

LANGUAGE SUPPRESSION, REVITALIZATION, AND NATIVE HAWAIIAN IDENTITY

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I ka ‘ōlelo nō ke ola, i ka ‘ōlelo nō ka make¹
Through language there is life; through language there is death

Having been the target of colonialist suppression for over a century and a half, the Hawaiian language has experienced a period of revitalization that began with the Native Hawaiian cultural and political renaissance of the 1970s. This revitalization, achieved largely through the growth and development of immersion schools, has led to a dramatic increase in the number of official speakers of Hawaiian and to more widespread acceptance of the language. Suppression of the language, however, is still ongoing in different contexts, particularly in education, government, and the courts. This holds true despite Hawaiian’s designation as one of the two official languages of Hawai‘i. Yet there are legal steps that might be taken to solidify the status of Hawaiian as an official language—not just in theory, but also in practice.

I. The Native Hawaiian Renaissance

In the 1970s, Hawai‘i was witness to an extraordinary Native Hawaiian renaissance that revitalized an indigenous people long subjected to Western colonial domination and suppression.¹ This renaissance was multifaceted and complex. On one level, it was a cultural renaissance, as it heralded a resurgence of interest in various aspects of Native Hawaiian heritage: traditional chants (oli), music, and dance (hula kahiko); the cultivation of traditional crops such as taro (kalo) and the practice of aquaculture through the use of fishponds (loko i‘a),

both by means of ancient methods; and the spiritual practices of the ancient religion, including the preservation and maintenance of sacred spaces. Moreover, the renaissance gave rise to a renewed interest in learning the Native Hawaiians’ ancestral methods of navigation. In 1976, the newly-founded Polynesian Voyaging Society² launched the Polynesian voyaging canoe Hōkūle‘a (“Star of Gladness”), which made a revolutionary journey to Tahiti and back by means of those ancient navigation techniques, using only celestial signs and ocean currents as guides.³

On another level, the Native Hawaiian renaissance

was political, as it precipitated long overdue official recognition of Native Hawaiian rights. To this end, the Hawai‘i State Constitutional Convention in 1978 enacted amendments to the Hawai‘i State Constitution that committed the state to the preservation and promotion of Native Hawaiian culture. One of these amendments established the Office of Hawaiian Affairs, charged with the mission of improving the well-being of Native Hawaiians. The sovereignty movement for Native Hawaiian self-determination also gained ground during the renaissance, as Native Hawaiian political leaders and activists belonging

¹ See William H. Wilson, *The Sociopolitical Context of Establishing Hawaiian-medium Education, in* INDIGENOUS COMMUNITY-BASED EDUCATION 95, 98–100 (Stephen May ed., 1999); William H. Wilson, *I ka ‘ōlelo*

Hawai‘i ke ola, ‘Life is found in the Hawaiian language,’ INT’L J. SOC. LANGUAGE 123, 130–131 (1998).

² POLYNESIAN VOYAGING SOCIETY, <http://www.hokulea.com/>.
[<https://perma.cc/8QFF-A98J>]

³ *Polynesian Navigation*, POLYNESIAN VOYAGING SOCIETY, <http://www.hokulea.com/education-at-sea/polynesian-navigation/>.
[<https://perma.cc/AV5T-84MM>]

to different grassroots organizations began organizing and demonstrating on a regular basis for the sovereignty cause.⁴

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Especially crucial, however, to the Native Hawaiian renaissance was the start of the revitalization of the Hawaiian language (‘ōlelo Hawai‘i). The language had been banned in 1896 as a medium of instruction in schools, and almost eighty years later, it was in serious danger of extinction.

By 1983, there were only two thousand native speakers in Hawai‘i, including fifty under the age of eighteen, in addition to a number of much older native speakers, most of them living in a community of full-blooded Native Hawaiians on the small island of Ni‘ihau.⁵ Via a constitutional amendment in 1978, the state had designated Hawaiian as one of the two official languages of Hawai‘i. Due to the concerted efforts of a grassroots organization of parents who wanted Hawaiian to be their children’s primary language, independent Hawaiian

immersion schools began operating in 1984.⁶ These were the first official immersion schools in the United States with an indigenous language as the medium of instruction. In 1987, the state Board of Education agreed to a pilot program of Hawaiian language immersion in selected public schools.⁷ Full-fledged Hawaiian language programs and Hawaiian studies programs—taught in Hawaiian—at the University of Hawai‘i, which had gotten off the ground in the 1970s, burgeoned in the 1980s.⁸

This process of language revitalization has served as an attempt to resist the colonialist suppression that the language had undergone over the past century and a half.

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suppressed language goes hand in hand with a revitalization of a suppressed cultural and political identity. Revitalizing the Hawaiian language means revitalizing Native Hawaiian identity. This Native Hawaiian identity was erased in the nineteenth century by a “language shift and sovereignty shift in government and education domains” that were “simultaneous and symbiotic.”⁹ Just as English supplanted the Hawaiian language as the language of education and governance, so did the United States supplant Hawaiian sovereignty. Indeed, the linguistic dominance of English was largely dependent upon the language being granted the “sole legitimacy of governance.”¹⁰

In a number of ways, the revitalization of the Hawaiian language is no longer suppressed as it once was. It is now recognized, of course, as one of Hawai‘i’s two official languages.¹¹ It is now possible to receive a K-12 Hawaiian-medium education in selected public schools. The University of Hawai‘i at Hilo offers graduate degrees taught in Hawaiian: an M.A. in Hawaiian Language and Literature and

⁴ For overviews of the sovereignty movement, see, e.g., *A NATION RISING: HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND SOVEREIGNTY* (Noelani Goodyear-Ka‘ōpua, Ikaika Hussey & Erin Kahunawaika‘ala Wright eds., 2014); J. KEHAULANI KAUNUI, *HAWAIIAN BLOOD: COLONIALISM AND THE POLITICS OF SOVEREIGNTY AND INDIGENEITY* (2008); HAUNANI-KAY TRASK, *FROM A NATIVE*

DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI‘I (1999).

⁵ *NATIVE HAWAIIAN LAW: A TREATISE* 1274 (Melody Kapilialoha MacKenzie ed., 2015).

⁶ See *A Timeline of Revitalization*, E OLA KA ‘ŌLELO HAWAI‘I, http://www.ahapunaleo.org/index.php?/about/a_timeline_of_revitalization/ [<https://perma.cc/C6VL-3FQB>]

⁷ *Id.*

⁸ *Id.*

⁹ Breann Nu‘uhiwa, “*Language Is Never About Language*”: *Eliminating Language Bias in Federal Education Law to Further Indigenous Rights*, 37 U. HAW. L. REV. 381, 406 (2015).

¹⁰ *Id.* at 405.

¹¹ Hawai‘i is the only state in the nation with two official languages.

Hawaiian¹² and a Ph.D. in Indigenous Language and Cultural Revitalization.¹³ The official state motto and anthem are in Hawaiian.¹⁴ The state and municipal governments use official Hawaiian orthography for words and names in official documents and street signs.¹⁵ There is a weekly radio program broadcast entirely in Hawaiian.¹⁶ There is also a television station that broadcasts programs in Hawaiian,¹⁷ and the prestigious hula competition at the Merrie Monarch Festival is now broadcast in both English and Hawaiian.¹⁸ Banks in Hawai‘i even accept checks drafted in Hawaiian.¹⁹

Yet in other ways, the current situation belies the Hawaiian language’s designated official status. The total number of speakers (including second-language speakers) is estimated to be just over 18,000 out of a state population of 1.4 million.²⁰ Advocates for Hawaiian

immersion schools have regularly faced uphill battles for recognition and state funding, notwithstanding the commitment to the preservation and promotion of Native Hawaiian culture in the state constitutional amendments of 1978. These advocates have also faced the skepticism of those who believe that Hawaiian immersion schools will produce individuals who are monolingual and unable to make their way in a country where English is the de facto official language. Moreover, despite its official status, Hawaiian is not an official language of government in Hawai‘i. Article XV, Section 4 of the Hawai‘i State Constitution designates English and Hawaiian as the state’s official languages, “except that Hawaiian shall be required for public acts and transactions only as provided by law.” With very few exceptions, state statutes and city ordinances are published only in English.

Courts neither accept documents in Hawaiian nor allow Hawaiian to be spoken in court proceedings.

The revitalization of the Hawaiian language and Native Hawaiian identity thus continues to face various challenges. For all the achievements of the Native Hawaiian renaissance, and despite the progress that the language has made over the past forty years in avoiding extinction, the Hawaiian language is still far from being an official language in practice. The aim of this paper is to interrogate the Hawaiian language’s status as an official language of Hawai‘i by examining how and why suppression of the language continues to this day, both in ways that are different from those implemented in the nineteenth century, but also in ways that are not very different at all. Part II of the paper will trace the history of the colonialist suppression of the

¹² *Master of Arts (M.A.) in Hawaiian Language and Literature*, KA HAKA ‘ULA O KE‘ELIKŌLANI (“COLLEGE OF HAWAIIAN LANGUAGE”),

<http://www.olelo.hawaii.edu/khuok/mhhma.php>. [<https://perma.cc/F9QV-GN9G>]

¹³ *Doctor of Philosophy (Ph.D.) in Hawaiian and Indigenous Language and Cultural Revitalization*, KA HAKA ‘ULA O KE‘ELIKŌLANI (“COLLEGE OF HAWAIIAN LANGUAGE”),

<http://www.olelo.hawaii.edu/khuok/mhhd.php>. [<https://perma.cc/F9QV-GN9G>]

¹⁴ The state motto is *Ua mau ke ea o ka ‘āina i ka pono* (attributed to King Kamehameha III and translated literally as “The sovereignty of the land is restored, as it should be,” but generally mistranslated as “The life of the land is perpetuated in righteousness.”). The state anthem (with Hawaiian lyrics) is Hawai‘i

Pono‘ī, composed by King David Kalākaua.

¹⁵ On the use of Hawaiian and non-Hawaiian place names in Hawai‘i, see R.D.K. Herman, *The Aloha State: Place Names and the Anti-conquest of Hawai‘i*, 89 ANNALS ASS’N AM. GEOGRAPHERS 76 (1999).

¹⁶ The program is called *Alana I Kai Ikina* (“Rising in the Eastern Sea”), on KWXX-FM, broadcast from Hilo, Hawai‘i.

¹⁷ The Native Hawaiian-owned and operated station is called ‘Ōiwi TV. ‘Ōiwi is the Hawaiian word for “native.”

¹⁸ *Instructions for SAP-Hawaiian Language*, MERRIE MONARCH FESTIVAL, <http://merriemonarch.com/instructions-sap-hawaiian-language>.

[<https://perma.cc/XH7D-2JLF>]

¹⁹ Paul F. Nahoia Lucas, *E Ola Mau Kākou I Ka ‘Ōlelo Makuahine: Hawaiian*

Language Policy and the Courts, 34 HAW. J. HIST. 1, 12 (2000).

²⁰ With 18,610 self-reported speakers, Hawaiian ranks fifth in a list of languages other than English that people speak at home in Hawai‘i. RESEARCH AND ECONOMIC ANALYSIS DIVISION, DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT AND TOURISM, STATE OF HAWAII, DETAILED LANGUAGES SPOKEN AT HOME IN THE STATE OF HAWAII 8 (2016),

http://files.hawaii.gov/dbedt/census/acs/Report/Detailed_Language_March2016.pdf. [<https://perma.cc/FL9F-ROCR>] On the various categories of speakers of Hawaiian, see Matthias Brenzinger & Patrick Heinrich, *The Return of Hawaiian: Language Networks of the Revival Movement*, 14 CURRENT ISSUES LANGUAGE PLAN. 300, 306–09 (2013).

language, from the arrival of the missionaries in the 1820s to the years following statehood in 1959. Part III will trace the key steps taken towards the revitalization of the language during and after the Hawaiian renaissance. Part IV will examine the ways in which suppression of the language is still ongoing in the face of this revitalization. Part V will discuss a number of steps that might be taken to solidify the status of Hawaiian as an official language of Hawai‘i not just in theory, but also in practice.

II. The Colonialist Suppression of the Hawaiian Language

In what is generally known as the pre-contact period (i.e., before the arrival of the first Europeans in 1778), the Hawaiian language was entirely oral, and had no written form. It was rich, nuanced, and sophisticated, with words having a multitude of meanings (kaona), both literal and figurative, and it abounded in poetic concepts.²¹ Spoken words embodied a host of life forces (mana) with “significant physical and spiritual powers unknown in Western society.”²² The

language developed a long tradition of oral literature, including chants, prayers, histories, myths, and traditional sayings.²³ Traditional Native Hawaiian schooling took place first in the home and then through instruction via the equivalent of apprenticeships to elders. Apprentices were taught to “observe, listen, and imitate.”²⁴

The American missionaries²⁵ introduced Western-style formal schooling in 1824, but with Hawaiian as the initial medium of instruction.²⁶ The missionaries found it urgent to educate the natives as quickly as possible in order to save them from what they perceived to be superstitious and immoral ways through conversion to Christianity. In addition, they believed that they would risk losing control over the natives if the population at large were to acquire English proficiency. To this end, the missionaries found it simpler to learn Hawaiian themselves and then to teach the natives in their own language. It was the missionaries who created an alphabet for the language, based on English. Having brought a printing press with them to Hawai‘i, the missionaries were soon

producing instructional materials, newspapers, and a Bible, all in the Hawaiian language.

Despite the success of the Hawaiian-medium schools, as shown by the high levels of literacy among Native Hawaiian adults in the 1850s,²⁷ growing numbers of educators were advocating an “English mainly” policy by the middle of the century.²⁸ In 1839, the missionaries had already established the Royal School, which was the first English-medium school in Hawai‘i. This private school was intended to educate the Native Hawaiian elite (royalty and chiefs) who expressed a desire to learn a language that was quickly making its presence felt in the kingdom²⁹—not only due to the missionaries, but also because of the increasing influence of Westerners (largely Americans) in business and politics. Advocates of the “English mainly” policy viewed instruction in English as a logical response to the steadily increasing English-speaking population, the rapidly decreasing Native Hawaiian population (due to disease), the influx of immigrants, and the “heathen practices” of the Native Hawaiians that had persisted

²¹ Lucas, *supra* note 20, at 1–2.

²² *Id.* at 2.

²³ THE GREEN BOOK OF LANGUAGE REVITALIZATION IN PRACTICE 134 (Leanne Hinton & Ken Hale eds., 2001).

²⁴ NATIVE HAWAIIAN LAW, *supra* note 6, at 1261.

²⁵ The American Board of Commissioners for Foreign Missions, founded in 1810 in

Massachusetts, sent missionaries to Hawai‘i over a period of more than thirty years. These missionaries belonged to the United Church of Christ.

²⁶ Nu‘uhiwa, *supra* note 10, at 398.

²⁷ MAENETTE K.P. BENHAM & RONALD H. HECK, CULTURE AND EDUCATIONAL POLICY IN HAWAII‘I: THE SILENCING OF NATIVE VOICES 70 (1998).

²⁸ Lucas, *supra* note 20, at 4–5.

²⁹ Both King Kamehameha III and King Kamehameha IV publicly espoused the advantages of learning English, which they believed would allow Native Hawaiians to engage with Westerners on equal terms. NATIVE HAWAIIAN LAW, *supra* note 6, at 1264.

despite the missionaries' best efforts.³⁰ These advocates supported the establishment of English-medium government-run schools that would be open to all. These schools, which began operating in 1854, came to be better funded than the Hawaiian-medium schools and had more resources overall in terms of literature and teacher training.³¹ As a result, enrollments began to decline in the Hawaiian-medium schools. Growing numbers of Native Hawaiians started enrolling their children in the English-medium schools in order to take advantage of their superior resources. Even the Kamehameha Schools, founded later in the century (1887) for the education of Native Hawaiian children, began by using English as the sole medium of instruction. The decline of Hawaiian-medium schools increased through the latter half of the nineteenth century as the numbers of immigrants to Hawai'i increased, owing to the large-scale recruitment of workers for the sugar plantations. The children of immigrants were taught only in English-medium schools. By 1888, only 15.7 percent of all students were enrolled in Hawaiian-medium schools.³²

Although Hawaiian was an official language of government in Hawai'i throughout most of the nineteenth century, its status shifted over the years. A statute enacted in 1846 required all laws to be published in both Hawaiian and English.³³ Indeed, laws as well as all other government documents were bilingual, in order to meet the needs of both Native Hawaiians and Westerners.³⁴ The Hawai'i Supreme Court had even initially legitimized Hawaiian as the dominant language, but Hawaiian came to be perceived as ill-adapted to the uses of lawmakers and the courts.³⁵ In 1859, the Hawai'i legislature passed a law providing that the English version of any statute would be binding over the Hawaiian language version.³⁶ Reenacted six years later, the law provided that "[w]henver there exists a radical and irreconcilable difference between the English and Hawaiian versions of the laws of the Kingdom, the English version shall be held binding."³⁷ Although the legislature included both Native Hawaiian and American representatives, the former group was largely missionary-educated, a fact that may have "sway[ed] government decisions toward dominant

colonial activity."³⁸ By the end of the Kamehameha dynasty in the early 1870s, the legislature was publishing laws and documents in English first and having them translated into Hawaiian afterwards.³⁹

There were, to be sure, some voices of resistance to the growing dominance of English in the kingdom. In 1864, the Native Hawaiian head of the Board of Education severely criticized the legislature's practice of prioritizing English-medium schools over the Hawaiian-medium schools. He saw the preservation of the Hawaiian language as necessary for the kingdom's identity as a Native Hawaiian nation, but instruction in English was teaching Native Hawaiians to view their own language as inferior and not worth preserving.⁴⁰ There were even some missionaries who argued against these perceptions of the Hawaiian language as inferior.⁴¹

In the latter half of the nineteenth century, King David Kalākaua fostered a resurgence of Hawaiian culture⁴² in opposition to Western influences—yet this was met by counter-resistance on the part of government. Kalākaua sponsored efforts to permanently record ancient chants and genealogies in

³⁰ Nu'uhiwa, *supra* note 10, at 399.

³¹ Lucas, *supra* note 20, at 5–6.

³² NATIVE HAWAIIAN LAW, *supra* note 6, at 1265.

³³ Act of April 27, 1846, ch. 1, art. 1, sec. 5.

³⁴ JOHN E. REINECKE, LANGUAGE AND DIALECT IN HAWAII: A SOCIOLINGUISTIC

HISTORY TO 1935, 32 (Stanley M. Tsuzaki ed., 1969).

³⁵ *Id.*

³⁶ Civil Code of 1859, sec. 1493.

³⁷ Act of Jan. 10, 1865, sec. 1.

³⁸ BENHAM & HECK, *supra* note 25, at 50.

³⁹ REINECKE, *supra* note 32.

⁴⁰ NATIVE HAWAIIAN LAW, *supra* note 6, at 1267.

⁴¹ *Id.* at 1267–68.

⁴² This resurgence is sometimes referred to as the first Hawaiian renaissance, as opposed to the renaissance of the 1970s.

writing, supported performances of ancient music and hula, encouraged Native Hawaiian religious practices and ancient medicinal healing, and collected and preserved cultural artifacts.⁴³ In 1883, during Kalākaua's reign, the Hawai'i Supreme Court heard a case in which a non-Hawaiian printer was convicted of publishing a program of hula written in Hawaiian for Kalākaua's coronation.⁴⁴ The government deemed the hula to be obscene. The court reversed the conviction on the narrow grounds that the printer did not know Hawaiian and, therefore, had no criminal intent. The fact that the government criminalized the publication of Hawaiian and the court did not comment on the government's obscenity claim indicated that the "free and open exercise of Hawaiian" was clearly coming to an end.⁴⁵

The illegal overthrow of the Hawaiian Kingdom in 1893 by American businessmen (a number of whom belonged to missionary families), with the aid of military forces, dealt a crippling blow to the Hawaiian language. In 1896, the government of the new Republic of Hawai'i implemented an "English only" policy by enacting a law establishing English as the exclusive medium of

instruction in both public and private schools.⁴⁶ This law effectively banned all non-English languages (not just Hawaiian) as a medium of instruction. As an "English only" advocate observed, "With this knowledge of English will go into the young American republican and Christian ideas; and as this knowledge goes in, kahunaism, fetishism and heathenism generally will largely go out."⁴⁷ Since education in a language is crucial for language survival, the survival of the Hawaiian language was now put to an extreme test. In 1880, there were as many as 150 Hawaiian-medium schools still in operation.⁴⁸ Prior to the 1896 law, there were seventy-seven; after 1896, only one of these schools remained.⁴⁹ By 1902, it was gone.⁵⁰ The very act of speaking Hawaiian was forbidden and severely punished in schools; teachers even paid home visits to reprimand parents for speaking Hawaiian to their children in their own homes.⁵¹ The Organic Act of 1900, which was enacted two years after the U.S. annexation of Hawai'i, ensured the dominance of English in the new Territory of Hawai'i by providing that all government business was to be conducted in English only.⁵²

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These "English only" laws were part of the federal government's broader effort at the time to eradicate the indigenous languages of Native Americans on the mainland, which included the removal of children to English-medium boarding schools.⁵³ The goal of this "English only" policy was to assimilate, eradicate native cultures, and promote national unity via the creation of a national character; in addition, it had the added purpose of protecting indigenous people in their business dealings and transforming them into good citizens.⁵⁴

After annexation, the Hawaiian language entered a linguistic dark age that was to last for a good part of the twentieth century. The language went underground and largely found refuge in some churches, particularly in sermons and various church publications.⁵⁵ A small group of ministers from these churches taught the language at the University of Hawai'i for a

⁴³ *Id.* at 1268–69.

⁴⁴ *The King v. Grieve*, 6 Haw. 740 (1883).

⁴⁵ Lucas, *supra* note 20, at 8.

⁴⁶ Act of June 8, 1896, ch. 57, sec. 30.

⁴⁷ Lucas, *supra* note 20, at 8.

⁴⁸ ALBERT J. SCHÜTZ, *THE VOICES OF EDEN: A HISTORY OF HAWAIIAN LANGUAGE STUDIES* 352 (1994).

⁴⁹ David Barnard, *Law, Narrative, and the Continuing Colonialist Oppression of Native Hawaiians*, 16 TEMP. POL. & C.R. L. REV. 1, 33 (2006).

⁵⁰ SCHÜTZ, *supra* note 49.

⁵¹ Lucas, *supra* note 20, at 9.

⁵² Organic Act of April 30, 1900, ch. 339, §44, 31 Stat. 141 (1900).

⁵³ Nu'uhiwa, *supra* note 10, at 407–08.

⁵⁴ *Id.* at 408.

⁵⁵ Lucas, *supra* note 20, at 9–10.

period of thirty years.⁵⁶ Yet the churches were unable to sustain the language for long, as the Hawaiian-speaking ministers died one by one and there were no qualified individuals to take their place.⁵⁷ The language also disappeared from the public media. While over a hundred Hawaiian-language newspapers had been published since 1834, there was only one remaining in circulation by 1948.⁵⁸ Moreover, there was no place for Hawaiian on the radio or on television.⁵⁹ There were attempts in 1919 and 1935 to reintroduce the language into the schools by amending the 1986 law. But Hawaiian was to be reintroduced as a course of instruction rather than as a medium of instruction, and in the form of woefully inadequate lessons lasting ten minutes a day.⁶⁰ Reversing the practice of a century of bilingual publication, the legislature enacted a statute in 1943 that required laws to be published in English only.⁶¹ When Hawai‘i became a state in 1959 and tourism developed into a booming industry, the influx of English-speaking visitors and the commodification and debasement of Native Hawaiian culture for the benefit of these visitors only further reinforced the “English only”

imperative in both education and government.⁶²

III. The Revitalization of the Hawaiian Language

The revitalization of the Hawaiian language towards the end of the twentieth century began with acts of formal recognition by the supreme law of the state. The heightened public attention brought to Native Hawaiian culture and identity by the renaissance of the 1970s laid the foundations for three crucial amendments to the Hawai‘i State Constitution in 1978. These amendments support, both directly and indirectly, the preservation and promotion of the Hawaiian language. First, Article XV, Section 4 recognizes Hawaiian as an official language of the state: “English and Hawaiian shall be the official languages of Hawai‘i, except that Hawaiian shall be required for public acts and transactions only as provided by law.” This amendment gives what appeared to be legal status to a language that had been driven underground for almost a century and was rendered nearly extinct. Granted, the amendment includes a disclaimer to the effect that despite its official status, Hawaiian is not automatically deemed a language of

government. Instead, the amendment allows for exceptions, “as provided by law,” to the rule that English remains the language of government in Hawai‘i.

Second, Article X, Section 4 affirms the state’s commitment to promoting Native Hawaiian culture through educational programming in the public schools:

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.

This amendment acknowledges the importance of including Native Hawaiian culture in the public school curriculum.⁶³ While the amendment does not explicitly mandate instruction with the Hawaiian language actually used as a medium of instruction, it does clearly provide for the study of the language.⁶⁴

⁵⁶ NATIVE HAWAIIAN LAW, *supra* note 6, at 1273.

⁵⁷ *Id.*

⁵⁸ Lucas, *supra* note 20, at 9.

⁵⁹ *Id.*

⁶⁰ *Id.* at 10; Ka‘ano‘i Walk, “Officially” *What? The Legal Rights and Implications*

of ‘Ōlelo Hawai‘i, 30 U. HAW. L. REV. 243, 250 (2008).

⁶¹ 1943 Haw. Sess. Laws, ch. 218, sec. 1.

⁶² THE GREEN BOOK, *supra* note 24, at 135.

⁶³ In 1978, a semester-long course in modern Hawaiian history (1778–present)

became a requirement for graduation from a public high school. Wilson (1999), *supra* note 2, at 100.

⁶⁴ In contrast with the history requirement, a language requirement was not something that could be implemented immediately, due to a lack of qualified

Third, Article XII, Section 7 asserts the state's commitment to protecting various Native Hawaiian rights: "The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural, and religious purposes and possessed by ahupua'a⁶⁵ 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." This amendment covers the rights enjoyed by the ancient Native Hawaiians before European contact, including cultural rights. Granted, the amendment includes a disclaimer regarding the state's prerogative to "regulate such rights," which appears to limit the reaffirmation and protection of these rights asserted at the beginning of the section.

The renewed interest in revitalizing the Hawaiian language led to the establishment of the first Hawaiian-language immersion preschools in the early 1980s. Native Hawaiian parents seeking to raise their children to speak Hawaiian as their first

language gathered together in 1983 to establish a nonprofit organization, 'Aha Pūnana Leo, Inc. ("Language Nest Corporation") for the purpose of Hawaiian-medium instruction.⁶⁶ The organization created the first Pūnana Leo immersion preschool in the following year, modeled after the successful Maori language preschools Te Kohango Reo in Aotearoa (New Zealand).⁶⁷ Additional preschools opened in 1985.⁶⁸

Because of the 1896 "English only" law, however, these initial Pūnana Leo immersion preschools did not operate under the auspices of the state Department of Education. As a result of intense lobbying efforts by 'Aha Pūnana Leo, the state legislature passed an amendment in 1986 to the 1896 law, allowing special projects using the Hawaiian language with approval by the state Board of Education.⁶⁹ The Board itself then approved a pilot Hawaiian Language Immersion Program in 1987 for children wishing to continue with their immersion in the language after graduating from the Pūnana Leo preschools.

This pilot program, called Papahana Kula Kaiapuni, was gradually extended over the years, one grade per year, to grade 12.⁷⁰ The goals of this pilot program were "to assist the Hawaiian-speaking families in the revitalization of the language and culture and maintain usage of the language, to assist those families who wish to integrate into the Hawaiian-speaking community by eventually replacing their home language with Hawaiian for future generations, and to assist those families who wish to use Hawaiian as a second or third language in interacting with the Hawaiian-speaking community."⁷¹ In 1999, the first class of students to have received a K-12 education taught entirely in Hawaiian received their high school diplomas.⁷² In 2011, reports indicated that Hawaiian immersion students were maintaining a 100% graduation rate from high school, with over 80% going on to higher education.⁷³ By 2015, twenty-one immersion schools across

instructors. Indeed, "short lessons in colours, body parts and greetings" were decidedly not what proponents had in mind. *Id.* at 100–101.

⁶⁵ The ahupua'a was the traditional Hawaiian pie-shaped land division, extending from the mountains all the way down to the seashore. Under the rule of a chief and under supervision by an overseer, the common people maintained the ahupua'a, which was self-sufficient due to the sustainable resources that it provided.

⁶⁶ *Timeline, supra* note 7. On the advantages of Hawaiian-medium education, see William H. Wilson & Kauanoie Kamanā, "For the Interest of the Hawaiians Themselves": Reclaiming the Benefits of Hawaiian-Medium Education, 3 HŪLILI 153 (2006); Keiki K.C. Kawai'ae'a, Alohalani Kaluhiokalani (Kaina) Housman & Makalapua (Ka'awa) Alencastre, *Pū'ā i ka 'Ōlelo, Ola ka 'Ohana: Three Generations of Hawaiian Language Revitalization*, 4 HŪLILI 183 (2007).

⁶⁷ Lucas, *supra* note 20, at 11; Nu'uhiwa, *supra* note 10, at 416–17.

⁶⁸ *Timeline, supra* note 7.

⁶⁹ Haw. Rev. Stat. sec. 298-2(b) (1993).

⁷⁰ Lucas, *supra* note 20, at 11.

⁷¹ Lucas, *supra* note 20, at 11.

⁷² *Timeline, supra* note 7.

⁷³ *Celebrating Success of Hawaiian Immersion Schools*, HAWAII ISLAND JOURNAL, <http://www.hawaiiislandjournal.com/2011/06/celebrating-success-of-hawaiian-immersion-schools/>.

the state were educating about 2,000 students each year.⁷⁴

“These charter schools provide students with an education that emphasizes Native Hawaiian culture and values.”

A network of seventeen public Native Hawaiian charter schools has also developed, partly out of a desire for autonomy from the traditional public school system and for the freedom to explore innovative pedagogical methods. These charter schools provide students with an education that emphasizes Native Hawaiian culture and values.⁷⁵ While the instruction in some of these schools is in English, six of these schools are actual Hawaiian language immersion schools.⁷⁶

In the 1990s, the revitalization of the Hawaiian language received legal validation through Congress. The federal Native American Languages Act (NALA), enacted in 1990, encourages the preservation and promotion of native languages by encouraging children to be educated in their own language.⁷⁷ The Act applies to Native Americans, Native

Alaskans, Aleut peoples, Native Hawaiians, and descendants of the aboriginal peoples of Pacific islands that are U.S. possessions or territories. Pursuant to § 2904 of the Act, “[t]he right of Native Americans to express themselves through the use of Native American languages shall not be restricted in any public proceeding, including publicly supported education programs.” The federal Native Hawaiian Education Act (NHEA), enacted in 1994, has the goal of improving educational opportunities for Native Hawaiians and restoring the linguistic integrity of the Hawaiian language.⁷⁸ The Native Hawaiian Education Council, which implements programs under the NHEA, is comprised of members recommended by the Native Hawaiian community. The Council awards grants to Native Hawaiian educational and community-based organizations engaged in projects supporting Native Hawaiian education. Hawaiian-medium classroom instruction is on the list of prioritized projects eligible for these grants.

“The resolution thus grants implicit approval for future efforts to repair the relationship between the United States and the descendants of subjects of the kingdom.”

In 1993, Congress passed an Apology Resolution in official recognition of the illegal overthrow of the Hawaiian Kingdom in 1893.⁷⁹ This joint resolution acknowledges the “historical significance of this event which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people.”⁸⁰ The resolution also notes the public apology granted in the same year by the United Church of Christ (the church of the missionaries sent to Hawai‘i), which acknowledged its “historical complicity” in the illegal overthrow.⁸¹ The resolution expresses Congress’ “commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawai‘i, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people.”⁸² By acknowledging Native Hawaiian suppression and the need for reconciliation between

⁷⁴ Nu‘uhiwa, *supra* note 10, at 417. For a list of these immersion schools, see *Kaiapuni schools—Hawaiian language immersion*, HAWAII STATE DEPARTMENT OF EDUCATION, <http://www.hawaiipublicschools.org/TeachingAndLearning/StudentLearning/HawaiianEducation/Pages/Hawaiian-language-immersion-schools.aspx>.

⁷⁵ For an overview of the development and philosophy of these Native Hawaiian

charter schools, see Nina K. Buchanan, Robert A. Fox, Susan Leigh Osborne & C. Puanani Wilhelm, *Kua O Ka Lā: A Hawaiian Culturally Focused Charter School*, in *PROUD TO BE DIFFERENT: ETHNOCENTRIC NICHE CHARTER SCHOOLS IN AMERICA* 21, 28–33 (Robert A. Fox & Nina K. Buchanan eds., 2014).

⁷⁶ *Kaiapuni schools*, *supra* note 75.

⁷⁷ Native American Languages Act, 25 U.S.C. §§ 2902 et seq.

⁷⁸ Native Hawaiian Education Act, 25 U.S.C. §§ 7511 et seq.

⁷⁹ Joint Resolution, 103d Congress, Nov. 23, 1993, Publ. L. No. 103-150, 107 Stat. 1510.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

Native Hawaiians and their colonial oppressor, the resolution thus grants implicit approval for future efforts to repair the relationship between the United States and the descendants of subjects of the kingdom. The illegal overthrow was a colonial act that led directly to the legal prohibition of the Hawaiian language in the schools as well as in government. Therefore, the resolution arguably apologizes as well for this legal prohibition of the language.⁸³ While the resolution does include a disclaimer asserting that “[n]othing in this Joint Resolution is intended to serve as a settlement of any claims against the United States,”⁸⁴ the resolution’s official gesture towards reconciliation efforts is nonetheless significant.

IV. The Ongoing Suppression of the Hawaiian Language

A. Education

While neither the federal nor state government generally cannot enact laws restricting the use of non-English languages,⁸⁵ the government does not necessarily have an affirmative duty to provide non-English speakers with programs and/or services in their own language.⁸⁶ Indeed, the Hawai‘i state Board of

Education has not recognized any affirmative duty to fully fund the Hawaiian language immersion schools. The Board’s official position in 1997 was that the program is a program of choice and not of right.⁸⁷ Therefore, the immersion schools can and do receive funds if they are available, but not at the expense of other public schools and school programs where English is the medium of instruction.

A lack of adequate funding and support for the Hawaiian immersion schools gave rise in the 1990s to a legal challenge to the state Department of Education (DOE). At stake was the potential for such funding and support, in the form of curriculum materials and teacher training, to put the immersion schools on a level equaling or exceeding English-language instruction in the public schools. In *Office of Hawaiian Affairs v. Department of Education*, 951 F. Supp. 1484 (D. Haw. 1996), the Office of Hawaiian Affairs claimed that the DOE’s failure to provide sufficient support and resources for the immersion schools violated both state law and the Native American Languages Act (NALA). The State argued that OHA’s claim under NALA should be dismissed because

NALA creates no enforceable rights or implied private right of action: in other words, NALA does not impose an affirmative duty on the state to provide what OHA requested.

The court ruled in favor of the DOE. It found that § 2904 of NALA provides that the “right of Native Americans to express themselves through use of Native American languages shall not be restricted in any public proceeding, including publicly supported education programs.” However, the court did not see this provision as creating an enforceable right: “at most it prevents the state from barring the use of Hawaiian languages in schools.”⁸⁸ Yet the court failed to consider the historical context for the decline of Hawaiian-medium schools in the nineteenth century—particularly the fact that English-medium schools were better funded and enjoyed superior resources in comparison.⁸⁹ The court also failed to acknowledge the skepticism (and even hostility) of certain DOE administrators and school principals regarding the viability of the Hawaiian immersion schools.⁹⁰ The refile of portions of the OHA’s lawsuit in 1998 led to a settlement in 2000 for increased funding for the immersion schools over the

⁸³ Summer Kupau, *Judicial Enforcement of “Official” Indigenous Languages: A Comparative Analysis of the Māori and Hawaiian Struggles for Cultural Language Rights*, 26 U. HAW. L. REV. 495, 520 (2004).

⁸⁴ *Id.*

⁸⁵ See, e.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923).

⁸⁶ See, e.g., *Guadalupe Organization, Inc. v. Tempe Elementary School District No. 3*, 587 F.2d 1022 (9th Cir. 1978).

⁸⁷ *Lucas*, *supra* note 20, at 12.

⁸⁸ *Office of Hawaiian Affairs v. Department of Education*, 951 F. Supp. 1484, 1495 (D. Haw. 1996).

⁸⁹ NATIVE HAWAIIAN LAW, *supra* note 6, at 1278.

⁹⁰ *Id.*

next five years, with the OHA partially matching funds allocated by the DOE.⁹¹

“The immersion schools as well as the Native Hawaiian charter schools have also come into conflict with the No Child Left Behind Act (NCLB) of 2001.”

The immersion schools as well as the Native Hawaiian charter schools have also come into conflict with the No Child Left Behind Act (NCLB) of 2001.⁹² The charter schools in particular have the autonomy to use innovative and culturally based pedagogical methods, but these methods do not meet the goals of the NCLB, which are based on standardization.⁹³ The immersion schools have also encountered problems with the NCLB’s standardized testing requirements. Although these schools formally introduce English into the curriculum at a later stage than do English language schools, the NCLB assessment tests in English are still required for all students at the same time.⁹⁴ There has been ongoing experimentation with standard assessment tests translated into Hawaiian, but with mixed results. In 2015, the DOE received a one-year waiver from the U.S. Department of Education that

allowed third and fourth graders to take assessment tests written in Hawaiian.⁹⁵

B. Government

The right to use the Hawaiian language in the courtroom was the subject of a legal challenge in 1994, sixteen years after Hawaiian was designated an official language in the state constitution. In *Tagupa v. Odo*, 843 F. Supp. 630 (D. Haw. 1994), a bilingual Native Hawaiian attorney (fluent in both Hawaiian and English) contested a court order requiring him to give his oral deposition in English for an employment discrimination lawsuit. He claimed that he had the right to give the deposition in Hawaiian. He argued that this right came from Article XV, Section 4 of the state constitution (recognizing Hawaiian as an official language) and from NALA (recognizing the right of Native Americans to express themselves through the use of Native American languages is not restricted in public proceedings).

“The right to use the Hawaiian language in the courtroom was the subject of a legal challenge in 1994, sixteen years after Hawaiian was designated

an official language in the state constitution.”

The court ruled against the plaintiff. It rejected the argument based on the state constitution, holding that Article XV, Section 4 “provides little guidance” for the court to determine whether there indeed existed a right to give a deposition in Hawaiian.⁹⁶ The court also held that it was not Congress’ intent to extend the reach of NALA, a statute that dealt primarily with education, to judicial proceedings in federal courts.⁹⁷ In addition, the court decided that allowing depositions in Hawaiian would result in unnecessary delays and expenses involved in finding qualified interpreters. Because the plaintiff was bilingual and spoke English, it was more expedient for him to give his deposition in English.⁹⁸ The court thus found practical concerns to be controlling. Ultimately, the court found that “a definitive judicial determination of this issue is better left to the Hawaii state courts.”⁹⁹ However, no state courts have yet interpreted the legal effect of Article XV, Section 4. The discouraging message conveyed by the *Tagupa* decision is that “language revitalization and perpetuation efforts end in the

⁹¹ *Id.*

⁹² No Child Left Behind Act, 20 U.S.C. §§ 6301 et seq.

⁹³ NATIVE HAWAIIAN LAW, *supra* note 6, at 1280.

⁹⁴ *Id.*

⁹⁵ *E ola ka ‘ōlelo Hawai‘i: Assessment tests in Hawaiian language granted federal waiver*, OFFICE OF HAWAIIAN AFFAIRS, <http://www.oha.org/news/assessment-tests-in-hawaiian-language-granted-federal-waiver/>.

⁹⁶ *Tagupa v. Odo*, 843 F. Supp. 630, 631 (D. Haw. 1994).

⁹⁷ *Id.* at 632.

⁹⁸ *Id.* at 631.

⁹⁹ *Id.*

schools and homes, with no place in the government and the courts.”¹⁰⁰

The holding in *Tagupa* stands in contrast with the holding in the 2003 case *Commonwealth of the Northern Mariana Islands v. Guerrero*.¹⁰¹ In this case, the appellant sought to overturn his conviction on the grounds that the trial court did not allow him to use the Chamorro language during trial. The appellant based his right to use Chamorro on Article XXII, Section 3 of the Commonwealth Constitution, which designates Chamorro as an official language of the Northern Mariana Islands, along with Carolinian and English. The Supreme Court of the Northern Mariana Islands reversed the trial court, holding that a native speaker of Chamorro or Carolinian has the constitutional right to speak that language in court.¹⁰² Indeed, this right applies even if that native speaker is fluent in English as well—as was the appellant in *Guerrero*.

The *Tagupa* holding also stands in contrast with the legal situation regarding the indigenous Māori language (Te Reo Māori) in Aotearoa (New Zealand).¹⁰³ The Treaty of Waitangi Act of 1975¹⁰⁴ created the Waitangi Tribunal,

which had the authority to investigate Māori claims under the 1840 Treaty of Waitangi (by which Māori tribes arguably ceded sovereignty to England). The Tribunal recommended that official recognition of Te Reo Māori must be more than “mere tokenism . . . those who want to use our official language on any public occasion or when dealing with any public authority ought to be able to do so.”¹⁰⁵

Although the court in *Mihaka v. Police* (1980) held that English was the official language of the courts,¹⁰⁶ Te Reo Māori can now be used in any legal proceeding, thanks to ensuing legislation. The Treaty of Waitangi Amendment Act of 1985¹⁰⁷ allowed the Tribunal to investigate claims dating back to the Treaty of 1840. The resulting Tribunal’s Report of 1986 on the Te Reo Māori claim considered whether the New Zealand Crown was obligated to preserve Te Reo Māori under the 1840 Treaty.¹⁰⁸ The Māori Language Act of 1987 established the expressed right to speak Te Reo Māori in legal proceedings, regardless of the speaker’s English proficiency.¹⁰⁹ This Act generated a number of court decisions, culminating in

Wharepapa v. Police in 2002.¹¹⁰ In this case, the court held that a person “ought not to be presumed to have committed an offence merely because he is speaking a language other than English, particularly when the language being spoken is an official language of New Zealand.”¹¹¹

V. Hawaiian as an Official Language of Hawai‘i

What does the future portend for the Hawaiian language as an official language of the state? Having stepped back from the brink of extinction, the language has made remarkable progress over the past forty years. Yet the fact remains that despite the ever-increasing numbers of individuals who now speak and write Hawaiian in immersion schools and in their homes, Hawaiian is not the language of government or the courts. Forty years ago, of course, it could not have been so. Today, the 18,000 individuals who identify Hawaiian as the language they speak at home show that it is a living language, and it is thriving. If the same kind of progress continues, the number of Hawaiian language speakers will only grow. The question, then, remains as to what it will

¹⁰⁰ Kupau, *supra* note 84, at 500.

¹⁰¹ *Commonwealth of the Northern Mariana Islands v. Guerrero*, 2003 MP 15.

¹⁰² *Id.* ¶ 10.

¹⁰³ For a comparative analysis of the revitalization movements for the Māori and the Hawaiian languages, see Kupau, *supra* note 84.

¹⁰⁴ Treaty of Waitangi Act, 1975 (N.Z.).

¹⁰⁵ WAITANGI TRIBUNAL, DEP’T OF JUSTICE, REPORT OF THE WAITANGI TRIBUNAL ON THE TE REO MAORI CLAIM (Wai 11) § 8.2.8 (1986) (N.Z.).

¹⁰⁶ *Mihaka v. Police*, [1980] 1 N.Z.L.R. 460.

¹⁰⁷ Treaty of Waitangi Amendment Act, 1975 (N.Z.).

¹⁰⁸ WAITANGI TRIBUNAL, *supra* note 103.

¹⁰⁹ Māori Language Act, 1987 (N.Z.).

¹¹⁰ *Wharepapa v. Police*, [2002] N.Z.L.R. 611.

¹¹¹ *Id.* at 617.

truly mean for Hawaiian to be an official language of the state.

An important consideration with regard to this question involves the ways in which the state constitutional amendments of 1978 “can be used as a tool to increase benefits for Hawaiian speakers.”¹¹² Although the court in *Tagupa* found “little guidance” in Article XV, Section 4 of the state constitution, there have been proposals regarding possible ways of framing the amendments so as to build a case for the use of Hawaiian in government and in the courts.

Because the court in *Tagupa* reasoned that the plaintiff was not actually prevented from giving his deposition, albeit in a language that he did not want to use, a distinction has arisen between an individual’s right of self-expression and the cultural right of a people.¹¹³ While the court in *Tagupa* viewed the plaintiff’s fluency in English as a practical solution to an immediate problem and saw no violation of his right to self-expression and due process, it failed to consider the significance of using the Hawaiian language as a means of revitalizing both the language itself and the culture of the Native Hawaiian people. If the use of Hawaiian is framed as a cultural right, then

bilingualism is rendered meaningless: it would not matter whether an individual knows English or not.

“If the use of Hawaiian is framed as a cultural right, then bilingualism is rendered meaningless: it would not matter whether an individual knows English or not.”

There has been some discussion over how to affirm the cultural rights of Native Hawaiians by advocating for the traditional and customary rights of Native Hawaiians pursuant to Article XII, Section 7 of the state constitution. In *Public Access Shoreline Hawaii v. Hawai‘i County Planning Commission (PASH)*, 903 P.2d 1246 (Haw. 1995), the Hawai‘i Supreme Court held that the state was obligated to protect Native Hawaiians’ legitimate exercise of traditional access and gathering rights that had been established by 1892. Hawai‘i’s custom and usage law established English common law in Hawai‘i in 1892, with a special exception for existing Hawaiian judicial precedent or established usage.¹¹⁴ In effect, this law subordinated English and American common law to traditional and customary Native Hawaiian practices. The court in *PASH* reaffirmed all traditional and customary rights

existing under state law, and outlined “specific, although not necessarily exhaustive, guidelines” in interpreting the rights in Article XII, Section 7 of the state constitution.¹¹⁵ The right that is sought must be “reasonable” and “traditional” and in place prior to 1892.¹¹⁶ The state (or opposing party) must then show that some actual harm would result by implementation of this right.

The language of Article XII, Section 7 of the state constitution creates an enforceable right in ahupua‘a tenants (tenants of the traditional Hawaiian land division) choosing to practice their traditions and customs under state law. The amendment specifically refers to these traditions and customs as “all rights, customarily and traditionally exercised for subsistence, cultural, and religious purposes and possessed by ahupua‘a tenants.” It has been argued that because Article XII, Section 7 applies to “all rights,” it should apply to the use of the Hawaiian language, as it is a “well-documented and customary practice that has been exercised by Native Hawaiians for centuries.”¹¹⁷ The *PASH* holding might thus support the reaffirmation and protection of the traditional and customary practice of using Hawaiian in government and in the courts.¹¹⁸ Indeed, it can be

¹¹² Lucas, *supra* note 20, at 18.

¹¹³ Kupau, *supra* note 84, at 501; NATIVE HAWAIIAN LAW, *supra* note 6, at 1288.

¹¹⁴ HAW. REV. STAT. § 1-1 (2013).

¹¹⁵ *Public Access Shoreline Hawaii v. Hawai‘i County Planning Commission (PASH)*, 903 P.2d 1246, 1259 (Haw. 1995).

¹¹⁶ *Id.* at 1263.

¹¹⁷ Lucas, *supra* note 20, at 19.

¹¹⁸ *Id.*

argued that the right to use Hawaiian is already framed as a cultural right in the amendment. Analogized to the traditional and customary rights in PASH, the right to use Hawaiian could be an enforceable right as well.

In 2013, the Hawai‘i state legislature enacted the first bilingual statute in seventy years.¹¹⁹ Enacted to establish February as ‘Ōlelo Hawai‘i Month (“Month of the Hawaiian Language”) to “celebrate and encourage the use of Hawaiian language,” the statute was largely symbolic. But the historic gesture is significant. Even if the process is incremental, the revitalization of the Hawaiian language continues. As the first half of the Hawaiian proverb goes, “I ka ‘ōlelo nō ke ola.” (“Through language there is life.”)

¹¹⁹ Haw. Rev. Stat. § 8-24 (2013).