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# Blood Quantum and Equal Protection

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*Modern equal protection doctrine treats laws that make distinctions on the basis of indigeneity defined on blood quantum terms along a racial/political paradigm. This dichotomy may be traced to* Morton v. Mancari *and more recently to* Rice v. Cayetano. *In* Mancari, *the Supreme Court held that laws that privilege members of Native American tribes do not constitute racial discrimination because the preferences have a political purpose – to further the right to self-government of tribes.* Rice v. Cayetano *crystallized the juxtaposition of the racial from the political nature of indigeneity by invalidating a law that privileged Native Hawaiians. That law, according to the Court, used an ancestral blood requirement to construct a racial category and a racial purpose.*

*Close analysis of the legal construction of the dichotomy between the constitutive notion of indigeneity as either a racial and political identity has largely escaped scholarship. Scholars have examined and critiqued equal protection law's racialized construction of blood quantum laws and to a lesser extent, their political construction. A more robust examination of the equal protection doctrinal approach itself in categorizing one as race and the other as political, however, has been lacking. This Essay aims to fill this void in scholarship by interrogating and critiquing the dichotomy of the racial versus political meaning of indigeneity based on blood quantum. In so doing, I make two interrelated points. First, I argue that the dichotomy obscures the structural inequalities in the current regulatory process that limits the conferral of federal tribal recognition to a select group of indigenous groups. An indigenous group's acquisition of federal recognition is critical because, as* Mancari *shows, equal protection law equates such recognition with political status, which immunizes the group from strict scrutiny.*

*Second, I examine cases in the U.S. territories that have been overlooked in equal protection cases involving blood quantum laws. These cases upheld property ownership restrictions that utilize blood quantum distinctions because they functioned to protect the property and cultures of the indigenous peoples in those territories. Continued*

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*marginalization of these territorial cases, I argue, would be a mistake. At minimum, these territorial cases help to advance a broader theory of indigeneity's political meaning. This more expansive view of the political theory of indigeneity recognizes the relationships among culture, property and autonomy. More broadly, by interjecting these cases in the modern interpretation of blood quantum as a marker for either a racial or political identity, they demonstrate that equal protection law's current approach sets up a false dichotomy. The implication of law's recognition of cultural differences in the territories to "mainstream" equal protection law is significant given the doctrine's resistance to cultural claims. Consequently, these cases facilitate retheorizing the way law views race, political identity, culture and property.*

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## INTRODUCTION

What is the relationship between blood and identity? A plethora of scholars have examined the legally and socially constructed link between the two in varied contexts, particularly in the context of race.[1] Historically, law deployed the metaphor of blood through hypodescent rules[2] to racialize and subordinate African Americans[3] and other non-whites.[4] This pernicious use of blood was reflected in various cases[5] and informs modern equal protection today, which currently views legal distinctions on the basis of blood akin to racial discrimination.[6] The Supreme Court expressed this

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[1] IAN F. HANEY LOPEZ, WHITE BY LAW, THE LEGAL CONSTRUCTION OF RACE (1996); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind*, *in* CRITICAL RACE THEORY 257 (Kimberle Crenshaw et al eds., 1995); Ariela Gross, *Litigating Whiteness,* 108 YALE L.J. 108 (1998); Cheryl I. Harris, *Whiteness as Property,* 106 HARV. L. REV. 1709 (1993). For recent scholarship that provide nuanced discussion of the legal and social construction of blood as a marker for race, see Daniel J. Sharfstein, *Crossing the Color Line: Racial Migration and the One-Drop Rule, 1600-1860*, 91 MINN. L. REV. 592, 595-97 (2007) (explaining that the one-drop rule did not "make all mixed-race people black" and "pushed many mixed-race people into whiteness"); Kevin Noble Maillard, *The Pocahontas Exception: The Exemption of Native American Ancestry From Racial Purity Law*, 12 MICH. J. RACE & LAW 351 (2007) (examining the state of Virginia's view of American Indian ancestry as "not a threat to White racial purity"). *See also* SCOTT L. MALCOMSON, ONE DROP OF BLOOD, THE AMERICAN MISADVENTURE OF RACE (2000).

[2] *See* Harris, *supra* note 1 at 1738 (1993) ("'Hypodescent' is the term used by anthropologist Marvin Harris to describe the American system of racial classification in which the subordinate classification is assigned to the offspring if there is one 'superordinate' and one 'subordinate' parent. Under this system, the child of a Black parent and a white parent is Black").

[3] *Id.;* Christine B. Hickman, *The Devil and the One Drop Rule*, 95 MICH. L. REV. 1161, 1167 (1997).

[4] HANEY LOPEZ, *supra* note 1 at 203-08 (providing a chart that included cases in which a person's blood functioned to ascribe non-whiteness on a person).

[5] *Plessy v. Ferguson*, 163 U.S. 537 (1896) (noting that Homer Plessy, who was phenotypically white was deemed a Black person for purposes of Louisiana's segregation laws because he was genotypically 7/8ths white and 1/8th Black); *In re Camille*, 6 F. 256 (1880) (holding that a person of "half white and half Indian blood is not a 'white person'" for purposes of immigration naturalization); *Jeffries v. Ankeny*, 11 Ohio 372, 374 (1842) (holding that plaintiff was not a free white citizen because he does not have pure white blood and thus, he does not have the right to vote). *See also In re Alverto*, 198 F. 688 (D.C.Pa. 1912) (stating that petitioner was "ethnologically speaking, one-fourth of the white or Caucasian race and three-fourths of the brown or Malay race" and consequently, ineligible for naturalization); *In re Knight*, 171 F. 299 (E.D.N.Y. 1909) (holding that petitioner's "Mongolian blood" excluded him from classification as a white person and thus eligible for U.S. citizenship).

[6] *Rice v. Cayetano*, 528 U.S. 495 (2000); *In re Santos*, 112 Cal. Rptr. 2d 1 (Ct. App. 2001) (stating that "[w]hether we characterize this genetic association as racial, ethnic, or ancestry, a determination based on 'blood,' on its face invokes strict scrutiny").

modern construct in *Rice v. Cayetano*[7] when it invalidated a provision of the Hawaii Constitution that limited the right to vote for trustees of a state agency to Native Hawaiians only, who were defined as descendants "of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778."[8] In striking down the law, the Court explained that "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[9]

Although the State of Hawaii's position was ultimately unavailing, the state contended that the blood quantum requirement was similar to the policy upheld by the Supreme Court in *Morton v. Mancari*.[10] In *Mancari*, the Court determined that a federal agency's preferential hiring policy for persons with "one-fourth Indian blood" did not "constitute racial discrimination"[11] and, in fact, was "not even a 'racial' preference."[12] Disaggregating race from the historically racialized construction of blood, the Court explained that the blood quantum hiring preference had a political, non-racial dimension because it was directed to members of federally recognized tribes.[13] The Court in *Rice*, however, refused to acknowledge that "[N]ative Hawaiians have a [political] status like that of the Indians as organized tribes."[14] In so doing, the Court crystallized that the racial versus political construction of indigenous blood rested ultimately on the theory that federal recognition of tribal status conferred a political dimension that was immune from strict scrutiny.[15]

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[7] *Rice*, 528 U.S. at 517 (invalidating Native Hawaiian only voting requirement because it was an unconstitutional racial classification).

[8] *See id.* at 499.

[9] *See id.* at 517 (quoting *Hirabayashi v. United States*, 320 U.S. 81 (1943)).

[10] 417 U.S. at 535 (1974).

[11] *Id.* at 553.

[12] *Id.*

[13] *Mancari*, 417 U.S. at 554, fn. 24 (stating that "the preference is political rather than racial in nature").

[14] *Rice*, 528 U.S. at 518 ("If Hawaii's restriction were to be sustained under *Mancari* we would be required to accept some beginning premises not yet established in our case law. Among those postulates, it would be necessary to conclude that Congress, in reciting the purposes for the transfer of lands to the State – and in other enactments such as the Hawaiian Homes Commission Act and the Joint Resolution of 1993 – has determined that native Hawaiians have a status like that of Indians in organized tribes[.]").

[15] The Court noted that even if *Mancari* were applicable in the case, the State of Hawaii sought to extend the native Hawaiians right to self-government beyond the boundaries contemplated by *Mancari*. *See id.* at 520 (explaining that Congress may not allow 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"). Although *Rice* is ultimately a case about the prohibitions of the Fifteenth Amendment, its prescription of the

Closer examination of the legal construction of the dichotomy between the racial and political meaning of indigeneity[16] vis-a-vis indigenous[17] blood has largely escaped scholarship. Scholars have examined the impact of *Rice* on other Native American preferential laws[18]

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difference between a racial and political indigenous group is what I seek to examine in this Essay. *See* Part I *infra* and accompanying notes.

[16] As Jeremy Waldron has noted, the use of the word "indigeneity" is "something of a mouthful." Jeremy Waldron, *Indigeneity? First Peoples and Last Occupancy*, 1 NEW ZEALAND J. PUB. & INT'L LAW 55, 56 (2003). Both its etymology and definition are unclear. *See id.*

[17] The term *indigenous* lacks a precise definition and, in fact, many indigenous groups have opposed the prescription of an exact definition. *See* RONALD NIEZEN, THE ORIGINS OF INDIGENISM 18 (2002) (explaining that indigenous-rights groups believe that the enactment of a legal definition of the word "indigenous" would impose standards that would be contrary to their interests). James Anaya, prominent scholar on indigenous rights, has described indigenous peoples as those "living descendants of preinvasion inhabitants of lands now dominated by others." JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 3 (2004). The World Council of Indigenous Peoples (WGIP) has advocated that the question of "who is indigenous" is "best answered by indigenous communities themselves." Jeff J. Corntassel, *Who Is Indigenous? 'Peoplehood' and Ethnonationalist Approaches to Rearticulating Indigenous Identity*, 9 NATIONALISM & ETHNIC POLITICS 75 (2003) (explaining that the WGIP passed a resolution stating that indigenous peoples should have the right to self-identification). The concept of self-identification, however, has been critiqued as too broad and could "lead other ethnic groups to position themselves as 'indigenous' solely to obtain expanded international legal status.'" *Id.* States in which indigenous peoples reside have sought for a clear definition of indigeneity. *See id.* The problems associated with this proposition is that it runs the risk of being too restrictive as too exclude legitimate indigenous groups from gaining recognition. *See id.*

In this Essay, I examine the decision by indigenous peoples of the U.S. who have chosen to use the metaphor of blood to determine who may qualify as an "authentic" member of their group for purposes of rights, benefits and privileges, including property rights. An examination of what this self-identification means for those individuals who consider themselves indigenous but are excluded from the group's chosen definitive membership characteristics is beyond the scope of this Essay. For scholarship on this issue, see Carla D. Pratt, *Tribes and Tribulations: Beyond Sovereign Immunity and Toward Reparation and Reconciliation for the Estelusti*, 11 Wash. & Lee Race & Ethnic Anc. L.J. 61, 75-93 (2005) (examining several American Indian tribes, including the Cherokee Nation, that engaged in slavery).

[18] Paul D. Spruhan, *Indian as Race/Indian as Political Status: Implementation of the Half-Blood Requirement Under the Indian Reorganization Act, 1934-1945*, 8 RUTGERS RACE & L. REV. 27 (2007) [hereinafter Spruhan, *Indian as Race*] (examining the continued validity of a category in the Indian Reorganization Act that privileges those persons with one-half or more Indian blood); Frank Shockey, *'Invidious' American Indian Tribal Sovereignty:* Morton v. Mancari *contra* Adarand Constructors, Inc. v. Pena, Rice v. Cayetano *and Other Recent Cases*, 25 AM. INDIAN L. REV. 275, 313 (2000-2001); L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702, 731-748 (2001).

and sovereignty[19] as well as critiqued *Rice*'s racialized construction of Native Hawaiians[20] and the subversive role of equality principles in denying claims of Native Hawaiian sovereignty.[21] An analysis of the race vs. political dichotomy *itself*, however is wanting. Yet, deconstruction of this dichotomy is sorely need. Recent challenges to blood quantum laws show that there remain unanswered questions about the extent to which the racialized (and thus invalid) Native Hawaiian only voting law applies to other blood quantum laws privileging Native Hawaiians[22] and Native Americans.[23] Moreover, the race vs. political dichotomy has important implications for blood quantum laws in other jurisdictions.[24]

This Essay aims to fill this void in scholarship by interrogating and criticizing the dichotomy of the racial versus the political meaning of indigeneity based on blood quantum. In so doing, I make two interrelated points. First, I argue that the dichotomy obscures the structural inequalities in the current regulatory process that limits the conferral of federal tribal

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[19] Carole E. Goldberg, *American Indians and "Preferential Treatment*, 49 UCLA L. REV. 943, 950-955 (2002) (describing *Rice v. Cayetano* as an example of equality-rhetoric based litigation challenging the special status of Indian tribes and consequently their sovereignty).

[20] Chris Ijima, *Race Over* Rice*: Binary Analytical Boxes and a Twenty-First Century Endorsement of Nineteenth Century Imperialism in* Rice v. Cayetano, 53 RUTGERS L. REV. 91, 111-23 (2000) (contending that the Supreme Court's use of racial equality norms invalidated the Native Hawaiian only law and explaining that the "question should be whether they have been specifically harmed as a people by the loss of their nationhood").

[21] Leti Volpp, *Rethinking Asian American Jurisprudence*, 10 ASIAN L.J. 51, 54 (2003) (critiquing the limitations of civil rights jurisprudence for its failure to accommodate self-determination claims); Eric Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747, 1776 (2000) (critiquing the appropriation of civil rights rhetoric in modern "reverse discrimination" cases).

[22] Since the Supreme Court decided *Rice v. Cayetano*, three lawsuits have been filed to challenge the legitimacy of other blood quantum policies in Hawaii. *See Doe v. Kamehameha*, 470 F. 3d 827 (2006), *appeal dismissed*, 127 S.Ct. 2160 (2007); *Arakaki v. Lingle*, 477 F.3d 1048 (9th Cir. 2007); *Kahawaiolaa v. Norton*, 383 F.3d 1271 (9th Cir. 2004).

[23] *See* Spruhan *supra* note 18 at 28 (stating that the "half-blood" requirement of the Indian Reorganization Act is vulnerable under *Rice v. Cayetano*).

[24] As I discuss more fully in Parts II and III *infra*, the dichotomy implicates the validity of blood quantum laws in two U.S. territories, American Samoa and the Commonwealth of the Northern Mariana Islands. Moreover, in Alaska, laws that also use blood quantum distinctions may be rigorously examined as well. *See* 43 U.S.C. § 1601-1607 (establishing the Alaska Native Claims Settlement Act (ANCA), which conveyed 44 million acres of land to newly created twelve corporations the stocks of which were issued only to native Alaskans as a citizen of the United States "who is a person of one-fourth degree or more Alaskan Indian . . . Eskimo, or Aleut blood").

recognition to a select group of indigenous groups.[25] An indigenous group's acquisition of federal recognition is critical[26] because equal protection law equates such recognition with political status, which immunizes the group from strict scrutiny.[27] My analysis reveals the ways in which the doctrinal framework applicable to blood quantum laws and the regulatory process for recognizing Indian tribes serve to undermine the political claims of indigenous peoples such as Native Hawaiians who are explicitly excluded from the federal acknowledgment process.

Second, I examine cases in the U.S. territories that analyzed and upheld blood quantum laws outside of the racial/political paradigm.[28] These cases upheld the use of blood quantum laws because they functioned to protect the property and cultures of the indigenous peoples in those territories.[29] Notably, these cases have been overlooked in equal protection jurisprudence on blood quantum laws. Continued marginalization of these territorial cases in constitutional and property cases involving indigenous peoples' rights, however, would be a mistake. At minimum, these territorial cases help to advance a broader theory of indigeneity's political meaning. This more expansive view of the political theory of indigeneity is premised in large part on the relationships among culture, property and self-government. More broadly, by elaborating and integrating these cases in the modern interpretation of blood quantum as a marker for either a racial or political identity, they demonstrate that the current approach sets up a false dichotomy. Consequently, I argue that these cases facilitate reorienting

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[25] *See* Matthew L.M. Fletcher, *Politics, History, and Semantics: The Federal Recognition of Indian Tribes*, 82 N. D. L. REV. 487 (2006) (explaining that "[c]urrently, 562 Indian and Alaskan Nations enjoy recognition" by the federal government). *See also* RENEE ANN CRAMER, CASH, COLOR, AND COLONIALISM: THE POLITICS OF TRIBAL ACKNOWLEDGMENT (2005) (explaining the process of obtaining recognition of Indian tribes by the federal government).

[26] I do not mean to suggest that the federal recognition process is the only means by which indigenous groups ought to be classified as political sovereigns and, in fact, I critique it precisely for this reason. *See* Fletcher *supra* note 25 at 497 (contending that tribal acknowledgment must be seen as part of the larger relationships among the political relationships among tribes, states and the federal governments).

[27] *Mancari*, 417 U.S. at 555 (examining the hiring preference policy for Native Americans under rational basis review).

[28] *See Wabol v. Villacrusis*, 958 F.2d 1450 (9th Cir. 1992) (holding that application of equal protection to the right to own property would lead to cultural genocide in the Commonwealth of the Northern Mariana Islands); *Craddick v. Territorial Registrar*, 1 A.S.R.2d 11 (1980) (holding that the race-based land alienation restriction was justified by the compelling government interest in protecting the American Samoan cultural way of life).

[29] *See Wabol*, 948 F.2d at 1462; *Craddick*, 1 A.S.R.2d at 14.

equal protection jurisprudence to more adequately address a colonial legacy that is often ignored.

The Essay proceeds as follows. In Part I, I discuss the modern doctrinal framework that currently governs the constitutional analysis of blood quantum laws. Next, I critique it by showing the structural flaws in the federal recognition process that gets elided by the race vs. political paradigm. In particular, I demonstrate how the inherent design of the administrative process of acquiring federal tribal recognition reify not only the equation of federal recognition with political status under equal protection doctrine but also the racialized construction of indigenous groups who are unable to obtain federal recognition.

In Part II, I examine the territorial cases that upheld the constitutional legitimacy of indigenous blood quantum restrictions in property ownership in the territories. This part focuses principally on *Craddick v. Territorial Registrar*, the opinion that upheld American Samoa's blood quantum property law[30] and where relevant, I also discuss *Wabol v. Villacrusis*, which held that the Northern Mariana Islands' blood quantum property law is constitutional.[31] Cases from the U.S. territories tend to be marginalized in "mainstream" jurisprudence. By placing these neglected cases within the ambit of normative equal protection doctrine, I contend that, at minimum, they provide an opening outside of the strict understanding of racial and political indigeneity. While I explain that the territorial cases reached the correct result in lending legal protection to the indigenous peoples' cultures, I offer some cautionary remarks about the inherent problems in claiming culture.

Part III develops the foundation for expanding the "political" side of the race vs. political paradigm. Under this broader theory of political indigeneity, the non-alienation of indigenous lands may be understood using the property theoretical framework of "property as sovereignty." As I explain in this part, the current restrictions on alienation of indigenous peoples' property constitutes a property right, which provides the indigenous peoples in these territories some measure of sovereignty over members of their group as well as non-indigenous peoples. While the use of blood quantum rules raise problematic assumptions about racial purity,[32]

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[30] *Craddick*, 1 A.S.R.2d at 14.

[31] *Wabol*, 958 F.2d at 1461.

[32] *See* Gotanda, *supra* note 1 at 259 ("The metaphor [of blood] is one of purity and contamination: white is unblemished and pure, so one drop of ancestral black blood renders one black").

I argue that they cannot be understood completely without situating them within the larger history of loss of sovereignty and dispossession of lands in which the laws arose.

Finally, in Part IV, I examine the broader implication of this expanded understanding of political indigeneity in other contexts that may be explored more fully in future projects. In particular, I analyze the import of a broader theory of political indigeneity on current litigation in homestead laws that limit participation of some homestead programs to Native Hawaiians.

## I. BLOOD QUANTUM LAWS AND THE RACE V. POLITICAL DICHOTOMY OF INDIGENEITY

In analyzing the dichotomy between indigeneity's racial and political meaning, I aim to reveal how their legally constructed mutual exclusiveness reify each other's bounded meanings and jointly serve to undermine claims grounded on racial discrimination and loss of political autonomy.[33] A deeper understanding of the contours of the racial/political dichotomy of indigeneity requires a close analysis of the legal narratives employed in both *Morton* and *Rice*. As the opinions of the courts that examined these cases demonstrate, the legal discourse narrates the conflict between the right of the individual against racial discrimination versus the right of the group to have a measure of self-government.[34] At bottom, *Morton* and *Rice* were at the intersection of equal protection and the right to self-determination. What gets obscured by the oppositional positions of these two rights is the fundamentally unfair process that severely restricts which group may acquire federal recognition and ultimately, political status.

### A. Blood Quantum and Political Identity

*Morton v. Mancari* involved a constitutional challenge to a federal agency's preferential employment hiring policy.[35] The Bureau of Indian Affairs (BIA) established a policy that gave hiring preferences to American

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[33] *See* MICHEL FOUCAULT, SOCIETY MUST BE DEFENDED 45 (1997) (explaining that our "task should be to reveal relations of domination, and to allow them to assert themselves in their multiplicity . . . [we should be] showing how the various operators of domination support one another, relate to one another, at how they converge and reinforce one another").

[34] *See* Goldberg, *supra* note 19 at 950-51 (explaining that the discursive move of using "equality rhetoric" against Indian law to overturn *Morton v. Mancari*).

[35] 417 U.S. at 554.

Indians with "one-fourth or more degree of Indian blood."[36] Two non-Indian BIA employees challenged the preference policy on the grounds that it constituted racial discrimination.[37] This challenge signaled the beginning of what Carole Goldberg described as the use of "equality rhetoric" to argue against the validity of laws that conferred distinct rights to Indians.[38] By the time that the plaintiffs filed their lawsuits, two significant civil rights laws had passed. Specifically, Congress had enacted the Civil Rights Act of 1964[39] and the Equal Employment Opportunity Act of 1972,[40] which proscribed discrimination in hiring on the basis of race, color, nation origin or sex. The plaintiffs alleged that the Indian preference policy violated these two statutes as well as the Fifth Amendment.[41] The three-judge district court agreed with the plaintiffs and held the policy violated both the Civil Rights and EEOC Acts.[42] Using the language of equality,[43] the court explained that civil rights laws required that in the employment context, one "should rise or fall on the basis of merit, not on the basis of race [and] that every qualified individual – black or white or else – should be given an equal chance – not preferential treatment – at employment."[44] Importantly,

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[36] *Id.* The policy was promulgated as part of an overall shift in federal Indian policy that occurred in the 1930s. Congress enacted the Indian Reorganization Act of 1934, which had as its purpose the need to craft measures "whereby Indian tribes would be able to assume a greater degree of self-government." 417 U.S. at 542. *See also* 25 U.S.C. § 461. One such measure included increasing "the participation of tribal Indians in the BIA operations." *See* 417 U.S. at 543. The Court noted that according to the BIA, preferences in hiring and promotions of Indians were necessary in order to make the agency "more responsive to the interests of the people it was created to serve." *Id.* at 542 (explaining that "[i]f the Indians are exposed to any danger, there is none greater than the residence among them of unprincipled white men").

[37] *Id.* at 537.

[38] Goldberg, *supra* note 19 at 948 (explaining that the discursive use of equality principles have always been used to invalidate laws privileging American Indians but that the earlier cases focused on "emancipating" them from federal domination). As Professor Goldberg aptly noted, "[t]his rhetoric of emancipation conveniently ignored the possibility that Indians might be able to rid themselves of the worst forms of federal domination without losing their special rights, status and benefits." *Id.* at 947.

[39] 42 U.S.C. § 2000e-2(a) (2000) (prohibiting discrimination in employment on the basis of race, color, national origin or sex).

[40] 42 U.S.C. § 2000e-16(a) (proscribing discrimination in federal employment).

[41] *Mancari v. Morton*, 359 F. Supp. 585, 587 (D.C.N.M. 1973).

[42] 359 F. Supp. at 591. The court opted not to rule on the constitutionality of the policy but stated that "we could well hold that the statute must fail on constitutional grounds." *Id.*

[43] Central to the district court's decision was the "reality" of the policy, which had already gone "far beyond the formative stage." 359 F. Supp. at 589 (explaining that the violation of the individual rights of the plaintiffs who were teachers and programmers and had received advanced training was deeply problematic).

[44] *Id.* at 590 (quoting Senator Byrd's remarks in favor of the Equal Employment

the court explained that Title VII of the Civil Rights Act also "forbids reverse discrimination."[45]

The Supreme Court reversed the lower court.[46] Unlike the individual-rights approach of the district court, the Court employed a group's rights move to uphold the policy. It did this by reframing the issue as not concerning race at all and emphasizing the right of Indian tribes to political sovereignty. To be sure, Indians have historically been constructed as both racialized and sovereign peoples.[47] Justice Harry Blackmun, writing for the majority, explained that "the preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion."[48] Accordingly, the policy did not discriminate on the basis of race[49] but membership in federally recognized tribes.[50] Consequently, it only triggered rational basis review. Under this less exacting standard, the Court concluded that the special treatment was rationally tied to the fulfillment of Congress' unique obligation to ensuring that American Indian tribes attain "greater control over their own destinies."[51]

The recognition of the right to self-government of American Indians was an important manifestation of the current federal Indian policy at the time.[52] Under the new self-determination policy, Congress "recognize[d] the obligation of the United States to respond to the strong expression of the Indian people for self-determination."[53] The Act recognized that the federal government has the ongoing obligation to

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Opportunities Act of 1972).

[45] *Id.*

[46] The Supreme Court noted probable jurisdiction, which enabled the case to go directly to the Court from the three-judge district court. *See* 414 U.S. 1142 (1974).

[47] *See Montoya v. United States*, 180 U.S. 261, 266 (1901) (describing Indian tribes as "a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory").

[48] 417 U.S. at 554.

[49] *See id.* (explaining that the "preference is reasonably and directly related to legitimate, nonracially based goal," which is "the principal characteristic that generally is absent from proscribed forms of racial discrimination").

[50] *See id.* at 554, n.24.

[51] *Id.* at 555.

[52] *See* DAVID H. GETCHES, ET AL., FEDERAL INDIAN LAW 41-216 (2005) (providing a history of federal Indian law and policy). The policy of self-determination began in the early 1960s as an official abandonment of the previous policy of terminating Indian tribes. *See id.* at 218.

[53] 25 U.S.C. § 450a(a).

promote self-determination through the development of strong and stable tribal governments.[54] The gist of the *Mancari* opinion is that the use of a factor that had racial implications, such as blood quantum, is valid when it employs a political purpose. But it clarified that this political purpose must be tied to American Indian tribes, specifically those that are federally recognized,[55] which by virtue of their status have the right to self-government.[56] Thus, where the blood or ancestry-based rule facilitates the group's right of self-government, the classification has a legitimate, non-racial purpose.[57]

### B. (Re)Racializing Blood

The application of *Mancari*'s validation of the political use of blood in non-Indian contexts was examined almost 25 years later in *Rice v. Cayetano*. As in *Mancari*, *Rice* involved a claim of reverse racial discrimination by a non-indigenous person. A white Hawaiian challenged the constitutionality of a provision in the Hawaii Constitution that limited the right to vote for the trustees of the Office of Hawaiian Affairs (OHA) to native Hawaiians. That provision defined Native Hawaiian as those persons who can trace their ancestry to "not less than one-half part of the races inhabiting the Hawaiian Islands prior to 1778" and to people inhabiting the islands in 1778.[58] Similar to the plaintiffs in *Mancari*, the plaintiff that sued the State of Hawaii grounded his reverse discrimination claim under the Fifteenth Amendment's proscription against the denial or abridgement of the right to vote on the basis of race.[59]

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[54] *Id.* at § 450a(b).

[55] Federal recognition refers to what Professor Fletcher expressed as "that magical status that most Indian tribes try to achieve." Flether *supra* note 24 at 489 (explaining that "federally recognized tribes benefit from the trust relationship between the federal government and Indian tribes"). Some of the benefits of obtaining federal recognition include tax benefits, housing and health services. *See id. See also* CRAMER *supra* note 24.

[56] *Cf. Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (holding that Indian woman whose children were excluded from tribal membership because she married outside of the tribe, even though children of Indian men with exogenous marriages acquire tribal membership, may not sue Indian tribe in court because of tribal sovereignty).

[57] *See* 417 U.S. at 554.

[58] 528 U.S. at 499. Both the district court and the U.S. Court of Appeals for the Ninth Circuit upheld the statute on the basis that similar to Native Americans, Native Hawaiians have a guardianship relationship with Congress, and in this case, the State of Hawaii. *See Rice v. Cayetano*, 146 F.3d 1075 (9th Cir. 1998); 963 F. Supp. 1547 (D. Haw. 1997).

[59] 528 U.S. at 499. *See also* U.S. Const., amend. XV, §1.

The Supreme Court in *Rice* held in favor of the plaintiff.[60] Contrary to the approach it took when it examined the Indian blood quantum law, the Court focused on the violation of the right of the plaintiff to equal protection in the context of the Fifteenth Amendment.[61] While noting that the purpose of the Fifteenth Amendment "was to guarantee to the emancipated slaves the right to vote"[62] the Court explained that it applies to "all persons, not just members of a particular race."[63] Enforcement of the Amendment, the Court noted, was not immediately realized as several barriers of the right of African Americans to vote emerged.[64] Among these barriers were "scheme[s] which did not mention race but instead used ancestry in an attempt to confine and restrict the voting franchise."[65] These ancestry-based discriminatory obstacles included grandfather clauses and white primaries that sought to disenfranchise Blacks.[66]

Despite the unmistakable difference between the history and purpose of white primaries[67] and the Native Hawaiian-only law,[68] the Court placed them in the same category and, more importantly, subjected the law to strict scrutiny analysis.[69] In fact, the Court specifically chided the state for its lack of subtleness or indirectness in "granting the vote to persons of defined ancestry and to no others."[70] The Court stated that in this case, ancestry was being used as a proxy for race and consequently held that it

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[60] *See* 528 U.S. at 512. Both the district court and the U.S. Court of Appeals for the Ninth Circuit held for the State of Hawaii. The opinions emphasized the collective benefits of the law on Native Hawaiians. 146 F.3d at 1076 (explaining that because the Native Hawaiians are the only group that will benefit from the trust that OHA administered, restricting the vote to Native Hawaiians only should be based on rational basis).

[61] *See* 528 U.S. at 512. By contrast, the Ninth Circuit employed language akin to *Mancari* in its opinion, explaining that "the voting restriction is not primarily racial, but legal or political." 146 F.3d at 1080. Taking a historical approach analysis, the court underlined the history of Hawaii, from the overthrow of the state's monarchy to the right of self-determination of the Native Hawaiians, and reiterated how "special treatment" of Hawaiians is analogous to that of Native Americans. *See id.* at 1080-81.

[62] 528 U.S. at 512.

[63] *Id.*

[64] *Id.*

[65] *Id.* at 513-14.

[66] *Id.*

[67] *See* Guy-Uriel E. Charles, *Democracy and Distortion*, 92 Cornell L. Rev. 601 (2007) (examining the use of race in voting schemes).

[68] *See* Yamamoto *supra* note 21 at 1776 (discussing how the Supreme Court's formalistic approach to race obscured the purpose of the Native Hawaiian only law in promoting the right to self-government of Native Hawaiians).

[69] *See Rice*, 528 U.S. at 514.

[70] *Id.* at 514.

was an impermissible race-based voting qualification.[71] Accordingly, the law "demean[ed] the dignity and worth of a person [by being judged based on] ancestry instead of his or her own merit and essential qualities."[72] With regard to the State of Hawaii's argument that drew an analogy to the recognized political rights of American Indians, the Supreme Court described it as the "most far reaching of the State's arguments."[73] Refusing to make the analogy, the Court noted that "it is a matter of some dispute [ ] whether Congress may treat the native Hawaiians as it does the Indian tribes."[74] Additionally, the Court emphasized that the preference in *Mancari* was "only to members of 'federally recognized' tribes" and thus the preference was "political rather than racial in nature."[75]

One final point. The Court's majority opinion impliedly discounted any cultural argument that Native Hawaiians may have attached to the significance of restricting the right to vote to indigenous Hawaiians. The court explained,

> When the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations; and their dismay may be shared by many members of the larger community. As the State of Hawaii attempts to address these realities, it must, as always, seek the political consensus that begins with a sense of shared purpose. One of the necessary beginning points is this principle: *The Constitution of the United States, too, has become the heritage of all the citizens of Hawaii.* [76]

Here, the Court makes clear the need of Native Hawaiians to adopt the cultural value of the U.S. Constitution as an initial point from which to view

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[71] *Id.* at 517. The Ninth Circuit also applied strict scrutiny but reached the opposite conclusion. *See* 146 F.3d at 1081. Taking a historical approach analysis, the court underlined the history of Hawaii, from the overthrow of the state's monarchy to the right of self-determination of the Native Hawaiians, and reiterated how "special treatment" of Hawaiians is analogous to that of Native Americans. *See id.* While the court distinguished Hawaiians from Native Americans in that Hawaiians are not organized as tribes, the opinion nevertheless stressed that merely because the voting restriction is race-based classification does not mean that the court will find it unconstitutional. *See id.*

[72] 528 U.S. at 517.

[73] 528 U.S. at 518.

[74] *Id.* at 519.

[75] *Id.* at 520.

[76] *Rice*, 528 U.S. at 524 (emphasis added).

their desire to craft measures designed to further their right to self-government.[77]

### C. Political Indigeneity and the Federal Acknowledgment Process

The *Rice* Court crystallized not only its theory of what constitutes an impermissible racial classification, which includes the use of ancestry-based distinctions, but also what it considers an appropriate bloodline distinction, which only American Indians have the privilege to employ. As held in *Mancari* and cemented in *Rice*, it is only those federally recognized Indian tribes that may validly rely on blood quantum distinctions to promote their right of self-government.

Grounding the right of self-government and the validity of the use of blood quantum law on federal tribal recognition, however, is problematic.[78] It reinforces the equation of political status to federal recognition and fails to take into account the subjective, arbitrary and unfair process itself.[79] Not

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[77] *See* Volpp, *supra* note 21 at 55 ("There was no space within the Supreme Court majority's analysis, or within their idea of civil rights, for the question of sovereignty to be addressed; in fact the use of civil rights served to preclude addressing questions of dispossession and self-determination").

[78] *See* Fletcher *supra* note 24 at 494 (arguing that the "racial, anthropological, and ethnohistorical analysis required under the [federal acknowledgment process] fails to account for the political relationship between Indian tribes and the federal government"); Cramer *supra* note 24 at 106-24 (explaining how racism and prejudice figure in the federal recognition process); MARK EDWIN MILLER, FORGOTTEN TRIBES: UNRECOGNIZED INDIANS AND THE FEDERAL ACKNOWLEDGMENT PROCESS (2004) (critiquing the criteria utilized by the Bureau of Acknowledgment and Research as subjective, inconsistent and inherently unfair).

[79] *See* MILLER *supra* note 78 at 17-20. Current administrative regulations provide an extensive list of required criteria, which includes,

> (a) the group has been identified from historical times to the present, on a substantially continuous basis, as Indian; (b) "a predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present"; (c) the group "has maintained political influence or other authority over its members as an autonomous entity from historical times until the present"; (d) the group has a governing document; (e) the group has lists of members demonstrating their descent from a tribe that existed historically; (f) most of the members are not members of any other acknowledged Indian tribe; (g) the group's status as a tribe is not precluded by congressional legislation.

25 C.F.R. § 83.7. The U.S. Department of Interior examines applications for recognition of tribal status using these criteria. *See* 25 C.F.R. § 83.11(e)(8).

only is tribal recognition difficult to obtain[80] but as one commentator has pointed out, federal recognition is "often the result of good fortune or the accidents of history."[81] Consequently, many legitimate Indian tribes are excluded from federal recognition.[82]

From the perspective of Native Hawaiians, the federal recognition process is also a story of exclusion. In addition to the focus of the regulations on criteria that emphasizes a "tribal" structure that is distinct from the social, cultural and political framework of Native Hawaiians,[83] the regulations limit the application process "only to those American Indian groups indigenous to the continental United States which are not currently acknowledged as Indian Tribes[.]"[84] That is, only those indigenous groups located in the contiguous states may apply for federal recognition.[85] Thus, by its own terms, the tribal recognition process excludes Native Hawaiians from even going through the application process. The framework is thus defective for Native Hawaiians because they are expressly unable to obtain the status necessary that would shift their status from the racial to political classification.[86] While the federal recognition process "is an inherently political question,"[87] it is by current design only political for (some) Indians and consequently, reinforces the racialization of Native Hawaiians.

An equal protection challenge to these regulations failed to overturn the inherent problem in the federal recognition process as applied to Native Hawaiians.[88] The U.S. Court of Appeals for the Ninth Circuit explained in

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[80] FELIX COHEN, FEDERAL INDIAN LAW 3 (1982). During the Indian Reorganization Act of 1934, for example, the process of obtaining federal recognition of a tribe during that period was on a case-by-case basis, which resulted in ninety-nine tribes being recognized as organized tribes and ninety-six getting excluded; Fletcher *supra* note 24 at 502-08 (explaining the struggles of the Michigan Anishinaabeg in obtaining federal recognition). *See also* Alva C. Mather, *Old Promises: The Judiciary and the Future of Native American Federal Acknowledgment Litigation*, 151 U. PA. L. REV. 1827, 1831 (2003).

[81] MILLER *supra* note 78 at 17.

[82] *See id.* at 156-208 (explaining the failure of the United Houman Nation to obtain federal recognition).

[83] As the Supreme Court explained in *Rice*, the Hawaiian people during their first contact with Europeans were ruled by four kings. *See Rice*, 528 U.S. at 500. In the early 1800s, the islands were united under one king, King Kamehameha I. *See id.* at 501.

[84] 25 C.F.R. § 83.1-83.3(a).

[85] *See* 25 C.V.R. § 83.3(a). The regulations define the "continental United States" as the "contiguous 48 states and Alaska." 25 C.F.R. § 83.1.

[86] *See* Fletcher *supra* note 24 at 493

[87] Fletcher *supra* note 24 at 493.

[88] *See Kahawaiolaa v. Norton*, 386 F.3d 1271 (9th Cir. 2004) (challenging the Bureau of Indian Affairs regulations used in the federal acknowledgment process). The plaintiffs were native Hawaiians who filed a declaratory action in court seeking the right to apply for

*Kahawaiolaa v. Norton* that the exclusion of Native Hawaiians from the tribal recognition process was constitutional, holding that the exclusion of Native Hawaiians from the tribal recognition process for Indian tribes did not violate the equal protection clause of the Fifth Amendment.[89] Ironically, the plaintiffs who brought the constitutional challenge to the lawsuit used *Cayetano*'s categorization of Native Hawaiians as a racial group to contend that the appropriate constitutional level of analysis should be strict scrutiny.[90] The court rejected the argument, however, noting the inapplicability of *Rice* because the lawsuit "challenges the very regulations that acknowledge the quasi-sovereign government-to-government relationship between the United States and Indian tribes."[91] To emphasize again: the regulations that assign the *political* status of Indian tribes concomitantly served to deny the Native Hawaiiams their ability to obtain inclusion into the process as well as consigned them to their racial status. As the Ninth Circuit aptly noted, "[n]o Hawaiians need apply."[92]

Thus, the political constitutive notion of indigenous blood is ultimately dependent on the U.S. Department of Interior's arbitrary exclusionary process of recognizing federal tribes. This important role in the framing of indigeneity on political grounds has been elided in the equal protection discourse examining indigenous-only laws involving blood quantum. By uncritically accepting the equation of federal recognition with political status, equal protection doctrine reinforces the boundaries of what constitutes a racial and political identity. As I point out in the following section, cases in the U.S. territories that upheld indigenous-only property laws challenge this formalistic binary construction of indigenous blood along racial/political lines.[93] In particular, by recognizing the connection between blood quantum and cultural identity, the territorial cases offer an exit out of the rigid framework and entry into varied understanding of indigenous blood quantum's function and meanings.

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federal recognition as an Indian tribe. *See id.* at 1274.

[89] 386 F.3d at 1282-83.

[90] *See id.* at 1278 (stating that the plaintiffs contended that the appropriate review is strict scrutiny because the regulations constitute racial discrimination). The court, however, held that the appropriate standard of review is rational basis. *See id.*

[91] *Id.* at 1279 (agreeing with the Department of Interior's argument that the classification is politically based).

[92] *Id.* at 1274.

[93] Indeed, for Native Hawaiians, the metaphor of blood historically did not implicate raise. *See* Rona Tamiko Halualani, *Purifying the State, State Discourses, Blood Quantum, and the Legal Mis/Recognition of Hawaiians IN* BETWEEN LAW AND CULTURE, RELOCATING LEGAL STUDIES 141, 144-47 (Goldberg et. al. 2001) (explaining "blood was understood in terms of performative kinship relations" in that blood defined one's relationships to the Gods as well as their relatives).

## II. THE LEGAL PROTECTION OF PROPERTY AND CULTURE IN THE TERRITORIES

Two cases that have been neglected in equal protection cases involving blood quantum laws are *Craddick v. Territorial Registrar of American Samoa*[94] and *Wabol v. Villacrusis*.[95] Their exclusion from constitutional discourse exemplifies the typical marginalization of U.S. territorial issues in constitutional theory and jurisprudence.[96] While it may be true that the precedential import on Supreme Court opinions of the territorial cases are limited because the courts that issued the decisions are inferior courts,[97] understanding them may nonetheless shed light on the way law orients questions of race, culture and political identity. As I argue below, neglecting these cases reify the dichotomy of indigeneity on the race vs. political paradigm. Although the bulk of my analysis focuses on *Craddick*, where necessary, I include in the discourse the *Wabol* case where necessary. [98]

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[94] 1 A.S.R.2d at 11.

[95] 958 F.2d at 1450.

[96] *See* Peter J. Spiro, *The Impossibility of Citizenship*, 101 MICH. L. REV. 1492, 1492-93 (2003) (discussing the marginalization of issues involving the U.S. territories); Sanford Levinson, *Why the Canon Should be Expanded to Include the Insular Cases and the Saga of American Expansionism*, 17 CONST. COMMENT. 241 (2000). More recently, several scholars have begun to examine more closely questions of constitutionalism and citizenship in the territories. *See* EDIBERTO ROMAN, THE OTHER AMERICAN COLONIES, AN INTERNATIONAL AND CONSTITUTIONAL LAW EXAMINATION OF THE UNITED STATES' NINETEENTH AND TWENTIETH CENTURY ISLAND CONQUESTS (2006); T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP (2002); FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION (Christina Duffy Burnett & Burke Marshall eds., 2001).

[97] *Wabol* was decided by the U.S. Court of Appeals for the Ninth Circuit while *Craddick* was decided by the High Court of American Samoa, which are inferior to the Supreme Court.

[98] It is worth stating that American Samoa and the Commonwealth of the Northern Mariana Islands, like the other three U.S. territories (Guam, Puerto Rico and the Virgin Islands), have distinct political, social and cultural experiences. For example, American Samoa maintains its communal ownership of property while the CNMI has a private system of land ownership. Consequently, while they may share parallels, it is important to recognize that they have important differences that should inform law's treatment of their legal issues. *See* Devon Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283, 1306 (2002) (explaining that to say that we ought to recognize and to pay attention to the multiracial manifestation of racial subordination, is not to say that all of our discussions about race should be multiracially focused"); Devon Carbado, *The Ties That Bind*, 19 CHICANO-LATINO L. REV. 283, 288 (1998) (stating that "[w]e can, should, and sometimes must racially particularize our political [and civil rights] engagements").

### A. Protecting Property and Culture in the U.S. Territories

*Craddick* was decided six years after *Morton* and twenty years before *Rice* but similar to these cases, it involved the claim that requiring an ancestral bloodline constitutes unlawful racial discrimination.[99] Douglas Craddick and his wife, Magdalene Craddick, bought property and sought to register it under both their names with the Territorial Registrar of American Samoa.[100] The Territorial Registrar, however, refused to register the warranty deed under both their names because it would have been contrary to the restriction on the alienation of land to non-Samoans.[101] Although Magdalene Craddick is a native Samoan, her husband, Douglas, is white and under the American Samoan Code, they both needed to have at least "one-half" native Samoan blood.[102] Chapter 27, Section 204(b) of the American Samoan Code provides:

> It is prohibited to alienate any lands except freehold lands to any person who has less than one half native blood, and if a person has any nonnative blood whatever, it is prohibited to alienate any native lands to such person unless he was born in American Samoa, is a descendant of a Samoan, lived in American Samoa for more than five years and has officially declared his intention in making American Samoa his home for life.[103]

The Craddicks challenged the constitutionality of the statute, contending that the American Samoan Code violated their fundamental rights to due process and equal protection under the Fifth Amendment.[104] The couple lost at trial and subsequently appealed.

The court recognized that the statute "determines Samoan nationality on the basis of blood" and that "this is clearly a racial classification."[105] Citing *Loving v. Virginia*,[106] the court applied the standard of strict scrutiny[107] and held that American Samoa "has

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[99] *Craddick*, 1 A.S.R.2d at 11.
[100] *Craddick*, 1 A.S.R.2d at 11.
[101] *Id.*
[102] A.S.C.A. § 37.024(b) (limiting ownership of American Samoan lands to persons who have no "less than one-half native blood").
[103] *Craddick*, 1 A.S.R.2d at 11-12.
[104] *Craddick*, 1 A.S.R.2d at 11.
[105] *Id.*
[106] 388 U.S. 1 (1967).
[107] *Craddick*, 1 A.S.R.2d at 12 (explaining that statutes that discriminate on the basis of

demonstrated a compelling state interest in preserving the lands of American Samoa for Samoans and for preserving the Fa'a Samoa, or Samoan culture."[108] Quoting a much earlier case,[109] the court explained that land was "the most valuable tangible thing that the Samoan people possessed"[110] and the Statute provides protection for the "average Samoan . . . if he is not to lose it forever."[111] In other words, the blood quantum law was deemed constitutional because of its explicit purpose of helping to maintain the cultural identity of the American Samoan people.

The court noted that land is so important to the Samoan people that they specifically included a provision in their Constitution that would maintain their ownership of their property. Under this provision, the government of American Samoa must "protect the lands, customs, culture, and traditional Samoan family organization of persons of Samoan ancestry."[112] Land tenure in American Samoa is communal and, as explained further in the subsequent section, communal ownership of land is tied to their social, cultural and political structures.[113] Highlighting that the land alienation policy has been around "since the raising of the American flag in April 17, 1900,"[114] the court explained,

> The whole fiber of the social, economic, traditional and political pattern in American Samoa is woven fully by the strong thread which American Samoans place in the ownership of land. Once this protection for the benefit of American Samoa is broken, once this thread signifying the ownership of land is pulled, the whole fiber, the whole pattern of the Samoan way of life will forever be destroyed.[115]

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race are subject to the strictest judicial inquiry). In examining the constitutional validity of the blood quantum land alienation law, the High Court of American Samoa acknowledged that the Fifth Amendment of the U.S. Constitution applies in the territory. *See id.* The court explained that the due process and equal protection rights guaranteed by the Fifth Amendment are basic to American Samoan laws. *See id.*

[108] *Id.*

[109] *See Haleck v. Lee*, 4 A.S.C. 519 (1964).

[110] *Craddick*, 1 A.S.R.2d at 14-13 (quoting *Haleck*, 4.A.S.C. at 551).

[111] *Id.* at 13.

[112] *Id.* at 13.

[113] *See* Part III *infra* and accompanying notes.

[114] *Id.* at 13.

[115] *Id.* at 14 (citing *Haleck v. Lee*, 4 A.S.C. 519, 551 (1964)) (upholding under the current statute the validity of the land alienation restriction law).

Critically, the court expressed that this compelling governmental "need to preserve an entire culture and way of life" permitted the "government of American Samoa to utilize a racial classification and still withstand the rigorous scrutiny of a watchful court."[116] Holding that the American Samoan Code had a "proper purpose" rather than a "discriminatory one," the court held that the racial classification was necessary to safeguard the territory's compelling interest in protecting the people's culture.[117]

B. Equal Protection, Culture and Assimilation

Equal protection law has been critiqued for forcing individuals and groups "to assimilate to mainstream norms in ways that burden [their] equality."[118] Rights to cultural differences are among those claims that have been rejected in equal protection law, demonstrating equal protection law's assimilative bias. The Supreme Court in *Rice* expressly articulated this bias when it explained that the U.S. Constitution should be the starting point from which Native Hawaiians ought to address the realities of the loss of their culture wrought by colonization.[119] Yet, as already explained in Part I, the Court elides the fact that the colonial legacy of Hawaiians and measures designed to address the effects of colonization are by design ill-equipped to adequately address those concerns.[120] Both cultural and political claims of Native Hawaiians are viewed as "racial" concerns by equal protection's cramped view of what constitutes valid political measures.

Given the marginalization of cultural claims within equal protection jurisprudence, what import might the *Craddick* case have for normative equal protection law? The privileging of indigenous peoples' ownership of lands and their culture illustrates that equal protection framework's potential to expand beyond its prescribed borders. Unlike the equal protection racial/political paradigm, which invalidated the Native Hawaiian law for using "ethnic characteristics and cultural traditions,"[121] the more expansive interpretation of equal protection norms in the territories accommodated a separate and distinct cultural identity.[122]

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[116] *Id.* at 14.
[117] *Id.*
[118] KENJI YOSHINO, COVERING 27 (2006).
[119] *Rice*, 528 U.S. at 524.
[120] *See* Part I, *supra* and accompanying notes.
[121] *Rice*, 528 U.S. at 495.
[122] By contrast, equal protection doctrine is yet to accept within its legal protective bounds the right to preserve one's culture. *See* Ford *supra* note 22 at 1803 (stating that

Importantly, as I argue in Part III, the territorial cases facilitate a broader conception of the political notion of indigenous blood by recognizing that the deployment of blood quantum may be validly used outside of the prescribed borders of *Morton* and *Cayetano*. Accordingly, the territorial cases help to reconfigure the current doctrine that views American Indian tribes as the only political groups that may validly benefit from the use of blood quantum policies. Some will rightly point out that the deviation from equality norms in the territories is grounded on the doctrine known as the *Insular Cases*,[123] which is the analytical framework primarily used to examine constitutional questions in the U.S. territories.[124] These cases, however, support rather than oppose the proposition for a broader perception of indigeneity. Specifically, while there are those who disagree with the territorial cases' deviation from equal protection principles,[125]

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"[f]or the most part, [proposals that advance cultural preservation rights] have not yet been embraced by the courts").

[123] Several cases comprise the *Insular Cases*, which were a set of cases that decided the application of the U.S. Constitution in the newly acquired territories at the turn of the 20th century. In these cases, the Supreme Court held that only fundamental constitutional rights apply in the territories. *See, e.g.*, *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Grossman v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901);

[124] Scholars have criticized the *Insular Cases* because they treat territorial peoples as second-class citizens. *See* Carlos R. Soltero, *The Supreme Court Should Overrule the Territorial Incorporation Doctrine and End One Hundred Years of Judicially Condoned Colonialism*, 22 CHICANO-LATINO L. REV. 1, 4 (2001) (arguing that the territorial incorporation doctrine is at odds with the Bill of Rights and thus, the U.S. Supreme Court should "restore the previously settled law that the Constitution and Bill of Rights fully apply in territories subject to U.S. rule and thereby overrule the" territorial incorporation doctrine); Ediberto Roman, *The Alien-Citizen Paradox And Other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1, 39 (1998) (contending that the first step to granting Puerto Rican's equal citizenship is overturning "the incorporated/unincorporated territory distinction of the *Insular Cases*.").

[125] *See* Gerald L. Neuman, *Constitutionalism and Individual Rights in the Territories*, *in* FOREIGN IN A DOMESTIC SENSE 182, 200 (Burnett & Marshall, eds., 2001) (stating that "accepting linguistic and cultural differences as the basis for recognizing separate peoples within a permanent political union" challenges the character of U.S. citizenship); Marybeth Herald, *Does the Constitution Follow the Flag into United States Territories or Can it be Separately Purchased and Sold?*, 22 HASTINGS CONST. L.Q. 707, 742 (1995) (critiquing the Ninth Circuit's use of "cultural genocide" to uphold the constitutionality of the CNMI land alienation restriction law because of the court's failure to analyze how the law protects culture and family identity); James A. Thornbury, *A Time for Change in the South Pacific?*, 67 REV. JUR. U.P.R. 1099, 1108-1110 (1998) (criticizing *Presiding Bishop v. Hodel*, 830 F.2d 374 (D.C. Cir. 1987), which noted with approval the legitimate interest in preserving and respecting American Samoa's traditions regarding land ownership); James A. Branch, *The Constitution of the Northern Mariana Islands: Does a Different Cultural Setting*

these cases demonstrate the broad scope with which Congress has exercised its plenary power. These territorial cases indicate that Congress may choose to utilize its plenary power in ways that does not need to conform to the recognized prescription of *Morton* and *Rice.*

*Craddick* thus offers a way of reorienting the way equal protection law thinks of race, culture and political status. Several questions may be explored. For example, we can examine, as the High Court of American Samoa did, the equation of race with culture. Or, we could envision what a cultural claim – distinct from either race or political – would look like under normative equal protection jurisprudence. Still another query could engage on the relationship between culture and sovereignty to frame an argument grounded on a political use of blood or indigeneity. These varied understanding of indigeneity and blood quantum thus offer a retheorization of equal protection doctrine and how it might better address the historical, legal and cultural effects of the colonization of indigenous peoples. In Part III, I examine in more detail one of the possible altermative approaches to political indigeneity. Before doing that, however, it is necessary to discuss some of the inherent problems of making cultural claims.

### C. Cautionary Remarks on Claiming Culture

As with most claims of differentiation, there is the potential to essentialize "one" view of culture when in reality, there could be multiple views of culture. Seyla Benhabib has criticized liberal political theorists' portrayal of "cultures as homogenous wholes."[126] In the specific context of the American Samoan right to culture as narrated by the *Craddick* court, the problem of essentializing one American Samoan culture was evident. In particular, the *Craddick* court described the significance of land to the culture of Samoans. But who is an American Samoan for determining the

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*Justify Different Constitutional Standards?*, 9 DENV. J. INT'L L. & POL'Y 35, 59-62 (1980) (stating that the land alienation restrictions in the CNMI present several constitutional conflicts, including the equal protection clause of the Fourteenth Amendment).

[126] SEYLA BENHABIB, THE CLAIMS OF CULTURE 61 (2002) (critiquing what she viewed was Will Kymlicka's description of what constitutes culture). She explains what she considers the erroneous epistemic premises of both progress and conservative liberal theorists:

> that (1) cultures are clearly delineable wholes; (2) that cultures are congruent with population groups and that a noncontroversial description of culture of a human group is possible; and (3) that even if cultures and groups do not stand in one-to-one correspondence, even if there is more than one culture within a human group and more than one group that may possess the same cultural traits, this poses no important problems for politics or policy

cultural argument? Whatever views Douglas, a white and non-native Samoan, held was apparently not shared by the majority American Samoan community. Moreover, Magdalene – as a member of the native community – showed that she opposed the group's cultural views.[127] The increased influx of non-Samoans since the *Craddick* case was decided raise critical challenges to the ongoing perception of the importance of property on the Samoan "culture."[128]

Moreover, the *Craddick* opinion provided a static and monolithic discussion of the importance of land ownership to the people's culture. In upholding the law, the court provided the following colloquy:

> Land to the American Samoa is life itself. He cherishes the land where his ancestors came hundreds of years ago, and where he and his children were born. Land is the only thing he values above anything else because it belongs to him and will belong to his children, just as it belonged to his predecessors for centuries past.[129]

While the above may be true at the time the opinion as written, it is questionable that American Samoans today view their property in the same light as their ancestors did 100 years ago.[130] The different economic

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[127] The fact that Douglas Craddick's wife, Magdalene Craddick, is a native Samoan and was a plaintiff in the case may indicate that she also disagreed with the view that only native Samoans should be allowed to own property in American Samoa. In that case, her action in filing the lawsuit may be viewed as a group member's attempt to change the group's culture. *See* BENHABIB *supra* note 153, at 66 (explaining that the preservation of the right to culture should include protection for the individual members in a group "to subvert the terms of their own cultures"); Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 498 (2001) (discussing efforts by members of a group to create cultural change). It is unclear, however, whether Magdalene Craddick truly disagreed with the land alienation policy. In a follow-up case, years after Douglas passed away, Magdalene prevailed in invalidating a trust that named Douglas as a beneficiary. *See Craddick Development Inc. v. Craddick*, 28 A.S.R.2d 117 (1995) (explaining that Douglas Craddick created a trust under Magdalene's name to benefit him and other named trust beneficiaries). The court in *Craddick* II applied the law against alienation of land to non-native Samoans to the trust and consequently held the trust invalid. *See id.* at 5-6.

[128] The current census shows that the population of American Samoa in 2000 was 57,291. Of that group, 20,660 or 36.1 percent are non-Samoan. *See* U.S. CENSUS, AMERICAN SAMOA: 2000, SOCIAL, ECONOMIC AND HOUSING CHARACTERISTICS, 50 (June 2003).

[129] *Craddick*, 1 A.S.R.2d at 13-14.

[130] As discussed in Part III, for example, in the late 20th century, prior to the acquisition of American Samoa by the U.S., American Samoans' property system distinguished between the right of ownership with the right to use the property. *See* Part II.B. *supra* and

function of land is a prime example of how land use was probably different in the early 1900s. For example, the court explained,

> Land is what he lives from, for it is only on the land that he can plant, nurse, and grow his plantations of coconuts, papayas, taro . . . and other food. Land is where he cooks his food. Land is where the bones of his beloved ancestors are buried. Land is where he builds his *fale*, large or small. Land is the material thing he loves most, after his children. Land is the most valuable inheritance he can leave his children when he dies.[131]

This quote demonstrates clearly the import of property to Samoan life as it provides the people with shelter, food and a material possession that can be passed down through inheritance laws. Whether property functioned in the same way in 1980, the year that *Craddick* was decided, as it did in 1964, when the case from which that quote was derived,[132] or even in the early 1900s when the U.S. took control of the islands is unclear. To make a broad statement about a peoples' connection to their lands based on what appears to be an outmoded and romanticized view of property makes the cultural claim questionable.[133] Here, the culture of American Samoans was essentialized and primitivized through romantic notions of territorial culture.[134]

I reiterate my earlier point regarding the importance of protecting and recognizing an indigenous group's cultural rights; however, the claim to culture must recognize culture's fluidity. Basing a claim on an essentialized notion of culture could have legal implications for the recognition of the right in the first instance. For example, if in a number of years, American Samoan lands no longer provide the traditional role of providing shelter and food, the cultural grounding of the land as previously narrated in *Craddick* loses its import.[135] Fetishizing laws run the risk of culturalizing something

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accompanying notes. The *Craddick* opinion did not make clear whether the distinction between ownership and use of property continues to be recognized in modern American Samoan property law.

[131] *Craddick*, 1 A.S.R.2d at 14.

[132] *See Haleck v. Lee*, 4 A.S.R. 519, 547 (1964) (upholding the land alienation law in American Samoa as valid exercise of the territory's police powers).

[133] *See* BENHABIB, *supra* note 127, at 63 (noting that "to insist upon the historical genealogy of their incorporation, particularly if their own historical memory and life conditions do not actively keep this alive, may be tantamount to cultural essentialism").

[134] *See id.*

[135] *See King v. Andrus*, 452 F. Supp. 11, 15-17 (D.D.C. 1977) (holding that the right to a jury trial applies in American Samoa because the culture of Samoa with respect to the

that may no longer be considered part of the Samoan way of life. It is therefore important to recognize the indigenous peoples' right to culture but in ways that reflect culture as a dynamic and fluid subject.[136] In the next part, I argue that one way to examine the right to culture of indigenous peoples is to consider it as part of the overall right of indigenous peoples to political autonomy, whether in the form of sovereignty, self-government or self-determination. Intrinsic in understanding these various concepts of political autonomy is the role of that property ownership and blood play in facilitating this goal.

## III. Property and (Limited) Sovereignty

Legal philosopher Morris Cohen argued in his infamous law review article that, "property confers sovereignty."[137] The right of property grants the holder the right to exclude others, compels "service and obedience" and essentially, power over another.[138] This notion of property more accurately characterizes the nature of property not as a relationship between a person and a thing, but rather between the owner and other persons in reference to things.[139] It is a theory that scholars have examined or intimated in contexts different from what Cohen analyzed,[140] including federal Indian law, [141] segregated Jewish communities,[142] and takings.[143] I aim to use the "complex relations between property and sovereignty"[144] to explain how indigenous peoples' ownership of property constitutes a form

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peoples' inability to judge their peer because of *matai* and other family influence has change).

[136] *See* BENHABIB *supra* note 127, at 68 (noting that culture changes and gets reinvented over time).

[137] Morris Cohen, *Property as Sovereignty*, 13 CORNELL L. Q. 8 (1927).

[138] *See id.* at 12.

[139] *See id.* at 12.

[140] Cohen's article addressed laissez faire and the unrecognized relationship between economic wealth and sovereignty. *See* Cohen, *supra* note 137 at 14. Scholars have situated Cohen's writing in Legal Realism. *See* Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 487-89 (1988). *But see* Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 272 (1997) (pointing out that Cohen was later known to be a critic of the realist approach to jurisprudence).

[141] Joseph William Singer, *Sovereignty and Property*, 86 Nw. U. L. Rev. 1, 7 (1991) [hereinafter Singer, *Sovereignty*] (explaining that "[f]ederal Indian law therefore raises serious questions about the meaning of democracy, property, equality and the rule of law in the United States").

[142] Abner S. Greee, *Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 4 (1996).

[143] Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1677, 1679 (1996).

[144] Singer, *supra* note 142 at 7.

of self-government in the territories. Ultimately, I argue that the recognition of the nexus between property and self-government provides an initial point from which to develop a theoretical framework that expands law's recognition of political indigeneity beyond what equal protection law currently contemplates.

### A. Communal Ownership of Property and *Matai* System in American Samoa

To understand the link between property and (limited) sovereignty in the territories and where cultural claims to property fit within this relationship, it is necessary to provide a brief discussion of the American Samoan cultural and historical landscape. For thousands of years, the peoples of Samoa were largely isolated, self-sufficient and politically self-governing.[145] Traditionally, as it still is today, Samoans resided in villages,[146] which are under the control of a *matai* or chief of the family.[147] As is still is today, Samoa has a communal land tenure system.[148] Ownership of the property generally rested in an extended family or group with the *matai* as the primary administrator. The *matai* in turn made determinations about how the property would be used and allocated the lands among extended family and other village members. Overall, everyone who resided in the property and made use of the land contributed towards the welfare of the family and the village.[149] The *matai* system works in conjunction with communal ownership of property, giving the *matai* the authority to make decisions about land use, possession and other rights associated with the land.

The arrival of the Europeans and Americans in the 18th century brought unwelcome changes to the islands, including religion, weapons,

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[145] *See* ARNOLD LEIBOWITZ, DEFINING STATUS, A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS 412-415 (1989) (providing a historical background on American Samoa).

[146] Today, there are 72 villages in American Samoa. *See* http://doc.asg.as (last visited Mar. 21, 2007).

[147] STANLEY K. LAUGHLIN, JR., THE LAW OF THE UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS 318 (1995 (discussing the forms of ownership and acquisition of land in American Samoa). Families generally live in villages, which is comprised of several households. *See* LEIBOWITZ, *supra* note 145, at 404. The *matai* system is another component of the American Samoan social and cultural life that is inconsistent with the Constitution. *See* Const., art. I, sec. 9 ("No titles of nobility shall be granted by the United States").

[148] FELIX M. KEESING, MODERN SAMOA, ITS GOVERNMENT AND CHANGING LIFE 270 (1934) (examining the Samoan communal land tenure system).

[149] *See id.*

legal systems and diseases that overwhelmed the cultural, social and political structures of the islands.[150] One of the significant cultural changes was the conferral of "a land consciousness" that the Samoans did not have previously as it became clear to them that the foreigners valued their lands.[151] As some Samoans began to sell lands and others understood their lands' commercial value, new social and political conflicts among the various villages arose, particularly over property rights.[152] Conflicts about user rights and ownership rights created conflicts among the different *matai* chiefs and villages as property boundaries were established and made uncertain previous claims to property.[153]

### B. Loss of Sovereignty, But Not Property

The disruption in the political and social systems ultimately led various *matai* chiefs to conclude that they would need a foreign stable government to "prevent alienation of Samoan land to foreign commercial interests."[154] Consequently, in 1878, the Samoans entered into a treaty of friendship with the U.S. whereby the Samoans gave the U.S. a nonexclusive right to the harbor of Pago Pago, located in Tutuila, the biggest Samoan island, in exchange for U.S. intervention on problems that may arise between Samoans and other governments.[155] It was not until the 1880s when the threat of German domination over Samoa did the U.S. send military ships to the islands to protect U.S. interests, which further fueled conflicts not only between Germany and the U.S. but among Samoans as well.[156] In 1889, Great Britain, Germany, and the U.S. officially ended indigenous sovereignty over their own lands by imposing a tripartite foreign

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[150] LEIBOWITZ, *supra* note 145, at 412 (discussing the arrival of French explorer Jean Francois de Galaup de la Perouse, which effectively ended "Samoan isolation from European influence"). The Europeans introduced, among other things, new religion, legal systems and weapons. *See id.* at 415.

[151] KEESING, *supra* note 149, at 273(discussing how Samoans had not known about their lands having any commercial value until the arrival of the European and American).

[152] *See id.* (explaining how the sale of lands created uncertainty regarding the users' rights to the lands to which they previously had permission to use).

[153] *See id.*

[154] LEIBOWITZ *supra* note 145, at 451. According to a leading scholar on U.S. territorial history, a few Samoan chiefs gave the U.S. rights to the Pago Pago harbor in exchange for protection for the people of that village. *See id.* at 412. The U.S. Senate, however, refused to ratify the harbor agreement. *See id.* at 413 (explaining that the Senate was at the time "preoccupied with civil war reconstruction and uninterested in American involvement with a distant, alien land").

[155] *See id.* at 413.

[156] *Id.*

government over the Samoan Islands.[157] Ten years later, under the Washington Convention of 1899 the U.S. renounced its rights to Western Samoa, over which Germany eventually obtained control, and acquired control over what would later become American Samoa.[158]

In 1900, President William McKinley placed American Samoa under the authority of the U.S. Navy and implemented the land ownership restriction.[159] In so doing, it replaced the former customary rule of indigenous collective ownership of lands with a federal policy of protecting indigenous lands.The U.S., however, asserted that their "anti-colonial" policy necessitated obtaining the consent of the chiefs in American Samoa before the U.S. could officially assert control over American Samoa.[160] The U.S. obtained "consent" after convincing the chiefs that it was in their interest to accede to U.S. control.[161] Subsequently, in April 1900, several Samoan chiefs formally ceded the islands of Tutuila and Aunu'u to the U.S.[162] In 1904, the king and chiefs of Manu'a islands ceded their islands to the U.S. as well.

The significance of these documents differs depending on whose perspective one asks. From the U.S. perspective, it is appears that the cessions were relatively unimportant. After all, it was not until 1929 that Congress officially recognized the documents.[163] Moreover, President McKinley ordered the U.S. Navy to place American Samoa under the country's control before the chiefs issued the cession documents.[164] Yet, one may consider the documents to imply that the Samoan chiefs gave consent to become colonial subjects and the terms under which the Samoan

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[157] *Id.* at 414 (explaining that the three governments met at the Berlin Conference in 1889).

[158] *Id.* (discussing the different concessions the three countries gave to each other). The two Samoas would never be united again. Today, western Samoa is an independent country. Similar to American Samoa, it maintains a communal land ownership system and a *matai* system.

[159] *See id.* at 425.

[160] *See id.* at 414-15. The assertion of an anti-colonist policy was belied by history for it was during this period that the U.S. expanded its political sovereignty beyond the domestic context. *See* ROMAN, *supra* note 96, at 24. At around the same time that the U.S. acquired American Samoa, it also acquired the Philippines, Guam and Puerto Rico. *See id.* at 25.

[161] *See* LEIBOWITZ *supra* note 145, at 414-15.

[162] *Id.* at 414-15 (pointing out that the cession of lands occurred after the U.S. obtained sovereignty over the islands).

[163] *See* LEIBOWITZ *supra* note 145, at 416. *See* Act of February 20, 1929, 45 Stat. 1253; Act of May 22, 1929, 46 Stat. 4.

[164] *See* LEIBOWITZ *supra* note 145, at 414.

people agreed to be governed.[165] The documents demonstrate the chiefs' desire to have a recognized unitary Samoa formed under the sovereignty of the U.S.[166] in exchange for the right to reserve ownership over their property.[167] That is, the various chiefs opted to give up their political sovereignty but maintain the *matai* and communal land ownership systems. The 1900 cession showed that the Samoans' decision to give up absolute ownership and cede of control of their islands to the U.S. government was based in part on their view that U.S. administration would assist in preserving "the rights and property of the inhabitants of said islands."[168] Similarly, the 1904 cession provided that that "the rights of the Chiefs in each village and of all people concerning their property according to their customs shall be respected."[169] The privileging of land ownership in American Samoa today thus emanated from the disaggregation of land ownership from sovereignty.[170] It is a unique and overlooked decoupling of sovereignty from property, one that differed remarkably from the experience of Indian tribes[171] and Native Hawaiians.[172]

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[165] A critical response to this perception may be grounded on Antonio Gramsci's theory of hegemony where it could be argued that the Samoan people gave consent to U.S. sovereignty because of their dominance and power. *See id*. at 10 (discussing Antonio Gramsci's theory of hegemony and application in the colonial context).

[166] Samoa did not have one ruler.

[167] *See* Singer, *Sovereignty*, *supra* note 141 at 6-7 (explaining that when some American Indian tribes reserved hunting and fishing rights near lands they ceded to the government by treaty and thus, when such rights are described as discrimination against non-Indians, they ignore that the reserved rights constitute property rights).

[168] LEIBOWITZ, *supra* note 145, at 424 (discussing the Preamble to the 1900 Cession of Tutuila and Aunuu).

[169] *See id.* at 424 (discussing the 1904 Cession of Manu'a Islands).

[170] Eventually, American Samoans were allowed to establish their own local legislature. They have a bicameral legislature and a governor who, although previously appointed by the Department of Interior, is now elected. The *matai* system plays an important part in the legislative system in that all senators have to be a *matai*. The establishment of the local legislature, however, did not change the manner with which decisions about use of lands and land ownerships are made. As previously noted, land ownership remains communal and the *matai* continues to be the head of the family who makes overall administrative decisions about use and ownership of the lands.

[171] *See Johnson v. M'Intosh*, 21 U.S. 543 (1823) (holding that Indian tribes lost their right of ownership over their lands and instead acquired a right of occupancy because "[c]onquest gives a title which the Courts of the conqueror cannot deny"). The dispossession of Indian lands shows how both their loss of sovereignty also facilitated the loss of their property. *See id.*. *Cf.*, Singer, *Sovereignty*, *supra* note 141 at 7 (stating that federal Indian law reveals "how law allocates both property rights and political power along lines of racial caste").

[172] *See Rice*, 528 U.S. at 504 (explaining that foreigners were allowed to buy lands in Hawaii in 1850). By 1920, Congress reported that most indigenous Hawaiians owned very little land in Hawaii. *See id.*

Moreover, indigenous ownership of lands in American Samoa also constitutes a distinct form of local governance. I do not refer here to a formal governing entity such as an executive or legislative body. Instead, I refer here to the continued social and cultural function of *matai* as the head of the family who, in consultation with members of the family, makes decisions about the use and possession of lands. The preservation of the authority of American Samoan chiefs is something that the chiefs wanted to guard firmly at the cost of U.S. citizenship. In 1948, when the possibility of American Samoans becoming U.S. citizens arose, the chiefs asked Congress to table the issue. As one commentator noted, the "chiefs were distrustful of the application of the U.S. Constitutional protections to the social and cultural structure of the Samoan way of life," including the application of the Equal Protection Clause.[173] Consequently, ninety Samoan chiefs requested that any legislative bills concerning their islands, including discussions of U.S. citizenship, should be postponed for a number of years.[174]

An unintended consequence of giving American Samoans the ability to maintain ownership over their lands is that the law is consistent with prevailing international human rights norms regarding the rights of indigenous peoples to self-determination.[175] Specifically, the United Nations Declaration on the Rights of Indigenous Peoples ("Draft Declaration")[176] acknowledges the right of indigenous peoples to "freely determine their political status and freely pursue their economic, social and cultural development."[177] It further articulated the various ways in which the right to self-determination may be conceptualized and exercised. For example, Article 31 of the Draft Declaration stated that, "as a specific form

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[173] LEIBOWITZ *supra* note 145, at 426.

[174] *See id.* To this day, American Samoans are U.S. nationals and the territory is considered an "unorganized" one. That is, unlike the other four territories, American Samoa does not have a federal law that establishes its governmental structure. *See* LAUGHLIN, *supra* note 147, at 84 (explaining that the difference between an organized and unorganized territory is the lack of a congressional law defining its legal status).

[175] *See* ANAYA, *supra* note 17, at 141 (explaining that the protection of the right of indigenous peoples to protect their culture as well as the right to control who may own property are recognized manifestations of the right to self-determination under international law).

[176] *See* Declaration on the Rights of Indigenous Peoples, http://www.ohchr.org/english/issues/indigenous/declaration.htm (last visited March 30, 2007) ["Draft Declaration"]. The Draft Declaration was adopted by the U.N. Human Rights Council in June 2006 and recommended its adoption by the General Assembly. *See id.*

[177] *See* Draft Declaration, art. 3.

of exercising their right to self-determination, [indigenous peoples] have the right to autonomy or self-government in matters relating to their internal and local affairs[.]"[178] Thus, under international law human rights norms, ensuring that indigenous peoples maintain control over their property and culture is intertwined with their right of self-determination.[179]

### C. Land Alienation Law and Interest Convergence

The protective policy of indigenous lands that the U.S. promulgated may strike many to be an unknown beneficent rule that was contrary to what the U.S. did during that period.[180] The circumstances surrounding the enactment of the policy, however, show that it was not done primarily for altruistic purposes.[181] Through the land alienation restriction, the U.S. was able to secure its military interests in American Samoa.[182] The protection of U.S. foreign policy interests here is bolstered by the fact that the U.S. signed the Treaty of Berlin with Great Britain and Germany in 1890,[183] ten years before the *matai* chiefs ceded the lands. The three nations entered this treaty as a result of tensions over their commercial and military interests on the islands. The U.S. in particular was "determined to prevent German domination of Samoa."[184] Under the treaty, the parties agreed to impose a "tripartite foreign authority over any Samoan government to be established under a new and freely chosen king."[185] Thus, while the treaty did prohibit the sale of lands in Samoa to any citizen or subject of a foreign country, so that "native Samoans may keep their lands for cultivation by themselves and their children after them,"[186] it also functioned to protect the U.S.'s new territorial possession from foreign encroachment.

Whether or not the U.S. did it for benevolent, anti-colonial or military interests, there is no doubt that the effect of the policy was to

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[178] *See id.*, art. 31.

[179] *See* ANAYA *supra* note 17, at 141; *see also Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. (Ser. C) No. 79 (2001) (holding that Nicaragua violated the right of an indigenous community to use and enjoy their property when it allowed a multi-national company to use their lands without their consent).

[180] ROMAN *supra* note 96, at 8 (stating that the "self-proclaimed superiority and self-ordained mandate to rule, often reject cultural compromises with the conquered").

[181] *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest Convergence Dilemma*, *in* CRITICAL RACE THEORY 20, 22 (1995).

[182] LEIBOWITZ, *supra* note 145, at 413 (discussing the military interest in the harbor of American Samoa).

[183] Treaty of Berlin, 1890, 31 Stat. 1878.

[184] LEIBOWITZ, *supra* note 145, at 414.

[185] *See id.*

[186] *Craddick*, 1 A.S.R.2d at 14, fn. 3 (quoting Treaty of Berlin).

ensure that American Samoan lands remained the property of indigenous peoples as it had been for thousands of years before they lost their political sovereignty. Despite their colonized status, the land alienation restriction secured their right to exclude others from displacing their cultural systems regarding the use and possession of property. Consequently, more than 100 years since the U.S. acquired American Samoa, over 90 percent of the lands in American Samoa continue to be owned by American Samoans, which demonstrates the effectiveness of the anti-land alienation policy.[187] The form of sovereignty exercised here is, of course, not of the type equated with nationhood but one that can be thought of in ways that a property rights is deemed to confer sovereignty on a person. The land alienation law gave the American Samoans the right to exclude others from owning not only their lands but also disrupting their communal land ownership and *matai* system.[188]

### D. Blood Quantum, Property and Self-Determination

Admittedly, what made the land alienation law in American Samoa problematic for many people is its blood quantum requirements. Certainly, not all indigenous groups are focused on blood as an essential quality of indigenous membership or identification.[189] The reality, however, is that many indigenous groups in the U.S. utilize a blood rule to make decisions about membership rights and privileges.[190] This decision

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[187] *See id.*

[188] *See* THE FUTURE POLITICAL STATUS STUDY COMMISSION OF AMERICAN SAMOA, FINAL REPORT, at 48 (Jan. 2007) ("The Samoan communal way of life is built around the *matai.* For our way of life to continue, it is absolutely necessary to protect and preserve the integrity of the *matai* system.").

[189] Several definitions of "indigenous peoples" include, among other factors, the principle of descent as an identifying characteristic of indigeneity. *SEE* INTERNATIONAL LABOUR ORGANIZATION, CONVENTION CONCERNING INDIGENOUS AND TRIBAL PEOPLES IN INDEPENDENT COUNTRIES, ART. 1, part (b), June 27, 1989 (stating that indigenous peoples "are regarded as indigenous on account of their descent from the populations which inhabited the country"); International Work Group for Indigenous Affairs (IWGIA), *Identification of Indigenous Peoples*, (defining indigenous persons as the "disadvantaged descendants of those peoples that inhabited a territory prior to the formation of a state"), available at http://www.iwgia.org/sw641.asp (last visited August 1, 2007); ANAYA, *supra* note 17, at 3 (explaining that "the term indigenous refers broadly to the living descendants of preinvasion inhabitants of lands now dominated by others"). Although descent is regarded as an important characteristic as these documents indicate, it is not regarded as the *sole* determining factor for membership nor is descent defined on blood terms.

[190] A recent and controversial example of this is the Cherokee Nation's March 2007 decision to expel over 2,800 Freedmen Indians from their tribes because their names do not appear on the Dawes Roll, which listed names of members essentially based on their lack perceived lack of African blood or ancestry. *See Slave Descendants Lose Tribal Status*,

constitutes legitimate "tribal control over membership criteria that refer to descent, given that descent is a tribal concern tracing to the cultures' muost scared narratives."[191] Moreover, this decision must be seen as the exercise of the growing recognition of indigenous peoples to the right to self-identification.[192]

An examination of the distinct yet related experience of indigenous peoples in American Samoa, the Marianas, Alaska, Hawaii and Indian tribes regarding the role that blood played in either the protection or dispossession of their property is deeply understudied and one that I plan to explore in a future project. For purposes of this Essay, what I aim to do in this part is to show how the metaphor of blood has been used both as a colonizing tool as well as a method of self-determination. My discussion is purposely descriptive and not normative of the complex, troubling yet understandable reasons for the modern use of blood quantum requirements in some indigenous communities. Nevertheless, I contend that examining the way in which blood functioned to establish the property rights of indigenous peoples facilitates a deeper understanding of the relationship between property and sovereignty.

1. American Samoan Half-Blood Land Ownership Requirement

As explained *supra*, the U.S. implemented a land alienation restriction in American Samoa in 1900. That policy, however, differs remarkably from its current version. The policy as codified in the American Samoan Code expressly defines an American Samoa as "one-half native blood," at least for purposes of property ownership.[193] In addition, unlike the earlier land policy that was promulgated and enforced by the U.S. government, the latter was written by the American Samoan people

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N.Y. TIMES, Mar. 4, 2007, at A24; Evelyn Nieves, *Putting to a Vote the Question 'Who is Cherokee'?*, N.Y. TIMES, Mar. 3, 2007, at A9. *See also* CIRCE STURM, BLOOD POLITICS, RACE, CULTURE AND IDENTITY IN THE CHEROKEE NATION OF OKLAHOMA 27, 33-51 (2002).

[191] Carole Goldberg, *Descent Into Race*, 49 UCLA L. REV. 1373, 1392 (2002) (contending that the fact that the federal government is partly responsible for promoting membership criteria based on blood should not be reason to delegitimize modern tribal decisions to continue to use blood quantum).

[192] As noted in note 17, *supra*, the idea of self-identification continues to be the overarching normative answer to the question of who should be considered an indigenous person or group. *See* Corntassel, *supra* note 17, at 75-76.

[193] AM. SAMOA CODE ANN. § 37.0204(b).

themselves[194] and is enforced by them as well.[195] In 1960, American Samoans ratified their own constitution.[196] It reiterated that it would be the "policy of the Government of American Samoa to protect persons of Samoan ancestry against alienation of their lands and the destruction of the Samoan way of life and language, contrary to their best interests."[197] The American Samoan Code subsequently codified the policy into the statute. In so doing, however, it defined a person of American Samoan descent on "blood" terms. The American Samoan Code expressly prohibits the alienation of lands, "except freehold lands to any person who has less than one-half native blood."[198] The privileging of those persons who are "fifty-percent" Samoan is further expressed by the provision that states that if a person "who has *any* nonnative blood" (referring to persons who are not full-blood American Samoa) marries another who also "has any nonnative blood," their children need to have a total of "one-half native blood" in order to be able to own property.[199]

The restrictive "one-half" native blood may lead one to believe that its attendant historical purpose was to deny ownership of lands to the children of inter-racial marriages. The circumstances of that time, however, show that the American Samoan people desired opening up ownership of

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[194] The ability to write their own constitution was an important development in American Samoan history. With the advent of the United Nations after World War II emerged calls to invalidate colonialism and promote the right of former colonial subjects to attain their right of self-government. In 1946, the U.N. designated American Samoa a non-self governing territory, which propelled the need to establish a self-governing American Samoa. This in turn led to efforts to give American Samoans the right to draft their own constitution. *See* LEIBOWITZ, *supra* note 145, at 414-23.

[195] The American Samoan Code provides that the Governor must approve any sales of communal lands. *See* AM. SAMOA CODE § 37.0204(a). Moreover, the American Samoan Code created a Land Commission, which acts as an advisory group to the Governor on matters related to the sale or lease of property beyond the fifty-five year term allowed by the Code. *See* AM. SAMOA CODE § 37.0203.

[196] The constitution naturally spurred governmental changes, including the establishment of their legislative body and locally elected governor. In 1977, the Interior Secretary's governance over American Samoa formally ended when American Samoans elected their first governor. The Interior Secretary, however, maintains exclusive authority to appoint members of the High Court of American Samoa upon recommendation by the Governor. *See* LEIBOWITZ *supra* note 145, at 453

[197] *See* AM. SAMOA CONST. art. I, § 3. The Secretary of Interior approved the Constitution. *See* LEIBOWITZ, *supra* note 145, at 427. In 1983, Congress removed the discretion of the Secretary of the U.S. Department of Interior to make unilateral changes to the American Samoan Constitution. *See* 48 U.S.C. § 1662 (1988) (providing that any changes to the Constitution of American Samoa may be made only through an act of Congress).

[198] AM. SAMOA CODE ANN. § 37.0204(b).

[199] AM. SAMOA CODE ANN. § 37.0204(c).

lands to mixed-blood children. Specifically, the "one-half" blood quantum distinction was entered into the American Samoan Code to correct the discriminatory policy of denying the right of property ownership[200] and *matai* title[201] to children of mixed-marriages, particularly those between American Samoans and white military soldiers.[202] Opening up the lands to those persons who had at least "fifty-percent" Samoan blood closed this disparity while at the same time, it secured indigenous land ownership.[203]

### 2. Indian Nations and Blood Quantum Property Requirements

The use of blood as a colonizing tool to dispossess indigenous peoples property was particularly evident in the context of Indians.[204] In the early 20th century, the U.S. government imposed several limitations on the exercise of two basic property rights that were grounded on the amount of Indian blood a person possessed.[205] These restrictions were part of a larger

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[200] LEIBOWITZ, *supra* note 145, at 425 (explaining that the restriction regarding land ownership was intended to . . . "do away with the arbitrary discrimination against persons of the half blood who, since 1900, have been denied land ownership in the land of their birth").

[201] LEIBOWITZ, *supra* note 145, at 417 (referencing that the relaxation of standards for the *matai* from having three-fourth's blood to one-half Samoan blood "in part was a response to the off-spring of many Marine-Samoa unions").

[202] LEIBOWITZ, *supra* note 145, at 417, fn. 73 (explaining that children born of interracial relationships were accepted within Samoan society without stigma).

[203] At the same time, the half-blood requirement of American Samoa's land alienation law functions to discourage inter-marriage between Samoans and non-Samoans. For those Samoans considered to be "half-blood," the land alienation law limits their potential spouses to Samoans of "pure" or "half-blood" descent. Otherwise, their children would be considered not "Samoan" enough to have ownership rights over land and subsequently, excluded from community functions related to determinations over land use and possession.

[204] For discussion of the way blood functioned to determine the property rights of Native Hawaiians, see Halualani, *supra* note 93, at 156 (discussing how the original Hawaiian Homestead Commission Act proposal of defining "native Hawaiian" as a descendant of "not less than one-thirty-second part of the blood of the original races which inhabited the islands at the time of their discovery by Captain Cook" was later reduced to "1/2 part of the blood," as a result of the lobbying efforts of the sugar industry). Reducing the blood quantum requirement from "one-thirty-second" to "one-half" resulted in disqualifying many Native Hawaiians from qualifying for the homestead program. *See id. See also* RONA TAMIKO HALUALANI, IN THE NAME OF HAWAIIANS, NATIVE IDENTITIES & CULTURAL POLITICS 80 (2002).

[205] *See* Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1, 34-36 (2006) (discussing various statutes that relied on blood quantum to determine allotment eligibility); Margo S. Brownell, *Who Is An Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. MICH.

federal policy at the time of assimilating Indians into "American" society.[206] The first impacted the ability of an American Indian to acquire property after the federal government broke up all Indian lands under the Dawes Severalty Act[207] and allotted them to individual persons. Regulations implementing the Dawes Severalty Act required that only those persons with one-half Indian blood qualified for an allotment.[208] Those Indians in the reservations who lacked the requisite blood quantum[209] were not given property and such lands that would have been allotted to them were made available to whites.[210]

The second set of restrictions affected those Indians with property. Blood quantum rules operated to diminish their ability to sell their lands. An 1867 Treaty with the Chippewas,[211] for instance, provided that Indian tribal land "may not be alienated except with the approval of the Secretary of Interior."[212] In the 1906 amendment to this treaty, entitled the Clapp Amendment,[213] the U.S. removed restrictions on the alienation of lands owned by "mixed-blood" Indians but kept the limitation on the ability to sell lands owned by full-blood Indians.[214] Restrictions on the sale of property owned by full-blood Indians "shall be removed when the Secretary

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J.L. REFORM 275, 279 (2000 & 2001) (explaining that the Dawes Severalty Act of 1887 led to the first use of blood quantum as a "determinant of when an Indian would be allowed to alienate an allotment of land"); Gould, *supra* note 18, at 719 (noting that the federal government introduced the concept of race vis-a-vis blood quantum as a membership criterion through the Dawes Severalty Act, which divided up Indian lands and allotted to individual Indians who met the appropriate blood quantum).

[206] GETCHES, WILKINSON & WILLIAMS, FEDERAL INDIAN LAW 111 (2004) (discussing the Era of Allotments and Assimilation).

[207] In 1887, Congress enacted the Dawes Severalty Act, also known as the Great Allotment Act, which was designed to break up Indian reservations into plots of land and allot them to individual Indians. *See* Dawes Act, ch. 119, 24 Stat. 388 (1887) (encouraging Indians to forego hunting and use the lands for agricultural and grazing purposes).

[208] *See* Gould *supra* note 17, at 720.

[209] Note that some Indians who had only one-fourth blood or were full-blooded Indians but they did not belong to particular tribe were denied property as well. *See* Gould *supra* note 62, at 720. Gould *supra* note 171, n. 124 (citing a source that estimated that "between 1887 and 1934, Indian lands declined from 138 million acres to 52 million acres"). It is interesting to point out that "half-breeds" were also considered dangerous. *See* Bethany Berger, *"Power of This Unfortunate Race": Race, Politics and Indian Law in United States v. Rogers*, 45 WM. & MARY L. REV. 1957, 2032 (2004).

[210] *See id.* The result of the Dawes Act was the tremendous loss of Indian lands, an estimated 86 million acres.

[211] *See* 1867 Treaty with the Chippewas, at art. 7.

[212] *Id.*

[213] *See* Act of March 1, 1907, ch. 2285, 34 Stat. at L. 1015, 1034.

[214] *See* Act of Apr. 26, 1906, ch. 1876, 34 Stat. at L. 1376.

of Interior is satisfied that said adult full-blood Indians are competent to handle their own affairs."[215]

These earlier cases demonstrate that the function of indigenous blood was shaped by the policy goal of assimilating Indians into society.[216] The switch towards the federal policy of promoting the right to self-determination of American Indian tribes was thus a crucial component of the reconfiguring of American Indian blood from the racial to the political category. Under this new self-determination policy, Congress "recognize[d] the obligation of the United States to respond to the strong expression of the Indian people for self-determination."[217] The Act acknowledged that the federal government has the ongoing obligation to promote self-determination through the development of strong and stable tribal governments.[218] The conferral on American Indian tribes of their status as federally recognized tribes with self-governing powers allowed them to escape the racial ascription and legitimated their use of blood quantum.

## IV. IMPLICATIONS IN EQUAL PROTECTION DOCTRINE

Having explained the distinct legal recognition of the right to culture and property and the relationships among blood, autonomy and property in American Samoa as well as some Indian tribes, I now explore its import on the current constitutional framework of the racial/political paradigm of indigeneity. As I explained in Part I, the formalistic definitions of race and political identity constructed an either/or approach and consequently left no room for claims that may remotely qualify as a political employment of indigeneity.[219] The current political process forces all claims not grounded on a federal tribal recognition to become labeled as race.[220] Yet, we can think of the relationship between property, culture and (limited) sovereignty in American Samoa to build on a more expansive understanding of what constitutes valid indigenous-only property laws. Under a broader framing of "political status," law can focus less on the problematic status of federal recognition, and instead focus more on the

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[215] *Id.*

[216] The period between 1871 and 1928 is generally known in history as the Era of Allotment and Assimilation. *See* GETCHES *supra* note 172, at 141. The breaking up of Indian lands was "designed to serve dual goals: to open more land for white settlement and to end Indian tribalism." *Id.*

[217] 25 U.S.C. § 450a(a).

[218] *See id.* at § 450a(b).

[219] *See* Part I *supra* and accompanying notes.

[220] *See id.*

obligation of the federal government to promoted the right to self-determination of indigenous peoples.

Adopting an expanded interpretation of equal protection doctrine's conception of political indigeneity enables the law to examine current challenges to blood quantum laws in Hawaii from a different perspective. By looking beyond the boundaries of the prescribed political status as necessitated by *Rice* and *Morton*, one can see how the various blood quantum laws in Hawaii may be seen as efforts to promote not only the right to culture of Native Hawaiians but also their right of self-government. On a narrow level, the recognition by the *Craddick* court of the nexus between indigenous property and political autonomy enable us to consider its particular application on current litigation in Hawaii regarding state homestead and leasing programs that are restricted to Native Hawaiians.[221]

### A. Native Hawaiians and the Hawaiian Homestead Commission Act

In *Arakaki v. Lingle*, non-Native Hawaiians challenged their exclusion from a state program that allows only Native Hawaiians to lease property for a term of ninety-nine years at the rate of $1.00 per year.[222] The program was created by the Hawaiian Homes Commission Act was enacted in 1921 to create a permanent "land base for the beneficial use of Native Hawaiians."[223] Similar to the invalidated law in *Cayetano*, this program is restricted to Native Hawaiians who can trace their bloodline to someone who lived in Hawaii in 1778 and was "one-half" Native Hawaiian.[224] Calling the program racially discriminatory,[225] the plaintiffs argue that it is unconstitutional under the Equal Protection Clause of the Fourteenth and Fifth Amendment.[226]

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[221] More broadly, acknowledging that *Craddick* recognized more than just real property enables us to consider other interests that may also be broadly viewed as property. On that note, the broader application of *Craddick* implicates the lawsuit filed against a private school in Hawaii that has an admissions preference for Native Hawaiians. *See Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate,* 470 F.3d 827, 831 (9th Cir. 2006) (en banc).

[222] *Arakaki v. Lingle*, No. 04-15306, 2007 WL 430650, at *1 (9th Cir. Feb. 9, 2007).

[223] *Id.* at *2.

[224] *Id*.

[225] Martin Kasindorf, *Racial Tensions are Simmering in Hawaii*, USA TODAY, March 7, 2007, at 1A; Rita Beamish, *Tropical Battle of Race, Rights Divides Islanders*, WASH. POST, Sept. 14, 2003, at A3 (noting that plaintiffs of the lawsuit against the Native Hawaiian lease program have argued that tax dollars should not subsidize programs that discriminate based on race).

[226] *See Arakaki*, 2007 WL 430650, at *1.

The holding in *Rice* requires that this case is reviewed along the prescribed racial/political paradigm and particularly, whether the bloodline restriction violates the equal protection right of persons to property. Similar to voting, discrimination in property ownership composed a significant part of U.S. history. Although common law principles generally viewed restrictions on ownership of land as generally invalid, many laws prevented racial minorities, women and non-citizens from owning property.[227] Racial discrimination in the ownership of property ultimately became a prescribed principle of both property and constitutional law since the Supreme Court decided *Buchanan v. Warley*.[228] In that case, the Supreme Court held that the Fourteenth Amendment, in particular the Equal Protection Clause,[229] entitled Blacks to "acquire property without state legislation discriminating against him solely because of color."[230] In *Oyama v. California*,[231] the Supreme Court extended this nondiscrimination imperative to invalidate an ancestry-based property ownership requirement.[232] According to the Court, the property rights of an American

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[227] *See* Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359 (1983) (examining historical discrimination in women's ability to own property in the U.S.); Phyliss Craig-Taylor, *To be Free: Liberty, Citizenship, Property, and Race*, 14 HARV. BLACKLETTER J. 45, (1998); Polly Price, *Alien Lane Restrictions in the American Common Law: Exploring the Relative Autonomy Paradigm*, 43 AM. J. LEGAL HIST. 152 (1998).

[228] 245 U.S. 60 (1917) (invalidating a city ordinance that proscribed the occupancy and sale of real property on the basis of the occupant's race or color). The city ordinance made it "unlawful for any colored person to move into and occupy as residence . . . any house upon any block upon which a greater number of houses are occupied as residences . . . by white people." *Id.* at 70-71.

[229] *See id.* at 75-79 (discussing the enactment and purpose of the Fourteenth Amendment to provide protection to the "emancipated race" from discrimination by the states).

[230] *Id.* at 79 (explaining that the right to property "is more than the mere thing which a person owns" for it includes the constitutional right to own, acquire and dispose of it regardless of one's race). As *Buchanan* demonstrates, historically, the right to own property privileged primarily white citizens, particularly white males. Various discriminatory laws deprived the right to own property to women, people of color, and non-citizens.

[231] *See* 332 U.S. 633 (1948) (overturning an escheat proceeding in which the property of a person of Japanese descent vested to the state because of the state's view that the ownership of the property violated California's Alien Land Law).

[232] *See id.* at 640. Under California's Alien Land Law of 1913, persons who were ineligible for citizenship were not allowed to own property. At that time, U.S. immigration law prohibited immigrants from Japan from becoming U.S. citizens. Thus, California's Alien Land Law applied only to Japanese. In fact, as scholars have commented, the alien land laws were directed primarily at Japanese Americans. *See, e.g.*, Keith Aoki, *No Right to Own? The Early Twentieth Century "Alien Land Laws" as a Prelude to Internment*, 40

citizen "may not be subordinated merely because of his father's country of origin."[233] As a result of *Buchanan, Oyama* and subsequent decisions,[234] the equal right to acquire, use and dispose of property regardless of race, color, or ancestry has been firmly ingrained in property and constitutional law.

Despite the difference between the property restrictions invalidated in *Buchanan* and progeny and the Hawaiian program that privileges Native Hawaiians, *Rice* requires that this law is examined under the prescribed racial/political paradigm. The relevant question becomes whether the law makes a racial classification. Given that the definition of Native Hawaiian in this case is identical to the description of Native Hawaiian held to be unconstitutional in *Rice,* the chances of the law surviving strict scrutiny is doubtful. Specifically, Native Hawaiians still lack the political status and its attendant right of self-government.

Yet, reconfiguring the political paradigm as I have urged by examining the connections among property, culture and autonomy enables the law to drum up questions that seek to analyze how the Native Hawaiian program may promote the islanders' political right. In particular, examining the law under the holding in *Craddick* allows for a broader analysis of the purpose of the program. By situating the program in its historical context, one gains a broader picture of how the blood quantum law seeks to protect the property rights of Native Hawaiians and rehabilitate their cultural identity as right to property.

At a series of hearings prior to the enactment of the HHCA, Congress determined that the institution of private ownership of lands in Hawaii led to Native Hawaiians holding "but a very small portion of the lands in the Islands."[235] The homestead laws in place at the time led to lands being transferred from the hands of Native Hawaiians to the hands of wealthy businesses who became the "real beneficiaries of the homestead

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B.C. LAW REV. 37, 39 (1998) (stating that "[t]he salient point of these laws was their strongly racialist basis – 'aliens ineligible for citizenship' was a disingenuous euphemism designed to disguise the fact that the targets of such laws were first-generation Japanese immigrants, or 'issei'").

[233] *Id.* at 647.

[234] *See, e.g.*, *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (holding that judicial enforcement of private race covenants preventing the sale and occupancy of property on the basis of race or color violates the Fourteenth Amendment); *Sei Fujii v. State*, 242 P.2d 617, 630 (Cal. 1952) (holding unconstitutional the California Alien Land Law of 1913).

[235] *Rice*, 528 U.S. at 503. The *Rice v. Cayetano* Court provided a lengthy history of Hawaii, which included a discussion of the HHCA's legislative history.

laws."[236] By 1919, only 6.23 percent of the lands in Hawaii were held by Native Hawaiians.[237] Congress found that the alienation of Native Hawaiians from their lands caused economic, social, psychological damage and cultural loss.[238] In particular, it found that it was necessary to establish a land base for Native Hawaiians in order to address the "deteriorating condition of the Hawaiian people."[239] Consequently, Congress set aside 200,000 acres of lands that can only be leased to Native Hawaiians as well as allow for the creation of loans that would benefit Native Hawaiians.[240] From the expanded political theory of indigeneity that I have advocated, it becomes clear that the purpose of the HHCA and programs was to address the attendant cultural alienation that resulted from the loss of lands. Understanding the relationship between the protection of property and culture provides an important starting point for determining the law's connection to their right of self-government.[241]

## CONCLUSION

Civil rights law has been critiqued for failing to address claims of equality and its role in reifying subordination.[242] The current equal protection paradigm that examines blood quantum laws along a dichotomous racial/political construction of blood constitutes an example of equal protection law's inability to appropriately address historical injustice and domination. In this Essay, I critiqued the doctrinal limits of current equal protection jurisprudence, which undermined efforts of Native Hawaiians to exercise their right to political autonomy. The formalistic race versus political theory of indigeneity forced Native Hawaiians to ground their political claims on a legally constructed principle of self-government that excludes them from its scope. In highlighting that there are legal decisions that recognized the cultural and property rights of indigenous peoples in the territories, I initiated a possible basis for expanding the constitutive notion of political indigeneity. In so doing, this

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[236] *Id.* Many lands were also lost because of lack of funds to support agriculture operations. *See id.*

[237] *See id.*

[238] *See* Iijima *supra* note 20, at 118-20 (discussing Congress' findings on how the loss of lands affected Native Hawaiians).

[239] *Arakaki v. Lingle*, 2007 WL 430650, * 2.

[240] *Id.*

[241] I do not aim to provide all the necessary questions here. Rather, I seek to situate the line of questioning from a theoretical framework that would analyze the blood quantum law beyond the racial/political paradigm and one that understands that indigenous peoples have cultural ties to the lands.

[242] YOSHINO *supra* note 18, at 27.

Essay hoped to direct both scholarship and the courts to retheorize equal protection law in ways that broadened its reach and made it more amenable to the cultural, property and political rights of indigenous peoples in the U.S.