Acknowledgements

Mahalo nui loa to Kamehameha Schools for supporting Ka Huli Ao’s Post-Juris Doctor Research Fellowship Program, which enables recent law graduates to conduct cutting-edge research and produce new scholarship on issues that impact Native Hawaiian law and the Native Hawaiian community. The Fellows’ papers are published as part of ‘Ohia: A Periodic Publication of Ka Huli Ao Center for Excellence in Native Hawaiian Law.

The name ‘Ohia was inspired by a line from a chant for Kalākaua: ‘ohana mai ā pau pono nā ‘ike kumu o Hawai‘i, gather up every bit of the basic knowledge of Hawai‘i.

Ka Huli Ao Center for Excellence in Native Hawaiian Law is an academic center that promotes education, scholarship, community outreach and collaboration on issues of law, culture and justice for Native Hawaiians and other Pacific and Indigenous peoples.

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HOʻOULU LĀHUI:
LAND, ECONOMIC DEVELOPMENT,
AND NATION REBUILDING IN HAWAIʻI

Nāpali Souza

ʻOhia:
A Periodic Publication of Ka Huli Ao Center
for Excellence in Native Hawaiian Law
HO'OULU LĀHUI:¹
LAND, ECONOMIC DEVELOPMENT, AND NATION REBUILDING IN HAWAI‘I

Nāpali Souza²

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¹ Hoʻoulu lāhui is a Hawaiian phrase that means “to increase and preserve the nation.” Mary Kawena Pukui & Samuel H. Elbert, Hawaiian Dictionary 341 (1st ed. 1971).
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I. INTRODUCTION

For Native Hawaiians, nation and land are bound in ways that go beyond spatial and political logistics. ʻĀina carries genealogical, ontological, and historical significance that upends classifications of it as simply property or assets. Beginning with moʻoolelo that speak of a direct kinship between Native Hawaiians and their natural surroundings and moving on to the contemporary political and legal battle over rights to and use of ʻāina, land is an enduring theme in Hawai‘i’s larger narrative. The principle of aloha ʻāina, which translates to mean “love of the land,” captures the revered position that land occupies in a Native Hawaiian worldview. Aloha ʻāina is often used interchangeably with environmental stewardship, but focusing on the idiom’s literal meaning ignores its rich etymology.

The expression outgrew its pastoral subtext when it surfaced as a political pronouncement during the struggle over power in the 1890s. Anti-annexationists adopted the phrase under the banner of Hui Hawai‘i Aloha ʻĀina, an organization formed to protest the overthrow of the Hawaiian monarchy. Along with a sister organization for women, the group petitioned, protested, and lobbied for restoration of the crown. In this context, aloha ʻāina communicated a “resistance to loss of land, identity, culture, and political power.” This interpretation reemerged in the 1970s during Hawai‘i’s cultural renaissance, which renewed political activism in the Native Hawaiian community, particularly over matters concerning land. Attention and energy coalesced around the island of Kahoʻolawe and the U.S. military’s use of it to stage combat exercises. Stories and memories of Kahoʻolawe’s history, preserved by kūpuna, gained wider exposure and revealed the island’s spiritual significance to the larger public. In light of these revelations, many saw the government’s occupation as desecration – a sacred island battered, stripped bare, and littered with shrapnel and unexploded ordnances. Out of the ensuing struggle to terminate the bombings, Kahoʻolawe emerged as a rallying point, triggering a groundswell of consciousness on issues of environmentalism, spirituality, ancestry, and sovereignty – all under the ethos of aloha ʻāina.

Activism during the 1970s continued on to the present day in various forms, and those efforts bring Native Hawaiians ever closer to a mode of formal self-governance. With self-governance will come the
monumental task of rebuilding a nation after more than a century of dispossession. In achieving that goal, reformers will need to create opportunities for citizens to thrive while maintaining cultural integrity and strengthening genuine independence, a task situated at "the intersection of economics and Native law." The nationalistic inflections incorporated in the declaration of love for the land demonstrates the inseparability of ʻāina from Native Hawaiian personal and political identity. Nation is ʻāina. ʻĀina is nation. With this coupling comes the duty to care for both the land and the people who trace their genealogy directly to the land.

This article explores the convergence of economic, developmental, and cultural forces that will shape the formal process of nation rebuilding. This analysis makes the basic assumption that a Native Hawaiian governing entity will actively pursue economic development to improve citizens' welfare. When framed as "the process by which a community or nation improves its economic ability to sustain its citizens, achieve[s] its sociocultural goals, and support[s] its sovereignty and governing processes," economic development hardly seems negotiable. However, given the contentious history of land in Hawai‘i and a value system arranged around this layered principle of aloha ʻāina, a unique approach to economic development is needed.

To better understand both the nuance and importance of aloha ʻāina, this article will begin with a discussion of land in Hawai‘i. Land is a fountainhead for a host of issues, and Part II highlights those pieces of the ongoing saga that illustrate the deeply woven relationships among ʻāina, nationhood, and contemporary Kanaka Maoli identity. Part III formulates these themes in the context of economic development, where ideology, culture, and sovereignty are tremendously relevant to economic outcomes. Part IV looks at a traditional source of government revenue – taxation – and contemplates some of the obstacles that impact tax collections. This explains the need for the government to take a more participatory approach to economic development. Part V explores how that might be done, beginning with an examination of the government corporate model that is used to revive reservation economies in the United States. ʻĀina will be a major piece of the economic model, and this section conceives of economic outcomes as a function of formal and informal institutions. By considering and managing the institutions that underpin the relationship between land and development, the Native Hawaiian governing entity should be better positioned to engage economic development without betraying aloha ʻāina.

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15 See Manley A. Begay et al., Development, Governance, Culture: What Are They and What Do They Have to Do with Rebuilding Native Nations?, in REBUILDING NATIVE NATIONS 34, 34 (Miriam Jorgensen ed., 2007).
16 Ezra Rosser, This Land is My Land, This Land is Your Land: Markets and Institutions for Economic Development on Native American Land, 47 ARIZ. L. REV. 245, 249 (2005).
17 Begay, supra note 15, at 36.
18 Kanaka maoli means "Hawaiian person." Pukui & Elbert, supra note 1, at 118. In plural form, it is kānaka maoli. See id. This article generally uses Native Hawaiian, Hawaiian, and Kanaka Maoli interchangeably to refer to the indigenous people of the Hawai‘i.
II. ALOHA ‘ĀINA

The etymology of aloha ‘āina is long. Its origins date back to the world’s earliest beginnings. Preserved in
the Kumulipo, a genealogical chant, the roots of aloha ‘āina coincide with the dawn of humankind.19 The
Kumulipo tells a story of how man and the natural world came into being and illustrates the belief that all
things are tethered to the same cosmological and familial chain.20

A. Origins of Aloha ‘Āina

With its ordered chronology and patterned structure, the Kumulipo provides a poetic prologue for the rich
and turbulent history of land in Hawai‘i. Set in the “deepest darkness,”21 the first seven of the chant’s sixteen
verses recall the earliest periods of creation before the arrival of men and women.22 These are juxtaposed
with the final nine sections, which take place in ao, symbolizing the period of humanity.23

Amidst all of this cosmological activity is the story of Papa and Wākea, which captures the intercon-
nectivity among gods, humans, and nature that is emblematic of aloha ‘āina.24 Papa and Wākea, the respec-
tive earth mother25 and sky father26 deities, mate and have a daughter named Ho‘ohōkukalani.27 She and
Wākea have two children.28 Their first child Hāloa-naka is stillborn and buried, and out of its burial place
grows the first kalo29 plant.30 For centuries, kalo was a dietary staple cultivated widely throughout the islands,
thriving in both damp and dry climates.31 With the development of over 150 varieties and a multitude of
culinary, religious, and medicinal uses,32 kalo’s cultural importance is unparalleled.33 It came to embody the
Kānaka Maoli milieu in many ways and continues to carry tremendous significance despite a precipitous
decline in production and consumption.34

19 Silva, supra note 6, at 97.
20 See id. at 98.
22 Martha W. Beckwith, Function and Meaning of the Kumulipo Birth Chant in Ancient Hawaii, 62 J. Am. Folklore
290, 290 (1949).
23 Id.
24 See Silva, supra note 6, at 101-02.
25 Id. at 102.
26 Walter Ritte, Jr. & Le‘a Malia Kanehe, Kuleana No Holoa (Responsibility for Taro): Protecting the Sacred Ancestor
from Ownership and Genetic Modification, in PACIFIC GENES & LIFE PATENTS 130, 131 (Aroha Te Pareake Mead &
Steven Ratuva eds., 2007).
27 Silva, supra note 6, at 101.
28 Id.
29 Kalo is the Hawaiian word for “taro.” Pukui & Elbert, supra note 1, at 115.
31 See Amy B. H. Greenwell, Taro: With Special Reference to Its Culture and Uses in Hawaii, 1 ECON. BOTANY 276,
279-81 (1947) (discussing taro’s wet and dry cultivation in Hawai‘i).
32 See id. at 281, 283.
33 See id. at 279.
/pdl/SA-1.pdf.
Ho’ohōkūlani’s second child, also called Hāloa as homage to the firstborn, is a kanaka. As “the first Hawaiian Ali‘i Nui,” Hāloa is regarded as progenitor of the lāhui. His life marks the beginning of all life for Kānaka Maoli — a common ancestor shared by all Native Hawaiians. A statement by Hale Naua, a genealogical society formed in 1886 by the last ruling Hawaiian king Kalākaua, remarks: “Now you must understand that the children born from Hāloa, these are yourselves.” According to Hawaiian thought, one’s genealogy is of utmost importance. For example, “lineages of Hawaiian chiefs could be traced back for nine hundred generations and more.” In addition to serving as a time measurement and historical record, ancestry also provides an anchor to the past and a source of mana. Descent influences a person’s identity, because no one is believed to be independent from his or her ancestors. “[T]he character of [one’s] ancestors…is the sum total of [one’s] identity.”

Significantly, this unfolding network of bloodlines, which begins with Hāloa as all Hawaiians’ common ancestor, preserves a kinship with kalo that is recognized even today. Elders are traditionally revered in Hawaiian society, so the relationship between Kānaka Maoli and kalo is one of “filial love, loyalty, and care.” This devotion is not exclusive to kalo, as all things from the spiritual and the natural world are threaded into Hawaiians’ genealogy. Their inclusion reaffirms the overarching “belief in the familial relationship of Kanaka Maoli to all the other life forms in their environment. This genealogical world view gives rise to the particular form that love of nation takes in Hawai’i, which is aloha ʻāina…”

35 Kame‘eleihiwa, supra note 30, at 24. Kanaka means human being. Pukui & Elbert, supra note 1, at 118.
36 Kame‘eleihiwa, supra note 30, at 24. Ali‘i Nui formed a class of “paramount chiefs.” Ross H. Cordy, The Effects of European Contact on Hawaiian Agricultural Systems – 1778-1819, 19 Ethnohistory 393, 398 (1972). Lāhui is the Hawaiian word for “nation.” Pukui & Elbert, supra note 1, at 176. It is used throughout this article to identify Kānaka Maoli as a collective people as well as a nation. It is also used to refer to the physical space that the Native Hawaiian nation will occupy, an equivalent of sorts to “reservation.”
37 Kame‘eleihiwa, supra note 30, at 24.
39 See Kame‘eleihiwa, supra note 30 at 21; see also Haunani-Kay Trask, Feminism and Indigenous Hawaiian Nationalism, 21 Signs 906, 906 (1996).
40 Kame‘eleihiwa supra note 30, at 22.
41 Id. at 19.
42 Id. at 21. Mana is Hawaiian for “supernatural or divine power.” Pukui & Elbert, supra note 1, at 217.
43 Kame‘eleihiwa, supra note 30, at 21; see also Shawn Malia Kana‘aupuni, Ka‘akālai Kū Kanaka: A Call for Strengths-Based Approaches from a Native Hawaiian Perspective, 33 Educ. Res. 26, 30 (2004) (“The strengths of families include the connection and relationships borne through genealogy . . . .”).
44 Kame‘eleihiwa, supra note 30, at 21.
45 In 2002, patents were issued to a researcher from the University of Hawai‘i after developing three new varieties of the plant, which would be resistant to a fungus that caused leaf blight, through crossbreeding. Tracie Ku‘uipo Cummings Losch, Hawaiian Issues, 19 Contemp. Pac. 222, 228 (2006). Native Hawaiians protested the patenting of kalo because of its religious and genealogical significance. Id. Native Hawaiians declined the university’s offer to transfer ownership of the patents to them, and the school later relinquished its claims of ownership. Id. at 229.
46 Kame‘eleihiwa, supra note 30, at 25.
47 Silva, supra note 6, at 102.
48 Id.
49 Id.
B. Aloha ʻĀina in Practice

This belief in a kinship with the land governed land tenure in ancient Hawai‘i. “In precolonial, precapitalist times . . . the people took care of the land in what they conceived of as a reciprocal relationship, and they managed and governed themselves in what is usually described as the ali‘i system.”50 These methods found their application in the ahupua‘a – a pie-shaped unit of land typically flanked by mountain ridges that ran from the peak of the valley to the ocean.51 Each island was carved into ahupua‘a using geographical features as natural markers.52 Yet the land had no owner; it was maintained “under a communal system [in which] all people had access.”53 This provided those who resided within the ahupua‘a the full abundance of resources, from the ocean to the uplands.54

A system of reciprocity also policed civic responsibilities and land management.55 This too was an outgrowth of the kinship Hawaiians share with ʻāina.56 The social hierarchy, loosely divided into a ruling ali‘i class and the makaʻāinana commoner class, “was stratified but interdependent.”57 Ali‘i were divided into subclasses with Ali‘i Nui, considered to be human representations of gods, at the top of the ranks.58 As the nearest link to the gods, Ali‘i Nui had a responsibility to look after the makaʻāinana.59 They did this in part by maintaining the resources and infrastructure necessary to support cultivation.60 In return, the makaʻāinana provided the Ali‘i Nui with food and clothing.61

A persistent adherence to the principle and practice of mālama ʻāina maintained this symbiosis.62 “[T]o Mālama ʻĀina was by extension to care for the makaʻāinana and the Ali‘i, for in the Hawaiian metaphor, these three components are mystically one and the same.”63 Again, this way of viewing the individual’s relationship with the larger world goes back to the nested cosmology and genealogy of Kānaka Maoli.64 Here, that metaphysical arrangement converges in the quotidian exercise of caring for and looking after the land. This understanding reinforces the primacy of ʻāina and Kānaka Maoli devotion to the land prior to Western contact.

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50 Id. at 39.
51 Kameʻeleihiwa, supra note 30, at 27.
52 Id.
53 Id. at 8-9.
54 Id. at 27; see also Christopher S. Peebles & Susan M. Kus, Some Archeological Correlates of Ranked Societies, 42 Am. Antiquity 421, 424 (1977) (“Each ahupuaa . . . contained within its boundaries sufficient environmental diversity and productivity so that it was relatively self-sufficient with regard to subsistence items.”). But cf. Peter R. Mills, Social Integration and the Ala Loa: Reconsidering the Significance of Trails in Hawaiian Exchange, 41 Asian Persp. 148, 161-63 (2002) (concluding that the ancient economy was characterized by frequent inter-ahupuaa trade and commerce).
56 See Kameʻeleihiwa, supra note 30, at 10.
57 Silva, supra note 6, at 39.
58 Kameʻeleihiwa, supra note 30, at 37.
59 Id. at 26.
60 Id. at 30.
61 Id.
62 Id. at 25.
63 Id. at 31.
64 See Richard Kekuni Blaisdell et al., Ka Ahupuaʻa, 2 EcoHealth 373, 373 (2005).
It is this ontological understanding, premised on interconnectivity, that underpins a Maoli worldview and frames a system of values enshrined in aloha 'āina. Literally meaning “love of the land,”65 aloha 'āina is a relatively contemporary expression for a system of norms that dates back to Hawaiian antiquity.66 While its literal meaning is a direct outgrowth of ancient thought, aloha 'āina's subtext grows richer and more nuanced with each readjustment in Hawai‘i’s political economy and social architecture.

C. Privatization of ‘Āina

On this point, one of the most momentous disruptions happened with the Māhele, which dismantled the communal land regime by permitting ownership of land in fee.67 With the forces of colonization steamrolling over the Pacific,68 one theory posits that the Mō‘ī, or King, instituted the Māhele as a preemptive measure, so that property rights might survive a takeover if Hawai‘i assumed a land regime that mirrored those found in the West.69 Domestic upheaval accompanied the shifting geopolitical landscape, and the Māhele, discussed in depth below, can be interpreted as a reaction to changing conditions at home.70

The old system based on reciprocity became increasingly difficult to maintain through the decades of continuous contact that followed Captain James Cook’s arrival in 1778. One reason for this was massive population losses.71 Foreigners exposed Kānaka Maoli to viruses and infections against which they had no naturally acquired immunity, shrinking the native population by hundreds of thousands in a series of epidemics that lasted throughout the 1800s.72 Not surprisingly, widespread illness and death left the once robust ahupua‘a network languishing.73 Food production dwindled, and in certain parts, cultivations were abandoned.74

The thrust of outside trade and Western forms of economic thought added to the strain. Trade outside of the ahupua‘a began soon after contact, and ships voyaging through the Pacific would use the islands to stock up on pig and produce in exchange for weaponry and other European goods.75 This source of outside demand promoted agricultural activities, particularly in the districts that surrounded heavily visited ports, like Kealakekua and Kailua on Hawai‘i and, a little later, Honolulu on O‘ahu.76 So while trade did not undermine

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65 Pukui & Elbert, supra note 1, at 19.
66 Kamē‘e leihiw a, supra note 30, at 25.
67 Id. at 137.
68 See Jon M. Van Dyke, Who Owns the Crown Lands of Hawai‘i? 30 (2008). “As Britain, France, and the United States competed for territories in the Pacific to expand their military and economic interests, Hawai‘i, with its harbors and choice location in the North Pacific, was desired by all three nations.” Id.
69 See Stuart Banner, Preparing to be Colonized: Land Tenure and Legal Strategy in Nineteenth-Century Hawai‘i, 39 Law & Society Rev. 273, 278 (2005) (“The object of the Māhele was to ensure that, in the event of annexation, Kamehameha III and other Hawaiian elites would not be dispossessed of their landholdings.”).
70 Jonathan Kay Kamakawiwoʻole Osorio, Dismembering Lāhui 47, 49 (2002).
71 See id. at 47.
72 See Van Dyke, supra note 68, at 19-21.
73 Id. at 21.
74 See Cordy, supra note 36, at 408 (concluding that, in the absence of hard data, huge population losses would have caused agriculture to suffer).
75 Id. at 400.
76 See id. at 402-03 (explaining that O‘ahu replaced Hawai‘i Island as a trading hub in the early 1900s, and the demand
the efficacy of the ahupua’a system, it did add the element of exchange to a predominately subsistence-based economy.\textsuperscript{77} This in turn intensified the production and labor needed to underwrite the chiefs’ consumption of foreign goods and guns.\textsuperscript{78}

More disruptive was the Kingdom’s foray into the sandalwood trade. Great demand for the tree’s fragrant wood, especially in China,\textsuperscript{79} led to the export of ‘iliahi, Hawaiian sandalwood, beginning in the early 1800s under the tight controls of Kamehameha I.\textsuperscript{80} After his death in 1819, “the royal monopoly was dispersed among the Ali‘i Nui, [and] capitalist penetration into the heretofore self-sufficient society accelerated.”\textsuperscript{81} At the same time, the U.S. entered its “first great depression,”\textsuperscript{82} but American traders found an insatiable appetite for foreign goods in the Hawaiian ali‘i.\textsuperscript{83} The ali‘i recruited men by the thousands and sent up them into the valleys to remove whole forests of ‘iliahi.\textsuperscript{84} The wood could be exchanged for “everything from pins, scissors, clothing, and kitchen utensils to carriages, billiard tables, house frames, and sailing ships.”\textsuperscript{85} All of this new wealth, however, came at the cost of food production.\textsuperscript{86} As the trees became less and less abundant, workers would be absent for longer stretches of time, making it impossible to maintain a functioning ahupua’a.\textsuperscript{87} Poor maintenance of agricultural lands brought about famine and hunger.\textsuperscript{88} Adjustment to the new economic system proved to be a difficult,\textsuperscript{89} and less than thirty years later, overharvesting brought the sandalwood trade to a halt.\textsuperscript{90}

In light of the industry’s precipitous rise and ultimate collapse, the sandalwood experience is significant for a number of reasons. It represents the first time that the major principles of capitalism converged into practice in Hawai‘i. This led to the commoditization of a resource and the creation of an independent labor class, all operating within a market-based system using a common currency as a means of exchange. These kinds of interactions had no precursor in Hawai‘i. Also, while capitalism unlocked an untapped reserve of wealth, it simultaneously triggered the islands’ autarkic dislocation. The reciprocity and self-sufficiency that Kānaka Maoli perfected under the ahupua’a model faltered in this new, primarily mercantilist effort, where disequilibrium is pursued and exploited for maximum profit. Sandalwood introduced Hawai‘i to “the capitalist net and its incumbent difficulties.”\textsuperscript{91} Put more cynically, the “Hawaiian nation had arrived in the ‘civilized’ world.”\textsuperscript{92}

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from ships ramped up food production).
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\textsuperscript{77} See id. at 410.
\textsuperscript{78} Id. at 403.
\textsuperscript{80} Ralph S. Kuykendall, \textit{Early Hawaiian Commercial Development}, 3 PAC. HIST. REV. 365, 374 (1934).
\textsuperscript{81} Kame‘eleihiwa, \textit{supra} note 30, at 140.
\textsuperscript{83} Kuykendall, \textit{supra} note 80, at 375.
\textsuperscript{84} Cordy, \textit{supra} note 74, at 409.
\textsuperscript{85} Kuykendall, \textit{supra} note 80, at 375.
\textsuperscript{86} Cordy, \textit{supra} note 74, at 409-10.
\textsuperscript{87} See id. at 410.
\textsuperscript{88} Id.
\textsuperscript{89} See Kuykendall, \textit{supra} note 80, at 376 (“All of this resulted in the pitiless exploitation not merely of the sandalwood but of the labor and the vitality of the common people.”).
\textsuperscript{90} Cordy, \textit{supra} note 74, at 409.
\textsuperscript{91} Kame‘eleihiwa, \textit{supra} note 30, at 140.
\textsuperscript{92} Id. at 140.
Less apparent in the move from subsistence to market is the shift in thought that accompanied it. That shift spanned the distance between two competing ideologies. "A culture which sees money as the greatest value confronts one which sees that value in the land and man's relationship with it."93 To seize and sell 'iliahi is incompatible with an ideology that views mankind and the natural world as cosmologically and genealogically intertwined. The bare act of commoditization – of treating the 'āina's resources as products for purchase and sale – conflicts with aloha 'āina values. Yet, by the turn of the eighteenth century, the ali'i oversaw the rapacious felling of entire sandalwood forests. Their aggressive entrance into the sandalwood trade revealed the deeper psychic changes accruing in post-contact Hawai'i.

The causes of this paradigm shift were numerous and overlapping, but the proliferation of Christianity was chief among them.94 Before the missionaries' proselytizing dislodged the whole scheme of traditional customs, Hawaiian spirituality and law intersected under the kapu system.95 Ancient religious beliefs, like the divinity of ali'i for example, often gave rise to the rules that regulated behavior.96 Like any legal framework, the kapu system kept society ordered. Its slow undoing began immediately after contact with foreigners.97 When kapu violations by the new arrivals went unpunished – for example, when one of Captain Cook's officers did not drop dead after patting an Ali'i Nui on the back – doubt surfaced.98 So when Ka'ahumanu sat down with Liholiho to share a meal nearly forty years later in 1819, openly breaking the kapu system's sacrosanct ritual of women and men eating separately, the gesture doubled as a public repudiation of many of the old religious traditions.99

The spiritual vacuum that followed gave Christianity space to ripen.100 The competing system of beliefs worked its way into the Kānaka Maoli creed, muddying its foundation of aloha 'āina.101 "The new religion stressed the salvation of people and taught that man was superior to other living creatures. There was no longer a respect for equality among ocean animals, the large trees, the fresh water, and the newly created earth."102 Although Christianity initially received a tepid reception, the unceasing scourge of death and an
accompanying sense that the old gods abandoned the lāhui created a more pliable audience. For the ali‘i charged with stabilizing a nation in freefall, Christianity and its prefabricated set of rules and rituals presented a mechanism of control. And over time, “belief in man’s superiority eroded the sense of aloha ‘āina.” American Calvinists arrived shortly after the kapu system evaporated and filled the void. Their brand of Christianity and accompanying worldview proved to be a particularly conservative strand of Western hegemony. The Calvinists’ “capitalistic tendencies and sexually repressive philosophy [were] so antithetical to the Hawaiian celebration of life.” Gone were the old rules, and ingratiation with the West began in full.

This transition often meant swapping native traditions for foreign ones, and with the Māhele, the Kingdom abandoned the ancient system’s fulcrum – communal land ownership. This process of land privatization entitled three classes of people to make a claim: “the Mō‘ī in his role as head of the government, the Ali‘i, and the maka‘āinana.” The divisions began with the Mō‘ī first selecting the ‘āina he intended to keep. Next, the Ali‘i, numbering between 245 and 251, did the same. The Ali‘i and Mō‘ī then relinquished claims where their interests overlapped. And finally, maka‘āinana could claim lands that they cultivated and occupied.

Despite the monarchy’s prudence, historians generally regard the Māhele as a failure. The theory that allowing ownership of land in fee would preserve Hawaiian title in the event of an invasion supported a desirable objective – keeping the relationship between Kānaka Maoli and ‘āina intact. The problem though is that for many Kānaka, and maka‘āinana in particular, the Māhele brought disenfranchisement. The equal sharing of ‘āina among the three classes never came to fruition. At the end of quitclaim period, “Kauikeaouli, [the reigning Mō‘ī,] held title to nearly 2.5 million acres, or 60 percent of the land in the

103 See Kameʻeleihiwa, supra note 30, at 141 (“When death is imminent, Christian salvation and the promise of life after death is very appealing.”).
104 See id. at 153-54.
105 Kanahele, supra note 12, at 154.
106 Kameʻeleihiwa, supra note 30, at 138.
107 See id. (“[The Calvinists] believed life was meant to be full of suffering in order that one might know joy in the afterlife. In fact, of all the missionaries who ventured to the Pacific, the Calvinists were perhaps the most ethnocentric, anti-Native, and racist.”).
108 Id. at 134.
109 See generally Banner, supra note 69, at 288-93 (detailing the five separate events that make up the Māhele).
110 Van Dyke, supra note 68, at 40.
111 Id. at 40-41.
112 Id. at 41.
113 Id. at 44.
114 Id. at 46.
115 Jocelyn Linnekin, Sacred Queens and Women of Consequence 7 (1990) (“Even pro-Western historians now concede that the Māhele’s long-term effects were disastrous for the Hawaiian people.”).
116 See Van Dyke, supra note 68, at 51-52.
118 Banner, supra note 69, at 292-93 (“When the Māhele was finished, property ownership in Hawaii was no more egalitarian than it had been before. The chiefs ended up with 1.6 million acres of land. The government got 1.5 million acres. The king, in his personal capacity, received nearly 1 million. And the maka‘āinana, the vast majority of the population, ended up with 29,000 acres.”).
Kingdom.” He transferred 1.5 million acres to the Government, reducing his own personal holdings by more than half. This divided the Kingdom’s 4.126 million acres into three chunks: 23.8 percent held by the Mō‘ī, 37 percent held by the government, and 39.2 percent held by the Ali‘i. Title to all lands was ostensibly subject to maka‘ainana claimants, but Ali‘i began disposing of property as soon as their Māhele awards were determined, and subsequent owners refused to recognize the validity of any pre-existing maka‘ainana interest in the land. Making matters worse was the persisting confusion that hung over the entire process. “Many were unaware that they needed to do anything, because they had always had access to whatever lands they needed.”

To improve the realty prospects for maka‘ainana, the legislature passed the Kuleana Act of 1850. The statute brought some clarity to the titling process, by delineating the size of a kuleana parcel for instance. Maka‘ainana could file their claims with the Land Commission only after having the property surveyed, which would be paid for out-of-pocket, and the petition validated by two witnesses. Despite the law’s intent, its impact was insubstantial, with awards for less than one percent of total ‘āina going to maka‘ainana. A number of factors are cited for the paltry allocation of kuleana lands, among them are: a poor grasp of the new property regime within the maka‘ainana class and the steps required to secure title, their inability to afford the surveyor fee, and the narrow window of time allotted to file claims.

Nonetheless, at the Māhele’s conclusion, ‘āina could be freely bought and sold, and a Western economic model had the land base needed to fuel growth. Consequently, people became “competitors rather than…caretakers of the ‘āina.” In this changing dynamic, Westerners assumed the upper hand, wielding it so completely that Kānaka Maoli had little room to compete. The haole, equipped with both the know-how and the capital to leverage ‘āina and turn a profit, built the new economy around sug-

119 Van Dyke, supra note 68, at 42.
120 Id.
121 Linnekin, supra note 17, at 17.
122 Van Dyke, supra note 68, at 45.
123 Id. at 46.
124 See Banner, supra note 69, at 291.
125 2 Revised Laws of Hawaii 2142 (1925). Maka‘ainana could claim the land actually cultivated plus another fourth of an acre for a dwelling. Id.
127 Id.
128 Van Dyke, supra note 68, at 46-47.
129 See Banner, supra note 69, at 304-05. A popular argument made by foreigners during the lead-up to the Māhele was that privatization would make Kānaka more industrious; if Hawaiians had an ownership interest in their lands, it would incentivize them to make it productive went the reasoning. Id. at 293-94. An offshoot to this was the prediction that privatization would bring investors and capital to the islands, which a commercial agriculture industry would need to grow and mature. Id. at 295. So when land became transferable, the “land-rich but cash-poor” Hawaiian landowners had no trouble finding a market of non-Native buyers, who quickly bought up properties with an eye on their commercial prospects. Id. at 304-05.
130 Osorio, supra note 70, at 55.
131 Kame‘eleihiwa, supra note 30, at 298.
132 The word “haole” was formerly used to describe any stranger or foreigner, but it has primarily come to mean Caucasian. Osorio, supra note 70, at 290.
The industry and its businessmen vaulted to dominance during the last half of the 1800s. “Those who planted, financed, and freighted sugar and shaped the policies that enabled large-scale plantations to become the economic reality in the Islands were those who wielded power.”

Like Christianity’s secularization of ‘āina, the Māhele transformed the relationship between Kānaka Maoli and their lands. Only post-Māhele, the transformation became enforceable and irrevocable. The combination of spiritual and spatial dislocation undid the once-unshakable precept of kinship with ‘āina that ordered relations and duties in pre-contact Hawai‘i. The ancient genealogy that anchored living Kānaka to the earth was severed, at least officially. And with it seemed to go the disciplined belief and wholesale practice of aloha ‘āina.

D. Reinstatement of Traditional Relationships

Decades later, during the struggle over annexation, Kānaka Maoli resuscitated the dormant aloha ‘āina framework in the form of grassroots political activism. An 1893 coup led by “a handful of U.S.-identified politicians and businessmen” hastened its revival. Collusion with U.S. Minister John L. Stevens gave them the reinforcement of the American military, which prompted the reigning Mō‘i Queen Lili‘uokalani abdicate her throne under protest. Minister Stevens extended the renegade government, bent on Hawai‘i’s annexation to the U.S., diplomatic recognition.

Following Queen Lili‘uokalani’s dethronement, “her people…immediately organized in protest.” Two parties formed to counter attempts to undo the Kingdom’s independence: Hui Hawai‘i Aloha ‘Āina and its sister organization Hui Hawai‘i Aloha ‘Āina o Nā Wāhine. “Throughout the struggle Kanaka Maoli who worked to retain the sovereignty of their own nation called themselves ‘ka po‘e aloha ‘āina’ (the people who love the land).” This was the first time Hawaiians employed the aloha ‘āina framework in a political context, and it has been an indelible theme in the conversation over Native Hawaiian issues ever since.

Expanding on the practice of land stewardship, aloha ‘āina suddenly and simultaneously embodied a declaration of independence. Ka po‘e aloha ‘āina communicated their sovereignty in varying ways: using song and figurative language to circulate messages of support for the Queen, sewing quilts with a Hawaiian flag motif, and withholding contributions to churches that expressed allegiance to the provisional government. “Their actions should not be construed as nationalism in which the people see

134 Osorio, supra note 70, at 102.
135 Id.
136 Silva, supra note 6, at 129.
137 Id. at 129-30.
138 Id. at 130.
139 Id.
140 Id.
141 Id. at 131.
142 Id. at 134-35. The provisional government assumed control immediately after the monarchy was overthrown to manage the Hawaiian polity and prepare for Hawai‘i’s annexation to the U.S. Donald Rowland, The Establishment
themselves as superior to other races but, rather, as resistance to the loss of land, identity, culture, and political power.”

In its most visible translation, aloha ‘āina was exercised by petitioning against annexation in 1897. After President William McKinley signed and submitted a treaty of annexation to Congress for ratification in the summer of 1897, both branches of Hui Aloha ‘Āina, plus a third party called Hui Kālai‘aina, mobilized in protest. This nationalist coalition coordinated a mass petition drive, sending representatives throughout the islands to collect signatures from those who opposed annexation. In total, approximately 38,000 Kānaka out of a native population of 40,000 signed the petitions. Four delegates traveled to Washington D.C. in late November of 1897 to present the petitions to the United States Congress and persuade a handful of senators to oppose the annexation treaty. By the end of their Washington campaign in February of 1898, the delegates brought the pro-annexation vote count down from 58 to 46, fourteen short of the sixty needed for ratification. Aloha ‘āina, in this instance, amounted to a love of nation and the steadfast defense of territorial integrity and sovereignty.

E. Hawai‘i’s Modern Cultural Renaissance

After a period of cultural hibernation that accompanied Hawai‘i’s territorial and early-statehood years, the 1960s and ’70s saw the rebirth of a modern aloha ‘āina movement. Its revival after decades of total submersion in the culture and political economy of the U.S. is a testament to the idea’s endurance. One kupuna explains the tenacity of cultural consciousness in this way:

We have the gift of ancestral memory and we have options as to how this gift is used. We may choose
to carry it around with us and not bother to unwrap it…. Some of us find this gift worthless and old-fashioned, eventually tossing it aside. Others of us see that this is all we have; it is a start for our life…. When we realize that we possess this ancestral gift, we must take the time to unwrap it, take the time to enjoy and understand each exposure before going on.154

Absorbing the weight of doctrine over the centuries, aloha ‘āina features prominently in the evolving, contemporary Hawaiian identity. In recent years, expressions of aloha ‘āina have been particularly visible, encompassing the idiom’s total etymology – from its cosmological core to its environmental and political transmutations.

Like the anti-annexation campaign that preceded it, the modern aloha ‘āina movement regained its footing during a time of flux. By the 1940s, the Hawaiian voting bloc that dominated local politics through an alliance with the haole sugar barons during the early-territorial years no longer represented the majority.155 The Japanese community had grown in size, and they consolidated their electoral weight with the Democratic Party, scoring a political upset over the Hawaiian-backed Republicans in 1954.156 With the departure of Kanaka Maoli from government, Hawaiian issues slipped to the periphery.157 Loss of influence in government shifted political activity to the grassroots, which was buoyed by the spirit and energy of national movements for civil and minority rights.158 This political climate set the stage for the activism of the 1970s.159 Hawai‘i’s economy also underwent major changes, especially after statehood in 1959. As the pineapple and sugar companies moved offshore in pursuit of cheaper labor, tourism and development of former plantation lands picked up the slack.160 The substitution, however, did nothing to dilute the concentration of power and wealth.161 In the 1960s and 1970s, thirty-nine landowners held 45.2 percent of land in Hawai‘i, with the state and federal governments controlling a combined 48.5 percent, leaving 6.3 percent for everyone else.162 In the 1970s, the sinking trend of Native Hawaiian welfare persisted, as evidenced across a number of socio-economic indicators.163 Out of these conditions arose a “demand for land…to meet [the] cultural, economic, and political needs of the Hawaiian people.”164

With the space between Hawaiians and ‘āina more distant than ever, the call of aloha ‘āina ricocheted throughout the islands during the 1970s. Native Hawaiians used community organizing to mobilize polit-
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cally and shape their own distinct social movement.165 This triggered a scattering of localized events and causes, which came to characterize the decade’s activism.166 Aloha ‘āina’s resurgence as a political and cultural declaration was most pronounced on the island of Kaho‘olawe. Since 1941, the U.S. military had been using Kaho‘olawe to stage missile and bombing exercises, and by the 1970s, the island was a shell.167 The atmosphere of heightened cultural and racial consciousness directed attention to this battered island. Hawaiians organized in a grassroots fashion under the aegis of the Protect Kaho‘olawe ‘Ohana (“PKO”), and aloha ‘āina steered the organization’s reclamation of ‘āina and culture.168 “The fact [everyone] emphasize[d] was that this ancestral land was worth saving.”169 Their strategy combined civil disobedience and litigation with cultural education, reacquainting Hawaiians with their heritage and Kaho‘olawe’s sacred history.170 These acts of aloha ‘āina “became a call to reclaim Kaho‘olawe and all Hawaiian land and use the land in a way that benefited the people.”171 After more than ten years of protests, court battles, and a series of illegal occupations of the island by activists, PKO succeeding in bringing the bombings to a halt.172 The military agreed to clear the island of ordnance and assist in restoring Kaho‘olawe’s ecosystem.173 In 1994, title to the island was transferred from the federal government to the State of Hawai‘i, with the understanding that it be held in trust for Kānaka Maoli until a sovereign entity is formed.174

Coming off of a decade of community mobilization, Native Hawaiians expanded their scope of objectives during the 1980s and ’90s.175 Sovereignty issues moved to the foreground and set the political agenda

166 In the 1970s, Native Hawaiian political activism was predominately localized and land-related. See id. A number of organizations sprung up throughout the decade to address fairly discrete issues. “The Hawaiians” organized in 1970 as watchdog group to the Hawaiian Homes lands Commission. Id. at 179. Also in 1970 were the protests in Kalama Valley, orchestrated by Kokua Kalama Committee, to resist the eviction of Hawaiian and non-Hawaiian farmers so that the land could be developed by the Bishop Estate and Kaiser Aetna. Id. at 180. The Congress of the Hawaiian People came together in 1971 to oversee the Bishop Estate, Hawai‘i’s biggest private landowner and the legacy of Princess Bernice Pauahi Bishop, responsible for educating Native Hawaiian children at the Kamehameha Schools. Id. at 182. In 1972, the Aboriginal Lands of Hawaiian Ancestry (A.L.O.H.A.) formed to get a reparations bill for a land and cash settlement through Congress. Id. at 183. The following year, Hawaiian landowners came together under Hui Malama ‘Āina o Kōolau to protect their farms and water resources from incoming development. Id. at 184. The lobby group Homerule Movement also started up in 1973. Id. at 185. ‘Ohana o Hawai‘i was “the first nationalist organization of the contemporary sovereignty movement,” and it formed in 1974. Id. The Coalition of Native Hawaiian Claims, now the Native Hawaiian Legal Corporation, got started in 1974 as well “with the goal of documenting and initiating Hawaiians reparations claims to land and ocean resources.” Id. at 185-86. Hui Ala Loa took on the issue of land and ocean access in 1975. Id. at 186. Hoala Kanawai brought attention to the State’s duty to use public trust land revenues to improve the conditions of native Hawaiians, as mandated by the 1959 Admissions Act. Id. at 188. This served as a prelude to the creation of the Hawaiian Affairs Package at Hawai‘i’s 1978 Constitutional Convention, which gave birth to the Office of Hawaiian Affairs. Id.
167 Trask, supra note 10, at 377.
168 Tracy Takano, Aloha ‘Āina (Love of the Land), EAST WIND, Spring/Summer 1982, at 18, 21.
169 Kanahele, supra note 12, at 154.
170 Id.
171 Takano, supra note 168, at 21.
172 Trask, supra note 10, at 377.
173 Blackford, supra note 14, at 568.
174 Id. at 568-69.
175 Di Alto, supra note 165, at 190.
Nāpali Souza

on a local and national scale. A number of organizations sprung up to form the contemporary sovereignty movement, contributing to a plurality of perspectives on nationhood and self-governance. According to Dr. Davianna McGregor, a Native Hawaiian scholar and activist, these perspectives can be bundled into three different camps. The nation-within-a-nation faction supports a political relationship with the U.S. under the federal legal framework and self-governance over territory within the State of Hawai‘i. Other groups put Hawaiian sovereignty in the international context, favoring Hawai‘i’s total independence from the U.S. on the assertion that Hawaiian sovereignty was never legitimately relinquished. And then there are the aloha ‘āina groups. They

are groups on the land that are practicing the culture, practicing the spiritual customs and beliefs, and defending them day to day. [These groups] participate in the sovereignty effort primarily as a way to solidify…claims and…rights to protect the ancestral lands; to protect the resources. These are people who have never lost a sense of sovereignty as a Hawaiian people.

An allegiance to aloha ‘āina, in all its permutations, has played a major role in shaping the modern Hawaiian political movement. This is partly because the adoption of aloha ‘āina, as either a personal commitment or a political platform, does not require a subscription to any particular position on Hawaiian sovereignty. That flexibility has contributed to the proliferation of a value system that puts a premium on the integrity of culture and ‘āina across the ideological spectrum. Furthermore, there need not be any formal recognition of sovereignty to defend access to land, use of resources, and traditional and customary practices. This has also enabled aloha ‘āina to serve as a catalyst for political activism.

Beginning with the campaign to liberate Kaho‘olawe from military control, aloha ‘āina has framed many of the contemporary debates over issues that touch the Native Hawaiian community. For example, it was behind Pele Defense Fund’s opposition to geothermal energy development inside the Wao Kele o Puna rainforest on Hawai‘i Island during the ‘80s and ‘90s. The area is the physical domain of the volcano goddess Pele, who is considered a living deity and features prominently in the Native Hawaiian religious tradition. Tapping the heat reserves in an area that Hawaiians regard as sacred is tantamount to desecration. While spiritual beliefs were at the heart of the controversy, the anti-geothermal movement stood for something larger, because the “act of protecting…land serves as a metaphor for protecting [Native Hawaiians], and their cultural and spiritual identity.”

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176 See id. at 213-14.
177 Id. at 204.
178 Id. at 206.
180 See Lori A. Boulanger, “Resisting Coercive Assimilation”: Identity, Empowerment, and Activism in the Native Hawaiian Movement on Hawai‘i Island 134 (1999) (“For many Hawaiians… aloha ‘āina, (love of the land), has been a dominant theme since the 1970’s”).
181 See id. at 217.
182 Id.
183 Id. at 219.
184 Id. at 224.
185 Id.
This intersection of religion, culture, identity, and land rubbing up against development is important because of the resulting constraints. It recently played out at a macro level on Moloka‘i when opposition from the island’s predominately Native Hawaiian community shelved a proposed development plan in 2008.186 Orchestrated by Moloka‘i Ranch, the plan would have reserved 26,000 acres of land for conservation, resurrected the shuttered Kaluakoi Hotel, and created jobs in the process.187 The project was undone by its inclusion of a 200-home luxury subdivision at La‘au Point along the island’s southwestern edge.188 Opponents, who staged protest marches and occupations of the site, “resorted to tactics reminiscent of 1970s‘ Kaho‘olawe-era protests.”189 They took issue with the development’s anticipated impacts on water for farming, fishing and hunting grounds, cultural sites, and, above all else, the traditional subsistence lifestyle that is the norm.190 Moloka‘i earned its reputation as “the last Hawaiian island” because of residents’ enduring intimacy with the ‘āina.191 As with Kaho‘olawe three decades earlier, at La‘au Point, aloha ‘āina ultimately won out when the development plan was tabled. It did, however, come at the cost of over a hundred jobs after Moloka‘i Ranch decided to shutter its operations and pull out of the island.192

These events demonstrate the inseparability of aloha ‘āina from any discussion on development in Hawai‘i. “For indigenous peoples, ‘development’ can be an uneasy marriage of capitalism and culture.”193 It is no different for Native Hawaiians. The recent history of development in Hawai‘i confirms that a Native Hawaiian governing entity must uphold “culturally based worldviews” when seeking ways to build up the lāhui’s economic base.194 To quote noted educator Kū Kahakalau: “Only if we follow the principles of aloha ‘āina can we, the people of Hawai‘i save our islands. Only if we practice aloha ‘āina as a way of life can Hawai‘i and the Hawaiian people survive.”195

186 Dan Barry, In an Age-Old Quest for Balance, an Uncertain Shift, N.Y. TIMES, Dec. 8, 2008, at A16.
188 Barry, supra note 186.
190 Brady, supra note 187.
191 Ullman, supra note 189.
192 Barry, supra note 186.
194 See id. at 11.
195 Interview with Kū Kahakalau, Director, Kanu o ka ‘Āina New Century Public Charter School, in Honolulu, Haw. (Sept. 11, 2008).
Native Hawaiians continue forward on the campaign towards self-determination. In realizing that end, Native Hawaiians will take on increasing responsibility for and accountability to the lāhui as greater control over assets, policy, and decision-making is assumed. Restoration of both the burdens and privileges of self-governance will necessarily give way to the lāhui’s engagement in matters of development.

Economic development is foundational to the modern welfare of nearly all societies. With sovereignty comes a nation’s right “to control economic activity within its jurisdiction.” The United Nations considers development and the use of resources one of indigenous peoples’ basic rights. Their “right to self-determination” reinforces the freedom to pursue “economic, social and cultural development.” But not since the Kingdom’s undoing have Kānaka Maoli exercised any considerable control over the management of their kula‘iwi, so there are a number of preliminary considerations.

A. Ideological Challenges

A history of being sidelined along the economic periphery will present its own set of challenges as the lāhui transitions from the margins. Part of this difficulty will be due to a shortage of growth inputs – for example, know-how and capital. But a separate challenge in spurring and sustaining an economically robust lāhui is philosophical. The ideological misalignment that might inhibit a wholesale adoption of classic Western economic principles and techniques needs to be addressed.

Western hegemony is unparalleled in its influence. Likewise, the United States’ global presence is so colossal that American principles and norms are sometimes taken for granted. Large parts of the Western economic canon – the very characteristics that exhibit rational economic behavior – are perceived to be axiomatic. The allocation of resources to maximize profits, for example, is second nature to the principle’s many adherents. With that kind of monolithic influence, it is easy to forget that this predominant economic institution is a “relatively recent phenomenon” that is idiosyncratic to the West. In other words, “capitalism, industrial civilization and the market economy – as well as the whole realm of cultural practices associated with them – are not immanent qualities of all societies.” An economy situated around the market is not a one-size-fits-all arrangement. As societies and communities begin to recognize this, those with a non-Western backbone tend to take a more tailored approach, opting to “become ‘modern’ only in partial ways” by incorporating some, but not all, of the West’s economic principles into the developmental praxis. Cultural misalignment produces “important forms of resis-
tance to the extension of the practices associated with the dominant Western economic rationality.”

As recounted above, development in Hawai‘i regularly invites resistance, especially from Native Hawaiians. Their reengagement of aloha ‘āina suggests that the United States, as a “colonizing form[, did] not triumph completely; there are structures, relations and behaviours that constantly escape [it] and which act as means of resistance and creativity.” As Native Hawaiians expand their realm of self-governance, “cultural creativity” will serve the lāhui well in strategizing ways to manage and grow an economic base.

Native American tribes are familiar with the need to reconcile competing developmental philosophies. The U.S. government’s adoption of positions that favor self-determination puts more of the navigational control in indigenous hands. Native American tribes “have framed their entry into global economic systems as part and parcel of tribal values, otherwise termed by [Professor Angelique EagleWoman] as the ‘tribalist economic philosophy.’” While tribal economies are as diverse as the tribes themselves, all must negotiate the tension between tradition and Western notions of modernity. Setting economic policy becomes an exercise in cultural calibration where allocations are made between foreign and indigenous values on matters such as trade, industrial development, redistribution, regulation, and growth.

Tribalist economic theory is a relatively loose framework. Apart from the cultural feedback loop, there are few fixed principles. This is expected given the great diversity across Indian country, but there are some common themes. Sustainability and environmental impact appear to influence policy determinations in a significant way. This is an outgrowth of the Native American tradition that exalts balance in the natural world. The impact of industrial development and consumption should be minimized so as not to upset that harmony. Collectivism, as a political philosophy, also frames economic thought. In contrast to societies that tout individualism, like the United States, an appreciation for interdependence shapes tribalist economic theory. Thus, “sharing of wealth rather than the accumulation of resources by an elite with the subsidiary creation of economic classes of people” represents a more ideal economic structure.

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206 Id. at 164.
207 Id. at 167.
208 Id.
210 See id. at 396.
211 See id. at 397.
212 See id. (“In navigating capitalistic based economic systems, Tribes have found ways to uphold tribal values.”).
213 See Begay, supra note 15, at 47.
215 Id. at 17.
216 Id. at 18.
217 See id. The ways in which people perceive their relation to each other impact economic behavior. Richard Ball, Individualism, Collectivism, and Economic Development, 573 ANNALS AM. ACAD. POL. & SOC. SCI. 57, 58 (2001). “In more individualistic societies, people tend to behave like Homo economicus: they choose actions that maximize their private material self-interest.” Id. Alternatively, “[i]n more collectivist societies, people tend to behave like Homo sociologicus: their actions are conditioned by the norms, expectations, and interests of the social groups of which they are part.” Id.
218 EagleWoman, supra note 214, at 18.
219 Id. at 18.
B. Cultural Fit

Professor EagleWoman’s sketch of an economic meta-theory for Native Nations demonstrates the larger principle that a government’s institutions and policies need a “cultural grounding.”\textsuperscript{220} In other words, there must be a “cultural match: a fit between the formal institutions of governance and the underlying political culture of the society being governed.”\textsuperscript{221} That kind of alignment sublimates into legitimacy, which in turn makes for more trustworthy governments.\textsuperscript{222} So maintaining a cultural fit should be a persistent priority for the Native Hawaiian governing entity in fleshing out its economic and development policy.

Culture, however, can make for an amorphous blueprint. Anthropologists themselves regularly spar over what it encompasses,\textsuperscript{223} and there is good reason why “culture” has been called “one of the two or three most complicated words in the English language.”\textsuperscript{224} Definitions used by cultural studies academics are typically takeoffs of ideas proposed by Raymond Williams,\textsuperscript{225} a scholar who laid the groundwork in the field. By his interpretation,

\begin{quote}
...Culture is a description of a particular way of life, which expresses certain meanings and values not only in art and learning but also in institutions and ordinary behavior. The analysis of culture ... is the clarification of the meanings and values implicit and explicit in a particular way of life, a particular culture.\textsuperscript{226}
\end{quote}

Williams himself counseled against relying on any one definition of culture because of the term’s complexity.\textsuperscript{227} More to the point is a definition offered by Kevin Aruch – “culture refers to the socially transmitted values, beliefs and symbols that are more or less shared by members of a social group.”\textsuperscript{228} An important corollary to any understanding of culture is that it is “never neat, bounded, or complete.”\textsuperscript{229} It is not uniformly dispersed throughout a population; internally, there are inconsistencies and contradictions smoothed over by even the most benign generalizations.\textsuperscript{230} Despite the imprecise boundaries, culture is one of indigenous peoples’ distinguishing markers.\textsuperscript{231} It would be a mistake though to say that these markers are fixed. The habit of referencing the past to gauge the authenticity of contemporary beliefs, behaviors, and objects ig-

\textsuperscript{220} Begay, \textit{supra} note 15, at 49.
\textsuperscript{221} \textit{Id.} at 47.
\textsuperscript{222} \textit{Id.} at 48-49.
\textsuperscript{223} \textit{Id.} at 46; see also, Naomi Mezey, \textit{Approaches to the Cultural Study of Law: Law as Culture}, 13 \textit{Yale J.L. & Human.} 35, 40 (2001).
\textsuperscript{224} Raymond Williams, \textit{Keywords: A Vocabulary of Culture and Society} 76 (1976).
\textsuperscript{225} Mezey, \textit{supra} note 223, at 41.
\textsuperscript{227} \textit{Id.} at 42.
\textsuperscript{229} Mezey, \textit{supra} note 223, at 43.
\textsuperscript{230} Avruch, \textit{supra} note 228, at 393.
\textsuperscript{231} See Begay, \textit{supra} note 15, at 46.
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nores the thumbprints of modification. C22 “Cultures change as circumstances change, as peoples interact, one with another, and as people learn from experience and imagine new things.”233

The cultural history of Native Hawaiians bears the hallmarks of adaptation. Aloha ʻāina’s multiplicity of form and function is demonstrative of Maoli culture’s fluidity. Cognitively, aloha ʻāina represents the interconnectivity between Native Hawaiians and the natural world, which stems from a shared genealogy. At the same time, aloha ʻāina has come to stand for sovereignty and self-determination. This has manifested itself in the preservation and defense of traditional and customary practices, land, and identity. Because “[r]ational planning decisions and institutions rest on underlying belief systems, cultural values, and social structure,”234 aloha ʻāina will invariably be a component in the lāhui’s developmental matrix.

C. Sovereignty

The possession of sovereignty is an obligatory first step in a formal nation-building process.235 Like culture, sovereignty’s boundaries can be blurry. It “is, at best, an ambiguous term.”236 After more than two decades of research, the Harvard Project on American Indian Economic Development (“Harvard Project”) identified two variations of sovereignty at play in the relationship between the U.S. and Native American tribes. The first is political sovereignty.237 It is defined as “the extent to which a tribe has genuine control over reservation decision-making, the use of reservation resources, and relations with the outside world.”238 The upper bounds of this authority are set by federal policy, and under the current era of self-determination, tribal governments’ political consignment has expanded with the relaxation of U.S. control.239 Political sovereignty can be characterized as a recessive form of authority that matures into “de facto sovereignty,” the second variation of sovereignty identified by the Harvard Project.240 This is achieved when tribes absorb “genuine decision-making control over the running of tribal affairs and the use of tribal resources.”241

Even though the U.S. maintains a position of extending greater autonomy to native peoples, its dominion over tribal affairs persists.242 Federal monies are the financial lifeblood for a lot of native governments, which means that non-indigenous bureaucrats have been known to exercise a “disproportionate degree of influence in Native nations’ affairs.”243 This top-down sovereign-to-sovereign relationship promotes patern-

232 See id. at 47 (“The idea that Indigenous cultures were somehow static before the arrival of Europeans or that Indigenous peoples were passive participants in a long process of cultural change toward Western ideas, behaviors, and objects is demonstrably wrong.”).
233 Id.
234 Pinel, supra note 92, at 33.
236 Meller & Lee, supra note 152, at 167.
238 Id.
239 See EagleWoman, supra note 209, at 395-96.
240 Cornell & Kalt, supra note 237, at 13.
241 Id.
243 Id. at 10.
nalism, watering down the actual authority that tribal governments exert.\(^{244}\) Within Indian country, this superficial version of sovereignty prevails, because the “default” setting of the “federal control model” can be tough to shake.\(^{245}\) However, more and more tribes are shifting the balance of power by recapturing meaningful management and decision-making authority wherever possible.\(^{246}\) Doing so demands less reliance on federal funding; federal control is more likely to attach to federal cash.\(^{247}\) But before a native government can sidestep these all too critical resources, it must build a sustainable economic base within the nation.

This is the ripening of political into practical sovereignty, and it is proving to be foundational in creating a robust nation.\(^{248}\) The reasons for this are two-fold. First, extra-tribal control guarantees misalignment between the decisions made and methods used and the priorities and interests of the native constituents.\(^{249}\) This decoupling, in turn, spoils the spirit of political legitimacy, and the resulting mistrust hampers strategic planning. When intra-tribal decision-makers man the controls, actions of the tribal government are attuned to the needs of the community, giving rise to better governance.\(^{250}\) Second, the control that practical sovereignty secures is accompanied by responsibility for its consequences.\(^{251}\) This puts political accountability in its appropriate place – on the body charged with managing tribal assets and governing tribal members.\(^{252}\) Having a bigger stake in outcomes heightens the risks, but it also boosts the upside.\(^{253}\) Tribes collect a bigger portion of the rewards and, with time, the quality of decisions improves.\(^{254}\)

Within the federal paradigm, the United States has sent Native Hawaiians mixed messages where their sovereignty is concerned. The courtship began with enactment of the Hawaiian Homes Commission Act (“HHCA”) in 1921, which reserved a little over 200,000 acres of homesteading land for Native Hawaiians.\(^{255}\) During the Act’s hearings, the relationship between the U.S. and Hawai’i’s indigenous people drew comparisons to the trust arrangement the U.S. already shared with Native Americans.\(^{256}\) Subsequent to the HHCA’s passage, a series of events and enactments added muscle to the analogy. There was the 1959 admission of Hawai’i into the Union, upon which Congress transferred a 1,400,000-acre annexation inheritance to the State of Hawai’i.\(^{257}\) Attached to the transaction was a condition in Section 5(f) of the Admission Act directing the state to preserve the land in “public trust.”\(^{258}\) Trust revenues were to be used for five purposes, one of which included “the betterment of the conditions of native Hawaiians.”\(^{259}\) This eventually led to the creation of the Office of Hawaiian Affairs in 1978. Congress further smudged the line between Native Hawaiians and federally recognized tribes beginning in the 1970s with an anthology of legislation that either establishes

\(^{244}\) See id. at 14.  
\(^{245}\) Cornell & Kalt, supra note 237, at 29.  
\(^{246}\) Cornell & Kalt, supra note 235, at 21.  
\(^{247}\) Id. at 10.  
\(^{248}\) Id. at 21.  
\(^{249}\) Id.  
\(^{250}\) Id.  
\(^{251}\) Id.  
\(^{252}\) Id.  
\(^{253}\) Id.  
\(^{254}\) Id.  
\(^{255}\) Van Dyke, supra note 68, at 237.  
\(^{256}\) Id. at 237, n.5.  
\(^{257}\) Id. at 257-56.  
\(^{259}\) Id.
special programs for Native Hawaiians or includes them as co-beneficiaries alongside Native Americans.\(^{260}\) And then in 1993, Congress passed the Apology Resolution, in which the United States admitted complicity in the illegal overthrow of the Hawaiian Kingdom while acknowledging that “the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty.”\(^{261}\)

Despite the comparative treatment and the professed existence of a special relationship between Native Hawaiians and the United States, it is not akin to the political relationship other domestic indigenous peoples share with the federal government.\(^{262}\) Nowhere was the absence of such a designation made clearer than in the U.S. Supreme Court’s \(\text{Rice v. Cayetano}\) decision. The majority observed that Congress had not yet “determined that native Hawaiians have a status like that of Indians in organized tribes.”\(^{263}\) The implication then is that an unequivocal legislative endorsement is needed.\(^{264}\)

This is where the Native Hawaiian Government Reorganization Act, dubbed the Akaka Bill after the Senator from Hawai’i who introduced it, comes in. Working its way through Congress at the time of this writing, the bill’s passage will represent the culmination of a decades-long, half-baked federal courtship of the Native Hawaiian people. For better or for worse, “the Akaka Bill is designed to emulate the ‘domestic dependent nation’ status of American Indian tribes and thereby offer a form of political identity to Native Hawaiian people as a group.”\(^{265}\) Naturally, the prospect of such a designation is charged with controversy. There are benefits to the status, like “autonomy and the return of land and resources.”\(^{266}\) Whether the benefits outweigh the costs, and whether the Akaka Bill is pono\(^{267}\) given the historical injustice of the overthrow and all its attendant reverberations, is hotly debated in the Hawaiian community. If there is consensus on any point, it is that the Akaka Bill is poised to alter the political boundaries of Native Hawaiian sovereignty. This article is not intended to be an advocacy piece or a deconstruction of the Akaka Bill’s propriety or constitutionality. The bill serves as a point of departure in looking at how practical sovereignty can be achieved through economic self-sufficiency.

‘Āina is critical to accomplishing those ends. Once the preliminary process of government formation and membership definition gets underway, the Akaka Bill contemplates a period of negotiations involving the state, federal, and Hawaiian governments.\(^{268}\) Matters of territory will feature prominently in those

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\(^{262}\) In \textit{Morton v. Mancari}, the U.S. Supreme Court qualified distinctions based on membership to a Native American tribe as being political and not racial. Morton v. Mancari, 417 U.S. 535, 554 n.24 (1974). Thus, a hiring preference favoring Native American employment at the Bureau of Indian Affairs was not ruled as racial discrimination. \textit{Id.} at 553. Because of their “unique legal status,” any preferential treatment must only “reasonable and rationally designed to further Indian self-government” to pass constitutional muster. \textit{Id.} at 555.

\(^{263}\) Rice v. Cayetano, 528 U.S. 495, 518 (2000). The Court stated that this is a “question[] of considerable moment and difficulty,” \textit{Id.} at 518, and decided to “stay far off that difficult terrain.” \textit{Id.} at 519.

\(^{264}\) Van Dyke, supra note 68, at 271.


\(^{266}\) Van Dyke, supra note 68, at 271.

\(^{267}\) Pono is often defined as “uprightness” or “moral.” \textit{Pukui & Elbert}, supra note 1, at 314. Pono can also be used to describe a state of “perfect harmony.” \textit{Kame’eleihiwa}, supra note 30, at 25. It is used here to acknowledge the fact that many do not feel like the Akaka Bill is a correct response to a desire to promote Native Hawaiian sovereignty and self-determination, especially in light of their unique and tainted history with the United States.

\(^{268}\) Native Hawaiian Government Reorganization Act of 2010, H.R. 2314, 111th Cong. § 9(c)(1) (2010) (as passed by
discussions, and a transfer of Crown Lands to the new nation has been championed as the most coherent outcome.269 The Crown Lands are a product of the Māhele, distinct from the Government Lands.270 Initially conceived as a personal set-aside by the then-reigning Mō'ī Kauikeaouli, the Crown Lands encompassed nearly 1 million acres of private property.271 They served the dual purpose of supporting the Mō'ī, in both his personal and political capacity, while also supporting the makaʻāinana.272 In this way, the Crown Lands were treated like trust property held for the benefit of “makaʻāinana, who did not receive their fair share of the lands distributed during the Mahele.”273 Under Kauikeaouli, Crown Lands worked like a modified version of the traditional land tenure system, but with the elements of title and ownership thrown in.274 This caused confusion under the new property regime – were the Crown Lands public or private?275 Its anomalous management scheme gave way to a serpentine title history,276 concluding with the Crown Lands’ present status as Public Trust Lands.277 Nevertheless, Professor Jon Van Dyke, a legal expert on the Crown Lands, argues that they retain “a unique linkage to the history, culture, and spiritual values of Native Hawaiians and would be a logical choice to form the core of the land base needed by the sovereign Native Hawaiian Nation.”278 This article adopts that perspective in considering ʻāina and its relationship to economic development.

Equally critical to development is a fiscal base.279 Without that, it is “difficult for the state to function properly, let alone to deliver on wider roles, such as social services.”280 In the United States, tax dollars make up the bulk of state governments’ general funds.281 The three major categories are sales taxes and personal and corporate income taxes. In 2008, sales taxes accounted for approximately 50% of Hawai‘i’s general funds, personal income taxes another 29%, and corporate income taxes 2%.282 Fees and other taxes made up the remaining 19%.283 Local governments rely on tax dollars too, most of which comes from property taxes.284 For the City and County of Honolulu, more than 60% of its revenues were attributed to taxation in both 2008

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269 See Van Dyke, supra note 68, at 382 (“The Crown Lands do appear to be appropriate to serve as the core land base for the restored Native Hawaiian Nation, along with the Hawaiian Home Lands, Kahōlalae, and perhaps other lands as well, including some now held in the All‘i Trusts.”); see also Samuel P. King, History of Crown Lands May Determine Their Future, HONOLULU STAR-BULL., Dec. 23, 1994, at A-13 (“Or better yet, all of [the Crown Lands] could be transferred to the Office of Hawaiian Affairs to form the beginnings of a land base for the benefit of all Hawaiians.”).
270 Van Dyke, supra note 68, at 54.
271 Id. at 52-53.
272 Id. at 52.
273 Id. at 382-83.
274 See id. at 376.
275 See id.
276 “[D]uring the Republic (1894-98), . . . Government Lands were combined with Crown Lands to make up the Public Lands, in the Territorial period (1898-1959), when these lands were called the Ceded Lands, and after Statehood (1959), when the State of Hawai‘i received the majority of the Ceded Lands as a trust.” Id. at 58.
278 Van Dyke, supra note 68, at 383.
282 Id.
283 Id.
284 Id.
and 2009. Given the importance of these monies to a functioning political economy, the next section looks at how they might shore up the lāhui’s operating budget.
IV. TAXATION

While the powers of a domestic "quasi-sovereign" undergo regular revisions, taxation is accepted as one of governance's most basic features. Indeed, for any government, tax revenue is a critical piece in the operations model; it helps finance the cost of services that citizens expect their governments to perform and provide. Tribal governments have the same need for revenue, which the U.S. Supreme Court acknowledged when it declared that "the power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management." This gives rise to the power to tax tribal members and, under certain conditions, non-members. Tribal tax revenues, however, are neither as steady nor secure as state and federal collections. And a number of indicators suggest that the same will hold true for a Native Hawaiian governing entity.

A. Internally Fragile

Before exercising the power of taxation, the Native Hawaiian government would need to take inventory of the tax base. For most tribal nations, an appraisal of the tax base exposes its fragility. Taxing citizens' incomes is never popular, but in many nations throughout Indian country, the practice is simply unworkable. Personal income taxes are hardly collected because most reservation populations are sparse, and per capita earnings tend to be very modest. Levels of poverty and unemployment throughout Indian country soar above national averages, so taxing what little wealth there is would have debilitating effects. A Native Hawaiian governing entity might have a broader tax base to rely on, but it must consider the structure of a population that has long carried a poor socio-economic profile. Much of the data suggests "that Native Hawaiians disproportionately experience social and economic hardships." Compared to the other major ethnic groups in Hawai'i, Native Hawaiian families, on average, have the lowest incomes and are more likely to live in poverty. Household sizes tend to be larger too, and that dilutes per capita incomes, which also rank as the state's lowest. And any financial difficulties are further strained in Hawai'i by the high cost of living. So with these economic forces at play, taxation becomes increasingly problematic.

286 See Tsosie, supra note 265, at 47.
287 EagleWoman, supra note 209, at 421.
291 See EagleWoman, supra note 214, at 12.
292 Fletcher, supra note 290, at 771.
294 EagleWoman, supra note 209, at 491.
296 Id. at 342-43.
297 Id. at 85.
298 Id. at 342.
Citizenship in the lāhui is not likely to eliminate anyone's federal taxpayer status either. In the 1956 case *Squire v. Capoeman*, the U.S. Supreme Court ruled that "Indians are citizens [of the United States] and that in ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens."\(^{299}\) The qualification has been integrated into I.R.S. policy, so that unless explicitly exempted through treaty or statute, members' personal incomes are subject to a federal income tax.\(^{300}\) This includes income earned entirely within a reservation's borders.\(^{301}\) By this interpretation then, Native Hawaiian citizenship alone cannot terminate a federal income tax liability.

Nor will it necessarily shield citizens from state income taxes. In *Oklahoma Tax Commission v. Chickasaw Nation*, the U.S. Supreme Court held that Oklahoma could tax the wages of members who worked for their tribe but lived off of the reservation.\(^{302}\) The majority maintained that its reasoning was grounded in the long-standing principle "that a jurisdiction . . . may tax all the income of its residents, even income earned outside the taxing jurisdiction."\(^{303}\) A non-contiguous land base overlaid with scattered residential patterns makes it difficult to predict who will live where. But there is a strong probability that a good number of Native Hawaiians will live off of the lāhui, and the state would then be able to impose its income tax. The persistence of both state and federal income taxation following establishment of the lāhui makes it impracticable to impose a third layer of personal income tax.

Property taxes are another major source of government revenue. Hawai'i's constitution gives the county governments the exclusive power to tax real property.\(^{304}\) For the City and County of Honolulu, this brought in $802.6 million, or fifty-two percent of revenue derived from governmental activity, during the 2009 fiscal year.\(^{305}\) The money helps pay for a range of operations, from basic government administration, to the maintenance of "public safety, highways and streets, sanitation," and the support of "human services, culture and recreation, and utilities (transportation)."\(^{306}\) Tribes certainly have the same need for dollars, but taxing tribal lands is hardly an option. In *Mescalero Apache Tribe v. Jones*, the Supreme Court held that reservation lands cannot be taxed "absent cession of jurisdiction or other federal statutes permitting it."\(^{307}\) Taxation of reservation lands is permitted only if Congress has "made its intention to do so unmistakably clear."\(^{308}\) Lands first acquired by a tribe in fee but later taken into trust by the Bureau of Indian Affairs are similarly immune to tax.\(^{309}\) If the property is "freely alienable," e.g. not held in trust, then there is the presumption that it can be taxed.\(^{310}\) Theoretically, this might occasion the collection of a property tax by the tribe. However, the state

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299 *Squire v. Capoeman*, 351 U.S. 1, 6 (1956).
301 See id.
302 *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 465 (1995) (reversing the decision by the lower court, which held that Oklahoma could not tax the earnings of members who were employed by the tribe and lived off of the reservation).
303 Id. at 462-63.
304 Haw. Const. art. VIII, § 3.
305 *City & County of Honolulu*, supra note 285, at 26.
306 Id. at 20.
310 *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 113 (1998). This includes lands that were allotted under the General Allotment Act but become transferable once restrictions on alienability are lifted. *County
or local government would also be free to levy a property tax of its own, thereby resulting in a double-taxation scenario that would work to the tribe’s detriment. Thus, if the lāhui mirrors the reservation regime in the lower forty-eight states, then a property tax is not likely to be revenue generator.

B. Externally Vulnerable

There are other ways that states have extended their reach to undercut tribal revenue, paring the tax base down further. The general principle is that states cannot tax reservation lands or members that live on the reservation without “cession of jurisdiction or other federal statutes permitting it.” This doctrine is rooted in the idea that “the tax immunity of the United States is shared by the Indian tribes for whose benefit the United States holds reservation lands in trust.” This gives Congress the power to legislate away tribes’ tax immunity on the states’ behalf, which it has done in the past. The U.S. Supreme Court, for example, found that the General Allotment Act sanctioned a local government’s taxation of reservation land owned in fee by Washington’s Yakima Nation. The tax immunity also allows for a “nondiscriminatory [state] tax on private parties with whom... an Indian tribe does business.” In *Cotton Petroleum Corp. v. New Mexico*, the Supreme Court ruled in New Mexico’s favor, finding its oil and gas production tax on a non-Indian company operating on Indian land permissible.

Similarly, a state can apply a sales tax to on-reservation transactions with non-member customers. To demonstrate the rule’s economic impact, consider a pack of cigarettes. Tribal smokeshops claim an exemption from state sales and cigarette taxes and pass the discount on to customers. The bargain prices draw business to the reservation that would otherwise go elsewhere. The state enforces its tax on sales to non-

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311 See id. at 115 (holding that the county could tax freely alienable land that the tribe owned in fee).
315 See generally County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251 (1992). The General Allotment Act of 1887, or the Dawes Act, gave the President the power to unilaterally apportion tribal lands, to be held in trust by the U.S., without tribal consent. Id. at 254.
316 *Cotton Petroleum*, 490 U.S. at 175.
317 Id. at 186-87.
319 Id.
members to prevent tribes from “marketing their tax exemption,” thereby eliminating the price advantage.320 Any tax the tribe might then charge puts them at a firm disadvantage.321 Consequently, revenues, which help pay for tribal government services, take a hit.322 In Washington v. Confederated Tribes of Colville Indian Reservation, the U.S. Supreme Court agreed that this interest in generating revenue to support government programs exists, but cautioned that it competes with the interests of the state.323 The Court considered the source of underlying value behind the tax and whether or not the party taxed – member or non-member – is a recipient of services that the tax helps finance.324 On balance, the Court concluded in Colville that the state’s taxes were “reasonably designed to prevent the Tribes from marketing their tax exemption to nonmembers who do not receive significant tribal services and who would otherwise purchase their cigarettes outside the reservations.”325

Combined, the case law offers a glimpse at how concurrent taxing authority might play out in Hawai‘i. The jurisdictional boundaries are far from concrete, and are regularly tinkered with by the courts. Meanwhile, advocates for broader state taxation chime in under claims of fairness – the contention being that holding a tribe to the same tax constraints to which the state is subject levels the playing field.326 Absent from this charge is any contemplation of the contextual factors that create present disparity between state and reservation economies, like market access and social conditions.327 Economics aside, letting states cut in on tribal tax revenues reveals the porosity of native self-governance within the U.S. paradigm.328 Decisions that treat Indian governments less like sovereigns and more like ordinary, state-regulated entities open them up to outside interference.329 These subversions of sovereign authority inculcate paternalism; they suggest that the U.S and all its parts are better served when tribal nations are “brought into conformity with surrounding state practices.”330

This sets up relationships of subordination, and it is a framework that has already found its way into the conversation on Native Hawaiian self-governance in Hawai‘i. Governor Linda Lingle’s reversal of support for the Akaka Bill in March 2010 is demonstrative.331 In her remarks on the decision to withhold endorsement, she pointed out that the legislation’s “basic problem…is that…the ‘governmental’ (non-commercial) activities of the Native Hawaiian governing entity, its employees, and its officers, will be almost completely free from State and County regulation.”332 It is incomprehensible to the governor that “two completely different

320 Id. at 157.
321 Id. at 154.
322 Id.
323 Id. at 156-57.
324 Id.
325 Id. at 157.
326 EagleWoman, supra note 214, at 14.
327 “Economic development in Indian Country needs capital not simply to bring tribes on par with off reservation communities’ level of annual investment, but to address historic backlogs in areas such as educational attainment, poor health and crime.” Rob Capriccioso, Economic Success in Indian Country: A Complex Tale That Needs to Be Told, AM. INDIAN REP., Sept. 2007, at 10.
328 See EagleWoman, supra note 214, at 14.
329 See EagleWoman, supra note 209, at 419.
330 EagleWoman, supra note 214, at 15.
332 Press Release, Governor Linda Lingle, Statement by Governor Linda Lingle on the Native Hawaiian Government
sets of rules – one for ‘governmental’ activities of the Native Hawaiian governing entity and its officers and
employees, and one for everyone else – makes sense for Hawai‘i.333

The Akaka Bill does carve out a space for governmental activities free from state interference, but in all
other matters related to economic development, the state’s reach is extensive. Under the current version of
the bill, federal recognition is formally conferred on the Native Hawaiian governing entity (“NHGE”) after
the Secretary of the Interior approves the organic governing documents and elected government officials
are installed.334 Negotiations with the U.S. and the State of Hawai‘i proceed from there and should cover
a range of matters before culminating in legislation that gives the agreements legal force. During this gap
period, the state will have broad tax authority. Apart from an exemption for governmental activities,335 the
bill preserves the state’s power to tax: NHGE members and their property,336 the NHGE’s property337 and
any development338 or non-government activity that occurs on the property,339 as well as commercial and
business activity by the NHGE or any of its business affiliates340 along with the businesses themselves.341 In
addition, the Akaka Bill makes it impossible for the NHGE to tax non-members342 and their corporations or
other business entities without express consent.343

Combined, the Akaka Bill sets out an unprecedented invasion of a sovereign’s taxation authority. The
blanket reservation of state power to tax with no regard to place or party departs from the basic markers
that courts use in finding the line “between state regulatory authority and tribal self-government.”344 Courts
typically rule against state taxation of a tribe or members while on the reservation, unless the tribe cedes
jurisdiction or a federal law permits the tax.345 As far as on-reservation activities involving non-Indians are
concerned, courts weigh the competing interests.346 So “if the balance of federal, state, and tribal interests
favors the State, and federal law is not to the contrary, the State may impose its levy.”347 The matters of “who”
and “where” are pivotal to outcomes in tribal tax immunity cases.348 The Akaka Bill sets up a more rigid
system. In exempting just government activity and other non-commercial entities, it leaves everything else
open to state tax.

By maximizing the State’s taxation authority before negotiations on the issue begin, the bill puts the Na-
tive Hawaiian government in a disadvantageous position. The Akaka Bill does contemplate negotiation over

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333 Id.
passed by House, Feb. 23, 2010).
335 Id. § 9(c)(3)(I).
336 Id. § 9(c)(3)(E).
337 Id. § 9(c)(3)(L).
338 Id.
339 Id. § 9(c)(3)(K).
340 Id. § 9(c)(3)(J).
341 Id. § 9(c)(3)(M).
342 Id. § 9(c)(3)(F).
343 Id. § 9(c)(3)(G).
346 Bracker, 448 U.S. at 144-45.
347 Oklahoma Tax Commission, 515 U.S. at 459.
these issues post-formation, but it does not give the Native Hawaiian governing entity much starting lever-
age. Nevertheless, it is impossible to predict this early on in the process what any final compacts between the two governments will look like. If the experience between tribes and states confirm anything, it is that the tax base of native nation is shaky at best, and the jurisdictional quagmire is often perceived as a zero-sum game. Gains by tribes are framed as losses by states and vice versa. The broader implications point back to the hazard of being too dependent on tax revenue to finance government operations. It corroborates the importance of adopting an unwavering commitment to diversification through economic development.
V. ECONOMIC DEVELOPMENT

Economic development is vast in scope. Indeed, there is no universal list that sets out which actions constitute economic development. The Native Nations Institute defines it "simply as an increase in economic activity in a community or other social unit." This leaves plenty of room for any number of activities, from subsistence-based to market-based, as well as objectives and motivations. Perhaps because of economic development’s open-endedness, it can be a contentious issue in native communities, especially when it gets conflated “with assimilation into the mainstream society, the reorganization of...communities around market forces and corporate structures, and the loss of Indigenous cultures.” This article predicates the exploration of economic development on achieving desirable outcomes for the lāhui. For that reason, the definition proposed by a handful of contributing authors to Rebuilding Native Nations is instructive. They define economic development as "the process by which a community or nation improves its economic ability to sustain its citizens, achieve its sociocultural goals, and support its sovereignty and governing processes." With that understanding in mind, this next section considers ways that a Native Hawaiian governing might approach the development process. It begins with a discussion of economic structure.

A. Government Corporate Model

The peculiar economic realities that tribal governments face create an economic structure that is not typical of federal and state governments. Four out of every five dollars of federal government revenue are financed by personal income taxes and payroll taxes. Of the remaining fifth, corporate income taxes account for twelve percent and a combination of excise taxes, estate and gift taxes, customs duties, Federal Reserve earnings, and other fees and charges make up the rest. Most state spending comes out of a general fund, which is a pool of personal income, corporate income, and sales taxes. As explained above, these revenues are not as readily available to tribal governments because of the economic and political constraints. Unfortunately, for a number of tribes, the narrowed options contribute to their reliance on federal grant monies, which can make it difficult to achieve a functioning, self-sustained economy.

The architecture of many reservation economies is built around tribally owned businesses. “Tribally chartered and owned corporations are the engine driving contemporary tribal economic development at all levels.” Like municipal governments, tribal governments are usually responsible for basic civil services,

351 Id.
352 Id.
353 Begay, supra note 15, at 36.
355 Id.
356 Nat’l Ass’n of State Budget Officers, supra note 281, at 92.
357 Fletcher, supra note 290, at 774.
358 Id. at 775.
359 EagleWoman, supra note 209, at 397-98.
like “police and fire protection, road building and education.” So business profits are used to bankroll these basic government services. But their operations also play a more central role in facilitating on-reservation economic activity. They stimulate job creation and, for some tribes, they provide members a source of income through per capita payments, much like dividends do for corporate shareholders. Of course, there are variations in priorities, but most tribally owned businesses are rarely ever just about maximizing profits and fattening shareholder value.

This is a degree of government presence in the economy that is not seen in many parts of United States. The West – and the United States, Canada, and the U.K. in particular – strives to keep government along the periphery where the economy is concerned. These countries have traded economic models ordered around central planning, with the accompanying “reliance on state enterprises as economic actors,” for those characterized by “private ordering and markets, privatization, deregulation, and opening of economies.” From the government’s perspective, the progressive thing to do is allocate more and more of the economic functions and controls to the private sector. This theory has been carried out to various degrees across the globe, and governmental retreat from the business sector brought the percentage of worldwide production by state-owned entities down to five percent from a percentage high in the teens during the 1980s. So the active participation of tribally owned enterprises in stimulating reservation economies appears somewhat retrogressive. Rather than “getting out of the business of business,” tribal governments are getting in.

The centrality of tribal governments in the economic sphere attracts reproach from those who equate it with socialism. Yet, the experiences of post-socialist and non-Western countries transitioning to market economies reveal that the “size of the government is less important than the quality of its policy and the manner of changes of government size.” Privatization and other market reforms are lauded as the means to sustaining economic growth and improving the quality of life, but there are structural differences across economies that call for varying degrees of government participation. With tribes, the “tax advantages, revenue needs, tribal policy and federal law” often make it sensible for their governments to assume a more

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361 Victoria Knight, Indian Tribes Seek to Diversify Wealth, WALL ST. J., Oct. 11, 2006, at B5F.
362 Fletcher, supra note 290, at 775.
363 Id. at 775-76.
366 Id. at 12.
367 Kenneth Grant & Jonathan Taylor, Managing the Boundary Between Business and Politics: Strategies for Improving the Chances for Success in Tribally Owned Enterprises, in REBUILDING NATIVE NATIONS, supra note 15, at 175, 175.
368 Id.
371 See id. at 23.
influential role in the business sector. This does not mean that all tribes successfully use public enterprises to lift their economies and power growth. Many efforts in fact fall flat, and in areas that lack an abundance of natural resources, success can be especially elusive.

One of the more successful tribes to commercialize their resources is the Southern Ute tribe in Colorado. In a turnaround of fortunes, the 1,300-member tribe found itself atop huge deposits of natural gas after being forced from its original homeland by the U.S. to make way for gold extraction. Miners eventually stripped the mines clean, but under the relocated reservation land, initially thought to be worthless, is the methane gas that powers the Utes’ economic livelihood. The tribe launched Red Willow Production Co., the first Native American-owned gas production company, and revenues from the operation finance a multibillion-dollar growth fund that the Utes use to invest in other businesses and real estate. The diversified holdings make the Southern Utes one of a handful of tribes that do not depend on gambling. Instead, the tribe is exploring economic opportunities in the alternative and renewable energy industries with biodiesel and wind projects. The new wealth pulled the tribe out of poverty and is helping to build schools and infrastructure, but it is creating a number of new concerns. Environmental degradation, tensions over the manner in which profits are distributed to tribal members, cultural alienation, and discomfort with a predominantly non-native management class are some of the complications that accompany the Utes’ prosperity. Nevertheless, the tribe is widely admired by other tribes as an exemplary model of Native American economic development.

Leveraging natural resources to create a diversified, government-owned conglomerate proves to be a successful strategy for some tribes, but gaming remains the economic centerpiece for a good portion of Indian country. Congress enacted the Indian Gaming Regulatory Act of 1988 to codify the right to conduct gaming “as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.” Since its passage, Indian gaming has matured into a sophisticated industry that pulls in billions of dollars in revenue each year. A number of tribes are expanding their offerings by giving visitors a mix of entertainment, dining, and shopping options. With approximately 230 tribes engaged in some form

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372 Grant & Taylor, supra note 367, at 175.
373 Fletcher, supra note 290, at 777-78.
374 Id. at 779.
376 Id.
378 Rosenberg, supra note 375.
379 Dugan, supra note 377.
382 Dugan, supra note 377.
383 Id.
384 Id.
387 Id. at 381.
of gaming across 28 states, there is however significant variation in levels of performance, as evidenced by the disproportionate concentration of earnings. In 2007, for example, “the top 6% of Indian gaming facilities generated over 40% of total gaming revenue.” So while gaming makes significant contributions to both tribal and non-tribal governments in the form of business income, jobs, tax revenue, and direct payments, it has not been a panacea. It does, however, offer tribes a way to broaden their economic base.

Like the Southern Utes’ strategy of parlaying natural gas into a diversified income base, shrewd gaming tribes take a similar tack. One oft-cited example is the Ho-Chunk Nation. Formerly the Winnebago, the tribe established Ho-Chunk, Inc. in 1994 to minimize its reliance on WinnaVegas, the casino business launched in 1992. “The goal was to develop an entrepreneurial company to recognize and develop various economic opportunities, provide job opportunities for Tribal members and enable economic self-sufficiency for the Tribe.” Eight million dollars of startup capital were injected into the new venture, which had just one employee on payroll. The corporation now controls eighteen subsidiaries across a range of industries and employs more than 1,100 people. In 2008, Ho-Chunk, Inc. brought in $2.6 million in profits on $156 million in revenue. Success in business trickles down to improve the general welfare of the more than 6,500 tribal members through the Ho-Chunk Village, a 40-acre commercial and residential development.

It is worth mentioning that gaming will not an option in Hawai‘i, at least if the current version of the Akaka Bill becomes law. The bill expressly forbids the “Native Hawaiian governing entity and Native Hawaiians [from]…conduct[ing] gaming activities as a matter of claimed inherent authority.” The provision also precludes any claims of authority under “the Indian Gaming Regulatory Act [or]…any regulations thereunder promulgated by the Secretary or the National Indian Gaming Commission.” This is unfortunate because gaming’s economic contributions are far-reaching, benefiting not only the tribe and its members, but also the state and local governments.
but the federal and state governments and non-members as well. The Akaka Bill handicaps the lāhui by removing a proven catalyst for economic self-sufficiency.

Nevertheless, the government corporate model combined with a diversification strategy, should find application in Hawai‘i. Whether engaging in resource-extraction, gaming, or something else, successful tribes parlay business ventures into other pursuits, building an economy drawn from a range of profitable sectors. Chances are that, like tribes, the Native Hawaiian governing entity will play multiple roles at once: “principal actor’ as well as ‘monitor,’ ‘regulator’ and ‘catalyst’ of development efforts.” Given that, the nation will need to adopt a coherent strategy; the next section explores how that might be done.

B. Economic Development and ʻĀina

Once a land base is established, ʻāina is going to be a chief issue in the lāhui’s economic policy. This is so for a couple of reasons. Like many indigenous peoples, Native Hawaiians view land and natural resources as “inseparable from the people, their culture, and their identity as a nation.” Within a Maoli worldview, the principle of aloha ʻāina succinctly captures these ideas. More prosaically, the land and its resources provide the physical base upon which to build the economy. There are certainly other ingredients, but few are as critical as ʻāina. It is at once an economic and non-economic variable – a source of Maoli identity and history as well as a lucrative capital asset. Decisions regarding land and natural resources must reconcile historical and cultural moorings with the economic and fiscal imperatives of running a nation. It stands to reason then

403 See Meister, supra note 386, at 386 (“[I]t was estimated that in 2007 Indian gaming directly and indirectly generated approximately $85.8 billion in output, 732,000 jobs, $29.4 billion in wages, and $14.8 billion in tax revenue and direct payments to federal, state, and local governments.”).
404 This emphasis on government-run enterprises must not be taken as a rejection of the concurrent need to stimulate entrepreneurship and a private sector. Because the Native Hawaiian governing entity is likely to have a formidable presence in economic activities, there is the hazard that it will suffocate other economic actors, like the lāhui’s own citizens. Independently run businesses are critical to sustaining a healthy economy. M.B. Neace, Entrepreneurs in Emerging Economies: Creating Trust, Social Capital, and Civil Society, 565 ANNALS 148, 149 (1999). Among other things, a private sector keeps money circulating in the local economy; provides jobs, generates taxable activity, and aids in economic diversification. Stephen Cornell et al., Citizen Entrepreneurship: An Underutilized Development Resource, in Rebuilding NATIVE NATIONS, supra note 15, at 197, 199-200. It will be major part of any future economic strategy, but it’s just beyond this article’s periphery.
405 Meister, supra note 386, at 411.
407 On the topic of ʻāina, there are many unknowns. Chief among them are the existence and boundaries of the land base; until negotiations get under way, the territory’s composition and location are speculative. One scenario advanced by Professor Van Dyke contemplates the transfer of Kaho‘olawe, the Hawaiian Home Lands, and the Crown Lands to the lähui. Van Dyke, supra note 68, at 382. This arrangement falls somewhere near the optimistic end along the spectrum of possible outcomes.
409 Id.
410 Economic policy and development are shaped by both economic and non-economic factors. Graham, supra note 405, at 622. History and culture are important non-economic concerns. Id. And in addition to land and natural resources, the other economic inputs usually include “infrastructure and geography, human development, and financial capital.” Id.
“that a development strategy which minimizes social costs is a far more successful strategy than one which requires cultural change as a precondition for economic development. It is critical that Native Hawaiians begin thinking about how the governing entity might frame its approach. There are scores of possibilities, but one position that draws wide agreement is that the quality of a nation’s institutions is a fundamental determinant of economic performance. The remainder of this section looks at the relationship between economic development and ‘āina through the lens of institutional economics.

1. Institutional Economics
The field of institutional economics has been around for decades, spawned by a disregard for the impact of institutions on economic performance by mainstream economic thought. Institutional economics can be divided into old and new and their respective classes of sub-theories, but what holds across the discipline is the maxim that “institutions matter.” Institutions are “the rules of the game.” They “are the humanly devised constraints that structure political, economic and social interaction.” Laws, rules, and regulations are a society’s formal institutions, while “sanctions, taboos, customs, traditions, and codes of conduct” are its informal ones. Unlike neoclassical economics, these approaches do not assume the institutional framework as given but make it into the object of research and also seek to consider the implications for economic behavior of any given institutional arrangement. Rather than promote a single formula for economic development with little regard for preexisting variables, institutional economics allows for more flexibility.

Institutional economists stress the affect that these constraints have on economic performance. This is so because “[i]nstitutions set the incentive structure of an economy,” which “shapes the direction of economic change towards growth, stagnation, or decline.” Economic development and transactions take place within the boundaries of this institutional structure.

412 See Daron Acemoglu et al., The Colonial Origins of Comparative Development: An Imperial Investigation, 91 Am. Econ. Rev. 1369, 1395 (2001) (“Many economists and social scientists believe that differences in institutions and state policies are at the root of large differences in income per capita across countries.”).
415 Richter, supra note 414, at 163.
417 Douglass C. North, Institutions, 5 J. Econ. Persp. 97, 97 (1991).
418 Id.
419 Id.
420 Rosser, supra note 16, at 280.
422 North, supra note 417, at 97.
capital, and access to financial capital will be virtually useless if...the institutional structures necessary to maintain a hospitable environment for human and financial investment” are inadequate.\(^{424}\) Thus, variability in economic outcomes across the developed and developing world is largely seen as a function of institutional differences.\(^{425}\)

Central to this incentive structure are transaction costs.\(^{426}\) Very generally, they can be thought of as the “costs of running the economic system.”\(^{427}\) It is helpful to think of them as being analogous to “friction in physical systems.”\(^{428}\) Traditionally, neoclassical economics ignored the impact of these costs entirely,\(^{429}\) but they are present with every exchange. They arise before an exchange happens, during the period when commercial parties seek each other out, get to know the nature of the deal, and hammer out the terms through bargaining and contracting.\(^{430}\) And they linger long after a transaction takes place in the form of “maladaptation, renegotiation, monitoring, and breach of contract.”\(^{431}\) Institutional economics looks at how the rules of the game impact transactions costs. An institutional environment that keeps these costs down not only facilitates a market economy, but it strengthens the development process.\(^{432}\) With less friction, the Native Hawaiian governing entity, for example, would have more latitude to plot developmental strategies that accrue the lāhui’s benefit.\(^{433}\)

2. ‘Āina’s Rules of the Game

The institutions that govern land tenure will be “essential and fundamental determinants of economic and societal performance.”\(^{434}\) A nation’s property regime directs its institutional capacity with regard to land. Property rights that are more certain and safeguarded create an atmosphere that encourages investment in physical and human capital.\(^{435}\) The institutions that touch ‘āina are going to be influenced by rules pressed upon the lāhui from outside as well as the internal dictates of Maoli culture.\(^{436}\) This section considers how the confluence of both forces might play out in Hawai‘i.

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425 Herath, supra note 421, at 879.
426 See Richter, supra note 414, at 165 (“In this approach, transaction costs (or information costs) are essential as an explanatory element.”).
429 Ruester, supra note 423, at 2.
430 Id. at 10.
431 Id.
432 Rosser, supra note 16, at 283.
433 See id. at 284.
435 Acemoglu, supra note 412, at 1369.
436 See Douglass C. North, Introduction to Self-Determination: The Other Path for Native Americans 1, 2 (Terry L. Anderson et al. eds., 2006) (“In particular, the interplay between exogenously imposed rules and culturally derived tribal rules and norms has resulted in a fundamental but still incompletely understood aspect of societal performance.”)
Where Native American economic development is concerned, the trust status of tribal lands is a major source of institutional weakness. Ownership of most tribal territory is structured so that the United States holds legal title for the benefit of tribes. This trusteeship is designed to curb the dispossession of land and natural resources, but the “extra layer of bureaucracy” can work against economic performance. It is “large, cumbersome, and not business-oriented.” The United States’ ownership interest makes it a party to many major economic decisions involving trust property. So tribes must often secure the federal government’s approval, usually through the Bureau of Indian Affairs (“BIA”), before trust land is sold, leased, or otherwise encumbered. Not only does this add time and cost, but it stifles whatever economic dynamism a tribe might attempt to create because of federal agencies’ aversion to taking on too much risk. Furthermore, there is little guarantee that federal agents charged with making these decisions possess a competency in business. The oversight also makes it difficult to liquidate or leverage properties and reinvest the proceeds in ways that expand the economic pie. So a tribal member, for example, could not pledge a piece of trust property as collateral for a loan that would serve as operating capital for a small business. In this situation, the next best alternative is usually to lease the property, often to someone outside of the tribe, which hardly parlays into growth.

These exogenous institutional constraints complicate the challenge of spurring economic activity. They create friction and add uncertainty to the developmental process, which impinge on the innovation and economic verve that nation rebuilding desperately requires. Lance Morgan, the president and chief executive officer of Ho-Chunk, Inc., blamed the trust relationship as the reason why so many tribes struggle with poverty. He called the economic system it incubates “an astounding failure.” When the federal government holds a kind of veto power over land decisions, it gives U.S. authorities immense discretion in shaping economic outcomes. When a nation’s most important asset is outside of its control, self-determination is inhibited.

This trust arrangement stands in stark contrast to the situation in Alaska, which was conceived out of the Alaska Native Claims Settlement Act of 1971 (“ANCSA”). Just one reservation exists there.

439 Huffman & Miller, supra note 437, at 280.
441 Id. § 415.
442 Id. § 81.
443 Miller, supra note 369, at 805.
444 Huffman & Miller, supra note 437, at 280-81.
446 Id.
447 See Huffman & Miller, supra note 437, at 290-91.
448 Hearing, supra note 445, at 1 (testimony of Lance Morgan).
449 Id. at 2.
453 See id. § 1618(a) (exempting Annette Island Reserve from the provision revoking Alaskan reserves).
tribal lands are held in fee by state-chartered Native corporations. This means that the Native corporations can sell, lease, and encumber the lands that they own as they see fit. Clearly defined private property rights and the corporate form, situated within Alaska’s body of corporation law, would seemingly create a desirable institutional setting in which to promote economic development. Free from federal meddling and possessing total control over their lands and natural resources, Alaska Natives, in theory, enjoy a generous degree of self-determination. In practice though, it is more complicated.

Freedom from federal control has come at a cost to Alaska Natives’ sovereignty. Tribal political sovereignty can be a nebulous thing, largely because “its scope is predicated on its recognition by the federal government.” Scope in turn depends on whether a court or legislature is using membership status or territorial status as the mark for determining jurisdiction. A tribe can assert sovereignty over its own members with little issue, whereas territory serves as a basis to bring nonmembers and non-natives under a tribe’s jurisdictional purview. For that to happen though, the territory must qualify as “Indian country” by being reservation land, an Indian allotment, or a dependent Indian community. Tribal lands in Alaska are neither reservations nor allotments. That leaves domestic dependent communities as the only other option, and in Alaska v. Native Village of Venetie Tribal Government, the Supreme Court interpreted this to mean land “set aside by the Federal Government” for Indian use and “under federal superintendence.” The Court held that the land in question failed to qualify on both counts, because (1) ANCSA’s revocation of Alaskan reservations belied any Congressional intent to create a set-aside, and (2) land owned in fee is not subject to a sufficient degree of federal control to bring it under superintendence. Without a territorial basis for jurisdiction, the Native Village of Venetie’s tribal government lacked the authority to tax a nonmember contractor doing business on land that the government owned in fee.

The dismantling of the trust relationship with respect to Alaska Natives’ land holdings impedes their “practical ability to self-govern.” Jurisdiction over members emerged from Venetie unscathed, but beyond this sphere of influence, little else in the way of sovereign power remains. In this context, the nature of the institutional environment is hardly relevant. It means very little to anyone outside of the tribe looking to do business on tribal land, because there are, after all, serious doubts that nonmembers would be subject to

454 See supra note 311 and accompanying text.
455 Chaffee, supra note 312, at 127.
457 See Chaffee, supra note 312, at 127 (”Unlike most other Native American groups in the United States, Alaska Natives can operate their corporations and make decisions for their communicates without worry of paternalistic interference from the federal government because shareholders are able to shape the objectives of the corporations.”).
459 Id. at 433.
460 Id.
463 Id. at 532-33.
464 Id. at 525.
465 Thompson, supra note 458, at 449.
466 Id.
a Native Alaskan tribal government's rules in the first place. That jurisdictional, and institutional, lacuna would likely be filled by the state.

Between these two U.S. extremes is Canada, which provides a nascent arrangement between the federal government and a handful of its First Nations that offers the lāhui a potential way forward. There are two regimes of land and resource management operating in Canada. The first is a product of the Indian Act and shares a lot of similarities with the trust system in the United States. Under it, native reserves are "held by the Crown to be used by Indian bands to occupy and live on." Possession occurs by way of customary right, a certificate of possession, or a lease. As in the United States, the arrangement leaves First Nation lands exposed to exogenous interference from the Canadian government, which circumscribes economic development by multiplying transaction costs. Canada introduced an alternative system in 1999 with the passage of the First Nations Land Management Act ("FNLMA"). The FNLMA offers a First Nation a way out from under the Indian Act's provisions by allowing instead for substitution by land laws of the First Nation's own creation. The federal government still holds title to the lands, but once the First Nation's land code completes the certification process, those laws are fully enforceable in Canadian courts. This then gives the tribal government the jurisdiction "to enact laws with respect to interests in, and in relation to, First Nation land." That has created a lot of open legal and regulatory space for the First Nation to maintain, from resource management and taxation to zoning and land use.

This decoupling of land institutions and external control creates more favorable economic climates. Getting a land code in place takes three years to complete on average, but once established, more efficient institutions are typically achieved. The expansive tribal powers might at first make third parties wary, but at the very least, they can be used to bring transaction costs down, creating a climate that generates less resistance on economic growth and development. In one example, the Mississaugas of Scugog Island First Nation removed all trace of federal administration over land matters from its code, and approval processes that once took almost two years to complete were reduced to days at most. Investment in the territory ensued.

467 See id. at 449 (concluding that Venetie fatally weakens an Alaskan tribal government's civil, criminal, and regulatory authority over nonmembers).
468 See id.
469 Id. at 424.
470 Id.
471 See Alcantara, supra note 434, at 424-26 (describing the ways in which disincentives and bureaucracy are structured into land tenure).
474 Id. at 1049.
475 Id. at 1050.
476 Id. at 1054-55.
477 See Alcantara, supra note 434, at 423 ("At a minimum, land codes reduce transaction costs by eliminating the involvement of the federal government in on-reserve property transactions.").
478 Id. at 426.
479 See Issac, supra note 473, at 1055.
480 Alcantara, supra note 434, at 431.
481 Id. at 428.
482 Id.
The formal institutions that accompany the various land arrangements play a chief economic role, so the lāhui must commit to improving and strengthening these rules of the game. On the practical end, this will require implementation of clear rules, straightforward approval processes, accessible land information repositories, and a trusted forum for settling disputes.\footnote{Rosser, supra note 16, at 288.} Bargaining and decision costs need to be managed without compromising the opportunity for the community to air its concerns. At the same time, the threat of project derailment must not be so great as to deter investment, innovation, and entrepreneurial efforts.\footnote{Id.} The more transparent the future Native Hawaiian governing entity is, and the more diligent its approach to minimizing transaction costs, the more freedom it should have in building an economic base to support its activities and opportunities for the lāhui. This emphasis on institutions is not meant to downplay the importance of leadership, knowledge, or resources. But these “can be wasted or go untapped unless…an incentive environment that channels them into productive ends” is established.\footnote{Cornell & Kalt, supra note 424, at 446.}

The formal rules and regulations make up only part of the institutional framework; informal institutions are just as important.\footnote{Douglass C. North, Institutions, Institutional Change, and Economic Growth 36 (1990).} These are derived from cultural mores and norms that work to encourage or discourage certain behaviors.\footnote{Id.} From an economic standpoint, they, like formal institutions, make certain activities more or less feasible.\footnote{See id. (“By ‘informal’ we mean the culturally-shared mechanisms of approbation and censure that lower or raise the costs of certain kinds of behavior, and thereby encourage members to conform to societal norms.”).} Culture acts as a lens through which economic conduct is filtered; thus, exchanges, transactions, and policies that align with a Maoli worldview are the ones that should be pursued.\footnote{See id. at 450 (Culture-as-knowledge also can offer strategic guidance at the level of economic activity, selecting for those activities that best fit with indigenous conceptions of self and of appropriate intragroup relations.”).} Combined together, formal and informal institutions make up “a system of incentives, constraints, and ‘recipes’ that direct individuals into productive or destructive activity, broadly conceived.”\footnote{Id. at 448.} Culture acts as a lens through which economic conduct is filtered; thus, exchanges, transactions, and policies that align with a Maoli worldview are the ones that should be pursued.\footnote{See id. at 450 (Culture-as-knowledge also can offer strategic guidance at the level of economic activity, selecting for those activities that best fit with indigenous conceptions of self and of appropriate intragroup relations.”).}

Contemporary Native Hawaiian culture is woven together by diverse strands of beliefs; principles of aloha `āina are a visible part of this tapestry. The reverence many Kānaka Maoli have for `āina means that land and resource development are regularly met with scrutiny. In the past, such scrutiny has given way to outright resistance. By framing aloha `āina as a body of informal institutions, the Native Hawaiian governing entity can approach economic development more mindfully, insofar as it impacts land and natural resources. If the lāhui adheres to the institutional boundaries embedded in Maoli culture, then resources and efforts will be guided towards more productive ends. This kind of approach engenders a spirit of legitimacy that strengthens governance and, ultimately, sovereignty.\footnote{Id. at 448.} To make these ideas more tangible, the next section looks at how a self-defined development strategy need not be captive to cultural incompatibility.

### C. Economic Entry Point

Economic engagement on the part of a Native Hawaiian governing entity will be required, and building a diversified economy within a given institutional framework is going to take an engine. It is worth looking at

\footnote{483 Rosser, supra note 16, at 288.}
\footnote{484 Id.}
\footnote{485 Cornell & Kalt, supra note 424, at 446.}
\footnote{486 Douglass C. North, Institutions, Institutional Change, and Economic Growth 36 (1990).}
\footnote{487 Cornell & Kalt, supra note 424, at 448.}
\footnote{488 See id. (“By ‘informal’ we mean the culturally-shared mechanisms of approbation and censure that lower or raise the costs of certain kinds of behavior, and thereby encourage members to conform to societal norms.”).}
\footnote{489 See id. at 450 (Culture-as-knowledge also can offer strategic guidance at the level of economic activity, selecting for those activities that best fit with indigenous conceptions of self and of appropriate intragroup relations.”).}
\footnote{490 Id. at 448.}
\footnote{491 See id. at 451 (providing examples of ways that cultural and institutional dissonance lead to dissension in operations and governance).}
how to do so in the least disruptive way, with an eye on the possible formal and informal rules of the game in mind. The Akaka Bill's proposed prohibition on gambling eliminates a mainstay for economic development under the classic tribal development model. As the state of Hawai'i's bread-and-butter industry, tourism is an obvious alternative. The industry accounts for about a third of the islands' economic output and is responsible in some way for approximately three-quarters of work in the islands. In spite of the industry's contribution to Hawai'i's gross state product, the reliance on tourism has been problematic.

In the past, the lack of economic diversification left the state overexposed to downturns in visitor arrivals. When Japan's economic growth deteriorated in the 1990s, Hawai'i's tourism industry, which relied heavily on Japanese visitors and investment, collapsed with it. Thousands of jobs were lost, and after three decades averaging growth of 4.4% annually, the state's economy flattened out across the 1990s while the rest of the U.S. boomed. Things picked up in the first half of the 2000s with higher-than-average growth in economic output and the lowest unemployment numbers in the country, but the late-2000s recession put everything in reverse. Most consumers' vacation budgets either tightened or disappeared in the economic downturn, causing Hawai'i visitor arrivals to slide after peaking in 2006. With so many segments of the state's economy wound up in tourism, there was little else to hedge against the industry's weak performance. Tax revenues dried up, and Governor Linda Lingle scrambled to cover huge budget shortfalls. Despite predictions that “a smorgasbord of small industries” that emerged in the early-2000s would mitigate the boom-bust pattern of the past, Hawai'i skidded into its worst recession since becoming a state, “dragged down by its reliance on a single industry.” So while the tourism industry teems with economic possibility, the lāhui needs to be mindful of the risk of being too reliant on visitor dollars.

Tourism is further complicated by the “contradictions inherent in selling place, lifestyle, and culture.” Despite being the keystone to the state's economic model, the commercialization of Hawai'i's natural features and cultural heritage regularly provokes condemnation. Native Hawaiians occupy an especially

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495 *The State the Boom Forgot*, ECONOMIST, June 20, 1998, at 29.
496 Carlton, *supra* note 495.
497 *Tourism in Hawaii: Hoping for an Obama Effect*, *supra* note 493.
498 *Id.*
499 Carlton, *supra* note 495.
ambivalent position in the tourist machine. Their values and traditions have long been used to package and the islands’ tropical escapism. Some of Hawai‘i’s most indelible symbols are cut from indigenous cloth. The hula girl and the luau are two of more recognizable tokens used to conjure up the Hawaiian experience. Co-option of Maoli culture by the tourism industry has created job opportunities mostly of the low-wage variety. Entertainment, for example, is one of the industry’s more reliable segments for Native Hawaiian employment. But the “sale of Hawai‘i as a commodity destination” necessarily involves the sale of a culture “reduced to symbolic caricatures – plastic leis, commercialized luaus, and cellophane grass skirts – all part of making the ‘aloha spirit’ a product.” This act of commoditization, and the accompanying debasement of cultural artifacts into souvenirs and kitsch, stokes indignation in parts of the Native Hawaiian community.

It takes no stretch of the imagination then to see the potential for institutional friction. That can make it harder to engage in business and trigger the sustained economic productivity the lāhui will need. Perhaps it will be different if the host culture is actually playing host – less exploitative and, consequently, less likely to attract resistance. The informal rules embedded in aloha ‘aina – love for land, culture, nation, and identity – suggest that it could go any number of ways. So while tourism is unlikely to be off of the table completely, recycling the economic strategy of the State by selecting the visitor industry as the lāhui’s cash crop is not strategic.

Renewable energy presents a more promising entry point into diversified economic development. Given the present economics of energy in Hawai‘i, the growth prospects of a homegrown alternative industry are significant. The Hawaiian archipelago is “too recent in origin to have experienced the natural cycle necessary for the formation of fossil fuels.” This explains the absence of any oil, coal, or natural gas deposits, either onshore or offshore. Nuclear energy has not been developed either, partly because of its economic infeasibility – demand is too low, and there are no adjoining markets where excess supply might be distributed. Because of these constraints, 92% of the state’s energy consumption is fed by imported coal

505 See Lia O’Neill Moanike‘ala Ah-Lan Keawe, Ki‘i Pāpālua: Imagery and Colonialism in Hawai‘i 94-115 (2008), for a critical examination of how the Hawaiian hula girl has been misappropriated, peddled, and commoditized.
506 Imada explains that the term “luau” is a malapropism of the word “lū‘au.” Iamada, supra note 502, at 330. Luau refers to the popular Hawaiian feast, particularly ones geared for tourists; however, the word is actually a misuse of lū‘au, the Hawaiian word for the taro leaves that are a regular ingredient in traditional cooking. Id. A more accurate word for the event is ‘aha‘aina or pā‘aina. Id. Nevertheless, hotels host luaus day in and day out, reprising the “inescapable script of hospitality and leisure.” Id. at 352.
507 Kent, supra note 504, at 176.
508 See id. at 180.
509 Ohnuma, supra note 502, at 375.
510 Canan & Hennessey, supra note 501, at 238.
511 See Kent, supra note 504, at 183.
513 Id.
514 Id.
515 Id.
and petroleum.\textsuperscript{516} Most of it is crude oil – approximately 50 million barrels per year\textsuperscript{517} – and much of this is sourced from foreign nations where political instability lingers.\textsuperscript{518} This all contributes to some of the highest prices for gasoline and electricity in the U.S.\textsuperscript{519} For example, the average price of residential electricity in Hawai‘i in 2009 ran between 21.53 cents per kilowatt-hour on O‘ahu to 32.69 cents per kilowatt-hour on Hawai‘i Island.\textsuperscript{520} These figures are approximately two to three times what most residential customers pay on the U.S. mainland.\textsuperscript{521} Combine these pricing trends with ongoing advances in technology that are making it cheaper to produce energy from renewable sources, and the situation yields attractive financial models. More than anywhere else in the country, Hawai‘i offers its nascent renewable energy industry favorable economics.

This reliance on imported fossil fuel is incomprehensible given the breadth of Hawai‘i’s environmental endowment.\textsuperscript{522} The islands’ biodiversity and climate open up the whole spectrum of renewable energy sources to commercialization. The state is flush with radiant light that is both consistent and concentrated.\textsuperscript{523} Consumer photovoltaic power systems and solar thermal systems already convert some of that energy into power, and scalability is slowly being introduced. The largest solar farm in Hawai‘i, Lā Ola, is a 10-acre, 1.2-megawatt facility on the island of Lāna‘i.\textsuperscript{524} It will be dwarfed by a proposed 120-acre site in central O‘ahu that will produce 20 megawatts of electricity.\textsuperscript{525} Water is another resource in ready supply. One technology, ocean thermal energy conversion (“OTEC”), produces electricity using the temperature differential between deep and shallow waters.\textsuperscript{526} Wave power, a less mature technology,\textsuperscript{527} converts the energy of rising and falling waves into electricity. Wind energy has been around for a long time, but a number of factors – “political will, recent technological improvements, and the success of wind power generation as a proven business model” – are renewing interest and investment.\textsuperscript{528} Geothermal energy has supplied a portion of Hawai‘i Island’s electricity needs since 1981,\textsuperscript{529} but not without controversy.\textsuperscript{530} The state’s sole geothermal power company

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\item \textsuperscript{516} Dep’t of Bus., Econ. Dev., and Tourism, Energy Resources Coordinator Annual Report 2 (2009).
\item \textsuperscript{517} Hawai. Natural Energy Inst., Hawaii Bioenergy Master Plan 2 (vol. 1 2009).
\item \textsuperscript{518} Dep’t of Bus., Econ. Dev., and Tourism, supra note 516, at 1.
\item \textsuperscript{519} Id.
\item \textsuperscript{520} Hawaiian Electric Company, http://www.heco.com/portal/site/heco (follow “Residential Services” hyperlink; then follow ”Electric Rates” hyperlink; then follow ”Average Electric Rates” hyperlink) (last visited Aug. 19, 2010).
\item \textsuperscript{522} Shupe, supra note 512, at 1194.
\item \textsuperscript{523} Id.
\item \textsuperscript{524} Jennifer Sudick, Lāna‘i’s La Ola Solar Farm is Dedicated, HONOLULU STAR-BULL., Jan. 7, 2009, at A1.
\item \textsuperscript{525} Andrew Gomes, Hawai‘i’s Biggest Solar Farm Proposed for Mililani Fields, HONOLULU ADVERTISER, May 27, 2010, at B2.
\item \textsuperscript{526} Shupe, supra note 512, at 1195.
\item \textsuperscript{528} Id. at 436.
\item \textsuperscript{529} Shupe, supra note 512, at 1197.
\item \textsuperscript{530} See Sally-Jo Bowman, Hawaiians Try to Preserve a Rainforest, CHRISTIAN SCI. MONITOR, Jan. 3, 1991, at 10 (“[O]pponents of geothermal development also support using alternative energy sources, but contend that other means will not so severely affect the ecosystem, endangered species, archaeological sites, and native religious and cultural practices.”).
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Nāpali Souza

is expanding production capacity and exploring potential new heat reserves on Maui. A final source of renewable energy is biomass, which is used to produce fossil fuel substitutes. Bagasse, sugarcane production's fibrous remains, was a readily abundant feedstock until Hawai‘i’s sugar industry began its steady exodus. Algae, with their rapid growth rates and high oil content, hold significantly more promise and are seen as a viable alternative to fossil fuels. All technologies combined, the range of options is immensely attractive, especially with the uncertainty over which āina will be transferred to the lāhui.

The likelihood of reaching more culturally compatible development outcomes with renewable energy is unmatched by most other industries. These technologies are consonant with the kinship that Native Hawaiians share with their surrounding environment, and they help wean the islands and the lāhui away from a dependence on the global market for their energy needs. This is aloha ʻāina. By investing in renewable energies, the Native Hawaiian governing entity would better accommodate an institutional setting in which cultural norms support and solve economic problems.

531 Dep’t of Bus., Econ. Dev., and Tourism, supra note 516, at 14.
533 Id.
534 See Sean Davies, Superfuels from Superbugs, Engineering & Tech, Mar. – Apr. 2010, at 42.
VI. CONCLUSION

Economic development is a colossal undertaking. In no way does this article come close to weighing all of its constituent parts. Nevertheless, it is incumbent upon Native Hawaiians to begin preparations for the day they regain governance over themselves. True sovereignty is in no small part a function of economic sovereignty. How the lāhui achieves economic sovereignty will depend on a host of variables, but it is the institutions that shape economic structure and policy that will determine the ways in which they interact and the outcomes produced. By diligently managing the formal and informal rules of the game, a Native Hawaiian governing entity can better maximize the value of the lāhui’s land and natural resources without betraying aloha ‘āina.