (June 23, 2014), <https://www.doi.gov/sites/doi.gov/files/migrated/ohr/reorg/upload/Hawai-i-State-Capitol-Honolulu-O-ahu-062314.pdf> [<https://perma.cc/5EXK-ZUKD>] (testimony of Williamson B.C. Chang) (highlighting the broad array of individuals who argue for de-occupation and express concern for federal recognition). *But see* S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 361-64 (1994) (arguing convincingly that federal recognition does not forestall future independence efforts by Native Hawaiians).

120. Office of Hawaiian Affairs, Comment on Proposed Rule for Procedures for Reestablishing a Government-to-Government Relationship with the Native Hawaiian Government (Dec. 17, 2015), <https://www.regulations.gov/contentStreamer?documentId=DOI-2015-0005-3626&attachmentNumber=1&contentType=pdf> [<https://perma.cc/U8R6-BF62>] (noting that of the 5,782 comments the OHA reviewed, a supermajority, including both Hawaiians and non-Hawaiians, commented in support of federal recognition).

121. Indian Country is legally defined under 18 U.S.C. § 1151 (2018) and includes lands within Indian reservations, dependent Indian communities, and Indian allotments where the Indian title has not been extinguished. Colloquially, however, the term Indian Country is somewhat looser and frequently includes areas where title may have been extinguished but the tribal community retains significant ties to the area. *See generally*, Marc Slonim, *Indian Country, Indian Reservations, and the Importance of History in Indian Law*, 45 GONZ. L. REV. 517 (2010).

122. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, C2010BR-12, U.S. CENSUS BRIEFS: THE NATIVE HAWAIIAN AND OTHER PACIFIC ISLANDER POPULATION: 2010, at 16 tbl.6 (2012), <https://www.census.gov/content/dam/Census/library/publications/2012/dec/c2010br-12.pdf> [<https://perma.cc/U62U-272S>] (using 2010 census data there are 527,077 Native Hawaiians in the United

Hawaiian congressional recognition efforts was an assurance of a separate funding stream for Native Hawaiians.¹²³ This same sentiment is found in the administrative pathway finalized in 2016.¹²⁴ However, not only has the National Congress of American Indians, a membership-based advocacy group, consistently supported Native Hawaiian recognition, but individual tribal nations submitted comments in support of the DOI creating a pathway for Native Hawaiian recognition.¹²⁵

Finally, there is a contingent of anti-race-based politicians and US citizens who consistently oppose any and all political efforts that appears to provide “special treatment” to a minority group.¹²⁶ This contingent has adopted civil rights language and uses it against civil rights aims, referring to its position as one that is “colorblind.”¹²⁷ One critique, however, of this colorblind approach is that those unaffected by racism (i.e. Caucasians) often ignore the effects of racism and feel comfortable and justified in accepting the current world order.¹²⁸ Some opponents of this anti-race-based politics have gone so far as to call this approach “colorblind racism.”¹²⁹ Regardless of how one characterizes this approach, conservative groups such as the Heritage Foundation and the Grassroot Institute of Hawai’i have taken

States); Office of Hawaiian Affairs, Data Book, Chapter 01 Population, Table 1.19, http://www.ohadatabook.com/go_chap01.17.html [<https://perma.cc/36XX-PYXW>] (follow “Population” hyperlink to download the Microsoft Excel file; then open the file, and go to sheet 1.19). *See also* Valerie Richardson, *Obama Urged to Use Executive Order to Recognize Native Hawaiians*, WASH. TIMES (Aug. 22, 2013), <http://www.washingtontimes.com/news/2013/aug/22/obama-urged-touse-executive-order-to-recognize-na/> [<https://perma.cc/4LBP-2BGB>] (citing that “the 2010 census estimates there are about 527,000 Native Hawaiians”).

123. Native Hawaiian Government Reorganization Act of 2010, H.R. 2314, 111th Cong. (2d Sess. 10).

124. Final Rule, *supra* note 15, at 71315.

125. 153 CONG. REC. H11967-68 (daily ed. Oct. 24, 2007) (Statement of Joe Garcia, President of the NCAI providing support of H.R. 505 the Native Hawaiian Reorganization Act). *See also* NCAI Press Release: Comments in Support of Procedures for Reestablishing a Formal Government-to-Government Relationship with the Native Hawaiian Community (Sept. 23, 2016), <http://www.ncai.org/news/articles/2016/09/23/comments-in-support-of-procedures-for-reestablishing-a-formal-government-to-government-relationship-with-the-native-hawaiian-community> [<https://perma.cc/RSG6-BBQF>]; San Carlos Apache, Comment on Proposed Rule for Procedures for Reestablishing a Government-to-Government Relationship with the Native Hawaiian Government (Sept. 16, 2015), <https://www.regulations.gov/document?D=DOI-2015-0005-2302> [<https://perma.cc/9ZTD-38EC>].

126. REPUBLICAN POL’Y COMM., S. 147 OFFENDS BASIC AMERICAN VALUES: WHY CONGRESS MUST REJECT RACE-BASED GOVERNMENT FOR NATIVE HAWAIIANS 2 (June 22, 2005).

127. Robert Westmoreland, *A New and Improved Affirmative Action?*, 72 U. CINNCINATI L. REV. 909, 911–12 (2004) (describing colorblind initiatives as anti-civil rights). Using Martin Luther King’s famous wish to have his children be judged by “the content of their character” and not the “color of their skin,” anti-race-based individuals wrap themselves in the cloak of civil rights language to attack programs intended to support equality. *See* Martin Luther King, Jr., *I Have a Dream*, Speech on Lincoln Memorial (Aug. 28, 1963).

128. *See* Stephanie A. Fryberg & Nicole M. Stephens, *When the World is Colorblind American Indians are Invisible: A Diversity Science Approach Invisible: A Diversity Science Approach*, 21 PSYCHOL. INQUIRY 115, 115 (2010).

129. Eduardo Bonilla-Silva & David Dietrich, *The Sweet Enchantment of Color-Blind Racism in Obamerica*, 634 THE ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI. 190, 190 (2011).

positions in opposition of Native Hawaiian recognition using mainly these colorblind arguments.¹³⁰ These groups fail to fundamentally understand the political designation of indigenous people and instead choose to see indigenous entities purely in a racial category.¹³¹

One additional consideration that does not directly impose any challenges on tribes, but should be mentioned, is the legal authority for the DOI to formally recognize indigenous people. The DOI relies on a general delegation of regulatory authority necessary in the “performance of its business” as its legal justification to recognize tribes.¹³² This general authority is then precariously stretched to provide legal authority to engage in the process of recognizing an official government-to-government relationship.¹³³ In the Final Rule, the DOI lays out a shaky argument that this rulemaking is within its purview because Congress has enacted over 150 acts that provide services to Native Hawaiians in a manner similar to those for federally recognized tribes.¹³⁴

Although questions exist as to the DOI’s authority, it is clear that Congress can use its plenary power to recognize Native Hawaiians. In fact, Congress has, in the past, considered legislation to reorganize a Native Hawaiian governing entity. In as recently as 2010, the House passed the Native Hawaiian Reorganization Act, while the Senate Committee of Indian Affairs reported out favorably another version of the bill.¹³⁵ However, since the retirement of Senator Akaka, the only Native Hawaiian Senator and primary sponsor of the Native Hawaiian Reorganization Act, no significant legislative activity has been undertaken on this front. Therefore, because the

130. See HANS VON SPAKOVSKY, THE HERITAGE FOUNDATION, THE OBAMA ADMINISTRATION’S ATTEMPT TO BALKANIZE HAWAII (2014), <http://www.heritage.org/report/the-obama-administrations-attempt-balkanize-hawaii> [<https://perma.cc/VK6R-6A5X>]; see also Grassroot Institute of Hawaii, *Grassroot Institute Criticizes DOI Rule for Subverting Will of Native Hawaiians* (Sept. 23, 2016), <http://www.grassrootinstitute.org/2016/09/grassroot-institute-criticizes-doi-rule-for-subverting-will-of-native-hawaiians/> [<https://perma.cc/79PR-GXLP>].

131. See *Morton v. Mancari*, 417 U.S. 535 (1974) (upholding an Indian preference for hiring based, in part, on the political nature of tribal nations); see also Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as a Racial Remedy*, 86 N.Y.U. L. Rev. 958, 1002 (2011). Cf. *Rice v. Cayetano*, 528 U.S. 495 (2000) (holding that limiting elections for the Office of Hawaiian Affairs, a state agency whose mission is to benefit Native Hawaiians, to Native Hawaiian voters violated the Fifteenth Amendment of the United States Constitution). *Contra* Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL’Y REV. 95, 102 n.41 (1998) (listing treaties between the Hawaiian Kingdom and the United States and arguing that Native Hawaiians constitute a political class that should be subject to rational basis review akin to federally recognized tribes).

132. See Lorinda Riley, *Shifting Foundation: The Problem with Inconsistent Implementation of Federal Recognition Laws*, 37 N.Y.U. REV. L. & SOC. CHANGE 629, 632 (2013) (noting that federal agencies require either specific or general legal authority to issue regulations, that general legal authority may be challenged, and that any rule that exceeds the legal authority granted to the agency by Congress can be stricken under the Administrative Procedure Act).

133. Recall that it is Congress that has plenary power over Indian issues. See *id.*

134. See Final Rule, *supra* note 15, at 71285.

135. It should also be noted that the Native Hawaiian Reorganization Act also required that Native Hawaiian citizens’ civil rights be protected, in a guaranteed form similar to the ICRA.

administrative process for Indian tribes to petition¹³⁶ for federal recognition under the Procedures for Federal Acknowledgment of Indian Tribes forestalls the possibility of a Native Hawaiian petition and because legislative attempts to create a process for recognizing Native Hawaiians have been unsuccessful, the Obama Administration proposed a process for the Native Hawaiian community to reestablish their government-to-government relationship with the US.

III. ICRA AND NATIVE HAWAIIANS

A. *Rulemaking to Reestablish a Government-to-Government Relationship: Does the ICRA Belong?*

Congress' failure to pass legislation to recognize Native Hawaiians resulted in some advocates turning their attention to a possible administrative route for federal recognition. This section explores the administrative rulemaking process, delves into the specifics of the Final Rule, discusses whether the ICRA already applies to Native Hawaiians, analyzes whether this recognition process treats Native Hawaiians equitably when compared to federally recognized tribes, and opines on why the federal government is so desirous that the ICRA apply to Native Hawaiians.

In this highly politicized environment, it is increasingly common for the legislative process to stall. Our bicameral legislative system serves as a strict gatekeeper making large shifts in policy challenging.¹³⁷ As such, once Hawai'i's long time senators, Daniel Akaka and Daniel Inouye, were no longer in office to shepherd Native Hawaiian recognition bills through Congress, advocates had to develop a new strategy.¹³⁸ Rather than focusing on legislative recognition, advocates supportive of federal recognition took advantage of the fact that, for the first time, a president who grew up in Hawai'i was overseeing the Administration. President Obama was largely seen as an ally on indigenous issues and understood the challenges that Native Hawaiians faced.¹³⁹ Furthermore, administrative actions are frequently less cumbersome than their legislative counterparts, making this administrative strategy very promising.

Although issuing regulations under the APA is considered less

136. *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1283 (9th Cir. 2004).

137. See FRANCESCO PALERMO & KARL KOSSLER, *COMPARATIVE FEDERALISM: CONSTITUTIONAL ARRANGEMENTS AND CASE LAW* 165–78 (2017) (discussing constitutional entrenchment of bicameral legislatures); see also Paolo Passaglia, *Unicameralism, Bicameralism, Multicameralism: Evolution and Trends in Europe*, 10 PERSP. ON FEDERALISM E1 (2018) (providing a generalized discussion of the characteristics and values of bicameralism using European examples); see generally Bertrall L. Ross II, *Against Constitutional Mainstreaming*, 78 U. CHI. L. REV. 1203, 1231–33 (2011) (discussing the politicization of Congress and the function of gatekeepers vis-a-vis democratic will).

138. See Sarah Blackwill, *The Junior Senior Senators*, MSNBC (Jan. 4, 2013), <http://www.msnbc.com/the-daily-rundown/the-junior-senior-senators> [https://perma.cc/C4UB-YM3Y] (noting that Hawai'i is suffering the biggest seniority shift in the 113th Congress).

139. See Loretta Tuell, *The Obama Administration and Indian Law—A Pledge to Build a True Nation-to-Nation Relationship*, 63 THE FED. LAW. 44, 44–45, 47–48 (2016).

burdensome than passing legislation, the public and interest groups have increasingly scrutinized the process. As such, administrative agencies take more than two years to finalize most administrative rules under the APA.¹⁴⁰ The APA sets out a process that federal executive agencies must follow when issuing regulations. The APA requires that once an agency determines that a rulemaking should be promulgated, it publishes a Notice of Proposed Rulemaking (NPRM) in the Federal Register with an open comment period of at least thirty, but generally more than sixty days.¹⁴¹ The agency must then review all comments and respond to each unique comment.¹⁴² While the agency is under no obligation to implement the comments, it must show that it has considered the comments and explain why it chose whether or not to implement it.¹⁴³ These comments must be addressed in the final rule.¹⁴⁴ If the agency determines that the NPRM requires significant changes, they must reissue the NPRM with an additional comment period to ensure that the final rule is a “logical outgrowth” of the NPRM and that the public is not surprised by the changes.¹⁴⁵

During the Final Rule rulemaking process, the ICRA and its application to a Native Hawaiian governing entity was a topic of significant discussion. Because of the controversial nature of the proposed rulemaking, the DOI went through the additional elective step of issuing an ANPRM.¹⁴⁶ This

140. See Administrative Procedure, 5 U.S.C. §§ 551-59 (2018); Jason W. Yackee and Susan W. Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1457–58 (2012) (providing an analysis of timeframe required to complete a rulemaking, typically ranging from one year to two years).

141. See 5 U.S.C. § 553 (2018); see also JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 275, 278–79 (4th ed. 2006).

142. Jonathan Weinberg, *The Right to be Taken Seriously*, 67 U. MIAMI L. REV. 149, 150 (2012) (discussing the notice and comment process in rulemaking and the agency’s duty to respond to comments).

143. Comment, *Agency Discretion to Accept Comment in Informal Rulemaking: What Constitutes “Good Cause” Under the Administrative Procedure Act?*, 1980 B.Y.U.L. REV. 93, 94 (1980) (providing a discussion of agency discretion in the rulemaking process).

144. Weinberg, *supra* note 142, at 157 (noting that “if an agency does not respond to significant comments, its decision-making cannot be deemed rational”).

145. Phillip M. Kannan, *The Logical Outgrowth Doctrine in Rulemaking*, 48 ADMIN. L. REV. 213, 215–16 (1996).

146. The DOI engaged in an extensive process before finalizing the rule creating “Procedures for Reestablishing a Formal Government-to-Government Relationship With the Native Hawaiian Community.” This process included publishing an Advance Notice of Proposed Rulemaking, 79 Fed. Reg. 35,296–303 (2014) [hereinafter ANRPM], in the Federal Register on June 20, 2014. The DOI also conducted 15 hearings in Hawai’i and 5 hearings on the continental United States, largely for Indian tribes to comment, but where many Native Hawaiians living on the continental United States came to provide testimony. See Docket ID DOI-2015-0005, Supporting & Related Materials, <https://www.regulations.gov/docket?D=DOI-2015-0005> [<https://perma.cc/Q92A-K5GW>] (follow “View all documents and comments in this Docket” hyperlink; then filter results by “Supporting & Related Material”) (listing hearing transcripts). Then, on October 1, 2015, the DOI published the Proposed Rule, *supra* note 7, which outlined the proposed process under which the Native Hawaiian community could pursue federal recognition. Comments were then accepted until December 30, 2015, after which the DOI read and analyzed those comments. Finally, the Final Rule, *supra* note 15, was published on October 14, 2016, which officially created the procedure that the DOI would use to make the determination whether a petitioning Native Hawaiian community met the requirements to be federally recognized. This process

process is often included when agencies want to ensure that the public has had ample input into the development of a rule.¹⁴⁷ It also serves to support the proposition that the agency did not act arbitrarily or capriciously, which is a reviewable standard under the APA.¹⁴⁸

The ANPRM consisted of nineteen questions in total, five of which were threshold questions, all geared towards obtaining information on whether the DOI should endeavor to undertake a rulemaking that would create a process to reestablish a government-to-government relationship with the US.¹⁴⁹ While a majority supported the DOI moving forward, a vocal minority expressed distrust in the federal government and only supported the full return of Hawai'i to Native Hawaiians. Because the majority of the comments were supportive, the DOI issued a NPRM on October 1, 2015.¹⁵⁰ The NPRM was open for a little over ninety days and the DOI received over 5,100 written comments in addition to the oral testimony from the hearings.¹⁵¹ The DOI analyzed and responded to the comments in the Final Rule published on October 14, 2016.¹⁵²

The Final Rule created a process by which the Native Hawaiian community may submit a proposal requesting that the Secretary of the Interior reestablish a government-to-government relationship with the Native Hawaiian people. This proposal should include a duly ratified constitution or other governing document and a narrative describing the process undertaken to develop, draft, and ratify the governing document.¹⁵³ The governing document must establish a governmental structure, provide for periodic elections, provide criteria for membership that includes those eligible under the Hawaiian Homes Commission Act (HHCA), incorporate civil rights protections under the ICRA, not contradict federal law, and describe the process for amendments in the Native Hawaiian Constitution.¹⁵⁴ In making the determination as to whether to reestablish a government-to-government relationship with Native Hawaiians, the Secretary of the Interior must determine whether the Native Hawaiian community has met the requirements under the Final Rule and if a sufficient number of Native Hawaiians and HHCA-eligible Native Hawaiians participated and voted in the affirmative.¹⁵⁵

is prescribed under the Administrative Procedure Act (APA), specifically 5 U.S.C. § 553 (2018). In addition, Section 706 of the APA allows for final rules to be challenged under specific circumstances. This particular rule has yet to be challenged.

147. ANPRM, *supra* note 146.

148. 5 U.S.C. § 706(2)(A) (2018).

149. ANPRM, *supra* note 146, at 35,296–303.

150. Proposed Rule, *supra* note 9, at 59,113–32.

151. *Id.* at 59118; *supra* note 146 (comment period was open from October 1, 2015 to December 30, 2015).

152. Final Rule, *supra* note 15.

153. 43 C.F.R. § 50.10 (2018).

154. *Id.* § 50.13.

155. *Id.* § 50.16. Note that there are numerous practical challenges involved in bifurcating the voting process to ensure that a sufficient number of each category of Native Hawaiians voted and voted in the

Under the Final Rule, unlike Indian tribes who have the autonomy to determine their membership,¹⁵⁶ Native Hawaiians must exclude individuals that have no Native Hawaiian blood and must only include those that qualify under the HHCA.¹⁵⁷ Particularly noteworthy is that the DOI's interpretation of the Procedures for Federal Acknowledgment of Indian Tribes that govern whether an Indian entity qualifies as an Indian tribe allows for approximately 20 percent of the individuals on the membership roll to not have valid proof of tribal ancestry.¹⁵⁸ The Final Rule, thus, treats Native Hawaiians differently. In addition, to be eligible under the HHCA, an individual must have at least 50 percent or more verifiable Native Hawaiian blood.¹⁵⁹ It is difficult to imagine any type of citizen requirement that would exclude this category of Hawaiians while including those with lesser blood quantum. Furthermore, the concept of a blood quantum is foreign to Native Hawaiians, as indicated in several comments, which makes this requirement all the more curious.¹⁶⁰

The ANPRM specifically asked whether the Secretary of the Interior should have the authority to approve a Native Hawaiian constitution and, if so, what factors the Secretary should consider.¹⁶¹ It does not appear that any member of the public suggested that the ICRA be incorporated to Native Hawaiians; however, the DOI, using its broad discretion over administrative issues, inserted the requirement that the ICRA be incorporated into the Native Hawaiian governing entity's governing documents in the NPRM.¹⁶²

The DOI's proposition that the ICRA should extend to Native Hawaiians is, however, tenuous. By analyzing the definition of "Indian tribe" in the ICRA, the DOI concluded that the ICRA would include Native Hawaiians. The DOI reached this conclusion because the ICRA defines an Indian tribe as "[a]ny tribe, band or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government."¹⁶³ Even though Native Hawaiians would not become an "Indian" tribe upon federal recognition, the DOI argued that this broad

affirmative. This information is not easily available and essentially must be created specifically for the purpose of voting. Furthermore, the Kingdom of Hawai'i extended citizenship to some non-Hawaiians, however, the Final Rule proscribes their descendants' inclusion in this process.

156. *Santa Clara v. Martinez*, 436 U.S. 49, 72 n. 32 (1978).

157. *Id.* §§ 50.12–13.

158. See DEPARTMENT OF THE INTERIOR, ACKNOWLEDGMENT PRECEDENT MANUAL 55 (2002), <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/ofa/admindocs/PrecedentManual2002.pdf> [<https://perma.cc/S57H-FX2G>] (noting that the Office of Federal Acknowledgment (OFA) accepted a showing of 80% of the Samish petitioning tribal entity was able to prove descendency from the historic tribe, which provides a cushion of 20% of enrolled members who are unable to show descendency by blood); see Lorinda Riley, *supra* note 132, at 658 (noting, on average, a successful petition to OFA must be able to show that at least 81% of the membership descends from the historical tribe).

159. Hawaiian Homes Commission Act, 42 Stat. 108 (codified as amended at 48 U.S.C. note prec. § 491 (1988)).

160. See Final Rule, *supra* note 15, at 71297.

161. ANPRM, *supra* note 146, at 35297.

162. Proposed Rule, *supra* note 7, at 59118, 59125; Final Rule, *supra* note 15, at 71284, 71290.

163. Final Rule, *supra* note 15, at 71307.

language would nonetheless encompass Native Hawaiians. Further, because once recognized, Native Hawaiians would have “virtually the same legal basis and structure as the formal government-to-government relationship between the United States and federally-recognized tribes in the continental United States,” the DOI concluded that this justified their inclusion under the ICRA’s broad definition of Indian tribe.¹⁶⁴

In contrast, some other federal statutes define “Indian tribe” as tribes “eligible for the special programs and services provided to Indians because of their status as Indians.”¹⁶⁵ The DOI argues that because Congress provided for Native Hawaiians separately in many complementary statutes, Native Hawaiians would not be Indian under this definition. Thus, these different definitions are used to justify bringing Native Hawaiians under the umbrella of being an “Indian tribe” for the purposes of the ICRA but not for the purpose of other statutes such as the Indian Child Welfare Act or Violence Against Women Act.¹⁶⁶ Congress did not have this specific intention since Native Hawaiians were not recognized at the time that these statutes passed, and Native Hawaiians were absent in a meaningful way during the debate.

Left undiscussed is a more reasonable argument that neither definition encompasses Native Hawaiians. Although many statutes dealing with Native Hawaiians were passed alongside complementary Native American statutes, some statutes treated Native Hawaiians similarly in the same act. In other words, Congress created nearly identical programs for Native Hawaiians as Native Americans, excepting those programs that could not apply to Native Hawaiians because they were not federally recognized, such as those related to law enforcement, jurisdiction, or self-governance. Native Hawaiians do not fit neatly under the existing Native American legal framework because they are not, in fact, Indians. Rather than try to create a secondary class of federally recognized indigenous entities, which does not currently exist, the DOI should acknowledge the larger issue: whether any federal statutes, rules, and policies will apply to Native Hawaiians. This issue will likely require deeper legal discussion and debate than what can occur in the preamble of a rulemaking.¹⁶⁷

The DOI notes that Native Hawaiians would remain “ineligible for Federal Indian programs, services, and benefits provided to Indian tribes in the continental United States and their members (including funding from the Bureau of Indian Affairs and the Indian Health Service) unless Congress expressly declared otherwise,” presumably because Native Hawaiians are

164. *Id.* at 71290.

165. *Id.* at 71307.

166. *Id.* at 71307–08 (providing a justification related to definitions of “Indian tribe,” but not directly addressing the issue of inconsistent treatment).

167. This issue will most likely need to be resolved either by Congress, which through its plenary power will make a determination of which statutes apply to Native Hawaiians, or by the federal judiciary in response to litigation, which will no doubt occur once Native Hawaiians become federally recognized.

not “Indians” and so do not qualify for Indian programs.¹⁶⁸ Despite the DOI’s attempt to distinguish Native Hawaiians from Indian tribes, its conclusion that Native Hawaiians are Indians for purpose of a government-to-government relationship and legal framework but not for the purpose of Indian programs is difficult to follow.

The Final Rule is required to respond to each unique public comment, and in this process, the DOI showed an unwillingness to entertain Native Hawaiians determining their own definitions and boundaries of civil rights.¹⁶⁹ For example, in response to a comment suggesting that the ICRA should not be applied to Native Hawaiians because the imposition of the ICRA without the corresponding beneficial statutes applied to tribes is inconsistent, the DOI simply refuted the suggestion that ICRA protection must be included in governing documents.¹⁷⁰ The DOI justified this position by arguing that “[t]o determine which statutes will apply to the Native Hawaiian Governing Entity, the Department considers each statute’s language defining its scope of application.”¹⁷¹

Once recognized, Native Hawaiians should be endowed with the same rights as newly recognized tribes. However, under the DOI’s argument, they would not be granted these rights. Creating a secondary class of recognized tribes violates the equality principles upon which this nation was founded. Further, it may violate the US’ fiduciary obligations by knowingly treating one type of indigenous group worse than the others. The fact that Congress passed statutes that provided separately for Native Hawaiians could just as easily be because of the unique way in which the US acquired the Kingdom of Hawai‘i.¹⁷² In fact, the DOI here appears to want it both ways—oversight over Native Hawaiians by imposing Indian obligations but skirting eligibility for Indian programs.

According to the DOI, the ICRA applies to “all Indian tribes without expressly stating that they cover only those Indian tribes that the Secretary deems eligible for the special programs and services that the United States provides,” supporting the idea that the ICRA includes indigenous entities who are not currently deemed eligible by the Secretary.¹⁷³ Putting aside the argument that one is hard-pressed to think of a federally recognized tribe that would meet the first definition but run afoul of the second narrower

168. Final Rule, *supra* note 15, at 71290.

169. *See id.* at 71284, 71290 (expressing through the mandatory inclusion of federal concepts of civil rights by the application of the ICRA to Native Hawaiians that they lacked agency to make that determination in the contrary).

170. *Id.* at 71307–08.

171. *Id.* at 71307.

172. *See* S.J. Res. 19, 103rd Cong. (1993), Pub. L. No. 103-150, 107 Stat. 1510, 1512 (stating that the Republic of Hawai‘i ceded the Kingdom of Hawai‘i’s public, crown, and government lands without consent of the Native Hawaiian people and without compensation). Since the United States acquired Native Hawaiians by overthrowing the Kingdom, as opposed to adding Indians under the doctrine of discovery, Native Hawaiians cannot just be added under the umbrella of “Indians.”

173. Final Rule, *supra* note 15, at 71317.

definition, this justification still seems somewhat contrived.¹⁷⁴ A separate panoply of programs for Native Hawaiians exist alongside Indian programs and services, and the DOI uses the existence of these programs for Native Hawaiians as the backbone to justify the continued inapplicability of Indian programs once Native Hawaiians are recognized. However, equally likely is that the only reason these separate statutes exist is because Native Hawaiians were not federally recognized at the time of their passage. Under the DOI's logic, indigenous entities deserving of but not receiving federal recognition must inherit a lower status merely because they were successful in advocating for some special programs but failed to gain federal recognition. None of the statutes that provide for Indian programs and services expressly exclude Native Hawaiians, so to use that as a justification for the continued exclusion of Native Hawaiians once they are recognized as an "Indian tribe" runs counter to the canon that statutes must be construed liberally in favor of the Indian.¹⁷⁵

Moreover, extending the DOI's logic results in a confounding interpretation of federal Indian law. Under this argument, a state-recognized tribe should be bound by the ICRA because it would be a group of Indians "recognized as possessing powers of self-government," subject to the "jurisdiction of the United States" through the recognizing state.¹⁷⁶ As Native Hawaiians are currently recognized by the state of Hawai'i,¹⁷⁷ they could already be subject to the ICRA under this interpretation. However, this makes little sense since most of the provisions of the ICRA require territorial jurisdiction to be effectuated. For example, state-recognized tribes would be hard-pressed to violate the First Amendment rights of their members or hold a criminal proceeding because to violate a citizen's right of free speech or due process, they would need to impose their police powers over their members.

Given the significant amount of control that the federal courts wield over Indian criminal cases and the general public's often misplaced fears of unfair or corrupt tribal justice systems, it is easy to understand why the DOI (and the Department of Justice) would be so insistent upon maintaining control over all indigenous entities, including Native Hawaiians, that have the potential to have a judiciary. However, to meet these ends, the DOI has had to twist these two definitions of "Indian tribe" so that only in the case of Native Hawaiians one applies and the other does not. Ultimately, the Final Rule required the governing document of the Native Hawaiian governing entity to "protect and preserve the liberties, rights, and privileges of all persons affected by the government's exercise of its powers, *see* 25 U.S.C.

174. Note that the author cannot find a situation where this would occur other than for Native Hawaiians.

175. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918) (noting that statutes should be construed to benefit tribal communities).

176. 25 U.S.C. § 1301 (2018).

177. HAW. REV. STAT. § 10H (2018) (originally Act 195, 2011 Haw. Sess. Laws).

1301 *et seq.*”¹⁷⁸ While the DOI purports that Native Hawaiians would similarly be subject to the ICRA, the fact that it mandates that the governing document explicitly state such is redundant.¹⁷⁹ In fact, one could argue that if the ICRA already applies, there would be no need for the governing documents to state such.

Department of Justice officials indicated their desire that the ICRA be cited by incorporation in the Native Hawaiian governing document.¹⁸⁰ It is not extraordinary that a nation’s governing document ascribe civil rights to its citizens, and many indigenous nations, seeing the expressions of these values as a fundamental goal of their constitution, have included these rights in their constitutions.¹⁸¹ It is, however, curious that the DOI made this a requirement since the Secretary of the Interior does not require the same exacting civil rights protective language for federally recognized tribal nations. In fact, federally recognized tribal nations need not have a written constitution at all.¹⁸² Requiring this provision to be in the constitution of the Native Hawaiian government, but not making a similar requirement of federally recognized tribal nations, begs the question: does the ICRA actually apply or is the DOI’s goal for the Native Hawaiian government to self-impose these requirements because they may not, in fact, apply? Again, this disparate treatment of one indigenous entity over another is unsupportable.

The suggestion that the Native Hawaiian Constitution should incorporate the ICRA by reference or replication is equally troubling. When incorporating by reference, any amendments to the original document will automatically be incorporated into the indigenous entity’s constitution. If the indigenous nation were to disagree with any newly amended language by the U.S, the Native Hawaiian government would have to go through a constitutional amendment process to fix the offending language.¹⁸³

178. 43 C.F.R. § 50.13(h) (2018). *See also* Final Rule, *supra* note 15, at 71321, 71290 (stating that the governing document must also protect and preserve the rights of all persons affected by the Native Hawaiian government’s exercise of government powers in accord with the ICRA).

179. The impact of this legal question is that Native Hawaiian courts may be able to operate without oversight from federal authorities since the habeas corpus protections under the ICRA have been upheld and utilized on a fairly regular basis among tribal nations.

180. This is according to my conversation with Sam Hirsch, former US DOJ Lead Environmental Attorney, and Justin Smith, US DOJ Attorney, in Honolulu, HI, on June 24, 2014.

181. *See* Breann Swann Nu’uhiwa, *Government of the People, By the People, For the People: Cultural Sovereignty, Civil Rights, and Good Native Hawaiian Governance*, 14 *ASIAN-PAC. L. & POL’Y J.* 57, 87–88 (2013) (providing a generalized discussion of traditional and modern individual civil rights within tribal communities).

182. Joseph Kalt, *The Role of Constitutions in Native Nation Building: Laying a Firm Foundation*, in *REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT* 81 (2007) (explaining constitutions need not be written to provide basic architecture for designing, implementing, and upholding community values and sustaining social order).

183. Video: Melissa Tatum, *Striking a Balance on What to Include in your Constitution* (presentation highlight) (2013), <https://nngovernance.arizona.edu/melissa-tatum-striking-balance-what-include-your-constitution-presentation-highlight> [<https://perma.cc/8VRC-VAW4>] (making the point that incorporating external limitations may result in governance constraints); *see generally* MELISSA TATUM,

Constitutional amendments tend to be much more cumbersome than a regular legislative process. The Final Rule argues that it is consistent with federal policy of self-determination and self-governance, yet by suggesting that the ICRA be incorporated, the federal government is running afoul of its own stated goals of supporting nation building by mandating language that may be contrary to Native Hawaiian values.¹⁸⁴ Applying the ICRA, therefore, allows the US government to continue to dip its fingers into the affairs of the Native Hawaiian government in a way that pushes indigenous governments to mirror the federal system. The Native Hawaiian Constitution provides one potential vessel for this push towards a homogenized justice system.

B. Constitution of the Native Hawaiian Nation: Traditional Values and the ICRA

Concurrent to the DOI promulgating Procedures for Reestablishing to Re-establish a Formal Government-to-Government Relationship With the Native Hawaiian Community, the Native Hawaiian community embarked on what will likely be a long discussion of how to reorganize the Native Hawaiian governing entity. This section discusses how the efforts of nation building came about, what challenges arose, and the agreed upon process; reviews the approved Native Hawaiian Constitution; and analyzes the Native Hawaiian Constitution's incorporation of traditional beliefs related to civil rights.

The Native Hawaiian nation building effort kick-started when the Office of Hawaiian Affairs (OHA), a state agency, reached out to several Ali'i Trusts, Royal Societies, and other Native Hawaiian organizations to facilitate a unified dialogue on governance. Out of this group, several individuals came forward and founded Na'i Aupuni, whose sole purpose was to unify Native Hawaiians towards nation building.¹⁸⁵

Through a grant from Akamai Foundation, with funds that originally came from OHA, Na'i Aupuni took the first step of having an election of Native Hawaiian delegates who would draft a constitution.¹⁸⁶ OHA went to great pains to ensure that it would not have any control over the direction that Na'i Aupuni takes.¹⁸⁷ For example, OHA did not manage, request to manage, or have the ability to veto any of the decision of the 'Aha, the

MIRIAM JORGENSEN, MARY GUSS & SARAH DEER, STRUCTURING SOVEREIGNTY: CONSTITUTIONS OF NATIVE NATIONS 21–23 (2014) (discussing the option of citing external legal documents in a tribal constitution).

184. Final Rule, *supra* note 15, at 71290 (requiring that any acceptable Native Hawaiian constitution include the civil rights protections found in the ICRA).

185. *Grant Agreement between The Akamai Foundation and the Office of Hawaiian Affairs for the Use and Benefit of Na'i Aupuni*, NAIAPUNI.ORG, <http://www.naiapuni.org/docs/FundingAgreementFINAL.pdf> [https://perma.cc/7G8W-3RT8].

186. *Id.*

187. *See id.* For example, funding was provided to the Akamai Foundation, which oversaw and implemented the grant to Na'i Aupuni, effectively creating a layer between the OHA and the 'Aha process.

constitutional convention. Furthermore, OHA had no votes or official role in the ‘Aha. Several OHA employees participated as delegates in the ‘Aha, but they did not represent the agency and were required to take official leave.¹⁸⁸

The delegate elections were limited to Native Hawaiians, as a gathering of indigenous people. To vote, one had to be on a base roll and “prove” descendancy from someone who lived on the archipelago of Hawai‘i prior to 1778.¹⁸⁹ One way to prove this was to show Native Hawaiian listed on their own or a biological parent’s birth certificate.¹⁹⁰ Because of the perceived racial factor in these elections, Keli‘i Akina, CEO and president of Grassroots Institute of Hawai‘i, sued to halt the elections.¹⁹¹ He argued that this vote violated the Fifteenth Amendment, the Fourteenth Amendment’s due process and equal protection clauses, and the Voting Rights Act because Na‘i Aupuni was acting in place of the state of Hawai‘i by receiving OHA funds.¹⁹² Rather than submit to the suit, Na‘i Aupuni decided to halt the election of delegates and invite all interested candidates to attend the convention, rendering the legal issue moot.¹⁹³

In February 2016, 154 delegates participated in the ‘Aha held in Kailua, Hawai‘i.¹⁹⁴ Over the four-week convening period, the delegates heard from nation building and legal scholars before setting to the task of drafting the Constitution. After breaking into subcommittees, each charged with drafting specific sections, the groups came back together to debate the provisions. Delegates voted on February 26, 2016, and approved the Constitution by a vote of eighty-eight in favor, thirty opposed, and one abstention.¹⁹⁵

The Constitution of the Native Hawaiian Nation articulates many of the traditional values of the Native Hawaiian people, rights traditionally held by Native Hawaiians individually and communally, and highlights some

188. *Id.*

189. Kana‘iolowalu, *What is a Native Hawaiian?*, KANA‘IOLOWALU KOKUA DESK (Oct. 11, 2014), <https://kanaiolowalu.freshdesk.com/support/solutions/articles/31259-what-is-a-native-hawaiian> [https://perma.cc/D3SC-MGB3].

190. Kana‘iolowalu, *Criteria*, KANA‘IOLOWALU KOKUA DESK (Apr. 15, 2014), <https://kanaiolowalu.freshdesk.com/support/solutions/articles/31250-criteria> [https://perma.cc/US6D-F5LK].

191. *Akina v. Hawaii*, 835 F.3d 1003 (9th Cir. 2016).

192. *Akina v. Hawaii*, 141 F.Supp.3d 1106, 1122–24 (D. Haw. 2015).

193. *Na‘i Aupuni Press Release: Na‘i Aupuni Terminates Election Process*, NAIAUPUNI.ORG (Dec. 15, 2015), <http://www.naiaupuni.org/docs/NewsRelease-NaiAupuniTerminatesElectionProcess-121515.pdf> [https://perma.cc/FY3W-49DH]; *see also Na‘i Aupuni Q&A*, NAIAUPUNI.ORG (Dec. 15, 2015), <http://www.naiaupuni.org/docs/NaiAupuni-Q&A-121515.pdf> [https://perma.cc/J6J5-TCJH].

194. *Na‘i Aupuni Press Release: Na‘i Aupuni Announces Participant Total For February ‘Aha is 154*, NAIAUPUNI.ORG (Jan. 6, 2016), <http://www.naiaupuni.org/docs/NewsRelease-NaiAupuniAnnouncesParticipantTotalForAhas154-010616.pdf> [https://perma.cc/QC2N-HP7T]. *See Akina v. Hawaii*, 835 F.3d 1003, 1011 (9th Cir. 2016) (dismissing interlocutory appeal of denial of preliminary injunction as moot).

195. Timothy Hurley, *Native Hawaiian convention adopts constitution*, STAR ADVERTISER (Feb. 26, 2016), <http://www.staradvertiser.com/2016/02/26/breaking-news/native-hawaiian-constitutional-convention-adopts-governing-document> [https://perma.cc/7HHF-LYEX].

significant changes in beliefs due to colonialism. For example, the preamble of the Native Hawaiian Constitution states “We are a people who Aloha Akua, Aloha ‘Āina, and Aloha each other . . . malama all generations . . . [and have] Kuleana to all lands, waters, and resources,”¹⁹⁶ which highlights much of the fundamental traditional rights and values of Native Hawaiians.¹⁹⁷ The Native Hawaiian Constitution includes the provision that “the rights of Native Hawaiian tenants in the ‘Āina (land, water, air, ancestor) and ahupua‘a, shall not be abridged.”¹⁹⁸ Simultaneously, it also embodies the significant changes in values that Native Hawaiians have experienced due, in part, to colonialism. Articles 6 and 8, Rights of the Individual and Government Prohibitions respectively, are remarkably similar to the US Constitution’s Bill of Rights, which the ICRA was modeled after.¹⁹⁹

It is difficult to say how much the adoption of American judicial due process ideas influenced the Native Hawaiian Constitution and how much is due to the clear message that the DOI sent mandating that the ICRA protections needed to appear in the Native Hawaiian Constitution to be considered sufficient.²⁰⁰ Many of the requirements mandated in the ICRA are values that most Americans can find no flaw with, however, some are curious for a nascent indigenous nation. For example, requiring that a jury of no less than twelve be assembled for all criminal cases is quite a remarkable undertaking for a new nation with no experience in judicial matters and has a population of approximately 250,000 members in Hawai‘i. Moreover, there is nothing inherently fairer about having twelve jurors versus six or eight given the smaller population that is spread over large areas and experience poverty at higher rates, making jury service onerous.²⁰¹ Recall that the ICRA lowered that number to six because the federal government believed gathering twelve jurors would be too burdensome for indigenous nations.²⁰²

The rights of the individual come before the collective with the ICRA,

196. This phrase roughly translates to “love of God, love of land, and love to each other . . . caring for all generations [and have] responsibility to all lands, waters, and resources.”

197. *Const. of the Native Hawaiian Nation, Preamble*, COUNCIL FOR NATIVE HAWAIIAN ADVANCEMENT, https://www.hawaiiancouncil.org/wp-content/uploads/2014/08/20160315_Cxn_wNames_ForDigitalDistribution.pdf [https://perma.cc/N2T6-MW2Z].

198. *Id.* at art. 5. An ahupua‘a is a traditional Hawaiian division of land from measuring from the mountains to the sea.

199. *Id.* at art. 6, 8 (noting that the individual has the right to life, liberty, and property; guaranteed equal protection; security from unreasonable searches and seizures; not be twice put in jeopardy for the same offense; have a right to a jury of at least twelve in criminal prosecutions; presumption of innocence; etc.)

200. *Cf.* Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479, 485 (2000) (noting that “tribal courts have deeply assimilated many Anglo political values”).

201. DAVID WILKINS & HEIDI K. STARK, *AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM* 1–54 (4th ed. 2017).

202. *See supra* note 73.

which limits the indigenous governing entity's ability to structure its dispute resolution system in any manner that best suits its traditions. The idea that one should not be compelled to be a witness against oneself is burned into the American psyche, but in a traditional restorative justice system, a key element of conflict resolution is that the perpetrators must fully participate and take responsibility for their actions.²⁰³ For example, Native Hawaiian dispute resolution, or ho'oponopono, requires that each party be open and willing to share its experiences and feelings to transform hurt into healing.²⁰⁴ Conceptually, until one is able to get to the root of the problem, it is not possible to mend or heal. This is difficult to accomplish if the accused can remain at arm's length during the entire proceeding.

In fact, several of the provisions of the ICRA assume an adversarial criminal justice system. The right to be free from excessive bail, the right to a speedy and public trial, and the right to confront the witnesses are each important rights in an adversarial system.²⁰⁵ However, ho'oponopono may take hours, days, or even years to resolve the issue.²⁰⁶ It is a highly emotional and spiritual process that may not be able to meet the due process protections under this Native Hawaiian Constitution. Ho'oponopono may require an exemption from certain provisions under Article 6, specifically self-incrimination, speedy trial, and possibly other rights in order to be most effective.

Thus, certain provisions of the Native Hawaiian Constitution may have been inserted to comply with the ICRA and appease federal officials. For example, while Article 46, Judicial Authority Primary Focus, states "[t]he primary focus of the Judicial Authority shall be restorative justice," Articles 6 and 8, Rights of the Individual and Government Prohibitions, respectively, provide for rights that may make ho'oponopono difficult to effectuate.²⁰⁷ Granted, there is nothing in the Native Hawaiian Constitution that prohibits the use of ho'oponopono; rather, there seems to be an unnatural tension between using two types of justice systems—one based in a Western punitive model and the other based in an indigenous restorative model.

Given the litigation surrounding the validity of the delegate election in the 'Aha and the heated nature of the DOI's ANPRM hearings, some serious concerns about the legitimacy of the Native Hawaiian Constitution have been raised. According to the US Census, there are approximately 360,000 adult Native Hawaiians in the United States, yet only 122,785 signed up to

203. See generally TONY MARSHALL, RESTORATIVE JUSTICE: AN OVERVIEW (1999), http://www.antonioacasella.eu/restorative/Marshall_1999-b.pdf [<https://perma.cc/MCR9-YUN6>].

204. Manulani A. Meyer, *Ho'oponopono: Healing through ritualized communication*, at 7–8, Jan. 30, 2016 (on file with author).

205. 25 U.S.C. § 1302 (2018).

206. Manulani A. Meyer & Albie Davis, *Talking Story: Mediation, Peacemaking, and Culture*, AMERICAN BAR ASSOCIATION DISPUTE RESOLUTION MAGAZINE, 5–9 (1994) (comparing ho'oponopono to western justice and noting that the process may take between three hours to days).

207. *Const. of the Native Hawaiian Nation*, *supra* note 197, at Art. 6, 8, 46.

be placed on the Rolls that were used to elect delegates.²⁰⁸ Some have argued that the lack of enthusiasm in participating in the Rolls highlights these legitimacy concerns.²⁰⁹ Others see the low turnout to be emblematic of the larger issues of colonialism and low civic participation seen throughout Hawai'i.²¹⁰ They note that colonization has been so effective amongst Native Hawaiians that many Native Hawaiians have given up hope of becoming a nation again, domestic or otherwise.²¹¹ Similarly, voter turnout in Hawai'i is the lowest in the nation, hovering around 43 percent.²¹² With such little interest in voting, in general, it is easy to see why Native Hawaiians also would be disinclined to affirmatively sign up for a Roll let alone vote in a delegate election.

Facing this type of battle, Na'i Aupuni announced on March 16, 2016, that they would not be pursuing a ratification of the Native Hawaiian Constitution by the general Native Hawaiian population.²¹³ Not only did they not have sufficient grant funds left, but they believed that the community needed more education on the importance of this Constitution, and more efforts at unifying the Native Hawaiian community were paramount.²¹⁴ Since the 'Aha, another organization called Aloha Lāhui has taken up the charge to raise funds and educate the community regarding the Constitution and need for ratification. Although they have raised significant funds, they have not yet met their goal.²¹⁵

208. U.S. CENSUS BUREAU, *supra* note 122, at 14 (estimating that there were over 520,000 self-identified Native Hawaiians in the United States); Data Book, *supra* note 122, at Table 1.25 (reporting roughly 340,000 Native Hawaiians in 2010 Census age 18 and over); Kanaiolowalu Home Page, <http://www.kanaiolowalu.org> [<https://perma.cc/P2L4-Z65E>] (listing 122,785 individuals registered).

209. Noelani Goodyear-Ka'ōpua & Bryan K. Kuwada, *Making 'Aha: Independent Hawaiian Pasts, Presents, & Futures*, 147 DAEDALUS: J. OF AM. ACAD. OF ARTS & SCI. 49 (2018); *see generally* Linda Zhang, *Re-Building a Native Hawaiian Nation: Base Rolls, Membership, and Land in an Effective Self-Determination Movement*, 22 ASIAN PAC. AM. L. J. 1 (2017) (concluding creation and maintenance of inclusive and accurate base roll is necessary for Native Hawaiian self-determination and commenting on the challenges experienced by the Native Hawaiian Roll Commission); *see also* Dimitrios Panagos et al., *Explaining Aboriginal turnout in federal elections: Evidence from Alberta, Saskatchewan, and Manitoba*, in ABORIGINAL POLICY RESEARCH: VOTING, GOVERNANCE, AND RESEARCH METHODOLOGY 3–24 (Jerry P. White et al. eds., 2013).

210. Eileen Luna, *Mobilizing the Unrepresented: Indian Voting Patterns and the Implications for Tribal Sovereignty*, 15 WICAZO SA REV, 91, 102 (2000) (arguing that colonization destroyed traditional tribal alliances, which are necessary for political mobilization to occur).

211. Brittany Lyte, *First steps towards Native Hawaiian sovereignty get tripped up*, ALJAZEERA AMERICA (Dec. 5, 2015), <http://america.aljazeera.com/articles/2015/12/5/first-steps-toward-native-hawaiian-sovereignty-get-tripped-up.html> [<https://perma.cc/GFF7-6PE9>] (providing several interpretations of how Native Hawaiian factions view Hawaiian sovereignty, including the belief that some Hawaiians are afraid to act).

212. *2016 Presidential election, America Goes to the Polls, A Report on Voter Turnout*, NONPROFIT VOTE, <https://www.nonprofitvote.org/america-goes-to-the-polls-2016/press-release> [<https://perma.cc/M8SD-337F>].

212. *Na'i Aupuni Press Release: Na'i Aupuni Decides Not to Pursue Ratification Vote*, NAIAUPUNI.ORG (Mar. 16, 2016), <http://www.naiaupuni.org/docs/NewsRelease-NaiAupuniDecidesNoRatificationVote-031616.pdf> [<https://perma.cc/ZL2W-WG4C>].

213. *Id.*

214. *Id.*

215. *Aloha Lāhui homepage*, ALOHALAHUI.COM (Feb. 19, 2019), <http://www.alohalahui.com/love->

CONCLUSION

The ICRA was a monumental piece of legislation that had a significant impact on Indian tribes. The ICRA straddled two policy eras and attempted to strike a balance between impinging on tribal self-determination and respecting tribal autonomy. Varying views of whether the ICRA was beneficial or harmful to tribal self-determination exist; however, the Supreme Court's limitation on remedies to habeas corpus relief has stemmed some of the most detrimental aspects of the ICRA. That the ICRA's impact is far and wide is hardly surprising. The Act imposed most of the US Bill of Rights on tribal nations and provided a cause of action for potentially aggrieved tribal citizens. In addition to the ICRA itself being controversial, the hallmark case dealing with the ICRA, *Santa Clara Pueblo v. Martinez*, is likely one of the most controversial cases in Indian law jurisprudence. *Martinez* solidified the sovereign immunity of tribes unless a legislative act expressly abridges that right. However, it is surprising to see a statute such as the ICRA, being applied so liberally and assertively in other contexts such as the recognition of a Native Hawaiian governing entity, especially considering that Congress at the time of the ICRA's passage likely did not discuss its application to Native Hawaiians.

Native Hawaiians, while federally confirmed as indigenous people by Congress, have not been successful at obtaining federal recognition because of community unity, concerns about stretching limited resources among a larger group of indigenous people, and increasing anti-race-based sentiments. As a result, Native Hawaiians currently lack a government-to-government relationship with the US.

The DOI, for its part, promulgated a rule that created the "Procedures for Reestablishing a Formal Government-to-Government Relationship With the Native Hawaiian Community." One surprising element of this rulemaking was that the ICRA protections were incorporated into the Native Hawaiian Constitution. While the DOI insists that the ICRA applies to Native Hawaiians, its half-hearted argument relies on a "creative" distinction of dueling definitions of "Indian tribe." Regardless, the Native Hawaiian Constitution ultimately incorporated much of the ICRA, though whether because Native Hawaiian values match the ICRA or due to the Final Rule's mandate. Either way, the DOI's mandate impinges upon Native Hawaiian sovereignty and should not be imposed on Native Hawaiians.

The ICRA is ingrained in the indigenous law landscape in the United States. Advocates would be wise to gain a better understanding of not only the applicability of this statute, but also ways in which tribal nations, and now Native Hawaiians, can better protect themselves from future litigation around this topic. As Native Hawaiians begin the process of nation building, it is imperative that the community has discussions surrounding which civil rights protections should be included in the nation's governing document. It

may very well be that a deeper understanding of the impact of the ICRA could result in modifications of the Native Hawaiian Constitution and further negotiations with the DOI. It is only when the community has decided for itself what its values are and how those values should best be expressed that one can have a truly legitimate Native Hawaiian government.