Perpetuated in Righteousness: Proposals for Strengthening Hawai'i's "Ceded Land" Protections

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I. INTRODUCTION

"*Hānau ka ʻāina, hānau ke aliʻi, hānau ke kanaka*. Born was the land, born were the chiefs, born were the common people."[1]

5.1 million years ago, volcanic magma breached the surface of the calm Pacific Ocean. The first of a major string of islands emerged from the depths of the sea. This land would, in time, become Hawaiʻi and its people, Kanaka Maoli. They voyaged from other islands in Polynesia and would find their way to these new islands. Through the centuries, they would develop an advanced society, culture,

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† My interest in this subject came from volunteering with the Office of Hawaiian Affairs in early 2021. During that time, I learned a great deal about Hawaiian history, land rights, and the sacred connection that the Hawaiian people have with the ʻāina. Realizing my position as a *haole*, I try to take a tone and position that gives options that may not have been considered to the Native Hawaiian community but does not try to make a decision for them, as it is their land and what to do with it should be their decision alone. The daily and unwavering commitment by activists and leaders of the Kanaka Maoli people to protect their rights and land is something that I have a deep and lasting respect for and is why I decided to write this article. I would like to acknowledge the works of Professor Melody Kapilialoha MacKenzie and the late Professor Jon Van Dyke for making this project possible, as well as comments and support from Professor MacKenzie, Wayne Tanaka, and Letani Peltier.

[1] *ʻŌlelo Noeau: Relating to ʻĀina (Land)*, Hoʻokuaʻaina, https://www.hookuaaina.org/%ca%bbolelo-noeau-relating-to-%ca%bbaina-land/ (last visited Jul 18, 2021) (quoting Mary Kawena Pukui, ʻŌlelo no'eau Hawaiian Proverbs & Poetical Sayings (1983)).

and collective identity as Kanaka Maoli, ultimately creating a united Hawaiian Kingdom.[2]

The land is a sacred part of Hawaiian culture, religion, and identity.[3] This paper addresses the modern challenges that impact the "ceded lands"[4] of Hawai'i and specifically examines Hawai'i Revised Statutes section 171-64.7.[5] This paper argues that HRS 171- 64.7 is woefully insufficient. The restrictions put in place by the statute still allow for the land to be sold or gifted. Despite requiring a two-thirds majority to sell or gift the land, this requirement can be altered with a simple majority vote by the state legislature,[6] making it a faux protection.

Further, the current law does not include leases, thus, allowing the trust lands to develop. One way to properly halt the sale and development of the "ceded lands" until Native Hawaiian beneficiaries settle their claims is to put the land-use restrictions in the state constitution. The scope of this article covers just the lands owned by the State of Hawai'i. Part of the "ceded lands" are in the Hawaiian Homelands Trust, a specific trust established by Congress in 1921 to benefit Native Hawaiians of not less than fifty percent Hawaiian ancestry,[7] or are held in fee simple by the United States Government as part of the deal for admission to the Union and fall outside the scope of the review.[8]

Hawai'i Revised Statute 171-64.7, passed as Act 176 in 2009, protects the "ceded lands" of Hawai'i from a fee sale. The statute requires that any attempt to sell any part of the "ceded lands" in fee sale must have a two-thirds majority approval from the legislature.[9] Under normal circumstances, this would be a very high bar; however, as the 2021 legislative session of the Hawai'i Legislature has demonstrated, those that would seek to develop the land are attempting to find ways around this law. In 2021, two bills were proposed that would impact the "ceded lands." The first, House Bill-499 (HB-499), which became law as Act 236, would extend leases on commercial developments already constructed on the "ceded lands" for many of the leaseholders; this would mean having over a 100-

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[2] The word Hawai'i has what is known in 'Ōlelo Hawai'i (Hawaiian language) as an 'okina, it is written as an open single quotation mark and not as an apostrophe. Hawai'i is a Hawaiian word, native to the language, Hawaiian is an English word, and so does not have an 'okina in the word.

[3] Off. of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp., 177 P.3d 884, 926 (Haw. 2008), *rev'd sub nom.* Hawaii v. Off. of Hawaiian Affairs, 556 U.S. 163 (2009).

[4] Due to the legal questions surrounding the "ceded lands" their use will be in quotation marks, they may also be referred to by their original designation of the Crown Lands and Government Lands, as well as the Public Land Trust.

[5] HAW. REV. STAT. § 171-64.7.

[6] § 171-64.7(b).

[7] Hawaiian Homes Commission Act, Pub. L. No. 34, ch. 42, §§ 201(a), 42 Stat. 108.

[8] Hawaii Admission Act, § 5, Pub L. No. 86-3, 73 Stat 4. § 5(c)-(d) are the specific sections I'm excluding.

[9] HRS 171-64.7 was amended by 2011 Haw. Sess. Laws Ch. 169 which required the DLNR to give more detail about the parcel they wished to sell.

year lease.[10] The second, Senate Bill-2 (SB-2), would allow the Governor to set aside any amount of the land for the Hawai'i Housing Finance Development Corporation to build and develop via a lease, rather than a fee sale.[11]

The "ceded lands" encompass a large volume of the lands of the inhabited Hawaiian Islands. The state held lands are specifically "all lands or interest therein owned or under the control of state departments and agencies classed as government or crown lands previous to August 15, 1895 . . . ."[12] The Admission Act identifies these under Section 5(b) and 5(e) and any lands added following admission.[13]

This paper will begin by laying out the history of Hawai'i and the creation of the Public Land Trust. To do this requires understanding how Hawaiian land use laws have changed over time and how those changes impact the current law. Then, the paper will discuss the modern laws and cases that control the Public Land Trust today. This section will review their geneses and their weaknesses. Finally, I will propose five versions of constitutional amendments, each progressively more lenient than the last. Following each proposed amendment will be the general positives and negatives of each version of the amendment.

II. BACKGROUND

Modern Hawaiian land use law begins with the Great Māhele.[14] The Māhele was the first codified entrance of western ideals of land ownership and privatization in the Hawaiian Kingdom. The impacts from this land division are still in the law, culture, and society today, as the land division is what would become the "ceded lands" in the first place. Therefore, to fully understand how the Māhele changed Hawaiian land use, one must know why it happened in the first place and understand the system that preceded it.

A. Pre-Māhele

Before the Māhele, the Hawaiian community had a unique land tenure system.[15] The ahupua'a land tenure system was a highly developed and self-sustaining land

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[10] *See* H.B. 499, H.D. 2, S.D. 2, C.D. 1, 35th Leg., 1st Sess. (Haw. 2021); Haw. Gov. Message 1364, July 5, 2021 (100-year leases are derived from the lease extensions to the already present 65 year leases).

[11] S.B. 2, S.D. 2, H.D. 2, 35th Leg., 1st Sess. (Haw. 2021).

[12] HAW. REV. STAT. § 171-64.7 (2021).

[13] *See* Hawaii Admission Act § 5. [Hereinafter Admission Act].

[14] Māhele means division in 'Ōlelo Hawai'i, Great Māhele means great division, referring to the division of land. *See* ULUAKU HAWAIIAN ELECTRONIC LIBRARY, Nā Puke Wehewehe 'Ōlelo Hawai'i, https://wehewehe.org/gsdl2.85/cgi-bin/hdict?e=q-11000-00---off-0hdict---00-1----0-10-0---0---0direct-10-ED---4---textpukuielbert%2ctextmamaka-----0-1l---11-haw-Zz-1---Zz-1-home-M%c4%81hele---00-4-1-00-0---4----0-0-11-00-0utfZz-8-00&a=d&d=D11847.

[15] MELODY KAPILIALOHA MACKENZIE, HISTORICAL BACKGROUND, NATIVE HAWAIIAN LAW: A TREATISE 8 (2015).

division. This management system served Kanaka Maoli for generations before European contact.[16] The system worked in a quasi-tiered system. Unlike in Western society, where a person could have a fee simple ownership of their property, in the Hawaiian land tenure system, the aliʻi nui or high chief was the trustee of the land. Thus, it would be a mischaracterization to say that the *aliʻi nui* was the "landowner" in the Western sense of land ownership.[17] Broadly, the *aliʻi nui* held the land in trust for the chiefs who would act as land managers, and for the *makaʻāinana*, who would work and cultivate the land, working together to provide for the community and preserve the land for future generations.[18] The *aliʻi nui* and chiefs would change with time, but the *makaʻāinana* remained with the land.[19]

Following the unification of the Hawaiian Islands by King Kamehameha I, he did what the *aliʻi nui* before him had done and distributed the land amongst his supporters,[20] not only continuing the land tenure system, but also creating governorships for each of the islands to maintain order while he was away.[21] His successor, Kamehameha II (Liloliho), did not redistribute the land, keeping the land arrangement as it was.[22] Following the death of King Kamehameha II, the Council of Chiefs created a new law allowing the chief to keep the land they currently had and pass it down to their heirs without having to go through redistribution.[23]

To protect his people, King Kamehameha III promulgated the Declaration of Rights in 1839.[24] This document, sometimes referred to as the Hawaiian Magna Carta,[25] within which Kamehameha III declares that "[p]rotection is hereby secured to the persons of all the people, together with their lands, their building lots and all their property and nothing whatever shall be taken from any individual, except by an express provision of the laws."[26] It was the first time that such protections were codified into Hawaiian Law.[27]

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16 *Id.*

17 Jocelyn Linnekin, *The Hui Lands of Keanae: Hawaiian Land Tenure and the Great Māhele*, 92 J. POLYNESIAN SOC'Y. 169, 171 (1983).

18 *Id.*

19 *Id.* at 171-72.

20 RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM 1778-1854: FOUNDATION AND TRANSFORMATION 52 (1983).

21 *Id.* at 53.

22 MACKENZIE, *supra* note 15, at 10.

23 *Id.* at 11.

24 HAW. KING. CONST. OF 1840, *reprinted in Translation of the Const. and Laws*, 1842, *digitalized at* , LEGAL ARCHIVES COLLECTION (2021), http://punawaiola.org/constitution.html.

25 DAVIANNA MCGREGOR & MELODY MACKENZIE, MOʻOLELO EA O NĀ HAWAIʻI, HISTORY OF NATIVE HAWAIIAN
GOVERNANCE IN HAWAI'I 220 (2015).

26 KE KUMUKĀNĀWAI O KA MAKAHIKI 1839, § 5

27 *See* MCGREGOR & MACKENZIE, *supra* note 25 at 219.

A year following the promulgation of the Declaration of Rights, King Kamehameha III promulgated the 1840 Constitution.[28] It stated that the land belongs to the people of Hawai'i and not to the King alone; the King's role was to serve as the trustee for the land.[29] This addition, however, was not enough to stop the spread of foreign interests in the *'āina* (land). The leasing of land to foreigners continued.[30] In one lease dispute, a British naval officer temporarily overthrew the Hawaiian Government in the name of the British Empire. However, the British government rejected this action and returned the Kingdom to its people.[31] Nevertheless, the signal was clear that something in the Hawaiian land system needed to change in order to preserve the Kingdom from outside interference.[32]

B. The Great Māhele[33]

The Māhele was the first true venture into private property that the Hawaiian Kingdom had taken.[34] The King used the Board of Commissioners to Quiet Land Titles (the Land Commission) to accomplish this objective.[35] The Land Commission established a set of principles that it was to abide by and objectives for it to carry out.[36] The principles established by the commission created the fundamental backbone for Māhele and what it is known for today: the land's division into thirds. One-third of the land would go to the king, one-third to chiefs,[37] and one-third would go to the government. The Land Commission gave land awards to the chiefs as they were in *Māhele Book*,[38] which acted as a recording of land interests between the king, the chiefs, and the government.[39]

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28 HAW. KING. CONST. OF 1840, *reprinted in* KE KUMU KANAWAI A ME KE KANAWAI [CONSTITUTION], 1841.

29 HAW. KING. CONST. OF 1840, *reprinted in* TRANSLATION OF THE CONSTITUTION AND LAWS (1842), *digitalized in Constitutions*, LEGAL ARCHIVES COLLECTION (2021), http://punawaiola.org/constitution.html.

30 MACKENZIE, *supra* note 15, at 12.

31 JON VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? 27-28 (2008).

32 JAMES L. HALEY, CAPTIVE PARADISE, A HISTORY OF HAWAII 160 (2014).

33 Māhele means division, "great" in this instance does not describe the feeling of goodness but rather the size of the endeavor and its change to Hawaiian society.

34 Linnekin, *supra* note 17, at 173.

35 Act of Dec. 10, 1845, An Act to Organize the Executive Departments of the Hawaiian Islands, Part I,
ch. VII, art. IV, *1845-46 Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands*, 107.

36 Neil M. Levy, *Native Hawaiian Land Rights*, 63 CAL. L. REV. 848, 854 (1975).

37 Chiefs (ali'i) and managers, referred to as *konohiki* were combined into their one-third of the land in Hawai'i. *Id*.

38 KAMEHAMEHA III, BUKE KAKAU PAA NO KA MAHELE AINA I HOOHOLOIA IWAENA O KAMEHAMEHA III A ME NA LII A ME NA KONOHIKI ANA HALE ALII, HONOLULU, IANUARI, 1848 (1848) (hereinafter the Māhele Book).

39 Levy, *supra* note 36, at 855.

During the Māhele period, the Land Commission sent out a notice for people who had land interests in Hawai‘i to record their names and the lands they claimed.[40] The first māhele of land was conducted in January of 1848, with the last on March 7th, 1848.[41] The *maka'āinana* were also able to apply for land in the Māhele process; however, they had to show that they cultivated the land they wished to claim. This restricted the *maka'āinana's* ability to take part in the Māhele seriously.[42] The notice to the *maka'āinana* was placed into the *Polynesian* newspaper and written in terms foreign to the common people. It is important to note that at this time the idea of private property was still very new in the Hawaiian Islands and that the notice was vaguely and complexly written for the average person to understand its intent. As a result, many common Hawaiians never claimed their land.[43] In July of 1850, the Hawaiian Legislature passed a law allowing foreigners to have a fee-simple title and transfer rights in the land.[44] Ironically, this right was granted to foreigners before it was extended to the *maka'āinana*.[45]

1. Crown and Government Lands

The Māhele divided the land into thirds all at once. The land was divided first between the king, the chiefs, and *konohiki* then recorded in the *Māhele Book*, but the king still had total possession of half of the land.[46] From this, the land was divided into two parts. The first part was the government lands and the second was the crown lands.[47] Before this division, the King held around 2.5 million acres of land, which is about 60.3% of the land.[48] King Kamehameha III divided the land with 1.5 million acres going to the chiefs and the people into perpetuity.[49] The Hawaiian Legislature then declared that the lands the king had set aside for the chiefs and people would be the Government Lands.[50] In what is known as the Second Division of 1850, the Government Lands were further enlarged. The chiefs and *konokini* gave up one-third of their land to the government to acquire an absolute title in the remaining land.[51]

The remaining lands from the Māhele were the Crown Lands which were the lands reserved for the king, his heirs, and his successors, which would be private

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40 *See* Linnekin, *supra* note 17, at 173.

41 THE MĀHELE BOOK, *supra* note 37, at 11, 177.

42 Linnekin, *supra* note 17, at 173-74.

43 MCGREGOR & MACKENZIE, *supra* note 25, at 262-263; LINNEKIN, *supra* note 16, at 174.

44 Maivân C. Lâm, *The Kuleana Act Revisited: The Survival of Traditional Hawaiian Commoner Rights in Land*, 64 WASH. L. REV. 233, 259 (1989).

45 *Id.*

46 KUYKENDALL, *supra* note 20, at 288.

47 *Id.* at 288-289.

48 MCGREGOR & MACKENZIE, *supra* note 25, at 221.

49 *Id.*

50 *Id.*

51 *Id.*

land.[52] In total, the king reserved about 984,000 acres for the Crown Lands.[53] It was clear during the Māhele that the Crown Lands were the private property of the king. Before the Māhele, the King owned all the land and had reserved this remaining portion of the land for himself.[54] As will be expanded on in another section, the Supreme Court of Hawai'i decided that the Crown Lands did not belong to the king personally but rather to the institution of the Crown; thus, stripping the private land title from the *Mō'ī* (king) and essentially reapportioning that land back to the government.[55]

Overall, the Māhele was one of the most consequential moments in Hawaiian history, for many reasons other than changing the way land was legally held in the Kingdom and how it was perceived. Nevertheless, the ownership of the land and the transformation from the traditional land tenure system to a semi-capitalist land system would have profound impacts on Hawaiian culture and would eventually contribute to the overthrow of the Hawaiian Kingdom in 1893.[56] It cannot be overstated that the *'āina* is at the core of Hawaiian culture, religion, and way of life, and this fact is why the Māhele remains important today.[57]

C. Overthrow of the Hawaiian Kingdom[58]

The overthrow of the Hawaiian Kingdom is one of the most defining moments in Hawaiian history. It is a clear demarcation point of a radical and hostile change in the way of life for Hawaiians and the use of their land.[59] For decades, the monarchs of Hawai'i had to maneuver and strategize to maintain the sovereignty of the Kingdom whilst remaining on the good side of the *haole* businessmen, who held an immense amount of power in the Kingdom.[60] The overthrow in 1893 was the zenith of the long road to the overthrow of the monarchy, and the institution of an American-friendly, white, male, foreign-run government.[61] The overthrow itself can be analogized to a tsunami, with the epicenter being the first contact of Captain Cook in 1778, moving along through the century following, cresting in

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52 KUYKENDALL, *supra* note 20, at 288.

53 MCGREGOR & MACKENZIE, *supra* note 25, at 222.

54 Levy, *supra* note 36, at 855.

55 *In re* Estate of His Majesty Kamehameha IV, 2 Haw. 715 (1864).

56 Levy, *supra* note 36, at 858.

57 Off. Hawaiian Aff. v. Hous. and Cmty. Dev. Corp. Haw. (HCDCH), 177 P.3d 884, 926 (Haw. 2008), *rev'd sub nom.* Haw. v. Off. Hawaiian Aff., 556 U.S. 163 (2009).

58 There is often confusion between the terms "Hawaiian Kingdom" and "Kingdom of Hawaii." Kingdom of Hawaii is an American term used in the 1993 Apology Resolution. S.J. Res. 19, 103d Cong. (1993). Hawaiian Kingdom was the official name of the Kingdom, this can be seen in documents of the time such as the 1864 constitution for the Kingdom. Const. Haw. King. § 47 (1864).

59 VAN DYKE, *supra* note 31, at 174 (2008).

60 *See* HALEY, *supra* note 32, at 246-47; *see also* MACKENZIE, *supra* note 15, at 19.

61 *See generally* VAN DYKE, *supra* note 31, at 111-208 (the road to annexation was not a singular event but rather a series of events that led to the outcome).

January of 1893.[62] In terms of land use, with a particular focus on that of Government and Crown lands, the overthrow of the Hawaiian Kingdom would see the monumental change to the lands that would form the "ceded lands" that are at issue today.

The one issue that is at the core of the Hawaiian Kingdom's overthrow is racism.[63] In the years preceding the overthrow in January of 1893, the relationship between the white business owners and the Hawaiian monarchs had been becoming more and more strained.[64] The Māhele, as mentioned in earlier sections, had come about because of pressure from both Hawaiians and foreigners. Still, in the end, foreigners had a major influence on the Land Commission, and the result favored business owners and Western interests.[65]

The overthrow of the Hawaiian Kingdom came to a head when Queen Lili'uokalani attempted to present a new constitution to the Hawaiian Legislature to undo the forced changes brought about in the Bayonet Constitution of 1887.[66] To the white businessmen, members in an organization called the "Hawaiian League,"[67] the new constitution was a bridge too far, and the time to strike and launch the coup d'etat against the queen had come.[68] Among the co-conspirators were the American Minister to the Hawaiian Kingdom, John L. Stevens, who stated, "[t]he Hawaiian pear is now fully ripe, and this is the golden hour for the United States to pluck it."[69] The Honolulu Rifles, together with United States Marines and Sailors from the U.S.S. Boston, bloodlessly overthrew the Hawaiian Kingdom.[70] Queen Lili'uokalani knew that armed resistance against the United States' forces would have led to needless bloodshed and abdicated her authority.

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62 *See generally* MACKENZIE, *supra* note 15. (giving an expansive account of Hawaiian History from pre-contact to annexation).

63 Letter from Sanford B. Dole to John W. Burgess (Mar. 31, 1894) (on file with U.C. Press) (The racism that led to and resulted in the overthrow of the Hawaiian Kingdom is outside the scope of this paper, however, it is important enough that it should be mentioned. The blatant strategy of the "Provisional Government's" leaders to deny Hawaiians the ability to vote shows that they understood that what they were doing was strongly despised by the Native Hawaiians. While other factors could be included, such as the economics of the sugar industry which led to the push for the Reciprocity Treaty, the very idea that the Hawaiian Kingdom and its people should be manipulated and outright usurped for profit is, in itself, based in racism, white supremacy, and the myth of Manifest Destiny.)

64 MACKENZIE, *supra* note 15, at 19-20.

65 VAN DYKE, *supra* note 31, at 32-40, 51-53.

66 HAW. KING. CONST. (1893) (proposed); HAW. KING. CONST. (1887).

67 GROVE KROGER, IMPERIALISM AND EXPANSION IN AMERICAN HISTORY, A SOCIAL, POLITICAL, AND CULTURAL ENCYCLOPEDIA AND DOCUMENT COLLECTION 270-71 (Chris Magoc & David Bernstein eds., 2016).

68 VAN DYKE, *supra* note 31, at 151-52.

69 H.R. Foreign Rel. Comm., 53d Cong. Letter from John L. Stevens to John W. Foster (Feb. 1, 1893) in *Affairs in Hawai'i*, 402 (Comm. Print 1895).

70 HALEY, *supra* note 32, at 297-99.

Critically, she yielded her authority to the United States and not the "Committee of Safety"[71] which was established by the white annexationists to take charge.[72]

1. Republic of Hawai'i

Following the overthrow of the Hawaiian Kingdom, the insurrectionists established the "Republic of Hawai'i."[73] The Republic was never actually meant to be, however. Opposition in Washington from anti-imperialist members of Congress and President Cleveland's election drastically slowed the efforts of the insurrectionists to have the United States annex the Hawaiian Islands.[74] With the fall of the Hawaiian Kingdom came the fall of the Hawaiian Kingdom's land and the laws governing them. The Republic of Hawai'i, no longer having the entity of the Crown to hold lands, combined the Crown lands and Government lands into the Government land.[75] This co-mingling of lands would go on to form the "ceded lands."[76]

With a change in leadership in Washington, in 1897, President McKinley and imperialist members of Congress attempted to ratify a treaty of annexation with the Republic of Hawai'i. Still, they failed to reach the two-thirds majority threshold to do so.[77] Following these failures,[78] Congress voted for, and the President approved, the annexation of the Hawaiian Islands by a resolution in 1898.[79] In 1900, Congress passed a law that formally provided a government, Territory of Hawai'i.[80] In the annexation to the United States, the Republic of Hawai'i ceded all public, government, and crown lands to the United States.[81] This treaty by the Republic of Hawai'i was never agreed to by the United States Senate; however, in the Annexation Resolution, the text of the treaty is referred

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71 The Hawaiian League, Honolulu Rifles, Committee of Safety, Provisional Government, and Republic of Hawai'i have many of the same actors and participants. Most notable among them were Lorrin Thurston and Sanford B. Dole.

72 Liliuokalani R., *Liliuokalani, 1893 to Sanford B. Dole*, UNIVERSITY OF HAWAII AT MANOA LIBRARY, http://libweb.hawaii.edu/digicoll/annexation/protest/liliu2.php.

73 REPUBLIC HAW. CONST. art. XIV.

74 VAN DYKE, *supra* note 31, at 172.

75 Laws of Hawai'i 1895, § 445.

76 HAW. REV. STAT. § 171-64.7(a) (2021).

77 VAN DYKE, *supra* note 31, at 208-09.

78 Liliuokalani R., *Liliuokalani to William McKinley (U.S. President), June 17, 1897*, UNIV. OF HAW. MANOA LIBRARY (June 17, 1897), http://libweb.hawaii.edu/digicoll/annexation/protest/liliu5.php.

79 Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, J. Res. 55, 55th Cong., 30 Stat. 750 (1898) [hereinafter Annexation Resolution]. It should be noted that the Republic of Texas was annexed through a joint resolution. However, this is not a comparable example, Texas became a state directly, not a territory, and there was an actual vote by the citizenry of Texas for statehood. MacKenzie, *supra* note 14, at n. 221.

80 Act to Provide a Government for the Territory of Hawai'i, Pub. L. No. 56–339, 31 Stat. 141 (1900) [hereinafter Hawai'i Organic Act].

81 Resolution of the Senate of Hawai'i Ratifying the Treaty of Annexation, art. II (S. Rep. Haw. 1897, 37), (this treaty was never ratified by the United States and thus is not the law.)

to as the Republic of Hawai‘i giving its consent to be annexed.[82] In this act, the government and crown lands had now become the "ceded lands."[83]

2. Territory of Hawai‘i

With the now "ceded lands" turned over to the United States by the Republic of Hawai‘i, the United States became the new trustee for these lands. The Republic of Hawai‘i had transferred around 1.8 million acres to the United States in the annexation.[84] In the Annexation Resolution, the United States provided an exception to the lands in Hawai‘i, declaring that the ordinary public land laws of the United States will not apply and that Congress will provide special laws for the territory.[85] However, the resolution did acknowledge the Crown and Government Lands in its preamble, declaring that the United States Government now owned them with a fee simple title.[86] The resolution further stated that the lands not being used for military, civil, naval, or assigned to local government might be used solely for the benefit of the inhabitants of the islands or for public education.[87]

The Annexation Resolution is a short document, thus, leaving a lot of information open to interpretation. The attorney general of the United States explained further what the resolution meant when it referred to the use of the term "ceded lands."[88] The attorney general stated that the lands annexed by the United States, since they were under special laws from Congress and not subject to the public land laws of the rest of the United States, were then in a "special trust."[89] Further stating that Congress, under the resolution, has "absolute authority" over the lands.[90] The opinion went on to say that the Resolution deprived the local Hawaiian authorities of the ability to control the land in any way, reaffirming the aforementioned absolute power of Congress over the land. At the time of the opinion, Congress had not yet formed a territorial government for Hawai‘i, which the Resolution points out is the objective of Congress in the time following annexation.[91] During the annexation, President McKinley, who signed the resolution, stated, "[w]e need Hawaii just as much and a good deal more than we did California . . . [i]t is manifest destiny."[92]

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82 Annexation Resolution, J. Res. 55, 55th Cong., 30 Stat. 750.

83 *See* HAW. REV. STAT. 171-64.7(a). (2021).

84 MELODY KAPILIALOHA MACKENZIE, PUBLIC LAND TRUST, NATIVE HAWAIIAN LAW: A TREATISE 79 (2015).

85 Annexation Resolution, J. Res. 55, 55th Cong., 30 Stat. 750. (1898).

86 *Id.*

87 *Id.*

88 Haw.—Pub. Lands, 22 Op. Att'y Gen. 574, 576 (1899).

89 *Id.*

90 *Id.*

91 Annexation Resolution, 30 Stat. at 750-51.

92 John A. Garraty, *William McKinley and His America by H. Wayne Morgan*, 69 AM. HIST. R. ,795, 795 (Apr. 1964).

In 1900, Congress provided a government for the Territory of Hawai‘i via the Hawai‘i Organic Act of 1900.[93] The Organic Act directly addressed the Crown Land by stating:

That portion of the public domain known as Crown land is hereby declared to have been, on the twelfth day of August, eighteen hundred and ninety-eight, and prior thereto, the property of the Hawaiian government, and to be free and clear from any trust of or concerning the same, and from all claim of any nature whatsoever, upon the rents, issues, and profits thereof. It shall be subject to alienation and other uses as may be provided by law.[94]

The Organic Act also referred to the Great Māhele land and the land granted by the Land Commission during that time.[95] The Organic Act put into place a Public Lands Commissioner, whose job was to oversee and manage the land in place of the Minister of the Interior. In essence, this new office was a territorial equivalent to the Department of the Interior.[96]

3. Lili’uokalani v. United States

One of the most important cases relating to the Crown Lands at the time of annexation and the institution of the Organic Act concerned the ownership of the Crown Lands. It was originally understood at the time of the Māhele that the Crown Lands were the personal property of the *Mō‘ī* and would be passed down to their heirs and successors.[97] In the case of *Liliuokalani v. United States*,[98] Queen Liliuokalani challenged the United States’ possession of the Crown Lands by arguing that they were her personal lands and that possession by the United States was a taking; thus, the United States owed her the value of the land.[99] In addition, the Queen claimed that she had a “vested equitable life interest” in the Crown Lands as an heir and successor to Kamehameha III.[100] The court reviewed Hawaiian history concerning the Crown Lands; it conceded that up until 1865, Lili’uokalani’s view of the Crown Lands was correct; however, that changed with the Act of 1865 from the Hawaiian Legislature (by that time controlled by white Americans).[101] With the promulgation of the Act of 1865, the *Mō‘ī* had been divested of all rights to the Crown Lands.[102]

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93 Hawai‘i Organic Act, Pub. L. No. 56–339, 31 Stat. 141 (1900).

94 *Id.* § 99, 31 Stat. at 161.

95 *Id.* § 73, 31 Stat. at 154.

96 *Id*.

97 MCGREGOR & MACKENZIE, *supra* note 25, at 221-222.

98 Liliuokalani v. United States, 45 Ct. Cl. 418, 424 (1910).

99 *Id.*

100 *Id.* at 424.

101 *Id.* at 427-28.

102 *Id.*

The court also relied on *In re Kamehameha IV Est.*[103] regarding the rights of dower to Queen Emma, stating that Queen Emma was entitled to the right of dower but not to a right of inheritance as only monarchs could inherit the Crown Lands.[104] The major holdings in the case were that King Kamehameha V and his successors were entitled to inherit the Crown Lands and the future Mō'ī were able to dispose of the lands as they wished with the funds from such actions being their personal property.[105] This opinion, however, was drafted before the Act of 1865 referenced in the Court of Claims opinion, which stripped the Crown Lands from the personal property of the Sovereign.[106]

The Court of Claims concludes by stating that from the history of the Crown Lands, the lands were the procession of the Crown as an entity and not that of the Sovereign as a person. Thus, when the entity of the Crown ceased existing, so did any claim to them.[107] The court further stated that the Republic of Hawai'i and the Organic Act effectively ended any trust attached to the Crown Lands.[108] Therefore, the court held that Queen Lili'uokalani did not have a claim against the United States because the Crown Lands were never her personal property.[109]

D. Admission to the Union

On August 21, 1959, Hawai'i was officially admitted to the United States of America, becoming the 50th state in the Union.[110] Once again, this act of admission changed the nature of ownership for the "ceded lands," continuing with the turbulent seas following the Kingdom's overthrow. The Admission Act was comprehensive, covering a larger number of topics and in greater depth than the Annexation Resolution or Organic Act.[111] One of those areas was the Crown and Government lands, now referred to as the "Ceded Lands."

Section 5 of the Admission Act directly pertains to the use of the "Ceded Lands."[112] It specifically states:

Except as provided in subsection (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property, and to all lands defined as 'available lands' by section 203 of the Hawaiian Homes Commission Act, 1920, as amended, within the boundaries of the State of Hawaii,

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103 In re Kamehameha IV Est., 2 Haw. 715 (1864).

104 VAN DYKE, *supra* note 31, at 85.

105 VAN DYKE, *supra* note 31, at 87.

106 VAN DYKE, *supra* note 31, at 275; Liliuokalani v. United States, 45 Ct. Cl. 418, 427-428 (1910).

107 *Liliuokalani*, 45 Ct. Cl. at 428.

108 *Id.* at 429.

109 *Id.*

110 Admission Act, § 2.

111 *Id.*

112 *Id.* at § 5.

title to which is held by the United States immediately prior to its admission into the Union. The grant hereby made shall be in lieu of any and all grants provided for new States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii.[113]

Section 5(c) of the Admission Act simply states that any lands that were set aside for the United States, unless otherwise stated, shall remain under the control of the United States.[114] Section 5(d) of the Act gives the United States Government five years to set aside land from the Territory that it had been using via the means of a license, permit, or verbal or written permission, to then be placed under Federal control.[115] It was essentially moving any land the United States Government was using without full title to now moving it under the title of the Federal Government. Section 5(e) gave the Federal Government five years to designate land that it owned already to be set aside for the State to use.[116] Unfortunately for the State, the Federal Government only returned 595.41 acres of land.[117] Most of the land transferred to the State under section 5(d) were small bits of land from various military installations, with the largest being 157.71 from the Waianae-Kai Military Reservation.[118] After stiff opposition from the State's leaders, the Federal Government relinquished more land in 1963.[119] This act transferred unused portions of Sand Island to the State of Hawai'i, as well as allowed for other surplus lands to be turned over to the State in the future without the need for the State to pay for them, but to hold the lands under the terms of the Admission Act.[120]

Section 5(f) creates what is known today as the Public Land Trust (still the "ceded lands") in Hawai'i. Section 5(f) states:

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[113] *Id*. at § 5(b). The impact of the Hawaiian Homes Commission Act of 1920 is outside the scope of this paper. Briefly, the HHCA was an effort by the United States during the Territorial Period to help native Hawaiians create homes on their native land. The HHCA provides the ability for Native Hawaiians, which means a person who has at least 50% native Hawaiian blood quantum, the ability to lease land from the United States for 99-years for one-dollar per year. Critically, the land that was set aside for the law was a very small amount of land and not all of it was useable in a productive way such as farming. For example, some of the land side aside was covered with dried lava, unstable for farming or habitation. Following admission to the Union, the Admission Act gave the responsibility of the HHCA to the Hawaiian Government and created a new department called the Department of Hawaiian Homelands (DHHL). Section 5 of the act also includes four other uses for the "ceded lands" held in trust, public education, farm and home developments, public improvements, and public use. All of these are permitted uses of the "ceded lands." Article XII § 4 of the State Constitution breaks apart the Public Land Trust from the Department of Hawaiian Homelands Trust. The available lands mentioned in Section 5(b), refers to Section 203 of the HHCA. Section 203 states in surveyor terms exactly which lands are being granted as available land and on which island.

[114] *Id*. at § 5(c).

[115] *Id*. at § 5(d).

[116] *Id*. at § 5(e).

[117] MACKENZIE, *supra* note 84, at 83.

[118] ROBERT H. HORWITZ ET AL., LEGIS. REF. BUREAU, NO. 5, PUBLIC LAND POLICE IN HAWAII: AN HISTORICAL ANALYSIS, 70-71 (Univ. of Hawaii ed., 1969).

[119] *See* Act of Dec. 23, 1963, Pub. L. No. 88-233, 77 Stat. 472-473 (1963).

[120] *Id*. at 473: HORWITZ, *supra* note 118, at 73.

The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use.[121]

This act firmly established that the Crown and Government lands of the Hawaiian Kingdom were now largely under the control of the State of Hawai‘i, for many uses, including the benefit of all Hawaiians. However, confusion surrounds the language in Section 5(f) that pertained to the proceeds and income from the public lands under the trust of the State of Hawai‘i. Finally, Section 5(g) gives a brief outline of the terms used in the preceding sections stating, "the term public lands and other public property' means, and is limited to, the lands and properties that were ceded to the United States by the Republic of Hawaii under the joint resolution of annexation approved July 7, 1898."[122] This also includes those that the Republic or the United States acquired in a land exchange.[123]

In the negotiations between the Federal Government and the Hawai‘i government on which lands would be set aside and which lands would be given to the state, the Federal Government wished to keep some of the lands it had been using but was—to some extent—willing to hand it over to the state.[124] The Federal Government elected, under Section 5(d), to keep some 87,236.55 acres of land it had under a lease, permit, or license out of 117,412,73 acres.[125] The remaining 30,176.18 acres were then turned over to the Hawaiian Government to be leased to the Federal Government for the price of $1.00 for the entire 65-year term of the lease.[126] These lands are a part of the discussion around HB-499. However, another section of the Hawai‘i Revised Statutes, Hawaii Revised Statute 171-95, allows the Board of Land and Natural Resources to lease public land to the Federal Government and other entities.[127] HB-499 seeks to extend leases on "ceded lands" by up to 40 years.[128]

Now, sixty-three years after the creation of the State of Hawai‘i, the Native Hawaiian people have more of a say in how the lands and their usage. Congress

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121 Admission Act, § 5(f).

122 *Id*. at § 5(g).

123 *Id*.

124 *See* HORWITZ, *supra* note 118, at 75.

125 MACKENZIE, *supra* note 84, at 83.

126 *Id*.; HORWITZ, *supra* note 118, at 75.

127 HAW. REV. STAT. § 171-95 (2021).

128 H.R. 499, H.D. 2, S.D. 2, C.D. 1, 35th Leg., 1st Sess. (2021).

had stated that the lands were to be used for their benefit and the State of Hawai‘i had more local control over those lands. However, as will be discussed in the following sections, this did not mean that everything went well for the Kanaka Maoli people or the "ceded lands."

III. ROAD TO THE CURRENT LAW

The birth of the current law is one of passion and years of litigation. HRS 171-64.7 arose from the battle between the State of Hawai‘i and the Office of Hawaiian Affairs.[129] To fully understand what the Office of Hawaiian Affairs is and does, as well as how Act 176[130] passed into law, one must start in 1978, when the Hawai‘i State Constitution underwent revisions.

In the years after admission to the Union, development in Hawaii exploded, and Hawai‘i's "ceded lands" were being snatched up by outside developers.[131] These developers would expand by evicting people from their ancestral lands in order to make way for new phases of their developments.[132]

In 1978, Hawai‘i called its second constitutional convention since statehood, and for the first time, it contained a committee for Hawaiian affairs.[133] The Hawaiian Affairs Committee's job was to draft proposed amendments to the Hawai‘i Constitution that would better protect Native Hawaiians.[134] At the convention, the Hawaiian Affairs Committee voted in favor of a proposed Office of Hawaiian Affairs.[135]

The Office of Hawaiian Affairs, created to be a separate and distinct political entity from that of the other branches of government. In essence, it would act as a quasi-fourth branch of the State of Hawai‘i.[136] The Office of Hawaiian Affairs was designed to hold title over the land it managed and keep its powers and authority distinctly separate from the rest of the Hawai‘i State government.[137] In November of 1978, 200 years after the first contact with Western explorers, the Office of Hawaiian Affairs was codified into the Hawai‘i Constitution by a slim margin of 5,952 votes.[138] Following the vote, the Public Land Trust as well as the

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129 *See* MACKENZIE, *supra* note 84, at 115.

130 Act 176 was the name of Hawai‘i Revised Statute 171-64.7 before it was codified.

131 MCGREGOR & MACKENZIE, *supra* note 25, at 62.

132 *Id*.

133 *Id*. at 69.

134 *See generally*, PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAI‘I OF 1978, (1980) (hereinafter Convention Report).

135 *Id*. at 644.

136 *Id*. at 645.

137 *Id*. at 645.

138 Inter-university Consortium for Political and Social Research, Referenda and Primary Election Materials Part 50: Referenda Elections for Hawai‘i, 39 (votes were 129,089 in favor and 123,137 against).

Office of Hawaiian Affairs and its powers are articulated in Article XII Sections 4, 5, and 6 of the Hawaiian Constitution.[139]

Section 4 reaffirms the beneficiaries of the Public Land Trust stating:

> The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.[140]

Recall that Section 5(b) of the Admission Act includes any lands that are considered "available lands" by the Hawaiian Homes Commission Act of 1920 and all public lands and other public property.[141] The new constitutional provision, above, excludes Hawaiian Home Lands from the Public Land Trust because those lands are already in a separate and distinct trust.

Section 5 of Article XII formally established the Office of Hawaiian Affairs and its trustees.

> There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law. The board members shall be Hawaiians. There shall be not less than nine members of the board of trustees; provided that each of the following Islands have one representative: Oahu, Kauai, Maui, Molokai and Hawaii.[142]

With this addition to the Hawaiian Constitution, the Kanaka Maoli people now had a newfound vessel to have greater control over their ancestral lands. Section 6 sets out the powers of the Board of Trustees and, importantly, how the Office

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139 HAW. CONST. art XII §§ 4-6 (1978).

140 HAW. CONST. art. XII § 4. As a part of Admission, the United States moved the HHCA under the control of the state government, thus creating the Department of Hawaiian Homelands, this moved allowed the Hawaiian government to amend the law in the constitutional convention.

141 Admission Act § 5(b).

142 HAW. CONST. art. XII § 5 (omitted the last sentence pertaining to the chair of the board of trustees). Initially, only Native Hawaiians could vote for the Office of Hawaiian Affairs trustees and only Hawaiians could serve as members. This was reasonable as the land was held for benefit of Native Hawaiians, as such, Native Hawaiians would be on the ones vote and be trustee to the land. Nevertheless, in the case *Rice v. Cayetano*, 528 U.S. 495 (2000), the U.S. Supreme Court held that since Native Hawaiians did not have the special legal framework that federally recognized American Indians Tribes have, the full force of the U.S. Constitution applies, and the voting restriction was a violation of the Fifteenth Amendment. *Id*. at 500. In the case *Arakaki v. Hawaii*, 314 F.3d 1091 (9th Cir. 2002), the Ninth Circuit held that Office of Hawaiian Affairs Trustee positions cannot be restricted by race. It must be noted that there is no certainty that federal recognition will protect a Native Hawaiian government from these suits. *See* Williamson Chang, *Darkness over Hawaii: The Annexation Myth Is the Greatest Obstacle to Progress*, 16 ASIAN-P. L. & POLICY J. 70,74 (2015).

of Hawaiian Affairs would collect its income.[143] Under the Constitution, the Office of Hawaiian Affairs would collect its share of the funds, *pro rata*, from the proceeds of the Public Land Trust land recognized under Section 4. The Board would also have the ability to exercise its authority over the land set aside for it to oversee. This would allow it to bring lawsuits to protect its holdings and responsibilities, which it would do so in the landmark case, *Office of Hawaiian Affairs v. HCDCH I.*[144]

A. Halting the Sale of "Ceded Lands"

A real genesis to the law that is on the books today and the first concept of the restrictions that HRS 171-64.7 places on the sale and gift of "ceded lands" were a series of cases that came down or started in the 1990s.

One of the cases that arose from this time was *Pele Defense Fund v. Paty*.[145] This case came on the heels of a federal case, *Ulaleo v. Paty*.[146] In *Pele*, the cause of action was very similar to that of *Ulaleo*: a question of a breach of the Admission Act and Article XII Section 4 of the Hawai'i Constitution.[147] Involving the "ceded lands," the case revolves around the exchange of land between the Department of Land and Natural Resources and the Campbell Estate.[148] Pele Defense Fund alleged that the exchange of land was a breach of the state's responsibility which was established by Section 5(f) of the Admission Act and Article XII of the Hawai'i Constitution.[149] The statute at the heart of the case, HRS chapter 195, states that Hawai'i is a biologically and geologically unique area in the world and that certain places that ascribe such uniqueness should be protected for future generations.[150] Part of the land that was being exchanged by

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143 HAW. CONST. art. XII § 6.

144 *See Id.*

145 Pele Def. Fund v. Paty, 73 Haw. 578, 584 (1992).

146 Ulaleo v. Paty, 902 F.2d 1395 (9th Cir. 1990). *Ulaleo* was case brought to challenge the exchange of land between the Board of Land and Natural Resources (BLNR) and a private estate, it was also brought by the Pele Defense Fund. This exchange took place under the authority of HRS 171-50 which allows for the transfer of public land for private land so long as the value of the land is the same, the law at the time allowed for the legislature to halt the exchange, today the statute requires the legislature to prove the sale by a majority vote. The plaintiffs brought suit under the State Constitution and 42 USC 1983 stating that the BLNR violated their responsibility under the Admission Act and State Constitution by improperly valuing the land, using it for improper uses, as well as a due process violation under Fourteenth Amendment. The Ninth Circuit held that the Eleventh Amendment of the Constitution bars suits against governments and officials in their official capacity in a retroactive manner. Thus, dismissing for lack of jurisdiction.

147 *Pele*, 73 Haw. at 584.; *See Ulaleo*, 902 F.2d.

148 *Pele*, 73 Haw. at 584.

149 *Id.*

150 HAW. REV. STAT. § 195-1 (2020) (Statute has been unamended since its initial passage in 1970).

the Department of Land and Natural Resources was a part of the state Natural Area Reserve System (NARS).[151]

The Hawai'i Supreme Court stated that it could not rule on the Admission Act claim or the 42 USC § 1983 claim because of *res judicata*. Since the Ninth Circuit had heard and ruled on virtually the same issue, those issues could not be adjudicated again by the Hawai'i Supreme Court.[152] On the remaining issue, the Court stated that Pele Defense Fund was barred from recovery because of the doctrine of sovereign immunity and applying it retroactively as the *Ulaleo* decision bound it.[153] In reviewing these claims; however, the Court stated that the State has a fiduciary responsibility to uphold the trust set out in Section 5(f) of the Admission Act and now enshrined in the Hawai'i Constitution.[154] In a footnote, the Court stated that it will apply the high level of scrutiny normally applied to private trustees to the state government on how it controls the Public Land Trust or "ceded lands."[155] The Court specifically stated that it would "[apply] this high standard of fiduciary duty to the government in deciding whether 1) the trustee administered the trust solely in the interest of the beneficiaries, and 2) whether the trustee used reasonable skill and care to make trust property productive."[156]

1. Apology Resolution

In November of 1993, to mark the 100th Anniversary of the overthrow of the Hawaiian Kingdom, Congress adopted what is known as the Apology Resolution.[157] The purpose of the Apology Resolution was to offer an apology on behalf of the United States of America to the Native Hawaiian people for the role the United States Government took in overthrowing the Hawaiian monarchy.[158] This resolution states in chronological order the events that took place which led to the United States getting involved in the affairs of the Hawaiian Kingdom. It explicitly states, "without the active support and intervention by the United States diplomatic and military representatives, the insurrection against the Government of Queen Liliuokalani would have failed for lack of popular support and insufficient arms."[159] Most importantly, in the Resolution, the final prefatory clause states that Congress supports the reconciliation efforts of the State of Hawai'i with the Native Hawaiians.[160] Congress acknowledges the right to self-

151 *Pele*, 73 Haw. at 587.

152 *Id.* at 600-01.

153 *Id.* at 611.

154 *Id.* at 606.

155 *Id.* at n.18.

156 *Id.*

157 Overthrow of Hawaii, PL 103–150, 107 Stat 1510. [Hereinafter Apology Resolution].

158 139 Cong. Rec. E2898-01 (1993).

159 Apology Resolution, ¶ 10, 107 Stat. at 1511.

160 Apology Resolution, ¶ 37, 107 Stat. at 1513. It should be noted that Section 2 of the Apology Resolution explicitly states that "Native Hawaiian" means any person who is descended from the

determination of Native Hawaiians and that the overthrow of the Hawaiian Kingdom deprived them of that sacred right.[161] It also calls for reconciliation between the United States and Native Hawaiians.[162] These resolutions are tied to the findings where Congress stated that the Republic of Hawai‘i illegally ceded 1.8 million acres of Crown, Government, and Public without the consent of or compensation to Native Hawaiians.[163] The Office of Hawaiian Affairs would use this resolution as a clear and direct statement from the United States to reconcile and be a legal vehicle to rectify Native Hawaiian disputes.[164]

B. Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawaii I

The lead-up to where the law stands today came to a head in the case of *Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawaii (OHA v. HCDCH I)*.[165] In 2008, fifteen years after the passage of the Apology Resolution called for reconciliation between the United States and the State of Hawai‘i with Native Hawaiians,[166] the Hawai‘i Supreme Court took up the case which arose out of the fiduciary responsibility of caring for the "ceded lands."[167] In the years since the implementation of the Apology Resolution and following *Pele*, the real duty owed by the state was still opaque.[168]

The case originated with the sale of two parcels of land from the "Ceded Lands" Trust on Hawai‘i island and Maui to private developers in 1994.[169] The Hawai‘i Housing Finance Development Corporation (HFDC), a state corporation, was attempting to transfer the parcels to a third party.[170] In 1995, the Office of Hawaiian Affairs and four other plaintiffs filed suit against the State of Hawai‘i and requested an injunction against all sales of the "ceded lands" and, in

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aboriginal people of Hawai‘i prior to 1778. This is a departure and far more inclusive than the definition used in the Hawaiian Homelands Commission Act, which is 50% of Hawaiian Blood. In section three it states that this resolution is not a settlement. This can be compared to the Alaska Native Claims Settlement Act of 1971, where the United States extinguished all claims the Native Alaskans had to the land in exchange for 44 million acres of land to be held by trustees.

161 *Id.* § 1(3).

162 *Id.* § 1(4).

163 Apology Resolution, ¶ 24, 107 Stat. at 1512.

164 *See* R. HŌKŪLEI LINDSEY, NATIVE HAWAIIANS AND THE CEDED LANDS TRUST: APPLYING SELF-DETERMINATION AS AN ALTERNATIVE TO THE EQUAL PROTECTION ANALYSIS, 34 AM. INDIAN L. REV. 223, 255-56 (2010).

165 Off. of Hawaiian Affs. v. Hous. & Cmty. Dev. Corp. of Hawaii (HCDCH), 117 Haw. 174 (2008), *rev'd and remanded sub nom.* Hawaii v. Off. of Hawaiian Affs., 556 U.S. 163, 129 (2009).

166 Apology Resolution, § 1(3), 107 Stat. at 1513. (1993).

167 33 U. HAW. L. REV. 447, 489.

168 *Id.*

169 *Id.* at 489-90.

170 *Id.* In 1997 the Hawai‘i Legislature combined HFDC with the Hawai‘i House Authority, creating the HCDCH.; *See OHA v. HCDCH I*, 117 Hawai‘i 174 n. 9., *rev'd and remanded sub nom. Hawaii v. Off. of Hawaiian Affs*., 556 U.S. 163.

particular, the parcel on Maui.[171] They also sought a declaratory judgment stating that such sales violate the state constitution and the Admission Act and/or that if sales are allowed, the sale of the land does not extinguish the claims that Native Hawaiians have to the land.[172] In this case, one of the largest issues is centered around the transfer of lands not between state entities, but between the State and third parties. In 1987, the Hawaiian Legislature, faced with the problem of a shortage of low-income and sanitary housing options, created the Housing and Community Development Corporation of Hawai‘i (HCDCH).[173] The act establishing the corporation stated that its mission was to develop "fee simple or leasehold property, construct dwelling units thereon, including condominiums, planned units, and cluster developments, and sell, lease, or rent or cause to be leased or rented, at the lowest possible price to qualified residents, nonprofit organizations, or government agencies."[174]

In 1990, the development of these low-income housing units began on Hawai‘i Island and Maui. In 1992, the Hawaiian Legislature enacted HRS § 10-13.6, which created a formula for the Office of Hawaiian Affairs to be compensated for the use of the land for these parcels.[175] Following the passage of the Apology Resolution and Congress's support of reconciliation and recognition of the Native Hawaiian claims to the Crown and Government lands, the Office of Hawaiian Affairs asked that a disclaimer be added to the acceptance of any funds from the sale of the parcel that states that the sale of the land does not extinguish any Native Hawaiian claims to the "ceded lands."[176] HFDC denied this demand in 1994 because it would add a cloud to the title of the land; thus, making title insurance unavailable for the buyers of the Maui parcel.[177] Not long after, the Department of Land and Natural Resources transferred the land to HFDC, about 500 acres on Maui. Per HRS § 10-13.6, HFDC sent a check for $5,573,604.40 to the Office of Hawaiian Affairs, who refused to take it, citing that the Apology Resolution created a cloud on the title.[178] Thus, the stage was set, and the plaintiffs in the case filed suit in November of 1994.[179]

The Court recognized that at the heart of the plaintiff's argument was the 1993 Apology Resolution.[180] The legal theory central to this claim is that the Apology

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171 *OHA v. HCDCH I*, 117 Hawai‘i 174 (2008), *rev'd and remanded sub nom. Hawaii v. Off. of Hawaiian Affs.*, 556 U.S. 163 (2009).

172 *Id.*

173 *Id.* at-186.

174 *Id.*

175 *Id.*

176 *Id.*

177 *Id.*

178 *Id.* at 187-88.

179 *Id.* at 188.

180 *Id.* at 189. A number of other state laws were relied upon by the opinion, citing Acts 354, 359, 329, and 340. Since the Court partial based its ruling on these state laws the holding in *OHA v. HCDCH I* still stands—so long as all conditions are met as they are laid out by *OHA v. HCDCH II*.

Resolution recognizes that the Native Hawaiians never gave up their claim to the "ceded lands."[181] Thus, the United States Government's recognition put a cloud over the titles of all of the "ceded lands" that were sold because, with that recognition, the current "title holder's" claim could be challenged by Native Hawaiians claiming their ancestral lands.[182] The Office of Hawaiian Affairs asserted that the Apology Resolution's passage "confirms the factual foundation for the claims that previously had been asserted."[183] Further stating that the Resolution did not force the lands that are in use to be turned over to Native Hawaiians, but rather "puts the State on notice that it must carefully preserve these lands so that a subsequent transfer can take place when the political branches reach an appropriate resolution of this dispute."[184] The HFDC relied on Section 3 of the Resolution which stated that it does not settle any of the claims to the land and that the Resolution does not create any remedies.[185]

When analyzing the legal impact of the Apology Resolution, the Hawai'i Supreme Court stated that in most cases, when such a resolution, passed by both houses of Congress and signed by the President, is passed, it is treated as law.[186] Using that logic, the court then applied an intentionalism approach to interpreting the Apology Resolution.[187] With that, the court read the Resolution and flatly stated:

> Based on a plain reading of the above passages, we believe Congress has clearly recognized that the native Hawaiian people have unrelinquished claims over the ceded lands, which were taken without consent or compensation and which the native Hawaiian people are determined to preserve, develop, and transmit to future generations.[188]

In defending this position, the Court said that to do as the HCDCH wishes would be going against the tenets of statutory interpretation, which is to read and utilize each word in the statute and recognizing the significance of each of them in the totality of the law.[189]

The Hawai'i Supreme Court did not just base this decision on federal law. It also relied on state law to come to similar conclusions.[190] The Court relied on a series of bills passed by the legislature around the time the Apology Resolution

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181 Apology Resolution, 107 Stat. at 1512. (1993).

182 *See* Off. of Hawaiian Affs. v. Hous. & Cmty. Dev. Corp. of Hawaii (HCDCH), 117 Haw. 174 (2008), *rev'd and remanded sub nom.* Hawaii v. Off. of Hawaiian Affs., 556 U.S. 163 (2009).

183 *Id.* at 190.

184 *Id.*

185 *Id.*

186 *Id.* at 191.

187 *Id.*

188 *Id.*

189 *Id.* at 192.

190 *Id.* at 193.

passed—the centenary of the Overthrow of the Hawaiian Kingdom.[191] One of the acts passed by the Legislature declared:

> Because the actions taken by the United States were viewed as illegal and done without the consent of native Hawaiians, many native Hawaiians feel there is a valid legal claim for reparations. Many native Hawaiians believe that the lands taken without their consent should be returned and if not, monetary reparations made, and that they should have the right to sovereignty, or the right to self-determination and self-government as do other native American peoples.
>
> The legislature has also acknowledged that the actions by the United States were illegal and immoral, and pledges its continued support to the native Hawaiian community by taking steps to promote the restoration of the rights and dignity of native Hawaiians.[192]

At the time, the idea of "a nation within a nation" was circulating; other bills with similar clauses called for the right of self-determination and the return of the land to the Hawaiian People.[193] The Court, citing *Pele,* stated that it is settled law that Native Hawaiians have the right to sue the government under the State Constitution for the state's violation of its' fiduciary responsibility to Native Hawaiians.[194] In terms of the State's fiduciary duty, the Court finally shed light on what exactly that meant in terms of the "Ceded Lands" Trust by saying, "[t]he use of the term 'most exacting fiduciary standards' imports the notion that [this] court will strictly scrutinize the actions of the government."[195] Further stating that the individual plaintiff in the case is, as Native Hawaiians are the beneficiaries of the "Ceded Lands" Trust and that the Office of Hawaiian Affairs is, along with the State government, a trustee of said trust and is tasked with administering that trust.[196] In these statements, the Court is echoing what it said in relation to the Hawaiian Homelands Trust and applying those rules to the "Ceded Lands."[197] In applying these responsibilities to the Office of Hawaiian Affairs, the Court is inferring that to carry out its responsibility to the beneficiaries of the trust, the Office of Hawaiian Affairs is required to bring suit against the State for such a breach.[198] Concluding this line of analysis, the court reaffirmed the connection this case had to federal *and* state law,[199] protecting it from any ruling that may nullify the issues on federal law.

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191 *Id*.

192 *Id* (quoting 1993 Haw. Sess. L. Act 354, § 1 at 999–1000).

193 *Id*.

194 *Id*. at 194.

195 *Id*. at 195 (quoting Ahuna v. Dep't of Hawaiian Home Lands, 64 Haw. 327, 339 (1982)).

196 *Id*.

197 *Id*.

198 *Infra*. *Id.*

199 *Id*.

The Court then turned to address the "Ceded Lands" in general and the issue of sovereign immunity and ripeness.[200] Through analysis, the Court stated that the plaintiffs were not barred by sovereign immunity from bringing suit.[201] The Administrator Land Division stated in a memorandum that there was a self-imposed moratorium on the sale of "ceded lands," because the Department of Land and Natural Resources was concerned about the "corpus" of lands and the returns to the Office of Hawaiian Affairs.[202] The trial court had stated that this moratorium on the sale of the lands made a claim against the state is not ripe for review since the state could not sell the land.[203] The Court rejected this argument by stating that the moratorium, as easily as it was put in place, can just as easily be lifted and the land could be sold.[204] Further stating that "[o]nce the ceded lands are alienated from the public lands trust, they will be lost forever and will not be potentially available to satisfy the unrelinquished claims of native Hawaiians to the lands, as recognized and contemplated by the Apology Resolution and the related state legislation."[205]

The real secondary part of this case is the section in relation to injunctive relief. The injunctive relief is directly tied to the Apology Resolution, and state law as the Office of Hawaiian Affairs asserted that the Resolution gives them the ability to halt the sale of the "ceded lands."[206] They suggested that the Court should look at the aforementioned laws and trust law in general, suggesting that in general trust law, when lands have been illegally obtained, injunctive relief creating a moratorium is proper until a settlement is reached.[207] To determine if injunctive relief was proper, the Court turned to a three-prong test: 1) if the plaintiff is likely to prevail on the merits, 2) if the risk of irreparable damage favors an injunction, and 3) if it is in the public's interest to have an injunction.[208]

For the first prong of the test, the Court sided with the plaintiff, explaining that they had had successfully pled their appeal and had succeeded on the merits of their case in terms that the alienation of the "ceded lands" would breach the fiduciary responsibility of the State government.[209] The Court looked to the Apology Resolution for justification; citing the Resolution's call to halt the development of the "ceded lands" pending the reconciliation between the United States and the Hawaiian people.[210] To justify this prong under state law, the Court

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200 *Id.* at 204.

201 *Id.* at 206.

202 *Id.* at 206 n. 23.

203 *Id.* at 206 (explaining that beneficiaries have standing where there are breaches of trust in sales of land).

204 *Id.* at 208.

205 *Id.*

206 *Id.* at 211.

207 *Id.*

208 *Id.* at 212.

209 *Id.*

210 *Id.*

looked to the various state laws that had been passed and the Governor's own words in working towards reconciliation with the Hawaiian people; as well as, the State's self-imposed moratorium that was in place until the present case was concluded.[211]

For the second prong, the Court relied on its determination that once the "ceded lands" have been lost, they can never be returned and determined that the prong had been met.[212] The Court dismissed the notion that the "ceded lands" could be compensated monetarily, looking to the Apology Resolution's reference that the *ʻāina* is something Native Hawaiians are "intrinsically" tied to.[213] The Court also relied on the testimony given by experts on Hawaiian history and law on the relation between the *ʻāina* and the Hawaiian people and its connection to sovereignty generally as well as to culture and religion.[214]

In the third prong, the Court looked at the state laws that had been passed to support reconciliation stating, "any further diminishment of the ceded lands (the *ʻāina*) from the public lands trust will negatively impact the contemplated reconciliation/settlement efforts between native Hawaiians and the State."[215] The Court further noted that not issuing an injunction would allow the state, who is a trustee of the land and the entity that can alienate the land, a much greater position to negotiate any future settlement which would be unfair to Native Hawaiians negotiating for their land.[216]

In its conclusion, the court handed down a number of holdings for this very complex and intricate case. As it related to the alienation of the "ceded lands" generally, the Court held that the Apology Resolution and state law create a fiduciary responsibility for the State of Hawai'i for the Public Land Trust but in particular the "ceded lands."[217] The Court held that the question of whether an injunction is appropriate to prevent the alienation of "ceded lands" is ripe for adjudication.[218] It held that the Office of Hawaiian Affairs had met the three-pronged test for whether an injunction was proper until the claims of Native Hawaiians and the "ceded lands" were settled via the political process.[219] The Court thus ordered the lower court to issue an injunction for the sale of the parcel of land on Maui and for all the remaining "ceded lands" until the claims were settled.[220] With this action, the Hawai'i Supreme Court halted the sale or transfer of Hawai'i's "ceded lands"; however, the Hawai'i State Government would not

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211 *Id.* at 213.

212 *Id.* at 214, 216.

213 *Id.* at 214 (citing Apology Resolution, Pub.L. No. 103–150, 107 Stat. 1510).

214 *Id.* at 214-15 ('āina means land in Hawaiian).

215 *Id.* at 216.

216 *Id.*

217 *Id.* at 217.

218 *Id.* The Court would further go into whether a claim is ripe to stop the alienation of lands in *OHA v. HCDCH II*.

219 *Id.*

220 *Id.*

leave it there. After this ruling was handed down, the State appealed the order to the United States Supreme Court for review, with the high court granting certiorari.[221]

1. Hawaii v. Office of Hawaiian Affairs

The case of *Hawaii v. Office of Hawaiian Affairs*[222] could be considered a setback in the fight for Hawaiian land sovereignty and in the preservation of the "ceded lands" from alienation. In the unanimous opinion, authored by Justice Alito, the Supreme Court ruled that the Hawai'i Supreme Court erred in relying on the Apology Resolution to stop the alienation of the "ceded lands."[223] The crux of the argument used by Alito is that the prefatory clauses of the Apology Resolution do not stop the State of Hawai'i from exercising its power as the sovereign of its lands.[224] The Court points out that the Apology Resolution only has two sections that may be acted upon; the first was the apology itself, and the second was stating that the resolution did not extinguish the claims that Hawaiians may have.[225]

The Court made three points when it took on the issue, first "whereas" clauses in a statute do not have legal authority. Second, even if they did, they cannot "restructure" a state's authority. Third, even if they did have power, they would raise constitutional questions about the Federal Government's ability to cloud the title of land decades after the state was admitted.[226] The Court cited *District of Columbia v. Heller*[227] in saying that in reviewing the prefatory parts of federal laws, "a court has no license to make it do what it was not designed to do."[228] Further quoting another case,[229] the Court indicated that the preamble of law is not actually a part of that law in a meaningful way, other than to know the intent of Congress.[230] For the second point, the Court entertained the idea that prefatory clauses did carry weight, only to explain in this instance that it would not have impacted their decision. The Court said that even if the prefatory clauses of the Apology Resolution did carry legal weight, they did not change the landscape of the law and impact the State of Hawai'i's rights or obligations.[231] The Court stated

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221 *Id.*; Hawaii v. Off. of Hawaiian Affairs, 554 U.S. 944 (2008)) (announcing the granting of the writ of certiorari); Brief for Petitioner, Hawai'i v. Off. of Hawaiian Affairs, 554 U.S. 944 (2008) (No. 07-1372).

222 Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163, 166 (2009).

223 *Id.* at 166.

224 *Id.* at 175.

225 *Id.* at 173.

226 *Id.* at 175-76.

227 *Id. at 175 (citing* Dist. of Columbia v. Heller, 554 U.S. 570, 578 (2008)*).*

228 *Id.*

229 *Hawaii*, 556 U.S. at 175 (quoting Yazoo & Miss. Valley R. Co. v. Thomas, 132 U.S. 174, 188 (1889))

230 *Id.*

231 *Id.* at 175.

that Congress did not indicate that it intended to change Hawai'i's legal rights or responsibilities with the Apology Resolution as set out in the Admission Act.[232] Further, the Apology Resolution did not create a cloud on the title of the "ceded lands" held by the United States and then transferred to Hawai'i after admission.[233] On the final point, the Court proactively answered the question: Is it legal if the Apology Resolution prefatory clauses were binding and if they did put a cloud on the State's title on the land? Here, the Court said that such a conclusion would raise a constitutional problem since the Apology Resolution came long after Hawai'i joined the Union.[234] Congress cannot, retroactively or generally after statehood, reserve the lands of a state for itself.[235]

In the last paragraph of the opinion, the Court addressed the state law claims that were raised in *OHA v. HCDCH I* by the Hawai'i Supreme Court by saying that the U.S. Supreme Court lacked the authority to hear or rule on the state law claims, but only had authority as far federal law permitted.[236] In the opinion, the ruling of the Hawai'i Supreme Court was reversed and remanded.[237] Critically, the U.S. Supreme Court only reversed the sections that relied on Federal law; thus, the ruling in *OHA v. HCDCH I* that relied on state law still stood.[238] The case was sent down to the Hawai'i courts, but would find its way back up to the Hawai'i Supreme Court.

2. Office of Hawaiian Affairs v. Hawai'i Housing and Community Development Corporation II

Less than a year following the decision from the Hawai'i Supreme Court in *OHA v. HCDCH I* and the United States Supreme Court decision in *Hawaii v. OHA*, the issue of the "ceded lands" was again at the Hawai'i Supreme Court. This case, *OHA v. HCDCH II*,[239] is the effort of the one remaining plaintiff in the original suit.[240] The Office of Hawaiian Affairs and the other plaintiffs in the original case had settled with the State of Hawai'i, which resulted in the enactment

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232 *Id.* at 175-76.

233 *Id.* at 176.

234 *Id.* Hawai'i was admitted to the Union in 1959, the Apology Resolution was signed in 1993.

235 *Id.* (quoting Idaho v. United States, 533 U.S. 262, 280 (2001)) Interestingly, this Courts argument that the Federal Government cannot reserve state lands for itself after admission is helpful in the battle against HB 499. The argument that the lands in the 65-year leases would be lost forever or that they are in some way the Federal Government's is wrong. In 2021 the Federal Government cannot set aside land that it did not in 1959 with the Admission Act. The 65-year leased land, once (or if) the leases expire, is then the state's land in fee simple absolute. Currently the land is the state's land but lease to the Federal Government.

236 *Id.* at 177.

237 *Id.*

238 MACKENZIE, *supra* note 84, at 119.

239 Off. of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw., 121 Hawai'i 324, 326 n.1 (2009), *as amended* (Nov. 24, 2009).

240 MACKENZIE, *supra* note 84, at 121.

of Act 176, which will be discussed in a future section.[241] The remaining plaintiff, Jonathan Kamakawiwo'ole Osorio, remained on the case to press his claim regarding the "ceded lands."[242] Three issues were at play in this case. First, whether Osorio had standing; second, whether the case was ripe; and third, whether an impermissible advisory opinion was requested.[243]

Osorio's claim that he had standing to bring the case comes only from his being a Hawaiian and bringing the case on behalf of the Hawaiian people.[244] The State of Hawai'i argued that under the law, Osorio is not a Native Hawaiian as he does not meet the one-half Hawaiian blood ratio that is established by the Admission Act, which uses the same definition as the Hawaiian Homes Commission Act.[245] Osorio stated that he used the definition in HRS 10-2 which does not set a blood quantum and just refers to the descendants of the people living on the islands before 1778, notably HRS 10-2 differentiates Hawaiian and Native Hawaiian.[246] The court accepted Osorio's argument in stating that in terms of the "ceded lands" and access to the Public Land Trust in general, as a Hawaiian, Osorio suffers from alienation from the land just as much as a person who is Native Hawaiian.[247] The Court found that Osorio did have standing if he could prove that 1) he had suffered an injury in fact and 2) "that the concerns of a multiplicity of suits are satisfied by any means."[248] For the first prong of the test, which has three parts, the Court said that Osorio would be injured by the sale of the "ceded lands" out of the trust, citing the religious and cultural connections the Hawaiian people have to the *'āina*.[249] For the second part of the injury in fact test, the court stated that the actions that led to the injury in fact, were traceable to the State of Hawai'i as they are a trustee and are responsible for the land.[250] For the third part of the injury in fact test, that a favorable outcome would benefit Osorio, the court concluded that if an injunction that stops the alienation of any of the ceded lands were issued to the state, it would be the favorable outcome, thus, meeting the requirement and the third prong of the test.[251] For the second prong, the Court said that it would be "absurd" to prevent a Hawaiian like Osorio from suing the state for a breach of trust; using the rationale in *Pele Defense Fund,* the Court ruled that Osorio met the second prong and had standing.[252]

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241 *Id.*
242 121 Hawai'i 324, 326-27.
243 *Id.* at 327.
244 *Id.*
245 *Id.* at 328.
246 HAW. REV. STAT. § 10-2 (2021).
247 121 Hawai'i 324, 334.
248 *Id.* at 333 (quoting *Pele Defense Fund*).
249 *Id.* at 334.
250 *Id.* at 334-35.
251 *Id.*
252 *Id.* at 335.

The key part of this case is the ruling on ripeness. This ruling, in a way, allows Native Hawaiians and the public at large to be at the ready in the event the "ceded lands" become alienated. The Court ruled that the case was not yet ripe for review and thus dismissed it.[253] Applying a two-prong test to determine ripeness, the Court stated that first, the issue must be fit, and second, the parties must suffer a legal hardship in the event the court does not act.[254] In determining the ripeness question, the court looked at the recently enacted Act 176 (HRS 171-64.7), which required a two-thirds majority vote to sell or gift the ceded lands.[255] In addressing the fitness prong of the ripeness test, the Court concluded that it had been met as the parcel transfer on Maui to the HCDCH was already finalized, despite the fact that it had not actually happened.[256] The legal mechanisms had already been put into place to transfer the parcel from the DLNR.[257] However, with the passage of Act 176, the final agency action was no longer the action of the agency transferring the land, but rather the legislature approving the land.[258] This means that in order for a claim brought by a member of the public to stop the sale of ceded lands, the final agency action must take place, and the alienation of the ceded lands via a sale or gift can only be "final" once the legislature votes to approve it. The Court ordered the case dismissed for the claim not yet being ripe,[259] but the ruling establishes an important trigger that once the sale or gift of "ceded lands" becomes approved by the legislature, a claim such as Osorio's would be ripe.

IV. ACT 176 AND THE CURRENT LAW[260]

Act 176, known in the legislative session as SB 1677[261] and codified as HRS 171-64.7,[262] was the culmination of an agreement between the Office of Hawaiian Affairs and three of the plaintiffs in the *OHA v. HCDCH I* with the State of Hawai'i.[263] This law gave the legislature a greater amount of control over the sale and gift of the "ceded lands." Previously there were no such protections on the sale or gift of land; the only real protection was to sue the state, which is what led to *OHA v. HCDCH I*. The closest protections that were in place were in Hawai'i Revised Statute 171-50, which required a majority vote of the legislature for the

253 *Id.* at 339.
254 *Id.* (Quoting *OHA v. HCDCH I*).
255 *See* HAW. REV. STAT. § 171-64.7, [hereinafter Act 176].
256 121 Hawai'i 324, 339.
257 *Id.* at 208.
258 *Id.* at 339.
259 *Id.*
260 2009 Haw. Sess. Laws. 705.
261 S. 1677, 25th Leg., 1st Reg. Sess. (Haw. 2009).
262 HAW. REV. STAT. § 171-64.7 (2009).
263 MACKENZIE, *supra* note 84, at 119

transfer of lands to take place.[264] Previous versions of the law require a majority vote of the legislature to *stop* the exchange.[265] This changed in 2014.[266] Section 171-18 of the Hawai'i Revised Statutes is about the Public Land Trust but mainly covers the use of monies concerning the trust.[267]

The purpose of Act 176 was to establish a process for the sale or gift of the "ceded lands" and to allow the public to have more of an impact and voice in how and whether those lands should be sold.[268] The Act recognizes that when that "ceded lands" are sold, they are lost forever; to do this, the Act requires that the legislature approve the sale of the lands before it can go ahead.[269] An important part of Act 176 is that it requires two-thirds majority approval by *both* houses of the legislature.[270] The Act itself pertains to "all lands or interest therein owned or under the control of state departments and agencies classed as government or crown lands previous to August 15, 1895, or acquired or reserved by the government upon or subsequent to that date . . . ."[271] The Act then lists the various types of land that it includes in its protections and gives some exceptions. The first exception is to lands that are set aside by United States law; this section refers to the land that the United States could set aside in Section 5(f) of the Admission Act.[272] Act 176 also requires any agency to give specific details on the location and type of land suggested for sale.[273] The Act specifically requires the agency to send:

> The state department or agency proposing to sell or give any state land described in subsection (a) shall submit for introduction to the legislature a concurrent resolution for review of the proposed sale or gift. The concurrent resolution shall contain a list of all sales or gifts of state land proposed by the state department or agency.[274]

Along with this requirement that gives the legislature notice, a requirement is set that requires the requesting agency to send their request and all required information to the Office of Hawaiian Affairs for their review as well.[275] Generally, a two-thirds majority is hard to reach, which is the goal of setting it so high, meaning that the legislature would *really* want to sell the land. For reference,

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264 *See* HAW. REV. STAT. 171-50.
265 2009 Haw. Sess. Laws 707
266 2014 Haw. Sess. Laws 559.
267 HAW. REV. STAT. § 171-18 (2021).
268 § 1. Act 176, Haw. Sess. Laws. at 706.
269 *Id.*
270 § 2. Act 176, Haw. Sess. Laws. at 706.
271 *Id.*
272 *Id.*
273 § 2. Act 176, Haw. Sess. Laws. at 706.
274 *Id.*
275 *Id.*

similar land bills in the Hawaiian Legislature were deferred in committee.[276] Maybe one of the strongest parts of this act is the section that requires agencies to abandon sales should the legislature vote down the measure. "If the legislature fails to approve the concurrent resolution by at least a two-thirds majority vote of both houses, the transaction shall be abandoned by the state department or agency."[277]

The final section of Act 176 refers to the aforementioned Hawai'i Revised Statutes 171-50, which requires an agency seeking a land exchange to submit a purpose for the exchange; as well as, sending a copy of the resolution it submitted to the legislature to the Office of Hawaiian Affairs.[278]

1. Passage from Bill to Act

Act 176 started off as Senate Bill 1677 (SB 1677) in the Hawai'i Senate prior to passage as Act 176.[279] The bill had a lot of attention from the Native Hawaiian community because of the two high-impact cases that had happened.[280] Over the course of the legislative session, many people gave oral and written testimony on their opinion of SB 1677. The testimony ranges from fervent support to outright opposition, with most of the testimony summarized as "better than nothing."[281]

During the legislative session, the bill went to the Water, Land, Agriculture and Hawaiian Affairs and Judiciary and Government Operations in the Senate, which acted as a joint committee and Hawaiian Affairs, Water, Land, & Ocean Resources/Judiciary, and Finance in the House.[282] SB 1677 went through four alterations between the House and Senate before the Conference Committee decided on the final language. The most fighting occurred in Section 3 of the bill, which relates to the exchange of lands but not the sale.[283] However, notably in SB 1677 SD 1 HD 2, a section was added that would handle the exchange *and* sale of the state lands, applying not just to "ceded lands" but also to any other state

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276 *See* S.B. 2, S.D. 2, H.D. 2, 35th Leg., 1st Sess. (2021); § 2 Act 176, Haw. Sess. Laws. at 706.

277 *Id*.

278 § 3. Act 176, Haw. Sess. Laws. at 707.

279 S. 1677, 25th Leg., 1st Reg. Sess. (Haw. 2009).

280 *See*, S.B. No. 1677, S.D. 1, H.D. 1 Relating to Lands Controlled by the State: Hearing on S.B. no. 1677, S.D. 1, H.D. 1 Before the H. Comm. on Fin. & H. Comm. on Haw. & H. Comm. on WLO-JUD ., 25th Leg. (2009), available at https://www.capitol.hawaii.gov/session2009/testimony/; See *OHA v. HCDCH I* and *Hawai'i v. OHA*; Editorial, *Bill Offers Compromise on Ceded-Land Fight*, HONOLULU STAR ADVERTISER, Feb. 23, 2009, at A6; *Hawaiians in da House (and the Senate)*, ALL HAW. NEWS, (Feb. 25, 2009), https://www.allhawaiinews.com/2009/02/honolulu-more-than-300-people-chanted.html.

281 *See generally*, S.B. No. 1677, S.D. 1, H.D. 1 Relating to Lands Controlled by the State: Hearing on S.B. no. 1677, S.D. 1, H.D. 1 Before the H. Comm. on Fin. & H. Comm. on Haw. & H. Comm. on WLO-JUD ., 25th Leg. (2009), available at https://www.capitol.hawaii.gov/session2009/testimony/.

282 S. JOURNAL 25th Leg., Reg. Sess. 881, 971 (Haw. 2009); H. JOURNAL 25th Leg., Reg. Sess. 1294, 1342, 1454 (Haw. 2009).

283 S.B. No. 1677 S.D.1 H.D.1, 25th Leg. 1st Sess. (Haw. 2009); S.B. No. 1677 S.D. 1, 25th Leg. 1st Sess. (Haw. 2009).

lands.[284] This section would have required the legislature's disapproval in order for a sale to be stopped and applied to all of the state land held in fee simple.[285] This section would semi-mirror the language in Hawai'i Revised Statute 171-50, which at the time required legislative disapproval for a land exchange to be halted.[286] There was no testimony on this version of the bill so it is unknown how the Native Hawaiian community responded to it. This was a change in the Conference Committee to what Act 176 passed as.[287]

Throughout the process, the Native Hawaiian community expressed its general thoughts about SB 1677, but their support for other measures was clear. Many of the people who submitted written testimony mentioned that they wished for a full moratorium on the sale of the "ceded lands" rather than a way to sell them.[288] The Office of Hawaiian Affairs mentioned this in their testimony for every version of the bill where testimony was permitted.[289] Saying in one testimony, "OHA would prefer a bill that imposes a full moratorium."[290] The bill that was referred to the most was SB 1085, which would be a full moratorium on that sale, transfer, exchange, lease, or gift of the "ceded lands."[291] Nevertheless, the legislature pushed ahead with SB 1677. The House Committee on Hawaiian Affairs Report on the bill stated that while many testifiers wanted a full moratorium, the committee's option was a "viable and reasonable" alternative to a full moratorium.[292] The final Conference Committee Report stated, "[r]ealizing that each sale; however reasonable or necessary, is final and permanent . . . this

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284 S.B. No. 1677 S.D.1 H.D. 2, 25th Leg. 1st Sess. (Haw. 2009).

285 Id.

286 HAW. REV. STAT. § 171-50 (2009).

287 SB 1677 S.D. 1 H.D. 2 C.D. 1, 25th Leg. 1st Sess. (Haw. 2009).

288 *See generally*, S.B. No. 1677, Relating to Lands Controlled by the State: Hearing on S.B. no. 1677, Before the Comm. on WLO-JUD., 25th Leg. (2009).

289 S.B. No. 1677, Relating to Lands Controlled by the State: Hearing on S.B. no. 1677, Before the S. Comm. on Water, Land, Agri, and Haw. Affairs, S. Comm. on Jud. and Gov. Ops., 25th Leg. (2009), available at https://www.capitol.hawaii.gov/session2009/testimony/SB1677_TESTIMONY_WTL-JGO_02-04-09.pdf (Office of Hawaiian Affairs Testimony); S.B. No. 1677, S.D. 1, Relating to Lands Controlled by the State: Hearing on S.B. no. 1677, S.D. 1, Before the H. Comm. on Water, Land, and Ocean Res., H. Comm. on Jud., 25th Leg. (2009), available at https://www.capitol.hawaii.gov/session2009/testimony/SB1677_SD1_TESTIMONY_WLO-JUD_03-13-09_.pdf (Office of Hawaiian Affairs Testimony); S.B. No. 1677, S.D. 1, Relating to Lands Controlled by the State: Hearing on S.B. no. 1677, S.D. 1, Before the H. Comm. on Haw. Affairs, 25th Leg. (2009), available at https://www.capitol.hawaii.gov/session2009/testimony/SB1677_SD1_TESTIMONY_HAW_03-04-09_LATE_.pdf (Office of Hawaiian Affairs Testimony); S.B. No. 1677, S.D. 1, H.D. 1 Relating to Lands Controlled by the State: Hearing on S.B. no. 1677, S.D. 1 H.D. 1 Before the H. Comm. on Fin., 25th Leg. (2009), available at https://www.capitol.hawaii.gov/session2009/testimony/SB1677_HD1_TESTIMONY_FIN_04-01-09_6_.pdf (Office of Hawaiian Affairs Testimony).

290 S.B. No. 1677, S.D. 1, H.D. 1 Relating to Lands Controlled by the State: Hearing on S.B. no. 1677, S.D. 1, H.D. 1 Before the H. Comm. on Fin., 25th Leg. (2009), available at https://www.capitol.hawaii.gov/session2009/testimony/SB1677_HD1_TESTIMONY_FIN_04-01-09_6_.pdf (Office of Hawaiian Affairs Testimony).

291 S.B. 108, 25th Leg. 1st Sess. (Haw. 2009).

292 H. JOURNAL 25th Leg., Reg. Sess. 1294 (Haw. 2009).

measure establishes a legislative prior-approval process that must be completed before most state-owned land may be sold."[293] It is evident by the committee reports that the legislature understood what its objective was and what it considered to be the most politically possible way of achieving that goal. In total, few written testimonies opposed this bill, underscoring the general support that the Hawaiian people had for a measure that protected the "ceded lands" from alienation.

Hawai'i Revised Statute 171-64.7 was further amended in 2011 to require the agencies wishing to sell parts of the "ceded lands" to identify if the land is Crown Lands or Government Lands.[294] Hawai'i Revised Statute 171-64.7 has been amended a total of twelve times since its original passage in 2009, with the latest version of the law being passed in 2021, which would exempt certain parcels of land that are not a part of the "ceded lands."[295] This is where the law on protecting Hawai'i's "ceded lands" stands today.

V. WEAKNESSES IN THE LAW

The testimony on SB 1677 is enough to show that it was a compromise, and not the total solution that the Native Hawaiian people were hoping for.[296] As previously mentioned, the attitude of those giving testimony in 2009 was one of the general understanding that the end result would be a compromise with the state. Nevertheless, they made sure to make wishes for a full moratorium like the one established in *OHA v. HCDCH I* known.[297] Act 176 and, in turn, Hawai'i Revised Statute 171-64.7, is too weak to protect the "ceded lands" from alienation adequately. Additionally, HRS 171-64.7 does not account at all for the leasing of the "ceded lands." As the law is written today, any agency that controls the "ceded lands" is able to lease lands out to other entities for a variety of purposes for up to 65-years with the impending possibility of some of those lands eventually being able to extend their lease by up to 40 years at a time.[298]

There are many flaws to the design of HRS 171-64.7. Some of the flaws are integrated into the very nature of statutes as they relate to other statutes. Other flaws are in the text of the statute itself. These two issues are connected with each other. This is why leaving the protections of Hawai'i Revised Statute 171-64.7 in the statutes should not be a long-term solution to protecting the sovereign lands of the Native Hawaiian people.

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293 S. JOURNAL 25th Leg., Reg. Sess. 881 (Haw. 2009).

294 2011 Haw. Sess. Laws Ch. 169; H.B. no. 397 H.D. 2, S.D. 2, 26th Leg. 1st Sess. (Haw. 2011).

295 H.B. 77 H.D. 1 S.D. 1, 31st Leg. 1st Sess. (Haw. 2021).

296 *See generally*, testimony SB 1677 (2009).

297 *Id*., *OHA v. HCDCH I*, 117 Hawai'I at 218 (while not mentioned by name in the testimony, *OHA v. HCDCH I* did establish a moratorium via an injunction against the State of Hawai'I selling or transferring "ceded lands' to third parties.)

298 *See* HAW. REV. STAT. § 171-36; HB 499

A. Chapter 171 of the Hawai'i Revised Statutes

Chapter 171 of the Hawai'i Revised Statutes generally pertains to land and land usage along with any exceptions that may apply.[299] Chapter 171 generally applies to the Department of Land and Natural Resources (DLNR) and its governing body, the Board of Land and Natural Resources (BLNR).[300] Thus the protections in this chapter, unless otherwise stated, apply only to the DLNR. Hawai'i Revised Statute 171-2 gives the definition of Public Lands in Hawai'i.[301] HRS 171-2 plays an important role in its relation to HRS 171-64.7 as the lands in the "ceded lands" are a part of the Public Land Trust. HRS 171-2 describes the public lands as:

> [A]ll lands or interest therein in the State classed as government or crown lands previous to August 15, 1895, or acquired or reserved by the government upon or subsequent to that date by purchase, exchange, escheat, or the exercise of the right of eminent domain, or in any other manner; including lands accreted after May 20, 2003, and not otherwise awarded, submerged lands, and lands beneath tidal waters that are suitable for reclamation, together with reclaimed lands that have been given the status of public lands under this chapter . . . .[302]

This section of HRS 171-2 is similar to the first section of HRS 171-64.7 which says:

> [A]ll lands or interest therein owned or under the control of state departments and agencies classed as government or crown lands previous to August 15, 1895, or acquired or reserved by the government upon or subsequent to that date by purchase, exchange, escheat, or the exercise of the right of eminent domain, or any other manner, including accreted lands not otherwise awarded, submerged lands, and lands beneath tidal waters that are suitable for reclamation, together with reclaimed lands that have been given the status of public lands under this chapter . . . .[303]

What is most critical is what comes after each of these clauses. In HRS 171-2, following the word "chapter" is the word "except."[304] The primary difference between these two statutes and why they are different is that HRS 171-2 refers to "public lands," whereas HRS 171-64.7 refers to the Public Land *Trust*.[305] The lands covered in HRS 171-2 overlap with the lands covered in HRS 171-64.7 to make sure that "ceded lands" and other lands covered are also protected by the two-thirds majority vote.

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299 HAW. REV. STAT. §§ 171-1 et seq.

300 HAW. REV. STAT. § 171-1.

301 HAW. REV. STAT. § 171-2.

302 *Id.*

303 HAW. REV. STAT. § 171-64.7(a).

304 HAW. REV. STAT. § 171-2.

305 HAW. REV. STAT. §§ 171-2, 171-64.7.

B. Issues in Hawai'i Revised Statute 171-64.7

As stated, HRS 171-64.7 appeared to be a compromise between what the Native Hawaiian Community wanted, and what the legislature and governor were prepared to pass and sign.[306] The statute is nowhere near clear in offering protection of the "ceded lands." By its very nature, the act allows for the sale and gift of the "ceded lands," it just makes it harder to accomplish.[307]

Section (b) of HRS 171-64.7 sets out the first issue with the statute. "Notwithstanding any law to the contrary."[308] Many statutes throughout the United States have this simple language, however; it covers the basic idea that all statutes are equal to each other. Constitutions are the supreme law of the land for a jurisdiction. Thus, the laws created by their authority are under them and cannot supersede their authority.[309] What is wrong with this section in HRS 171-64.7 is that by simple majority, the Hawai'i Legislature could change the law or repeal it outright by a simple majority.[310] This is evident with the legislative history of HRS 171-64.7 alone. It has been amended ten times since it was passed in 2009.[311] Admittedly, not all of these changes have been hostile in nature, such as HB 397 in 2011, which required that the Office of Hawaiian Affairs be given notice of a requested sale when the legislature is noticed.[312]

C. Leases

One of the most glaring holes in HRS 171-64.7 is the lack of any mention of leases. There are agencies within the Hawai'i State Government with the purpose of providing housing to low-income people in Hawai'i. Most notable of these is the Department of Hawaiian Homelands and the Hawai'i Housing Finance Development Corporation. By the very mission of these agencies, they must provide leases to the people who rent the land they manage.[313] These agencies, however, do not typically rent directly to people but to other developers who then

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306 *See* S.B. No. 1677, Relating to Lands Controlled by The State: Hearing on S.B. no. 1677, S.D. 1, Before the S. Comm. On Haw., 25th Leg. (2009), https://www.capitol.hawaii.gov/session2009/testimony/SB1677_SD1_TESTIMONY_HAW_03-04-09_.pdf. (Much of the testimony submitted on this bill is "form" testimony, this is a method used by organizers to get a large number of people who support or oppose something to send the same points in a preformatted letter. Many of the testimonies submitted reference SB 1085 as a better alternative, but since it had stalled, SB 1677 was a suitable alternative.)

307 *See* HAW. REV. STAT. § 171-64.7 (2021).

308 HAW. REV. STAT. § 171-64.7(b).

309 *Infra* John O. Mcginnis & Michael B. Rappaport, The Constitutionality of Legislative Supermajority Requirements: A Defense, 105 YALE L.J. 483, n.60 (1995). (Restating the understood rule that one legislature cannot bind a future one, and by extension one statute is equal to another).

310 HAW. REV. STAT. § 1-7 (2021).

311 *See generally* HAW. REV. STAT. 171-64.7 (Westlaw Credits) (the general legislative history of HRS 171-64.7 gives an accounting of the number of laws that have amended it since its inception.)

312 H.B. 397 H.D. 2 S.D. 26th Leg. 1st Sess. (Haw. 2011).

313 HAW. REV. STAT. § 201H-33 (2021).

sub-lease to people for low-income properties.[314] Generally, the Department of Hawaiian Homelands is exempt from HRS 171-64.7. There are other agencies that lease land with which they are trusted. One such is the Department of Land and Natural Resources.[315] This department manages a lot of the public land trust's land, including the 65-year leases negotiated with the United States during admission.[316]

During the admission to the Union, Hawai'i agreed to lease the United States' land for 65 years in return for the land that was being leased as state land instead of federal land, as was allowed under the Admission Act.[317] The law currently governing how state agencies run leases for public lands is Hawai'i Revised Statute 171-36.[318] Generally, HRS 171-36 sets out the restrictions that the Board of Natural Resources[319] has to abide by when creating leases with other entities.[320] Section (a)(2) of the statute states that the Board cannot have leases that are longer than 65 years in most circumstances.[321]

HB 499 exposes the hole in the leasing exception to HRS 171-64.7 by adding a new section that uses the "except as otherwise provided" language in HRS 171-36.[322] HB 499 allows for the extension of leases in the Public Land Trust for up to 40 more years.[323] HB 499's purpose is to allow the Board of Land and Natural Resources to extend certain leases on the land it manages, which is a large portion of the Public Land Trust. Under Section 5(b) and Section 5(f) of the Admission Act, the United States turned over large tracts of land to the State of Hawai'i for the use and benefit of Native Hawaiian people. Those lands that were initially conveyed to the State of Hawai'i are known as "5(b)" land in the State of Hawai'i's Public Land Trust Information System.[324] In total, as of this writing, the Department of Land and Natural Resources manages 3,986,055.3261 acres of land classified as 5(b) lands.[325]

Additionally, the Department of Land and Natural Resources oversees 115,821.2245 acres of land that were deemed surplus lands under Section 5(e) of

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314 *See Id.*

315 HAW. REV. STAT. § 171-3 (2021).

316 MACKENZIE, *supra* note 84, at 83.

317 HORWITZ, *supra* note 118, at 75.

318 HAW. REV. STAT. § 171-36 (2021).

319 The Board of Land and Natural Resources is the governing body for the state department of the Department of Land and Natural Resources.

320 *See* HAW. REV. STAT. § 171-36.

321 § 171-36(a)(2). There is a further exception for residential leasehold interests which have a starting lease of 55 years with the option under certain conditions to be extended to 75 years.

322 HAW. REV. STAT. § 171-36(a)

323 H.B. 499, H.D. 2, S.D. 2, C.D. 1, 35th Leg (2)(d); Governor Ige did not sign HB 499 but allowed it to become law because he did not veto it. It became law as Act 236 on July 6, 2021.

324 Admission Act §§ 5(b),5(f).

325 Public Land Trust Information System, Dep't. Land Nat. Res. (Aug. 18, 2021), https://pltis.hawaii.gov/HomeAuthenticated/Map. (Search query for fee owner DLNR, narrowed by 5(b) trust land status.)

the Admission Act or were entered into the trust after admission.[326] Collectively they are a part of the Public Land Trust and are protected from sale under HRS 171-64.7.[327] At the time of Admission to the Union, the State of Hawai‘i gave a lease-hold interest to the United States on fourteen parcels of land, culminating in 30,176.185 acres of land, placed under a 65-year lease.[328]

H.B. 499 states that the lessees of the land who wish to apply for lease extensions may do so if they substantially improve the land that they are leasing.[329] This is to fix any crumbling infrastructure on those properties.[330] In order for a property to be considered for a lease extension, it has to have completed the substantial improvement. Then the Board of Land and Natural Resources can grant a lease extension for up to forty years, making the combined lease length of 105 years for the first application.[331] There is, of course, nothing stopping a future legislature from further extending those leases in 2069,[332] which touches on the part of the argument that one legislature cannot bind another future legislature to its laws. The legislature may repeal or change laws at any time and by whatever rules they set in place for themselves. In terms of leases, this possibility of perpetual exemption and the creation of a 105-year lease show that the "ceded lands" may be protected from a fee sale and thus lost forever out of the Public Lands Trust. However, they are not protected from having the equivalent of a fee sale, a perpetual lease.

These types of practices can be seen on the mainland; American Indian tribes have been subjected to perpetual leases or to long-term 99-year leases that rob them of the ability to use their land.[333] With some American Indian tribes, the United States has established 99-year leases for residential buildings on Native land.[334] The result of such construction is that non-American Indians will move into those properties, and then it will be nearly impossible to remove them once done.[335] The core point is that 99-year leases, such as in a context where the lessee is impossible to remove, amount to a fee sale on the property.[336] This is the situation faced in Hawai‘i. The land belongs to the State of Hawai‘i, per the Admission Act. The land is leased, in this instance, to the Federal Government of

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326 Admission Act § 5I; PLITS, *supra* note 323. (Query for Section 5I lands and land added after admission.)

327 *See* HAW. REV. STAT. § 171-64.7.

328 HORWITZ, *supra* note 118, at 76.

329 2021 Haw. Sess. Laws 851. It is necessary to add that, HAW. REV. STAT. 171-95.1 allows the BLNR to extend leases beyond the 65-year term for school or government leaseholders. HAW. REV. STAT. 171-95.1.

330 *Id.*

331 *Id. see also* HAW. REV. STAT. § 171-36(a)(2)

332 1959+5(five years mentioned in the Admission Act)+65+40=2069.

333 *See* REID PEYTON CHAMBERS & MONROE E. PRICE, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 STAN. L. REV. 1061, 1062 (1974).

334 *Id.*at 1061-62.

335 *Id.* at 1078.

336 *Id.*

the United States. However, the State is willing to give the option to extend the lease for up to 105 combined years. The idea that the land is a part of the Public Land Trust is simply legal fiction. This fiction is compounded by the history of how these lands came about, because the Federal Government first had the option under the Admission Act to set aside the land or give them to the new State of Hawai'i. Under pressure from the Hawaiian delegation to Congress, the Bureau of the Budget and the State of Hawai'i agreed that Hawai'i would own the land and then lease it back to the United States, with the land being returned in 2029.[337] At the time, the State of Hawai'i was negotiating with a weak hand as the Federal Government threatened that it could just set the land aside with the other lands it had—which it could have done—but that is no longer the case.[338]

This leasing system, as well as the option to have lands that are a part of the "ceded land" corpus be leased and not used for the benefit of the Native Hawaiian people, is a serious and dangerous hole in the land protections that are supposed to be in HRS 171-64.7. These dangers were recognized at the outset. The current and future reaction by the Native Hawaiian Community should not be a surprise for the State of Hawai'i; as stated, many people gave testimony in 2009 for Act 176 stated that they preferred a full moratorium on state lands.[339] Officially the lands belong to the State of Hawai'i and have the possibility to be turned over in 2029 at the end of the leasing period. The mere option that they could not should be considered a breach of the State's fiduciary responsibility to the Native Hawaiian people and illuminates a glaring need for stronger land protections to be put in place.

D. Land Conversion

While the "ceded lands" remain partially exposed to development, they run the risk of conversion to other uses than their current use. This can be dangerous for the longevity and planned uses of the lands to better Native Hawaiians. The danger lies in lands that would be good for development for the better of Native Hawaiians lost to prior developments. Taken in this situation means that the land is no longer suited to the construction of a type of development such as prior industrial land being unable to support residential development. Conversion happens when the government takes land that is normally reserved for conservation and changes its land-use for non-conservation purposes.[340] The danger and weakness in the current law are that the leasing of land is handed to

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337 HORWITZ, *supra* note 118, at 75.

338 *Id.*

339 *See* S.B. No. 1677, Relating to Lands Controlled by The State: Hearing on S.B. no. 1677, S.D. 1, Before the S. Comm. On Haw., 25th Leg. (2009). Available at https://www.capitol.hawaii.gov/session2009/testimony/SB1677_SD1_TESTIMONY_HAW_03-04-09_.pdf. Critically, this bill did not pass this session but may be resurrected in the 2022 session.

340 Robert H. Levin, *When Forever Proves Fleeting: The Condemnation and Conversion of Conservation Land*, 9 N.Y.U. ENVTL. L.J. 592, 596 (2001).

the Department of Land and Natural Resources, who, while limited under certain provisions, are also open to lease the "ceded lands" to developers, thus, converting it.[341]

In the 2021 Legislative Session, one bill, which was referred to and not voted down by the legislature, would run the risk of doing just that.[342] Senate Bill 2 ("SB 2"), would allow the Governor of Hawai'i to set aside public lands and give them to the Hawai'i Housing Finance and Development Corporation ("HHFDC") and allow the HHFDC to lease public lands from any other department in the state, with no limit on the amount of land set aside.[343] This bill posed a serious threat to the integrity of the Public Land Trust as it would allow the HHFDC to convert the lands from conservation to residential lands, thus, preventing them from being used for other purposes, such as agriculture. Further, these lands would not necessarily be to the benefit of Native Hawaiians. While the bill did give preference to people on the waitlist for the Department of Hawaiian Homelands, preference is not exclusive.[344] Further, since the land is set aside for the HHFDC, it is not under the "protections" of Chapter 171, which governs the Department of Land and Natural Resources and under the leasing requirements for the HHFDC.[345] HHFDC is allowed to lease its land up to ninety-nine years; whereas, DLNR is limited to 65 years, pending extension.[346] Further, as mentioned, such 99-year leases, particularly in residential cases, amount to a fee simple sale of the land.[347]

These sorts of land conversions erode the "ceded lands" and cause death by a thousand cuts to the land base for Native Hawaiians.

VI. A SOLUTION TO THE PROBLEM

At the heart of the problem is the State's supposed efforts to reconcile with Native Hawaiians. The whole reason for the Public Land Trust is for the betterment of all Native Hawaiians as well as to hold the lands in trust until the claims that Native Hawaiians have to the land can be settled.[348] With the state's ability to sell, gift, exchange, and lease the land, it has the ability to permanently diminish the "ceded lands" from the trust by leasing them. Then, as the Hawai'i

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341 HAW. REV. STAT. § 171-36 (2021), *See OHA v. HCDCH I* and SB 2.

342 S.B. No. 2 S.D. 2 H.D. 2 (Haw. 2021).

343 *Id.*

344 *Id.*

345 S.B. No. 2 S.D. 2 H.D. 2, Relating to Public Lands, Hearing on S.B. No. 2 S.D. 1 H.D. 2, Before the Comm. on Fin. 31st Leg. (2021) Available at https://www.capitol.hawaii.gov/Session2021/Testimony/SB2_HD1_TESTIMONY_FIN_04-01-21_.PDF. (Native Hawaiian Legal Corporation Testimony.)

346 HAW. REV. STAT. § 201H-57; § 171-36.

347 Chambers & Price, *supra* note 335.

348 Admission Act § 5(f).

Supreme Court recognized, once the "ceded lands" have been sold, they are lost forever.[349]

To stop the destruction of the "ceded lands," protect the future interests of Native Hawaiians, and move powerfully towards reconciliation, much more robust protections are required for the "ceded lands," ones that do not allow the state to sneak around in creative ways. "Ceded land" protections must be added to the Hawai'i State Constitution.

There are a number of reasonable questions that follow such a statement: What exemptions, if any, should be included? Should there be a time limit attached? What about the land that is currently being used? And what, if any, organization, such as the Office of Hawaiian Affairs, wishes to use the land to carry out its mission?

An amendment to the Hawai'i State Constitution is the only way to truly preserve the lands as it is the foundation of all laws for the state; thus, no law can supersede it.[350] As stated, the weakness in the law currently and with any other law, no matter how strict, could be overcome with another law in the following year. Whilst the current law requires a two-thirds majority vote in the legislature to approve the sale of the lands, a majority vote can repeal, replace, or alter that current language and protection, creating a glaring, exploitable hole in the protections. This issue was identified in the testimony for SB 1677. One testifier stated that the only way to bind a future legislature is to pass a constitutional amendment, as one legislature could undo the two-thirds majority rule and sell the land in a new process.[351]

Any such addition to the state constitution would be in Article XII.

A. Language

When drafting an amendment or legislation in general, language is important. One word can change the meaning of an entire clause, section, or law. In 2009, other bills were drafted and considered that had stronger language than SB 1677.

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349 *OHA v HCDCH* I, 117 Hawai'i at 208.

350 *Infra* HAW. CONST. art. XVI § 15. (Inferring that the State has the ability to make laws because of the power of the constitution).

351 S.B. No. 1677 Relating to Lands Controlled by The State: Hearing on S.B. no. 1677, Before the S. Comm. on WTL-JGO, 25th Leg. (2009). Available at https://www.capitol.hawaii.gov/session2009/testimony/SB1677_TESTIMONY_WTL-JGO_02-04-09.pdf (Testimony of Kenneth Conklin). Kenneth Conklin is not a friend of the Hawaiian Sovereignty movement or of the Hawaiian rights in general, this may be surmised by his testimony on SB 1677. His opposition to the movement has been written a number of his pieces that outline his misguided opinions. The section of his testimony referred to is the *only* part that is worth reading as it is legally correct and the only testimony to mention placing the limitation in the State Constitution. That is the sole reason it is included in this article. The author of this article firmly stands against what Conklin believes and espouses and feels the need to make that absolutely clear.

Of these, only one proceeded to its first crossover in the legislature but then died in the Hawai'i House of Representatives, which is SB 1085.[352]

SB 1085 provides similar but stronger verbiage to the protection of the "ceded lands." It creates a new section in Chapter 171 of the Hawai'i Revised Statutes and prohibits a lease with the option to buy, sell, or exchange lands.[353] It adds on to Hawai'i Revised Statute 171-13, which is on the disposition of public lands. It also adds that the public lands shall not be dispossessed if it would violate Section 171-18, which describes the Public Land Trust and how its funds are managed. It gives three conditions for allowing the lands to be used, with the state only having to achieve one.[354] First, the claims of the Native Hawaiian people as they are described in the Apology Resolution have been resolved. Second, the State of Hawai'i declares through a concurrent resolution passed by two-thirds in each house that the State no longer supports reconciliation between the Native Hawaiian people and the State. Third, that following December 31, 2014, the legislature approves the lease of purchase, sale, or exchange of the land pursuant to a new section in Hawai'i Revised Statute 171-18.[355]

It further adds a new section to Hawai'i Revised Statute 171-8, which allows for the lease, permit, license, easement, exchange, or set aside by the state or any of its political subdivisions and agencies so long as four conditions are met.[356] These conditions were: "1) [t]he State establishes a compelling state interest for the disposition, 2) [t]here is no reasonable alternative means to accomplish the compelling state interest, 3) [t]he disposition is limited to accomplishing the compelling state interest, and (4) [t]he disposition is approved by the legislature by concurrent resolution adopted by at least two-thirds majority vote of the members to which each house is entitled."[357] These conditions did not stop the state from disposing of remnants, creating easements for public utilities, and exchanging land as provided in Hawai'i Revised Statute 171-50.[358]

This overall language is strong; however, it does pose legal challenges that were brought up in testimony by the State Attorney General saying that such a prohibition could leave the state open to lawsuits for violating the Admission Act.[359] This legal analysis is not entirely correct as the Ninth Circuit held that the Admission Act does not create an express or implied way for a private person to

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352 S.B. No.1085 S.D. 2 H.D. 1, 25th Leg. 1st Sess. (Haw. 2009).

353 *Id.* at § 1.

354 *Id.*

355 *Id*. The 2014 date would set a five-year total moratorium on the disposition of the "ceded lands." Following the end of the five-year period, the legislature would be able to dispose of the land with the added process that would also come in the bill for state agencies, however, this process did not require any high threshold to create lease to purchase or sale options, thus weaking the bill.

356 S.B. No. 1085 S.D. 2 H.D. 1 at § 3.

357 *Id.*

358 *Id.*

359 S.B. No. 1085, S.D. 2 Relating to Ceded Lands: Hearing on S.B. No. 1085, S.D. 2 Before the Comm. on Haw., 25th Leg. (2009) (Testimony of the Attorney General).

sue for compliance.[360] A person may, however, bring suit against the state under 42 U.S.C. 1983, claiming a violation of the Fourteenth Amendment.[361] Whilst technically correct, it is difficult to foresee how holding the "ceded lands" until the claims of Native Hawaiians are settled would create an issue under the Fourteenth Amendment.

B. Proposed Language

The proposed language for an amendment to the Hawai'i Constitution would need to be precise enough to prevent loopholes and minimize the need for litigation whilst minimizing any unintended consequences. The language would have to avoid incorporating other lands that are not in the "ceded lands" but might be public lands.

There are a number of possible angles and strengths that such proposals could have. This article will suggest and review five possible additions to the Constitution of the State of Hawai'i. Each proposal will be progressively more lenient with limitations and restrictions on the lands. It will then review the strengths and weaknesses associated with each.[362]

Overall, each option bans the sale or gift of the "ceded lands" but changes how the legislature handles land transfers and leases.

1. Option One

> Section 1
>
> The State shall not dispose of any land, by lease, sale in fee simple, gift or exchange, in the Public Land Trust, as established by Article XII Section 4, including any lands added to the Trust following admission.
>
> Section 2
>
> Any lands in the Public Land Trust that are currently under lease may remain under lease but shall not be renewed or extended.
>
> Section 3
>
> The State Government may not set aside or transfer lands in the Public Land Trust to other agencies within the State Government.

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360 Keaukaha-Panaewa Cmty. Ass'n v. Hawaiian Homes Comm'n, 588 F.2d 1216, 1220 (9th Cir. 1978).

361 Hearing on S.B. No. 1085, S.D. 2, 25th Leg. (Testimony of the Attorney General).

362 It is not the role of the article to decide which option, if any, are best for the Hawaiian people and the protection of their land. This section is to propose a number of options that may be used in part or in whole to create the necessary language to put in place a moratorium on the further use and conversion of the "ceded lands."

Strengths

This suggestion is by far the strongest in its language. This addition would have a complete and near-total ban on the sale, lease, and transfer of any land in the Public Land Trust, which would come under Section 5(b) and 5(e) of the Admission Act via Article XII Section 4, which establishes the Public Land Trust as such. This language forces the State of Hawai‘i into addressing reconciliation with the Native Hawaiian people or else face the inability to use the lands. Section 2 of the proposed language allows for any land that is currently under a lease to finish out the remaining amount of time in the lease before the land is then unable to be used. This language is to prevent the State of Hawai‘i from possibly breaching any lease agreement. This section, and all subsequent proposed options, do not refer to a state statute when describing the Public Land Trust but rather to the Admission Act. This prevents the legislature from amending any statutory reference to gut the amendment. Section 3 is a direct response to SB 2; it prevents the state from moving lands in the Public Land Trust, out of the domain of the Department of Land and Natural Resources, governed by Chapter 171, to another department or agency which does not have such strong protections.

Weaknesses

The weakness in the proposal is that it may be too strong to be practical. Mainly in its total ban on leases. Some leases on lands in the Public Land Trust are generally beneficial and low impact, such as cell towers. Another issue with the prohibition on leases would be, unless stated in the lease, the buildings constructed by the lessees over the duration of their lease would turn over to the state to hold and maintain. This may cause those buildings to fall into disrepair; as a result, causing environmental and health hazards. This also bans transferring land of any kind and of any value within the public land trust. This sort of moratorium was mentioned in the testimony for SB 1085 by the Hawai‘i Attorney General.[363] The Attorney General stated that such a moratorium would stop any type of land, no matter how beneficial for the public land trust, from being transferred.[364] Additionally, this proposal’s tight restriction would end funding that the Office of Hawaiian Affairs and DLNR use to preserve these lands; the funding these lands receive is still vital to maintaining them for the Native Hawaiian community.

2. Option Two

Section 1

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[363] Hearing on S.B. No. 1085, S.D. 2, 25th Leg. (Testimony of the Attorney General).

[364] *Id.*

> The State shall not dispose of any land, by lease, sale in fee simple, gift or transfer, in the Public Land Trust, as established by Article XII Section 4, including any lands added to the Trust following admission.
>
> Section 2
>
> Any lands in the Public Land Trust that are currently under lease may remain under lease but shall not be renewed or extended.
>
> Section 3
>
> The State may exchange lands in the Public Land Trust for private lands as provided by law, so long as the land acquired by the Trust is greater than or equal to the value, type, and size of the private land exchanged.
>
> Section 4
>
> The State Government may not set aside or transfer lands in the Public Land Trust to other agencies within the State Government.

Strengths

This proposal allows for slightly more flexibility in land exchanges, but only allows for exchanges and not total transfers. This section guarantees that the Public Land Trust will either stay the same or grow with land transfers. While allowing land transfers in the form of swapping land, this section still prohibits the state from moving lands out of the management of the DLNR and on to the less restrictive statutory scheme of another department.

Weaknesses

The weaknesses in this proposal are similar to Option One. First this option does allow for the exchange of lands for lands that are greater in value than the lands transferred out of the Public Land Trust. Further, another downside is that it does not allow for any land leasing in the Public Land Trust. Leasing of lands in the Public Land Trust may benefit the Native Hawaiian people; benefits could include housing, farming, business, or other economic development. The option to lease some of the "ceded lands" for a limited and restricted period of time may be, at some point in time, advantageous to Native Hawaiians; this option forecloses that option.

3. Option Three

> Section 1
>
> The State shall not dispose of any land, by sale in fee simple or gift in the Public Land Trust, as established by Section 5(b) and Section 5(e) of the Admission Act, including any lands added to the Trust following admission.
>
> Section 2

> The Legislature, via concurrent resolution presented by the Board of Land and Natural Resources, passed by both houses by a two-thirds majority vote, may approve the lease of land in the Public Land Trust. Any leases shall be limited to sixty-five years and shall not be renewed or extended for the current lessee. In order for the lands to be leased, the Board shall present:
>
> The location of the land;
>
> The size of the land;
>
> Whether the land is on Crown or Government land or was acquired after August 15, 1895;
>
> The names of all appraisers performing appraisals of the land to be leased and date of appraisal;
>
> Appraised value of the land;
>
> Purpose of the land being leased;
>
> Detailed and finalized version of the development plans of the property.
>
> Any amendment to the plans following approval shall require the lease to be re-approved via the same process stated in Section 1.
>
> Section 3
>
> The Legislature shall have the right to terminate the lease by a simple majority if the lessee is considered not to be acting in the best interests of the beneficiaries of the Public Land Trust.
>
> Section 4
>
> Any lease on the land for a duration exceeding ten years must also be approved by the Office of Hawaiian Affairs Board of Trustees before it may be effective.
>
> Section 5
>
> The State may exchange lands in the Public Land Trust for private lands as provided by law, so long as the land that is acquired by the Trust is greater than or equal to the value and size of the private land exchanged.
>
> Section 6
>
> The State Government may not set aside or transfer lands in the Public Land Trust to other agencies within the State Government.

Strengths

This proposal allows for more flexibility in all dimensions. It still prohibits the sale or gifting of the lands in the Public Land Trust; however, it allows for leasing under certain conditions. Notably, section two prevents the lease of land beyond

65 years, thus, plugging the gap latched on to by HB 499. The conditions that must be met in order to lease lands were largely lifted from Hawai‘i Revised Statute 171-64.7.[365] This section sets out that all critical information about the land being leased must be known before the legislature is to consider the proposal. This section also states that any amendment to the proposal voids any version that had already been approved, and the process must start over again. Section three allows for the legislature to act in a greater role in overseeing and maintaining the lands by allowing, through a simple majority, the cancellation of the lease "if the lessee is considered to not be acting in the best interest of the beneficiaries." This language is subjective by design and allows the beneficiaries to inform the legislature that they no longer believe the lessee is acting in their best interest and that the state should act on its fiduciary duty to end the lease. Finally, this has an added layer of protection in section four. This section requires the Board of Trustees for the Office of Hawaiian Affairs to approve the lease of lands before it goes into effect. The Office of Hawaiian Affairs also has a fiduciary responsibility to protect the Public Land Trust; this gives them the ability to independently halt the use of the lands if, as a trustee, they feel the land use will not be to the benefit of their beneficiaries.[366]

Weaknesses

The greatest weakness in this option are the sections on leases. While section 2 does allow leases, section 3 may scare away investors who feel that the legislature will yank away their lease at any time. This, however, is not a "strong" weakness. Such a move by the legislature would require a vote on the measure, which can be difficult to get moving. The greatest weakness falls in section four; this may be a separation of powers violation. Allowing for the Office of Hawaiian Affairs to, in effect, have veto power over the legislature's abilities may be a violation of that doctrine. This section would be a ticking litigation time bomb waiting to happen, all dependent on how the Hawai‘i Supreme Court rules on the issue. An amendment to this section to echo similar sections in the statute where the Office of Hawaiian Affairs receives notice at the same time as the legislature is possible in drafting.[367] Finally, this option does not mention exchange of land. This would mean that exchanging land in the Public Land Trust to private land would still be as it is under the Hawai‘i Revised Statutes.[368]

4. Option Four

Section 1

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365 HAW. REV. STAT. § 171-64.7(c).

366 *See generally, OHA v. HCDCH I*.

367 *See* HAW. REV. STAT. § 171-64.7(c).

368 HAW. REV. STAT. § 171-50.

The State shall not dispose of any land, by sale in fee simple or gift in the Public Land Trust, as established by Section 5(b) and Section 5(e) of the Admission Act, including any lands added to the Trust following admission.

Section 2

The Board of Land and Natural Resources may, via a concurrent resolution, request a lease be granted by the Legislature. The Legislature may approve the lease by a simple majority in both houses. Any leases shall be limited to sixty-five years without the option to extend the lease. For the legislature to consider the concurrent resolution, the resolution must contain:

The location of the land;

The size of the land;

Whether the land is on Crown of Government land or was acquired after August 15, 1895;

The names of all appraisers performing appraisals of the land to be leased;

Appraised value of the land;

Purpose of the land being leased;

Detailed and finalized version of the development plans of the property.

Any amendment to the plans following approval shall require the lease to be re-approved via the same process stated in Section 1.

Section 3

The Legislature shall have the right to terminate the lease by a simple majority if the lessee is considered to not be acting in the best interests of the beneficiaries of the Public Land Trust. Any lease renewal with the same lessee must be brought as a concurrent resolution and comply with Sections one and two.

Section 4

Before any concurrent resolution is brought before the legislature, the Board must have communicated with and seek input from the beneficiaries of the Public Land Trust.

Section 5

The State Government may not set aside or transfer lands in the Public Land Trust to other agencies within the State Government.

Strengths

This option, like the others, continues to ban the sale or gift of the lands in the Public Land Trust. It offers developers who wish to lease the lands an avenue to

acquire a lease from the Board of Land and Natural Resources. It allows for the legislature to review the request. For any change to the request, the Board must re-submit it to the legislature to review. Section four requires the Board of Land and Natural Resources to have a public comment period. This is similar to how administrative rules are made with the beneficiaries, before the concurrent resolution is brought before the legislature. This allows the legislature to quickly know the position of the beneficiaries of the Public Land Trust on the issue of the leasing land prior consideration and before the legislature.

Weaknesses

The primary weakness is that it requires the legislature to approve a lease of the lands via a simple majority vote, rather than a two-thirds majority vote which is currently required under the law for selling these lands.[369] While there is currently no legal protection via the legislature to leasing the "ceded lands," lowering the threshold to a simple majority, depending on the make-up of the legislature, may be tantamount to a rubber stamp. This section also does not require notification to the Office of Hawaiian Affairs or mandate its consent to the land being leased. While avoiding a constitutional issue like Option Three; it also prevents another entity, like the Office of Hawaiian Affairs, with a fiduciary duty to protect the Public Land Trust, from being fully informed from the very beginning.

5. Option Five

Section 1

The State shall not dispose of any land, by lease, sale in fee simple, gift or transfer, in the Public Land Trust, as established by Article XII Section 4, including any lands added to the Trust following admission.

Section 2

The Department of Land and Natural Resources shall be responsible for the leasing of lands in the Public Land Trust. The lands in the Public Land Trust shall not be set aside or transferred to any other agency, except to the Office of Hawaiian Affairs.

Section 3

Any parcel proposed for leasing that is greater than one square kilometer must be approved by a vote of the Legislature with necessary specifications presented to the Legislature as provided by law.

Section 4

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369 *See* HAW. REV. STAT. § 171-64.7(b).

> The Department of Land and Natural Resources shall work with the Office of Hawaiian Affairs to designate land within the Public Lands Trust that may be leased. Both agencies must agree on the parcel size, lease duration, and lease terms before the land may be leasable.
>
> Section 5
>
> Any proposed leases of the Public Land Trust submitted to the Department of Land and Natural Resources must also be submitted to the Office of Hawaiian Affairs not later than three months before the Department signs the lease to the land.

Strengths

This proposal is by far the most relaxed option proposed. This option continues the moratorium on the sale or gift of the Public Land Trust; however, it allows for the Department of Land and Natural Resources to lease the land out and does not require the department to pre-approve leases less than one square kilometer with the legislature. It does provide that the legislature must approve any lease on a parcel greater than one square kilometer, but the legislature must decide the size of the majority, plus the requirements that the department must meet. This option also requires the department to work with the Office of Hawaiian Affairs. The proposal prohibits the Government of Hawai‘i from changing who controls the Public Land Trust lands from the Department of Land and Natural Resources with the sole exception that lands may be set aside and given to the Office of Hawaiian Affairs to hold in trust. This is based on the idea that as an elected body, working for the benefit of all Hawaiians, the Office of Hawaiian Affairs is better suited to find a productive use that is to the benefit of Native Hawaiians. Finally, the Department and the Office of Hawaiian Affairs must work together to determine which lands can be leasable and for the Department to give notice to the Office of Hawaiian Affairs of any upcoming leases.

Weaknesses

This proposal being the laxest, means that it leaves the lands open to some form of alienation. While it is open to a more current form of realty, in that lands in the Public Land Trust are open to various purposes, it does allow for their development and use. The primary weakness is that it leaves the Legislature the authority to decide what the requirements that the department or the Office of Hawaiian Affairs have to meet to lease the land. Further, the legislature gets to set which majority it wants to have when it votes to approve a lease. Another potential weakness is that, to avoid the one-square-kilometer rule, the department or the legislature could divide the parcels until they are all below one square kilometer, thus, nullifying that section of the option.

6. Summary

Overall, there are many elements of each proposal that could add to a new option that would meet the political hurdles of the day. The intention of these proposed options is to prevent the Public Land Trust from developing these lands via leases to the extent that Native Hawaiians will never be able to have any outstanding claims heard. This could occur because of land conversion or because these lands would be owned de facto by a state agency leasing the land to a developer or the United States Military. The end goal of these proposals is for the State to move reconciliation with the Native Hawaiian community forward from its backburner position and settle the question of claims to Hawai'i's "ceded lands."

C. Process

The Hawai'i State Constitution is rather clear about the amendment process. Pursuant to Article XVII, there are two paths that an amendment can take: the first path is through a constitutional convention, while the second path is an amendment proposed by the legislature.[370] The writing will focus on the legislative option, although, the language proposed may serve to aid any future constitutional conventions.

For either option, the proposed amendment must be put to the people in a general election, the measure must then be approved by at least fifty percent of the voters who participated in the election, and the election must have at least 30 percent of the total eligible voter turnout.[371] In order to reach this stage, the proposed amendment must enjoy a two-thirds majority vote in both houses of the legislature.[372] Once the legislature adopts the measure, it must be broadcasted across the state via newspapers for the general public to read before the election.[373] Following the election and pending fifty percent of the people supporting the measure, the amendment will be adopted into the Constitution.[374]

D. General Weakness

One major weakness to this approach is sheer politics. Whilst Hawai'i does have a Democratic supermajority, that does not mean that everything is unified and seamless.[375] On the issue of "ceded lands," the Hawai'i Legislature is rather divided, with the majority of the legislature swinging in the direction against a moratorium on the "ceded lands." This was evident in 2009 and in 2021. In 2009

370 HAW. CONST. art. XVII § 1 (1978).

371 HAW. CONST. art. XVII § 2, 3.

372 *Id.* § 3.

373 *Id.*

374 *Id.*

375 Hawai'i State Capitol, *All Legislators*, HAW. ST.. CAPITOL, https://www.capitol.hawaii.gov/members/legislators.aspx?chamber=all.

the aforementioned SB 1085 was stalled in the House, and in 2021 HB 499 passed the House of Representatives smoothly with 36 in support and 15 against, and 25 to 9 in the Senate.[376] In 2009 SB 1677 (Act 176) passed 25 to 0 in the Senate and passed the House of Representatives 44 to 4.[377] This shows that when there is not a large amount of stress and pressure around the topic of the "ceded lands," the legislature is not prone to act on them in a favorable way. In 2009, the state had just come off of a massive legal battle starting in the early 1990s, which resulted in *OHA v. HCDCH I* and a United States Supreme Court decision that tossed around the question of the "ceded lands" a lot, bringing them to the public eye. Even then, as seen with SB 1085, the legislature was not keen on adopting a total moratorium on the alienation of "ceded lands." This was in contrast to a large amount of testimony in support of a full moratorium.[378]

The second obstacle and weakness would be getting the people of the State of Hawai'i at large to vote in favor of this amendment. Recall that the 1978 Amendment that created the Office of Hawaiian Affairs passed with a slim margin.[379] In the event that the legislature is not willing to amend the State Constitution to curb their power, these proposals may be adapted to fit legislation to accomplish part of their goal, although, they would still be open to repeal.

1. Unintended Consequences

The unintended consequences of these options would be the halted development of the lands that would be beneficial to the Native Hawaiian community, such as low-income housing. Whilst federal law does prohibit limiting these housing developments by race, Native Hawaiians are a large portion of the state's low-income population.[380] Limiting or ending the leasing of lands to people who the lands are meant to benefit would cause damage or, at least, would not lessen the pressure on low-income people in Hawai'i.

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376 *See* 2009 Archives, SB1085 SD2 HD1, Hawaii State Legislature (2009), https://www.capitol.hawaii.gov/archives/measure_indiv_Archives8-12.aspx?billtype=SB&billnumber=1085&year=2009; 2021 House Journal Day 54, 2021 Senate Journal Day 54 (unpublished). In the Hawaiian legislature, a member can vote "yes with reservations" on a final reading of the bill, these votes count towards the total yes votes. This is outside the scope of the paper but, such a system is dangerous and foolhardy in a final reading of the bill. Such "with reservation" votes are helpful in committee as they give an out for the member while the bill is under review and still open, but when the final vote is being cast, members should have to commit to a yes or no. H. Rules. § 11.6(2) (Haw. 2021) S. Rules § 71(1) (Haw. 2021).

377 S. JOURNAL 25th Leg., Reg. Sess. 671 (Haw. 2009); H. JOURNAL 25th Leg., Reg. Sess. 879 (Haw. 2009).

378 *See generally*, Hearing on S.B. No. 1677, 25th Leg. (2009) (referring to the large number of people who testified in favor of a full moratorium).

379 Inter-university Consortium for Political and Social Research, Referenda and Primary Election Materials Part 50: Referenda Elections for Hawai'i, 39.

380 42 U.S.C. § 3604 (2018); *See* Research and Economic Analysis Division, *Demographic, Social, Economic, and Housing Characteristics for Selected Race Groups in Hawai'i*, Dep't. Bus. Econ. Dev. Tourism, March 2018.

Stifled economic development would create other consequences. Hawai‘i’s economy is tourist centric.[381] However, there are large pushes to diversify the economy and reduce the state’s reliance on tourism. The proposals are meant, in part, to block further or new development of tourism on the “ceded lands” and allow for claims to finally be heard. However, these options could also make economic diversification more difficult by not allowing other sectors of an economy, such as high-tech, agriculture, or business access, via a lease or land, to construct structures, fields, or housing for workers. In agriculture, limiting leases to 65-years could create hesitation in investment depending on the size of the farm and the type of crops. This would be reliant on *who* is asking for a lease. The hurdles may put off large commercial agriculture, but small farmers may see an opportunity.

Another unintended consequence to consider would be the cost put onto future small businesses or individuals attempting to cultivate or develop lands in the Public Land Trust. There could be a backlog of leases, or a high cost incurred to move a concurrent resolution through the legislature. An individual seeking a parcel of land could likely not make such an effort. There would have to be a further process created by the legislature or executive branch to have an entity move the resolution through the legislature without incurring cost to an individual. The specifics of this proposal are outside the scope of this paper, but would be necessary to guarantee all beneficiaries of the Public Land Trust have the opportunity to develop their land without wealth having an impact on the likelihood of legislative approval.

A weakness that may not be immediately considered an issue is what to do with these amendments once reconciliation with the Native Hawaiian people is complete or met to the satisfaction of the people. Any such proposal would have to have a sunset clause that triggers once reconciliation formally begins, or an agreement with the legislature to put forth a new amendment to change the constitution to add new language that no longer has such a large burden on alienating the land. Whilst not exactly a weakness, it is a consideration that must be taken into account when presenting these options.

VII. CONCLUSION

The history of Hawaiian land rights and usage links up with how the lands are used today. Since the overthrow of the Hawaiian Kingdom, Native Hawaiians have been without a land base to exercise their right to self-determination. The State of Hawai‘i and the United States have also drifted away from their commitment to reconcile with the Native Hawaiian people since 1993 and the cases involving the alienation of the “ceded lands.” Those cases and the current

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[381] *See Hawaii’s Economic Structure: An Analysis Using Industry Level Gross Domestic Product Data April 2020 Update*, Dep’t. of Bus., Econ. Dev. and Tourism, April 2020, at 4-5, https://dbedt.hawaii.gov/economic/files/2020/04/GDP_Report_Final_April2020.pdf.

statutes do not address leases on the "ceded lands," allowing in effect the de facto alienation of the land with the option of century-long leases with statutes that allow for lease extensions, such as HB 499. So long as the legislature has the ability to write the rules and enforce them, the "ceded lands" remain at risk of alienation as the state attempts to dance around the edge of its fiduciary responsibility to Native Hawaiians. The only way to force the legislature to play by an enforceable standard of rules is by adding protections to the state constitution. This paper has set out five proposed options that the people and legislators may use in part or in whole to write a proposed amendment that will help protect Hawaiian lands until the Hawaiian people's claims on their land are settled.