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## Not Because They are Brown, But Because of Ea\*: Why the Good Guys Lost in *Rice V. Cayetano*, and Why They Didn't Have to Lose

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NOT BECAUSE THEY ARE BROWN, BUT BECAUSE  
OF EA\*: WHY THE GOOD GUYS LOST IN  
RICE V. CAYETANO, AND WHY THEY  
DIDN'T HAVE TO LOSE

*Gavin Clarkson\*\**

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INTRODUCTION

During its 1999 Term the Supreme Court heard a case directly involving the status of Native Hawaiians for the first time in its

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\* The Native Hawaiian word *Ea* is often translated as “sovereignty,” but the term encompasses more than the traditional Western notion of sovereignty. The concept of *Ea* in the Hawaiian state motto, “Ua Mau Ke Ea O Ka ‘Aina I Ka Pono” (translated as “The sovereignty of the land is perpetuated in justice”) includes not only notions of sovereignty, but also the essence of Native Hawaiian life, which is intertwined with the land, *‘aina*, as well. See generally Troy M. Yoshino, *Voting Rights and the Native Hawaiian Sovereignty Plebiscite*, 3 MICH. J. RACE & L. 475 (1998). By convention, this article uses the term sovereignty, but in doing so intends to evoke the full meaning of *Ea*.

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history.<sup>1</sup> At issue was participation in the election of the board of trustees of the Office of Hawaiian Affairs (OHA), an agency that administers programs benefiting two subclasses of Hawaiian citizenry: "Hawaiians" and "Native Hawaiians."<sup>2</sup> The Hawaiian State Constitution limited the right to vote for the nine OHA trustees and the right to run in the statewide election for the position of OHA trustee to those two subclasses.<sup>3</sup> The Court held that because the definitions of these subclasses were racial rather than political in nature, the voting restrictions violated the Fifteenth Amendment.

At first glance it appears that the rights of yet another group of indigenous inhabitants of this nation were trampled upon. A closer inspection of the case reveals, however, that the Native Hawaiians were instead victims of a constitutionally faulty remedial infrastructure that was based on their race rather than their inherent sovereignty as indigenous people. The crux of the majority opinion was that the voting restrictions were both racially defined and imposed by the State, and thus were constitutionally impermissible.<sup>4</sup> Although the majority opinion does not elucidate acceptable alternatives, it implies that had the voting restrictions been based on membership in a Native Hawaiian political entity, and had that entity, rather than the State of Hawaii, been the administrator of the resources controlled by OHA, it is likely that the outcome would have been favorable to the Native Hawaiians. The constitutional defect identified by the majority was not an attempt to provide a measure of self-determination for Native Hawaiians but rather a faulty infrastructure that attempted to promote such self-determination as a function of race under the auspices of the State.

How this faulty infrastructure arose is in large part a function of history. Writing in dissent, Justice Stevens correctly admonished the majority that a proper decision required an understanding of the history of Native Hawaiians.<sup>5</sup> As Professor Frickey notes: "In federal Indian law, lawyerly analysis that is devoid of broader historical and theoretical perspectives leads to misleading conclusions about the determinacy and substance of

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1. The history of Hawaii did play a role in two prior Supreme Court decisions: *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (upholding statute intended to correct certain perceived evils of concentrated property ownership in Hawaii) and *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (takings case involving ancient Hawaiian fishpond), but the status of Native Hawaiians was not at issue in either case.

2. The statutory definitions of these two subclasses are racially defined. See *infra* Part III, note 108 (quoting HAW. REV. STAT. § 10-2 (2000)). Both out of respect and for the sake of convention, the author will capitalize Native Hawaiians throughout this paper, except where a statute or quotation uses an alternative capitalization.

3. See HAW. CONST. art. XII, § 5.

4. See *Rice v. Cayetano*, 528 U.S. 495, 521-22 (2000).

5. See *id.* at 534. (Stevens, J., dissenting).

what the law 'is' [or 'was'] at any given moment."<sup>6</sup> Part II of this Article therefore reviews the history of Native Hawaiians in the broader context of the history of federal Indian law,<sup>7</sup> focusing on the vacillating congressional policies regarding Indians and how those policies almost always treated Indian tribes as political entities rather than ethnic communities. Part III reviews and analyzes the procedural history of the *Rice* case and its resolution by the Supreme Court. Part IV concludes with the argument that constitutionally-permissible alternative methodologies exist for accomplishing the same objective of self-determination for Native Hawaiians.

### I. CONTEXTUAL PERSPECTIVE ON RELEVANT HISTORY

Although Justice Kennedy allocates more than half of the majority opinion to the history of Hawaii,<sup>8</sup> he does not place that history in the broader context of the history of federal Indian law. Much of the argument from both sides centers on whether Native Hawaiians can legally be treated as Indians by way of the jurisprudence that identifies Indian status as a political rather than a racial classification.<sup>9</sup> It is thus necessary to understand the legal history of Indian policy. Numerous parallels exist between the treatment of Native Hawaiians on the islands and the treatment of Indians on the mainland. In several instances, however, the timing of major developments in Hawaiian history worked to the detriment of Native Hawaiians because of the character of Indian policy at the time. Like most renditions of the history of Indian law, this section is organized according to the different eras of federal Indian law and policy.<sup>10</sup>

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6. Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1767 (1997) (commenting on the status of Native Hawaiians in response to Benjamin, *infra* note 212).

7. For the purposes of this article, federal Indian law includes Supreme Court jurisprudence regarding Indian tribes as well as congressional and executive policy towards tribes, including Title 25 of the United States Code.

8. See *Rice*, 528 U.S. at 499–511.

9. See *Morton v. Mancari*, 417 U.S. 535, 554–55 (N.M. Dist. Ct. 1974); *infra* notes 99–102, 130–33 and accompanying text.

10. Most scholars analyze federal Indian law based on the historical periods that correspond with the prevailing policy towards Indians at that time: Pre-contact; Treaty Making and Removal (1789–1871); Allotment and Assimilation (1871–1928); Indian Reorganization (1928–1945); Termination (1943–1961); and Self Determination (1961–present). *E.g.*, FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* ch. 2 (1982). See also DAVID GETCHES ET AL., *FEDERAL INDIAN LAW* chs. 2, 3, & 4 (4th ed. 1998); ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW* 137–65 (3d ed. 1991); WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW* 10–32 (3d ed. 1998).

### A. Pre-Contact

Under the doctrine of discovery<sup>11</sup>, aboriginal peoples were typically viewed as heathen savages who, upon discovery, retained only limited “native title” to the lands they occupied, subject to the will of the sovereign that funded the discovery. Unlike the North American mainland, however, the Hawaiian Islands were isolated from Western European contact for centuries until 1778 when Captain James Cook arrived.<sup>12</sup> Each high chief, or *ali'i nui*,<sup>13</sup> controlled a district of an island or an entire island.<sup>14</sup> Local chiefs, the *ali'i* or *konohiki*,<sup>15</sup> controlled specific lands, and commoners, or *maka'ainana*,<sup>16</sup> worked them. Typically, lands were divided into parcels defined by boundaries radiating from a point high on a mountain-top down to the sea level, so as to enclose a drainage area. The parcel was known as an *ahupua'a*,<sup>17</sup> an economically self-sufficient tract of land that usually included forest resources, farmland, fresh water, and access to the sea.

Operation of the Hawaiian land tenure system somewhat resembled the feudal arrangements that prevailed in medieval Europe, because a portion of all that was produced went to the chiefs.<sup>18</sup> There were, however, significant differences.<sup>19</sup> Hawaiians considered land to be held for the common benefit.<sup>20</sup> If the *maka'ainana* believed that they were being treated unfairly, they could simply move to another *ahupua'a*, as they were not tied to the land.<sup>21</sup>

### B. Treaty Making and Removal (1789–1871)

As the newly-formed United States began its inexorable march westward, it developed a nearly insatiable appetite for more land. Unfortunately,<sup>22</sup> the Indians already occupied the land. To satisfy western

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11. See, e.g., *Johnson v. McIntosh*, 21 U.S. 543, 573 (1823). See also GETCHES, *supra* note 10, at ch. 2; COHEN *supra* note 10, at ch. 2, § A.

12. GETCHES, *supra* note 10, at 944.

13. See MELODY KAPILIALOHA MACKENZIE, *NATIVE HAWAIIAN RIGHTS HANDBOOK* 305 (1991).

14. The *ali'i nui* often fought amongst themselves for control of various territories, which resulted in periodic instability. See GETCHES, *supra* note 10, at 945.

15. See COHEN, *supra* note 10, at 798. See also MACKENZIE, *supra* note 13, at 306.

16. See MACKENZIE, *supra* note 13, at 307.

17. GETCHES, *supra* note 10, at 945; See also COHEN, *supra* note 10, at 798. See also MACKENZIE, *supra* note 13, at 305.

18. See COHEN, *supra* note 10, at 798; GETCHES, *supra* note 10, at 945.

19. See generally MACKENZIE, *supra* note 13, at 4.

20. GETCHES, *supra* note 10, at 945.

21. *Id.* at 945; See also COHEN, *supra* note 10, at 799; MACKENZIE, *supra* note 13, at 4.

22. That is, unfortunately for the Indians.

expansion goals, the Indian lands usually were not taken by force, but were instead ceded<sup>23</sup> to the United States by treaty in return for, among other things, the establishment of a trust relationship.<sup>24</sup> The federal government thus assumed a guardian-ward relationship with the Indians, not only because of prevailing racist notions of Indian societal inferiority<sup>25</sup> but also because the trust relationship was often consideration for the Indians'

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23. Tribes in the East were more likely to be removed to Oklahoma, whereas tribes in the West tended to have their land holdings reduced to smaller reservations. Compare Treaty of Dancing Rabbit Creek, Sept. 1830, reprinted in 2 CHARLES J. KAPPLER, INDIAN AFFAIRS, LAWS AND TREATIES 310 (1904) (signed by Choctaw leaders at *bok chukfi ahithac*—"the little creek where the rabbits dance"—providing for the removal from the ancestral homelands in Mississippi and Alabama to land in southeastern Oklahoma), with Fort Laramie Treaty, April 29, 1868, 15 Stat. 635, reprinted in FRANCIS PRUCHA, DOCUMENTS OF UNITED STATES INDIAN POLICY 109 (2000) (signed by the Sioux Nation at the conclusion of the Powder River War, establishing a reservation) [hereinafter "Fort Laramie Treaty"].

24. The scope of the trust relationship is multi-faceted. "Many treaties explicitly provided for protection by the United States." COHEN, *supra* note 10, at 65 n.38. See, e.g., Treaty with the Creeks, Aug. 7, 1790, art. 2, 7 Stat. 35, reprinted in KAPPLER, *supra* note 23, at 25 [hereinafter "Treaty with the Creeks"]; Treaty with the Kaskaskia, Aug. 13, 1803, art. 2, 7 Stat. 78, reprinted in KAPPLER, *supra* note 23, at 67 [hereinafter "Treaty with the Kaskaskia"]. See also *United States v. Kagama*, 118 U.S. 375 (1886)

These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive, and by Congress, and by this court, whenever the question has arisen.

*Id.* at 383–384.

Other treaties provided the means for subsistence. See, e.g., Fort Laramie Treaty, *supra* note 23 (providing for subsistence rations for the Sioux.); 1828 Treaty with the Western Cherokees, Art. 8, 7 Stat. at 313, reprinted in KAPPLER, *supra* note 23, at 290 [hereinafter "Treaty with the Western Cherokees"]; COHEN, *supra* note 10, at 81 ("[E]ach Head of a Cherokee family . . . who may desire to remove West, shall be given, on enrolling himself for emigration, a good Rifle, a Blanket, and a Kettle, and five pounds of Tobacco: (and to each member of his family one Blanket,) . . . a just compensation for the property he may abandon.").

25. See, e.g., *Johnson v. McIntosh*, 21 U.S. 590 (1823) ("But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness . . ."); *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) ("[Indians] are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."); *Worcester v. Georgia*, 31 U.S. 515, 588 (1832) (discussing the "humane policy of the government towards these children of the wilderness must afford pleasure to every benevolent feeling"). These three cases, often referred to as the "Marshall Trilogy," form much of the foundation for federal Indian law, particularly the notion of the guardian-ward relationship and the concept of Indian tribes as "domestic dependent nations." *Cherokee Nation*, 30 U.S. at 17.

relinquishment of land.<sup>26</sup> It is important to note that these treaties were always entered into as government-to-government relationships between the tribes as collective political entities and the United States.<sup>27</sup> “The United States from the beginning of its political existence recognized a measure of autonomy in the Indian bands and tribes. Treaties rested upon a concept of Indian sovereignty . . . and in turn greatly contributed to that concept.”<sup>28</sup>

In Hawaii, the situation was somewhat different. Perhaps “because of their geographic isolation and close proximity to one another, Native Hawaiians were able to unify to form a monarchy under King Kamehameha.”<sup>29</sup> Political unification was instrumental in dealing with the influx of foreigners who came to trade beginning in the nineteenth century.<sup>30</sup> In addition to preserving the “feudal” land tenure system,<sup>31</sup> the Hawaiian Kingdom furnished governmental leadership with which foreigners could deal and thereby encouraged foreign governments to enter into diplomatic relationships with Hawaii.<sup>32</sup>

Before long, however, the Hawaiian government began to encounter substantial foreign influence in its domestic affairs. Westerners gave advice to the government, “often unsought and often in the shadow of a foreign military presence.”<sup>33</sup> The land tenure system came under pressure as foreigners wanted land for themselves.<sup>34</sup> Originally, no formalized land titles existed since the property interests of the King, the chiefs, and the com-

26. See, e.g., Treaty with the Creeks, *supra* note 24; Treaty with the Kaskaskia, *supra* note 24; Treaty with the Western Cherokees, *supra* note 24; Fort Laramie Treaty, *supra* note 23.

27. See, e.g., Treaty with the Six Nations of October 22, 1784, *reprinted in PRUCHA supra* note 23, at 4; Treaty of Fort McIntosh of January 21, 1785, *reprinted in PRUCHA supra* note 23, at 5; Fort Laramie Treaty of September 17, 1851, *reprinted in PRUCHA supra* note 23, at 84 (referring to the United States and the Sioux collectively as “the aforesaid nations”).

28. FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY* 2 (1994).

29. COHEN, *supra* note 10, at 799. The availability of superior war-fighting technology is often credited with the rapid unification of the Hawaiian Islands within a few decades of Western contact. See, e.g., JARED DIAMOND, *GUNS, GERMS, AND STEEL* 64 (1997) (“After the arrival of Europeans, the Big Island’s King Kamehameha I rapidly proceeded with the consolidation of the largest islands by purchasing European guns and ships to invade and conquer [the other islands].”).

30. GETCHES, *supra* note 10, p. 945.

31. See *Rice*, 528 U.S. at 501 (“When Kamehameha I came to power, he reasserted suzerainty over all lands and provided for control of parts of them by a system described in our cases as ‘feudal.’”); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984); See also, *Kaiser Aetna v. United States*, 444 U.S. 164, 166–67 (1979).

32. 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, 313–14 (1994). See also *infra* notes 43–45.

33. GETCHES, *supra* note 10, at 945.

34. See COHEN, *supra* note 10, at 799.

moners were intertwined.<sup>35</sup> Pressure from Westerners who wanted to own land in fee simple, however, resulted in a series of developments that forever transformed Hawaiian land tenure relationships.

In 1840, on the advice of Westerners, King Kamehameha III promulgated a written constitution. Significantly, the Constitution declared that the monarchy controlled the land of the kingdom for the benefit of the chiefs and the people who owned the land collectively.<sup>36</sup> Pursuant to this initial formal declaration clarifying land ownership in the kingdom, the "Great Mahele" of 1848 affected a division of the lands so that clear title could be determined and transferred. The *mahele*<sup>37</sup> required that the King quitclaim his interest in about 1.5 million acres of *ahupua'a* and other lands to 245 chiefs, designate another 1.5 million acres of government lands for "the chiefs and people of my Kingdom,"<sup>38</sup> and set aside one million acres of crown lands "for me and for my heirs and successors forever, as my own property exclusively."<sup>39</sup> The *mahele* thus vested title in the King and the chiefs and imposed descendency requirements on the crown lands, essentially creating an estate in fee tail.<sup>40</sup> Although the *mahele* did not accomplish many of its intended objectives,<sup>41</sup> it did lay the groundwork for the establishment of a trust relationship between Native Hawaiians and the United States in the future.<sup>42</sup>

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35. See *id.* at 798–99.

36. See *id.* at 799 n.14.

37. Literally "division." *Id.* at 799.

38. *In re Estate of Kamehameha*, 2 Haw. 715, 723 (1864).

39. *Id.* at 723.

40. See *id.* at 725–26 (ruling on the language of the *Mahele* and the accompanying descendency requirements). See also COHEN, *supra* note 10, at 800 n.15.

41. The common people never received lands as originally anticipated by the land commission that recommended the *mahele*. In fact, very little land ever reached individual commoners. An intended remedy for the concentration of land outside commoners' hands was the provision of an 1850 act that allowed tenants to apply for *kuleana*—small parcels that they actually cultivated, and a house lot. Many of those eligible for *kuleana* did not get them because they could not afford the survey costs or meet other requirements of the law. Less than one percent of Hawaii's land was actually distributed as *kuleana*. Not only did the *mahele* fail to distribute land widely among natives, it ultimately resulted in large amounts of some of the best Hawaiian land passing to foreigners. The *mahele* and the laws passed soon after it effectively lifted the restriction on alienation of property that had been imposed by the 1840 Constitution. Government lands and the crown lands then were sold whenever the King approved. The chiefs had incurred large debts that they paid with land. Some attempted plantation farming but failed and lost their land through mortgage foreclosure. The King was free to sell, lease, or mortgage his crown lands as he pleased and the government sold considerable acreage, often at low prices. To check the loss of lands in this way the Hawaiian legislature, following a court decision ruling that crown lands would descend only to the successors of the King, declared in 1865 that crown lands were inalienable. GETCHES, *supra* note 10, at 946.

42. The lands set aside as crown and government lands eventually became the basis for a land trust for Native Hawaiians. See, e.g., Newlands Resolution, J. Res. 55, July 7, 1898, § 1, 30 Stat. 750; Admissions Act of 1959, Pub. L. No. 86–3, 73 Stat. 4 (1959).



Throughout the nineteenth century the Kingdom of Hawaii was acknowledged to be a sovereign and independent state within the international community. As such, it entered into numerous treaties with various foreign governments,<sup>43</sup> including the United States, which viewed Hawaii as part of the American continental system.<sup>44</sup> The *Rice* Court noted that a number of treaties were signed between the United States and the Kingdom of Hawaii during this period: "The first 'articles of arrangement' between the United States and the Kingdom of Hawaii were signed in 1826 . . . and additional treaties and conventions between the two countries were signed in 1849, 1875, and 1887."<sup>45</sup> It is important to note that all of the treaties between the United States and the Kingdom

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43. See generally Jennifer M.L. Chock, *One Hundred Years of Illegitimacy: International Legal Analysis of the Illegal Overthrow of the Hawaiian Monarchy, Hawai'i's Annexation, and Possible Reparations*, 17 U. HAW. L. REV. 463, 464 nn.7-16 (1995) (citing Treaty of Friendship, Commerce and Navigation between Belgium and Hawai'i, Oct. 14, 1862, Belg.-Haw., 126 Consol. T.S. 329; Treaty between Denmark and Hawai'i, Oct. 19 1846, Den.-Haw., 100 Consol. T.S. 13; Treaty of Friendship, Commerce and Navigation between Hawai'i and Sweden, July 1, 1852, Haw.-Swed., 108 Consol. T.S. 217; Treaty of Friendship, Commerce and Navigation between Hawai'i and Netherlands, Oct. 14, 1862, Neth.-Haw., 126 Consol. T.S. 343; Treaty of Friendship, Commerce and Navigation between Italy and Sandwich Islands, July 22, 1863, Italy-Haw., 128 Consol. T.S. 109; Treaty of Friendship, Commerce and Navigation between Hawaiian Islands and Spain, Oct. 29, 1863, Haw.-Spain, 128 Consol. T.S. 251; Treaty of Friendship, Establishment of Commerce between Hawai'i and Switzerland, July 20, 1864, Haw.-Switz., 129 Consol. T.S. 333; Convention of Commerce and Navigation between Hawai'i and Russia, June 19, 1869, Haw.-Russ., 139 Consol. T.S. 351; Treaty of Commerce and Navigation between Hawai'i and Japan, Aug. 19, 1870, Haw.-Japan, 141 Consol. T.S. 447; Treaty of Commerce and Navigation between Austria-Hungary and Hawai'i, June 18, 1875, Aus.-Hung.-Haw., 149 Consol. T.S. 305; Convention between Hawai'i and Portugal for the Provisional Regulation of Relations of Friendship and Commerce, May 5, 1882, Haw.-Port., 160 Consol. T.S. 209).

44. See GETCHES, *supra* note 10, at 947. In 1842, U.S. Secretary of State Daniel Webster wrote "that the Government of the [Hawaiian] Islands ought to be respected; that no power ought either to take possession of the islands as a conquest, or for the purpose of colonization; and that no power ought to seek for any undue control over the existing [g]overnment." RALPH S. KUYKENDALL, *A HISTORY OF HAWAII* 157 (1945). Later, U.S. Secretary of State James Blaine would elucidate the U.S. position on the status of Hawaii as a sovereign state within the American continental system:

This policy has been based upon our belief in the real and substantial independence of Hawai'i. The government of the United States has always avowed and now repeats that, under no circumstances, will it permit the transfer of the territory or sovereignty of these islands to any of the European powers.

ALICE FELT TYLER, *THE FOREIGN POLICY OF JAMES G. BLAINE* 198 (1927).

45. *Rice*, 528 U.S. at 504 (citations omitted). The court omitted mention of the treaty between Hawaii and the United States that was signed in 1842. Perhaps the reason was that in the 1842 treaty, President Tyler explicitly recognized the sovereignty of the Kingdom of Hawaii and declared it United States policy to support Hawaiian independence. See RICH BUDNICK, *STOLEN KINGDOM: AN AMERICAN CONSPIRACY* 14 (1992). See also Pub. L. No. 103-150, 107 Stat. 1510 (1993).

of Hawaii treated Native Hawaiians as a collective political entity, not as an ethnic group.

*C. Allotment and Assimilation (1871–1928)*

During this next period on the mainland Congress ceased making treaties with the Indians<sup>46</sup> and instead embarked on a concerted program to destroy tribalism and assimilate Indians as individuals into the dominant society.<sup>47</sup> This policy involved taking collectively-owned lands away from tribes and allotting parcels to individual tribal members (and selling the surplus at bargain prices to non-Indians).<sup>48</sup> Although anti-Indian prejudices undoubtedly contributed to the passage of the General Allotment Act of 1887,<sup>49</sup> historians agree that the Act was primarily “pushed through Congress, not by western interests greedy for Indian lands, but by eastern [liberals] who deeply believed that communal landholding was an obstacle to the civilization they wanted the Indians to acquire . . . .”<sup>50</sup> These liberals believed that “[p]ride of ownership . . . would generate individual initiative . . . and bring material and cultural advancement” for the Indians.<sup>51</sup> Prominent liberal James Bradley Thayer of Harvard Law School enthusiastically praised the Dawes Act—designed to sever the individual from the tribal collective—as a “great, far-reaching, and beneficent” achievement.<sup>52</sup>

In an address to Congress in 1901, President Theodore Roosevelt expressed his sense of the assimilation policy:

[T]he time has arrived when we should definitely make up our minds to recognize the Indian as an individual and not as a member of a tribe. The General Allotment Act is a

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46. Treaty making with the Indians was ended by Congress in 1871: “[H]ereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent, nation, or power with whom the United States may contract by treaty . . . .” Abolition of Treaty Making, 16 Stat. 544, 566 (1871), *reprinted in* PRUCHA, *supra* note 23, at 135. For timeline purposes it is worth noting that the end of treaty-making with the Indians was within a few years of the last treaty signed with the Kingdom of Hawaii.

47. See GETCHES, *supra* note 10, at 141.

48. *Id.*

49. 24 Stat. 388 (1887). The statute is also known as the Dawes Act after Senator Henry L. Dawes of Massachusetts. While the Dawes Act represented the final, full-scale realization of the allotment policy, many treaties made with western tribes from 1865 to 1868 provided for allotment in severalty of tribal lands. See ROBERT WINSTON MARDOCK, *THE REFORMERS AND THE AMERICAN INDIANS* 212 (1971).

50. FRANCIS PAUL PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 669 (1984).

51. MARDOCK, *supra* note 49, at 22.

52. James Bradley Thayer, *The Dawes Bill and the Indians*, *THE ATLANTIC MONTHLY*, Mar. 1888, at 315.

mighty *pulverizing engine* to break up the tribal mass [acting] directly upon the family and the individual . . . .<sup>53</sup>

The Allotment Era was thus marked by aggressive policies intended to “pulvarize” the communal political identity of the native peoples on the mainland. During this same period, however, the Kingdom of Hawaii was itself overthrown and annexed. The United States did not subsequently identify Native Hawaiians as a separate political entity, for to do so would have been inconsistent with the overall policy of destroying indigenous political sovereignty.<sup>54</sup>

By the 1880s, American officials had come to view the Kingdom of Hawaii as part of the American continental system,<sup>55</sup> meaning that the “kingdom had come under the virtual suzerainty of the United States.”<sup>56</sup> It was a colony in substance, if not in form, so that efforts by another foreign power, such as England or Japan, to colonize the islands would have been regarded as acts in defiance of the United States’ strategic interests in the Pacific.<sup>57</sup>

American officials and Presidents as far back as Ulysses S. Grant had suggested the idea of voluntary annexation of the kingdom by the United States,<sup>58</sup> but it was American merchants and missionary families that initiated the chain of events by which Hawaii formally became a territory of the United States. In 1887, having consolidated their economic gains into political dominance, these primarily American Westerners forced the resignation of the Prime Minister of the Kingdom of Hawaii and the subsequent adoption of a new “Bayonet Constitution.”<sup>59</sup> The Constitution

53. 15 MESSAGES & PAPERS OF THE PRESIDENTS 6672 (1901) (emphasis added); see PRUCHA, *supra* note 50, at 669, 669 n.26 (noting that the “mighty pulverizing engine for breaking up the tribal mass” language was originally used by Merrill E. Gates at the 1900 Lake Mohonk Conference).

54. At times, these tactics included attempts to destroy any vestige of cultural identity whatsoever within the Native Hawaiian community. See e.g., LILIKALA KAME’ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LA E PONO AI? 316 (1992) (“Once Hawai’i became an American territory in 1900, foreigners prohibited Hawaiian language and beat Hawaiian children for speaking it. As a result, we became ashamed to be Hawaiian.”). See also Jon M. Van Dyke, *The Political Status of the Hawaiian People*, 17 YALE L. & POL’Y REV. 95, 103 n.50 (1998).

55. See *supra* note 44.

56. GETCHES, *supra* note 10, at 947.

57. See e.g., TYLER, *supra* note 44 (comments of Secretary of State Blaine).

58. GETCHES, *supra* note 10, at 947.

59. So called because it was literally forced on the King at gunpoint (presumably with a bayonet attached to the end). The coup was achieved with the help of two armed, vigilante groups: the Honolulu Rifles and the Hawaiian League. See Taryn Ranae Tomasa, *Ho’Olahui: The Rebirth of A Nation*, 5 ASIAN L.J. 247 (1998).

greatly increased the foreigner's political role,<sup>60</sup> for example, by extending the right to vote to non-Hawaiians.<sup>61</sup>

Still unsatisfied, the Westerners launched an insurrection in January of 1893.<sup>62</sup> John Stevens, the United States Minister to Hawaii, ordered the United States Marines ashore in support of the insurrection and recognized the new provisional government even before Queen Lili'uokalani's lines of defense had surrendered.<sup>63</sup> Realizing the futility of fighting both the armed merchants and the United States Marines, the Queen,

under this protest and impelled by said force, [yielded her] authority until such time as the Government of the United States shall, upon the facts being presented to it, undo the action of its representative and reinstate [her] and the authority which [she] claim[ed] as the constitutional sovereign of the Hawaiian Islands.<sup>64</sup>

The insurrectionists' goal had been annexation by the United States,<sup>65</sup> but President Cleveland was unimpressed. Indeed, Cleveland was offended by the actions of the American Minister. He denounced the role of the American forces, calling for the restoration of the Hawaiian monarchy.<sup>66</sup> Attitudes changed with the next administration, however, and in 1898, President McKinley signed a Joint Resolution, sometimes called the Joint Newlands Resolution, to annex the Hawaiian Islands as a territory of the United States.<sup>67</sup> Under the terms of the Joint Resolution, the

60. See COHEN, *supra* note 10, at 800.

61. See *Rice*, 528 U.S. at 504.

Under the 1887 Constitution, the king was stripped of power and the Hawaiian government was run by a United States-dominated cabinet. King Kalakaua's displeasure with the bayonet constitution moved him to propose restoration of his power. Attempts to reach that goal were all unsuccessful. The presence of American military forces in Hawaii helped to discourage these efforts, and American and European ministers directly intervened to pressure the king to retreat from his position.

GETCHES, *supra*, note 10.

62. COHEN, *supra* note 10, at 800.

63. *Id.*

64. *Lili'uokalani v. United States*, 45 Ct. Cl. 418, 435 (1910).

65. COHEN, *supra* note 10, at 801.

66. See President's Message Relating to the Hawaiian Islands, H.R. EXEC. DOC. NO. 47 (2d Sess. 1893) ("But for the presence of the United States forces in the immediate vicinity and in position to afford all needed protection and support the committee would not have proclaimed the provisional government from the steps of the Government building. . . . [B]ut for the lawless occupation of Honolulu under false pretexts by the United States forces . . . the Queen and her Government would never have yielded. . . ."). President Cleveland also found "the provisional government lacked the popular support of the Native Hawaiian population." COHEN, *supra* note 10, at 801.

67. See COHEN, *supra* note 10, at 801.

Republic of Hawaii<sup>68</sup> ceded all former “public, Government, or Crown lands”<sup>69</sup> to the United States. The resolution further provided that revenues from the public lands were to be “used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.”<sup>70</sup> Two years later, “the Hawaiian Organic Act established the Territory of Hawaii, asserted United States control over the ceded lands, and put those lands ‘in the possession, use, and control of the government of the Territory of Hawaii . . . until otherwise provided for by Congress.’”<sup>71</sup> By the provisions of the Act, an estimated 1.75 million acres of former crown and government lands in which the Native Hawaiians claimed an interest following the *mahele*, became United States property. Just as it had with regard to the Pueblo, Navajo, and California Indians after the war with Mexico and the subsequent treaty of Guadalupe-Hidalgo,<sup>72</sup> the United States also inherited a trust responsibility with regard to Native Hawaiians at the moment of annexation.<sup>73</sup>

Although the stated policy of Congress was to destroy tribal cohesiveness, the existence of the trust responsibility prompted congressional action when the deteriorating economic conditions of the Native Hawaiians could not be ignored.<sup>74</sup> Rather than restoring the land base to a Native Hawaiian political entity, Congress enacted the Hawaiian Homes

68. The provisional government was later renamed The Republic of Hawaii. See COHEN, *supra* note 10, at 801.

69. J. Res. 55, July 7, 1898, § 1, 30 Stat. 750.

70. *Id.*

71. *Rice*, 528 U.S. at 505 (quoting Act of Apr. 30, 1900, ch. 339, § 91, 31 Stat. 159). It is clear from the statutory language that Congress was plainly aware that it had assumed a trust relationship with the Native Hawaiians.

72. See Treaty of Peace, Friendship, Limits, and Settlement between the United States of America and the Mexican Republic, 9 Stat. 922 (1848). See also United States v. Sandoval, 231 U.S. 28 (1913).

Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or *territory subsequently acquired*, and whether within or without the limits of a State.

*Id.* at 45–46 (emphasis added).

73. Just as the Pueblo, Navajo, and California Indians had been living under the foreign Mexican government, the Native Hawaiians had been living under the foreign (and arguably illegal) Republic of Hawaii.

74. Secretary of the Interior Lane testified before Congress that “the natives of the islands, who are our wards, I should say, and for whom in a sense we are trustees, are falling off rapidly in numbers, and many of them are in poverty.” H.R. REP. NO. 839, at 4 (2d Sess. 1920).

Commission Act (HHCA).<sup>75</sup> The Act created a system somewhat similar to allotment; whereby 200,000 acres of the land ceded to the United States at annexation were set aside for the purpose of leasing homesteads for a nominal fee to individual Native Hawaiians. According to Professor Williams, "The Hawaiian Homes Commission Act was remarkably similar in purpose and effect to the General Allotment Act. Both statutes submergered Congress's good intentions in the ambitions of others who coveted the lands. Both were poorly carried out, often giving their purported beneficiaries parcels of inarable land."<sup>76</sup> Significantly, the HHCA defined Native Hawaiians racially<sup>77</sup> rather than politically, because a collective political identification would have been inconsistent with the anti-tribal policies of the time. The "pulverizing engine" was, in effect, still running.<sup>78</sup>

#### D. *The Period of Indian Reorganization (1928–1945)*

By 1928 it was clear that the United States needed to change its policies towards tribal government structures. In response to the *Merriam Report*,<sup>79</sup> Congress passed the Indian Reorganization Act of 1934 (IRA), also known as the Wheeler-Howard Act.<sup>80</sup> The IRA completely repudiated the policy of allotment. The legislation allowed tribes to adopt constitutions and to reestablish structures for governance. Congress also

75. See Act of July 9, 1921, ch. 42, 42 Stat. 108 (1921).

76. GETCHES, *supra* note 10, at 949.

77. The Act defined Native Hawaiians to be "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." 42 Stat. 108 (1921). The sad irony of this restriction is that the blood quantum requirement was not an attempt by the Native Hawaiians to exclude others, but was rather incorporated at the urging of the sugar barons and ranching interests to ensure that only a limited number of Native Hawaiians could participate, thus leaving a larger surplus of land for ranching and sugar plantations. See Lesley Karen Friedman, *Native Hawaiians, Self-Determination, and the Inadequacy of the State Land Trusts*, 14 HAWAII L. REV. 519 (1992). In fact, an earlier version of the HHCA imposed only a 1/32 blood quantum requirement. See MACKENZIE, *supra* note 13, at 47. See also Rice, 528 U.S. at 532 n.8

[the] compromise between the sponsor of the legislation, who supported special benefits for 'all who have Hawaiian blood in their veins,' and plantation owners who thought that only 'Hawaiians of the pure blood' should qualify. [Eventually] the statute defined a 'native Hawaiian' as 'any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.'

*Id.* (citations omitted).

78. See *supra* note 53.

79. The *Merriam Report*, documenting the failure of federal Indian policy during the allotment period, was issued in 1928. The report's official title was INSTITUTE FOR GOVT. RESEARCH, STUDIES IN ADMINISTRATION, THE PROBLEM OF INDIAN ADMINISTRATION.

80. 25 U.S.C. § 461 *et seq.* (1994).

passed specific acts<sup>81</sup> to remedy the effects of certain policies that had been in place during the allotment era. The policies of the Allotment Era were established with the intention of destroying the governance structure of particular tribes, such as the Five Civilized Tribes in Oklahoma.<sup>82</sup> No one could deny that congressional policy had completely reversed itself—tribal sovereignty was now to be encouraged rather than destroyed. Many tribes began to thrive economically as a result. The IRA “provided a powerful stimulus to tribal governmental organization and in many cases so strengthened that organization as to enable continued development despite fluctuations in administrative policy.”<sup>83</sup>

Unfortunately for the Native Hawaiians, congressional focus on their plight and the subsequent passage of the HHCA predated the IRA by more than a decade. The HHCA was an allotment-era policy<sup>84</sup>—enacted when Congress still thought that the “civilization” of these indigenous savages required the destruction of their sense of autonomy and their identification as a separate political identity. Had the plight of Native Hawaiians been considered during the IRA era, congressional policy would have been to strengthen communal identity and native sovereignty. The resulting legislation might have recognized a Native Hawaiian political entity and fostered various exercises of Native Hawaiian sovereignty. In

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81. The Oklahoma Indian Welfare Act of 1936 (OIWA), 49 Stat. 1967 (codified as 25 U.S.C. § 503), “permitted Oklahoma Indians to take advantage of most of the provisions of the 1934 Wheeler-Howard Act, which ended allotments in severalty, allowed the re-establishment of communal lands, and permitted the organization of tribal governments with control over tribal funds.” *Morris v. Watt*, 640 F.2d 404 (1981) (decided as *Morris v. Andrus*, reflecting a change in the Secretary of the Interior).

82. The Curtis Act, Act of June 28, 1898, ch. 517, 30 Stat. 495, and the Five Tribes Act, Act of April 26, 1906, ch. 1876, 34 Stat. 137, were both designed to destroy tribal cohesiveness among the Choctaw, Chickasaw, Creek, Cherokee, and Seminole Nations. The Five Tribes Act was particularly brutal in its dismantling of any sense of political autonomy:

That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year: Provided, That no act, ordinance, or resolution (except resolutions for adjournment) of the tribal council or legislature of any of the said tribes or nations shall be of any validity until approved by the President of the United States: Provided further, That no contract involving the payment or expenditure of any money or affecting any property belonging to any of said tribes or nations made by them or any of them or by any officer thereof, shall be of any validity until approved by the President of the United States.

34 Stat. 137.

83. GETCHES, *supra* note 10, at 197.

84. See *supra* note 76.

this respect, the Native Hawaiians were victims of history. Deleterious anachronisms of congressional policy toward Native Hawaiians were not limited to the timing of the passage of the HHCA, however. Other historical anomalies would damage the cause of Native Hawaiian sovereignty during the next shift in congressional Indian policy.

#### E. *The Termination Period (1945–1961)*

After World War II, congressional policy towards the Indians reversed itself once again. A 1949 Report on Indian Affairs by the Hoover Commission recommended “an about-face in federal policy: ‘complete integration’ of the Indians should be the goal so that Indians [will] move ‘into the mass of the population as full . . . citizens.’”<sup>85</sup> The official congressional policy in 1953 was “to end [the Indians’] status as wards of the United States.”<sup>86</sup> For the tribes that were “terminated” under this policy, the results were disastrous.<sup>87</sup>

The tragic saga of the Native Hawaiians moved into its next phase during this termination period. In 1959, as part of the Hawaiian Statehood Act,<sup>88</sup> Congress delegated to the State of Hawaii the trust responsibility owed to the Native Hawaiians. Congress ceded 1.2 million acres of land to the State for five specified purposes, including: “The betterment of the conditions of Native Hawaiians, as defined in the Hawaiian Homes Commission Act.”<sup>89</sup> In authorizing the grant, the Act “recited that these lands, and the proceeds and income they generated, were to be held as a public trust . . .”<sup>90</sup> In addition, the new State of Hawaii “agreed to adopt the [HHCA] as part of its own Constitution.”<sup>91</sup> Unfortunately the Act’s constitutionally-defective racial categorizations carried over because identifying Native Hawaiians as a political entity would have been inconsistent with the termination policies of the time. Once again, historical anachronisms dealt Native Hawaiian sovereignty a crushing blow.

#### F. *The Era of Self Determination (1961–present)*

Just as Congress had reversed itself when it repudiated allotment and passed the IRA, the policy of termination was also short-lived. Ironically, as Professor Williams notes, termination had the opposite effect in its

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85. GETCHES, *supra* note 10, at 204.

86. H.R. Con. Res. 108, 83rd Cong. (1953).

87. See CANBY, *supra* note 10, at 26.

88. See Admissions Act of 1959, Pub. L. No. 86-3, 73 Stat. 4 (1959).

89. *Id.* at 6.

90. *Rice*, 528 U.S. at 507–08 (internal quotations omitted).

91. *Id.* at 507.



attempt to detribalize.<sup>92</sup> Indians finally recognized that federal policy too often was directed at destroying tribalism. From that perspective, they concluded “that only tribal control of Indian policy and lasting guarantees of sovereignty could assure tribal survival in the United States . . . .”<sup>93</sup> With the Kennedy and Johnson administrations’ abandonment of the termination policy, “programs such as the Economic Opportunity Act [were passed, which] recognized the permanency of Indian tribes and the importance of social investment in reservation communities.”<sup>94</sup>

President Nixon was arguably the most ardent supporter of Indian sovereignty and he issued a landmark statement calling for a new federal policy of “self-determination” for Indian nations.<sup>95</sup> Perhaps the greatest of Nixon’s contributions to Indian tribal sovereignty was Public Law 638, the Indian Self-Determination and Education Assistance Act of 1975,<sup>96</sup> which expressly authorized the Secretaries of Interior and Health and Human Services to contract with and make grants to Indian tribes and other Indian organizations for the delivery of federal services. Acting at times pursuant to federal court orders,<sup>97</sup> the Bureau of Indian Affairs (BIA)<sup>98</sup> even assisted tribes in reconstituting their tribal governance structures.

During this period the Supreme Court handed down *Morton v. Mancari*,<sup>99</sup> one of the most important Indian cases of the modern era. The opinion held that tribal Indians were “members of quasi-sovereign tribal entities”<sup>100</sup> and that Indian status was thus “political rather than racial in nature.”<sup>101</sup> *Mancari* involved the BIA’s hiring preference for Indians, but the Court has extended its holding to other areas of Indian policy as “long as the special treatment can be tied rationally to the fulfillment of

92. See GETCHES, *supra* note 10, at 224.

93. *Id.*

94. GETCHES, *supra* note 10, at 226.

95. Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R.Doc. No. 91-363, 91st Cong., 2d Sess. (July 8, 1970). See also The Indian Financing Act of 1974, Pub. L. No. 93-262, 88 Stat. 77 (1974) (codified as 25 U.S.C. §§ 1451-1453).

96. Pub. L. No. 93-638 (1994) (codified in 25 U.S.C. §§ 450a-450).

97. See e.g., *Harjo v. Kleppe*, 420 F.Supp. 1110, 1121 (D.D.C.1976), *aff’d sub nom.* *Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir.1978); *Morris v. Watt*, 640 F.2d 404 (1981). In both instances, the court order reinstated tribal constitutions from the 19th century. The BIA subsequently assisted the tribes in redrafting modern constitutions. See generally Gavin Clarkson, *Reclaiming Jurisprudential Sovereignty: A Tribal Judiciary Analysis*, 50 U. KAN. L. REV. 473 (2002), (HBS Working Paper No. 01-151).

98. The BIA is part of the Department of the Interior and is the primary agency responsible for managing Indian affairs, although other agencies such as the Department of Justice and Health and Human Services also have specialized departments for interaction with Indian tribes.

99. 417 U.S. 535 (1978).

100. *Id.* at 554.

101. *Id.* at 553 n.24.

Congress' unique obligation toward the Indians" and the policy "is reasonable and rationally designed to further Indian self-government."<sup>102</sup>

Congress was not silent with regards to Native Hawaiians during this period either.<sup>103</sup> In 1993, Congress passed a joint resolution acknowledging the one-hundredth anniversary of the January 17, 1893, overthrow of the Kingdom of Hawaii, with the participation of citizens and agents of the United States. Congress offered "an apology to Native Hawaiians on behalf of the United States" and called on the executive branch "to support reconciliation efforts between the United States and the Native Hawaiian people."<sup>104</sup>

The State of Hawaii also began to reexamine the situation of Native Hawaiians and in 1978 amended its Constitution to establish the Office of Hawaiian Affairs,<sup>105</sup> designating as its mission "the betterment of conditions of native Hawaiians . . . [and] Hawaiians."<sup>106</sup> A Native Hawaiian board of trustees manages OHA, receiving and expending the portion of income from trust lands that is allocable to Native Hawaiians.<sup>107</sup> The well-intentioned members of the Hawaiian legislature and the constitutional convention that established OHA did not make any concerted attempts to enter into a government-to-government relationship with a Native Hawaiian political entity or to recognize any element of Native Hawaiian sovereignty, perhaps because they were satisfied with the racial definitions

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102. *Id.* at 554. *See, e.g.,* Fisher v. District Court of Rosebud County, 424 U.S. 382, 390 (1976) (per curiam); United States v. Antelope, 430 U.S. 641, 645 (1977). *See also, e.g.,* Moe v. Confederated Salish & Kootenai Tribes 425 U.S. 463 (1976).

103. Numerous statutes mention Native Hawaiians. *See, e.g.,* the National Historic Preservation Act, § 4006(a)(6), 16 U.S.C.A. § 470a(d)(6) (West Supp. 1998); the National Museum of the American Indian Act, § 1-10, 13, 16, 20 U.S.C. §§ 80q-80q-12, 80q-15 (1994); the Drug Abuse Prevention, Treatment and Rehabilitation Act, § 4106(d), 21 U.S.C. § 1177(d) (1994) (defining the category of Native Americans as expressly including "Native Hawaiians"); Native American Languages Act, 25 U.S.C. §§ 2901-2912 (1994) (explicitly including Native Hawaiian languages); the Workforce Investment Act of 1998, § 29 U.S.C.A. § 2911 (West Supp. 1998); the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1994) (stating that the Native Hawaiian faiths are explicitly included in the subset of religions described in the statutory heading as "Native American"); the Native American Programs Act of 1974, 42 U.S.C. §§ 2991-2992 (1994); the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act, § 311(c)(4), 42 U.S.C. § 4577(c)(4); the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (1994) (extending protection to American Indian and Native Hawaiian burial sites). *See also* Van Dyke, *supra* note 54, at 106 n.67.

104. Pub. L. No. 103-150, 107 Stat. 1510 (1993). Note that Section 2 of the Apology Resolution defines Native Hawaiians politically in terms of their sovereignty: "As used in this Joint Resolution, the term 'Native Hawaiian' means any individual who is a descendent of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii." *Id.*

105. *See* HAW. CONST. art. XII, § 5 (1978).

106. Haw. Rev. Stat. § 10-3 (1993).

107. *See* HAW. CONST. art. XII, § 6 (1978).

of “Native Hawaiian” or “Hawaiian.”<sup>108</sup> Yet, these particular racially-based classifications would be the linchpin in the case against the racially-exclusive system of election of the OHA board of trustees.

## II. THE CASE OF *RICE V. CAYETANO*

Although OHA and related programs had “been in place for decades and [had often] proven themselves to be more divisive than beneficial”<sup>109</sup> within the Native Hawaiian community, it was litigation from outside the community that proved to be its greatest threat.

### A. Procedural History

The petitioner, Harold “Freddy” Rice, was a “citizen of Hawaii and a descendant of pre-annexation residents of the islands.”<sup>110</sup> He was not, however, a “descendant of pre-1778 native inhabitants, and so [was] neither ‘native Hawaiian’ nor ‘Hawaiian’ as defined”<sup>111</sup> by statute.<sup>112</sup> Rice applied to vote in the election for OHA trustees in March 1996, but in order “to register to vote for the office of trustee,” Rice was “required to attest: I am also Hawaiian and desire to register to vote in OHA elections.”<sup>113</sup> Because “Rice marked through the words ‘am also Hawaiian’ and then checked the form ‘yes,’” the State denied his application to vote.<sup>114</sup> Mr. Rice sued Benjamin Cayetano, the Governor of Hawaii, in the United States District Court for the District of Hawaii, on the grounds

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108. The term “Hawaiian” is defined by statute: “‘Hawaiian’ means any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii.” HAW. REV. STAT. § 10-2 (2000). The statute defines “native Hawaiian” as follows:

“Native Hawaiian” means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.

*Id.*

109. Eric Steven O’Malley, *Irreconcilable Rights and the Question of Hawaiian Statehood*, 89 GEO. L.J. 501, 536 (2001).

110. *Rice*, 528 U.S. at 510.

111. *Id.*

112. HAW. REV. STAT. § 10-2 (2000).

113. *Rice*, 528 U.S. at 510.

114. *Id.*

that the voting restriction violated the Fifteenth Amendment,<sup>115</sup> as well as the Fourteenth Amendment's Equal Protection Clause.<sup>116</sup>

Rice's primary argument was that the Fifteenth Amendment's command is clear and allows for no exceptions or excuses.<sup>117</sup> According to the Amendment, "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race."<sup>118</sup> Rice contended that "[d]espite the plain terms of the Fifteenth Amendment and more than a century of this Court's jurisprudence, the State of Hawaii has imposed a stark race-based restriction on the right to vote in statewide elections for officials who distribute public funds."<sup>119</sup> Rice further argued that "[t]his flagrant racial discrimination in the voting booth plainly violates the Fifteenth Amendment's guarantee of race-neutral voting laws and is patently offensive."<sup>120</sup> Rice argued that nothing could salvage the OHA voting structure. Neither the beneficial motives of the state, the "special limited purpose" of the elections, nor the attempt to label the voting restriction as a political—as opposed to a racial—classification was sufficient to cure the alleged constitutional defect.<sup>121</sup>

Rice's second argument was that the voting scheme violated the Fourteenth Amendment's Equal Protection Clause.<sup>122</sup> Rice maintained that the race-based voting restriction could not withstand strict scrutiny, and that no lesser form of scrutiny was appropriate.<sup>123</sup> In essence, Rice's position was that Native Hawaiians were not in the same position as Indian tribes on the mainland and therefore should not be treated as "Indians." If the Native Hawaiians were not "Indians," then the lesser scrutiny allowed by *Mancari*<sup>124</sup> could not be used in examining policies for Native Hawaiians.

The State argued that rational-basis judicial review was proper regarding the Hawaiian-only voting requirement, because Native Hawaiians were just as "native" as any other Native Americans.<sup>125</sup> In the State's view, because the history of interaction between Native Hawaiians and the United States was similar to the history of other Native Americans, and

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115. See Brief for Petitioner at 13, *Rice v. Cayetano* 528 U.S. 495 (2000) (No. 98-818).

116. See *id.* at 28.

117. *Id.* at 13.

118. U.S. CONST. amend. XV.

119. Brief for Petitioner, *supra* note 115, at 13.

120. *Id.*

121. See *id.* at 14–27.

122. See *id.* at 28.

123. See *id.* at 28–45. The Court generally applies rational basis scrutiny when reviewing congressional statutes affecting Native Americans. See *Morton v. Mancari*, 417 U.S. 535 (N.M. Dist. Ct. 1974).

124. See *Mancari*, 417 U.S. 535; see also Brief for Petitioner, *supra* note 115, at 28–49.

125. See Brief for Respondent at 15, *Rice v. Cayetano*, 528 U.S. 495 (2000) (No. 98-818).

because Congress had repeatedly “extended to Native Hawaiians the same rights and privileges accorded to American Indian, Alaska[n] Native, Eskimo, and Aleut communities,”<sup>126</sup> rational-basis review was justified. Citing case law governing the Pueblos in New Mexico<sup>127</sup> and Alaskan Natives,<sup>128</sup> the State argued that Congress had “historically exercised its Indian-affairs power over indigenous people not organized into tribes in an anthropological sense, not recognized as tribes under then-prevailing definitions, or whose tribal status had been terminated . . . .”<sup>129</sup> Further, the State noted, the Supreme Court had upheld the use of this power.

The State’s objective in arguing that Native Hawaiians should be treated legally as Indians was to convince the district court to apply *Mancari*,<sup>130</sup> and find that the OHA voting restriction worked to fulfill the unique Congressional obligation toward Indians and to advance Indian self-governance. The State pointed out the Supreme Court’s recognition in *Mancari* that Congress has passed innumerable laws with respect to Native Americans. “If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.”<sup>131</sup> The State also pointed out that the Court has embraced the *Mancari* rationale for reviewing “legislation that singles out Indians for particular and special treatment”<sup>132</sup> and has found “the argument that [Indian] classifications are ‘suspect’ to be ‘untenable’.”<sup>133</sup>

The district court was persuaded by the State’s arguments, particularly those comparing Native Hawaiians to the Indian tribes of the continental United States.<sup>134</sup> The court found that the history of the islands and their people revealed the existence of a guardian-ward relationship with Native Hawaiians and compared that relationship to the one between the United States and the Indian tribes in granting summary

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126. *Id.* at 31 (quoting 20 U.S.C. § 7902(13)).

127. *See United States v. Joseph*, 94 U.S. 614, 617 (1876). *See also United States v. Sandoval*, 231 U.S. 28 (1913).

128. *See Morton v. Ruiz*, 415 U.S. 199 (1974). *See also Alaska v. Native Village of Venetie Tribal Gov’t*, 522 U.S. 520 (1998).

129. Brief for Respondent, *supra* note 125, at 31–32.

130. 417 U.S. 535.

131. Brief for Respondent, *supra* note 125, at 25 (quoting *Mancari*, 417 U.S. at 552).

132. *Id.* (quoting *Mancari*, 417 U.S. at 554–55 and citing *Duro v. Reina*, 495 U.S. 676, 692 (1990); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 673 n.20 (1979) (quoting *Mancari*); and *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500–01 (1979) (same)).

133. Brief for Respondent, *supra* note 125, at 26 (citing *Confederated Bands*, 439 U.S. at 501).

134. *See Rice v. Cayetano*, 963 F.Supp. 1547 (D. Hawai’i 1997).

judgment.<sup>135</sup> The court granted the qualification for voting the same latitude as legislation relating to Congress' power over Indian affairs.<sup>136</sup> The court held that the voting requirement was "rationally related to the State's responsibility under the Admission Act to utilize a portion of the proceeds from the [trust] lands for the betterment of Native Hawaiians." Accordingly, the district court declared that the voting restriction was constitutional and did not violate the ban on racial classifications.<sup>137</sup>

The Court of Appeals for the Ninth Circuit affirmed, pointing out that Rice had not challenged the constitutionality of OHA and its programs.<sup>138</sup> Seeking to preserve "the trusts and their administrative structure as [it found] them, and assum[ing] that both are lawful," the court held that the State of Hawaii "may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be."<sup>139</sup> The fact that the Hawaiian Constitution and implementing statutes "contain a racial classification on their face"<sup>140</sup> was not sufficiently persuasive to justify invalidating the voting restrictions.<sup>141</sup>

The Supreme Court granted certiorari,<sup>142</sup> and numerous amicus curiae briefs were filed on both sides. The Office of the Solicitor General, on behalf of the United States, filed one of the strongest briefs supporting the OHA race-based voting restriction. This brief advanced two points: (1) "Congress has concluded that it has a trust responsibility to Native Hawaiians precisely because it bears responsibility for the destruction of their government and their loss of sovereignty over their land,"<sup>143</sup> and (2) "Congress does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous people of a once-sovereign nation as to whom the United States has established a trust relationship."<sup>144</sup>

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135. See *id.* at 1551-54.

136. See *id.* at 1554-55 (citing *Mancari*, 417 U.S. at 555).

137. *Id.* at 1555.

138. See *Rice v. Cayetano*, 146 F.3d 1075, 1079 (9th Cir. 1998).

139. *Id.*

140. *Id.*

141. See *id.* at 1081.

142. See *Rice v. Cayetano*, 146 F.3d 1075 (9th Cir. 1998), *cert. granted*, 526 U.S. 1016 (1999).

143. Amicus Brief of the Solicitor General at 9, *Rice v. Cayetano*, 528 U.S. 495 (2000) (No. 98-818).

144. *Id.* at 10.

### B. *The Decisions*

Voting seven to two, the Court reversed the Ninth Circuit, holding that the OHA voting restriction violated the Fifteenth Amendment.<sup>145</sup> The Court issued four separate opinions. Justice Kennedy delivered the opinion of the Court, joined by Justices Rehnquist, O'Connor, Scalia, and Thomas. Justice Breyer authored a concurring opinion joined by Justice Souter. Justices Stevens and Ginsberg each wrote dissenting opinions, with Justice Ginsberg joining part of Justice Stevens' dissent.

#### 1. The Majority Opinion

Part I of the majority opinion presented a brief review of the history of the Hawaiian Islands. Part II discussed the historical development of the remedial federal and state structures put in place for the benefit of Native Hawaiians. Although Justice Kennedy's historical review consumed more than six pages, the opinion did not address the sovereignty exercised by Native Hawaiians prior to the illegal coup in 1893, nor did it examine the relevant history within the broader context of federal Indian law.<sup>146</sup> The basis for the majority opinion was presented in Part III. There, Justice Kennedy summarized the Court's understanding of the Fifteenth Amendment:

The purpose and command of the Fifteenth Amendment are set forth in language both explicit and comprehensive. The National Government and the States may not violate a fundamental principle: They may not deny or abridge the right to vote on account of race.<sup>147</sup>

The Court then rejected the argument that the OHA voting restrictions were not racial but rather ancestral in nature, declaring that “[a]ncestry can be a proxy for race. It is that proxy here.”<sup>148</sup>

Part IV of the majority opinion discussed the various arguments made by the State in support of the OHA voting restrictions. The Court first rejected the argument that the voting restriction was valid under prior Supreme Court decisions “allowing the differential treatment of certain members of Indian tribes.”<sup>149</sup> The Court determined that if this argument were valid, it would require the treatment of Native Hawaiians as “tribes.” The Court, however, did not resolve that issue: “[E]ven were we to take the substantial step of finding authority in Congress, delegated to

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145. See *supra* Part II.

146. *Rice*, 528 U.S. at 524.

147. *Id.* at 511–12.

148. *Id.* at 514.

149. *Id.* at 518

the State, to treat Hawaiians or native Hawaiians as tribes, Congress may not authorize a State to create a voting scheme of this sort."<sup>150</sup>

For the majority, the fatal flaw in OHA's remedial infrastructure was the fact that OHA was a state agency:

Although it is apparent that OHA has a unique position under state law, it is just as apparent that it remains an arm of the State . . . . [T]he elections for OHA trustee are elections of the State, not of a separate quasi-sovereign, and they are elections to which the Fifteenth Amendment applies. To extend *Mancari* to this context would be to permit a State, by racial classification, to fence out whole classes of its citizens from decision making in critical state affairs. The Fifteenth Amendment forbids this result.<sup>151</sup>

Thus, although Congress has the authority to pass laws regarding Indian tribes, and although that authority includes acknowledging tribes as quasi-sovereign entities, the Court found that Congress does not have the authority to allow states to violate constitutional provisions.<sup>152</sup> The OHA elections were not held by a tribe but rather by the State. Although tribal elections are exempt from the Fifteenth Amendment,<sup>153</sup> states are not. Ultimately, then, any quasi-sovereign status that the Native Hawaiians might enjoy was irrelevant to the case at hand.

The Court also did not agree that the OHA elections were "special, limited purpose" elections and thus exempt from constitutional restrictions on voting procedures.<sup>154</sup> The Court gave two reasons for rejecting the argument that the State was simply ensuring "an alignment of interests between the fiduciaries and the beneficiaries of a trust."<sup>155</sup> First, the Court determined that although both Native Hawaiians and Hawaiians had

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150. *Id.* at 519.

151. *Id.* at 521-22.

152. *See id.*

153. The Supreme Court has repeatedly recognized the freedom of tribes from constitutional restraints against governmental action. *See generally* CANBY, *supra* note 10. While the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. § 1302 (1994), imposes many of the provisions of the Bill of Rights on tribes, ICRA does not include the restrictions found in the Fifteenth Amendment.

154. *See Rice*, 528 U.S. at 522. Previously the Supreme Court had declared that certain elections for special governmental entities, such as those for water or irrigation districts, were not subject to the "one person, one vote" rule if they were restricted only to those who might be affected by the regulations of the board. *Ball v. James*, 451 U.S. 355 (1981); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973). The State of Hawaii argued that this same theory applied to OHA elections because the votes would create a special state agency serving a special class. The Court took the position that the special purpose cases arose under the Fourteenth, not the Fifteenth Amendment. It did not consider discrimination on the basis of race in those cases.

155. *Rice*, 528 U.S. at 523.



equal votes in electing trustees, the two groups were not treated equally in the budget of OHA, thus creating rather than eliminating “a differential alignment between the identity of OHA trustees and what the State calls beneficiaries.”<sup>156</sup> Second, the majority found that:

[t]he State’s position rests, in the end, on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters. That reasoning attacks the central meaning of the Fifteenth Amendment. . . . All citizens, regardless of race, have an interest in selecting officials who make policies on their behalf, even if those policies will affect some groups more than others.<sup>157</sup>

The Court determined that, the State of Hawaii had created a voting restriction based on race and that it could not overcome the Fifteenth Amendment’s prohibition of such a restriction.

## 2. The Concurring Opinion

Justice Breyer filed a concurring opinion, which Justice Souter joined. The concurring Justices went much farther than the majority in attacking the rationale of the OHA voting structure. According to Justice Breyer, “Hawaii’s effort to justify its rules through analogy to a trust for an Indian tribe [must be rejected] because the record makes clear that (1) there is no ‘trust’ for native Hawaiians here, and (2) OHA’s electorate, as defined in the statute, does not sufficiently resemble an Indian tribe.”<sup>158</sup> For Justice Breyer, these two objections were sufficient “to destroy the analogy on which Hawaii’s justification must depend.”<sup>159</sup>

## 3. The Dissent

Justice Stevens filed a dissenting opinion, which Ginsburg joined in part, that began:

The Court’s holding today rests largely on the repetition of glittering generalities that have little, if any, application to

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156. *Id.*

157. *Id.*

158. *Id.* at 525 (Breyer, J., concurring). In particular, the concurring justices had significant, although misplaced, reservations about highly fractionated blood quantum participants in a tribal society. *See id.* at 526–27. For the analysis of the logical errors in the concurring opinion on this issue, *see infra* notes 181–84 and accompanying text (discussing the tribal membership of persons with small factions of Native-American blood).

159. *Rice*, 528 U.S. at 527 (Breyer, J., concurring).

the compelling history of the State of Hawaii. When that history is held up against the manifest purpose of the Fourteenth and Fifteenth Amendments, and against two centuries of this Court's federal Indian law, it is clear to me that Hawaii's election scheme should be upheld.<sup>160</sup>

Having correctly pointed out that the majority opinion lacked any sense of connectedness to the history of Hawaii and the trust responsibilities owed to Native Hawaiians, Justice Stevens proceeded to refute each of the majority's contentions, alluding often to concepts of indigenous sovereignty.<sup>161</sup> His ultimate conclusion that the racially-defined voting restriction was not constitutionally defective, however, was not grounded in the inherent residual sovereignty of Native Hawaiians. Instead, Justice Stevens based his holding on the appropriateness of classifying Native Hawaiians based on the color of their skin in furtherance of a remedial objective.

### C. Analysis

#### 1. The Majority Opinion

In presenting a rather formalistic analysis that led to a narrow holding on Fifteenth Amendment grounds, the majority suggested an alternative remedial infrastructure that would have avoided the constitutional defect that resulted in reversal.<sup>162</sup> In addressing the State's argument that *Mancari* allowed the State to treat Native Hawaiians differently, Justice Kennedy identified that defect as the State's establishment of a race-based voting scheme. The majority avoided directly deciding whether Congress had determined that Native Hawaiians could be treated like Indians from a policy standpoint,<sup>163</sup> but it did not deny that Congress could make that determination. The majority stated unequivocally that *Mancari* did not allow Congress to "authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens."<sup>164</sup> But the Court's Indian law jurisprudence is equally clear

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160. *Id.* at 527–28 (Stevens, J., dissenting).

161. *See id.* at 529, 532–33, 536–541, 542 n.14 (Stevens, J., dissenting).

162. *Id.* at 521–22. The majority also dismissed the two additional arguments, that the restrictions were analogous to special purpose districts and that the restrictions were intended to insure alignment of interests between the fiduciaries and beneficiaries of the trust, (*see supra* notes 154–57 and accompanying text) but did not provide any further insight on what sort of structure would be acceptable when it addressed those arguments.

163. *See id.* at 519.

164. *Id.* at 520.

under *Santa Clara Pueblo v. Martinez*<sup>165</sup> that tribes have broad authority to define their membership, including establishing ancestral requirements, and thus can control who can vote in an election based on ancestry.<sup>166</sup> Significantly, the majority indicated that if the entity in question, such as a Native Hawaiian polity, were “a separate quasi-sovereign,” either *Mancari* or *Santa Clara*<sup>167</sup> or both would apply. The constitutional defect would thus be eliminated, as the Fifteenth Amendment does not apply to tribal elections.<sup>168</sup>

## 2. The Concurring Opinion

Although finding that “OHA bears little resemblance to a trust for native Hawaiians,”<sup>169</sup> the concurring Justices suggested that a trust responsibility is still owed to Native Hawaiians<sup>170</sup> since “Native Hawaiians, considered as a group, may be analogous to tribes of other Native Americans.”<sup>171</sup> The problem, as Justice Breyer saw it, was that “the statute defines the electorate in a way that is not analogous to membership in an Indian tribe.”<sup>172</sup>

Justice Breyer reaffirmed that “a Native American tribe has broad authority to define its membership,”<sup>173</sup> but suggested that definitions of tribal membership should be limited to what is reasonable.<sup>174</sup> In his opinion, however, Justice Breyer was somewhat vague and inconsistent as to what reasonable tribal membership definitions might entail. In *Santa Clara*, cited by Justice Breyer, the children of a Navajo father and a Pueblo mother were denied Pueblo tribal membership because Pueblos are patrilineal.<sup>175</sup> It would seem that Justice Breyer was comfortable that such a

165. 436 U.S. 49 (1978).

166. *Id.* at 55.

167. *See Rice*, 528 U.S. at 519–22; *see also infra* note 175 and accompanying text.

168. *See Rice*, 528 U.S. at 520; *supra* note 153.

169. *Rice*, 528 U.S. at 525 (Breyer, J., concurring).

170. Although Justice Breyer contended that OHA was not a trust for Native Hawaiians, a trust responsibility owed to Native Hawaiians still existed even if OHA was not a proper embodiment of that trust responsibility. *See supra* notes 70–73 and accompanying text.

171. *Id.* at 526.

172. *Id.*

173. *Id.* at 527 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978)).

174. *See id.* Note that it is unclear from the text of his opinion whether Justice Breyer would impose his reasonableness limitations on all tribal membership definitions, or just those defined in state or federal statutes: “There must, however, be some limit on what is reasonable, at the least when a State (Which is not itself a tribe) creates the definition.” *Id.*

175. *Santa Clara*, 436 U.S. at 52. The children would also have been ineligible to be members of the Navajo Nation, since Navajos are matrilineal and matrilineal. In Navajo society, children “are ‘born of’ their mother’s clan. . . .” James W. Zion & Robert Yazzie,

membership determination was "reasonable," as well he should. The Court stated in *Santa Clara* that:

A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community. Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters.<sup>176</sup>

Justice Breyer seemed to have difficulty, however, with fractionated ancestral qualifications for tribal membership. As examples of reasonable tribal definitions, Justice Breyer first pointed to the Alaska Native Claims Settlement Act, citing the portion of the statute which conferred "Native" status to anyone

who is regarded as an Alaska Native by the Native village or Native group of which he claims to be a member and whose father or mother is . . . regarded as Native by any village or group (a classification perhaps more likely to reflect real group membership than any blood quantum requirement).<sup>177</sup>

Justice Breyer also cited the Constitution of the Choctaw Nation of Oklahoma,<sup>178</sup> which provides: "[T]he Choctaw Nation of Oklahoma shall consist of all Choctaw Indians by blood whose name appears on the original rolls of the Choctaw Nation approved pursuant to Section 2 of the Act of April 26, 1906 (34 Stat. 136) and their lineal descendants."<sup>179</sup> Justice Breyer seemed to have great difficulty with someone with 1/512th of Hawaiian blood being eligible to vote in the OHA elections,<sup>180</sup> yet his approval of the Choctaw membership policies neglected to mention that if original enrollees<sup>181</sup> at the beginning of the twentieth century had 1/32nd Choctaw blood, as many did,<sup>182</sup> their modern day descendants

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*Indigenous Law in North America in the Wake of Conquest*, 20 B.C. INT'L & COMP. L. REV. 55, 77 (1997).

176. *Santa Clara*, 436 U.S. at 72 n.32 (citation omitted).

177. *Rice*, 528 U.S. at 526 (quoting 43 U.S.C. § 1602(b) (1994)).

178. *Id.*

179. CHOCTAW CONST. of 1983, art. II, § 1.

180. *See Rice*, 528 U.S. at 527.

181. "Original enrollees" were tribal members whose names appear on the Dawes Rolls from the allotment era. *See supra* note 49.

182. On my paternal great-grandfather's roll page, there are thirteen tribal members listed with 1/32nd Choctaw blood. *See UNITED STATES COMMISSION TO THE FIVE CIVILIZED TRIBES, THE FINAL ROLLS OF CITIZENS AND FREEDMEN OF THE FIVE CIVILIZED TRIBES IN INDIAN TERRITORY 6* (1907).

would still be eligible for tribal membership even though their blood quantum could also be 1/512th<sup>183</sup> (applying the same assumptions Justice Breyer used with respect to Native Hawaiians).<sup>184</sup>

In essence, the concurring Justices arrived at the appropriate conclusion for the wrong reasons. The fixation on race is ill-founded when dealing with the political status of Indian tribal membership. The color of one's skin is not the determining factor for tribal membership; it is one's ancestry. For Indian tribes, ancestry need not be a proxy for race.

One way to distinguish Indians (and Native Hawaiians) collectively as a political, rather than a racial, entity is to focus on membership as a property right analogous to an estate in fee tail.<sup>185</sup> In matrilineal societies, such as the Navajo, membership is analogous to an estate in fee tail female;<sup>186</sup> whereas in patrilineal societies, such as the Pueblo, membership is analogous to an estate in fee tail male.<sup>187</sup> Rather than being considered racial in nature, blood quantum requirements for membership, such as with the Eastern Band of Cherokees,<sup>188</sup> can be viewed as analogous to estates in tail special<sup>189</sup> (i.e., membership is passed along to heirs so long as each heir has a threshold number of ancestors who were tribal members). The fee tail analogue is particularly suited to the situation of many Hawaiians given that several *ali'i* trusts were created when various lines of

183. A telephone interview with the tribal membership office confirmed that there are indeed tribal members with even lower blood quanta than 1/512th. Cf. *Native American Roots, Once Hidden, Now Embraced*, WASH. POST, Apr. 7, 2001, at A01 (noting that the Cherokee Nation of Oklahoma has members with as little as 1/4096th Indian blood).

184. Justice Breyer assumed nine generations between 1778 and the present, or approximately twenty-five years per generation. See *Rice*, 528 U.S. at 526.

185. The fee tail allows the owner of a property interest to ensure that the property remains within his family indefinitely. If O conveys a fee tail to A, then upon A's death the property will go to A's heir, then to that heir's heir, and so on. Neither A nor any of A's decedents may convey the property outside the family line. If they try to do so, then the property reverts to O's heirs. The property also reverts to O's heirs if A's blood line runs out. Although uncommon in modern property regimes, some form of fee tail is still enforced in Delaware, Maine, Massachusetts, and Rhode Island. See JOSEPH WILLIAM SINGER, *PROPERTY LAW* § 4.5.3.3 (2d ed. 1997).

186. See BLACK'S LAW DICTIONARY 1466 (7th ed. 1999) ("tail female").

187. See *id.* ("tail male"). The situation of a child with a Navajo father and Pueblo mother that was therefore unable to inherit membership from either parent was at issue in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

188. The Eastern Band of Cherokee Indians restricts enrollment to those whose "direct lineal ancestor[s] . . . appear on the 1924 Baker Roll of the Eastern Band of Cherokee Indians [and who] possess at least 1/16th degree of Eastern Cherokee blood." E. BAND OF CHEROKEE INDIANS, ENROLLMENT INFO, at <http://www.cherokee-nc.com/enroll.htm> (last visited Jan. 28, 2002). See also 25 C.F.R. § 75.6 (2000) (specifying 1/16 blood quantum requirement for additions to Eastern Cherokee roll of persons applying for membership on or after August 14, 1963). Note that other tribes, such as the Comanche, Kiowa, and Tonkawa tribes, require 1/4 blood quantum for membership. See OKLA. INDIAN LEGAL SERVS., TRIBAL MEMBERSHIP, at <http://thorpe.ou.edu/OILS/blood.html> (Apr. 1998).

189. See BLACK'S LAW DICTIONARY, *supra* note 186 ("tail special").

descendancy from Kamehameha I ended without any heirs.<sup>190</sup> These trusts, such as the Kamehameha Schools/Bishop Estate,<sup>191</sup> the Lili'uokalani Trust,<sup>192</sup> the Lunalilo Trust,<sup>193</sup> and the Queen Emma Trust,<sup>194</sup> all hold land for the benefit of Native Hawaiians.

Another analogue to ancestral requirements for tribal membership is the "Law of Return" of the State of Israel.<sup>195</sup> Under the Law of Return, which is facially matrilineal in nature, every Jew has "the right to come to Israel as an *oleh* [a Jew immigrating to Israel] and become an Israeli citizen. For the purposes of this Law, 'Jew' means a person who was born of a Jewish mother . . . ."<sup>196</sup> Since 1970 "the right to immigrate under this law has been extended to include the child and the grandchild of a Jew, the spouse of a child of a Jew and the spouse of the grandchild of a Jew."<sup>197</sup> Descendancy from a Jewish mother or grandmother therefore entitles one to Israeli citizenship, even if that mother or grandmother is not ethnically Jewish (such as an Ethiopian Jew). Similarly, lineal descendancy from a tribal member is the key requirement for tribal membership for many Indian tribes. In the contexts of Indian law and tribal membership, ancestry is not a proxy for race.

### 3. The Dissenting Opinions

Although Justice Stevens' dissent properly identified that a trust responsibility extends to Native Hawaiians,<sup>198</sup> he wrongly interpreted the *Mancari* decision as allowing their differential treatment without requiring tribal membership.<sup>199</sup> The oft-cited footnote twenty-four of *Mancari* clearly states that

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190. See *supra* notes 40–42 and accompanying text.

191. See MACKENZIE, *supra* note 13 at 281–84.

192. See *id.* at 284–86.

193. See *id.* at 286–87.

194. See *id.* at 288–89.

195. Israeli Ministry of Foreign Affairs, Law of Return 5710–1950, available at <http://www.mfa.gov.il/mfa/go.asp?MFAH00kp0> (last visited Jan. 28, 2002).

196. *Id.* at 5730–1970, § 4B.

197. Israeli Ministry of Foreign Affairs, *Acquisition of Israeli Nationality*, available at <http://www.mfa.gov.il/mfa/go.asp?MFAH00mz0> (last visited Jan. 28, 2002). Although the ancestral nature of the Law of Return is quite clear, the analogy breaks down somewhat because there is a further stipulation that for those that have converted to Judaism, the right to come to Israel as an *oleh* is only available to those who are "not a member of another religion." *Id.* However, for those individuals that fall in the ancestral category, ancestry alone would seem to be sufficient irrespective of that individual's religion.

198. *Rice*, 528 U.S. at 532. Justice Stevens also correctly noted the analogue between Native Hawaiians and the Pueblo Indians. *Id.* at 530.

199. *But see* Frickey, *supra* note 6, at 1762.

The preference is not directed towards a “racial” group consisting of “Indians”; instead, it applies only to members of “federally recognized” tribes. This operates to exclude many individuals who are racially to be classified as “Indians.” In this sense, the preference is political rather than racial in nature.<sup>200</sup>

Although Stevens would extend *Mancari*'s scope to encompass Native Hawaiians as a “racial” group, both the majority and a proper reading of *Mancari* would not.

Justice Stevens also misidentified *Delaware Tribal Business Comm. v. Weeks*<sup>201</sup> for the proposition that tribal membership is not required for *Mancari* coverage.<sup>202</sup> This mischaracterization is not surprising given that Stevens dissented in *Weeks*. The issue in *Weeks* involved the distribution of an Indian Claims Commission judgment in favor of the descendants of the historical Delaware Nation.<sup>203</sup> The Kansas Delawares were excluded from the distribution because they had “dissolve[d] their relations with their tribe.”<sup>204</sup> Not comprehending the difference between tribal members and non-member (but ethnic) Indians, Justice Stevens argued for the inclusion of non-member Indians in the distribution of tribal property. Then, as now, Stevens saw Indian status as racial, not political.

Refuting Justice Breyer's contention that defining a Native Hawaiian entity based on lineal descendance from pre-1778 residents is too broad to be “reasonable,” however, Justice Stevens correctly pointed out that “[f]ederal definitions of ‘Indian’ often rely on the ability to trace one's ancestry to a particular group at a particular time.”<sup>205</sup> As an example, he quoted a Bureau of Indian Affairs regulation defining persons of Indian descent as “‘descendants of such [tribal] members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation.’”<sup>206</sup> Pointing out the flaw in Breyer's argument, Justice Stevens wrote that “[i]t can hardly be correct that once 1934 is two centuries past, rather than merely 66 years past, this classification will cease to be ‘reasonable.’”<sup>207</sup>

Justice Stevens also suggested a property rights conceptualization of tribal membership in his hypothetical example of “a trust to manage Monticello . . . [where] the descendants of Thomas Jefferson should elect

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200. *Mancari*, 417 U.S. at 553 n.24

201. 430 U.S. 73 (1977).

202. *See Rice*, 528 U.S. at 532 n.6.

203. *See Weeks*, 430 U.S. at 75.

204. *Id.* at 78 (quoting Treaty with the Delaware Indians, July 4, 1866, U.S.-Del. Tribe of Indians, 14 Stat. 793). *See also* PRUCHA, *supra* note 28, at 275, 394.

205. *Rice*, 528 U.S. at 535–36 n.11.

206. *Id.* (quoting 25 C.F.R. § 5.1 (1999)).

207. *Id.* *See also supra* notes 181–84 and accompanying text.

the trustees.”<sup>208</sup> Invoking *Hodel v. Irving*,<sup>209</sup> Justice Stevens elaborated further on the property rights concept in response to Justice Breyer’s problem with fractionated blood quanta:

Indeed, “[i]n one form or another, the right to pass on property—to one’s family in particular—has been part of the Anglo-American legal system since feudal times.” Even the most minute fractional interests that can be identified after allotted lands are passed through several generations can receive legal recognition and protection. Thus, we held not long ago that inherited shares of parcels allotted to the Sioux in 1889 could not be taken without compensation even though their value was nominal and it was necessary to use a common denominator of 3,394,923,840,000 to identify the size of the smallest interest. Whether it is wise to provide recompense for all of the descendants of an injured class after several generations have come and gone is a matter of policy, but the fact that their interests were acquired by inheritance rather than by assignment surely has no constitutional significance.<sup>210</sup>

Although Justice Stevens alluded to a property rights view of tribal membership, he did not rely on it to support his argument that there was no constitutional defect in the OHA voting restriction. Were it not for the fact that the definitions at issue were facially racial in nature, most of Justice Stevens’ dissent is extremely persuasive. His ultimate conclusion, however, was based on a determination of the appropriateness of classifying Native Hawaiians racially in furtherance of a remedial objective rather than the inherent residual sovereignty of the Native Hawaiians themselves.

### III. EXPLORATION OF ALTERNATIVES

In the majority opinion, the Court cited a scholarly debate between professors Benjamin and Van Dyke.<sup>211</sup> In that debate, Professor Benjamin contends that only federally recognized tribes get the benefit of *Mancari*.<sup>212</sup> Professor Van Dyke counters that all “ethnic” aboriginal descendants get *Mancari*’s benefit;<sup>213</sup> a position which was also argued in Justice Stevens’

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208. *Rice*, 528 U.S. at 545.

209. 481 U.S. 704 (1987).

210. *Rice*, 528 U.S. at 545 n.16 (citations omitted).

211. *See id.* at 518–19.

212. *See* Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 *YALE L.J.* 537 (1996).

213. *See* Van Dyke, *supra* note 54, at 95.



dissent.<sup>214</sup> It is likely that both the positive and normative realities lie somewhere in between. At the moment, however, Native Hawaiians are less autonomous than Indian tribes because they have no political identity, and a political identity is necessary if Native Hawaiians are to enjoy a government-to-government relationship with either the state or federal government.<sup>215</sup> As Justice Stevens said, "it is a painful irony indeed to conclude that native Hawaiians are not entitled to special benefits designed to restore a measure of native self-governance because they currently lack any vestigial native government—a possibility of which history and the actions of this Nation have deprived them."<sup>216</sup>

At the core of the Native Hawaiians' defeat is the fact that the remedial infrastructure that was crafted to benefit them was based on a notion of racial, as opposed to political, identity. The State did not employ the original statutory concept of "Hawaiian" based on descendance from the aboriginal peoples who exercised sovereignty over the Hawaiian Islands in 1778. Instead, the State used a race-based definition of "Hawaiian" in order to restrict votes for OHA trustees. It may be permissible for a tribe to limit voting to members of a certain blood quantum, but the Court held that it is not appropriate for any state to do so. What, then, could have been done to give Native Hawaiians the degree of self-determination that OHA was intended to provide?

One possible solution is that Congress might recognize Native Hawaiians as a political entity. Native Hawaiians' interaction with state or federal governments would then be on a government-to-government basis; because the "validity of the voting restriction . . . [was] the only question before"<sup>217</sup> the *Rice* Court, if a Native Hawaiian entity had administered the trust, there would have been no question at all because only members of that entity would have been eligible to vote. Justice Stevens' hypothetical Monticello trust<sup>218</sup> is an appropriate analogue to this situation. As long as the State is not involved in the internal political matters of the Native Hawaiian entity, the Fifteenth Amendment does not restrict that entity's internal management or operations.

A bill was introduced by the Hawaiian congressional delegation during the 106th Congress that would have created a government-to-government relationship between Native Hawaiians and the federal government similar to that between mainland Indian tribes and the federal government.<sup>219</sup> Given that the spectrum of opinion on the practical im-

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214. See *Rice*, 528 U.S. at 535.

215. See *Trask*, *infra* note 222, at 82–88.

216. *Rice*, 528 U.S. at 535 (Stevens, J., dissenting).

217. *Id.* at 521.

218. See *id.* at 545.

219. The bill was passed by the House but failed to move out of the Senate before Congress adjourned. See *Senators Reinroduce the "Akaka Bill"*, HONOLULU STAR-BULL., Jan.

plementation of Native Hawaiian self-determination is as varied as the flora and fauna of Hawaii itself,<sup>220</sup> the reaction to this bill was mixed.<sup>221</sup> As one Native Hawaiian activist notes:

The Hawaiian native community is comprised of individuals with diverse philosophies and political views [that] range from those who believe it is unrealistic and impractical to advocate for independence from the United States to those who refuse to acknowledge that the United States or the State of Hawaii has any authority over them.<sup>222</sup>

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22, 2001, available at <http://starbulletin.com/2001/01/22/news/briefs.html> [hereinafter *Senators Reintroduce the "Akaka Bill"*].

220. For example, the membership of the Hawaiian Sovereignty Advisory Council includes, but is not limited to, the following organizations: Trustees of the Office of Hawaiian Affairs; Department of Hawaiian Home Lands; Ka Pakaukau; Ka Lahui Hawaii; Ohana O Hawaii; Pro-Hawaiian-Sovereignty Working Group; Na Kane O Ka Malo; Institute for the Advancement of Hawaiian Affairs; Hawaiian Association of Civic Clubs Political Action Committee; Na Oiw; Council of Hawaiian Organizations; and State Council Hawaiian Homestead Association. See Act of June 26, 1991, No. 301, § 11, 1991 Haw. Sess. Laws 906, 909–10.

221. *Compare House Passes Native Hawaiian Recognition Bill*, ASSOCIATED PRESS NEWSWIRES, Sept. 26, 2000, available in WL, APWIRESPLUS (document number not available) ("The measure has caused disagreement among some in Hawaii. Some Native Hawaiians have complained it gives the federal government too much of a role in the Hawaiian sovereignty process. Many of those critics also advocate Hawaii's secession from the United States."), with Testimony of the Office of Hawaiian Affairs on S.2899, H.R. 4904, Submitted August 23, 2000, (2000 WL 1594804) ("This legislation provides us with the opportunity not only to protect current programs for Hawaiians, but to meaningfully address this lingering injustice. As such, it is the first step, but an essential step, on the journey for Hawaiians towards reconciliation.").

222. Elizabeth Pa Martin, *Hawaiian Natives Claims of Sovereignty and Self-Determination*, 8 ARIZ. J. INT'L & COMP. L. 273, 281 (1991). Native Hawaiian activist Mililani Trask described the continuum among sovereignty proponents as follows:

Discussions of Hawaiian sovereignty entail a choice among self-governing structures: a completely independent Hawai'i under the exclusive or predominating control of Hawaiians; "limited sovereignty" on a specified land base administered by a representative council but subject to United States Federal regulations; legally-incorporated land-based units within existing communities linked by a common elective council; or a "nation-within-a-nation" on the model of American Indian nations.

Mililani B. Trask, *Historical and Contemporary Hawaiian Self-Determination: A Native Hawaiian Perspective*, 8 ARIZ. J. INT'L & COMP. L. 77, 88 (1991). Trask was a former "Governor of Ka Lahui Hawai'i, the Sovereign Nation of Hawai'i," *id.* at 77, and an OHA board member. see Christine Donnelly, *The Hawaiian Roundtable*, HONOLULU STAR-BULL., Mar. 20, 2000, available at <http://starbulletin.com/2000/03/20/special/story1.html>.) See also Christine Donnelly, *Several Ways to Approach Sovereignty*, HONOLULU STAR-BULL., Mar. 20, 2000, available at <http://starbulletin.com/2000/03/20/special/story2.html>.

Within this continuum are groups that have indicated that they will be satisfied with nothing less than a completely independent Hawaiian nation.<sup>223</sup> Some sovereignty proponents contend that “the islands were never legally annexed to the United States and still exist as an independent country . . . [thus] reviv[ing] the Republic of Hawaii.”<sup>224</sup> Another “position is that the overthrow of the monarchy was also illegal, [thus] reestablish[ing] the monarchy.”<sup>225</sup> Others believe that “Hawaiians never voluntarily gave up their lands so that the present descendants of the Hawaiian people are, as a group, the legal sovereigns of the islands.”<sup>226</sup> Certain activists have even formed governments<sup>227</sup> and issued laws, decrees,<sup>228</sup> and constitutions.<sup>229</sup>

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223. See Garry Abrams, *The Liberation of Hawaii? 100 Years After the U.S. Toppled the Islands' Last Monarch, Native Hawaiians Demand Self-Government—or Even Independence*, L.A. TIMES, Jan. 17, 1993, at E1 (“A small minority advocates total independence, in effect re-creation of the old kingdom. An even smaller minority has gone on record for total independence coupled with expulsion of many non-natives, a position that is given no chance of success.”); Hawai’i United for Liberation and Independence, available at <http://www.huli.org> (“Hawai’i, an independent nation-state, is now occupied by a belligerent power, the United States. Hawai’i is neutral and equal to all nations. Hawai’i’s sovereignty has never been relinquished. . . . We have come together to form a united front, committed to the peaceful and non-violent restoration of our independent nation and the liberation of our lands, resources and people.”); Ka Pae’aina o Hawai’i Loa, *United Independence Statement*, Dec. 9, 1999, available at <http://www.hawaii-nation.org/united-independence.html> (“We, individuals, organizations, and representatives of the nation of Hawai’i, though diverse in our various opinions of strategies and pathways to the achievement of Hawaiian sovereignty, hereby unite in our common voice for the independence of . . .” Hawai’i.).

224. Samuel P. King, *Hawaiian Sovereignty*, HAW. B.J., July 1999, at 6, 9.

225. *Id.* See also Kingdom of Hawai’i, available at <http://www.pixi.com/~kingdom/> (seeking the reinstatement and restoration of the Kingdom of Hawai’i and providing historical, common law, and international documents).

226. King, *supra* note 224, at 9.

227. *Id.* According to King:

Dennis “Bumpy” Kanahale has achieved sovereignty already. He has established the Independent and Sovereign Nation of Hawaii with himself as the popularly chosen head of state. He and his followers are legally occupying government land and operating their own version of a Hawaiian nation. His followers are still few enough not to constitute a threat to the whole State.

*Id.* at 11. See also William H. Rodgers, Jr., *The Sense of Justice and the Justice of Sense: Native Hawaiian Sovereignty and the Second “Trial of the Century”*, 71 WASH. L. REV. 379 (1996) (discussing the sovereignty activities of “Bumpy” Kanahale).

228. See, e.g., *Proclamation of Restoration of the Independence of the Sovereign Nation State of Hawaii*, Jan. 16, 1994, available at <http://www.hawaii-nation.org/proclamall.html>. The Proclamation was promulgated under the guidance of Professor Boyle in response to the 1993 Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993). See also *supra* note 223.

229. See, e.g., Hawai’i Constitution, Jan. 16, 1995, available at <http://www.hawaii-nation.org/constitution.html>.

While substantial legal scholarship suggests that Native Hawaiians retain a right of self-determination under international law that supports their organization as an independent nation,<sup>230</sup> such an outcome is highly unlikely—“[s]ecession from the Union will not happen.”<sup>231</sup> Some “sovereignty advocates recognize that realistically the odds of achieving independence would be quite small, and that the Native Hawaiian movement is hindered by those who push for so extreme a solution, [instead of concentrating] on more achievable goals.”<sup>232</sup> Nonetheless, those who advocate a more pragmatic approach are not unsympathetic to those seeking a separate, independent nation; since there is universal agreement that the independence taken away is the basis for any position on sovereignty.<sup>233</sup>

Senator Akaka’s legislation<sup>234</sup> seemed to emanate from the position advocating the incorporation of Native Hawaiians as a political entity into the federal Indian law model. On January 22, 2001, Senator Akaka reintroduced the bill and predicted its passage.<sup>235</sup> Importantly, the Akaka bill emphasized the residual sovereignty of the Native Hawaiian people rather

230. See, Anaya, *supra* note 32; Chock, *supra* note 43; Pa Martin, *supra* note 222; O’Malley, *supra* note 109; Trask, *supra* note 222; Jon M. Van Dyke et al., *Self-Determination for Nonself-governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawaii*, 18 U. HAW. L. REV. 623 (1996); Lisa Cami Oshiro, Comment, *Recognizing Na Kanaka Maoli’s Right to Self-Determination*, 25 N.M. L. REV. 65 (1995); Taryn Ranae Tomasa, Note and Comment, *Ho’olahu: The Rebirth of a Nation*, 5 ASIAN L.J. 247 (1998). One scholar, Professor Francis Boyle, has devoted particular attention to the formation of the Independent and Sovereign Nation of Hawaii. See, e.g., Francis A. Boyle, *Restoration of the Independent Nation State of Hawaii Under International Law*, 7 ST. THOMAS L. REV. 723 (1995) (analyzing the Apology Resolution, *supra* note 104, and concluding that the legitimacy of Hawaiian sovereignty claims are one of the bill’s implications); *Professor Believes U.S. Apology Gives Hawaiians Right to Nationhood*, MAUI PRESS, Jan. 14–20, 1994, available at <http://www.alohaquest.com/archive/profapology.htm> (describing Professor Boyle’s views on Hawaiian sovereignty as a result of the Apology Resolution); *Affidavit of Francis A. Boyle*, Oct. 20, 1995, available at <http://www.hawaii-nation.org/boyleaff.html> (discussing how Professor Boyle came to serve as “Legal Adviser to the Nation of Hawaii” and stating that Professor Boyle provided “legal advice and counsel to Mr. Kanahale and the citizens of the Nation of Hawaii concerning the establishment of their state”).

231. Trask, *supra* note 222, at 88.

232. Jeffrey Wutzke, Comment, *Dependent Independence: Application of the Nunavut Model to Native Hawaiian Sovereignty and Self-Determination Claims*, 22 AM. INDIAN L. REV. 509, 559 (1998).

233. See, e.g., Christine Donnelly, *In Wake of Rice vs. Cayetano, What Happens Now?*, HONOLULU STAR-BULL., Mar. 20, 2000, available at <http://starbulletin.com/2000/03/20/special/transcript.html>.

234. See *Senators Reintroduce the “Akaka Bill,” supra* note 219.

235. See Susan Roth, *Hawaii Senators Reintroduce Native Recognition Bill*, GANNETT NEWS SERVICE, Jan. 23, 2001 (2001 WL 5104218) (“The lawmakers say . . . they remain optimistic that the bill, exactly the same as last year’s version, can pass in the 107th Congress. . . . Akaka has said he believes the 50–50 partisan split in the Senate and an early reintroduction will work to the bill’s benefit this year.”). See also *Senators Reintroduce the “Akaka Bill,” supra* note 219. The bill was reintroduced as S.81, 107th Cong. (2001). See CONG. REC. S338 (daily ed. January 22, 2001).

than their racial characteristics and established procedures for creating a roll of Native Hawaiians.<sup>236</sup>

While many sovereignty advocates bristle at the notion of a congressional determination of an initial membership roll as part of the reorganization process, the pragmatic reality is that Congress has the au-

236. The relevant portions of S.81, 107th Cong (2001) are as follows:

#### SEC. 2. DEFINITIONS.

(1) **ABORIGINAL, INDIGENOUS, NATIVE PEOPLE-** The term 'aboriginal, indigenous, native people' means those people whom Congress has recognized as the original inhabitants of the lands and who exercised sovereignty prior to European contact in the areas that later became part of the United States.

...

(6) **INDIGENOUS, NATIVE PEOPLE-** The term 'indigenous, native people' means the lineal descendants of the aboriginal, indigenous, native people of the United States.

(7) **NATIVE HAWAIIAN-**

(A) Prior to the recognition by the United States of a Native Hawaiian government . . . the term 'Native Hawaiian' means the indigenous, native people of Hawaii who are the lineal descendants of the aboriginal, indigenous, native people who resided in the islands that now comprise the State of Hawaii on or before January 1, 1893, and who occupied and exercised sovereignty in the Hawaiian archipelago, including the area that now constitutes the State of Hawaii . . .

(B) Following the recognition by the United States of the Native Hawaiian government . . . the term 'Native Hawaiian' shall have the meaning given to such term in the organic governing documents of the Native Hawaiian government.

...

#### SEC. 7(a) ROLL -

(1) **PREPARATION OF ROLL**—The United States Office for Native Hawaiian Affairs shall assist the adult members of the Native Hawaiian community who wish to participate in the reorganization of a Native Hawaiian government in preparing a roll for the purpose of the organization of a Native Hawaiian Interim Governing Council. The roll shall include the names of the—

(A) adult members of the Native Hawaiian community who wish to become citizens of a Native Hawaiian government and who are—

(i) the lineal descendants of the aboriginal, indigenous, native people who resided in the islands that now comprise the State of Hawaii on or before January 1, 1893, and who occupied and exercised sovereignty in the Hawaiian archipelago; or

(ii) Native Hawaiians who were eligible in 1921 for the programs authorized by the Hawaiian Homes Commission Act (42 Stat. 108, chapter 42) or their lineal descendants; and

(B) the children of the adult members listed on the roll prepared under this subsection.

thority<sup>237</sup> and has engaged in similar activities in the recent past.<sup>238</sup> Nonetheless, Senator Akaka subsequently introduced a revised version of the bill<sup>239</sup> that omitted mention of a specific reorganization process, because such a "process must be determined by the native Hawaiian community."<sup>240</sup> Yet another version of the bill was introduced,<sup>241</sup> incorporating additional changes<sup>242</sup> intended to "make the bill more palatable to political opponents without sharply limiting the number of Hawaiians served by the legislation."<sup>243</sup> The revised legislation, however, is still not without vocal opposition from some elements of the Native Hawaiian community.<sup>244</sup> Some participants in the Native Hawaiian sovereignty debate accept that complete autonomy and independence are unlikely but argue that the federal Indian law model is inappropriate for Native Hawaiians except with regards to its concept of self-determination.<sup>245</sup> Others support the

237. See 25 U.S.C. § 163 (1994) ("The Secretary of the Interior is authorized, wherever in his discretion such action would be for the best interest of the Indians, to cause a final roll to be made of the membership of any Indian tribe. . .").

238. See, e.g., 25 U.S.C. § 585 (1994) (Northwestern Bands of Shoshone Indians); 25 U.S.C. § 601 (1994) (Yakima Tribes); 25 U.S.C. § 677 (1994) (Ute Tribe of Utah); 25 U.S.C. § 715 (1994) (Coquille Indian Tribe); 25 U.S.C. § 763 (1994) (Paiute Indians of Utah). Note that sometimes federal involvement in the establishment of tribal membership is established in the Code of Federal Regulations. See, e.g., 25 C.F.R. § 61.4 (2000) (specifying membership criteria for numerous tribes including Pembina Chippewa, Hoopa Valley Tribe, and Coquille Tribe of Indians); 25 C.F.R. § 75.1-75.19 (2000) (specifying membership roll modification procedures for the Eastern Band of Cherokee Indians).

239. S.746, 107th Cong. (2001) was introduced on April 6, 2001. CONG. REC. S3757 (April 6, 2001).

240. Pat Omandam, *Akaka, Inouye change native recognition bill*, HONOLULU STAR-BULL., April 7, 2001, available at <http://www.starbulletin.com/2001/04/07/news/story9.html>. As compared to S.81, S.746 "deletes the prescribed reorganization process for a new native Hawaiian governing entity. The reorganization process was the most controversial part of it because it mandate[ed] how a new Hawaiian governing body was to be formed." *Id.*

241. S.1783, 107th Cong. (2001) was introduced on December 7, 2001. CONG. REC. S12681 (December 7, 2001).

242. Several of the differences between S.1783 and S.746 reflect the incorporation of input from the Bush administration. See Susan Roth, "Native Bill's Foes Uncovered," HONOLULU ADVERTISER, Dec. 13, 2001, available at <http://the.honoluluadvertiser.com/article/2001/Dec/13/ln/ln17a.html> (The revised bill "is not intended to supplant their original bill but incorporates some changes requested by the Bush administration in ongoing discussions about the legislation. The significant changes include a change in the definition of the term "Native Hawaiian." The new version refers only to those who were eligible for Hawaiian Homes Commission programs in 1921 and their descendants.")

243. Christine Donnelly, "Revamped Hawaiian Bill Aims at Compromise," HONOLULU STAR-BULL., Dec. 14, 2001, quoting OHA Chairman Clayton Hee, available at <http://starbulletin.com/2001/12/14/news/story7.html>.

244. See, e.g., STOPAKAKA.org, *Stop The Akaka Bill KU'E!* <http://www.stopakaka.org>.

245. See, e.g., statements of Robin Danner in Donnelly, *supra* note 233:

Hawaiians deserve and should receive recognition by the federal government of our sovereign political status [but political status] can be defined

development of an altogether different model along the lines of Nunavut territory,<sup>246</sup> which Canada carved out of the Northwest Territories<sup>247</sup> in 1999, or “the situation of the Maori people in New Zealand with their own territory under their own control and governance.”<sup>248</sup> Finally, the reconciliation discussions resulting from the Apology Resolution<sup>249</sup> has generated discussion on the formation of a Native Hawaiian political en-

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in many, many ways. So I don't think that political status should be automatically assumed to be the domestic status of Alaskan natives or American Indians. I think . . . we are deserving of a third classification that has political autonomy, political status, and autonomy from the state and federal governments.

*Id.* See also Trask, *supra* note 222.

While Ka Lahui Hawai'i seeks inclusion in the federal policy for Indian self-determination, its position is that Hawaiians are not Indians, are not entitled to any percentage of the federal Indian budget and should not be placed under the control of the Bureau of Indian Affairs. Ka Lahui Hawai'i asserts that Native Hawaiians should be allowed to form a federally recognized nation to exercise jurisdiction over its land free from state incursion and control, and have jurisdictional powers similar to those of Indian Nations.

*Id.* at 89; King, *supra* note 224,

[K]a Lahui Hawai'i's proposed land base would “be the Hawaiian home lands now administered by the Hawaiian Homes Commission, plus approximately 1.6 million acres constituting the ‘ceded lands trust,’ plus the assets of the private trusts that benefit Hawaiians and which are now being administered by separate boards of trustees. Their economic base will be the activity conducted on this land base.

*Id.* at 10.

246. See generally Wutzke, *supra* note 232.

247. See e.g., Steven Pearlstein, *Canada's Natives Reclaim “Our Land”*; *Country Has a New Territory, and Inuit Have New Hopes of Preserving Their Culture*, WASH. POST, Apr. 2, 1999, at A19.

248. King, *supra* note 224, at 9.

249. See *supra* note 104 and accompanying text.

tity.<sup>250</sup> Even this process, however, has generated some opposition from those who advocate complete independence as a separate nation.<sup>251</sup>

Whether arguing for the development of a new model or the application of the existing federal Indian model, the common objective remains the establishment of a Native Hawaiian political entity that can engage in government-to-government relations with the federal and state governments. Eventually the Akaka bill or some modified variant should pass, providing for the recognition of a collective political identity of Native Hawaiians. While their identity realistically will never be as a sovereign, independent nation on equal footing with the United States, their organization as a single collective political identity would make way for the formal exercise of Native Hawaiian *Ea* over a portion of their 'aina.<sup>252</sup> Native Hawaiians deserve more than just federal recognition as a sovereign entity, but *pono*<sup>253</sup> dictates that they deserve at least that much.

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250. A report on the reconciliation process between the federal government and Native Hawaiians, resulting from a series of public meetings between Native Hawaiian people and federal officials, was issued by the Department of Justice and the Department of Interior on October 23, 2000. See Dep't of the Interior & Dep't of Justice, *From Mauka to Makai: The River of Justice Must Flow Freely* (2000), available at <http://www.oha.org/pdf/report1023fin.pdf>. The report recommends that Native Hawaiians should be allowed to exercise self-determination within the framework of federal law: "As a matter of justice and equity, this Report recommends that the Native Hawaiian people should have self-determination over their own affairs within the framework of Federal law, as do Native American tribes." *Id.* at 17.

251. See, e.g., Jan TenBruggencate, "Restore the Kingdom"—Reconciliation Talks Draw 200 Hawaiians on Kauai, *HONOLULU ADVERTISER*, Dec. 6, 1999, available at <http://the.honoluluadvertiser.com/1999/Dec/06/localnews1.html> ("Representatives of the federal government said they cannot give what most Native Hawaiian people who attended a meeting on reconciliation yesterday said they want: the sovereign Hawaiian nation restored."); Dep't of the Interior, *Comments on Native Hawaiian Draft Report*, available at <http://www.doi.gov/nativehawaiians/nhcomments.htm>; Dep't of the Interior, *Written Statements Received in Connection with Meetings Held During December 1999 on the Reconciliation Process Between the Federal Government and Native Hawaiians*, available at <http://www.doi.gov/nativehawaiians/pdf/>.

252. Land. See MACKENZIE, *supra* 13, at 305.

253. Justice, or "goodness, uprightness, moral qualities, correct or proper procedure, excellence." *Id.* at 308.