

E PULE KĀKOU! (LET US PRAY!): Constitutionality and Practicability of Public School Sponsored Native Hawaiian Prayers



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Table of Contents

I.	INTRODUCTION	90
II.	THE EDUCATIONAL & CULTURAL VALUES OF PULE IN HAWAI'I PUBLIC SCHOOLS	94
	A. <i>Educational Value of Pule: Holistic Learning Approach</i>	95
	B. <i>Cultural Value of Pule: Cultural Heritage Preservation</i>	97
	C. <i>The Third Hawaiian Renaissance</i>	99
III.	STATE LAW PROTECTION OF PULE IN HAWAI'I PUBLIC SCHOOLS	102
	A. <i>Hawai'i State Constitutional Provisions</i>	102
	1. Free Exercise of Religion (Article I, Section 4)	103
	2. Native Hawaiian Education (Article X, Section 4).	103
	3. Traditional and Customary Rights (Article XII, Section 7)	105
	B. <i>Non-Land Based Native Hawaiian Right Exercises</i>	108

1. Prison	108
2. Court.	109
C. <i>Hawai'i Department of Education Policies</i>	111
IV. FEDERAL CONSTITUTIONAL CHALLENGE OF PULE IN HAWAI'I PUBLIC SCHOOLS	112
A. <i>The Establishment Clause Question</i>	112
B. <i>The Four Tests</i>	115
1. Lemon Test.	115
2. Endorsement Test	116
3. Coercion Test	118
4. Historical Practices Test	120
C. <i>Congressional Legislation on Native Rights</i>	121
D. <i>Possible Solutions</i>	122
V. CONCLUSION	123

I. Introduction

[The people directed their prayers] from the place of the sun's rising to its resting place, from the north to the south, and from the highest heaven to the foundation of the earth below, for these regions are filled with spirits. *Ka po'e kahiko* (the people of old) used to pray this way

—Samuel Mānaiakalani Kamakau¹

In 2015, Stuart Rosenthal, the business manager of Kawaikini New Century Public Charter School on Kaua'i, filed an employment discrimination complaint with the Hawai'i Civil Rights Commission, accusing the school of eliminating his position because of his repeated criticism of the school prayers being Christian.² Every morning before classes, students gather near the campus entrance for *piko* (morning assembly), turn to the east, and begin a series of Hawaiian language chants and songs led by teachers and administrators that are meant to ready them for learning.³ The school also has prayers at the start of staff meetings, and children in most classes take turns saying a *pule* (prayer) before lunch.⁴ This is a common practice at 17 out of 37 charter schools in Hawai'i which are

¹ SAMUEL MĀNAIAKALANI KAMAKAU, *KA PO'E KAHIKO: THE PEOPLE OF OLD* 28 (Dorothy B. Berrère ed., Mary Kawena Pukui trans., 1992); *NATIVE HAWAIIAN LAW: A TREATISE* 858 (Melody Kapilialoha MacKenzie et al. eds., 2015).

² Jessica Terrell, *Is School Prayer Crossing a Line at Some Hawaii Charter Schools?*, HONOLULU CIVIL BEAT (June 29, 2015), <https://www.civilbeat.org/2015/06/is-school-prayer-crossing-a-line-at-some-hawaii-charter-schools/>; Civil Beat Editorial Board, *Hawaii's Charter Schools Must Adhere to Federal Law on Prayers*, HONOLULU CIVIL BEAT (July 8, 2015), <https://www.civilbeat.org/2015/07/hawaiis-charter-schools-must-adhere-to-federal-law-on-prayers/>.

³ See Terrell, *supra* note 2.

⁴ *Id.*

Hawaiian-focused Charter Schools that emphasize Hawaiian language, culture, and values, but Rosenthal claims that the end of *piko* contains a Christian prayer, which is a violation of the U.S. Constitution.⁵

Aspects of Hawaiian language and culture have absorbed the language and culture of Christianity, including prayers.⁶ It is often difficult to separate Christianity intertwined culture, religion, and spirituality from Native Hawaiian beliefs and language, as shown by the students' morning *piko*.⁷ Within the Hawai'i K-12 public and charter school system, there are some Hawaiian immersion schools where all course subjects are taught in Hawaiian and have bilingual curriculum with a focus on Hawaiian cultural traditions⁸ such as *piko*, *oli* (chanting) and sometimes *pule*. These Hawaiian culture-focused schools have played a key role in the revitalization of Hawaiian language and culture since their inception.⁹ Both *oli* and *pule* are tied to the land and people of Hawai'i, and are considered types of traditional and customary rights.¹⁰ Hawaiian traditional and customary rights such as practicing *oli* and *pule* have been recognized as basic human rights of the culturally and politically suppressed Hawaiian people in the post-annexation era.¹¹

Oli refers to the Native Hawaiian ceremonial chanting, as its Hawaiian meaning is "to sing." It is similar to *mele* (songs, poems, chants) and is sometimes performed together with *hula* (dance).¹² The most

⁵ *Id.* Hawaiian-focused Charter Schools, Office of Hawaiian Affairs <https://www.oha.org/hawaiian-focused-charter-schools>.

⁶ Sometimes *pule kākou* refers to only Christian prayers, whereas *pule* refers to all prayers. See Kalena Silva, *The Adoption of Christian Prayer in Native Hawaiian Pule*, 20 PAC. STUD. 89, 95 (1997).

⁷ "The line isn't always so clear," said Tom Hutton, executive director of the Hawaii Charter Schools Commission. "If you are doing a chant that talks about the spirit and how to live, at what point would it cross the line to where it becomes prayer?" Terrell, *supra* note 2.

⁸ *Hawaiian Education*, OFF. OF HAWAIIAN EDUC., <https://www.hawaiipublicschools.org/TeachingAndLearning/StudentLearning/HawaiianEducation/Pages/home.aspx> (last visited Apr. 1, 2022). Also see Hawaiian-focused Charter Schools, *supra* note 5.

⁹ Scholars refer to these schools as "ethnocentric niche charter schools." They are similar to their counterparts for Native American students, which focus on teaching cultural heritage of native groups. See generally PROUD TO BE DIFFERENT: ETHNOCENTRIC NICHE CHARTER SCHOOLS IN AMERICA (Robert A. Fox & Nina K. Buchanan eds., 2014); Terrell, *supra* note 2.

¹⁰ PUALANI KANAKA'OLE KANAHELE ET AL., *Nā Oli no ka 'Āina o Kanaka'ole* (THE CHANTS FOR THE KANAKA'OLE LANDS): A COMPILATION OF OLI AND CULTURAL PRACTICE (2017), <https://edithkanakaolefoundation.org/docs/NaOliNoKaAinaOKanakaole.pdf>.

¹¹ S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 360–64 (1994).

¹² For a list of examples of the chants, see KENNEDY THEATER & UNIV. OF HAW. AT MANOA HAWAIIAN THEATER PROGRAM, *THE ART OF THE CHANTER* (2017), <http://manoa.hawaii.edu/liveonstage/wp-content/uploads/Art-of-The-Chanter-Playbill>. At the Mauna Kea protest in 2019, the *Kunihi* chant *Oli Kāhea-Kūnihi Ka Mauna* was used to calm the sacred mountain and request entrance to protect it. *Oli* can also be performed at *Makahiki* (Hawaiian new year) or other ceremonies. JUNE GUTMANIS, *NA PULE KAHIKO: ANCIENT HAWAIIAN PRAYERS* (1983).

famous *oli* is the creation chant *Kumulipo*, which has over two thousand lines and takes hours to recite.¹³ *Oli* is often used to “clear the way” and request entrance to a place.¹⁴ At schools, for example, there is the *E iho ana* chant, which is an *oli* practiced to ensure students are ready to enter and learn.¹⁵ The Hawaiian national anthem *Hawai‘i Pono‘ī* is sung often at public schools.¹⁶ These practices of *oli* in Hawai‘i public schools have never been legally challenged.

Pule refers to Native Hawaiian spiritual prayer, which provides benefits from *mana* (energy, divine power) and generates both *ola* (life) and *pōmaika‘i* (blessing).¹⁷ Aside from the direct translation of “prayer,” *pule* can also be described as appreciation or a celebration of the creation of all beings around us and including us.¹⁸ *Pule* can either be neutral, purely Hawaiian beliefs or a combination of several religious concepts, with notable influence from Christianity since the 1820s.¹⁹ Many *pule* are Christian in nature, stemming from a Western influence in Hawai‘i over the past two hundred years.²⁰ For example, Sunday in Hawaiian is called *lā pule*, the “day of worship.”²¹

Pule can either be practiced by asking forgiveness for the ‘ohana (family) with food offerings at a family altar called *pōhaku o kāne*, or at a *heiau* (Hawaiian temple) led by a *kāhuna pule* (professional priest or praying expert) and concluded by an *ali‘i* (high ranking chief or chiefess).²² Not all *pule* ‘o‘o (powerful prayers) share the names of Hawaiian deities.²³ For example, *Pule Kala*, the “prayer of forgiveness,” is an infor-

¹³ *Kumulipo* is a genealogical prayer chant linking the royal family to gods and the creation of the earth. It explains the linkage between the spirit world and the world of mankind. See THE KUMULIPO: A HAWAIIAN CREATION CHANT (Martha Warren Beckwith, ed., trans., 1972).

¹⁴ PUALANI KANAKA‘OLE KANAHELE ET AL., *supra* note 10 at 13.

¹⁵ Kau‘i McElroy, *Writing in the Path of Our Ancestors: Ke Ea Hawai‘i Student Council*, in THE VALUE OF HAWAII‘I 3: HULIHIA, THE TURNING 275–77 (Noelani Goodyear-Ka‘ōpua, Craig Howes, Jonathan Kay Kamakawiwo‘ole Osorio & Aiko Yamashiro eds. 2020).

¹⁶ A Place in the Middle, *A Place In The Middle: Hawai‘i Teacher’s Guide*, https://aplacethemiddle.org/uploads/websites/675/wysiwyg/A_Place_in_the_Middle_Hawaii_Teachers_Guide.pdf (last visited Apr. 1, 2022).

¹⁷ ROBERT J. HOMMON, THE ANCIENT HAWAIIAN STATE: ORIGINS OF A POLITICAL SOCIETY 19 (2013); GUTMANIS, *supra* note 12.

¹⁸ Terrell, *supra* note 2. Examples of traditional Hawaiian prayers: *pule* include *pule pale* (sorcery), *mele pule* (prayer chants). Examples of Christian Hawaiian prayers: *Pule Kahikolu* (Trinity Prayer), *Pule Alakai a ka Haku* (The Lord’s Prayer). GUTMANIS, *supra* note 12.

¹⁹ Kalena Silva, *supra* note 6, at 91.

²⁰ For examples of Christian *pule*, see KA BUKE O KA PULE ANA A ME KA HOOKO ANA: THE BOOK OF COMMON PRAYER IN HAWAIIAN (1862); *Pule Ho‘oku‘u Closing Christian Prayer*, in Silva, *supra* note 6, at 95.

²¹ Silva, *supra* note 6, at 95.

²² HOMMON, *supra* note 17, at 3, 11, 23; PATRICK VINTON KIRCH, HOW CHIEFS BECAME KINGS: DIVINE KINGSHIP AND THE RISE OF ARCHAIC STATES IN ANCIENT HAWAII‘I, 68 (2010).

²³ DAVIANNA PŌMAIKA‘I MCGREGOR, Nā KUA‘ĀINA E: LIVING HAWAIIAN CULTURE 193

mal prayer without specific deity names meant to release any negative energy prior to beginning work or a day through asking for forgiveness.²⁴ This *pule* is also a *mele* and can be practiced spontaneously during various social occasions.²⁵

<p>‘Auhea ke kala kala loloa, kala kala loloa o kai, kala kala māewa ana i kai kai pīkai, kala ē e kala ka hewa kua e kala ka hewa alo e kala loa ka hewa a kanaka ē i ola loa kanaka a puaaneane ‘o ka‘u pule kala nō ia ua lele a‘ela nei pule Lele!</p>	<p>Where is the seaweed of forgiveness the long forgiveness, forgive the long forgiveness of the ocean, forgive the forgiveness swaying in the sea the salty water of purification, forgive forgive the wrongdoing of the past forgive the wrongdoing of the present forgive fully the wrongdoing of man so man may experience life until breathing is but a faint sound this is my prayer for forgiveness my prayer has taken flight fly like a bird!²⁶</p>
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This article explores the possibilities of practicing *pule* within public schools in such a way that will not violate federal and state laws or bring forth potential legal challenges. As Rosenthal’s situation highlighted, *pule* has been practiced in Hawai’i public schools for years, which raises concerns about the separation of church and state and potential violations of the First Amendment’s Establishment Clause.²⁷ If *pule* is understood as an important component of Native Hawaiian religion, and this religion is recognized on the same level as other institutional religions such as Christianity and Islam, public schools would need to be careful teaching about *pule* for any occasion.²⁸

This aspect defines the key question of this article: can Hawai’i public schools legally sponsor *pule* practice? One could try to argue that Native Hawaiian religion does not meet the definition of an organized religion, but instead should be viewed as a cultural practice.²⁹ One could also argue that it is indeed a type of “religion” that the First Amendment’s Free Exercise Clause allows, but also subject to the Establishment Clause that prohibits the “establishment of religion” by any government agency.³⁰

(2007).

²⁴ GUTMANIS, *supra* note 12; PUALANI KANAKA‘OLE KANAHELE ET AL., *supra* note 10, at 7.

²⁵ PUALANI KANAKA‘OLE KANAHELE, *supra* note 10, at 7.

²⁶ *Id.* Translation edited.

²⁷ Terrell, *supra* note 2.

²⁸ Teaching *pule* in public school may trigger federal constitutional violations. *See infra* Part IV.

²⁹ Native Hawaiian chanted prayers and poetry are inextricably associated with Native Hawaiian language and culture. *See* Silva, *supra* note 6, at 92.

³⁰ U.S. CONST. amend. I.

The term “religion” here means a system of faith and worship recognized and practiced by a particular church, sect, or denomination.³¹ Today, Native Hawaiian religion is not a systematic religion run by one leader, an authority church, a symbolic building, or a class of clergies.³² The traditional Hawaiian divination expert class, *kāhuna*, has already vanished into history. Without the expert guardians or *kāhu* (pastors) serving as Native Hawaiian religious practitioners, there is neither a leading authority nor a hierarchical structure.³³ Therefore, current Native Hawaiian religion may not meet the requirements of a church, sect, or denomination for the purpose of the separation of church and state laws.

This article argues that the state of Hawai‘i should encourage and provide legislative protection for practicing *pule* in K-12 public schools on a regular basis for cultural and educational purposes. The Hawai‘i state constitution should have specific provisions regarding the time, venue, and practitioners of *pule*. Hawai‘i state laws should provide greater protection of Native Hawaiian religious rights than federal laws. Part II introduces the educational and cultural values of *pule*, its connection with ‘Ōlelo Hawai‘i (Native Hawaiian language) from the past to present, and *pule* practices as educational programs at public schools can contribute to the Third Hawaiian Renaissance. Part III reviews the current Hawai‘i state law protection of *pule* in public schools under constitutional, administrative, and judicial power, and examines what can be done in order to extend these protections. Part IV scrutinizes the challenges from the U.S. Constitution First Amendment’s Establishment Clause in the separation of church and state, and compares different federal laws related to indigenous rights.

II. The Educational & Cultural Values of Pule in Hawai‘i Public Schools

This Part discusses why *pule* teaching should exist in Hawai‘i public schools, and how it can be done in a culturally appropriate way. *Pule* not only means “prayer” as Westerners understand; it also refers to an appreciation or recognition of the divine creation on earth.³⁴ Therefore, it is a way of teaching Native Hawaiian language and passing on traditional knowledge through oral practices.³⁵ Due to the diversity and myriads of Native Hawaiian gods, *pule* is not directed towards one particular deity as seen in Western monotheism.³⁶ A common *pule* would include all gods in the opening invocation, “*E Ho‘oulu ana Ik kini o ke akua, ka lehu o ke*

³¹ *Religion*, BLACK’S LAW DICTIONARY (11th ed. 2019).

³² In pre-Western Hawaiian society, religious practice was systematic and hierarchical. Hierarchies of social beings and their actions were mirrored by the cosmological hierarchy of the gods. See VALERIO VALERI, *KINGSHIP AND SACRIFICE: RITUAL AND SOCIETY IN ANCIENT HAWAII* (1985).

³³ *Id.*

³⁴ GUTMANIS, *supra* note 12, at viii, ix, 1–2.

³⁵ *Id.*

³⁶ *Id.*

akaua, na mano o ke akua” (“invoke we now the 40,000 gods, the 400,000 gods, the 4,000 gods”).³⁷

Beyond serving as a spiritual view of Native Hawaiians around the world, *pule* is also a repository of traditional knowledge and culture accumulated by indigenous people all over the Hawaiian Islands.³⁸ University of Hawai‘i Hawaiian studies professor and director of the Hawaiian Studies Center Lilikalā Kame‘eleihiwa once said,

[t]oday Hawaiian charter schools and Hawaiian language immersion schools use *pule* or prayer on a daily basis to ask the ancestors to teach us their wisdom, this custom is integral to our lives and our Hawaiian teaching systems . . . One cannot have a Hawaiian cultural school without *pule*.³⁹

A. *Educational Value of Pule: Holistic Learning Approach*

The incorporation of *pule* in Hawai‘i public education is beneficial and deserves government protection on both the state and federal levels.⁴⁰ *Pule* practice is an inseparable part of the learning of ‘Ōlelo Hawai‘i.⁴¹ Since the 1978 amendment to the State Constitution that made ‘Ōlelo Hawai‘i the official language of the state and mandated the promotion of the “study of Hawaiian culture, history and language,” Hawaiian-centered schools and programs developed in the state at an unprecedented pace.⁴² Prior to 1980, the curriculum of the Hawai‘i public school system only included certain aspects of Hawaiian culture and knowledge, with teaching limited to selected grade levels and within specific subject areas.⁴³

Since the establishment of the Hawaiian Studies Program in 1980 and the Hawaiian Language Immersion Program (Kaiapuni schools) in 1986, there has been a major effort to incorporate more systematic elements of Hawaiian knowledge including culture, history, and language into the curriculum across various grade levels of the public school system.⁴⁴ Over thirty charter schools in Hawai‘i, including the

³⁷ The Hawaiian pantheon is extremely diverse and complicated, including various gods, lesser gods, ‘*aumakua* (personal guardian gods), *kupua* (demigods), ancestors, living beings and natural resources such as animals, plants and water which all carry *mana* (spiritual energy) that can benefit or harm humans. GUTMANIS, *supra* note 12, at 3–19.

³⁸ *Id.*

³⁹ Terrell, *supra* note 2.

⁴⁰ Protecting indigenous people’s religious practice including those of Native Americans and Native Hawaiians. Federal laws can regulate the protection such as in The American Indian Religious Freedom Act (AIRFA) of 1978. *Infra* Part IV.

⁴¹ All Hawaiian words have three interpretations: *hoopukaku* (literal), *kaona* (symbolic), and *noahuna* (esoteric or spiritual). Thao N. Le & Pono Shim, *Mindfulness and the Aloha Response*, 3 J. INDIG. SOC. DEV. 1, 2 (2013).

⁴² HAW. CONST. art. XV, § 4; art. X, § 4 (1978).

⁴³ Haw. State Dep’t of Educ., *History of Hawaiian education*, <https://www.hawaiiipublicschools.org/TeachingAndLearning/StudentLearning/HawaiianEducation/Pages/History-of-the-Hawaiian-Education-program.aspx> (last visited Apr. 1, 2022).

⁴⁴ *Id.*; see also KE KE’ KAIAPUNI OFF. OF HAWAIIAN EDUC., HAW. DEP’T OF EDUC., THE FOUNDATIONAL & ADMINISTRATIVE FRAMEWORK FOR KAIAPUNI EDUCATION: HAWAIIAN

aforementioned Kawaikini New Century Public Charter School on Kaua'i which was challenged for its *piko* and *pule* practices, have played a vital role in Native Hawaiian education.⁴⁵

The state Department of Education (DOE) has recently promoted *pule* as the key element to a holistic learning approach for Hawaiian culture.⁴⁶ In 2014, the Hawai'i State Board of Education reaffirmed its commitment to Hawaiian culture-based education and Hawaiian immersion programs in public schools by requiring that "all students in public schools graduate with proficiency in and appreciation for the indigenous culture, history, and language of Hawai'i."⁴⁷ The state DOE's 2030 Promise Plan for public schools focuses on the concept of *HĀ* (breath) that nurtures creative ideas and solutions toward a thriving, sustainable, multilingual society.⁴⁸ The Promise Plan states that "*HĀ*" or "BREATH" stands for the state DOE's goal to strengthen a sense of Belonging, Responsibility, Excellence, Aloha, Total-wellbeing, and Hawai'i among students and educators.⁴⁹ Grounded in Hawaiian values, language, culture, and history, *HĀ* supports "a holistic learning process with universal appeal and application to guide learners and leaders in the entire school community."⁵⁰

A holistic learning approach comprises the training of mind, body, and spirit.⁵¹ Future Native Hawaiian education should transcend mere language teaching and convey holistic guidance through curriculum, ceremonies, and social events demonstrating Native Hawaiian spiritual knowledge and humanistic connection to the world.⁵² Thus, *pule* should be incorporated in school programs to cultivate these values.

LANGUAGE IMMERSION PROGRAM (2015), <https://www.hawaiipublicschools.org/DOE%20Forms/KaiapuniFrameworkFinal.pdf> [hereinafter FAFKE].

⁴⁵ Terrell, *supra* note 2.

⁴⁶ HAW. DEP'T OF EDUC., *Nā Hopena A'o Statements: HĀ: BREATH* (2015), <https://www.hawaiipublicschools.org/DOE%20Forms/NaHopenaAoE3.pdf> [hereinafter *Nā Hopena A'o Statements*].

⁴⁷ STATE OF HAW. BD. OF EDUC., Policy 2105 (Feb. 18, 2014); NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 1, at 1276.

⁴⁸ HAW. STATE DEP'T OF EDUC., 2030 PROMISE PLAN PROGRESS (Apr. 18, 2020), <https://www.hawaiipublicschools.org/VisionForSuccess/AdvancingEducation/StrategicPlan/Pages/Phase-I.aspx>; *Hā* is the exchange of breath when two people press together the bridge of their noses while inhaling at the same time. HAW. DEP'T OF EDUC., STRATEGIC PLAN 2017–2020 (Dec. 6, 2016) <https://www.hawaiipublicschools.org/DOE%20Forms/Advancing%20Education/SP2017-20.pdf> [hereinafter STRATEGIC PLAN 2017–2020].

⁴⁹ *Nā Hopena A'o Statements*, *supra* note 46; STRATEGIC PLAN 2017–2020, *supra* note 48, at 5.

⁵⁰ *Nā Hopena A'o Statements*, *supra* note 46.

⁵¹ RONGHUI HUANG & J. MICHAEL SPECTOR, RESHAPING LEARNING: FRONTIERS OF LEARNING TECHNOLOGY IN A GLOBAL CONTEXT 367 (2012).

⁵² FAFKE, *supra* note 44. One example of such teaching approaches is using *piko*, a collective storytelling practice which brings all school members together in a shared participatory narrative reflective and build a sense of community. See generally Kelsey Matsu, *The Possibility of Storytelling: Building a Sense of Community within a Hawaiian Culture-Based School*, 52 EDUC. PERSP. 37 (2020).

Organizations such as the Native Hawaiian Charter School Alliance should take initiatives to recognize the educational value of *pule* and urge the state DOE to finalize a state curriculum for holistic learning of Native Hawaiian knowledge.⁵³

B. Cultural Value of Pule: Cultural Heritage Preservation

The 1978 amendments to the Hawai'i State Constitution recognized the concept of restorative justice for *Kānaka Maoli* (Native Hawaiian people), including the formalization of Native Hawaiian language and culture in state government actions.⁵⁴ Federal action has not completely fulfilled the goals of restorative justice and reconciliation with *Kānaka Maoli*, although the 1993 Apology Resolution has tentatively made progress.⁵⁵ On one hand, laws and cases related to *Kānaka Maoli* must take into account previous wrongful acts that caused harm and the necessary remedies. On the other hand, both litigants and adjudicators should consider the immediate and long-term consequences for *Kānaka Maoli* in terms of their social and economic conditions.⁵⁶ According to Professor D. Kapua'ala Sproat, “the pursuit of justice is less about equality and more about self-determination, including the return and restoration of traditional lands and other resources.”⁵⁷

Mahina Tuteur, a fellow at the University of Hawai'i Ka Huli Ao Center for Excellence in Native Hawaiian Law, asserts that there are four realms of a restorative justice analysis for Native Hawaiians in assessing the impact of government actions on Native Hawaiian people, community, and culture.⁵⁸ Cultural integrity, or *mo'omeheu*, is the first of these

⁵³ Kanu o ka 'Āina Learning Ohana (KALO) provides financial support for NLN and other educational programs including Kanu o ka 'Āina NCPCS, Mālamapōki'i (Early Childhood Education), Kaho'iwai – Center for Adult Teaching and Learning Programs (Post Secondary Programs). See About Us, KALO <https://kalo.org/about-us> (last visited Apr. 1, 2022).

⁵⁴ HAW. CONST. (amended 1978); N. Mahina Tuteur, *Reframing Kānāwai: Towards a Restorative Justice Framework for Indigenous Peoples*, 7(1) INDIG. PEOPLES' J.L. CULTURE & RESIST. 59, 70 (2022).

⁵⁵ Joint resolution to acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii, Pub. L. No. 103–150, 107 Stat. 1510 (1993); Tuteur, *supra* note 54, at 69–71.

⁵⁶ Tuteur, *supra* note 54, at 71. State laws, federal laws, and cases lack support both for Native Hawaiians' self-determination and their land and citizenship identity, which are the fundamental pillars of restorative justice. See D. Kapua'ala Sproat, *An Indigenous People's Right to Environmental Self-Determination: Native Hawaiians and the Struggle against Climate Change Devastation*, 35 STAN. ENVTL. L.J. 157 (2016) [hereinafter *Indigenous People's Right to Environmental Self-Determination*].

⁵⁷ D. Kapua'ala Sproat, *Wai Through Kānāwai: Water for Hawi'i's Streams and Justice for Hawaiian Communities*, 95 MARQ. L. REV. 127, 167 (2011) [hereinafter *Wai Through Kānāwai*]; Anaya, *supra* note 11, at 342.

⁵⁸ The four values or realms of restorative justice for Native Peoples are: (1) cultural integrity (*mo'omeheu*) (2) lands and natural resources (*'āina*), (3) social welfare and development (*mauli ola*); and (4) self-governing and self-determination (*ea*). Tuteur, *supra* note 54, at 61, 73–5.

realms and requires weighing cultural impacts on the people and land of Hawai'i for a restorative justice analysis.⁵⁹ Applied in this situation, the practice of *pule* in schools supports and restores cultural integrity.⁶⁰ *Pule* teaches the younger generation to understand the suffering and hope of Native Hawaiian beliefs, and thus it is an effective remedy for past harm and a healing process for future cultural survival.⁶¹ As Professor James Anaya said, Native Hawaiian people are entitled to “affirmative measures to remedy the past undermining of their cultural survival and to guard against continuing threats in this regard.”⁶² Therefore, practicing *pule* to recover old knowledge and prevent new threats to Native Hawaiian culture is crucial.

Pule also has its legal significance in the ancient Hawaiian Kingdom.⁶³ According to legend, if someone broke *kapu* (taboo or prohibition) including spiritual laws, the person would suffer illness until a reparation was offered with the assistance of a *kāhuna nui* (high priest), a *kāhuna pule* (praying priest), or a *kāhuna lapa'au* (healing priest).⁶⁴ *Pule* was part of the reconciliation process to seek forgiveness from and among contending parties, the governmental authority, and gods.⁶⁵ *Pule* was used to repair the relationship between *kānaka* (people), *ʻaumākua* (ancestral spirits), and *akua* (gods), and used to ask for guidance and wisdom.⁶⁶ The various classes of *kāhuna* served as mediators between the common world and the divine world, and played an important role in solving legal and divine disputes.⁶⁷ Following the modernization of the legal system in Hawai'i and the decline of the *kāhuna* experts along with the *kapu* system, this spiritual healing process has declined.⁶⁸ However, only through educating and understanding this system of “spiritual justice,” can one truly grasp the systematic worldview and traditional knowledge of the Native Hawaiians.⁶⁹

Pule is an inseparable part of Native Hawaiian traditional knowledge and intellectual property.⁷⁰ These traditional knowledges of *Kānaka Maoli* are passed down through generations of practitioners and observers.⁷¹ School children are the most important members in the

⁵⁹ *Id.* at 73–5.

⁶⁰ *Id.* *Pule* is the manifestation of Native Hawaiian cultural values and is bound with their unique history.

⁶¹ Anaya, *supra* note 11, at 345.

⁶² *Id.*

⁶³ KAMAKAU, *supra* note 1; DAVIDA MALO, KA MO'OLELO HAWAI'I: HAWAIIAN TRADITIONS 75 (Malcolm Naea Chun trans.) (1996); NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 1, at 860–65.

⁶⁴ NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 1, at 860–65.

⁶⁵ See HOMMON, *supra* note 17, at 17.

⁶⁶ *Id.*

⁶⁷ *Id.* at 3, 11, 17.

⁶⁸ See KAMAKAU, *supra* note 1, at 95; MALO, *supra* note 63, at 75.

⁶⁹ *Id.*

⁷⁰ GUTMANIS, *supra* note 12, at viii, ix.

⁷¹ NOELANI GOODYEAR-KA'ŌPUA ET AL., A NATION RISING: HAWAIIAN MOVEMENTS FOR

continuation of Hawaiian cultural heritage.⁷² Hawai'i was the first nation established a public compulsory education system in 1840.⁷³ The mission of Hawai'i public schools today was to provide cultural and language-based learning for Hawaiians.⁷⁴ The revival of the Hawaiian language after its ban in schools from 1896 to the 1970s shows the importance of preserving traditional Hawaiian knowledge through public education.⁷⁵

Since then, different forms of Hawaiian culture, such as *mele* and *hula*, have been revived and respected inside and outside of classrooms in the recent decades.⁷⁶ Like little streams running from *mauka* (mountain side) to *makai* (ocean side) as ocean waves in *ahupua'a* (watershed), these small steps of cultural revival can eventually become a large powerful movement.⁷⁷

C. *The Third Hawaiian Renaissance*

Pule is a significant component of a modern-day movement calling for restorative justice for Asian American and Pacific Islander "AAPI" communities including *Kānaka Maoli* (Native Hawaiians). Such movement is a direct response to the waves of post-pandemic racism, and a wake-up call for restorative environmental protection for *āina* (Hawaiian homeland) under the threat of climate change.⁷⁸ Many believe this current movement will become the third Hawaiian Renaissance and have profound influence in the following decades.⁷⁹

LIFE, LAND, AND SOVEREIGNTY 1–3 (2014).

⁷² Schools include Hawaiian language immersion schools and *hālau hula* (schools of Hawaiian chant, dance, and associated knowledges). *Id.*, at 13.

⁷³ FAFKE, *supra* note 44, at 7.

⁷⁴ STRATEGIC PLAN 2017–2020, *supra* note 48, at 5.

⁷⁵ *Clarabal v. Dep't of Educ.*, 446 P.3d 986, 989–91 (2019); GOODYEAR-KA'ŌPUA ET AL., *supra* note 71, at 79.

⁷⁶ GOODYEAR-KA'ŌPUA ET AL., *supra* note 71, at 84–5.

⁷⁷ HOMMON, *supra* note 17, at 13.

⁷⁸ For restorative justice for the AAPI community, see *Wai Through Kānāwai*, *supra* note 57; Kara Takasaki, *Stop AAPI Hate Reporting Center: A Model of Collective Leadership and Community Advocacy*, 23 J. OF ASIAN AM. STUD. 341 (2020); N'dea Yancey-Bragg, "Stop killing us": Attacks on Asian Americans highlight rise in hate incidents amid COVID-19, USA TODAY (Feb. 11, 2021), <https://www.usatoday.com/story/news/nation/2021/02/12/asian-hate-incidents-covid-19-lunar-new-year/4447037001>; For the Polynesian Hawaiian community during the COVID-19 pandemic, see Raynald Samoa et al., *COVID-19 and the State of Health of Pacific Islanders in the United States*, 17 AAPI NEXUS POL'Y PRAC. & CMTY. (2020); Leah Cha et al., *Pacific Islanders in the Era of COVID-19: an Overlooked Community in Need*. J. RACIAL AND ETHNIC HEALTH DISPARITIES (Jun. 24, 2021). For the threat of global warming and climate change to Native people, see RANDALL S. ABATE AND ELIZABETH ANN KRONK, CLIMATE CHANGE AND INDIGENOUS PEOPLES THE SEARCH FOR LEGAL REMEDIES (2013); Lianne Yu, *The Cost of Climate Change in Hawaii*, HAW. BUS. MAG. (Sep. 6, 2018), <https://www.hawaiiibusiness.com/cost-of-climate-change; Indigenous People's Right to Environmental Self-Determination>, *supra* note 56.

⁷⁹ For similar discussion, see Michelle Broder Van Dyke, "A new Hawaiian Renaissance": how a telescope protest became a movement, THE GUARDIAN (Aug. 17,

The first Hawaiian renaissance (1870–1880s) involved both an awakening of Hawaiian identities and the reshaping the Hawaiian Kingdom for industrialization under the threat of Western colonization.⁸⁰ The innovative King Kalākaua (reign 1874–1891) initiated this movement through his world travel experience and understanding of the crisis of Hawaiian survival amid Western imperial encroachment.⁸¹

The second Hawaiian renaissance (1970–1980s) was the revival of Hawaiian language and culture under population decline and threat of modernization.⁸² The context behind this renaissance was the dying Hawaiian language ‘Ōlelo Hawai‘i and the loss of Native Hawaiian representation due to overdevelopment of the islands, exacerbated by the booming real estate market on O‘ahu that forced the relocation of many Native Hawaiians.⁸³ Monumental events of the second renaissance included the Polynesian voyage of *Hōkūle‘a*, the Kalama Valley protest, the protecting Kaho‘olawe movement, and the legendary singer Israel Kamakawiwo‘ole.⁸⁴ Thanks to the second renaissance, especially the revival of ‘Ōlelo Hawai‘i, there are more educated Hawaiian scholars, attorneys, and social activists around today.⁸⁵ More Native Hawaiians serve in government and higher education institutions today that can make the community’s voices heard and take steadfast action, but further focus on preserving Native Hawaiian culture and freedoms needs to be done to effectuate change.⁸⁶

A third Hawaiian renaissance has arguably already started from the Mauna Kea TMT protest in 2019,⁸⁷ albeit temporarily suspended due to the COVID-19 pandemic. The movement’s key ideology is framed around restorative justice, which includes a wider range of concerns on Native Hawaiians’ civil rights than the previous two renaissances.⁸⁸ It touches on, but is not limited to: spiritual recovery of sacred sites (such as Mauna Kea) and sacred remains, reparation and racial justice backed by Hawaiian indigenous solidarity, and environmental protection and

2019), <https://www.theguardian.com/us-news/2019/aug/16/hawaii-telescope-protest-mauna-kea>.

⁸⁰ GOODYEAR-KA‘ŌPUA ET AL., *supra* note 71, at 61. For Hawaiian nationalist movement and history of identity building, see Maia Lichtenstein, *The Paradox of Hawaiian National Identity and Resistance to United States Annexation*, 16 PENN HIST. REV. 38–54 (2008).

⁸¹ NOENOE K. SILVA, *ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM*, 88–91 (2004).

⁸² Troy J. H. Andrade, *E OLA KA ‘ŌLELO HAWAII: Protecting the Hawaiian Language and Providing Equality for Kānaka Maoli*, 6(1) INDIG. PEOPLES’ J.L., CULTURE & RESIST. 3, 28–30 (2020).

⁸³ *Id.* at 29.

⁸⁴ *Id.* at 29–31; see also LELA GOODSELL, *A GUIDE TO THE ARCHIVES OF THE POLYNESIAN VOYAGING SOCIETY AND VOYAGES OF THE HŌKŪLE‘A* (1989).

⁸⁵ Andrade, *supra* note 82, at 38.

⁸⁶ *Id.*

⁸⁷ Broder Van Dyke, *supra* note 79.

⁸⁸ Sam ‘Olu Gon & Kawika Winter, *A Hawaiian Renaissance That Could Save the World*, AMERICAN SCIENTIST, July-Aug. 2019, at 232.

regulating land use under the threat of climate change.⁸⁹ During and after the initial pandemic wave, the Native Hawaiian community's priority was to protect the health of the indigenous populations, especially the *kūpuna*, and to reduce negative effects caused by the state government's excessive tourism-driven economic policies.⁹⁰

The third renaissance comprises a revival of non-land based exercises of Native Hawaiian rights, including current reforms in the public education system.⁹¹ Native Hawaiian knowledge is passed on not just through language teaching, but through a whole system of identity understanding and cultivation shaped at Hawaiian immersion schools.⁹² In regards to higher education, the University of Hawai'i has taken steps to protect indigenous knowledge such as denying the patents of new taro species,⁹³ and allowing student groups to build permanent spiritual monument *ahu* on Mānoa and Hilo campuses.⁹⁴ In the *kukia'imauna* (stand with the Mauna Kea) movement, the community initiated a program called the Pu'uhuluhulu University at the sacred mountain, which is a free school that teaches Native Hawaiian spiritual and cultural practices, literature, history, *mo'olelo* (story or myth), science, arts, and other subjects by experts across all fields.⁹⁵

⁸⁹ OHA and cultural practitioners' *hui* (association, society) retrieved twenty *iwi kūpuna* (ancestral remains) from the University of Cambridge in 2020. See *Group of Native Hawaiians to Bring Home Iwi Kūpuna Housed at English Institution for Over A Century*, OFF. HAW. AFFAIRS (Feb. 29, 2020) <https://www.oha.org/news/group-of-native-hawaiians-to-bring-home-iwi-kupuna-housed-at-english-institution-for-over-a-century>.

⁹⁰ Native Hawaiians and Pacific Islanders make up 25 percent of the state population. As of Aug. 13, 2021, 22 percent of total Covid-19 cases in Hawai'i are Native Hawaiians (21 percent of the population) and 17 percent cases are Pacific Islanders (4 percent of the population). Among 526 total deaths in Hawai'i, 110 are Pacific Islanders and 73 are Native Hawaiians. Native Hawaiians and Pacific Islanders (NHPI) also have a low vaccination rate (18 percent of total vaccinated population) comparing to other races. See *Hawai'i COVID-19 Data*, HAWAII DEP'T HEALTH, https://health.hawaii.gov/coronavirusdisease2019/current-situation-in-hawaii/?fbclid=IwAR16F1LRlavIYwwX_AVN-eZkpJeZaU6BDYLdfjUWn3EsjAjEpyLTaE1G0ds (last visited Apr. 1, 2022); See also Mahealani Richardson, *Impacts of pandemic to Hawaii's kupuna go far beyond public health threat*, HAWAII NEWS NOW (Mar. 23, 2021), <https://www.hawaiinewsnow.com/2021/03/23/impacts-pandemic-hawaiis-kupuna-go-far-beyond-public-health-threat>; Tariro Mzezewa, *In Hawaii, Reimagining Tourism for a Post-Pandemic World*, N.Y. TIMES (Mar. 7, 2021) <https://www.nytimes.com/2021/03/07/travel/hawaii-covid-tourism.html>; Melina Delkic, "There's just a sense of entitlement": *Hawaiians worry about a flood of heedless tourists*, N.Y. TIMES (Mar. 29, 2021) <https://www.nytimes.com/2021/03/29/us/Hawaii-tourists-covid.html>.

⁹¹ STRATEGIC PLAN 2017–2020, *supra* note 48, at 2.

⁹² MALCOLM NĀEA CHUN, *NO NĀ MAMO: TRADITIONAL AND CONTEMPORARY HAWAIIAN BELIEFS AND PRACTICES* 84 (2011).

⁹³ Gregory K. Schlais, *The Patenting of Sacred Biological Resources, the Taro Patent Controversy in Hawai'i: A Soft Law Proposal*, 29 U. HAW. L. REV. 581, 39 (2007).

⁹⁴ *About UH Mānoa Campus' Ahu*, HAWAII'INUIĀKEA SCHOOL OF HAWAIIAN KNOWLEDGE <https://manoa.hawaii.edu/hshk/hawaiinuiakea/about-us/about-uh-manoa-campus-ahu> (last visited Apr. 1, 2022).

⁹⁵ See *Pu'UHULUHULU UNIVERSITY*, <https://www.puuhuluhulu.com/learn/university> (last visited Apr. 1, 2022).

III. State Law Protection of *Pule* in Hawai'i Public Schools

The Hawai'i state constitution should be amended to support and protect *pule* practice in public schools. While protections can arise from the Free Speech Clause of the First Amendment in the federal constitution, state laws offer more robust protection than federal laws, as they can make easier regulations on behalf of religious and cultural rights.⁹⁶ The previous discussion on how *pule* is viewed for Native Hawaiian educational purposes demonstrates that *pule* are not only spiritual in nature, but have significance in reviving Native Hawaiian culture.

Since the Constitutional Convention of 1978, the Hawai'i State Constitution and case laws have expanded their protection of Native Hawaiian rights.⁹⁷ New sections added to the Constitution include the recognition of Native Hawaiian traditional and customary rights and a mandate to include Hawaiian language, culture, and history education programs in public schools.⁹⁸ This Part of the article will first examine relevant provisions related to *pule* practice in the Hawai'i constitution and the legislative approaches towards implementation. Second, it will assess cases of Native Hawaiian traditional and customary rights, including the judicial protection of non-land-based rights for Native Hawaiians in prison and court. Third, it will analyze the Hawai'i state DOE policies and their administrative limits on *pule* practice. The state's reaffirmation and protection of Native Hawaiian rights including *pule* practice through these three approaches effectuates restorative justice for the suppressed Hawaiian people and culture.

A. *Hawai'i State Constitutional Provisions*

The Hawai'i State Constitution has not provided greater protection for Native Hawaiian religion than the federal constitution.⁹⁹ The 1978 Constitutional Convention, "the People's Con Con," ratified general provisions that protect Native Hawaiian rights of language, culture, and history, and recognized traditional and customary rights.¹⁰⁰ However, these provisions have been shown to not be adequate to protect practices such as *pule*. There have been no specific laws or regulations on the state and county level protecting Native Hawaiian religious rights, and no offices or councils to oversee and protect Native Hawaiian religious practices. The Office of Hawaiian Affairs (OHA), an agency established in the 1978 Constitutional Convention to protect tangible properties of Native Hawaiians, may be able to take responsibility to protect intangible properties of Native Hawaiian such as religious heritage including *pule* practice.¹⁰¹ More work needs to be done by the state government and

⁹⁶ U.S. CONST. amend. I.

⁹⁷ NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 1, at 33.

⁹⁸ *Id.*; see also HAW. CONST. art. XII, § 7 (1978); *id.* art. X, § 4.

⁹⁹ NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 1, at 885.

¹⁰⁰ *Id.* at 33; HAW. CONST. art. I, § 4 (1978); *id.* art. X, § 4; *id.* art. XV, § 4; *id.* art. XII, § 7.

¹⁰¹ HAW. CONST. art. XII, § 5 (1978).

legislature to create a more comprehensive and feasible framework to protect Native Hawaiian religion.

1. Free Exercise of Religion (Article I, Section 4)

Under Article I, Section 4 of the Hawai'i Constitution, the state protects freedom of religion. The text is comparable to the First Amendment of the U.S. Constitution, including the Establishment Clause and the Free Exercise Clause:

No law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press or the right of the people peaceably to assemble and to petition the government for a redress of grievances.¹⁰²

This provision gives no regard to the uniqueness of Native Hawaiian religion and its close connection to indigenous knowledge and education.¹⁰³ Furthermore, Native Hawaiian religion plays a unique role, as a part of traditional culture, it has become more performative at festivals and social events rather than practical in daily lives on a regular basis including education compared to other religious practices such as Christianity.¹⁰⁴

2. Native Hawaiian Education (Article X, Section 4)

Article XV, Section 4 and Article X, Section 4 of the Hawai'i Constitution mandates the role of the state to support Hawaiian culture, history, and language in education.¹⁰⁵ Article XV Section 4 specifically recognizes Hawaiian as an official language of the State, subject to the right of the Legislature to regulate.¹⁰⁶ Article X, Section 4, titled “Hawaiian Education Program” requires that the state promote and provide relevant programs for the study of Hawaiian culture, history, and language:

The State shall promote the study of Hawaiian culture, history and language. The State shall provide for a Hawaiian education program consisting of language, culture and history in the public schools. The use of community expertise shall be encouraged as a suitable and essential means in furtherance of the Hawaiian education program.¹⁰⁷

This provision requires the state DOE to provide a comprehensive Hawaiian education program consisting of language, culture, and history as part of the regular curriculum of public schools.¹⁰⁸ Currently, Hawai'i

¹⁰² HAW. CONST. art. I, § 4 (1978).

¹⁰³ NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 1, at 873.

¹⁰⁴ Now, Native Hawaiian religious rituals are mostly performed at historical holidays including the Prince Lot Hula Festival (July), the King Kamehameha Celebration (June), *Eo E Emalani I Alakai* Festival (October), and *Makahiki* (October or November through February or March). See *Hawai'i's Annual Events & Festivals*, THE HAWAIIAN ISLANDS, <https://www.gohawaii.com/trip-planning/events-festivals> (last visited Apr. 1, 2022).

¹⁰⁵ HAW. CONST. art. XV, § 4 (1978); *id.* art. X, § 4.

¹⁰⁶ *Id.* art. XV, § 4.

¹⁰⁷ *Id.*

¹⁰⁸ FAFKE, *supra* note 44.

has seventeen Hawaiian language immersion programs operated by the state DOE on all major islands except Lāna‘i; six of them are charter schools.¹⁰⁹

In the 2014 case *Clarabal v. Department of Education*, Chelsa-Marie Kealohalani Clarabal, a Native Hawaiian mother on Lāna‘i, sued the state DOE and Board of Education alleging that the defendants violated the state constitution by failing to provide her school-aged daughters access to a Hawaiian immersion education.¹¹⁰ Lāna‘i was the only island among six major islands that did not have a Hawaiian immersion school.¹¹¹ The sole public school on the island offered courses related to Hawaiian history and culture on a long-term substitute basis only.¹¹² The state DOE argued that Hawaiian history classes and supplemental language instruction were sufficient for the revival of the Hawaiian language and fulfilled the obligation to provide a Hawaiian education program as required by Article X Section 4.¹¹³

The Hawai‘i Supreme Court scrutinized the legislative history of the 1978 constitutional amendments, and reemphasize the state’s affirmative duty of reviving and preserving ‘Ōlelo Hawai‘i.¹¹⁴ The Court ruled in a 4–1 opinion that the state had a constitutionally regulated duty to provide students access to Hawaiian language immersion education, and the state must take “all reasonable measures” to provide Clarabal’s daughters with access to such an immersion program with full-time teachers.¹¹⁵

The Court further explained that the intent of the 1978 amendment’s framers was to push the state DOE to ensure students could study the language and culture “in an in-depth and expansive manner if they so choose” rather than minimal “exposure to and some instruction in Hawaiian language, history and culture.”¹¹⁶ The Court reasoned that the state had to make effort to “rectify the ill effects of the historic suppression of the language.”¹¹⁷ Justice Richard Pollack, writing for the majority, emphasized that a Hawaiian education program that did not include reasonable access to Hawaiian immersion education could not result in the revitalization of ‘Ōlelo Hawai‘i.¹¹⁸

¹⁰⁹ Michael Brestovansky, *Court: State Must Provide Hawaiian Language Immersion*, HAWAII TRIBUNE-HERALD (Aug. 15, 2019, 12:05 AM) <https://www.hawaiiitribune-herald.com/2019/08/15/hawaii-news/court-state-must-provide-hawaiian-language-immersion>.

¹¹⁰ 446 P.3d 986 (Haw. 2019).

¹¹¹ *Id.* at 988.

¹¹² *Id.* at 1009.

¹¹³ *Id.* at 994–95.

¹¹⁴ *Id.* at 1004.

¹¹⁵ *Id.* The Hawaiian Supreme Court did not decide whether the Lāna‘i school had taken all reasonable measures to provide the immersion program. It remanded the case for a ruling on this issue.

¹¹⁶ *Id.* at 998 (highlighting the importance of a comprehensive program as an “intensive study”).

¹¹⁷ *Id.* at 999.

¹¹⁸ *Id.* at 1002.

Pule is one of the most important traditional forms of speaking ‘Ōlelo Hawai‘i. Prof. Hiapokeikikane Perreira of the University of Hawai‘i at Hilo emphasized this point by saying: “In Hawaiian, we don’t have a moment of silence. Prayer has to be spoken to be effectuated . . . You cannot just close your eyes and think a prayer and expect it to happen in a Hawaiian being. You have to physically speak it.”¹¹⁹ For Native Hawaiians, words in their own language have special spiritual power to “heal and give life” or “obfuscate and destroy.”¹²⁰ Since Hawaiian words have spiritual and cultural meanings, reciting *pule* is crucial in the revitalization of ‘Ōlelo Hawai‘i, and Hawaiian immersion programs should incorporate its practice in regular lessons of Hawaiian culture and history.¹²¹

As the Hawai‘i Supreme Court pointed out in *Clarabal*, Article X, Section 4 of the Hawai‘i Constitution requires the state to provide an in-depth and expansive curriculum and activities in order to revitalize Native Hawaiian language, culture, and identity.¹²² Teaching about *pule* can precisely serve this goal. Therefore, the Hawaii state legislature should enact laws to protect the teaching of Native Hawaiian spiritual practices such as *pule*.

3. Traditional and Customary Rights (Article XII, Section 7)

The Hawai‘i Supreme Court has recognized that “customary and traditional rights in these islands flow from native Hawaiians’ pre-existing sovereignty . . . and were not abolished by their inclusion within the territorial bounds of the United States.”¹²³ The rights protected by Article XII, Section 7 are not absolute. “For example, the constitutional language protecting the right to traditional and customary practices is qualified by the phrase ‘subject to the right of the State to regulate such rights.’” The Court has recognized rights under Article XII, Section 7 but limits these rights in balancing against state interests. This has judicially endangered *pule* practice in schools, and therefore state legislature should act to protect these practices.

Traditional and customary rights are the rights of indigenous people on the traditional inhabited land, including natural resources and land access.¹²⁴ The following constitutional provision acknowledges the

¹¹⁹ See Andrade, *supra* note 82, at 10–11.

¹²⁰ *Id.* at 11 (citing Melody Kapilialoha MacKenzie & D. Kapua‘ala Sproat, *Collective Memory of Injustice: Reclaiming Hawai‘i’s Crown Lands Trust in Response to Judge James S. Burns*, 39 U. HAW. L. REV. 480, 481 (2017)).

¹²¹ Katrina-Ann R. Kapā‘anaokalāōkeola Nākoa Oliveira, *E Ola Mau ka ‘Ōlelo Hawai‘i The Hawaiian Language Revitalization Movement*, in A NATION RISING, *supra* note 71, at 78–85.

¹²² *Id.* at 79, 81.

¹²³ Pub. Access Shoreline Haw. v. Haw. Cnty. Plan. Comm’n, 903 P.2d 1246, 1270 (Haw. 1995). State v. Pratt, 277 P.3d 300, 307 (Haw. 2012).

¹²⁴ Article 12 of the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP) can be used to protect and reinforce Native Hawaiian education of their spiritual and religious traditions. See NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 1, at 886, 1289.

traditional and customary rights for all Native Hawaiians, regardless of their physical residences:

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by *ahupua'a* tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.¹²⁵

This provision ensures state protection of Native Hawaiians' traditional and customary rights exercised for subsistence, cultural, and religious purposes.¹²⁶ Hawai'i courts have not interpreted this provision within the context of religious practice, which could be extended to offer greater protection than the federal Constitution.¹²⁷

There have been cases of government recognition of Native Hawaiian traditional and customary rights, including those belonging to indigenous knowledge, such as the taro case at the University of Hawai'i.¹²⁸ Native Hawaiians believe that *kalo* (taro) grown from *Hāloa*, is the older sibling of Hawaiian people in ancestral creation stories.¹²⁹ Hawaiians believe that all *kalo* plants are connected to the ancestors, so they have the *kuleana* (responsibility) to honor, respect, and protect it as they protect their own siblings.¹³⁰ Due to its sacredness, any Hawaiian varieties of taro should not be patented, because doing so would disturb *mana* (the spiritual force) Hawaiians have, which comes from their knowledge and intricate relationship with nature.¹³¹

In *State v. Pratt*, defendant Lloyd Pratt, a Native Hawaiian, trespassed within an undeveloped state land in Kalalau Valley on Kaua'i and was subsequently cited for violating administrative rules of the State

¹²⁵ HAW. CONST. art. XII, § 7.

¹²⁶ Other provisions: "HRS § 7-1: protects the right to gather; limited in scope to the enumerated items. HRS § 1-1: provides broader protection for the exercise of traditional and customary rights; extends rights to the gathering of materials essential to tenants' lifestyle." D. Kapua'ala Sproat, Prof. L., Univ. Haw. William S. Richardson Sch. L., Traditional & Customary Native Hawaiian Rights, Property I Guest Lecture (Apr. 21, 2021) (transcript on file with the author); Hawai'i Supreme Court cited HRS § 1-1 in protecting traditional and customary rights. See *Pub. Access Shoreline Haw.*, 903 P.2d at 1250, from Troy J. H. Andrade, *supra* note 82, at 39.

¹²⁷ See NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 1, at 879. Leading cases in land access rights to practice Native Hawaiian religion and gather traditional resources include *Palama v. Sheehan*, 440 P.2d 95 (Haw. 1968); *Kalipi v. Hawaiian Tr. Co.*, 656 P.2d 745 (Haw. 1982); *Pele Def. Fund v. Paty*, 837 P.2d 1247 (Haw. 1992); *Pub. Access Shoreline Haw.*, 903 P.2d; *State v. Hanapī*, 970 P.2d 485 (Haw. 1998); *Ka Pa'akai O Ka'Aina v. Land Use Comm'n*, 7 P.3d 1068 (Haw. 2000); *Pratt*, 277 P.3d; *State v. Palama*, No. CAAP-12-0000434, 2015 WL 8566696 (Haw. App. Dec. 11, 2015); In re. Conservation Dist. Use Application HA-3568, 431 P.3d 752 (Haw. 2018). Sproat, *supra* note 126.

¹²⁸ Schlais, *supra* note 93, at 581-618.

¹²⁹ *Id.* at 601.

¹³⁰ *Id.* at 602.

¹³¹ *Id.* at 602-03.

Department of Land and Natural Resources.¹³² Mr. Pratt claimed that he visited and camped in the closed area often in order to take care of the *heiau* (temple), perform cultural ceremonies, plant native plants, and clear brush and garbage.¹³³ He further explained that he was trained as a *kāhu*, and his ancestors were buried there.¹³⁴

The Hawai'i Supreme Court applied the “totality of circumstances” test on a case-by-case analysis.¹³⁵ The Court first decided that Pratt satisfied the three factors outlined in *State v. Hanapī*, including: (1) being a Native Hawaiian; (2) establishing that his claimed right is a constitutionally protected customary and traditional right; and (3) finding that the land in question is undeveloped or less than fully developed.¹³⁶ The Court went further by applying a balancing test that weighs a Native Hawaiian practitioner’s constitutional privilege for traditional and customary rights against the state’s interest in regulating such rights and protecting the area, and decided that Pratt’s activity went “beyond stewardship” which did not outweigh the state’s interest to “limit visitors for health and safety reasons, and to protect park resources.”¹³⁷

The Court in *Pratt* emphasized that Article XII, Section 7 is “not absolute” but instead “a textual commitment to preserving the practices while remaining mindful of competing interests.”¹³⁸ The Court also stressed the importance of its “careful judgment in resolving cases involving traditional and customary native Hawaiian rights.”¹³⁹

Practicing *pule* in public school is similar to Pratt’s practice of Native Hawaiian traditions on the state owned land, thus a Hawai’i state court will likely to apply *Pratt* and *Hanapī* including the “three factors” test, the balancing test, and the “totality of circumstances” test to weigh the *pule* practice against the state’s interest.¹⁴⁰ Here, the interests would be both protecting Native Hawaiian culture and promoting Native Hawaiian education, keeping in mind the doctrine of church-state separation and the prohibition of state established religion.

Due to the complexity of the state’s interests, the Court would need to examine state laws in order to evaluate the scope and hierarchy of the interests. However, as Professor Melody Kapilialoha MacKenzie pointed out, neither the Hawai’i State Legislature nor individual state departments have enacted comprehensive legislation or administrative rules protecting traditional religious practices or access to sacred sites.¹⁴¹ The state government should establish more comprehensive regulations

¹³² *Pratt*, 277 P.3d; NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 1, at 802–03, 883–84.

¹³³ *Pratt*, 277 P.3d at 302–03.

¹³⁴ *Id.*

¹³⁵ *Id.* at 310–12.

¹³⁶ *Id.* at 304; *State v. Hanapī*, 970 P.2d 485, 494–95 (Haw. 1998).

¹³⁷ *Pratt*, 277 P.3d at 311–12.

¹³⁸ *Id.* at 213, 277 P.3d at 307; NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 1, at 803.

¹³⁹ *Pratt*, 277 P.3d at 311; NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 1, at 843.

¹⁴⁰ *Pratt*, 277 P.3d; *Hanapī*, 970 P.2d.

¹⁴¹ NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 1, at 884.

and careful procedures to implement this constitutional provision and keep traditional and customary rights unharmed and prosperous, thus truly fulfilling the state and its agencies' affirmative duty of protecting these rights.¹⁴²

B. Non-Land Based Native Hawaiian Right Exercises

The protected practices of Native Hawaiian rights have transcended beyond land ownership and *ahupua'a* access to non-land based exercises, such as the right to practice Hawaiian religion in prison and to speak Hawaiian language in court as traditional and customary rights outside the context of land use.¹⁴³ Teaching about *pule* in school is also a non-land based right exercise, so such cases can provide some guidance into future legal debates and judgments.¹⁴⁴

1. Prison

Religious practice is a fundamental constitutional right that is protected in all public venues including prisons.¹⁴⁵ In the landmark case of *Cutter v. Wilkinson*, the U.S. Supreme Court concluded that an Ohio prison violated a group of prisoners' constitutional rights by prohibiting them from practicing religion rather than providing reasonable accommodation to the practice.¹⁴⁶ Justice Ruth Bader Ginsburg held that the section of the 2000 Religious Land Use and Institutionalized Persons Act's (RLUIPA) increasing the level of protection of prisoners' and other incarcerated persons' religious rights did not violate the Establishment Clause.¹⁴⁷ Justice Ginsburg argued: "'Exercise of religion' often involves not only belief and profession, but the performance of . . . physical acts [such as] assembling with others for a worship service [or] participating in sacramental use of bread and wine . . .'"¹⁴⁸ Thus, the Court reaffirmed that the First Amendment protection of religion includes both belief in a religion and the act of practicing a religion.¹⁴⁹

¹⁴² *Id.* at 879 (citing *State v. Andrews*, 651 P.2d 473 (Haw. 1982); *State v. Blake*, 695 P.2d 336 (Haw. 1985)).

¹⁴³ Andrade, *supra* note 82, at 46–7.

¹⁴⁴ For previous cases on religious rights lawsuits, see GOODYEAR-KA'ŌPUA ET AL., *supra* note 71.

¹⁴⁵ For religious freedom for prisoners, see JOHN BOSTON & DANIEL E. MANVILLE, PRISONERS' SELF-HELP LITIGATION MANUAL (3rd ed. 1995); *Know Your Rights: Freedom of Religion*, ACLU <https://www.aclu.org/know-your-rights/religious-freedom> (last visited Apr. 1, 2022); for more information about the First Amendment issues in prison, see Kelly Kortess, *The First Amendment Behind Bars: Free Exercise Claims Under RFRA and RLUIPA*, SUTTON HALL UNIV. STUDENT WORKS (2021) https://scholarship.shu.edu/student_scholarship/1083.

¹⁴⁶ *Cutter v. Wilkinson*, 544 U.S. 709 (2005); NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 1, at 878.

¹⁴⁷ *Cutter*, 544 U.S.; Religious Land Use and Institutionalized Persons Act (RLUIPA), *infra* Subpart C.

¹⁴⁸ *Cutter*, 544 U.S. at 710 (citing *Emp. Div. v. Smith*, 494 U.S. 872 (1990))

¹⁴⁹ *Id.*

In a recent case *Holt v. Hobbs*, the Court held that the Arkansas Department of Correction’s grooming policy violated RLUIPA by preventing a Muslim inmate from growing a half-inch beard in accordance with his religious beliefs.¹⁵⁰ The Court believed that RLUIPA requires a prison to grant a particular religious exemption or offer accommodation to inmates’ religious beliefs, otherwise the prison must provide persuasive reasons why it believes that it must take a different course.¹⁵¹ By citing *Cutter*, the Court provided three steps to apply RLUIPA to provide substantial protection for the religious exercise of prisoners, while “[af-fording] prison officials ample ability to maintain security.”¹⁵²

In *U.S. v. Maui Cnty.*, the U.S. District Court for the District of Hawai’i held that the language of RLUIPA related to religious land use was not unconstitutional under the Commerce Clause, the Tenth Amendment, and the Section 5 of the Fourteenth Amendment.¹⁵³

The indigenous peoples’ religious practice right, including Native Hawaiian prisoners’ right to practice their religion, should receive State constitutional and statutory protections.¹⁵⁴ In the Hawai’i version of the *Cutter* case, *Davis v. Abercrombie*, the federal district court focused on the Free Exercise Clause rather than the Establishment Clause.¹⁵⁵ The court did not apply RFRA and RLUIPA’s “strict scrutiny” for burdens on the Free Exercise of religion in prison and dismissed the plaintiffs’ claim of the violation of their constitutional rights.¹⁵⁶ The plaintiffs were Hawai’i resident prisoners who were jailed at private prisons in Arizona, whose religious objects for celebrating *Makahiki* (Hawaiian New Year) were confiscated by prison authorities.¹⁵⁷ The court dismissed the case due to the lack of a causal connection between defendant Abercrombie’s omissions and the alleged RLUIPA violations.¹⁵⁸ For *pule*-related cases, a court can rely on *Cutter*’s and *Holt*’s upholding of RLUIPA’s Establishment Clause requirement, rather than *Davis*’ holding on RLUIPA’s Free Exercise Clause application.

2. Court

Hawai’i state court has not been very clear about supporting constitutional protection on Native Hawaiian traditional and customary

¹⁵⁰ *Holt v. Hobbs*, 574 U.S. 352 (2015).

¹⁵¹ *Id.* at 369.

¹⁵² *Id.* (citing *Cutter*, 544 U.S. at 725).

¹⁵³ U.S. CONST. art. 1, § 8, cl. 3; *id.* amends. X, XIV § 5; *U.S. v. Maui Cnty.*, 298 F. Supp. 2d 1010 (D. Haw. 2003); NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 1, at 879.

¹⁵⁴ See Lee Irwin, *Freedom, Law, and Prophecy: A Brief History of Native American Religious Resistance*, 21 AM. INDIAN Q. 35 (1997); MICHAEL D. McNALLY, DEFEND THE SACRED: NATIVE AMERICAN RELIGIOUS FREEDOM BEYOND THE FIRST AMENDMENT (2020).

¹⁵⁵ *Davis v. Abercrombie*, Civ. No. 11–00144, 2014 WL 4956454 (D. Haw. Sept. 30, 2014); NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 1, at 900–01.

¹⁵⁶ *Abercrombie*, 2014 WL 4956454.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

rights.¹⁵⁹ In *Clarabal*, the Hawai'i Supreme Court held that the Hawaiian education provision in the State Constitution intended to require the state to "institute a program that is reasonably calculated to revive the Hawaiian language . . . [and] providing reasonable access to Hawaiian immersion education is currently essential to reviving the Hawaiian language, [thus] it is a necessary component of any program that is reasonably calculated to achieve that goal."¹⁶⁰ Similar to prisons, courts are another public arena where indigenous traditional and customary rights including religion and language, should be preserved.

One controversial incident took place in 2018, when during a court hearing regarding the protest against the Daniel K. Inouye Solar Telescope (DKIST) on the sacred mountain Haleakalā in Maui, Samuel Kaleikoa Ka'eo, a professor at the University of Hawai'i Maui College, fluent in 'Ōlelo Hawai'i, received a criminal bench warrant for his arrest because he insisted on speaking the native language in court.¹⁶¹ Professor Troy Andrade of the University of Hawai'i William S. Richardson School of Law analyzed the history of the laws pertaining to 'Ōlelo Hawai'i and argued that the courts must allow the use of 'Ōlelo Hawai'i because it is a traditional and customary practice crucial for the equality and justice of Native Hawaiians.¹⁶² He cited two federal court cases in Hawai'i in the 1990s where the federal district court in Hawai'i under Judge Alan C. Kay failed to recognize and uphold the importance of Hawaiian language and misinterpreted the legislative history of federal laws including the Native American Languages Act.¹⁶³

'Ōlelo Hawai'i is a traditional and customary right that is entitled to constitutional protection under Article XII, Section 7 of the Hawai'i State Constitution, and Hawai'i Revised Statutes Section 1–1.¹⁶⁴ *Pule* is a form of speaking 'Ōlelo Hawai'i, and therefore Hawai'i courts should also recognize the legal protection of practicing *pule* as important as 'Ōlelo Hawai'i. *Pule* and other Native Hawaiian religious practices meet all seven criteria of customary usage as they are ancient, continued, peaceful, reasonable, certain, uniformly applied, and consistent with other Native Hawaiian customs.¹⁶⁵ Thus, they are protected traditional and customary rights.

¹⁵⁹ See NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 1, at 879.

¹⁶⁰ *Clarabal v. Dep't of Educ.*, 446 P.3d 986, 988.

¹⁶¹ Andrade, *supra* note 82, at 6.

¹⁶² *Id.* at 3–4.

¹⁶³ *Id.* at 8 (the two cases are *Tagupa v. Odo*, 133 F.3d 929 (Table) (9th Cir. 1998) and *Office Haw. Affairs v. Dep't of Educ.*, 951 F.Supp. 1484 (D. Haw. 1996)).

¹⁶⁴ *Id.* at 44.

¹⁶⁵ *Id.* at 50; There are seven criteria to be satisfied in order to determine a specific usage or right based on a custom: (1) ancient; (2) continued; (3) peaceable and free from dispute; (4) reasonable; (5) certain; (6) compulsory and applied uniformly; and (7) consistent with and not repugnant to other customs or laws. *State ex rel. Thornton v. Hay*, 462 P.2d 671, 677 (Or. 1969); WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 75–78 (Thomas Cooley ed., 3d ed. 1884); see also Lew E. Delo, *The English Doctrine of Custom in Oregon Property Law: State Ex Rel Thornton v. Hay*, 4

Professor Andrade argued that although there are many Hawaiian language immersion schools and university programs in Hawaiian studies by 2020, Hawaiian language will not return to its original prominence as the widely used island language unless the state uses it in governmental proceedings.¹⁶⁶ Besides this vertical usage of ‘Ōlelo Hawai‘i in all governments and public institutions spanning prisons, courts, and schools, the horizontal usage is also important such as speaking ‘Ōlelo Hawai‘i in the forms of *pule*, *oli*, *piko*, *mele*, *mo‘olelo*, and *ka‘ao* (legend).

C. *Hawai‘i Department of Education Policies*

Hawai‘i Board of Education Policy 2230 titled “Religion and Public Schools Policy,” is the key administrative rule that regulates religions on public school campus:¹⁶⁷ It provides the relevant requirement below:

Hawai‘i’s public schools shall neither inculcate nor inhibit religion. Religion and religious convictions must be treated with fairness and respect. The First Amendment is upheld when the religious rights of students are protected, but religion is not promoted by public schools.

No religious instruction shall be given in any public school by any employee of the Department of Education during the regular school day. Teaching about religion shall be permitted where it is a natural part of the curriculum to study the history of religion, the role of religion in the history of the United States and other countries, and the religious influence on the art, music, literature, and social customs of various cultures. Discussion, examination, and reinforcement of values, ethics, and morals commonly shared in this pluralistic society shall be expected of every teacher when such opportunities arise.

Prayer and other religious observances shall not be organized or sponsored by schools and the administrative and support units of the public school system, especially where students are in attendance or can observe the activities.

Students may engage in voluntary, student-initiated religious activities and discussion as long as their behavior is neither disruptive nor coercive. Secondary students may meet in school during non-instructional time to pray, read religious materials, discuss their faith, and invite other students to join their religious group if the school establishes a limited open forum for one or more student-initiated groups.

This policy intends to avoid the violation of the First Amendment by public schools, through strictly banning prayers on campus.¹⁶⁸ Such a policy is unclear when it comes to *pule*, because it only mentions “the role of religion in the history of the United States and other countries;” it does not take into account the Native Hawaiian nation.¹⁶⁹ The state DOE

Env’t L. 383, 387 (1973).

¹⁶⁶ Andrade, *supra* note 82, at 37.

¹⁶⁷ HAW. BD. EDUC., POLICY NO. 2230, RELIGION AND PUBLIC SCHOOLS (1947)(last amended 1999), <https://boe.hawaii.gov/policies/2200series/Pages/2230.aspx> .

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

has not provided any further explanation or guidance regarding prayers in Native Hawaiian cultural settings.¹⁷⁰ The policy permits teaching of religion for cultural studies, so *pule* can be incorporated into the studies of Native Hawaiian language, history, and culture in school curriculum. More importantly, it allows secondary students to pray and organize religious activities on campus during non-instructional time.¹⁷¹

Regarding Native Hawaiian education, the Board of Education issued the new and more rigorous Policy 2105 in 2014 based on the Hawaiian Studies and Language Program Policy 2104, which required that public school students should have “reasonable access” to Hawaiian education programs.¹⁷² In 2015, the state DOE created the Office of Hawaiian Education to administer the new policy, and elevated its status from a section in the Office of Curriculum, Instruction and Student Support Service to a division directly under the Superintendent’s Office.¹⁷³ There are also unofficial social organizations such as Native Hawaiian Education Council and Native Hawaiian Education Association that assist in creating programs and improving teaching quality.¹⁷⁴ Hawaiian language immersion schools, or Kaiapuni schools, deliver instruction exclusively through the medium of Hawaiian language so they can incorporate *pule* into their curriculum.¹⁷⁵

IV. Federal Constitutional Challenge of *Pule* in Hawai’i Public Schools

A. *The Establishment Clause Question*

On June 14, 2021, Florida Governor Ron DeSantis signed bill HB 529 that required all K-12 public schools in Florida to hold a moment of silence at the start of the school day.¹⁷⁶ This law authorizes a brief period

¹⁷⁰ So far, Policy 2230 is the only official regulation regarding religious practice in Hawai’i public schools by the administrative agency.

¹⁷¹ Allowing prayers during non-instructional hours also matches the U.S. Department of Education policy. See U.S. DEP’T EDUC., GUIDANCE ON CONSTITUTIONALLY PROTECTED PRAYER AND RELIGIOUS EXPRESSION IN PUBLIC ELEMENTARY AND SECONDARY SCHOOLS (Jan. 16, 2020), https://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html; see also AMERICAN JEWISH CONGRESS, RELIGION IN THE PUBLIC SCHOOLS: A JOINT STATEMENT OF CURRENT LAW (Apr. 1995), <https://files.eric.ed.gov/fulltext/ED387390.pdf> (summarizing laws on religion in schools, co-signed by leading social organizations such as ACLU and major religious institutions).

¹⁷² Suevon Lee, *Court Rules Hawaiian Immersion Access Is Constitutional Right*, HONOLULU CIVIL BEAT (Aug. 13, 2019), <https://www.civilbeat.org/2019/08/court-rules-hawaiian-immersion-access-is-constitutional-right/>; FAFKE, *supra* note 44; HAW. BD. EDUC., POLICY NO. 2104, HAWAIIAN EDUCATION PROGRAMS (2001)(last amended 2014), <https://boe.hawaii.gov/policies/2100series/Pages/2104.aspx>.

¹⁷³ FAFKE, *supra* note 44.

¹⁷⁴ NATIVE HAW. EDUC. COUNCIL, <http://www.nhec.org> (last visited Apr. 1, 2022); NATIVE HAW. EDUC. ASS’N, <https://nhea.net> (last visited Apr. 1, 2022).

¹⁷⁵ FAFKE, *supra* note 44.

¹⁷⁶ Chandelis Duster & Jamiel Lynch, *Florida Governor Signs New Bill Requiring K-12 Public Schools to Hold Moment of Silence Each Day*, CNN (Jun. 15, 2021) <https://www.cnn.com/2021/06/15/politics/florida-governor-signs-bill-requiring-k-12-public-schools-to-hold-moment-of-silence-each-day/index.html>.

of silence for “meditation or voluntary prayer,” which already exists as a voluntary school activity in the Florida statute.¹⁷⁷ Under the law, the district school board may provide a brief period, not to exceed two minutes, for the purpose of silent prayer or meditation to be set aside at the start of each school day or each school week for public schools within the district.¹⁷⁸ Such laws, with both voluntary and mandatory practices, are established in thirty four states with the exception of Hawai’i.¹⁷⁹

Most of these laws were born after the Supreme Court landmark case *Wallace v. Jaffree*.¹⁸⁰ In *Wallace*, the Court decided that the 1978 law in Alabama enabling a minute of silence in public schools did not violate the First Amendment.¹⁸¹ However, the Court also held that two other Alabama laws in 1981 and 1982 authorizing school teachers to lead willing students in prescribed prayer or other forms of religious observation was unconstitutional, whether voluntary or involuntary.¹⁸² For example, if a teacher gives instruction about how to pray during the moment of silence, that would be a violation of the First Amendment.¹⁸³

In Hawai’i, if the school and government promote and protect *pule* as a religious practice, the Establishment Clause should be discussed rather than the Free Exercise Clause, based on the United States’ founding principle of the separation of church and state.¹⁸⁴ The Establishment Clause of the First Amendment states that “Congress shall make no law respecting an establishment of religion,” which prohibits any religious institutions and activities occurring in entities established by the government, including state government and public schools.¹⁸⁵ Under the Fourteenth Amendment, the Establishment Clause applies to both federal and state authorities.¹⁸⁶ This includes the prohibition of any religious observation and indoctrination led by public school teachers or

[cnn.com/2021/06/15/politics/florida-public-schools-moment-of-silence/index.html](https://www.cnn.com/2021/06/15/politics/florida-public-schools-moment-of-silence/index.html). Text of bill HB 529, <https://www.flsenate.gov/Session/Bill/2021/529/BillText/er/PDF>.

¹⁷⁷ Fla. Stat. § 1003.45 (2) (2011). <https://www.flsenate.gov/laws/statutes/2011/1003.45> (last visited Apr. 1, 2022).

¹⁷⁸ *Id.* “The district school board may provide that a brief period, not to exceed 2 minutes, for the purpose of silent prayer or meditation be set aside at the start of each school day or each school week in the public schools in the district.”

¹⁷⁹ GATEWAYS TO BETTER EDUCATION, 34 STATES WITH MOMENT OF SILENCE OR SCHOOL PRAYER LEGISLATION (Feb. 2014), <https://static1.squarespace.com/static/5a00e57baeb625aaac139aad/t/5a71fef7e4966b73011e59f7/1517420280747/States+with+Moment+of+Silence+Feb+2014.pdf>.

¹⁸⁰ 472 U.S. 38 (1985). The Court applied the *Lemon* test which will be discussed shortly after.

¹⁸¹ *Id.* at 48–84.

¹⁸² *Id.* at 48–72.

¹⁸³ *Id.*

¹⁸⁴ Most cases and current studies of Native Hawaiian religious practices focus on the Free Exercise Clause rather than the Establishment Clause, *see* NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 1, at 879–82.

¹⁸⁵ U.S. CONST. amend. I.

¹⁸⁶ U.S. CONST. amend. XIV; *see, e.g.,* *Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1, 8 (1947).

the school itself.¹⁸⁷ One of the most controversially related topics is legal challenges against the Pledge of Allegiance.¹⁸⁸

In *Newdow v. U.S. Congress*, the U.S. Court of Appeals for the Ninth Circuit held that the 1954 amendment to the Pledge of Allegiance including the language “under God” constituted an establishment of religion and was a violation of the Establishment Clause.¹⁸⁹ The Supreme Court later held that *Newdow* did not meet the standing requirement as a “reasonable observer” and the Pledge of Allegiance was constitutional.¹⁹⁰

In his concurrence of *Newdow*, Chief Justice William Rehnquist acknowledged *Wallace v. Jaffree* and argued that a ceremony should be scrutinized under the Establishment Clause beyond mere explicit mention of God.¹⁹¹ He reasoned that the reference to “God” in the Pledge of Allegiance qualifies as a minimal reference to religion, and the presence of those words is not absolutely essential to the Pledge, as demonstrated by the fact that it existed without them for over fifty years.¹⁹² He also recognized that “students who wished to avoid saying the words ‘under God’ can still consider themselves meaningful participants in the exercise if they join in reciting the remainder of the Pledge.”¹⁹³

Following this reasoning, even if a Hawaiian *pule* contains some Christian language or God’s name when used in school as ceremonial use, it should be regarded as a minimal reference to religion. Such language is not essential in *pule*, which has been practiced for years, and students have the option to exclude these religiously sensitive words if they wish to do so.¹⁹⁴ Based on *Newdow*, the federal courts should treat both traditional and Western influenced *pule* on the same grounds of ceremonial and customary language, and thus only the direct translation of Christian liturgy prayers in Hawaiian should be challenged.

¹⁸⁷ Forced attendance and peer pressure as unconstitutional religious observation and indoctrination are expressed in the Coercion Test, *infra*, stated in the Supreme Court cases *Town of Greece v. Galloway*, 572 U.S. 565 (2014) and *Lee v. Weisman*, 505 U.S. 577 (1992).

¹⁸⁸ See RICHARD J. ELLIS, *TO THE FLAG: THE UNLIKELY HISTORY OF THE PLEDGE OF ALLEGIANCE* (2005); Abner S. Greene, *The Pledge of Allegiance Problem*, 64 *FORDHAM L. REV.* 451 (1995); Yehudah Mirsky, *Civil Religion and the Establishment Clause*, 95 *YALE L.J.* 1237 (1986).

¹⁸⁹ *Newdow v. U.S. Congress*, 328 F.3d 466 (9th Cir. 2003).

¹⁹⁰ *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 6 (2004) (stating that “[n]o reasonable observer could have been surprised to learn the words of the Pledge”). There was a subsequent appeal in the Ninth Circuit. *Newdow v. Rio Linda Union School Dist.*, 597 F.3d 1007 (9th Cir. 2010).

¹⁹¹ *Elk Grove Unified Sch. Dist.*, 542 U.S. at 42–3; see also VINCENT PHILLIP MUÑOZ, *RELIGIOUS LIBERTY AND THE AMERICAN SUPREME COURT: THE ESSENTIAL CASES AND DOCUMENTS* 514–22 (2013).

¹⁹² *Elk Grove Unified Sch. Dist.*, 542 U.S. at 42–3.

¹⁹³ *Id.*

¹⁹⁴ See generally Silva, *supra* note 6.

B. *The Four Tests*

The Supreme Court has maintained a very clear position on the protection of religious freedom as a Constitutional right and the separation of church and state in two landmark cases in the 1960s, *Engel v. Vitale* and *Sch. Dist. of Abington v. Schempp*, where they held that school-sponsored prayers and Bible studies violated the First Amendment.¹⁹⁵ As discussed in Part III, the Hawai'i State Legislature or DOE can make a law to promote or require *pule* in public schools. A closer scrutinization of the existing four tests set by the Supreme Court can help decide whether such state law is constitutional.¹⁹⁶

1. *Lemon Test*

The *Lemon* test emerged from the 1971 landmark case *Lemon v. Kurtzman*, where the Supreme Court found a violation of the Establishment Clause for a Pennsylvania law that allowed the Superintendent of Public Schools to reimburse religious private schools.¹⁹⁷ The three prongs developed in *Lemon* for examining a statute involving religion included: (1) the statute must have a secular legislative purpose (“purpose” prong); (2) the principal or primary effect of the statute must neither advance nor inhibit religion (“effect” prong); and (3) the statute must not result in an “excessive government entanglement” with religion (“entanglement” prong).¹⁹⁸

After the test was modified in *Agostini v. Felton* by altering the Effect Prong, the three prongs to examine whether a government aid has the effect of advancing religion are: (1) resulting in government indoctrination; (2) defining the recipients of government benefits by reference to religion; and (3) creating an excessive entanglement between government and religion.¹⁹⁹ Over the years, the Supreme Court viewed the aged

¹⁹⁵ *Engel v. Vitale*, 370 U.S. 421 (1962); *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203 (1963).

¹⁹⁶ Claire Lee, *The Practice of Prayer at School Board Meetings: The Coercion Test as a Framework to Determine the Constitutionality of School Board Prayer*, 2020 U. CHI. LEGAL F. 367, 369–73, 393 (2020) (providing in-depth discussion of the four judicial tests of the Establishment Clause for prayers at public school board meeting and concluding that all Circuits have adopted a combination of the four tests without a particular preference; also arguing that the Coercion Test provides the best framework to consider school board prayer cases); Steven G. Gey, *Reconciling The Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 728, 799 (2006). (offering a more critical overview of the Supreme Court handling of the Establishment Clause cases as incoherent and unpredictable by claiming the relevant theories and tests as a “hopeless muddle”).

¹⁹⁷ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

¹⁹⁸ *Id.* at 612–13. Conservative Justices dislike the *Lemon Test*; Justices Scalia and Thomas called it “like some ghoul in a late night horror movie that repeatedly sits up in its grave and shuffles abroad” in *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring); see also *McCreary Cty. v. ACLU*, 545 U.S. 844, 890 (2005) (Scalia, J., dissenting).

¹⁹⁹ *Agostini v. Felton*, 521 U.S. 203 (1997). *Agostini's* modified *Lemon Test* was later adopted in another Supreme Court case, *Mitchell v. Helms*, 530 U.S. 793 (2000).

Lemon Test as too broad, vague, and weak, finding it is especially useless in deciding the constitutionality of historically supported religious monuments, symbols, and practices.²⁰⁰

If a Hawai'i law such as a statutory provision is established to require *pule* in public schools, it should have a secular and neutral legislative purpose without any intent to indoctrinate Native Hawaiian religious ideas, in order to pass the *Lemon* Test's first prong. The statute's purposes would be to promote Hawaiian culture and language, and to educate children about *pule* as a cultural heritage. For the second prong, if using the original *Lemon* Test's Effect Prong, the *pule* requirement may cause advancement of Hawaiian religion. However, if adopting the modified Effect Prong from *Agostini*, the recipient of government benefits would only be the children who received knowledge of Hawaiian traditional culture rather than religious doctrines. Therefore, the second prong could pass Constitution scrutiny. For the third prong, the statute would not result in "excessive government entanglement" with religion.²⁰¹ State *pule* practice law may pass the *Lemon* Test, but as judges can have wide discretion over applying this test, the results in each case would likely be unpredictable.

2. Endorsement Test

The Endorsement Test arose from the concurring opinion of Justice Sandra Day O'Connor in *Lynch v. Donnelly*, where the Court held that the city of Pawtucket's use of the nativity scene in its Christmas display did not violate the Establishment Clause.²⁰² The Endorsement Test is a two-pronged analysis based on the *Lemon* Test that assesses first the government's excessive entanglement with religious institutions, and second the government endorsement or disapproval of religion as a direct infringement of the Establishment Clause.²⁰³ The key "endorsement" prong replaces the "purpose" and the "effect" prongs of the *Lemon* Test.²⁰⁴ Justice O'Connor emphasized the main issue was whether the government intended to convey a message of endorsement or disapproval of religion, and decided that the city of Pawtucket did not intend to convey any message of endorsement of Christianity or disapproval of non-Christian religions.²⁰⁵ The Endorsement Test offers more room for

²⁰⁰ *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2080–82 (2019). Justice Kavanaugh's concurrence explained that the Court, "no longer applies the old test articulated in *Lemon v. Kurtzman*," *Id.* at 2092 (Kavanaugh, J., concurring); "the Court's decisions over the span of several decades demonstrate that the *Lemon* test is not good law and does not apply to Establishment Clause cases in any of the five categories." *Id.* at 2093. *See also* Lee, *supra* note 196, at 382.

²⁰¹ *Agostini*, 521 U.S. at 218.

²⁰² *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

²⁰³ *Id.* at 687–88.

²⁰⁴ *Id.* at 690.

²⁰⁵ *Id.* at 691.

government-sponsored activities or programs containing religious symbols than the *Lemon Test*.²⁰⁶

Promoting and preserving Native Hawaiian culture is in the interest of Hawai'i state government.²⁰⁷ As Native Hawaiian religion is a significant part of the Hawaiian culture, it is thus embedded in the state's general interest.²⁰⁸ The promotion of *pule* in public schools does not convey a message that the state government intends to endorse Native Hawaiian religion and disapprove other religions. In deciding whether a government sends a message to endorse a particular religion, the Supreme Court often uses the objective standard of a "reasonable observer," like the one used in the *Newdow* case.²⁰⁹ This standard has been criticized by scholarship for its vagueness and subjectiveness, which gives the judges a great power to manipulate the test by their own discretion.²¹⁰

In *Capitol Square Review & Advisory Bd. v. Pinette*, the "reasonable observer" was defined as "the personification of a community ideal of reasonable behavior, determined by the collective social judgment, whose knowledge is not limited to information gleaned from viewing the challenged display, but extends to the general history of the place in which the display appears."²¹¹ There, the "reasonable observer" was not an idealized individual observer, but the community as a whole that hosted history of the practice.²¹² Justice O'Connor, in her concurring opinion, pointed out that the Endorsement Test should not focus on an individual observer's perception and knowledge, but must be "deemed aware of the history and context of the community and forum in which the religious display appears."²¹³ She stated that "the 'history and ubiquity' of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion."²¹⁴

The "reasonable observer" standard may benefit our case because of its focus on community forum and history of the place.²¹⁵ By applying the community-based "reasonable observer" standard, a court can find the practice of *pule* has a long history in local communities, and this

²⁰⁶ Lee, *supra* note 196 at 382, 385–86.

²⁰⁷ HAW. CONST. art. XII, § 7.

²⁰⁸ *Id.*

²⁰⁹ *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Cty. of Allegheny v. ACLU*, 492 U.S. 573 (1989), *abrogated by* *Town of Greece v. Galloway*, 572 U.S. 565 (2014); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

²¹⁰ Lee, *supra* note 196, at 371.

²¹¹ *Pinette*, 515 U.S. at 755.

²¹² *Id.* at 779–80 (O'Connor, J., concurring).

²¹³ *Id.* at 780. Justice Stevens, in his dissent, disagreed with the "reasonable observer" idea and criticized it by called it an "ultrareasonable observer" that could not possibly exist. *Id.* at 807 (Stevens, J., dissenting). Because reasonable people would attribute a religious message to the State but do not know the difference between a "public forum," a "limited public forum," and a "non-public forum." *Id.*

²¹⁴ *Id.* at 780 (O'Connor, J., concurring) (citing *Cty. of Allegheny*, 492 U.S. at 630).

²¹⁵ *See id.*

vocal tradition is a type of Native Hawaiian culture closely tied to *oli* and *hula*.²¹⁶ The Hawaiian society has created, approved, and favored this form of oral practice for generations and its history is deeply rooted in the community.²¹⁷ *Pule* practice has been passed on through generations of Native Hawaiians including school pupils.²¹⁸ A “reasonable observer” from the local community who is familiar with the history and understands the tradition of *pule* will view the public school’s *pule* practice and teaching as the government’s tolerance of Native Hawaiian cultural practice rather than a government endorsement of proselytizing school pupils to Native Hawaiian religion, thus the practice does not violate the Establishment Clause.²¹⁹

3. Coercion Test

The Coercion Test appeared in *Lee v. Weisman*, where the Supreme Court held that the public school violated the Establishment Clause by inviting a Jewish rabbi to offer prayers at the graduation ceremony, which carried a particular risk of indirect coercion of religion.²²⁰ The Court concluded that:

The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause, which guarantees at a minimum that a government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which “establishes a [state] religion or religious faith, or tends to do so.”²²¹

The Test does not have prongs or standard elements, and it looks at the extent of supervision and social pressure on students to participate in religious activity.²²² A majority view sees both indirect and direct coercion violates the Establishment Clause, while the minority view sees only direct coercion as a violation.²²³

²¹⁶ GUTMANIS, *supra* note 12; McGregor, *supra* note 23; Hammon, *supra* note 17.

²¹⁷ GUTMANIS, *supra* note 12.

²¹⁸ *Id.*

²¹⁹ *Id.*; *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); the biggest weakness of the Endorsement Test is the unpredictability that various elements of the test can cause different results, such as the “reasonable observer” to be either teacher or student, *see Lee*, *supra* note 196, at 385–86.

²²⁰ 505 U.S. 577 (1992).

²²¹ *Id.* at 577–78 (citing *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)). The Establishment Clause trumps the Free Exercise Clause.

²²² *Lee*, *supra* note 196, at 372.

²²³ *Id.*; *see also Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting) (stating that direct coercion only referred to direct “coercion of religious orthodoxy and of financial support by force of law and threat of penalty”); Matthew A. Peterson, *The Supreme Court’s Coercion Test: Insufficient Constitutional Protection for America’s Religious Minorities*, 11 CORNELL J.L. & PUB. POL’Y 245, 245–46, 270–72 (2001) (pointing out that due to the imprecise and case-by-case nature of the coercion standard, the Supreme Court tends to use the coercion test more than a *de minimis* threshold standard for government actions concerning religious establishment, instead of a wholesale adoption of the test.); Gey, *supra* note 196, at 740–46 (explaining that direct

The Coercion Test takes into consideration time, space, and the totality of circumstances.²²⁴ In our case, if schools require *pule*, it may constitute direct coercion, but only if it promotes or hosts religion.²²⁵ The court would investigate whether the school and the government's actions coerce non-observers or non-believers including most students to support participation in Native Hawaiian religion or its exercise.²²⁶

The key of applying the Coercion Test is to decide whether the students undergo social pressure, or a “fair and real sense obligatory” to take part in the Native Hawaiian prayer *pule*.²²⁷ Regardless of whether students have a choice not to participate, which is different from the *Newdow* case, the school-sponsored prayers may prescribe a particular form of religious worship, which places “indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion.”²²⁸ However, in the majority view, most indirect coercions are not violation of the Establishment Clause.²²⁹

In *Santa Fe Independent School District v. Doe*, the Supreme Court applied the Coercion Test as well as the *Lemon* and Endorsement Tests, and decided that prayer before school football games was unconstitutional, even though the attendance was voluntary.²³⁰ Although the Court prefers the Coercion Test, the previous two tests were still relevant under the Court's scope.²³¹ The Ninth Circuit also applied both Coercion and *Lemon* Tests in recent cases on school board prayers.²³² Unlike other tests, the Coercion Test focuses on how a religious practice affects the non-consenting audience, especially regarding the negative effects.²³³ The Coercion Test is the only test that adopts the totality of circumstances viewpoint, *supra*, which looks into all factors related to the practice and their effect on the audience.²³⁴ The totality of circumstances includes

and indirect coercion is also comparable to broad and narrow coercion theories).

²²⁴ Lee, *supra* note 196, at 372, 388.

²²⁵ For the Coercion Test, the court may treat *pule* as a “civil religion” or “ceremonial deism” by first recognizing its nonsectarian and non-proselytizing nature and then review whether there is an endorsement or coercion. See Peterson, *supra* note 223, at 253–55; Mirsky, *supra* note 188, at 1247–57; Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 37 (2004); cf. Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 225 (1963) (warning against the secular humanism by stating that state shall not establish a “religion of secularism” which affirmatively opposing or showing hostility towards religion); see also John M. Swomley, *Myths about Voluntary School Prayer*, 35 WASHBURN L.J. 294, 300 (1996).

²²⁶ Lee v. Weisman, 505 U.S. 577, 577 (1992).

²²⁷ *Id.* at 586; Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311 (2000); Peterson, *supra* note 223, at 251, 262.

²²⁸ Engel v. Vitale, 370 U.S. 421, 431 (1962); Elk Grove Unified Sch. Dist., 542 U.S. at 1.

²²⁹ See Lee, 505 U.S. at 640.

²³⁰ Santa Fe Indep. Sch. Dist., 530 U.S. at 312–17.

²³¹ Lee, *supra* note 196, at 375.

²³² Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132 (9th Cir. 2018); see also Lee, *supra* note 196, at 379–80.

²³³ Lee, *supra* note 196, at 387.

²³⁴ *Id.* at 372, 388.

background information of historical practices, an important factor for the next test, discussed below.²³⁵ Considering the complicity of *pule* practice's cultural and historical contexts, the apparent effect on Hawai'i school children would be a combination of cultural recognition and understanding while maintaining room for their own traditions, and thus no government coercion is present.²³⁶

4. Historical Practices Test

Following the history and community focus of the Endorsement Test, the Historical Practices Test gives public religious practice an exception from the Establishment Clause for the practice's uninterrupted tradition.²³⁷ The Historical Practices Test was established in *Marsh v. Chambers*, where the Supreme Court held that the Nebraska State Legislature's chaplaincy practice of prayers did not violate the Establishment Clause.²³⁸ The Court reasoned that "the practice of opening sessions of Congress with prayer has continued without interruption for almost 200 years ever since the First Congress drafted the First Amendment, and a similar practice has been followed for more than a century in Nebraska and many other states."²³⁹ The Court concluded that chaplaincy practice in the legislature was not a violation of the Establishment Clause, but rather a "tolerable acknowledgment of beliefs widely held among the people . . . In light of the history, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society."²⁴⁰

The Historical Practices Test seems appealing for our case at a glance, but closer analysis exposes its shortcomings.²⁴¹ First, the practice must be based on an unbroken history or uninterrupted tradition tracing back to the founding of the country, particularly those belong to the Judeo-Christian tradition.²⁴² A federal level practice can guarantee the approved historical pattern of the practice on the state level.²⁴³ Native Hawaiian prayers have a continuous history, but weaker practice due to the annexation of Hawai'i in 1898, and the cultural suppression as a by-product of colonialism.²⁴⁴ Second, Native Hawaiian prayer at school has not become a part of the societal common understanding in all Hawai'i local communities.²⁴⁵ Third, in contrast to the *Marsh* case, public school religious activities have a greater impact on young minds than religious

²³⁵ *Id.* at 389.

²³⁶ *Id.* at 391–92.

²³⁷ *Marsh v. Chambers*, 463 U.S. 783 (1983).

²³⁸ *Id.* at 784.

²³⁹ *Id.* at 792.

²⁴⁰ *Id.* at 784.

²⁴¹ *Lee, supra* note 196, at 383–84.

²⁴² *Id.* at 383.

²⁴³ U.S. CONST. amend. XIV.

²⁴⁴ *See* McGregor, *supra* note 23; NOENOE K. SILVA, *supra* note 81; GOODYEAR-KA'ŌPUA ET AL., *supra* note 71.

²⁴⁵ *See* Lee, *supra* note 196, at 376.

activities on developed minds of the legislators, and the teacher-student relationship has unequal social power which is unlike the legislator's equal colleague relationship.²⁴⁶ Based on these disadvantages, the Historical Practices Test is inapplicable to our *pule* practice case.

C. *Congressional Legislation on Native Rights*

Regarding federal regulations on native religious practices, Congress passed several laws to ensure federal policies impacting the exercise of traditional religions of indigenous people complied with the constitutional mandate of the free exercise of religion.²⁴⁷ The American Indian Religious Freedom Act (AIRFA) in 1978 instructed federal agencies to consult with Native religious leaders on their rights and practices and permitted Native groups' access to sacred sites for traditional religious ceremonies.²⁴⁸ However, AIRFA offered little protection in real judicial practice for the free exercise of Native religions.²⁴⁹ In response to judicial rulings on the Free Exercise Clause, Congress passed the Religious Freedom Restoration Act (RFRA) in 1993,²⁵⁰ but it was deemed partially unconstitutional by the Supreme Court.²⁵¹ In response to *Boerne v. Flores* where the Court partially invalidated the law, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA) in 2000, which reinforced the protection of free exercise from any government

²⁴⁶ *Id.* at 387–88.

²⁴⁷ NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 1, at 870–79; AIRFA, 42 U.S.C. § 1996; AIRFA Amendments of 1994 (codified as amended at 42 U.S.C. § 1996a (2013)); RFRA, Pub. L. No. 103–141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2013)); RLUIPA, Pub. L. No. 106–274, 114 Stat. 804 (2000) (codified at 42 U.S.C. §§ 2000cc to 2000cc-5 (2013)).

²⁴⁸ *Id.*; H.R. Rep. No. 95–1308 (1978). The American Indian Religious Freedom Act Amendments of 1994, and their codification in 1996, include Native Hawaiian religion. “Henceforth it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.” Pub. L. 95–341, § 1, 92 Stat. 469 (Aug. 11, 1978).

²⁴⁹ NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 1, at 870–71; *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983), *cert. denied*, *Hopi Indian Tribe v. Block*, 464 U.S. 1056 (1984); *Crow v. Gullet*, 706 F.2d 856 (8th Cir. 1983).

²⁵⁰ Pub. L. No. 103–141, 107 Stat. 1488 (1993); 42 U.S.C. §§ 2000bb to 2000bb-4 (2013); NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 1, at 875–76.

²⁵¹ NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 1, at 875–76. The Act was ruled unconstitutional in *City of Boerne v. Flores*, 521 U.S. 507 (1997), and left only federal actions applicable in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). The 2000 amendment to RFRA defines “exercise of religion” to include all religious beliefs, not just a system of religious belief. 42 U.S.C. § 2000bb-2(4) (2013). Currently twenty-three states have passed their own versions of RFRA, except Hawai'i. The Hawai'i RFRA has not passed, though it was proposed in 2014. See H.B. 2398, 27th Leg., 2014 Sess. (Haw. 2014), https://www.capitol.hawaii.gov/session2014/bills/HB2398_.HTM (last visited Apr. 1, 2022); H.B. 1822, 27th Leg., 2014 Sess. (Haw. 2014). https://www.capitol.hawaii.gov/session2014/bills/HB1822_.HTM (last visited Apr. 1, 2022).

burdens.²⁵² Aside from these laws on religion, Congress passed the Native American Languages Act in 1990, the Native Hawaiian Education Act in 1994, and the Native Hawaiian Education Reauthorization Act in 2015 to encourage the learning of Native Hawaiian knowledge including language.²⁵³ Government agencies and social organizations, such as Native Hawaiian Education Council and Native Hawaiian Education Association, are involved in ensuring Native Hawaiian education according to the laws.²⁵⁴

D. *Possible Solutions*

With a more conservative Supreme Court, one can assume that the justices would be more tolerant of the First Amendment-related cases and give more leeway for religious practices in general.²⁵⁵ Among the four tests which a federal court could adopt to decide if practicing *pule* in public schools is a violation of the Establishment Clause, the Coercion Test would likely best serve this article's argument, because of its history and community focus within a clear formula, discretionary application, and its preference by conservative judges.²⁵⁶ The key problem of Native Hawaiian prayers for the First Amendment involves the texts, especially those containing Christian teachings.²⁵⁷ For example, other types of Native Hawaiian spiritual practices for school children such as *ho'oponopono* (reconciliation) or *nalu* (meditation) can be used for dispute resolution, reconciliation, and relationship reparation without reciting certain religious texts.²⁵⁸ A court can look at the history and common knowledge of Hawai'i local communities to decide whether practicing *pule* in public schools would not pressure children to convert to Native

²⁵² *City of Boerne v. Flores*, 521 U.S. 507 (1997); Pub. L. No. 106-274, 114 Stat. 804 (2000); 42 U.S.C. §§ 2000cc to 2000cc-5 (2013); NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 1, at 878-79.

²⁵³ NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 1, at 1282. Native American Languages Act, Pub. L. No. 101-477, 25 U.S.C. § 2901 (1990); Native Hawaiian Education Act, 20 U.S.C. § 7511 *et seq*; Native Hawaiian Education Reauthorization Act, H.R.895 (2015).

²⁵⁴ NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 1, at 1283-86.

²⁵⁵ Kelsey Dallas, *The Supreme Court Could Reinterpret the First Amendment in A Conservative Direction This Term. Here's How*, DESERET NEWS (Jan. 14, 2019), <https://www.deseret.com/2019/1/14/20663247/the-supreme-court-could-reinterpret-the-first-amendment-in-a-conservative-direction-this-term-here-s>.

²⁵⁶ Peterson, *supra* note 223, at 270-72; Lee, *supra* note 196, at 375, 386-92; Gey, *supra* note 196, at 728-30.

²⁵⁷ RICHARD WARREN PERRY & BILL MAURER, GLOBALIZATION UNDER CONSTRUCTION: GOVERNMENTALITY, LAW, AND IDENTITY 206-7 (2003).

²⁵⁸ MALCOLM NĀĒA CHUN, *supra* note 92, at 143-66, 252-88; NANA VEARY, CHANGE WE MUST: MY SPIRITUAL JOURNEY (1989); MJ HARDEN, VOICES OF WISDOM HAWAIIAN ELDERS SPEAK (1999); LUC BODIN, NATHALIE BODIN LAMBOY & JEAN GRACIET, THE BOOK OF HO'OPONOPONO: THE HAWAIIAN PRACTICE OF FORGIVENESS AND HEALING (2016); ULRICH E. DUPRÉE, HO'OPONOPONO: THE HAWAIIAN FORGIVENESS RITUAL AS THE KEY TO YOUR LIFE'S FULFILLMENT (2012); Thao N. Le & Pono Shim, *Mindfulness and the Aloha Response*, 3 J. IND. SOC. DEV. 1 (2014).

Hawaiian religion.²⁵⁹ The First Amendment drafters' intention was to protect the free exercise of religion, not to restrict it.²⁶⁰ Conservative judges might interpret the First Amendment in such a way to fit into their constitutionalism beliefs, especially for Judeo-Christian religions.²⁶¹

To avoid a superseding First Amendment violation, practicing *pule* in public schools should occur in the following forms: (1) educating students about *pule* and other Native Hawaiian spiritual practices in classrooms along with introduction of Native Hawaiian culture; (2) establishing state law to require a moment of silence in public schools, taking place at Native Hawaiian sacred sites as student field classes; (3) allowing student organizations or individual self-organized *pule* practice at schools, especially during non-instructional time; or (4) requiring *pule* practices only at Hawaiian language immersion schools, and carefully excluding texts related directly to Christianity.²⁶² Hawai'i state laws and regulations will have to provide more detailed guidance and concrete protection on where, when, who, and how to practice *pule* and Native Hawaiian religious traditions in public schools.

V. Conclusion

The recent tragic news of discovering unmarked mass graves at former Native American and First Nation boarding schools exposed the lesser known dark history of the cultural and physical genocide against indigenous populations by Western colonists in North America.²⁶³ Many of these ethnic cleansing schools were run by Christian convents and teachers, aiming for "civilizing the savages through God's grace."²⁶⁴ Religion blending in education is always a sensitive and controversial issue.²⁶⁵

²⁵⁹ *Lee v. Weisman*, 505 U.S. 577 (1992); *Lee*, *supra* note 196, at 386–92.

²⁶⁰ See LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (1986); Patrick N. Leduc, *Christianity and the Framers: The True Intent of the Establishment Clause*, 5 LIBERTY U. L. REV. 201 (2011); Jeffrey S. Theuer, *The Lemon Test and Subjective Intent in Establishment Clause Analysis: The Case for Abandoning the Purpose Prong*, 76 KY. L.J. 1061 (1987); RICHARD LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS, (2006); William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191 (1990).

²⁶¹ Dallas, *supra* note 255.

²⁶² These are the tentative approaches that could be implemented in Hawai'i. The Hawai'i state Department of Education and Board of Education can begin carefully promoting *pule* for educational purposes through these approaches, in consultation with the state government and lawmakers.

²⁶³ Ian Austen, "Horrible History": Mass Grave of Indigenous Children Reported in Canada, N.Y. TIMES (May 28, 2021) <https://www.nytimes.com/2021/05/28/world/canada/kamloops-mass-grave-residential-schools.html>; Ian Austen & Dan Bilefsky, *Hundreds More Unmarked Graves Found at Former Residential School in Canada*, N.Y. TIMES (Jun. 24, 2021) <https://www.nytimes.com/2021/06/24/world/canada/indigenous-children-graves-saskatchewan-canada.html>.

²⁶⁴ Jennifer Fish Kashay, *Problems in Paradise: The Peril of Missionary Parenting in Early Nineteenth-Century Hawaii*, 77 J. OF PRESBYTERIAN HIST. 81 (1999).

²⁶⁵ Mary Wisniewski, *Religion, and controversy, always part of U.S. education*, REUTERS

However, Native Hawaiian religion's spiritual practice has shown its significant role in reviving indigenous cultural heritage and passing on indigenous knowledge more than ever.²⁶⁶

Pule in public schools is one of the rapidly diminishing indigenous traditional and customary rights, through which all Native Hawaiian religious practices are at risk. They are especially vulnerable under federal laws and the First Amendment, and therefore need greater protection from state legislative, judicial, and executive branches. The State of Hawai'i should encourage and provide legislative protection for teaching and practicing *pule* in K-12 public schools for cultural and educational purposes. The people of Hawai'i should add a new constitutional amendment to the Hawai'i State Constitution clearly regulating the time, venue, and practitioners of *pule*, *oli*, and other Native Hawaiian cultural practices. The Hawai'i State Legislature can designate a new council or *hui* (assembly) to oversee Native Hawaiian spiritual practice, and the current state government agencies should establish new rules to protect and preserve Native Hawaiian religious right exercises within the local communities. However, these solutions are just small steps towards the real reconciliation and complete healing of the deeply wounded *Kānaka Maoli* and *ʻāina*. Hopefully, *pule* can continue to make a close connection between those who *kalana* (ask for forgiveness) and *kala* (offer forgiveness).

(Jun. 9, 2011), <https://www.reuters.com/article/us-usa-religion-schools/religion-and-controversy-always-part-of-u-s-education-idUSTRE75829R20110609>; From the Blaine Amendments in the 1870s to the landmark case *Locke v. Davey*, the federal government including three branches has kept constant attitudes on the prohibition of public funding (both federal and state funding) to religious schools. See Jane G. Rainey, *Blaine Amendments*, THE FIRST AMENDMENT ENCYCLOPEDIA <https://www.mtsu.edu/first-amendment/article/1036/blaine-amendments> (last visited Apr. 1, 2022). A recent study showed that 12 percent of teens (ages 13–17) in public schools in the South said teachers led them in prayers, while six percent of teens reported school prayers in the West, seven percent in the Midwest, and two percent in the Northeast. Elizabeth Podrebarac Sciupac & Philip Schwadel, *For a Lot of American Teens, Religion Is a Regular Part of the Public School Day*, PEW RESEARCH CENTER (Oct. 3, 2019), <https://www.pewforum.org/2019/10/03/for-a-lot-of-american-teens-religion-is-a-regular-part-of-the-public-school-day>. For the most recent state legislation pertaining to prayer in public schools in all fifty states, see Brett A. Geier & Annie Blankenship, *supra* note 167, at 381–436.

²⁶⁶ HOMMON, *supra* note 17, at 214–15.