Understanding Native Hawaiian Rights:

Mistakes and Consequences of *Rice v. Cayetano*[*]

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I. INTRODUCTION

This paper comprehensively reviews the Supreme Court case *Rice v. Cayetano*[1] and its implications for Native Hawaiian[2] legal rights. The *Rice* opinion, issued in 2000, continues to affect the Native Hawaiian community today. The issue of Native Hawaiian legal rights remains controversial, as demonstrated by recent suits challenging programs that benefit this community. The *Rice* opinion sheds crucial light on this issue because it marks the first time the Court has discussed the special status of Native Hawaiians. The opinion also highlights tensions between Congress and the Court in their treatment of indigenous populations, and it further exposes common misunderstandings of indigenous legal rights.

Part I narrates a history of the Hawaiian Islands from its first known settlement to today, providing an essential backdrop to the legal complexities relating to Native Hawaiian issues. Part II details the current status of Native Hawaiians living in Hawai'i and demonstrates this community's ongoing challenges. Part III first reviews the Supreme Court case *Morton v. Mancari*,[3] to explain the intersection of Federal Indian law

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1. 528 U.S. 495 (2000).

2. Many definitions exist for classifying the Hawaiian race. Under Hawaii Revised Statutes § 10-2, the term "Hawaiian" refers to any individual who is a descendant of the aboriginal peoples of Hawai'i and the term "Native Hawaiian" or "native Hawaiian" refers to any individual with at least one-half quantum of "Hawaiian" blood. HAW. REV. STAT. § 10-2 (2006). According to the Office of Hawaiian Affairs, the term "Native Hawaiian" refers to any individual who is a descendant of the aboriginal peoples of Hawai'i and the term "native Hawaiian" refers to any individual with at least one-half quantum of "Native Hawaiian" blood. Office of Hawaiian Affairs, Native Hawaiian Data Book (1998), *available at* http://www.oha.org/databook/databook1996_1998/appendix.98.html. Except when otherwise stated, this paper uses the term "Native Hawaiian" as used by the Office of Hawaiian Affairs to refer to any individual who is a descendant of the aboriginal peoples of Hawai'i.

3. 417 U.S. 535 (1974).

and Fourteenth Amendment equal protection analysis. It then summarizes the decisions of the District Court of Hawai'i, the Court of Appeals for the Ninth Circuit, and the United States Supreme Court in *Rice v. Cayetano*.[4]

Part IV examines the Supreme Court's opinion in *Rice v. Cayetano*.[5] First, this Section argues that the Court portrays Hawaiian history from the colonizer's perspective, setting the mood for a resistant opinion. Second, this Section explains that the Court's disinclination to rule on—or even to discuss—the Hawaiian people's political status contributed to a hollowed analysis of the case. Third, this Section asserts that the Court resorted to a formalistic Fifteenth Amendment analysis to avoid essential questions that might have led to a thorough development of the issue. Fourth, this Section observes how the Court's highly technical analysis misapplied civil rights principles and law to a case about indigenous rights. Fifth, this Section contends that the Court's superficial treatment of "race" is improperly applied to indigenous peoples, whose aboriginal classifications are necessarily tied to race.

Part V discusses *Rice*'s implications for Native Hawaiian legal rights. This Section asserts that the special relationship between Native Hawaiians and the federal government exists despite *Rice*'s unfavorable holding. This Section also argues that *Rice* is confined to Fifteenth Amendment claims and should not be mistakenly extended to cover Fourteenth Amendment equal protection claims. This Section further contends that the funding source of the Office of Hawaiian Affairs remains valid in light of the longstanding relationship between Native Hawaiians and the United States, and in light of *Rice*'s very own foundations. This Section also reviews the Native Hawaiian Reorganization Act, also known as the Akaka Bill, which contains plans to reorganize a governing entity for Native Hawaiians and to extend federal recognition to Native Hawaiians analogous to that afforded to Indian tribes and Alaska Natives.[6] This final Part argues that the Akaka Bill is beneficial for solidifying Native Hawaiian legal rights and for reorganizing the Native Hawaiian community.

II. A BRIEF HISTORY OF THE HAWAIIAN ISLANDS

The history of the Hawaiian people is an essential backdrop for understanding the legal issues facing Native Hawaiians, the original settlers of Hawai'i. Prior to Hawai'i's annexation to the United States and its admission as a state to the union, the Hawaiian people had developed their own society and government that exercised independent sovereignty from the United States. Congressional decisions thereafter created a structural regime for Native Hawaiians that was similar to, yet not quite fitting for,

4. 528 U.S. 495 (2000).
5. *Id.*
6. S. 310, 110th Cong. (2007); H.R. 505, 110th Cong. (2007).

the one previously set for Indians. Congress's management of issues concerning Hawaiians as a native, aboriginal group thus placed Native Hawaiians into a new and indeterminate category of their own. The *sui generis* nature of the relationship between Native Hawaiians and the United States government arises from this complicated history of political events.

A. Ancient Hawai'i

Historians estimate that the first settlers of Hawai'i discovered the islands as early as 700 A.D., or possibly even earlier.[7] Some historians speculate that these settlers were Polynesians who traveled in waves across the Pacific Ocean from the Marquesas and Society Islands,[8] part of today's French Polynesia.

During this time, Hawaiian society was structured as a communal land system, where the chiefs and chiefesses (*ali'i*) managed the land over commoners (*maka'āinana*).[9] Although the *maka'āinana* cultivated the land, the agriculture harvested therefrom belonged to the *ali'i*.[10] The *maka'āinana* also worked in various occupations including fishing, canoe-building, and house-building.[11] Through this system, the Hawaiian people forged a civilization with a maximum population conservatively estimated at 300,000.[12] They lived undisturbed until the 1778 arrival of Captain James Cook of England.[13] Traders and Christian missionaries followed.[14] These Westerners brought unfamiliar diseases, causing a sharp decline in the Hawaiian population.[15] By the late 1800s, the Hawaiian population had dwindled to about 40,000, comprising only one-fourth of the islands' total population.[16]

B. The Sovereign Kingdom of Hawai'i

In 1810, King Kamehameha I united all the islands.[17] From 1826 to 1887, the Hawaiian Kingdom entered into treaties with foreign nations, including the United States.[18] Recognizing the sovereignty of the Hawaiian

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7. 1 RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM 1778-1854, at 3 (1938); GAVAN DAWS, SHOAL OF TIME: A HISTORY OF THE HAWAIIAN ISLANDS xiii (1968).

8. KUYKENDALL, *supra* note 7, at 3; DAWS, *supra* note 7, at xii-xiii.

9. KAMEHAMEHA SCHOOLS, KA HUAKA'I: NATIVE HAWAIIAN EDUCATIONAL ASSESSMENT 25 (2005) [hereinafter KAMEHAMEHA SCHOOLS].

10. KUYKENDALL, *supra* note 7, at 9.

11. *Id.*

12. KAMEHAMEHA SCHOOLS, *supra* note 9, at 25. Other historians estimate that the population ranged from 800,000 to 1 million. *Id.* at n.1.

13. DAWS, *supra* note 7, at 1.

14. KUYKENDALL, *supra* note 7, at 12.

15. KAMEHAMEHA SCHOOLS, *supra* note 9, at 25.

16. *Id.*

17. KUYKENDALL, *supra* note 7, at 50.

18. For examples, *see* Treaties, Conventions and Other International Agreements of the Kingdom of Hawai'i, *available at* http://www.Hawaii-nation.org/treatylist.html (Throughout the 1800s, the

Islands, the United States signed its first treaty with the Kingdom of Hawai'i in 1826,[19] which was followed by three additional treaties in 1849, 1875, and 1887.[20]

Western influence triggered change in both the Kingdom's governmental structure and in the organization of land. King Kamehameha III and the *kuhina nui*,[21] Kekauluohi, signed the Kingdom's first Constitution in 1840.[22] This Constitution primarily outlined the government's structure, but it also created a representative body to include the voice of commoners in governmental decisions.[23]

The *Great Māhele* of 1848, a land distribution act proposed by King Kamehameha III, was likely the most significant event affecting land ownership in Hawai'i.[24] The *Māhele* converted the communal land system into one of private ownership.[25] Under this conveyance, the King received one million acres of "Crown Lands," about one-forth of the islands' total acreage.[26] The King also conveyed 1.5 million acres to the main chiefs of the Kingdom and the remaining 1.5 million acres to the Hawaiian government as "Government Lands."[27]

C. The Illegal Overthrow of the Hawaiian Monarchy

In 1885, a group of white businessmen who favored annexation by the U.S. and called themselves the "Hawaiian League" forced King Kalākaua to sign the Bayonet Constitution under threat of violence.[28] The Bayonet Constitution stripped the King of most of his authority, transferring it to the cabinet and legislature, which were comprised mostly of white men from

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Hawaiian Kingdom entered into various treaties with other countries besides the United States, including Great Britain, France, Denmark, Hamburg, Sweden, Norway, Tahiti, Belgium, Italy, Spain, Russia, Japan, Germany, Portugal, Hong Kong, and Samoa).

19. 8 Department of State, Treaties and Other International Agreements of the United States of America 1776-1949, at 861 (Charles I. Bevans ed., 1968).

20. Treaty With The Hawaiian Islands, 9 Stat. 977 (1849) (friendship, commerce, and navigation); Convention between the United States of America and His Majesty the King of the Hawaiian Islands, 19 Stat. 625 (1875) (commercial reciprocity); Supplementary Convention between the United States of America and his Majesty the King of the Hawaiian Islands to Limit the Duration of the Convention Respecting Commercial Reciprocity Concluded January 30, 1875, 25 Stat. 1399 (1887).

21. The position of *kuhina nui* is unique to the Hawaiian government and has no Western equivalent. The *kuhina nui* essentially shared supreme executive power equally with the king. KUYKENDALL, *supra* note 7, at 63-65.

22. *Id.* at 156-58.

23. *Id.* at 167.

24. Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95, 101-02 (1998).

25. *Id.*

26. *Id.*

27. *Id.*

28. HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI'I 11 (1999); NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM 122 (2004).

the Hawaiian League.[29] To preserve a white majority in the cabinet and legislature, the Bayonet Constitution also restricted voting privileges to those with a minimum income of $600 or at least $3,000 worth of property.[30]

In 1891, Queen Lili'uokalani inherited the throne from her brother, King Kalākaua.[31] In an effort to restore power to the Hawaiian monarchy, Queen Lili'uokalani sought to abrogate the Bayonet Constitution.[32] The subsequent battle for power between the Queen and the Hawaiian League eventually led to the overthrow of the monarchy. In 1893, the United States Minister to Hawai'i, John L. Stevens, conspired with Hawaiian League members to overthrow the Hawaiian monarchy.[33] Stevens called on the support of United States troops to overtake the Kingdom.[34] Queen Lili'uokalani surrendered to these forces on January 17, 1893 under protest and with confidence that the United States would reinstate the Monarchy after learning of the Minister's misuse of military force against the Kingdom.[35] Stevens and the group of non-Hawaiian men then declared themselves to be the "Provisional Government" of Hawai'i.[36] Thereafter, President Grover Cleveland ordered an investigation of the matter and "concluded that a 'substantial wrong has thus been done which a due regard for our national character as well as the rights of the injured people requires we should endeavor to repair' and called for the restoration of the Hawaiian monarchy.'"[37] Resisting the President's orders, the Provisional Government attempted to annex the Hawaiian Islands to the United States through the Senate but failed to obtain the requisite two-thirds vote.[38]

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29. TRASK, *supra* note 28, at 11.

30. *Id.*

31. DAWS, *supra* note 7, at 263-64.

32. TRASK, *supra* note 28, at 12.

33. SILVA, *supra* note 28, at 129-30; *see also* 100th Anniversary of the Overthrow of the Hawaiian Kingdom, Pub. L. No. 103-150, 107 Stat. 1510 enacted S.J. Res 19 (1993) (joint resolution acknowledging 100th anniversary of January 17, 1983 overthrow of the Kingdom of Hawai'i and offering an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawai'i) [hereinafter Apology Resolution] ("Whereas, on January 14, 1893, John L. Stevens . . . the United States Minister assigned to the sovereign and independent Kingdom of Hawaii conspired with a small group of non-Hawaiian residents of the Kingdom of Hawaii, including citizens of the United States, to overthrow the indigenous and lawful Government of Hawaii . . . ."). The Hawaiian League formed this group, which they called the "Committee of Safety." TRASK, *supra* note 28, at 12.

34. SILVA, *supra* note 28, at 129-30; *see also* Apology Resolution, 107 Stat. 1510 ("Whereas, without the active support and intervention by the United States diplomatic and military representatives, the insurrection against the Government of Queen Liliuokalani would have failed for lack of popular support and insufficient arms . . . .").

35. DAWS, *supra* note 7, at 276; TRASK, *supra* note 28, at 12-13.

36. DAWS, *supra* note 7, at 277; TRASK, *supra* note 28, at 12.

37. Apology Resolution, 107 Stat. at 1511.

38. *Id.* at 1511-12.

D. Annexation, Statehood, and Legislation regarding Native Hawaiians

In 1897, President William McKinley replaced President Cleveland, expediting the annexation of the Hawaiian Islands. In 1898, President McKinley signed a Joint Resolution to annex Hawai'i as a United States territory.[39] Under this resolution, 1.8 million acres of Crown, government, and public lands were ceded to the United States "without the consent of or compensation to the Native Hawaiian people of Hawai'i or their sovereign government."[40] The resolution required revenues from the ceded public lands to be "used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."[41] Two years later, the Hawaiian Organic Act was passed, establishing the Territory of Hawai'i.[42] The Act gave official control of the ceded lands to the United States "until otherwise provided by Congress."[43]

Due to concerns over the declining condition of the Hawaiian people, a territorial legislative commission visited Washington to communicate their plight to Congress.[44] In response, Congress passed the Hawaiian Homes Commission Act ("HHCA") in 1921 to rehabilitate the Hawaiian population.[45] Under the HHCA, 200,000 acres of the ceded public lands were to be used for a program benefiting "Native Hawaiians," with "Native Hawaiians" defined as "descendant[s] of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778."[46]

Hawai'i was admitted as the fiftieth state of the Union in 1959.[47] As part of Hawai'i's admission process, the United States required the State to adopt the HHCA as part of its Constitution.[48] Under the Admission Act, the United States gave the State title to 1.2 million acres of the previously ceded lands.[49] In addition, the United States reserved some of the ceded lands for the federal government's use.[50] The Act required the State to hold the lands and the income it generated "as a public trust" to be used for one or more of five listed purposes, one of which was "for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes

39. Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, ch. 55, 30 Stat. 750 (1898) [hereinafter Annexation Resolution].

40. Apology Resolution, 107 Stat. 1510; Annexation Resolution, ch. 55, 30 Stat. 750.

41. Annexation Resolution, ch. 55, 30 Stat. 750.

42. Organic Act to Provide a Government for the Territory of Hawaii, ch. 339, 31 Stat. 141 (1900).

43. *Id.*

44. DAWS, *supra* note 7, at 296-98.

45. Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, 42 Stat. 108 (1920).

46. *Id.*

47. Admission Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4 [hereinafter Admission Act]; *see also* DAWS, *supra* note 7, at 391.

48. Admission Act, 73 Stat. 4.

49. *Id.* at § 5(b)-(d).

50. *Id.*

Commission Act, 1920."[51]

In 1978, the citizens of Hawai'i voted to amend the State Constitution to establish the Office of Hawaiian Affairs ("OHA").[52] OHA's purpose was to improve the conditions of "Hawaiians" and "native Hawaiians," as defined by section 10-2 of the Hawaii Revised Statutes,[53] and to ensure that the State fulfilled its trust obligations to "native Hawaiians" as set forth in sections 5(b) and (f) of the Admission Act.[54] Prior to OHA's creation, Native Hawaiians did not receive benefits from the lands held in trust.[55] The State Constitution accordingly gave OHA the responsibility of managing a pro rata share (20%) of the proceeds from the 1.2 million acres of land.[56] In addition, OHA was authorized "to exercise control over real and personal property set aside by state, federal or private sources and transferred to the board for native Hawaiians and Hawaiians."[57] Article XII of the State Constitution set up a board of trustees to manage OHA, and required all board members and those voting for board members to be "Hawaiian."[58]

Section 10-2 of the Hawaii Revised Statutes defines "Hawaiian" as:

> "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii."[59]

Section 10-2 of the Hawaii Revised Statutes defines "Native Hawaiian" as:

> "any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii."[60]

The 1970s brought hope for the revival of Native Hawaiian and Native American communities. During the 1950s and 1960s, Congress

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51. *Id.* at § 5(f) (The five purposes were "[1] for the support of the public schools and other public educational institutions, [2] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, [3] for the development of farm and home ownership on as widespread a basis as possible[,] [4] for the making of public improvements, and [5] for the provision of lands for public use.").

52. HAW. CONST. art. XII, § 5.

53. HAW. REV. STAT. §§ 10-2, 10-3 (2006)

54. Rice v. Cayetano, 146 F.3d 1075, 1077 (9th Cir. 1998), *rev'd*, 528 U.S. 495 (2000).

55. *Id.*

56. Rice v. Cayetano, 528 U.S. 495, 509 (2000). The 200,000 acres of land that were set aside for the Hawaiian Homes Commission Act are managed by a separate agency and are not part of the lands managed by OHA. *Id.* at 509 (citing HAW. REV. STAT. § 26-17 (1993)).

57. HAW. CONST. art. XII, § 6.

58. *Id.* § 5.

59. HAW. REV. STAT. § 10-2 (2006).

60. *Id.*

implemented a policy of Indian termination that aimed to eliminate Indian tribes and to assimilate Indian communities into mainstream American culture.[61] In 1970, President Nixon issued a statement on Indian affairs, marking the era of termination a failure and urging Congress to adopt a policy of promoting Indian self-determination.[62] The Hawaiian Renaissance ran parallel to these events, invoking a resurgence of Hawaiian culture, language, and pride to a community on the verge of losing its identity.[63] Since the 1970s, Congress has enacted over 150 laws that "expressly include native Hawaiians as part of the class of Native Americans benefited."[64]

In 1993, Congress formally apologized to the Native Hawaiian people for the United States' participation in the illegal overthrow of the Kingdom of Hawai'i.[65] The Apology Resolution recognizes "the deprivation of the rights of Native Hawaiians to self determination" and "urges the President of the United States to also acknowledge the ramifications of the overthrow of the Kingdom of Hawai'i and to support reconciliation efforts between the United States and the Native Hawaiian people."[66] Notably, the apology is silent on independence and sovereignty.

III. CURRENT STATUS OF HAWAIIANS

Today, the majority of Native Hawaiians remain in the State of Hawai'i,[67] struggling to reclaim the power, land, and culture lost due to Western colonization. The 2000 United States Census estimated the Native Hawaiian population—which includes all individuals of part-Hawaiian ancestry—at 401,162 nationwide.[68] Native Hawaiians remain at the bottom of the economic, political, and social scales in their homeland. As indicated below, the facts are alarming.

A. Economic Status

The statistics describing Native Hawaiians' economic conditions are bleak. According to the 2000 U.S. Census, Native Hawaiians had the

61. H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953) (enacted).

62. Message of President Nixon to Congress, 116 Cong. Rec. 23,131, 23,132 (1970) ("[T]he time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.").

63. *See generally* GEORGE H. S. KANAHELE, KU KANAKA STAND TALL: A SEARCH FOR HAWAIIAN VALUES (1986).

64. Rice v. Cayetano, 528 U.S. 495, 533 (Stevens, J. dissenting); Van Dyke, *supra* note 25, at 106-07 n.67.

65. Apology Resolution, 107 Stat. 1510, § 1. Note that section 2 of the Apology defined "Native Hawaiian" as "any individual who is a descendent of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawai'i."

66. *Id.*

67. KAMEHAMEHA SCHOOLS, *supra* note 9, at 32. (According to the 2000 U.S. Census, 239,655 Native Hawaiians, about 60% of the total Native Hawaiian population, live in Hawai'i).

68. *Id.*

lowest mean family income of all major ethnic groups in Hawai'i.[69] Native Hawaiian families with children had an average income of $55,865, 15.9% below the state average of $66,413.[70] Since Native Hawaiians tend to have larger families, their per capita income statistics were even worse: $14,199, the lowest in the State, and 35% below the statewide average of $21,525.[71] According to the 2000 Census's *conservative* definition of poverty, 16% of Native Hawaiians, compared with 10.7% of the State as a whole, lived below the poverty line.[72] Native Hawaiians also had the highest unemployment rate among the State's major ethnic groups: 9.8%, compared to the statewide average of 6.3%.[73] Moreover, Native Hawaiians had the lowest rate of home-ownership among all major ethnic groups.[74]

B. Educational Status

The socioeconomic problems of Native Hawaiians are accompanied by markers of significant educational disadvantages as compared to other ethnic groups in the State. Financial resources, family relationships, physical health, and emotional stability all play interconnected roles in the educational success of Native Hawaiian youth,[75] who remain underrepresented in both undergraduate and graduate schools in Hawai'i.[76] According to the 2000 Census, only one in four Native Hawaiians of college age (eighteen to twenty-four) was enrolled in college.[77] Native Hawaiians were two-thirds as likely to attend college as compared to their peers of Chinese ancestry and about half as likely to attend college as their peers of Japanese ancestry.[78] Native Hawaiian students also lag behind statewide averages in standardized test scores: the average SAT math and reading scores for Native Hawaiian children in public schools are the lowest of all major ethnic groups in Hawai'i.[79] Further, Native Hawaiian public school students have the lowest rates of timely graduation among all major ethnic groups in the State.[80]

In 2002, in assessing the educational status of Native Hawaiians, Congress found that:

(A) educational risk factors continue to start even before birth for many

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69. *Id.* at 85.

70. *Id.*

71. *Id.*

72. *Id.* at 86 ("Because poverty thresholds are set so low, it is common practice to use a multiple of the poverty threshold to identify individuals and families with financial need.").

73. *Id.* at 83.

74. *Id.* at 82.

75. *Id.* at 178 (citations omitted).

76. *Id.* at 116.

77. *Id.* at 118.

78. *Id.*

79. *Id.* at 261, 268 (Native Hawaiian reading achievement was lowest in all categories: Grades 3, 5, 7/8, and 9/10).

80. *Id.* at 285.

Native Hawaiian children, including—

(i) late or no prenatal care;

(ii) high rates of births to unmarried women; and

(iii) high rates of birth to teenage parents;

(B) Native Hawaiian students continue to begin their school experience lagging behind other students in terms of readiness factors such as vocabulary test scores;

(C) Native Hawaiian students continue to score below national norms on standardized education achievement tests at all grade levels;

(D) both public and private schools continue to show a pattern of lower percentages of Native Hawaiian students in the uppermost achievement levels and in gifted and talented programs;

(E) Native Hawaiian students continue to be overrepresented among students qualifying for special education programs provided to students with learning disabilities, mild mental retardation, emotional impairment, and other such disabilities;

(F) Native Hawaiians continue to be underrepresented in institutions of higher education and among adults who have completed four or more years of college;

(G) Native Hawaiians continue to be disproportionately represented in many negative social and physical statistics indicative of special educational needs, as demonstrated by the fact that—

(i) Native Hawaiian students are more likely to be retained in grade level and to be excessively absent in secondary school;

(ii) Native Hawaiian students have the highest rates of drug and alcohol use in the State of Hawaii; and

(iii) Native Hawaiian children continue to be disproportionately victimized by child abuse and neglect; and

(H) Native Hawaiians now comprise over 23 percent of the students served by the State of Hawaii Department of Education, and there are and will continue to be geographically rural, isolated areas with a high Native Hawaiian population density. [81]

Congress's findings provide ample reason for serious public concern over Native Hawaiians' educational status. These problems are multi-dimensional and likely reflect the cumulative effects of many years of devastation and socioeconomic decline among Native Hawaiians.

C. Sociological and Cultural Status

Years of Western domination have resulted in an irrevocable loss of language, tradition, and identity for the Native Hawaiian population. Western missionaries, after establishing churches on the islands, banned as "immoral" many ancient Hawaiian traditions, including the native dance

81. 20 U.S.C. § 7512(16) (2006).

form of *hula* and the native religious practice of healing, *lapa'au*.[82] Although King Kalākaua endeavored to revive these traditions during his reign from 1836 to 1891, much of the oral culture was already lost.[83] Furthermore, when Hawai'i became a United States territory in 1900, English became the official language in all schools and governmental operations, despite the fact that most Hawaiian residents spoke Hawaiian.[84] In addition to the loss of their culture, Native Hawaiians now face pervasive economic, educational, and social concerns.

Native Hawaiians continue to have the highest percentage of single-mother families as compared to other major ethnic groups.[85] In addition, the rate of child abuse and neglect in Native Hawaiian households has recently been measured at more than triple that of statewide averages and estimates for other ethnic groups in the State.[86] This alarming statistic is still on the rise.[87]

Native Hawaiians are more likely to be arrested for violent crimes than individuals from any other major ethnic group in Hawai'i.[88] Native Hawaiian men constitute the largest ethnic group of the State's incarcerated adult population, at about 39.5%, despite the fact that Native Hawaiians comprise only about 20% of the State's population.[89] Among Native Hawaiians, the rate of abuse by a partner is also double that of the State's average.[90]

The erosion of Hawaiian culture has left the Native Hawaiian community in dire straits. Despite efforts to rebuild the community, the harmful effects of Western subjugation continue to pervade many aspects of Hawaiian life. The economic, educational, and social challenges facing Native Hawaiians constitute only part of the community's many concerns. No less upsetting is the status of Native Hawaiians in the political arena, which is the subject of the following Section.

IV. INJUSTICE CONTINUES FOR NATIVE HAWAIIANS: *RICE V. CAYETANO*[91]

This Section begins with an overview of the Supreme Court case

82. SILVA, *supra* note 28, at 88-89.

83. *Id.*

84. TRASK, *supra* note 28, at 142.

85. KAMEHAMEHA SCHOOLS, *supra* note 9, at 57.

86. *Id.* at 63 (In 2002, there were 63.9 cases per 10,000 (based on a three-year average), compared to 12.8 cases per 10,000 statewide and 15.9 cases per 10,000 by the next closest ethnic group, Filipinos.).

87. *Id.*

88. *Id.* at 76.

89. *Id.* at 32, 80-81 (The next highest ethnic group of incarcerated men, Whites, constituted 23.6% of the prison population.).

90. *Id.* at 64 (In 2002 and 2003, 4.5% of Native Hawaiians reported abuse by an intimate partner compared to 2.2% of the State's total, 2.3% of Filipinos, 2.1% of Whites, and 0.7% of Japanese.).

91. 528 U.S. 495 (2000).

Morton v. Mancari,[92] which sanctioned employment preferences for Indians within the Bureau of Indian Affairs, and then discusses in detail the *Rice v. Cayetano* opinions of the District Court of Hawai'i, the Court of Appeals for the Ninth Circuit, and the United States Supreme Court.[93].

A. Setting the Stage: Federal Indian Law and Morton v. Mancari[94]

In *Morton v. Mancari*, the Supreme Court held constitutional an employment preference implemented by the Indian Reorganization Act of 1934, which favored Indians in hiring and promoting practices within the Bureau of Indian Affairs (BIA).[95] Non-Indian employees of BIA challenged the federal statute as violating the Equal Employment Opportunity Act of 1972 and the Due Process Clause of the Fifth Amendment.[96] In reviewing the case, the Court noted the long-standing federal policy of giving hiring preferences to Indians.[97] The legislative history revealed that the acts were intended, in part, "to give Indians greater participation in their own self-government; to further the Government's trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life."[98]

After holding that the Equal Employment Opportunity Act of 1972 did not repeal the preference enacted through the Indian Reorganization Act of 1934,[99] the Court examined whether the preference constituted "invidious racial discrimination" in violation of the Fifth Amendment's Due Process Clause.[100] The Court acknowledged the need to consider the "historical and legal context" of Congress's relationship with the Indian tribes.[101] Congress's plenary power over Indian tribes, derived both "explicitly and implicitly" from the Indian Commerce Clause of the Constitution,[102] allows Indians as a group to be singled out "as a proper subject for separate legislation."[103] The Court reasoned that "[i]f these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25. U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized."[104]

Despite the fact that the policy required preferences for any individual

92. 417 U.S. 535 (1974).
93. 963 F. Supp. 1547 (D. Haw. 1997); 146 F.3d 1075 (9th Cir. 1998); 528 U.S. 495 (2000).
94. 417 U.S. 535 (1974).
95. *Id.*
96. *Id.* at 537.
97. *Id.* at 543-44.
98. *Id.* at 541-42.
99. *Id.* at 545-51.
100. *Id.* at 551.
101. *Id.* at 553.
102. *Id.* at 551-52; U.S. CONST. art I, § 8.
103. *Mancari*, 417 U.S. at 552.
104. *Id.*

who was "one-fourth or more degree Indian blood" and a "member of a Federally-recognized tribe," the Court claimed that the preference was not "racial,"[105] reasoning that "[t]he 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 BIA in a unique fashion."[106] In a footnote, the Court clarified:

> "The preference is not directed towards a 'racial' group consisting of 'Indians'; instead it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature."[107]

The Court then narrowed its holding by saying, "the preference applies *only* to employment in the *Indian service*" and not to other government agencies or activities.[108] The Court thus remained silent on the permissibility of similar preferences in other government agencies or activities.[109]

Finding that the unique relationship between Congress and the Indian tribes warranted only rational basis review of BIA policy and not strict scrutiny, the Court held that the preference did not violate the Due Process Clause because the policy was "reasonable and rationally designed to further Indian self-government."[110]

B. Rice v. Cayetano:[111] *The Facts*

In 1978, the multi-racial population of Hawai'i voted to amend the State Constitution to establish the Office of Hawaiian Affairs ("OHA").[112] OHA's main purpose was to improve the conditions of "native Hawaiians" and "Hawaiians" as defined by section 10-2 of the Hawaii Revised Statutes and to satisfy the State's trust obligation, created by the Admission Act, to use the public land trust for the betterment of "native Hawaiians."[113] OHA, a state agency led by a board of nine trustees,[114] is funded by 20% of the

105. *Id.* at 553, 554 n.24.

106. *Id.* at 554.

107. *Id.* at 554 n.24.

108. *Id.* at 554 (emphasis added).

109. *Id.* ("The preference does not cover any other Government agency or activity, and we need not consider the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations.").

110. *Id.* at 555.

111. 528 U.S. 495 (2000).

112. HAW. CONST. art. XII, § 5.

113. HAW. REV. STAT. §§ 10-1, 10-2, 10-3 (2006). "Hawaiians" are defined by section 10-2 of the Hawaii Revised Statutes as "descendant[s] of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter have continued to reside in Hawaii" and "Native Hawaiians" are those who possess at least one-half quantum of "Hawaiian" blood. HAW. REV. STAT. § 10-2 (2006) (referring to Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, 42 Stat. 108 (1920)).

114. HAW. CONST. art. XII, § 5.

trust proceeds created by section 5(f) of the Admission Act and by other legislative allocations.[115] Article XII of the State Constitution requires all board members and voters in OHA elections to be Hawaiian, as defined by statute.[116]

Plaintiff Harold "Freddy" Rice brought suit in the United States District Court for the District of Hawai'i, challenging the statutory restriction that excluded non-Hawaiians from voting for OHA trustees.[117] Rice was a rancher and a fifth-generation white descendant of missionary settlers who arrived in the Islands prior to the 1893 overthrow of the monarchy.[118] Rice attempted to register to vote for the 1996 OHA elections, but his application was denied because he did not fit the statutory definition of "Hawaiian" or "Native Hawaiian."[119] Rice claimed that the OHA's exclusion of non-Hawaiians from voting in trustee elections violated his right to equal protection under the Fourteenth Amendment and his right to vote without racial qualification under the Fifteenth Amendment.[120] Rice did not, however, challenge OHA's requirement that board trustees must be Hawaiian, nor did he question the source of OHA's funding.[121]

C. The District Court of Hawai'i Opinion

Judge David Ezra heard the case for the District Court of Hawai'i and held that OHA's voting qualification excluding non-Hawaiians met constitutional standards.[122] While acknowledging that formal tribal recognition was "not controlling for purposes of determining the proper standard of review," Judge Ezra noted that "Native Hawaiians have not and could not at this time receive formal recognition as an Indian tribe."[123] In recounting the history of the United States' dealings with Native Hawaiians, the court explained that Native Hawaiians were omitted from

115. Rice v. Cayetano, 963 F. Supp. 1547, 1552 (D. Haw. 1997), *aff'd on other grounds*, 146 F.3d 1075 (9th Cir. 1998), *rev'd*, 528 U.S. 495 (2000); *see also* HAW. CONST. art. XII, § 6.

116. HAW. CONST. art. XII, § 5.

117. *Cayetano*, 963 F. Supp. at 1548.

118. Robert M. Rees, *Race Matters*, HONOLULU WEEKLY, Apr. 28, 1999, *available at* http://www.honoluluweekly.com/archives/coverstory%201999/04-28-99%20Rice/04-28-99%20Rice.html.

119. *Cayetano*, 963 F. Supp. at 1548.

120. *Id.* at 1548-49. Section 1 of the Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Section 1 of the Fifteenth Amendment provides, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

121. *Cayetano*, 963 F. Supp. at 1549 n.2. After the U.S. Supreme Court's decision in *Rice*, several Hawai'i citizens brought suits in federal court to challenge these two very issues. *See infra* Part V; Arakaki v. Hawaii, 314 F.3d 1091, 1098 (9th Cir. 2002); Arakaki v. Lingle, 477 F.3d 1048 (9th Cir. 2007).

122. *Cayetano*, 963 F. Supp. at 1558.

123. *Id.* at 1553.

the acknowledgement system of formally recognizing tribes, in part because of their unique relationship with the federal government.[124] The court pointed to additional federal legislation enacted solely to benefit Native Hawaiians and to the inclusion of Native Hawaiians in other federal acts benefiting American Indians to show a "continuing guardian-ward relationship between Native Hawaiians and the Federal Government."[125] Accordingly, the court held that *Morton v. Mancari* applied to OHA since "the unique guardian-ward relationship"—"not formal recognition"—was the key to *Mancari*'s holding.[126] Applying a rational basis standard, the court concluded that OHA's structure was "rationally related to the State's responsibility under the Admission Act" because it was created "as a means to fulfill the obligation taken over from the federal government."[127]

The court also reviewed the "one-person, one-vote" principle, finding it inapplicable to OHA.[128] The Supreme Court had previously held that elections for functionaries having general governmental powers over a population must adhere to the one-person, one-vote standard.[129] The court reasoned that because OHA "does not and could not impose taxes," "cannot enact laws," does not "administer the normal functions of government," "does not by any means control the provision of [schools, health, and welfare] services to the general population," and "cannot issue bonds, unless specifically authorized by law," OHA did not implement the general governmental powers that call for a review under one-person, one-vote case law.[130] Instead, the court found that OHA was more like the constitutionally upheld "special interest" election cases: *Salyer Land Co. v. Tulare Lake Basin Water Storage District* and *Ball v. James*.[131]

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124. *Id.*

125. *Id.* at 1554.

126. *Id.* (applying Morton v. Mancari, 417 U.S. 535 (1974)).

127. *Id.* at 1555.

128. *Id.* at 1555, 1558. The one-person, one-vote principle was laid out in *Reynolds v. Sims*, 377 U.S. 533 (1964), *Avery v. Midland County*, 390 U.S. 474 (1968) and *Hadley v. Junior College District*, 397 U.S. 50 (1970). *Id.* at 1555.

129. Reynolds v. Sims, 377 U.S. 533, 568 (1964) ("We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State."); Avery v. Midland County, 390 U.S. 474, 484-85 (1968) ("We hold today only that the Constitution permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body."); Hadley v. Junior Coll. Dist., 397 U.S. 50, 52 (1970) ("[W]e reverse and hold that the *Fourteenth Amendment* requires that the trustees of this junior college district be apportioned in a manner that does not deprive any voter of his right to have his own vote given as much weight, as far as is practicable, as that of any other voter in the junior college district.").

130. *Cayetano*, 963 F. Supp. at 1558.

131. *Id.* at 1556-58; *see* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 730 (1973) ("We hold, therefore, that the popular election requirements enunciated by Reynolds, supra, and succeeding cases are inapplicable to elections such as the general election of appellee Water

D. The Ninth Circuit Opinion

Rice appealed the district court's decision to the Court of Appeals for the Ninth Circuit, where a three-judge panel composed of Judges James R. Browning, Melvin Brunetti, and Pamela Ann Rymer heard the case.[132] The Ninth Circuit affirmed the district court's decision, holding that because "[OHA's] voting restriction is not primarily racial, but legal or political," the voting qualification did not violate the Fourteenth or Fifteenth Amendments.[133]

The court first found that although the statutory voting requirements described by Hawai'i's Constitution and section 13D-3 of the Hawaii Revised Statutes "contain[ed] a racial classification on their face," they did not violate the Fifteenth Amendment.[134] Although the Fifteenth Amendment prohibits any race-based restriction on the right to vote, the court held that the Fifteenth Amendment did not apply because OHA trustee elections are not the type of general elections "for government officials performing government functions" for which Fifteenth Amendment analysis is necessary.[135] Further, voting for trustees was not the same as voting in general elections for officials who perform *general* governmental functions.[136]

The court also reviewed the applicability of *Salyer Land Co. v. Tulare Water District*, which held constitutional a state statute that permitted only landowners to vote in water storage district general elections.[137] The Court found that *Salyer* was not dispositive, however, because OHA's voting qualification was racial in nature and not based upon landownership as in *Salyer*.[138] Nonetheless, the court did find *Salyer* informative insofar as OHA trustee elections were similar to the special purpose elections described by *Salyer*.[139]

The Ninth Circuit likewise refused to apply *Mancari* to the case of OHA because "Hawaiians [were] not exactly like Indians" since, among

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Storage District."); *see also* Ball v. James, 451 U.S. 355, 371 (1981) ("As in the *Salyer* case, we conclude that the voting scheme for the District is constitutional because it bears a reasonable relationship to its statutory objectives. Here, according to the stipulation of the parties, the subscriptions of land which made the Association and then the District possible might well have never occurred had not the subscribing landowners been assured a special voice in the conduct of the District's business. Therefore, as in *Salyer*, the State could rationally limit the vote to landowners. Moreover, [the State] could rationally make the weight of their vote dependent upon the number of acres they own, since that number reasonably reflects the relative risks they incurred as landowners and the distribution of the benefits and the burdens of the District's water operations.").

132. Rice v. Cayetano, 146 F.3d 1075 (9th Cir. 1998), *rev'd*, 528 U.S. 495 (2000).

133. *Id.* at 1079.

134. *Id.* at 1079, 1082.

135. *Id.* at 1081.

136. *Id.*

137. *Id.*; Salyer Land Co. v. Tulare Water Dist., 410 U.S. 719 (1973).

138. *Cayetano*, 146 F.3d at 1080.

139. *Id.*

other reasons, Hawaiians were not organized into tribes and the Constitution contained no "Hawaiian Commerce Clause."[140] As a result, contrary to the district court, the Ninth Circuit held that *Mancari* was distinguishable and thus, did not control in this case.[141] The court explained, however, that *Mancari* nonetheless "indicate[d] that we are not compelled to invalidate the voting restriction simply because it appears to be race-based without also considering the unique trust relationship that gave rise to it."[142] Using the principles established by *Salyer* and *Mancari* and considering the unique history of the Native Hawaiian people, the court held that OHA did not violate the Fifteenth Amendment.[143]

The Ninth Circuit then reviewed Rice's claim that OHA's voting qualification violated his Fourteenth Amendment right to equal protection.[144] Again, the court agreed with the district court that a racial classification existed on the face of section 13D-3 of the Hawaii Revised Statutes, but disagreed that the classification was "primarily racial in context."[145]

The court also disagreed that strict judicial scrutiny as applied in *Adarand* should apply to the current case , and it went further to say that OHA's voting qualification would survive review even if strict scrutiny did apply, reasoning that the State had a compelling interest in fulfilling its federally-delegated trust responsibilities to Native Hawaiians under the Admission Act.[146] Furthermore, the voting restriction was the best way to ensure proper management of the allocated funds.[147] As the court explained, "[g]iven the fact that only Hawaiians and native Hawaiians are the trust beneficiaries, there is no race-neutral way to accord only those who have a legal interest in management of trust assets a say in electing trustees except to do so according to the statutory definition by blood quantum which makes the beneficiaries the same as the voters."[148]

E. The Supreme Court Opinions

The United States Supreme Court granted certiorari to hear the case and issued an opinion in early 2000.[149]

1. The Majority Opinion

In a 7-2 decision written by Justice Anthony Kennedy, the Court

140. *Id.* at 1081.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* at 1082.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. Rice v. Cayetano, 528 U.S. 495 (2000).

reversed the Ninth Circuit's decision and agreed with plaintiff Rice that the "race-based" voting qualification excluding non-Hawaiians from OHA trustee elections violated the Fifteenth Amendment.[150]

The Court began its analysis with a discussion of the Fifteenth Amendment and the important precedents that evolved from case law on racial exclusions in voting.[151] The Court discussed *Guinn v. United States*, which invalidated an Oklahoma law that exempted from a literacy requirement the lineal descendants of persons who were "on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation."[152] Recognizing this "transparent racial exclusion," the *Guinn* Court held the law unconstitutional.[153]

The *Rice* Court then rejected the State of Hawai'i's argument that the statutory definition of "Hawaiian" was based not on race but rather on a classification of "those whose ancestors were in Hawai'i at a particular time, regardless of their race."[154] The State argued that because the inhabitants of Hawai'i as of 1778 may have been from the Marquesas Islands, the Pacific Northwest, and Tahiti, the definition of "Hawaiian" included many different races.[155] Also, the classification excluded those who were of the same race but whose ancestors were not present in Hawai'i as of 1778.[156] The Court ruled against the State, reasoning that the State was using ancestry as a "proxy for race"[157] and hence, OHA's voting qualification was race-based.[158]

Next, the Court rejected the State's defenses. First, the State argued that excluding non-Hawaiians from voting in OHA elections was permissible under Indian case law.[159] Specifically, *Morton v. Mancari* upheld a hiring preference favoring Indians within the Bureau of Indian Affairs.[160] The Court declined to uphold OHA's voting scheme under *Mancari*, for fear that doing so would imply that Native Hawaiians held the same status as Indians in organized tribes.[161] However, the Court was silent as to what legal status Native Hawaiians *did* possess.[162] Taking a narrow

150. *Id.* at 499.
151. *Id.* at 512-14.
152. *Id.* at 513 (citing Guinn v. United States, 238 U.S. 347, 357 (1915)).
153. *Id.*
154. *Id.* at 514.
155. *Id.*
156. *Id.*
157. *Id.* at 515 ("The State . . . has used ancestry as a racial definition and for a racial purpose.").
158. *Id.* at 517.
159. *Id.* at 518.
160. *Id.*; *see also* Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974) (Although there was a racial component to the BIA's classification of those eligible for the preference, the *Mancari* Court stated in a footnote of the opinion that "the preference is political rather than racial in nature.").
161. *Rice*, 528 U.S. at 518.
162. *Id.* at 518-19 ("We can stay far off that difficult terrain, however.").

view of *Mancari*, the Court declined to "extend the limited exception of *Mancari* to a new and larger dimension"—OHA.[163] Emphasizing the "sui generis" nature of BIA and *Mancari*'s particular and limited application,[164] the Court found that because OHA trustee elections were state elections and "not [those] of a separate quasi-sovereign," the Fifteenth Amendment applied.[165]

The State also argued that OHA's voting qualification was valid under *Salyer* and *Ball* because OHA trustee elections were special purpose elections limited to the only interested parties: Hawaiians.[166] The Court, rejecting this argument, explained even if OHA's voting scheme adhered to the Fourteenth Amendment's one-person, one-vote principle, it must still comply with the Fifteenth Amendment's requirement of race neutrality.[167]

The Court also rejected the State's argument that OHA voting restriction "ensure[d] an alignment of interests between the fiduciaries and the beneficiaries of a trust,"[168] reasoning that this alignment of interests was impossible by OHA's own organizational structure, since both Hawaiians and native Hawaiians may vote for trustees despite the fact that the bulk of OHA's funding is used to benefit native Hawaiians.[169]

The Court's opinion concluded that "[t]he State's position rests, in the end, on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters."[170] Accordingly, the Court held OHA's voting qualification unconstitutional in violation of the Fifteenth Amendment.[171]

2. The Concurring Opinion

Justice Stephen Breyer, joined by Justice David Souter, set forth a concurring opinion in *Rice*.[172] Justice Breyer argued that OHA's voting scheme should have been rejected because "(1) there [was] no 'trust' for native Hawaiians here, and (2) OHA's electorate, as defined in the statute, [did] not sufficiently resemble an Indian tribe."[173] Justice Breyer asserted that the trust established by Congress was for the benefit of *all* the people of Hawai'i, which included native Hawaiians.[174] He reasoned that OHA's coverage of both Hawaiians and native Hawaiians was too "broad" to

163. *Id.* at 520.
164. *Id.*
165. *Id.* at 522.
166. *Id.*
167. *Id.*
168. *Id.* at 523.
169. *Id.*
170. *Id.*
171. *Id.* at 524.
172. *Id.* at 525 (Breyer, J., concurring).
173. *Id.*
174. *Id.*

constitute an Indian tribe because he was "unable to find any Native American tribal definition" as extensive as the definition created by OHA.[175] Justice Breyer argued further that although Native American tribes have broad authority to define their membership, "[t]here must . . . be some limit on what is reasonable, at the least when a State (which is not itself a tribe) creates the definition."[176]

3. The Dissenting Opinion

Justice John Paul Stevens, with whom Justice Ruth Bader Ginsburg joined as to Part II of his dissent, argued at length that OHA voting qualification should have been upheld given the compelling history of Hawai'i, the manifest purpose of the Fourteenth and Fifteenth Amendments, and more than two centuries of Indian law precedent.[177] In Part I, Justice Stevens asserted that the majority opinion was flawed because the very purpose of OHA and its programs—to ensure that the trust relationship was fulfilled, to compensate for past wrongs, and to preserve the Native Hawaiians' indigenous culture—undermined the Court's reasons for invalidating the voting scheme on Fifteenth Amendment grounds.[178] Justice Stevens explained that the principles underlying this conclusion were as follows: (1) the federal government "must be, and has been," given "wide latitude" to fulfill its obligations that arise from the special relationship it shares with aboriginal people, (2) the State has a fiduciary duty to administer the public trust assets assigned to it "by the Federal Government in part for the benefit of Native Hawaiians," and (3) even setting aside two centuries' worth of Indian law precedent, there is no apparent "invidious discrimination" in the State's effort to compensate indigenous peoples for past wrongs and to preserve the Native Hawaiian culture.[179]

In Part II, Justice Stevens discussed the manner in which case law has consistently recognized Congress's plenary power over Native American affairs.[180] He explained that the extent of Congress's power and the character of the trust relationship have never depended on "the ancient racial origins of people, the allotment of tribal lands, the coherence or existence of self-government, or other definitions of 'Indian' Congress has chosen to adopt."[181] He also cited *Mancari* for the proposition that "legislation that singles out Indians for particular and special treatment" shall not be disturbed as "long as the special treatment can be tied

175. *Id.* at 526.
176. *Id.* at 527.
177. *Id.* at 527-47 (Stevens, J., dissenting).
178. *Id.* at 528-29.
179. *Id.* at 529.
180. *Id.* at 530-31.
181. *Id.* at 531.

rationally to the fulfillment of Congress's unique obligation towards the Indians."[182] The majority's arguments for rejecting OHA voting qualification—(1) that "Congress'[s] trust-based power is confined to dealings with tribes, not with individuals," whereby Native Hawaiians would not qualify for such special treatment and (2) that the trustee elections were "the affair of the State" and not of a tribe—did not overcome the compelling analogy of the "historical sufferings" and status between Native Hawaiians and Native Americans.[183]

V. *RICE* UNDER REVIEW: MISTAKES OF THE SUPREME COURT

The *Rice v. Cayetano* opinion clearly reflected the Supreme Court's indifference and ignorance regarding indigenous rights. First, despite years of supposed progress in understanding America's indigenous populations, the *Rice* Court set forth a Euro-centric view of Hawaiian history. The majority opinion minimized past and present harms suffered by the Hawaiian community as a result of Western imposition as it disposed of the United States' blame in the matter. Nearly two hundred years following its *Johnson v. M'Intosh* decision,[184] the Court was still legitimizing the same Western notions of superiority over indigenous people.

Second, the Court refused to address the history of the special relationship between Native Hawaiians and the federal government, resulting in an empty opinion that failed to recognize the place of Native Hawaiian legal rights within the broader context of American law.

Third, by ignoring the existence of this "special relationship," the Court avoided important questions about Native Hawaiian legal rights—questions that the Court admitted were of "considerable moment and difficulty"—by confining its review to a superficial Fifteenth Amendment analysis.[185]

Fourth, the Court misapplied a framework developed to address civil rights claims to a case that was plainly about indigenous rights.

Last, the Court's treatment of "race" reflected a shallow understanding of the issues presented. The Court's technical approach failed to recognize that *Mancari*'s distinction between "political" and "racial" classifications was a superficial formality, since indigenous rights are necessarily tied to race. The rationale behind *Mancari*'s exception for "racial" Indian

182. *Id.* (citing Morton v. Mancari, 417 U.S. 535, 554-55 (1974)).

183. *Id.* at 534-35.

184. 21 U.S. 543, 590 (1823) ("But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.").

185. *Rice*, 528 U.S. at 518.

preferences originates from the indigenous status of such peoples.

A. The Supreme Court's Historical Fiction

A textual analysis of the *Rice* opinion reveals the Court's unwillingness to engage in a genuine discussion of Native Hawaiian rights. The Court's opinion represented the perspective of the colonizer. The late Professor Chris Iijima of the University of Hawai'i School of Law described the Court's depiction of Hawaiian history as "stereotypic and patronizing."[186] In Professor Iijima's view, the Court created a "remarkable narrative" that retold the "favorite American fairy tale of how the white man 'civilized' the savage."[187] For example, the Court remarked how "[i]n Cook's time . . . Kings or principal chieftains, as well as high priests, could order the death or sacrifice of any subject."[188] Providing no background to the complex role of the *ali'i nui* (king or queen) in ancient societal life, the Court's statement oversimplified the organizational system of ancient Hawaiians and depicted Native Hawaiians as savages.[189]

The Court also began its opinion with the absurd statement that Rice was "a citizen of Hawaii and *thus himself a Hawaiian in a well-accepted sense of the term.*"[190] This statement disrespected the Native Hawaiian community by trivializing what it means to be a member of the indigenous Native Hawaiian population. Citizens of the State of Hawai'i commonly understand that the term "Hawaiian" refers to persons of Native Hawaiian blood. Professor Iijima criticized the Court's description of Rice as "misinformed, biased, and plainly wrong."[191]

The Court also wrote that later arriving missionaries "sought to teach Hawaiians to abandon religious beliefs and customs that were contrary to Christian teachings and practices," euphemizing the destructive impact of these missionaries[192] whose actions contributed to the demise of Hawaiian language and cultural traditions.

Professor Iijima also noted the pernicious nature of the Court's rendition of Queen Lili'uokalani's actions.[193] The Court stated that "[t]ensions continued through 1893, when they again peaked, this time in response to an attempt by the then-Hawaiian monarch, Queen Liliuokalani,

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186. Chris K. Iijima, *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, 99 (2000).

187. *Id.* at 98. Professor Iijima also notes the fact that the Court refused to label the white missionaries and other "settlers" from Europe and America as immigrants to Hawaii, even though the Court had no trouble referring to the later arriving waves of Chinese, Portuguese, and Japanese people as immigrants to Hawai'i. *Id.* at 103.

188. *Rice*, 528 U.S. at 500.

189. Iijima, *supra* note 186, at 104.

190. *Rice*, 528 U.S. at 499 (emphasis added).

191. Iijima, *supra* note 186, at 98.

192. *Rice*, 528 U.S. at 501; *see* Ijima, *supra* note 186, at 99.

193. Iijima, *supra* note 186, at 100.

to promulgate a new constitution restoring monarchical control over the House of Nobles and limiting the franchise to Hawaiian subjects."[194] Nowhere did the Court mention that the Queen was trying to undo the Bayonet Constitution, which had wrongly placed the Hawaiian Kingdom in the hands of a white-controlled cabinet and legislature. The opinion stated that the United States Minister to Hawaii, John Stevens, and the Committee of Safety simply "*replaced* the monarchy with a provisional government,"[195] turning a blind eye to the findings of the Apology Resolution, passed just seven years prior to *Rice*, and omitting Congress's recognition that the Kingdom of Hawai'i was "*illegal[ly] overthrow[n]* . . . with the participation of agents and citizens of the United States."[196]

Near the end of its opinion, the Court shared its view about Hawaii's future:

> "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 shared sense of purpose. One of the necessary beginning points is this principle: The Constitution of the United States, too, has become the heritage of all of the citizens of Hawaii."[197]

Yet the Court's opinion omits the fact that OHA was created with the "shared sense of purpose" from the "political consensus" of Hawaiian citizens who created the Hawaiian-run OHA to address Native Hawaiians' interests.[198] Furthermore, the statement that the "Constitution of the United States . . . has become the heritage of all of the citizens of Hawaii" suggests a one-way exchange, leaving no room for the notion that Native Hawaiian heritage should be incorporated into the fabric of American history.

The Court's portrayal of Hawaiian history was replete with biases against Native Hawaiians. The Court downplayed the suffering of Native Hawaiians due to Western subjugation and deflected any blame in the matter away from the United States. This narrative inaccurately portrayed Hawaiian history and assumed a skewed perspective that favored the white colonizers, setting a negative tone for the rest of the opinion.

B. The Supreme Court's Refusal to Recognize or Address the Political Status of Native Hawaiians

The Court's failure to recognize or address the Hawaiian people's

194. *Rice*, 528 U.S. at 504.

195. *Id.* at 505 (emphasis added); *see also* Iijima, *supra* note 186, at 100.

196. Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 §§ 1, 3 (1993) (emphasis added).

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

198. Iijima, *supra* note 186, at 101 ("In a glaring and most telling omission, the Court never acknowledged that the creation of OHA itself, as well as its voting limitation at issue, resulted from a vote by the entire multiracial population of Hawai'i.").

political status amounted to a disingenuous move to decide the case without discussing the real legal issues. *Rice v. Cayetano* presented an opportunity for the Court to settle uncertainties concerning Native Hawaiian legal rights. Referring to the scholarly discussion between Professors Stuart Benjamin and John Van Dyke, the Court acknowledged that "[i]t is a matter of some dispute . . . whether Congress may treat the native Hawaiians as it does the Indian tribes."[199] However, the Court sidestepped the issue and declared that traversing "that difficult terrain" was unnecessary because OHA's voting scheme "fails for a more basic reason"—that "Congress may not authorize a State to create a voting scheme of this sort."[200]

The debate that the Court declined to address is one of constitutional significance that challenges the validity of many programs enacted by Congress and the State of Hawai'i to benefit Native Hawaiians.[201] This debate concerns Congress's authority (1) to enact legislation that singles out Native Hawaiians based on "race" alone, without regard to "tribal" membership[202] and furthermore, (2) to recognize officially a "special relationship," analogous to that of federally-recognized Indian tribes, between Native Hawaiians and the United States.[203] This debate is *critical* to a full understanding of Native Hawaiian rights. The arguments are summarized below.

In a controversial Yale Law Journal article, published ten years ago, Professor Stuart Benjamin explored the issue of whether legislation that benefited racially "native" individuals who were not members of an "Indian tribe" was subject to rational review in light of the Supreme Court's holdings in *Adarand Constructors, Inc. v. Pena*, *City of Richmond v. J.A. Croson Co.*, and *Morton v. Mancari*.[204] In *Adarand* and *Croson*, the Court held that government programs containing racial classifications are subject to strict scrutiny.[205] In *Mancari* however, the Court held that because the federal government's "special relationship" with the Indian tribes removed the Bureau of Indian Affairs from the purview of *Adarand* and *Croson*, the policy favoring American Indians was only subject to rational review.[206] Professor Benjamin analyzed the case of Native Hawaiians and concluded that because Native Hawaiians do not share a

199. *Rice*, 528 U.S. at 518 (citing Van Dyke, *supra* note 25; Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537, 541 (1996)).

200. *Id.* at 519 ("We can stay far off that difficult terrain, however.").

201. *See infra* Part V.

202. Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L. J. 537, 541 (1996).

203. *Id.*

204. *Id.*; *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Morton v. Mancari, 417 U.S. 535 (1974).

205. *Adarand*, 515 U.S. 200 (1995); *Croson*, 488 U.S. 469 (1989).

206. *Mancari*, 417 U.S. 535 (1974).

recognized "special relationship" with the United States like that of the Indian tribes, governmental programs benefiting Native Hawaiians should be subject to strict scrutiny, not rational review.[207]

Professor Benjamin reasoned that the federal government's special relationship with the Indian tribes, as explained by *Mancari*, does not extend to all Native Americans individually.[208] Instead, the Indian Commerce Clause, Congress's main source of constitutional power for establishing a "special relationship" with American Indians, refers to dealings with "Indian Tribes" and not with individual "Indians."[209] Thus, although Native Hawaiians may be "Indians" for constitutional purposes, because Native Hawaiians currently do not constitute an "Indian Tribe" they are precluded from having a special relationship with the United States.[210]

Professor Benjamin put forth several reasons why Native Hawaiians do not constitute an Indian Tribe: first, Native Hawaiians lack clear organization in their group;[211] second, although the history of Native Hawaiians and Indian tribes are similar, because Native Hawaiians did not remain organized in a "self-contained group"—through no fault of the United States[212]—they do not hold the same legal status as the Indian tribes;[213] and third, federal statutes singling out Native Hawaiians do not constructively create a special relationship between Native Hawaiians and the United States.[214]

In response to Professor Benjamin, Professor Jon Van Dyke of the University of Hawai'i Law School wrote an article in the Yale Law and Policy Review.[215] Professor Van Dyke argued that Professor Benjamin's highly technical analysis was incorrect because it lacked "an appreciation of the centuries of development of native rights law and the particular struggles of the Native Hawaiian people."[216] He affirmed that Native Hawaiians *do* have a special relationship with the federal government that is evidenced by Congress's continuous enactment of legislation specifically to benefit Native Hawaiians.[217]

Professor Van Dyke argued that the term "'Indian tribes' in the Indian Commerce Clause must be understood in a generic sense, as referring to historical and cultural groupings of *native* people."[218] Van Dyke reasoned

207. Benjamin, *supra* note 202, at 558.
208. *Id.* at 561-62.
209. *Id.* at 561.
210. *Id.* at 562.
211. *Id.* at 574.
212. *Id.* at 585.
213. *Id.* at 582.
214. *Id.* at 589-91.
215. Van Dyke, *supra* note 25.
216. *Id.* at 137.
217. *Id.* at 104-08.
218. *Id.* at 113 (emphasis added).

that framers of the Constitution referred to "Indian tribes" as such because of the formal relationships they held with the federal government at that time.[219] Because the concept of a "tribe," however, "has been malleable and elusive over the years" as a result of changes in policies and attitudes,[220] it would be improper to construe the term so narrowly as to preclude Native Hawaiians from its scope.[221]

The arguments put forth by Professor Benjamin and the *Rice* concurrence are problematic because they lack understanding of federal Indian law. As Professor Van Dyke argued, Professor Benjamin's analysis was too formalistic to do justice to the complex historical relationship between the United States and Native Hawaiians, and it "[flew] in the face of consistent recognition by the United States Congress and by numerous court decisions of the unique relationship between Native Hawaiians and the national government."[222] In like manner, the Supreme Court's failure to assess the relationship between Native Hawaiians and the federal government resulted in a misled analysis and an incorrect result.

C. The Supreme Court's Superficial Fifteenth Amendment Analysis

The *Rice* Court faced three separate issues central to the decision: first, whether Native Hawaiians share the same "special relationship" with the federal government as do Indian tribes; second, whether Congress may authorize a state to act in its place to manage this relationship; and third, the interplay between voting rights and indigenous law.

To avoid the complexities entailed by the first and second issues, the Court skirted around the crux of the case and invalidated OHA's voting qualification via the third, ancillary issue involving voting rights. Thus, despite the fact that Rice challenged OHA's voting qualification under both the Fourteenth and Fifteenth Amendments,[223] the Court invalidated the restriction on Fifteenth Amendment grounds and made only passing mention of the Fourteenth Amendment issue.[224] In sidestepping the real issues, however, the Court left two gaping holes in its analysis: (1) it avoided discussing the "racial"-"political" distinction created by *Mancari* and other equal protection analyses and (2) it ignored the complexities

219. *Id.* at 112.

220. *Id.* at 113. In the *Rice* dissent, Justice Stevens concluded that "the Federal Government must be, and has been, afforded wide latitude in carrying out its obligations arising from the special relationship it has with the aboriginal peoples, a category that includes the native Hawaiians, whose lands are now a part of the territory of the United States." Rice v. Cayetano, 528 U.S. 495, 529 (2000) (Stevens, J. dissenting).

221. Van Dyke, *supra* note 25, at 113.

222. *Id.* at 130; *see also* Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1767 (1997) ("[I]n federal Indian law, lawyerly analysis that is devoid of broader historical and theoretical perspectives leads to misleading conclusions about the determinacy and substance of what the law 'is' at any given moment.").

223. Rice v. Cayetano, 528 U.S. 495 (2000).

224. *See id.* at 498, 522-23.

presented by a federally-instituted mechanism for fulfilling trust obligations to native Hawaiians.

Because it avoided *Mancari*, the Court's argument for invalidating OHA's voting qualification lacked any discussion of whether the Native Hawaiians' "special relationship" could act as an exception to the Fifteenth Amendment's prohibition on race-based voting exclusions. Although the Court argued that *Mancari* "was confined to the authority of BIA, an agency described as '*sui generis*,'"[225] the Court could have similarly confined *Rice* to OHA's case. Furthermore, the *Mancari* opinion nowhere denies that its principles might extend to voting rights under the Fifteenth Amendment. The policy of furthering self-government for indigenous groups would make this expansion a natural one, especially for groups like the Native Hawaiians who are still rebuilding their community.

The Court made a roadblock of the pathway through which Congress had chosen to support indigenous Hawaiians. Congress had appointed the State of Hawai'i to manage a trust-based relationship between the federal government and the native Hawaiians. OHA, in allowing only Native Hawaiians to vote for issues concerning management of funds for Native Hawaiians' benefit, sought to place self-governance back into Hawaiians' hands, in accordance with the duty that Congress had passed onto the State. The Court's refusal to participate in this discussion hinders reconciliation with, and recompense to, the Hawaiian people. As pointed out by the dissent in *Rice*, "it is a painful irony indeed to conclude that native Hawaiians are not entitled to special benefits designed to restore a measure of native self-governance because they currently lack any vestigial native government—a possibility of which history and the actions of this Nation have deprived them."[226] In short, the Court in *Rice* turned Native Hawaiians into the victims of a federally-constructed legacy.

D. The Supreme Court Turns a Case About Indigenous Rights into a Case About Civil Rights

The Court's analysis was also flawed in that it forced the unique situation of Native Hawaiians into ill-fitting legal categories. The lack of discourse concerning the Native Hawaiians' special relationship with the federal government and the congressional delegation of the trust responsibility to the State left the Court few legal structures to apply. As a result, the Court produced an opinion that imposed civil rights concerns onto a case about indigenous peoples. As such, the *Rice* Court unfittingly began its analysis with a historical overview of the purpose of the Fifteenth Amendment, an awkward framework which Justice Stevens noted in his dissent: "The Court's holding today rests largely on the repetition of

225. *Id.* at 520 (referring to Morton v. Mancari, 417 U.S. 535, 554 (1974)).

226. *Id.* at 535 (Stevens, J., dissenting).

glittering generalities that have little, if any, application to the compelling history of the State of Hawaii."[227]

Although the *sui generis* nature of OHA made it a prime candidate for treatment under the principles of federal Indian law, the Court refused to apply an indigenous legal framework. As Professor Iijima explained, the Fourteenth and Fifteenth Amendments were not applicable to *Rice* since the mutual goal of the Amendments "was to remove racial barriers to full and equal participation in the polity"—a purpose—"entirely different from governmental programs instituted to rectify harms to a group of people resulting from the forcible loss of their independence and from the colonization foisted upon them by the American nation."[228] Professor Danielle Conway-Jones of the University of Hawai'i School of Law further commented that "[t]he argument of racial preferences and the implicit, yet perceived, connection to affirmative action through analogues to race classifications and remedies presented in *Rice v. Cayetano* distorts both the issue of being Native Hawaiian and the issue of Native Hawaiians' special relationship to the United States based upon indigenousness and political status."[229] The *Rice* Court's reluctance to extend federal Indian law principles to Native Hawaiians forced it to shove the Native Hawaiian issue into the only other legal construct available, a construct guided by Fifteenth Amendment civil rights jurisprudence.[230] The case of OHA, however, was not about civil rights or affirmative action; it concerned indigenous rights specific to Native Hawaiian history.

E. Lingering Questions About Race

The Court's finding that OHA's voting scheme, *qua* "race-based," violated the Fifteenth Amendment, warrants closer review. The inadequacy of the Court's understanding of "race" is revealed by its assertion that "[t]he State's position rests, in the end, on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters."[231] Earlier in its opinion, the Court also stated that "[a]n inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses . . . ."[232] These statements are so

227. *Id.* at 527-28.

228. Iijima, *supra* note 186, at 97.

229. Danielle Conway-Jones, *Beyond* Rice v. Cayetano*: Its Impacts and Progeny: The Perpetuation of Privilege and Anti-Affirmative Action Sentiment in* Rice v. Cayetano, 3 ASIAN-PAC. L. & POL'Y J. 7 (2002) ("What does affirmative action have in common with Native Hawaiian Sovereignty? Absolutely nothing, except in the manner that America responds to Peoples of Color.").

230. The Ninth Circuit was well aware of the problem that Native Hawaiians could not appropriately fit into any of the legal structures created by past Supreme Court cases of *Salyer* and *Mancari*, and aptly upheld the validity of the OHA in congruence with the principles of other guiding cases. *See* Rice v. Cayetano, 146 F.3d 1075, 1080-81 (1998), *rev'd*, 528 U.S. 495 (2000).

231. Rice v. Cayetano, 528 U.S. 495, 523 (2000).

232. *Id.* at 517.

antithetical to the purpose of OHA's voting qualification that they undermine the opinion's structural backbone.

So what makes a group "racial" or "political"? Is the distinction drawn by *Mancari* even necessary? Professor Benjamin has argued that Native Hawaiians do not fall under the protection offered by *Mancari* because the definition of Native Hawaiian is racial rather than political.[233] He argues that because the term "Native Hawaiian" refers to "the races inhabiting the Hawaiian Islands previous to 1778," it is necessarily tied to race.[234] Requirement of tribal membership, according to Benjamin, makes a group political,[235] and the inclusion of ancestry in the definition of "Native Hawaiian" "adds an element that is ordinarily suspect."[236] Professor Van Dyke countered this by first noting that "the *Mancari* preference was not free of racial overtones" because the hiring preference applied only to individuals with one-fourth or more Indian blood.[237] In addition, Van Dyke cited two cases following *Mancari* in which the Court upheld congressionally-enacted programs "that provided benefits to or established separate legal regimes for individual Indians who were not organized into formal tribes."[238] He concluded that the "governance of natives are political in nature," and that because of each tribe's unique historical context, individualized solutions are necessary.[239] As such, Congress must be afforded flexibility to "provide rough justice to each different native group."[240]

Mancari's casting of BIA's preferential treatment of Indians as "political" rather than "racial" is a superficial distinction constructed for the Court's own legal security.[241] At the heart of the issue is the fact that there exist groups of indigenous peoples who once exercised independent sovereignty from the United States. The descendants of such people maintain rightful claims against the United States that separate them into

233. Benjamin, *supra* note 202, at 569-71.

234. *Id.* at 569. The year 1778 is significant because it was the year the first Westerners arrived in the Hawaiian Islands. *Id.*

235. *Id.* at 570 (citing Morton v. Mancari, 417 U.S. 535 (1974)).

236. *Id.* at 571.

237. Van Dyke, *supra* note 25, at 114.

238. *Id.* at 115 (citing Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73 (1977); United States v. John, 437 U.S. 634 (1978)).

239. *Id.* at 117.

240. *Id.*

241. Some scholars have noted concern over the chipping away of *Mancari*'s political characterization of Indian tribes to expose the racial components beneath. They interpret this to mean that the Court's holding in *Adarand* possibly weakens or even overrules *Mancari*. *See* 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, 306-07 (2000). Professor Frickey, however, notes: "To import generic equal protection theories—themselves, as [*Adarand*] indicates, subject to criticism even on their own terms—into federal Indian law constitutes an error of significant magnitude, for it confuses a puzzling, conceptually intractable, and little-understood corner of public law with its mainstream." Frickey, *supra* note 222, at 1764-65.

legal classes of their own. Perhaps it makes sense to define some such groups according to "tribal membership." But for groups such as the Native Hawaiians, who have lost their sovereignty due to American encroachment on their land, such definitions are not yet workable. Thus, the principle behind *Mancari*, and not its formal categories, should guide our understanding of the "racial"-"political" distinction. In the end, whatever label the Court applies to aboriginal groups, a "racial" component will remain at the base of these issues, as ancestry is a necessary link for rectifying past injustices. Precluding Native Hawaiians from such recognition because their rights have not yet been "formally" acknowledged or because they do not constitute a "tribe" thus preempts any coherent analysis of the issue.

VI. NATIVE HAWAIIAN RIGHTS AFTER *RICE*

A. Native Hawaiian Rights Are Still Preserved Despite the Holding in Rice

Despite *Rice*, Native Hawaiian legal rights continue to exist. The survival of these rights is evidenced by Congress's maintenance of special relationships and "plenary power" over such indigenous peoples. Native Hawaiian rights after *Rice* should thus continue to be understood as encompassing three propositions: first, the "special relationship" between the federal government and Native Hawaiians remains regardless of *Rice*; second, *Rice* does not cover Fourteenth Amendment equal protection claims, as the *Rice* Court expressly limited its holding to Fifteenth Amendment analysis; and third, *Rice* precludes Native Hawaiians from *voting exclusively* on matters concerning the management of funds that are *run by a state agency*, but does not prevent Native Hawaiians from receiving exclusive benefits from the State or federal government.

Since *Rice*, plaintiffs have brought various cases to federal court, challenging the validity of OHA,[242] the Hawaiian Homes Commission Act,[243] and the Department of Hawaiian Homelands.[244] Recent Ninth Circuit decisions concerning these claims underscore the urgency of the above contentions.

1. The Special Relationship Still Exists: Doe v. Kamehameha Schools[245]

Despite *Rice*'s negative implications, the "special relationship" between Native Hawaiians and the federal government continues to exist.

242. Arakaki v. Hawaii, No. 00-00514, 2000 U.S. Dist. LEXIS 22394 (D. Haw. Sept. 19, 2000), *aff'd in part, vacated in part*, 314 F.3d 1091 (9th Cir. 2002); Arakaki v. Cayetano, 198 F. Supp. 2d 1165, 1169 (D. Haw. 2002), *aff'd in part, rev'd in part sub nom.* Arakaki v. Lingle, 477 F.3d 1048 (9th Cir. 2007).

243. *Cayetano*, 198 F. Supp. 2d at 1169.

244. *Id.*

245. 470 F.3d 827 (9th Cir. 2006) (en banc).

In fact, the Court did not deny that the special relationship exists, but rather found that *not enough* of the relationship exists for *Mancari* to apply to the OHA case. Furthermore, it would be difficult for the Court to deny such a relationship in light of America's longstanding identification of Native Hawaiians as true indigenous peoples of the United States.

For these reasons, the Ninth Circuit appears to recognize this "special relationship" between Native Hawaiians and the federal government. In *Doe v. Kamehameha Schools*, the Ninth Circuit held, *en banc*, that the private school's admissions preference for Native Hawaiians was valid and did not violate 42 U.S.C. § 1981, which provides, in part, that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."[246] In *Kamehameha*, plaintiff John Doe, who was not of Hawaiian ancestry, claimed that he was denied entry to Kamehameha Schools because of his race.[247] Kamehameha Schools conceded that Plaintiff would have likely been admitted if he were of Hawaiian ancestry.[248] The Ninth Circuit thus acknowledged the existence of a special relationship when holding that "[b]ecause the Schools are a wholly private K-12 educational establishment, whose preferential admissions policy is designed to counteract the significant, current educational deficits of Native Hawaiian children in Hawaii, and because in 1991 Congress clearly intended § 1981 to exist in harmony with its other legislation providing specially for the education of Native Hawaiians, we must conclude that the admissions policy is valid under 42 U.S.C. § 1981."[249]

Kamehameha Schools' preferential admission policy may have a different set of legal considerations because the school is a *private* entity that *educationally* benefits Native Hawaiians.[250] Yet even in light of this consideration, it is doubtful that the Ninth Circuit would have upheld such a policy for a similar entity absent beneficiaries with an aboriginal history like that of Native Hawaiians. Despite any negative implications from *Rice*, the Ninth Circuit recognized the "unique relationship that the United States has with Hawaii" and Congress's reliance on this "special relationship" to "provide specifically for [the welfare of Native Hawaiians] in a number of different contexts."[251]

The *Rice* decision does not affect the current special, though undefined, status that Native Hawaiians possess with respect to the federal

246. *Id.* at 835. Princess Bernice Pauahi Bishop left her property in a charitable trust that established the Kamehameha Schools. *Id.* at 831.

247. *Id.* at 829.

248. *Id.* at 834.

249. *Id.* at 849.

250. The property was left "in trust for a school dedicated to the education and upbringing of Native Hawaiians." *Id.* at 831 (citing Burgert v. Lokelani Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 (9th Cir. 2000)).

251. *Id.* at 848.

government. *Rice* merely precluded the application of a federal Indian law exception to Native Hawaiians because of the lack of formal federal recognition of Native Hawaiians as an indigenous group. Moreover, this special relationship is evidenced by the history of Congress's particularized dealings with Native Hawaiians as an aboriginal group.

2. Rice *Is Limited to Fifteenth Amendment Claims:* Arakaki v. Hawaii[252]

The decision in *Rice* only covers Fifteenth Amendment claims where the actor is a state agency. Expanding *Rice* to cover Fourteenth Amendment claims is inappropriate because the *Rice* Court expressly chose to invalidate OHA's voting qualification on Fifteenth and not Fourteenth Amendment grounds.[253] Broadening the scope of the *Rice* holding to cover Fourteenth Amendment claims therefore contradicts the Court's intent to sidestep the issue of Congress's authority to enact legislation for the benefit of Native Hawaiians. The *Rice* Court assumed that this authority exists,[254] and lower courts should thus defer to both *Rice* and the congressionally-established relationship between Native Hawaiians and the federal government.

The Ninth Circuit's decision in *Arakaki v. Hawaii*[255] supports the contention that *Rice* should be strictly limited to Fifteenth Amendment claims. About four months after *Rice*, thirteen citizens of Hawai'i filed a complaint in the District Court of Hawai'i, claiming that OHA's exclusion of non-Hawaiians from running for the position of OHA board trustee violated the Fourteenth and Fifteenth Amendments and the Voting Rights Act.[256] In compliance with *Rice*, Judge Helen Gillmore ordered the State to remove this restriction so that non-Hawaiians could run and, if elected, serve as OHA trustees.[257] On appeal in 2002, the Ninth Circuit affirmed, *but properly vacated the Fourteenth Amendment basis for the ruling.*[258] Although the Ninth Circuit held invalid OHA's exclusion of non-Hawaiians from board trustee eligibility, it confined *Rice*'s scope to Fifteenth Amendment voting-related issues.[259]

By invalidating OHA's voting qualification via the Fifteenth rather than the Fourteenth Amendment, the *Rice* Court avoided intruding on

252. Arakaki v. Hawaii, No. 00-00514, 2000 U.S. Dist. LEXIS 22394 (D. Haw. Sept. 19, 2000), *aff'd in part, vacated in part*, 314 F.3d 1091 (9th Cir. 2002).

253. Rice v. Cayetano, 528 U.S. 495, 524 (2000) (The Court invalidated the OHA voting scheme only on Fifteenth Amendment grounds despite the fact that Rice challenged the voting qualification as violating both the Fourteenth and Fifteenth Amendments.).

254. *See generally id.*

255. Arakaki v. Hawaii, 314 F.3d 1091 (9th Cir. 2002), *aff'g* No. 00-00514, 2000 U.S. Dist. LEXIS 22394 (D. Haw. Sept. 19, 2000).

256. Arakaki v. Hawaii, No. 00-00514, 2000 U.S. Dist. LEXIS 22394 (D. Haw. Sept. 19, 2000), *aff'd*, 314 F.3d 1091 (9th Cir. 2002).

257. *Id.* at *1, 50-51.

258. Arakaki v. Hawaii, 314 F.3d 1091, 1098 (9th Cir. 2002).

259. *Id.*

Congress's plenary power to enact legislation for Native Hawaiians' exclusive benefit. The Court has traditionally refrained from interfering with Congress's dealings with indigenous peoples and should accordingly defer to Congress's decisions concerning Native Hawaiian affairs. In sum, lower courts have no ground to expand *Rice* to cover Fourteenth Amendment claims.

3. The Source of OHA's Funding Is Still Valid: Arakaki v. Lingle[260]

The source of OHA's funding remains valid after *Rice*. Freddy Rice chose not to contest the source of OHA's funding,[261] and adding this element to the case would have created entirely different issues for the Court to consider. Thus, using *Rice* to invalidate OHA's funding is inappropriate because *Rice* did not contemplate the more complicated issues raised by such a potential challenge.

As explained in Part IV of this paper, Congress derives its powers to deal exclusively with Native Hawaiians from the Indian Commerce Clause. Despite ambiguity regarding whether Native Hawaiians are considered an Indian tribe as required by this clause, Native Hawaiians have been and should be included under this clause because they are an indigenous group. As discussed by Professor Van Dyke, Congress's powers to deal with indigenous groups are not limited to the Indian tribes of the lower forty-eight states.[262] Moreover, Congress's decision to include Alaskan Natives as federally-recognized indigenous peoples[263] further supports the contention that Congress has broad powers to deal with Native Hawaiians as a categorically "indigenous" group. Courts should accordingly follow Congress's lead in treating Native Hawaiians as indigenous people who may receive exclusive federal benefits.

The Ninth Circuit's recent decision in *Arakaki v. Lingle*[264] also supports the contention that the source of OHA's funding is still valid. On March 4, 2002, the same attorney who represented the plaintiffs in *Arakaki v. Hawaii*, H. William Burgess, along with attorney Patrick W. Hanifin, filed a complaint in the U.S. District Court of Hawai'i on behalf of sixteen plaintiffs to challenge the constitutionality of OHA, the Department of Hawaiian Homelands, and the Hawaiian Homes Commission Act, asserting that they violated the Fourteenth Amendment's Equal Protection Clause.[265]

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260. Arakaki v. Lingle, 477 F.3d 1048 (9th Cir. 2007).

261. Rice v. Cayetano, 963 F. Supp. 1547, 1549 n.2 (D. Haw. 1997), *aff'd on other grounds*, 146 F.3d 1075 (9th Cir. 1998), *rev'd*, 528 U.S. 495 (2000).

262. Van Dyke, *supra* note 25, at 146.

263. *See id.* at 119.

264. Arakaki v. Lingle, 423 F.3d 954 (9th Cir. 2005), *cert. granted, vacated*, 547 U.S. 1200 (2006).

265. Arakaki v. Cayetano, 198 F. Supp. 2d 1165, 1169 (D. Haw. 2002), *aff'd in part, rev'd in part sub nom.* Arakaki v. Lingle, 477 F.3d 1048 (9th Cir. 2007); Sovereign Stories: In the Courts, www.sovereignstories.org/courts.htm (last visited Mar. 16, 2008).

On January 14, 2004, Judge Susan Oki Mollway dismissed the suit against OHA, finding that the issue was a political question for Congress, not for the courts, to decide.[266] This decision was appealed, and on August 31, 2005, the Ninth Circuit found that Plaintiffs *did* have standing to sue as taxpayers.[267] On June 12, 2006, the Supreme Court granted certiorari and remanded to the Ninth Circuit for rehearing regarding the issue of whether state citizens had standing to sue as taxpayers in light of the Court's recent decision in *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006).[268] After rehearing the case, the Ninth Circuit held on February 9, 2007 that Plaintiffs *did not* have standing as taxpayers to bring suit against OHA, the Department of Hawaiian Homelands, or the Hawaiian Homes Commission.[269] The court remanded the case to the district court to determine whether the plaintiffs had an alternate standing on which they could bring suit.[270] Finally, on April 16, 2007, Judge Mollway issued an order ending the case altogether, finding that the plaintiffs had no standing to bring the suit against OHA.[271]

Despite the onslaught of litigation following *Rice*, the source of OHA's funding remains valid because of Congress's express decision to provide exclusively for Native Hawaiians. The only way that the source of such funding could be contested is through an invalidation of Congress's authority over Native Hawaiian affairs. In view of the extensive history and relationship between Congress and Native Hawaiians and the Court's unwillingness to challenge this congressional authority, it is unlikely that this constitutional power would cease to exist. Accordingly, *Rice* has not precluded Native Hawaiians, as an indigenous group, from receiving exclusive benefits from the State of Hawai'i and from the federal government.

B. Native Hawaiian Government Reorganization Act—Akaka Bill

In response to *Rice*, Senator Daniel Akaka of Hawai'i proposed the Native Hawaiian Government Reorganization Act,[272] also known as the Akaka Bill, to protect the Native Hawaiian legal framework from further erosion.[273] Senator Akaka introduced the first version of the Bill in 2000.[274]

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266. Arakaki v. Lingle, 305 F. Supp. 2d 1161 (D. Haw. 2004), *aff'd in part, rev'd in part*, 477 F.3d 1048 (9th Cir. 2007).

267. Arakaki v. Lingle, 423 F.3d 954 (9th Cir. 2005), *cert. granted, vacated*, 547 U.S. 1200 (2006).

268. Lingle v. Arakaki, 547 U.S. 1189 (2006).

269. Arakaki v. Lingle, 477 F.3d 1048 (9th Cir. 2007).

270. *Id.* at 1070.

271. *See* Debra Barayuga, *Federal Judge Says 16 Suing OHA Lack Standing*, STAR BULLETIN, Apr. 18, 2007, *available at* http://starbulletin.com/2007/04/18/news/story06.html; *see also* Derek Ferrar, *OHA Prevails in Suit Against Hawaiian Benefits*, Apr. 16, 2007, http://www.oha.org/index.php?option=com_content&task=view&id=344&Itemid=224.

272. S. 310, 110th Cong. (2007); H.R. 505, 110th Cong. (2007).

273. Pat Omandam, *Clinton Officials Say They Back Akaka Bill*, STAR BULLETIN, Aug. 28, 2000;

On October 24, 2007, the House of Representatives passed the Akaka Bill.[275] On February 5, 2008, the Senate Committee on Indian Affairs placed the Senate version of the Bill on the Senate's Legislative Calendar for debate, and—hopefully—for an eventual vote.[276]

The Akaka Bill seeks federal recognition for Native Hawaiians similar to that given to American Indians and Alaska Natives.[277] In particular, the Bill reaffirms the "special political and legal relationship" that the United States has with Native Hawaiians and provides a process through which the United States government would recognize and help establish a Native Hawaiian governing entity.[278] For these reasons, passage of this Bill would help protect programs such as OHA from Court decisions like *Rice* that undercut Native Hawaiian legal rights.

The following are some compelling considerations in favor of the Bill: (1) the Bill will help Native Hawaiians with the difficult feat of organizing a governing entity for their community; (2) the Bill will supersede *Rice* and allow Native Hawaiians to retain the exclusive vote over federally-delegated and state-managed trust funds; (3) the Bill will protect existing Ninth Circuit decisions from reversal by the Supreme Court; and (4) the Bill will foster stability for programs specially enacted for Native Hawaiian beneficiaries.

While proponents of the Bill hope that it will facilitate reconciliation between Native Hawaiians and the United States, the Native Hawaiian community is divided on whether the Bill is an appropriate solution for their people. Professor David Barnard outlines two strains of argument against the Bill: (1) that the Akaka Bill does not go far enough in restoring Hawaiian independence and (2) that the Bill itself is "a dangerous racial balkanization of the Hawaiian Islands that will lead to the dispossession of all racial and ethnic groups who cannot claim native ancestry."[279]

S. 310, 110th Cong. (2007); H.R. 505, 110th Cong. (2007).

274. S. 2899, 106th Cong.(2000).

275. 110 Bill Tracking H.R. 505 (2008). The House version of the Bill was introduced by Representative Neil Abercrombie from Hawai'i. The House of Representatives passed the Bill in a 261-153 roll call vote. *Id.*

276. 110 Bill Tracking S. 310 (2008); S. REP. No. 110-260 (2008).

277. S. 310, 110th Cong. (2007); H.R. 505, 110th Cong. (2007).

278. S. 310, 110th Cong. § 2 (2007); H.R. 505, 110th Cong. § 2 (2007).

279. David Barnard, *Law Narrative, and the Continuing Colonialist Oppression of Native Hawaiians*, 16 TEMP. POL. & CIV. RTS. L. REV. 1, 35 n.226. ("For a summary of the various positions, [*see, e.g.*,] S. REP. No. 109-68 (2005) []; Kenneth R. Conklin, Why People Outside Hawai'i Should Oppose the Akaka Bill, http://www.angelfire.com/hi2/hawaiiansovereignty/AkakaOtherStatesOppose.html (last visited [Mar. 16, 2008]); Brian Duus, *Reconciliation Between the United States and Native Hawaiians: The Duty of the United States to Recognize a Native Hawaiian Nation and Settle the Ceded Lands Dispute*, 4 ASIAN-PAC. L. & POL'Y J. 470 (2003); Annmarie M. Liermann, Comment, *Seeking Sovereignty: The Akaka Bill and the Case for the Inclusion of Hawaiians in Federal Native American Policy*, 41 SANTA CLARA L. REV. 509 (2001); J. Kehaulani Kauanui, *Precarious Positions: Native Hawaiians and U.S. Federal Recognition*, 17 CONTEMP. PAC. 1 (2005); Dean E. Murphy, *Bill Giving Native Hawaiians Sovereignty Is Too Much for Some, Too Little for*

Despite worries that the Act would bring Native Hawaiians under the chaotic purview of federal Indian law, the Akaka Bill should be viewed as a welcome compromise that may provide the Native Hawaiian community with an improved mechanism for addressing their problems—especially given the inadequate legal framework now available. Regardless of whether the Bill passes, however, Native Hawaiians still rightfully retain special privileges from the federal government that arise from their indigenous status.

VII. CONCLUSION

The Supreme Court's decision in *Rice v. Cayetano* conflated the complex legal issues facing the Native Hawaiian community, grounding its decision on a superficial analysis that merely inquired whether race was a factor. The Court's failure to address the historical relationship that led to OHA's creation made for a shallow and incoherent opinion. Using language lined with colonial euphemisms, the Court set the stage for an artificially constructed opinion. The majority opinion's refusal to recognize or address the political status of Native Hawaiians also led to the misapplication of legal theory. The Court further avoided important questions by applying a cursory Fifteenth Amendment analysis, neglecting to examine *Mancari*'s racial-political distinction. Overall, the Court demonstrated indifference towards indigenous rights and to the Native Hawaiian community's efforts to rebuild itself.

Despite the *Rice* decision, Native Hawaiians continue to retain special rights that arise from their indigenous status. The issue of Native Hawaiian rights after *Rice* should be understood on the following premises: first, the special relationship between Native Hawaiians and the federal government remains; second, *Rice* should be limited to its Fifteenth Amendment holding—Fourteenth Amendment equal protection claims should not be sustained, even under broader principles of *Rice*; third, the source of OHA's funding remains constitutionally valid under Congress's powers to deal specially with indigenous peoples; and fourth, *Rice* does not invalidate congressionally-approved programs enacted for the exclusive benefit of Native Hawaiians. Several Ninth Circuit decisions following *Rice* have supported these contentions.[280]

While the Akaka Bill may not be necessary to preserve the benefits that Native Hawaiians now receive, its passage would provide two major benefits: (1) a structure for Native Hawaiians to reorganize their own governing entity and (2) the opportunity for Native Hawaiians to regain their right to vote exclusively on their own matters. These benefits may

Others, N.Y. TIMES, July 17, 2005, at A17; Vicki Viotti, *The Akaka Bill: What Would It Mean for Hawai'i*, HONOLULU ADVERTISER, Apr. 10, 2005, [*available at* http://the.honoluluadvertiser.com/article/2005/Apr/10/op/op05p.html.]").

280. *See supra* Part V.A.

serve to improve the economic, educational, and political conditions of Native Hawaiians. Passage of the Bill would also stabilize the legal grounds for federal Native Hawaiian rights and serve as a platform for rebuilding the Native Hawaiian community. While the Bill does not rectify all the injustices experienced by Native Hawaiians, it is a starting point for reconciliation between the United States and the Native Hawaiian people.