RICE V. CAYETANO: AMERICA’S EVOLVING LEGAL DEBATE OVER RACE, AND THE CONSEQUENCES OF APPLYING “COLOR-BLIND” CONSTITUTIONALISM TO LAW AFFECTING INDIGENOUS PEOPLES

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Introduction

The issue of race in America is one that has been at the center of many of the country’s most difficult moral, ethical, and legal challenges during its history, and continues to generate much conflict today as America debates the question of how to best remedy the wrongs of the past. The Civil Rights movement of the 1960’s, with its concerns for justice and equality, led Presidents Kennedy, Johnson, Nixon, and Carter to advance what has come to be known as “affirmative action” programs for ethnic minorities and women. Although these various actions were designed to create more equality of opportunity in business and education, and were upheld by the Supreme Court in the Bakke ruling, which allowed the use of race as one factor in college admissions, by the 1980’s a countermovement was growing. ¹

This backlash against affirmative action began with the election of Ronald Reagan. This election saw a race and gender gap between women and minorities who voted for Carter, and white men who voted for Reagan, who ran on an anti-affirmative action, anti-E. R. A. platform. Shortly after inauguration, the new administration began to define its position on affirmative action, with Reagan announcing that his administration was firmly committed to equality, but adding the following.

I think that there are some things, however, that may not be as useful as they once were, or that may even be distorted in practice, such as some affirmative action programs becoming quota systems. And I’m old enough to remember when quotas existed in the U. S. for the purpose of discrimination. And I don’t want to see that happen again. ²

Reagan’s statement began the official political backlash against affirmative action and led to the “color-blind” ideology that equates affirmative action with past discrimination against minorities and women. As Fred L. Pincus states in his work Reverse Racism: Dismantling the Myth, associating affirmative action with quotas and equating it with past forms of gender and race discrimination is
part of the discourse of “reverse-discrimination”, and serves to promote an erroneous view of the true dynamics of race and gender in America today. ³

Pincus maintains that “reverse-discrimination” has been packaged, and contains a number of assumptions about the nature of affirmative action that have a built in conservative bias that mischaracterizes the nature of gender and race relations in the United States. His work shows how the concept of “reverse-discrimination” does not adequately portray how affirmative action affects whites, but instead links the concept of no preferential treatment with the “color-blind” ideology espoused by the Reagan administration. Pincus observes this idea was socially constructed and exaggerates the impact of affirmative action on whites, which consists primarily of increased competition for jobs due to corporate and government policies designed to eliminate past discrimination. Under the social construction of “reverse-discrimination”, these policies go against the traditional American values of individualism and hard work, and bring out feelings of anger, fear, resentment, and loss of privilege in white men. ⁴

Reagan based his argument on what he called anti-competitive rules holding back free enterprise and individualism that were hurting the economy, and his administration began attacking regulations that protected workers, the environment, and affirmative action programs. Because Reagan supported individual opportunity versus group entitlements and disparaged efforts at race-conscious affirmative action programs, he appointed people to lead the Equal Employment Opportunity Commission (EEOC), the Office of Federal Contract Compliance Programs (OFCCP), and the Assistant Attorney General’s office for Civil Rights who were all opposed to affirmative action. With these appointments, the Reagan administration retreated from the enforcement of affirmative action, a move the press reported led to a “virtual standstill” of enforcement at the EEOC, and “virtual paralysis” at the OFCCP. ⁵

The backlash concerned more than affirmative action when the Reagan administration also took a
stand against the proposed extension to the Voting Rights Act which expired in 1980. The President said the new bill would result in proportional representation by race, and that the government should be required to prove “intent” to discriminate in local voting, not just the “effects”, stating that “You could come down to where all of society had to have an actual quota system.” In this statement Reagan again makes reference to “quotas”, but faced with overwhelming bi-partisan support for the bill in Congress, the president eventually signed the extension of the Voting Rights Act. Reagan’s reference above to proving the “intent” to discriminate, not just the “effects” of discrimination is relevant to the legal theory of disparate impact.

Disparate impact is related to employment practices under Title VII of the Civil Rights Act of 1964, and deals with employment practices that do not appear to be discriminatory on their face, but are discriminatory in their effect or application towards members of protected classes such as women and minorities. Discriminatory practices are identified by the element of adverse impact, which entails measuring the effect of an employment practice on classes protected by Title VII, and requires proof of a substantially different rate of selection, usually 80%, in hiring and promotion that disadvantages minorities and women. When disparate impact is shown, the plaintiff can prevail without necessarily showing intent to discriminate, unless the defendant employer can show that the practice in question is related to the job requirements, known as the “business necessity”.

The Reagan administration’s moves were rebuffed by corporate America, however, which by this time had incorporated affirmative action “goals” and “timetables” into its structure, insisting they did not in fact require “quotas”, and that diversifying the workforce by hiring more minorities and women was good for business. However, the tension between correcting for past discrimination and protecting the seniority of workers eventually needed to be resolved by the courts, and came to the fore in two important cases, Bratton et al. v. City of Detroit, and Firefighters Local Union#1784 v. Stotts in 1984. The results were mixed. In Bratton, the Court allowed a temporary quota policy of
affirmative action aimed at diversifying the Detroit police force, which at the time was more than 80% white, to stand. The federal appellate court judge wrote that the purpose of the program was to “aid blacks”, and did not “unnecessarily trammel” the rights of whites because they also could be promoted. The Supreme Court without dissent rejected hearing the case, thereby letting the decision stand.  

In the Stotts decision, where the issue was race versus seniority, however, the Supreme Court came to a different conclusion. The case involved an attempt by the city of Memphis to rectify a severe racial imbalance in the fire department, where African Americans held only 10 percent of the jobs in a city that was 40 percent black. In 1980, the federal court affirmative action plan devised to address the disparity entailed that minorities receive 50 percent of the job vacancies and 20 percent of the promotions until the percentage approached the number of minorities in the local population. When the recession of 1981 forced city budget cuts, Carl Stotts, a black firefighter, asked the local court to base layoffs on race rather than seniority, as the later would decrease black representation on the force. Three white firefighters sued, and the case went before the Supreme Court, where the majority sided with the plaintiffs, finding the promotion system was bona fide and did not intend to discriminate, and was therefore protected under Title VII of the Civil Rights Act. 

Writing for the majority, Justice Byron White concluded that Congress had intended to provide relief only to those people who were actual victims of illegal discrimination, and that individuals must prove the discriminatory practice had impacted them. The Reagan administration put the broadest possible interpretation on the case, inferring that White’s comments retreated from the theory of disparate impact the courts had used since the 1970’s, and instead supported the administration’s claims that remedies for discrimination should be limited to individuals and not groups, such as minorities and women. Although the administration clearly overstated the ruling in Stotts, which was narrow and only concerned seniority, not all affirmative action, White’s opinion had opened the door
for challenges to affirmative action programs.\textsuperscript{10}

In Reagan’s second term the assault on affirmative action programs continued, with the administration declaring such programs “demeaning” because they relied on race instead of individual ability, and the U. S. Commission on Civil Rights chairman Clarence Pendleton Jr. stating that preferential treatment for minorities amounted to the “new racism”. President Reagan concurred in his weekly radio address to the nation on June 15\textsuperscript{10}, when he equated affirmative action with discrimination and invoked the words of Martin Luther King in an astonishing inversion of King’s original intent when he said,

“Twenty-two years ago Martin Luther King proclaimed his dream of a society rid of discrimination and prejudice, a society where people would be judged on the content of their character, not the color of their skin. That’s the vision our entire administration is committed to.”

The vision Reagan referred to was a “color-blind” society where no preferential treatment was allowed, and the president went so far as to prepare an executive order that would revoke the 1965 executive order of President Johnson that established the use of statistical measures to determine discrimination, thereby weakening disparate impact theory and making bias almost impossible to prove. Again, however, the Reagan administration policy to dismantle affirmative action found itself at odds with cities from coast to coast, with only three out of 57 jurisdictions supporting the order from the Justice Department to curtail their policies. Moreover, 95 percent of the CEO’s of the 120 largest corporations in America said they would continue to use numerical objectives to track the progress of women and minorities, regardless of government requirements.\textsuperscript{12}

There was also political opposition to dismantling affirmative action, with 200 congressmen and 70 senators going on record as opposed to the Reagan administration’s threat to sign the executive order. Congress went so far as to say they would pass a law mandating affirmative action if the president went ahead with his plans, thereby putting Reagan in a no-win situation of signing or
vetoing the bill, which would serve to divide the Republican party. In addition, seven of Reagan’s cabinet members opposed the new executive order, as did the new White House chief of staff Donald Regan. The debate within the administration continued, with Reagan and his Attorney General Meese using the celebration of Martin Luther King Jr. day in 1986 to again invoke a “color-blind” society. Meese went so far as to claim he was trying to carry out the original intent of the civil rights movement in proposing to eliminate the use of “quotas to discriminate”, which he said was “consistent with what Dr. King had in mind.”

By linking King’s desire for a “color-blind” society with their opposition to affirmative action, Reagan and Meese cleverly helped to create a movement that other conservatives would follow in future years. However, this argument was disingenuous as King had supported preferences for African Americans, and criticized Johnson for not creating “a new government agency, similar to the WPA” for blacks. Although King was assassinated before affirmative action was fully developed, the administration’s rhetoric was not appreciated by civil rights organizations, who characterized the moves as “scandalous”, and stated that if King were alive he would lead the bipartisan consensus fighting to save Johnson’s executive order. As a result, Reagan’s popularity among African Americans continued to decrease, with 56 percent claiming Reagan was racist, and less than a quarter of blacks approving his overall performance.

Though the Reagan administration continued to talk tough, the president did not sign the executive order banning affirmative action, realizing he was spending a lot of political capital and not achieving his end goal. The administration instead looked to the Supreme Court to accomplish the job of ending preferential programs, but was disappointed when the Court refuted their contention that Title VII prohibited goals and timetables in hiring practices, and that only individuals could benefit from affirmative action programs, not groups. In three important cases, *Local 93 of the International Association of Firefighters v. City of Cleveland*, *Local 28 v. Equal Employment Opportunity*
Commission, and United States v. Paradise, the Court found affirmative action programs constitutional as long as they fit four requirements. They must be limited in duration, carefully tailored to remedy the precise discrimination in each case, have flexible goals, and not unnecessarily trammel the rights of whites.  

Although the Reagan administration’s interpretation of Title VII and affirmative action had been rejected by the Court in the cases cited above, it had been upheld in the minority opinions of Justice William Rehnquist, who Reagan nominated to be Chief Justice on the retirement of Warren Burger in 1986. The president then nominated conservative federal judge Antonin Scalia to fill Rehnquist’s seat on the Court, shifting the ideological balance of the Court perceptibly to the right. The first major test of the new Court on affirmative action came soon after with the issue of gender and preferential treatment in the case of Johnson v. Santa Clara County Transportation Agency in 1987. The question was whether a public employer could promote females over males to rectify the fact that they were under-represented, though they might not have been discriminated against in the workforce.

The Court upheld the policy 6 to 3. This was the first time a ruling had ever given job preferences to women over men, and the first time the Court had held that without any proof of past discrimination employers could use both race and gender to promote diversity in the workforce that matched the local population. Scalia’s dissenting opinion was scathing, characterizing the majority opinion as allowing for an “enormous expansion” of affirmative action, and converting the 1964 Civil Rights Act into a “powerful engine of racism and sexism” aimed at white men. In spite of Scalia’s criticism, the Court had again rejected the Reagan administration’s interpretation of affirmative action and Title VII, and denied claims of reverse discrimination, thus rejecting the administration’s aim to end preferences and establish a “color-blind” society. The 1987 Court session would, however, mark the limits of judicial expansion for affirmative action.

The retirement of Justice Lewis Powell gave Reagan another chance to appoint a conservative to
the Court. After his first choice Robert Bork was not confirmed because of his opposition to *Roe v. Wade*, and the nomination of his second choice Douglass H. Ginsburg became a disaster after it was learned he had smoked marijuana at parties when a law professor at Harvard, Reagan decided on moderately conservative federal judge Anthony M. Kennedy, who was unanimously confirmed by the Senate. Reagan’s legacy in the arena of civil rights is thus marked by the appointment of three conservative judges to the Supreme Court, and more than 370 federal judges during his two terms, more than any other president up to that time, and more than enough to shift the judiciary towards a more conservative agenda.  

Although the new Bush Administration said that it supported affirmative action, the Supreme Court, now made more conservative by the appointments of Rehnquist, Scalia, and Kennedy, began to shift away from preferences. Two important cases, *City of Richmond v. J. A. Croson*, and *Wards Cove Packing Co. v. Antonio*, began the shift away from racial and gender preferences, and in both decisions the Reagan appointees voted with the majority. The *Croson* case involved a minority set-aside program for contractors in the city of Richmond, Virginia, which had an over 50 percent black population, but where minority contractors received only 1 percent of municipal contracts. In 1983 the city council passed a 30 percent set-aside policy for minority contractors, high compared to the 10 percent used across the country. Though based on federal law, the plan was poorly written, including groups of minorities that had never been in Richmond such as natives of the Aleutian Islands. When the J. A. Croson Company’s bid for a city contracting job and was rejected because the company lacked minority participation, Croson sued.  

When the case reached the Supreme Court it rejected 6 to 3 the city of Richmond’s claim that it had wide discretion to define its set-aside programs, citing an important difference between this case, which had been brought under the equal protection clause of the Fourteenth Amendment, and *Johnson* which had been based on Title VII. Justice Sandra Day O’Connor writing for the majority
made it clear that the only legitimate use of racial preferences was to remedy past discrimination, and because there was no evidence of such discrimination towards some of the groups mentioned in Richmond’s plan, such as natives of the Aleutian Islands, added that any use of racial preferences must pass “strict scrutiny”, the toughest judicial standard used when the issue before the Court stands on dubious constitutional grounds. O’Connor’s opinion stated that racial preferences could only be justified if they served a “compelling state interest” related to redressing “identified discrimination”, and that rigid quotas were “suspect” because they did not take into consideration “the number of minorities qualified to undertake a particular task.”  

The *Croson* case began the shift away from preferences of race and gender, but only in the contracting field if there had been no previous discrimination, however, the adoption of the strict scrutiny standard raised the question if affirmative action programs could survive such a challenge. The other significant case to come before the Court in the late 1980’s, *Wards Cove*, continued the move to a more conservative agenda for the judiciary concerning affirmative action. The suit had been filed by Filipino and Native American workers in an Alaskan salmon cannery who claimed that the hiring and promotion policies of the company, which included segregated mess halls and bunk-houses, discriminated against them and kept them on the cannery line, leaving the better jobs for whites. The minority plaintiffs argued that even if the policies were not racially motivated, they had a disparate impact on their opportunities for advancement and thus violated Title VII as decided by the Court in the *Griggs* case of 1971.  

The company rebutted the charge and stated the percentage of whites in the higher paying jobs reflected the available pool of qualified applicants rather than any form of discrimination. The trial judge ruled for the company, but the appeals court reversed, finding that the statistical imbalance of the workforce shifted the burden to the company to show the “business necessity” justification of the policies. The case went to the Supreme Court, where in a 5 to 4 majority the Court ruled for the
company, with all the Reagan appointees voting with the majority. Justice Bryon White, writing for the majority noted that the appeals court decision would lead to quotas, which Congress and the Court had rejected, and that if the imbalance in the workforce was due to a “dearth” of qualified applicants, the company’s policies could not be blamed for having a disparate impact on minorities. This decision essentially reversed Griggs, and meant that minorities and women now had to prove that their employers policies discriminated against them rather than just being under-represented on the workforce, and also made it easier for white men to sue for reverse discrimination, effectively discounting disparate impact theory as minorities and women now had to show a direct discriminatory cause and effect. 22

The dissent was sharply critical of the decision, with Justice Stevens noting that the salmon industry in Alaska bore an “unsettling resemblance to aspects of a plantation economy”, and Justice Blackmun writing that he wondered if the majority still believed that race discrimination against non-whites “is a problem in our society, or even remembers that it ever was.” 23 The decision alarmed women’s and civil rights groups, and the NAACP threatened civil disobedience on a scale never seen before if Congress failed to write a new civil rights law protecting the hard-won rights of minorities. Congress responded quickly with the Civil Rights Act of 1990, which was aimed at limiting challenges to affirmative action and allowed plaintiffs to show disparate impact through statistics, thereby shifting the burden of proof from the employee back to the employer. 24

President Bush vetoed the act, calling it the “quota bill” and positioned the issue of anti-affirmative action as one of “fairness” to white men who lost a job or promotion because of racial quotas. The issue of fairness became a campaign slogan for the Republican Party for the 1992 elections, with Bush framing the Democratic Party as the party “mugging the middle class and giving the spoils to their minority friends.” 25 While these events were unfolding, Bush had the opportunity to nominate two Supreme Court judges, the first coming on the retirement of Justice William Brennan, when mode-
rately conservative David Souter easily won confirmation, and the second upon the retirement of Justice Thurgood Marshall. For this position Bush nominated Clarence Thomas, who although African American, was adamantly opposed to all forms of racial preferences, and believed affirmative action to be a form of “social engineering.”

The Thomas nomination caused immediate alarm and controversy as he was replacing Marshall, who was a hero to civil rights organizations and had helped lead the Court in backing affirmative action plans. Women’s groups were also concerned with Thomas, as he had openly criticized the Court’s decision in Roe v. Wade, and opposed the Johnson decision, writing that the Court had stood “the legislative history of Title VII on its head.” Their concerns were only exacerbated by the hearings of Anita Hill, who had worked under Thomas at the EEOC and accused him of sexual harassment. The hearings became a media circus, with politicians arguing on the Senate floor, and Thomas characterizing the process as a “lynching”. Bush stood by Thomas, declaring that a “decent and honorable man has been smeared”, and the nomination was eventually confirmed by the Senate, 52 to 48. However, the affair hurt the administration’s reputation with women, who felt Bush was insensitive to sexual harassment, and minorities, who objected to Thomas’ opposition to affirmative action.

The nominations of Souter and Thomas to the Supreme Court moved it in a more conservative direction judicially, as between Reagan and Bush there were now 5 conservative justices on the bench. While the confirmation hearings were in progress, the Bush administration continued to fight Congress over the terms of the Civil Rights Act of 1991, which would not only return the burden of proof to the employer to show “business necessity” to justify discriminatory hiring patterns, but would amend Title VII of the 1964 Civil Rights Act to allow religious minorities, the disabled, and all women to sue employers for discrimination or sexual harassment. In the end, and again with the support of corporate America which found the administration’s anti-quota argument to be false,
Congress passed the bill and Bush signed it, claiming it to be a “civil rights bill”, not a “quota bill”.  

The 1991 Civil Rights Act was significant in that it wrote the concept of disparate impact into the law for the first time, thereby limiting the effects on affirmative action of the *Wards Cove* decision by mandating the disparate impact rules set in *Griggs*. The bill was also ambiguous and confusing in its language, rejecting Reagan’s, Bush’s, and the conservative majority of the Court’s views on affirmative action, while at the same time declaring unlawful employment practices to be those based on race, color, religion, or national origin, which seemed to outlaw preferences. The Bush administration continued to show little consistent philosophy on issues of race and civil rights during the remainder of its term in office, but it was the economy, not civil rights that opened the door for the election of President Clinton in 1992 that ended the conservative era of backlash against affirmative action.

According to Terry H. Anderson, whose work *The Pursuit of Fairness: A History of Affirmative Action* documents in detail the discussion above, the backlash against affirmative action had impacts that continue to resonate in American society today. Many of the judicial appointments made were conservative judges who opposed to preferences, the five conservative Supreme Court justices moved the Court away from the role of protector of civil rights to the proponent of a “color-blind” society, as shown by its decisions from 1989 on, and civil rights laws and equal employment laws were less strictly enforced. This led to a shift away from class-action lawsuits to those of individual victims, and group relief being seen as a form of “reverse discrimination”, thereby shifting the discourse of affirmative action to that of “quotas” which were seen as discriminating against white men. Anderson claims these developments contributed to a decrease in support of affirmative action, even though a majority of the population in America supports civil rights.

The anti-affirmative action backlash led by Presidents Reagan and Bush, led to many reversals of affirmative action programs that were deemed to be “reverse discrimination” by many in the popular
culture. However, in the University of Michigan cases *Gruter v. Bollinger* and *Gratz v. Bollinger* of 2003, which revolved around the use of race in the Universities’ admissions criteria, a conservative Supreme Court seemed unwilling to deliver the death blow to a policy that had become so widely established and accepted in so many areas of American life. Instead, in a 5 to 4 majority, the Court found that using race as one of many criteria for admission was constitutional, at least for the time being. Justice Sandra Day O’Connor spoke for the majority when she said, “We expect that 25 years from now, the use of racial preferences will no longer be necessary.”

Perhaps American society will move beyond the need of racial preferences to ensure a more diverse and egalitarian culture in 25 years. The present era has seen many changes of momentous import that have altered the fabric of the country over the last 25 years, with minorities and women gaining increasing access to opportunities formerly reserved for white men. However, in the meantime, much confusion and turbulence still surround the issue of race-based affirmative action in America. One of the reasons for the contentious debate is that both sides claim a certain moral superiority, supporters of affirmative action championing racial justice and equality, while detractors position themselves as defending the Constitution’s promise of “color-blind” equal protection.

This work will focus on the legal case that brought the issue to Hawai’i, *Rice v. Cayetano*, and examine the effects of applying “color-blind” jurisprudence to law that affects indigenous people. A brief history of the case prior to it reaching the Supreme Court, and background regarding the Office of Hawaiian Affairs (OHA) will help to place the case in context and clarify the problematic nature of OHA representing the sovereign interests of the Hawaiian people. In 1978 the State of Hawai’i created OHA in an amendment to the State Constitution approved by a majority of the citizens of Hawai’i. The intention of the State was that OHA would serve several purposes, including that of carrying out the duties of the trust relationship between Hawaiians and the Government of the United States, compensating for past wrongs to the ancestors of Hawaiians, and helping to
preserve the unique culture that had existed in Hawai‘i prior to Captain Cook’s arrival in 1778. 34

The Hawaiian Constitution limited the right to vote for the nine OHA trustees chosen in statewide elections to “Hawaiians”, defined by state law as “descendants of the peoples inhabiting the islands in 1778”. This category also included “native Hawaiians”, defined by law “as descendants of not less than one-half part of the races inhabiting the islands since 1778.” The petitioner, Harold Rice, a white citizen of Hawai‘i without the required ancestry to qualify as a “Hawaiian” under state law, applied to vote in the OHA trustee elections, and sued Governor Cayetano representing the state when he was denied. Rice’s claim was that the voting restrictions which excluded him were invalid under the Fourteenth and Fifteenth Amendments to the Constitution. 35

The Federal District Court, surveying the history of the islands and their people, determined that Congress and the State of Hawai‘i had recognized a guardian-ward relationship with native Hawaiians analogous to that between the United States and Indian tribes. The Court therefore examined the voting qualifications at issue with the same latitude applied to legislation enacted by Congress pursuant to its power over Indian affairs under the legal precedent of Morton v. Mancari, which found hiring practices that favored Indians in the Bureau of Indian Affairs “did not constitute invidious racial discrimination but was reasonable and rationally designed to further Indian self-government.” 36 The District Court accordingly found the electoral restrictions were rationally tied to the state’s responsibility under the Admission Act to use a part of the proceeds from the ceded lands trust for the benefit of native Hawaiians. The Ninth Circuit Court agreed, finding the State “may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty, should be the group who decides who the trustees ought to be.” 37

However, Harold Rice’s case was supported and partially funded by the Campaign for a Color-Blind America, a conservative legal foundation opposed to all affirmative action programs using race, and their attorney, Theodore Olson, who said his intent was to file suits that would dismantle all federal
and state supported programs for Hawaiians, including OHA. This strategy was part of a larger goal of the Campaign for a Color-Blind America to raise legal challenges in courts across the country to programs that supported ethnic minorities and Native Americans. If successful, the Rice case could be used in the effort to overturn all race-based legislation under the argument that all Americans are equal before the law.  

As such, the case was brought before the Supreme Court, which in a 7 to 2 decision agreed with Harold Rice and his supporters that the OHA voting requirements were unconstitutional under the Fifteenth Amendment, and reversed the judgment of the Court of Appeals for the Ninth Circuit. The Court, however, limited their decision to the OHA voting requirements, and did not concern itself with the constitutionality of OHA itself, thereby allowing the State agency to survive and continue its stated mission of bettering the conditions of native Hawaiians. To many, however, OHA represents the State of Hawai‘i and its vested interests in controlling the ceded land trust, rather than promoting true self-determination for the Hawaiian people.

Though ostensibly created to represent Hawaiian interests, OHA was in reality devised as an extension of the state, and as such was powerless as a mechanism of self-government for Hawaiians. It had no control over the ceded lands trust, and no statutory ability to prevent abuses of the trust by the state. OHA has also been troubled throughout its existence by scandal involving mismanagement of funds, misrepresentation of programs to the legislature, and its collaboration with the state Democratic party, which led it to support development of state projects contrary to Hawaiian interests. In the 1990’s, when the issue of “sovereignty” became identified with “nationhood”, OHA worked to position itself as the representative authority for the Hawaiian people, unveiling its “Blueprint” that would give it control over the ceded lands and Hawaiian Homelands trusts.

According to the “Blueprint”, claims against the state of Hawai‘i were dropped despite documented abuse of its trust relationship to Hawaiians, and all claims related to the overthrow of the
Hawaiian Kingdom and annexation of the islands to the United States were made against the federal government, with OHA being the agency recommended to control native Hawaiian assets. In the negotiations over ceded land claims against the state, OHA and the governor’s office concluded an agreement to settle ceded lands claims for 100 million dollars in 1991, with additional payments of 8.5 million thereafter. Thus, money rather than land became the crux of the settlement, with two state agencies, OHA and the governor’s office, cooperating to settle native Hawaiian claims. 41

Despite being publically repudiated by many groups of Hawaiians fighting for legitimate self-determination under international law, OHA continues to position itself as the agency responsible for Hawaiian self-governance, and in issues related to land, resources, language, and culture maintains itself as the primary representative of the Hawaiian people. International law however, requires that the process of self-determination, whether through plebiscite or referendum, be supervised by the United Nations and exclude any state or federal agencies in order to ensure the fair and impartial decision making process by the Hawaiian people, without fear of threat or intimidation. Thus, many Hawaiians consider conflating OHA with Hawaiian sovereignty to be a false conception that serves to distract the people from more substantive forms of sovereignty and sustainable self-determination, thereby creating a certain dependency on state institutions, instead of pursuing legitimate efforts at self-determination. 42

Ironically, the very fact that OHA was created as an agency of the state and is not a sovereign entity is what left it vulnerable to Harold Rice, his attorney Theodore Olson, and the Campaign for a Color-Blind America, who viewed the case as an excellent test of applying “color-blind” jurisprudence to laws affecting indigenous people. As their stated intention was to undermine and eventually overturn all affirmative action legislation, both here in Hawai‘i and on the continental United States, a successful outcome of the Rice case could prove useful to their strategy. Therefore, the primary focus of this work is not on the issue of the state trying to maintain control over the ceded lands trust.
through OHA, or the agency trying to position itself as the “Nation”, although these issues are related to the Rice case, and will be discussed as part of the work. However, the issue of sovereignty is complicated and difficult, and, as stated by international law, must be left to indigenous Hawaiians to decide. 43

Rather, this work will examine the legal consequences in Hawai’i of the Rice decision, and the possible consequences of applying it to legislation on the continent, where legal scholars such as Philip P. Frickey have expressed concern over its effect on the Mancari ruling that protects tribal interests in such cases involving racial preferences. The issue of using generic equal protection theories such as “color-blind” constitutionalism in cases of federal Indian law constituted a significant error for him, as it “confuses a puzzling, conceptually intractable, and little-understood corner of public law with its mainstream”, the “little-understood corner” referring to federal Indian law. 44

The irony of using a case like Rice against the tribes will also be a part of this work, as the history of the federal governments’ treatment of Hawaiians and Native Americans on the continent can be compared and contrasted in ways that can help us to better understand the injustices shared by the indigenous peoples of America in the past, and also allow us to gain insight into the possible unjust effects of applying “color-blind” constitutionalism to law affecting all native people in America. 45

In order to be able to view the Rice decision within its historic context, an understanding of how the law functioned as part of the colonizing process is necessary. The questions of why western law was adopted by Hawaiians and how it transformed Hawaiian culture have been investigated by modern scholars in ways that previous works accepted as classics in the field did not. In the histories written by Kuykendall (1938; 1953; 1967), Daws (1968), and Fuchs (1961), the transformation of Hawaiian legal, political, and economic institutions is portrayed as gradual, and for the most part welcomed by the Hawaiian people. In these works the threats of violence and the frequent attempts by European nations to forcibly annex the Hawaiian Kingdom are downplayed, while the resistance
Hawaiians gave, and the pain they endured due to the dislocation of their traditional culture is mainly silenced.

The work *Ethnicity and Inequality in Hawai‘i*, by Jonathan Y. Okamura interrogates the “melting pot” ideology that was developed during the 20th century, and that is directly related to the specific framing of Hawaiian history in the works of Kuykendall, Fuchs, and Daws the Court relied upon in the historic section of the opinion in the *Rice* decision. Okamura’s argument is that ethnicity, not race, is the defining factor in Hawaiian society, and that cultural representations that glorify Hawai‘i as a model of ethnic equality and amity obscure the subjugation of Hawaiians, Filipinos, and Samoans, and allow Chinese, Japanese, and whites to maintain their dominant social status. He uses opportunity for higher education as an example of this dynamic, noting that Hawaiians, Filipinos, and Samoans are all under-represented at the University of Hawai‘i at Mānoa, even though they constitute a majority of public school students. Okamura’s point is that the disparate impact of tuition increases on these students as compared to Chinese, Japanese, and white students, serves to help maintain the status-quo. 45

The prevalent view of Hawai‘i in America is one of a virtual paradise of ethnic relations and a model for other racially diverse societies. However, as Okamura points out, ethnicity in Hawai‘i is often more important than race, and cultural differences are often more important than skin color, as can be seen in the different social status of the same racial category, such as Asian, which encompasses Chinese, Japanese, and Filipinos. The characterization of Hawai‘i as a multicultural society where ethnic relations were distinguished by tolerance, equality, and harmony began in the 1920’s, and was first proposed by Romanzo C. Adams, the first scholar of island race relations. In his work *The Peoples of Hawaii*, Adams characterized Hawai‘i as a “racial melting pot” because of its high inter-marriage rate, which he said was due to the equality of economic, political, and educational opportunity of the “races” living in Hawai‘i. As a committed assimilationist, Adams espoused an ideology
where the people of Hawai‘i would eventually become “one people” through the process of intermarriage, American. 

This sanguine view of race relations in Hawai‘i was furthered in the post-World War II era by the work of Andrew W. Lind and Bernhard L. Hormann, two scholars of race relations at the University of Hawai‘i. In works such as Hawaii: The Last of the Magic Isles, they follow Adams in emphasizing the egalitarian nature of race relations in Hawai‘i as compared with the rest of the United States, where anti-miscegenation laws still existed, and racial violence often occurred. Lind and Hormann wrote that the absence of open violence bespoke a certain restraint and tolerance that had become a tradition in Hawai‘i, and this “principle” of acceptance would act to further the “unification” of the races.

In the decade post-statehood in 1959, Lind and Hormann were joined by other academics such as Lawrence Fuchs, who advanced one of the earliest arguments that Hawai‘i could serve as a model for other racially diverse societies throughout the world. Fuchs, in his work Hawaii Pono: An Ethnic and Political History, espouses the “promise of Hawaii” to illustrate the “nation’s revolutionary message of equality of opportunity for all”, where “peoples of different races and creeds can live together, enriching each other, in harmony and democracy.” From the perspective of the 1960’s, where in the South leaders of the civil rights movement were facing brutal violence as they challenged racial segregation, Fuchs may have had a point, however, the “promise” he wrote of has not been fulfilled either in Hawai‘i or in the rest of the United States.

In the 1980’s the “Hawai‘i multicultural model” emerged, and was championed by scholars such as Michael Haas and Ronald Takaki, who both suggested that America look to Hawai‘i as a model of multi-culturalism and ethnic harmony. Takaki went so far as to claim that Hawai‘i’s plantation past represented an example of “inter-ethnic cooperation”, thereby selectively ignoring examples of inter-ethnic conflict, the experiences of the indigenous Hawaiians whose lands were taken for the development of the plantations, and the institutionalized discrimination against the immigrants who came to
labor on the plantations. Academics were not the only contributors to the production of multiculturalism in Hawai‘i. Journalists such as John Griffin, former editor of the Honolulu Advertiser, wrote an essay entitled “Hawai‘i’s Ethnic Rainbow”, that focused on intermarriage and noted that 20 percent of the residents of Hawai‘i were of mixed ethnic heritage, compared to only 2.4 percent on the continent. Again, the multicultural model of ethnic relations in Hawai‘i is proposed as a “positive example” for “most other places in the nation” by Griffin’s commentary. 49

As Okamura states, Griffin’s work, and the work of other journalists with similar views, is significant not because it has anything to say about multiculturalism in Hawai‘i that has not been stated previously, but because its publication in the news media allows it to be read by an enormous audience around the world. Thus, Griffin’s inclusion of such tropes as “ethnic rainbow” and “melting pot”, serve to confirm and reinforce the stereotypical assumptions held by readers’ regarding the nature of ethnic relations in Hawai‘i as not only positive, but “special” and “unique”. 50

Okamura identifies four principal dimensions to the Hawai‘i multicultural “melting pot” model, based on the arguments of those who advocate it as an exemplar for the nation. These are a tradition of tolerance and peaceful coexistence, harmonious and cordial ethnic relationships with a high rate of intermarriage, equality of opportunity and status, and a shared local culture and identity. Okamura states that because these aspects of society in Hawai‘i have been popularized as part of the “aloha spirit”, and are more pronounced than on the continent where there is less of a normative emphasis on tolerance and acceptance, they may obscure the ways in which ethnic groups in Hawai‘i relate to one another in intolerant and unfair ways, such as the disparities in higher education, employment, and wealth. 51

Proponents of the ideology and norms of multiculturalism in Hawai‘i point out that the cultural diversity in the islands contributed to a sharing and blending of cultures that resulted in the creation of a common local culture and identity between Hawaiians and the immigrants who came to work
the plantations. Supporters of the Hawai‘i multicultural model also claim that because of the normative emphasis on tolerance and harmony the islands have experienced less racial and ethnic conflict than other societies, and that multiculturalism has been for the ultimate good of all, including Hawaiians and ethnic minorities, as it has brought benefits such as socio-economic mobility. Okamura finds these claims that the Hawai‘i multicultural model serve as solution for other societies, no matter how racially or ethnically different they may be from Hawai‘i, to be “grandiose, if not false”.  

For Okamura, the emphasis that multicultural approaches put on cultural differences, rather than racial differences tends to minimize the difficulties that racial minorities face when seeking to participate equally in society, thereby acting to obscure the power and status differences among racial and ethnic groups. Okamura observes that although the discourse of multiculturalism celebrates difference, it does not resolve the real disparities in power and privilege that exist among racial and ethnic groups in Hawai‘i. Because multiculturalism reduces the salience of racial differences and the barriers that can accompany it by focusing on culture, it is often viewed as a form of “postracialism” by those who assert that America has gone beyond race, and proclaim the country to be a “color-blind” society. Okamura states that this “postracial” aspect of multiculturalism serves to distract the United States from the persisting inequality that exists within the racial hierarchy of the country, rather than providing a means to address the problem.  

Another troubling aspect to multiculturalism for Okamura and others who study race and ethnicity in America is that it tends to eliminate the analytical distinction between race and ethnicity by blurring the distinction between racial and ethnic groups. This is problematic because race has held far more significance than ethnicity in structuring inequality in America, and therefore multiculturalism’s conflation of race and ethnicity only adds to the general confusion in society over issues of racial hierarchy, discrimination, and persisting inequality. For Okamura, Hawai‘i’s multicultural “racial project” model serves this interest and works to maintain the status quo of political and economic
dominance that favors the Chinese, Japanese, and white populations of Hawai‘i while ignoring the power and status disparities faced by Hawaiians, Filipinos, and Samoans.  

The multicultural model, however, is spread very effectively throughout Hawaiian society by various means, including government sources, the news media, public education, and popular culture. Residents are asked to express the “aloha spirit” when interacting, students are taught a simplistic version of the history of Hawai‘i that emphasizes the cultural contributions of Hawaiians and the immigrant plantation workers but omits the racism and discrimination both groups faced, and local comedians tell jokes that ridicule the language and cultural practices of ethnic groups, especially Filipinos, but maintain that such humor is directed at all ethnic groups equally, and therefore no one should take offense. Okamura states that although proponents of multiculturalism would remind us how lucky we are to live in a society where we can all laugh at ourselves, that is a simplistic view of what is actually occurring when others are the target of the jokes.

The above discussion of multiculturalism in Hawai‘i, the “melting pot” analogy that accompanies it, and its widespread dissemination throughout American popular culture during the 20th century was necessary in order to place the Supreme Court’s version of Hawaiian history in context. The works the Court relied on written by Kuykendall, Fuchs, and Daws, were part of the body of literature that helped to spread the ideology of Hawai‘i as a multicultural society that was likened to a “melting pot”, and that ignored the problematic and unrealistic nature of the analogy that Okamura’s work brings to light. The language the Court uses, and the historic omissions it commits throughout can be directly tied to these works, which have become part of the “canon” of scholarly writings on Hawai‘i.

The most obvious example of this dynamic is in the Court’s treatment of Hawaiian demographics in the historic section, where the opinion states that in response to the demands of the sugar industry which needed laborers for the cane fields,

...successive immigration waves brought Chinese, Portuguese, Japanese, and Filipinos to Hawaii.
Each of these ethnic and national groups has had its own history in Hawaii, its own struggles with societal and official discrimination, its own successes, and its own role in creating the present society of the islands. The 1990 census show the resulting ethnic diversity of the Hawaiian population.  

The relevance of this passage to the “melting pot” analogy is clear, however, in the context of the *Rice* decision it has added relevance for Hawaiians. The Court, by comparing the history, the struggles, and the successes of each of the immigrant groups mentioned with that of Hawaiians, is equalizing the historic playing field and thereby minimizing the unique circumstances faced by Hawaiians in their homeland, and thus diminishing the need for the kind of Hawaiian political empowerment Harold Rice objects to in his lawsuit.

Modern works written by Hawaiian authors such as Trask (1993), Kame‘eleihiwa (1992), Silva (2004), and Kauanui (2008), take a much more critical perspective on such issues as the effects of political disenfranchisement, the loss of the land, native Hawaiian resistance, and being identified by blood quantum have had on the Hawaiian people. Non-Hawaiian authors such as Stannard (1989), Dougherty (1992), Schweizer (1998), and Merry (2000), delve deeply into the effects that disease, missionaries, foreign pressure to modernize, and the colonizing power of the law had on Hawaiian culture. These works, in conjunction with such primary sources as written by Queen Lili‘uokalani (1898), Congressman Blount (1894), and Prince Kūhiō (1920), will focus the first part of this work on three important times in the colonial and early modern history of Hawai‘i, to illustrate how the law, regardless of its stated rationale, and in spite of Hawaiian resistance, primarily benefited the interests of the colonizer over those of Hawaiians.

Here, fortuitously, the Rice family offers an excellent case study of the dynamic mentioned above. In each of the three historic era to be discussed, the Māhele of 1848 and Kuleana Act of 1850, the years between 1887 and 1898 that encompass the Bayonet Constitution, the overthrow of Queen Lili‘uokalani and the annexation of the Hawaiian Kingdom, and the enactment of the Hawaiian Homes
Commission Act of 1921, successive generations of the Rice family played important, if not instrumental roles in the implementation and enforcement of laws that proved beneficial to the interests of the non-Hawaiians while proving damaging to those of Hawaiians. 57

The connections between religion, law, and business that enabled the Rice’s and other missionary families to become so prosperous and politically powerful in Hawai’i were all part of the colonizing process of American imperialism in the 19th century. This work will use the field of Critical Race Theory (CRT) to analyze those events mentioned above, as well as the Supreme Court decision in the Rice case, in order to help better understand how a CRT analysis of the Rice family history in Hawai’i might affect peoples’ perception of Harold Rice’s present day claim.58

Scholars in the field of CRT have laid a solid analytical foundation from which to interrogate the law for racial bias, and place emphasis on viewing legal decisions in their historic context. The issue of race and the law has been written on extensively by Bell (2004), and serves as an overview of how racism in America was methodically integrated into the legal system so as to affect laws concerning education, public facilities, interracial sex and marriage, property rights, voting rights, and the justice system itself. Bell’s work also includes a history of treaty negotiations between the federal government and the tribes that shows certain similarities when compared with that of Hawaiians, for although Native Americans and Hawaiians are distinctly different groups, they share a similar colonial historic experience.59

Other CRT scholars such as Omi and Winant (1994), have focused on racial formation and white privilege in America, exploring how concepts of race structure state and civil society and continue to shape identities and institutions significantly in America. Their conceptual framework is of particular relevance when applied in the Hawaiian context, and will help provide important insights into the colonial history of the islands and the dynamics which led to the formation of white privilege in
Hawai‘i. Another CRT scholar, Cheryl Harris, applies the dynamic of white privilege to property rights in the United States, arguing that race and property rights became intertwined in America and led to a “racialized conception of property implemented by force and ratified by law”, thus assigning white privilege a form of property interest. Harris bases her premise on the history of slavery against blacks and the theft of native land on the continent, however, applying the idea of “whiteness” as a property right in the Hawaiian context allows for insights into how the Māhele of 1848 and Kuleana Act of 1850 promoted similar dynamics of subordination and oppression in Hawai‘i.

Other CRT scholars have written extensively on the subject of “color-blind” jurisprudence, used by the Supreme Court’s majority in the Rice decision of 2000. From the perspective of CRT, “color-blind” constitutionalism, by categorizing any racial classification as impermissible under the law, leaves intact a status-quo based on hundreds of years of racism and legal discrimination that continues to disadvantage communities of color (Bell 2004). Another concern for CRT scholars is the application under “color-blind” jurisprudence of “strict scrutiny” to all race based legislation, whether the intent be invidious or benign. Kimberle Crenshaw explores how the intent requirement makes it virtually impossible to deal with the conditions of inequality that arise when race-neutral policies, such as voting in the Rice case, are advanced that may negatively impact minorities.  

Charles Lawrence III has written extensively on the subject of “color-blind” jurisprudence, the role ideology plays in racism, and how unconscious racism might affect the law. The issue of obtaining justice for people historically damaged by race, and the difficulties a “color-blind” approach presents to reaching that goal are primary concerns for Lawrence, and will be explored in the context of the Rice decision. Other influential legal scholars who have written in the field of CRT include Linda Hamilton Kreiger and Tanya Kateri-Hernandez, both exploring the ways stereotypes, whether racial, sexual, or cultural, can lead to the creation of unacknowledged biases in jurors, prosecutors, judges, and legislators that may affect the outcome of a case, but are essentially overlooked by the law.
This dynamic of unacknowledged or unrecognized bias that is associated with “color-blind” constitutionalism relates to disparate impact theory and how theoretically neutral practices can adversely affect women and minorities. In the context of the *Rice* decision and voting rights, another race-neutral practice, the impact of vote dilution absent the OHA restrictions could prevent Hawaiians from electing their chosen representatives, thereby preventing the native population of Hawai’i from engaging in the process of self-development and community identification underlying the constitutive understanding of the vote. Ironically, the Court in using “color-blind” rationale to strike down the OHA restrictions found no room in constitutional doctrine to consider that race-conscious rules of this sort may be necessary in order to render voting meaningful, and discredited the extent to which race-neutral laws may actually undermine the intrinsic value of voting.  

Alan David Freeman and Neil Gotanda have also written critical work in the field of CRT that might be applied in the context of Hawaiian history and the *Rice* case. Freeman feels that “color-blind” ideology, by equating all racial classifications as invidious, serves to stabilize existing racial disparities, thus making it difficult for lawmakers to compensate victims of discrimination or to promote diversity. Freeman’s review of Supreme Court doctrine accuses the court of prioritizing their focus on the types of laws enacted rather than their actual consequences. Gotanda’s critique of the use of “color-blind” jurisprudence, with its corresponding conflation of benign and invidious racial classifications, stems from the assertion that race neutrality is a present day norm rather than an ideal yet to be achieved. Gotanda warns that the focus on formal equality in a country where race has been used systematically by whites against people of color is a dangerous proposition.

As the literature suggests, many authors in the field of CRT apply critiques of “color-blind” constitutionalism that can be used as analytical tools of inequality before the law in the Hawaiian, and perhaps, Native American context. However, as Kauanui explains, CRT, in its focus on the study of racial formation and the legal construction of race, has failed “to consider how whiteness constitutes
a project of disappearance for Native peoples rather than signifying privilege.” 66 This is due to indigenous peoples being identified by blood quantum, which has been used routinely to disqualify Natives without the required percentage of Native blood, and thereby becomes a method of dispossession rather than one of subordination and discrimination. As this work will show, the Supreme Court majority in the *Rice* decision used the 50% blood quantum rule as one of the legal rationales justifying their decision.

Thus, CRT, by failing to recognize how whiteness can signify a project of disappearance for Native peoples, has neglected to connect land and indigeneity to concepts of race and law. However, as the *Rice* decision has given rise to several more legal challenges, not only to Hawaiian identity, but educational opportunities and benefits related to land entitlements, this work will utilize CRT where it is applicable, and acknowledge where it is not, to expand the understanding we can gain from such an analysis of the *Rice* case and its progeny. The goal of this work is to better understand the effects of applying “color-blind” constitutionalism to Native law by examining its impact on Hawaiians, and thereby see the possible consequences of applying “color-blind” ideology to Tribal law on the continent. If we can better understand the consequences of “color-blind” jurisprudence on Hawaiians and Native Americans, then we would have another perspective through which to view the effects of its application to affirmative action programs nationwide amid the continuing debate over race in America. The method used in order to gain this understanding entails utilizing an array of historic sources, both primary and secondary, to help show the role the law played in shaping Hawaiian history, and overlay the Rice family genealogy as a case study of white privilege that can be interrogated through CRT. Important legal decisions relevant to the discussion of “color-blind” constitutionalism, Tribal law, and legislation affecting Hawaiians will also be referenced to illustrate the impact and influence of the law on different groups in society. The combination of historic sources, CRT, and law serves well to properly interrogate the *Rice* decision which encompasses unresolved
issues and conflicts from the past that continue to affect the present, and will continue to affect the future, not only for Hawaiians, but for Native Americans on the continent as well.

Chapter 1 will focus on three historic periods in Hawaiian history where law was used as part of the colonizing process, and trace how these events are connected to the present day situation facing Hawaiians because of the Rice decision. The history of the Rice family, their involvement in these historic events, and the formation of white privilege in Hawai’i will be examined here through the lens of CRT in order to place Harold Rice’s complaint in a broader historic context.

Chapter 2 will examine the Supreme Court’s decision in the Rice v. Cayetano case in order to better understand the concerns of both the majority and dissenting opinions. The legal justifications for each opinion will be analyzed in order to show the complex and often contradictory nature of race and the law in America, with an emphasis on how our understanding of the Rice decision is enriched by CRT, and where a CRT analysis may not be sufficient in this context.

Chapter 3 will look at the legal consequences and repercussions of the Rice case here in Hawai’i. Several lawsuits challenging Hawaiian programs have been filed since the 2000 ruling by the Supreme Court, all citing the Rice v. Cayetano decision as precedent for their claims. The chapter will also examine the effects of the Rice case on sovereignty politics and state initiatives, as the case has intensified the sense of urgency for both Hawaiian political groups and the state agencies which oversee federal funds for programs intended to benefit Hawaiians.

Chapter 4 will compare and contrast the legal history of Native Americans on the continent with that of Hawaiians in order to clarify the manner in which the courts defer to the U. S. Congress in regards to legislation affecting indigenous peoples, and illustrate how federal legislation affecting Native Americans influenced laws affecting Hawaiians. The concerns of legal scholars regarding the Rice v. Cayetano decision affecting the continuing viability of Morton v. Mancari to reconcile federal law concerning Native Americans with the equal protection clause will end the chapter.
The conclusion will take stock of the insights to be gained from analyzing the effects of applying "color-blind" jurisprudence to law affecting indigenous peoples, and discuss the latest initiatives by the state to position OHA as the nation, Kaka‘ako Makai and Kana‘iolowalu, the Native Hawaiian Rolls Registry. The role the state of Hawai‘i plays in Hawaiian sovereignty politics should be examined with great caution, for if OHA indeed becomes the nation, the state will maintain its control over the ceded lands that were stolen from Queen Lili‘uokalani and the Hawaiian people in 1893, leaving Hawaiians with a severely curtailed form of sovereignty that would forego true self-determination.

Introduction Endnotes

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4. Ibid. p. 9.
10. Ibid. p. 182.
11. Ibid. p. 185.
13. Ibid. p. 189.
15. Ibid. p. 192.
16. Ibid. p. 194.
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18. Ibid. p. 197.
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31. Ibid. Preface.
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34. Ibid. J. Kennedy, Majority Opinion, p. 1.
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40. Ibid. p. 73.
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46. Ibid. p. 8.
47. Ibid. p. 9.
48. Ibid. p. 10.
49. Ibid. p. 11.
50. Ibid. p. 11.
51. Ibid. p. 12.
52. Ibid. p. 13.
53. Ibid. p. 15.
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Chapter 1:
Benefits to the Colonizer of the Changing Rationale of the Law in Hawai‘i

The Supreme Court’s majority opinion in the *Rice v. Cayetano* case was preceded by several pages of historical background, the necessity of which, according to Justice Kennedy writing for the majority, was to “recount events as understood by the lawmakers, thus ensuring that we accord proper appreciation to their purposes in adopting the policies and laws at issue.” ¹ Asserting that “the litigants seem to agree that two works in particular are appropriate for our consideration”, the Court relied primarily on Fuchs (1961) and Kuykendall (1938, 1953, 1967), with additional references to Daws (1968).² As noted in the introduction, these works were written by authors who were influential in helping to create the “melting pot” ideology in Hawai‘i, and have been acknowledged to portray the transformation of Hawaiian cultural institutions as a gradual process mainly welcomed by the Hawaiian people, while threats of colonial violence, forced annexation of the Kingdom, and acts of Hawaiian resistance are mainly downplayed, and thereby silenced.

The Court’s historic section contains information regarding the origins and migration of the Hawaiian people, their culture and political structure, first contact with Captain Cook in 1778, the unification of the islands in 1810 under Kamehameha I, the arrival of the missionaries in the 1820’s, and a general narrative of Hawai‘i that encompasses the legal history of the islands through the 19th century to the present. For the purposes of this work it is not necessary to examine the entire length of the Court’s historic section, as not all is relevant to my argument. However, it should be said that the section reads very much like the sources it was taken from (Fuchs, Kuykendall, Daws), with the primary focus being the concerns of the colonizers, and their endeavors to “civilize” and “rehabilitate” the native Hawaiians.³

The focus of this chapter will be on three important legal events in the history of Hawai‘i that have
direct bearing on the Rice case, the Māhele of 1848 and Kuleana Act of 1850, the overthrow of Queen Lili’uokalani and subsequent annexation of the islands in 1898, and the enactment of the Hawaiian Homes Commission Act (HHCA) of 1921. The historic context of these events, the rationale which motivated the colonizers, and the consequences of each for Hawaiians will be traced in order to illustrate how the law worked to establish and further the interests of the colonizer over those of the indigenous people.

As a case study of this dynamic, the Rice family history will be interwoven, thereby giving the reader the opportunity to view the formation of white privilege in Hawai’i through the actions of one family. To my knowledge, although others have written and commented on certain characters in Harold Rice’s family and their effect on Hawaiian history, no one has chronicled the entire family and its relationship with power and privilege in Hawai’i to the present day. By doing so, I believe we can better place the Rice case in historic perspective, and perhaps gain a deeper understanding into the problematic nature of applying “color-blind” constitutionalism to laws affecting Hawaiians and other indigenous peoples in America.

The Māhele of 1848 and Kuleana Act of 1850

During the era preceding the Māhele of 1848 and Kuleana Act of 1850 the Hawaiian Kingdom was beset by foreign threats to its sovereignty, and increasing demands by foreigners living in Hawai’i for private ownership of land. Beginning in the 1830’s France, England, and the United States all began to aggressively assert their interests in the politics and economy of the Hawaiian Kingdom. Because all three countries had citizens residing and doing business in Hawai’i, they began to pressure the Hawaiian government to modernize the laws of the Kingdom to comport more with those of Europe and America, especially where rights to the land were involved.
In response to these threats, Kamehameha III turned to his advisors, the New England missionaries, for assistance and advice on how to modernize the Kingdom in order to placate the foreign governments and show the world that Hawai‘i was “civilized”. According to Sally Engle Merry, this type of cultural appropriation was common during colonial times and can be seen in various forms as indigenous societies around the world resisted colonial oppression. This dynamic had a duality, however, as Merry states, “The Hawaiians appropriated the New England legal system in order to be civilized, and the New England missionaries appropriated Hawaiians as dark savages against which they saw themselves as the light.” 6 Thus, the law in Hawai‘i became part of the process of cultural production and appropriation incorporating agency and power for both colonizer and colonized. This dynamic can be seen throughout the contested history of Hawai‘i to the present day.

The Court’s summary of the decade preceding the Māhele does not mention the foreign threats to the Kingdom’s sovereignty that led Kamehameha III to appropriate the Anglo-American legal system of landholding, but introduces the events with the following,

While these developments were unfolding, the United States and European powers made constant efforts to protect their interests and to influence Hawaiian political and economic affairs in general. The first “articles of arrangement” between the United States and the Kingdom of Hawaii were signed in 1826. 7 The “articles of arrangement” between the United States and the Kingdom of Hawai‘i acted as the informal trade agreement between the two countries for many years, and were arguably more fair than the trade agreements forced upon the Kingdom by the French and the British, who did not hesitate to use the proven colonial tactic of gunboat diplomacy to enforce their interests. 8

For example, Captain Laplace in command of the French armed frigate Artemis, and acting under the guise of protecting religious toleration of its Catholic citizens in the Protestant Kingdom, in 1839 demanded and received a $20,000 indemnity from the Hawaiian government, free land for the Catholic Church, and the imposition of an unfair trade agreement, all under the threat of war. Subsequently, Lord George Paulet, in command of the British warship HMS Artemis, enforced a
questionable land claim by the British consul Richard Charlton, and again under the threat of war demanded the Hawaiian government pay an indemnity of $100,000. This led Kamehameha III, with advice from the New England missionaries who counseled him, to cede the Kingdom to the British rather than face bankruptcy or the violence implied by the British gunship in Honolulu Harbor.  

These constant threats to the independence of the Hawaiian Kingdom weighed heavily on the sovereign, who, relying on the counsel of his missionary advisors agreed reluctantly, and against the advice of the Hawaiian chiefs who opposed foreign land ownership fearing foreigners would buy all the land, to the Māhele. The Supreme Court’s version of this time in Hawaiian history neglects to mention these frequent attempts at takeover by European nations, but instead states that,

Beginning in 1839 and through the next decade, Kamehameha III approved a series of decrees and laws designed to accommodate demands for ownership and title...for it was obvious that the internal resources of the country could not be developed until the system of undivided and undefined ownership in land could be abolished.

This statement reflects the differences in perspective between the colonizers and the colonized regarding development of the land and its natural resources. As Haunani-Kay Trask clarifies, Hawaiian society was based on communal sharing of resources rather than economic exploitation, and there was “no idea or practice of surplus appropriation, value storing or payment deferral because there was no idea of financial profit from exchange.” Rather, the ahupua’a, wedge shaped pieces of land running from the mountains to the sea, allowed everyone access to the necessities of life, but depended on a communal exchange of resources between those who lived by the sea and those who lived inland. This practice of sharing that was such an integral part of Hawaiian culture and had produced such a healthy and productive population prior to European contact partially explains why the concept of private land ownership was such a foreign idea for Hawaiians.

The Court’s opinion continues,

Arrangements were made to confer freehold title to certain chiefs and other individuals. The King retained vast lands for himself, and directed that other extensive lands be held by the government, which by 1840 had adopted the first Constitution of the islands. Thus was affected a fundamental and historic division, known as the Great Mahele. In 1850, foreigners, in turn, were given the right of land ownership.
The Constitution of 1840 referred to by the Court was written by William Richards, a missionary who had been spiritual advisor to the young Kamehameha III, and now advised the King and his chiefs regarding political aspects of the Kingdom. Richards instructed the Hawaiians that in order to secure their independence as a “civilized” country they must follow their acceptance of Christianity with a constitutional government. Although the chiefs objected to this, seeing it would lead to the diminishment of their hereditary power, they also considered the continued threats to Hawaiian sovereignty posed by foreign powers if they resisted modernization. 14

As Merry documents in her work Colonizing Hawai‘i: The Cultural Power of Law, this development was part of the second transition of law in Hawai‘i, the first having been the shift from the traditional Hawaiian system of law premised on the divine authority of the gods to a Christian legal order based on the authority of Jehovah. The second transition involved the rapid transformation of the legal system premised on the authority of Jehovah to an Anglo-American legal system based on the authority of a sovereign populace. As part of this second transition, the authority of the chiefs, which rested in part on their control over the land and the commoners who worked it, was denigrated by the missionaries who characterized it as despotic and arbitrary, thereby providing another justification for the Māhele, protecting the commoners against the power of the chiefs. 15

The theory behind the Māhele, according to its missionary architects and attorney general William Little Lee, was to allow Hawaiians to prosper and achieve capitalist success as small farmers. Lee and The missionaries reasoned that regardless of social class, all Hawaiians could benefit through the proper use of the land, and saw themselves as promoting the process of “civilization” in the islands. The initial division began in 1848, with the King and 245 chiefs being awarded their lands, which were recorded in the Buke Māhele. The next step involved the maka‘āinana or commoners receiving their lands, which was to be accomplished through the Kuleana Act of 1850. This law allowed each male head of a family to claim fee simple interest in land that had been in continuous cultivation since 1839, or in the case of house lots occupied since the same year. 16
Records show that of approximately 88,000 Hawaiians alive in 1850, 29,220 were male above the age of 18 and therefore eligible to claim land. However, only 14,195 applications for Kuleana lands were filed, and of these only 8,421 were awarded. The question of why so few land claims were awarded has no definitive answer as the Land Commission kept no records of their deliberations, however, there are some reasonable explanations according to Lilikalā Kame‘eleihiwa in her work *Native Land and Foreign Desires: Pehea Lā E Pono Ai?* Kame‘eleihiwa posits first and foremost the idea of private land ownership being completely foreign to the common Hawaiian, who had worked the land for the chiefs, and considered it a part of his genealogical heritage rather than a commodity to be bought and sold. Another factor was the hesitancy of the maka‘āinana to claim land that had been controlled by the chiefs, as this would have been considered a‘ole pono or incorrect behavior. Related to this was the traditional bond the commoners felt to the chiefs, a tie becoming more tenuous each year with the arrival of more foreigners and the momentous changes they brought to Hawaiian society. Many commoners may have felt this bond would be irreversibly severed if they claimed the land.17

The particulars of the process, such as the filing of claims, the presentation of witnesses, and the cost of surveying the land itself also may have discouraged many from claiming their land. Yet, there are other more troubling explanations for why so few commoners received land, most of which involved the missionaries who controlled the Land Commission. The Land Commission initially had given the commoners a two year time limit to make their claims, after which many may have thought the deadline to claim land had passed. In addition, the government advertised the process of claiming the land through the newspapers and churches, with the King himself urging the people to claim their lands. But it is certainly conceivable those who did not read the newspapers or attend church could have been unaware of the particulars of the process by which to claim their land and neglected to apply. Finally, and perhaps most disturbing, is the fact that the Land Commission, which consisted of five
men in Honolulu, enlisted missionaries across the islands to register the land claims, thereby leaving open the distinct possibility that the small number of land claims actually awarded reflects only those who were in good standing with the church.  

In addition, as of 1850 foreigners were allowed to buy and sell land, as attorney general Lee and the missionaries believed that introducing a modern economy to Hawai‘i would ensure the independence of the Kingdom while strengthening native Hawaiians through the “civilizing” process. The law had now made it possible for foreign businessmen familiar with the concept of private ownership of land to compete with indigenous Hawaiians, to whom the concept was both alien and inhospitable. As a result, of the total acreage of approximately 4,118,000 on the eight major islands, the common Hawaiian, the intended beneficiaries of the Māhele, received 26,658 acres or less than 1%. By contrast, within forty years of the passage of the Māhele and Kuleana Act, four-fifths of the private lands in the Kingdom were owned by foreigners.  

The Court’s opinion omits these details of the events discussed above with the following brief statement, 

The new policies did not result in wide dispersal of ownership. Though some provisions had been attempted by which tenants could claim lands, these proved ineffective in many instances, and ownership became concentrated.  

The discussion above of the consequences of the Māhele and Kuleana Act gives details to the Court’s brief summary regarding the “provisions” by which “tenants could claim lands”, and how they “proved ineffective in many instances”, but neglects to answer the important question of in whose hands specifically did “ownership become concentrated”? Although businessmen and investors such as Lee and his partner Charles R. Bishop certainly benefitted from these events, many of the missionaries involved with the implementation of the new laws also prospered from the circumstances.  

Because of the missionaries’ success in bringing Christianity and literacy to the Hawaiian people, the American Board of Commissioners for Foreign Missions (ABCFM) severed their financial support
to their Brethren in Hawai‘i, leaving many with a sense of financial insecurity. Although the missionaries had for the most part previously eschewed association with the foreign business community, many now joined them in exploiting the opportunities offered by the Māhele and Kuleana Act. Thirteen missionary families were granted 560 acres each at nominal cost by the Privy Council in 1850. These missionary families included the Bailey’s, Baldwin’s, Bishop’s, Bond’s, Cooke’s, Clark’s, Emerson’s, Gulick’s, Parker’s, Rice’s, Rowell’s, and Wilcox’s. Others quickly followed suit, and by 1855 forty seven missionary families had accumulated thousands of acres of Hawaiian land.  

It is ironic that the missionaries, who had decried the “arbitrary” and “despotic” power of the chiefs over the commoners as part of the justification for the Māhele and Kuleana Act, were now, due to the consequences the laws had on the common Hawaiian, as much a part of the new form of inequality based on land tenure as the chiefs had been previously. As Merry notes, one consequence of the Māhele was that, “Inequality was gradually reconstituted on the basis of property ownership rather than birth and rank.” A second consequence of this transition to the rule of Anglo-American constitutional law was gendered, as only men were seen as entitled to govern themselves. Whereas the first transition of Hawaiian law to that of the law of Jehovah had been empowered in part by high ranking chiefesses such as Ka‘ahumanu, Keōpūolani, and Kina‘u, who saw Christianity, literacy, and the skills possessed by the missionaries as new sources of power, this second transition in effect reinscribed male power, with women emerging with a more subordinate status than before.

Now, having outlined the historic context of the events leading to the Māhele and Kuleana Act, examined the rationale of both the colonizer and the colonized to enact and appropriate the laws, and seen the disparate consequences the laws had on these two groups, an investigation of the Rice family and their involvement in the events described above is in order. The purpose of this section is to allow the reader to view the formation of white privilege in Hawai‘i through the history of one family in order to gain a better understanding of the how the dynamic of white privilege in America developed in the Hawaiian context.
Benefits to the Rice Family of the Māhele of 1848 and Kuleana Act of 1850

As discussed above, one direct consequence of the Māhele and Kuleana Act involved thirteen missionary families receiving 560 acres at nominal cost from the Privy Council, and 47 others using their familiarity with the government and the process of law to acquire large tracts of land by 1855. The Rice family, who had arrived in Hawai’i in 1841 as members of the ninth company of missionaries sent to the islands by the ABCFM, were one of the thirteen. William Harrison Rice and his wife Mary Sophia Hyde Rice, the great-great-grandparents of Harold Rice, had been raised in New York State, where her father was a missionary to the Seneca Indian tribe. After arriving in Hawai’i, the couple first worked on the island of Maui in the Hana district until 1844 when they relocated to O’ahu and began teaching at Punahou School, which had been founded two years before by Daniel Dole for the education of the missionary children. They worked at the school until 1854, when they moved again, this time to Kaua’i, where William managed the Lihu’e Plantation.  

During the 1850’s while managing the Lihu’e Plantation, William continued to advance the fortunes of the family by supplementing his pay with shares of ownership in the company, which subsequently became very valuable as the sugar plantations grew over the course of the 19th century. He is also credited with supervising the construction of the first irrigation ditch for sugar cane by diverting the Hanama’ulu Stream in order to solve the problem of uneven rainfall on the plantation. The success of this operation, and the attendant boon it provided to the sugar industry, began an effort by the sugar planters to build ditches on the islands of Kaua’i, O’ahu, Maui, and Hawai’i that when completed in the early part of the 20th century, would divert water from virtually every natural watershed in Hawai’i by as much as 800 million gallons per day.  

This development, although universally praised by state histories, plantation archives, and the biographies of the missionary descendants turned plantation owners, as helping to build a modern
economy for Hawai‘i only added to the dispossession Hawaiians were undergoing as a direct result of the Māhele and Kuleana Act. The reason for this can be understood by examining the manner by which Hawaiians had traditionally used water, and how the loss of these water rights affected their lifestyle, thereby making them more dependent on the colonizers’ economy to survive. The ancient ahupua‘a were designed to use the water from the mountaintops to the sea in order to provide sustenance for the people. The upland streams were used to gather limu (underwater plants), o‘opu (freshwater fish), hīhīwai (snails), and ‘ōpae (freshwater shrimp), while the water downstream was used to irrigate the lo‘i kalo (taro), and supply water to the brackish fishponds by the shore.  

The diversion of the water from the streams of the ahupua‘a to the sugar plantations of the colonizers had a profound effect on the natural resources mentioned above that Hawaiians had utilized and depended on for generations as part of their food supply. As the streams ran dry and these resources disappeared, Hawaiians found themselves unable to harvest their bounty or continue traditional Hawaiian agricultural practices which required fresh water. When combined with the dispossession Hawaiians were undergoing as a result of the Māhele and Kuleana Act, the diversion of water for the plantations added an incredibly difficult burden to the Hawaiian population.

The man responsible for this development, William Harrison Rice, lived until 1862 and fathered five children with his wife Mary before he died of tuberculosis. His children, the second generation of Rice’s in Hawai‘i, began to marry prominent businessmen, many of whom came from other missionary families that would later form what came to be known as the “Big Five”, a group of sugar planters and business associates that controlled the Hawaiian economy in the later part of the 19th century and for most of the 20th. Hannah Maria Rice married Paul Isenberg, who took over managing the Lihu‘e Plantation after William’s death, and later partnered with Heinrich Hackfeld to form AMFAC, one of the “Big Five”; while her sister Anna Charlotte Rice married Charles Montague Cooke, a missionary descendant and founding partner of another of the “Big Five”, Castle & Cooke.

William’s son William Hyde Rice, great-grandfather of Harold Rice, married Mary Waterhouse in
1872 and fathered eight children. It was during the 1870’s that the Rice family became one of the top ten land owners on the island of Kaua’i, where in addition to their interests in Lihu’e Plantation, they raised horses and cattle. During this period William Hyde Rice entered into politics, where he served in the House of Representatives of the Hawaiian Kingdom from 1870 to 1890. At this juncture, having placed the first two generations of the Rice family in context with the events of the Māhele of 1848 and Kuleana Act of 1850, an analysis of the formation of white privilege in America from the perspective of CRT will allow us to compare and contrast the dynamic in Hawai‘i.

White Privilege and the Māhele of 1848 and Kuleana Act of 1850

As J. Kēhaulani Kauanui notes in her work *Hawaiian Blood: Colonialism and the Politics of Sovereignty and Indigeneity*, “the ultimate effect of the Māhele was to create and introduce private ownership of land and commodification of labor and to accelerate the dislocation of Natives.” Kauanui’s treatment of the Māhele, and the consequential dispossession of Hawaiian land and its connection to the HHCA in 1921, offers critical insight into the dynamics involved in the loss of Hawaiian land and will be discussed in more detail later in this chapter. Although the sugar plantation economy was newly established in 1850, the legal groundwork for the system, private ownership of land, and a system of law and government that protected private property, was already in place. The children and grandchildren of missionaries were the “prime movers” in this transition to agricultural capitalism, often forging unions through marriage to people in the merchant class, they were instrumental in founding the sugar plantation economy and the related enterprises of railroads and shipping. By the end of the 19th century these missionary descendants and their merchant partners had virtually monopolized control of business, ownership of property, and political power in the Kingdom.

The facts regarding the history of the development of the sugar plantation economy and the rise
of the “Big Five” in the later part of the 19th century have been thoroughly documented in scholarly works and are incontrovertible (Kame‘elehiwa 1992, Trask 1993, Schweizer 1999, Merry 2000, Silva 2004, Kauanui 2008). The intent of examining the simultaneous development of white privilege in Hawai‘i through the lens of CRT is to deepen our understanding of these events, and allow us another perspective by which we can better understand their connection to the present. The work of Michael Omi and Howard Winant, Racial Formation in the United States From the 1960’s to the 1990’s, offers an excellent place to begin a discussion of the formation of white privilege in Hawai‘i as it relates to the Māhele of 1848 and Kuleana Act of 1850.  

Omi and Winant make the argument that race in America should be understood as “a fundamental dimension of social organization and cultural meaning”, and are critical of racial politics across the spectrum because of the tendency to reduce and diminish the significance of race by treating it as though it were “a mere manifestation of some other, supposedly more important, social relationship.” Omi and Winant propose that concepts of race in the United States have always been politically contested, and identify the government or state as being the “preeminent”, but not the only site of racial contestation.

The authors state that because the United States for most of its existence was a “racial dictatorship” where most non-whites were eliminated from politics and subjugated to legally sanctioned segregation and denial of civil rights, patterns of racial inequality in America have proven stubbornly resistant to change. Omi and Winant assert that this “racial dictatorship” is the norm against which politics in the United States should be measured, and give three consequences of its effect on American society. First, identity in the United States was defined as white, as opposed to the racialized other represented by Native, African, Latin, and Asian Americans. Second, this white identity allowed a divisive color line to cause a fundamental separation in American society that made racial divisions the norm in both the institutions and psychology of the United States. And finally, the imposition of this “racial dictatorship” fully consolidated an oppositional race
consciousness exemplified by slave revolts, native resistance, and various forms of nationalism such as the Black Panther movement of the 1960’s.  

Omi and Winant explore the concept of hegemony as articulated by Antonio Gramsci in order to help clarify how race and politics can be related to other axes of oppression such as class and gender. Gramsci understood hegemony as the necessary conditions in any society for the achievement and consolidation of rule, and theorized that hegemony always constitutes a combination of coercion and consent. Gramsci proposed that in order to consolidate their hegemony, the ruling class must elaborate a popular system of practices through education, law, religion, and folk customs which he described as “common sense”. Gramsci maintained that it is through adherence to this ideology of “common sense” that a society gives its consent to the manner in which it is ruled.

Omi and Winant apply Gramsci’s theory of hegemony to the consolidation of racial rule in the United States. They theorize that although the conquest and colonization of the “New World” by European settlers was certainly violent and coercive, over time the balance between coercion and consent began to shift as African slaves and Native Americans appropriated the tools of the oppressor and incorporated them into their quest for justice. This shift from a “racial dictatorship” to what Omi and Winant call a “racial democracy” involved the implementation of hegemonic forms of consent that eventually replaced those of coercion, but are qualified by the fact that America has yet to establish an ideal racial democracy, while coercion is still with us and not a relic of the past. The authors readily acknowledge the complexity of racial identity, and the multiplicity of competing and contradictory racial experiences in America, but maintain that the concept of hegemony, although contradictory to democracy, is an appropriate tool by which to interrogate racial rule in the United States.

Because of the ability of hegemony to both structure and signify meaning, Omi and Winant suggest that modern oppositional movements, whether based on race, gender, or class, can utilize an understanding of the hegemonic process to enhance their ability to interpret their subjugated status in
American society. Thus, according to Omi and Winant, race, class, gender, and sexual orientation, all constitute regions of hegemony where projects of resistance can take place, though they make clear these regions are not fixed and discrete and may intersect and overlap. The most important feature distinguishing political opposition today according to Omi and Winant is its insistence on identifying and speaking for itself, and the determination to transform the social structure by refusing to accept the logic of “common sense” imposed by the hegemonic order. ³⁷

I believe applying Omi and Winant’s theory of racial formation and its use of Gramsci’s perspective on the role of hegemony to the historic events in Hawai‘i that preceded and followed the Māhele of 1848 and Kuleana Act of 1850 can provide valuable insights into the consequences of these events for Hawaiians, and give us a better understanding into the formation of white privilege in Hawai‘i, as exemplified by the history of the Rice family and other missionary descendants. As discussed above, Gramsci’s theory of hegemony entails the utilization of a system of practices and ideologies that work together to form the basic understanding by which society gives its consent to being ruled. These practices include religion, education, law, and folk customs, all of which the missionaries from New England brought with them to Hawai‘i when they arrived in 1820.

Prior to the arrival of the New England missionaries, the Hawaiian ali‘i had already abandoned the ancient kapu system which had governed them spiritually and legally for generations. The two most powerful women in the Kingdom, Ka‘ahumanu and Keōpūolani, had broken the kapu shortly after the death of Kamehameha I by convincing his son Liholiho, the new King, to eat with them. Symbolically this was important, as according to the kapu men and women ate separately to ensure the men’s sacrifices to the male akua (gods) were not despoiled by menstruating women. Certain foods associated with male sexual prowess and mana (power) were also forbidden to women. Aside from this, both chiefly women had observed the growing numbers of foreigners arriving in Hawai‘i, all of whom were Christian, and all of whom had seemingly powerful mana, as they suffered no consequences for breaking the kapu, while Hawaiians continued to die from foreign disease. ³⁸
It is probable that a combination of these reasons led these two powerful women to abolish the kapu and subsequently embrace Christianity after the arrival of the missionaries, for both had converted to the new religion along with several other high ranking ali‘i by 1825. With the backing of Ka‘ahumanu, who essentially held control of the Kingdom until her death in 1832, the New England missionaries gained a prominent and privileged role in Hawaiian society that gave them enormous influence with the government. In this manner the missionaries quickly became the advisors to the chiefs in matters of religion, education, folk customs, and law, and in this capacity, I suggest became the purveyors of what Gramsci referred to as “common sense”. 39

Examples of this dynamic include translating the Bible into Hawaiian, teaching literacy while converting the Hawaiian people through the scriptures, writing the Constitution of 1840, and administering the Māhele of 1848 and Kuleana Act of 1850. Although the Christian religion, English language, Anglo-American law and New England folk customs of the missionaries were far from what Hawaiians had been accustomed to, most believed the missionary advisors understood the world of the colonizer and were acting to protect Hawaiian interests, and therefore quickly appropriated these new norms into Hawaiian society. As Merry’s work corroborates, the missionaries were instrumental in the first transition of Hawaiian law to that of Protestant Christianity, and also the second transition in the legal order derived from secular Anglo-American law. 40

As noted above, the Māhele of 1848 and Kuleana Act of 1850 were part of this second transition in Hawaiian law, and as a result of the consequential dispossession of Hawaiians from the land after 1850, became foundational to the construction of white privilege in Hawai‘i. The historic relationship in the United States between concepts of race and property rights is interrogated by Cheryl Harris, another legal scholar in the field of CRT. Harris’s work, Whiteness as Property, develops the idea that property rights in America became contingent on and intertwined with race, and that these “historical forms of domination have evolved to reproduce subordination in the present.” 41

Harris details how the interaction between race and property rights in the United States can be
traced back to African slavery and the theft of Native land, and that although the systems of oppression used against each differed in form, they were both undergirded by “a racialized conception of property implemented by force and ratified by law.” As examples, Harris points to blacks being seen and treated as a form of property, while the removal and extermination of indigenous populations was validated by a conception of white possession of the land. In both cases Harris notes that white privilege was assigned a form of property interest. \(^{42}\)

For the colonizers this sense of white privilege based on white supremacy had a legal rationale, according to Harris. As Native American customs were weakened and eventually replaced by white concepts of law that protected and recognized white privilege, this in turn reinforced a property interest in whiteness that reproduced subordination of people of color, whether Native American or African. \(^{43}\) The related dynamics of a racialized conception of property rights that was implemented by force, ratified by law, and led to the subordination of both African Americans and Native Americans in the United States, can be seen clearly in Hawai‘i through the events leading to the Māhele and Kuleana Act, their ratification and implementation, and the consequences of each for both the colonizer and the colonized.

For example, the use of gunboat diplomacy by the French and British to threaten Hawaiian sovereign interests and enforce their own during the decade preceding the implementation of the laws was certainly an explicit element of force that the Hawaiian government had to consider in strategizing ways to maintain the independence of the Kingdom. In addition, Kamehameha III’s reliance on his missionary advisors, and their insistence that adopting Anglo-American rules of law and property rights would “modernize” and “civilize” the Kingdom, thereby helping to secure its independence from foreign aggression, can also be tied to the rapid ratification and implementation of the laws.

Most importantly to the application of Harris’s argument in the Hawaiian context were the consequences of the laws for the colonizers and colonized. Instead of securing for the Hawaiian people
their birthright and the nation its independence, as was Kamehameha III’s intent, the effect of the Māhele of 1848 and Kuleana Act of 1850 was to promote white colonial interests over those of the native people. As related above, for a variety of reasons most common Hawaiians did not receive their kuleana land awards, whereas the white colonizer took full advantage of the situation, leaving them holding a majority of the land within approximately 40 years. Kauanui’s work, which will be used to interrogate CRT in general, and Harris’ theory in specific later in this chapter, illustrates how this dispossession was used in the HHCA blood quantum requirement to do more than subjugate Hawaiians, but to exclude many others.

The development of the plantation economy and the benefits accrued to the missionaries and their business partners also affected the dynamic of subordination acting on the Hawaiian people. As the colonizers grew wealthy and powerful their political influence grew as well, where the loss of land as a result of the Māhele and Kuleana Act led to a diminishment of Hawaiian political power that gave additional impetus to the decline of the common Hawaiian into a subordinate status in society as compared to the colonizers. The next section will examine how this dynamic affected the events that transpired during the years between 1887 and 1898, which included the imposition by threat of the Bayonet Constitution, the overthrow of Queen Lili‘uokalani, and the eventual annexation of the Hawaiian Kingdom to the United States.

The Bayonet Constitution of 1887, Overthrow of 1893, and Annexation of 1898

The dispossession of Hawaiian land, its transferal to foreign ownership, and the growth of white privilege in correlation to the sugar plantation economy discussed above had created by the 1880’s a situation in Hawai‘i where, as legal scholar Neil Levy remarks, “Western imperialism had been accomplished without the usual bothersome wars and costly colonial administration.” 44 I would argue that Levy was only partially correct, as until the forced imposition of the Bayonet Constitution in 1887, the
Hawaiian Kingdom and its monarchs had successfully resisted American imperialism by pursuing policies that sought to preserve the independence of the Kingdom in the face of mounting pressure from the sugar plantation owners to avoid tariffs by pushing for the annexation of the islands to the United States. The idea of an annexation treaty was first floated by Americans in the government of Kamehameha III, however the King was opposed to annexation and refused to sign the treaty. His successor, Kamehameha IV terminated annexation negotiations and instead promoted a policy of reciprocity that he hoped would also guarantee Hawaiian independence. This was an attempt to ease the sugar planters’ fears of foreign competition and stop their grumbling about the high United States sugar tariff. The King also asked for guarantees from the Americans, French, and British that Hawaiian independence be respected. The treaty did not pass muster in the United States Senate, though all three powers proclaimed a lack of interest in annexing Hawai‘i, while the sugar planters’ agitation for annexation was dampened temporarily by the profits made selling sugar to the northern states during the Civil War. Kamehameha V succeeded his brother in 1863, and continued the policy of seeking reciprocity with independence.

This endeavor was problematic, as in the 1860’s America began pursuing its policy of “Manifest Destiny” into the Pacific. The United States assigned the warship U. S. S. Lackawanna to the Hawaiian Islands indefinitely in 1866 and in 1868 the American Secretary of State, William H. Seward, advocated for the purchase of Hawai‘i, as Alaska had been acquired in 1867. Added to the troubling politics on the continent were the constant efforts of the sugar planters in Hawai‘i for a reciprocity treaty or annexation, who found an ally in the United States Minister Henry Pierce in 1869. Pierce suggested the cession of the Pearl River Lagoon as an American naval base in exchange for reciprocity. No deal was finalized during the reign of Kamehameha V, who died in 1872 and was replaced with the first elected Hawaiian monarch, William Lunalilo.

Lunalilo was genealogically connected to the Kamehameha family through his mother Kekāuluohi,
the third and last high ranking chiefess to bear the title Kuhina Nui (Prime Minister) after Ka’ahumanu and Kīna’u. Because of this genealogical connection and his good natured popularity with the people, Lunalilo was elected unanimously. When first coming to power, Lunalilo had reluctantly agreed with the advice of his Cabinet Minister Charles R. Bishop, who, along with United States General Schofield believed the Pearl River Lagoon was the ideal location for an American naval base. The Hawaiian people, however, spoke out strongly against any cession of land which they correctly viewed as a prelude to annexation, and the King reversed himself. Lunalilo, who suffered from tuberculosis, died in 1874 after reigning for little more than one year. 48

The election of the next Hawaiian monarch was of great interest to both Hawaiians and non-Hawaiians alike. Many Hawaiians felt strongly that Queen Emma, as the widow of Kamehameha IV and a descendant of Kamehameha I’s younger brother Keliʻimaikaʻi, had a stronger claim to the throne than her rival David Kalākaua, who was descended from another high chief, Keawaheulu, a cousin of Kamehameha I and one of the Kona chiefs who allied with him in the civil war that united the islands. When Kalākaua was declared the winner Emma’s supporters rioted, resulting in United States marines being landed in Honolulu to restore order. 49 The Hawaiian legislature, which at that time was controlled by the powerful missionary descended sugar plantation owners, much preferred Kalākaua as the next monarch, as Emma was not pro-American and they felt her election would threaten their interests. The business interests of the colonizers predominated in the legislatures’ decision, and even though the popular vote favored Emma, Kalākaua was named King. 50

As Noenoe Silva comments in her book Aloha Betrayed: Native Hawaiian Resistance to American Colonialism, Kalākaua was “caught between the demands for profit and economic well-being on one hand, and the necessity of retaining the sovereignty of the Kanaka Maoli on the other.” The King then acceded to the sugar planters demands for a reciprocity treaty, which represented a significant loss of sovereignty as it prohibited the Hawaiian government from leasing any land in the Kingdom to any other nation. 51 The treaty signed between the United States and the Kingdom of Hawai‘i in 1875
brought a boon to the sugar industry that had not been seen before as exports went from 17 million pounds in 1875 to 115 million pounds in 1883, bringing the sugar planters enormous profits.  

For example, as Mr. Charles T. Gulick wrote in the Blount Report regarding the choice of Kalākaua by the missionary controlled legislature.

The wisdom of their choice being at the present time amply demonstrated by the enormous annual gains of some of their number which far outrun the wildest dreams of romance, as for instance, Baldwin, with a net gain for the year of 1889 of over $300,000, followed closely by the Wilcox’s, Bailey, Castle, Cooke, Rice, and a number of others hardly less fortunate.  

In spite of their profits, relations between Kalākaua and the sugar planters continued to decline, as the King often made unpopular decisions and had business associates the puritanical missionary establishment despised, such as Walter Murray Gibson and Cesar Moreno. Unfortunately for Kalākaua, the sons of the first missionaries, unlike their parents, were not constrained by the ABCFM, and using the same discourses of civilization and savagery that had been utilized by their parents, determined to establish full colonial rule or overthrow the government of Hawai‘i.  

In 1887 the Hawaiian League, a group of sugar planter missionary descendants and businessmen, forced Kalākaua under physical threat to his life, to sign what has become known as the Bayonet Constitution, which severely curtailed the King’s power and restricted the vote by adding income and property qualifications that effectively disenfranchised many Hawaiians. As Congressman Blount wrote in his report to President Cleveland at the time,  

Power was taken from the King in the selection of nobles, not to be given to the masses but to the wealthy classes, a large majority of whom were not subjects of the Kingdom. Power to remove the cabinet was taken away from the King, not to be conferred on a popular body but on one designed to be ruled by foreign subjects. Power to do any act was taken from the King…this instrument was never submitted to the people for approval or rejection, nor was this ever contemplated by its friends and promoters.  

The consequences of these events for the Hawaiian people were severe, and one of their worst fears was realized in 1887, when the Pearl River Lagoon was added as a supplementary convention to the treaty of 1875. The Hawaiian Kingdom was now under the control of the sugar planter oligarchy, had relinquished sovereign territory to the United States, and its indigenous people had been disenfranchised to a great extent. The Supreme Court description of these events avoids these
details, but instead relates the following.

Tensions intensified between an anti-Western, pro-native bloc in the government on the one hand and Western business interests and property owners on the other. The conflicts came to the fore in 1887. Westerners forced the resignation of the Prime Minister of the Kingdom of Hawaii and the adoption of a new Constitution, which, among other things, reduced the power of the monarchy and extended the right to vote to non-Hawaiians.  

The Bayonet Constitution had essentially created an oligarchy of white missionary descended sugar planters and businessmen by destroying the power of the sovereign and allowing foreigners to vote without being naturalized citizens of the Kingdom if they held property worth at least three thousand dollars or had an annual income of at least six thousand dollars. This development has been noted as being the first time democratic rights to vote were determined by race, as in essence it meant that wealthy white foreigners could vote, while non-elite Hawaiians and Asian immigrants that worked the plantation fields could not.

The racial aspect of the colonial project in Hawai‘i now included more than the binary of white civilization and native savagery, as most Asians arriving in Hawai‘i, whether Chinese or Japanese, were excluded from participating in the political process, as only men of means could vote. The terms of the Bayonet Constitution also made vulnerable the Crown lands set aside in the Māhele of 1848, which had by the terms of the law been made “inviolable”. Hawaiians protested these events vehemently, attending mass meetings and signing petitions which delegates presented to the King. These protests resulted in the founding of the first Hawaiian political organization, the Hui Kālai‘āina, which by 1888 had established a constitution, and had a platform for the upcoming elections that included preserving the monarchy and reducing the property qualifications for voting rights.

Although the political atmosphere towards pro-active Hawaiians was certainly hostile, the Hui Kālai‘āina continued its political work and formed the National Reform Party in 1890, but could not accrue enough power in the legislature to change the constitution. They next petitioned Kālakaua for a new constitution, which he submitted to the legislature, whose sugar planter missionary descended faction was greatly alarmed, and sent American and British commissioners to warn the King.
against any such action. Though the Hui’s push for a constitutional convention failed in the legislature, the National Reform Party succeeded in passing some laws that benefitted the Hawaiian people. ⁵⁹

Adding to the political tension in of 1890 was the passage of the McKinley Tariff Act, which erased much of the economic advantage gained by the sugar planters in the Reciprocity Treaty of 1887, and served to add fuel to their calls for annexation. As missionary descendant sugar plantation owner Henry N. Castle wrote to his sister,

‘We are plunged into the depths of despair over the McKinley Tariff Bill. There is no doubt the situation is a very critical one...it is doubtful whether there is a plantation on the islands, which could make any money.’ ⁶⁰

In the midst of this, Kālakaua sailed to San Francisco on the United States ship Charleston, insisting he had not come to sign an annexation treaty but to improve his health. This was not to be, and King David Kālakaua died in San Francisco on January 20, 1891, having named his sister Liliʻuokalani to be his heir and successor. On taking office later that month, the Queen was also repeatedly pressed by her people to rectify the Bayonet Constitution, receiving petitions from both Hawaiian men and women concerned for their land and people. However, the Bayonet Constitution provided that the sovereign could take no action without the approval of the cabinet, which could be dismissed by the legislature at any time, thereby leaving the situation at a standstill. ⁶¹

Two years later in January of 1893, Liliʻuokalani did attempt to promulgate the new constitution her people were demanding in their petitions. The Queen, who had been raised with the Hawaiian belief that the strength of the aliʻi came from the love of the people, and to ignore their voice was to ignore the voice of God, was acting to restore the political rights of the Hawaiian people that had been taken by the Bayonet Constitution of 1887. ⁶² The Supreme Court describes the events in the following way.

‘Tensions continued through 1893, when they again peaked, this time in response to an attempt by the then Hawaiian monarch, Queen Liliuokalani, to promulgate a new constitution restoring monarchical control over the House of Nobles and limiting the franchise to Hawaiian subjects.’ ⁶³
The changes in the new constitution the Queen was proposing were actually fairly liberal and appropriate for a Constitutional Monarchy of the late 19th century. Though the original constitution was misappropriated during the overthrow and subsequent arrest and imprisonment of the Queen, drafts and statements from the Blount Report give clear indications of its content. According to article 57 the House of Nobles would be appointed by the sovereign as in the Constitution of 1864, but article 60 allowed the seats in the House to be doubled to 48, with two-thirds elected and one-third appointed, a clear step towards democracy. Article 62 particularly enraged the white population as it restricted the vote to citizens, thereby curtailing the right to vote of alien residents of the Kingdom who had not given up their own citizenship, while it removed the property qualification in the Bayonet Constitution of 1887 that had disenfranchised the Hawaiian population. 64

Other provisions of the constitution that were resented by the white community were articles 65 and 49, as the first reduced the term of the Kingdom’s Supreme Court judges, who were all white and well connected to the missionary descended sugar plantation owners, from a lifetime to six years. While the second, which provided the Queen sign all bills, even those that had passed by a two-thirds majority over a royal veto, was objected to under the pretext the Queen would not sign such a bill, even though she was obligated to do so under the same constitution. The proposed constitution also contained provisions to introduce amendments and thereby adjust the law of the Kingdom according to the legislative process, but these safeguards of democracy were ignored by the white community, who only saw the proposed new constitution as reducing their power and influence over the Kingdom. 65

The Supreme Court’s description of the overthrow continues,

A so-called Committee of Safety, a group of professionals and businessmen, with the active assistance of John Stevens, the United States Minister to Hawaii, acting with United States armed forces, replaced the monarchy with a provisional government. That government sought annexation by the United States. 66

The “professionals and businessmen” referred to were primarily the same men who had forced King Kalākaua to sign the Bayonet constitution, missionary descended sugar plantation owners and their
associates. Conspiring with United States Minister Stevens, who ordered armed marines ashore on
the pretext of protecting American lives and property from supposed threats of “bloodshed and
violence” by the Queen, they then occupied a government building, Ali‘iolani Hale, declared the
monarchical system of government to be abrogated, and proclaimed themselves the provisional
government of Hawai‘i. Minister Stevens immediately recognized the usurpers as the legitimate
government. 67

The conspirators had successfully put Lili‘uokalani in the situation where if she were to resist their
demands there could be armed conflict with American forces and bloodshed to her people. But in
yielding her authority, she did so not to the Provisional Government, but to the United States,
thereby obligating America to reinstate her or be held responsible for the loss of Hawaiian
sovereignty. Her eloquent response to this situation reads as follows.

Now, to avoid any collision of armed forces, and perhaps the loss of life, I do this under
protest, and being impelled by said force yield my authority until such time as the Govern-
ment of the United States shall, upon facts being presented to it, undo the actions of its
representatives and reinstate me in the authority which I claim as the Constitutional Sove-
reign of the Hawaiian Islands. 68

This occurred on January 17, 1893, and within two days Lili‘uokalani had written to President
Benjamin Harrison asking that he wait until hearing from her envoy before taking action regarding
the annexation of Hawai‘i. Harrison, who was cognizant of the events in Hawai‘i and supportive of
the conspirators, had no intention of waiting, and transmitted the annexation treaty to the Senate
on February 16th for ratification. That body, however, was divided regarding the annexation of
Hawai‘i, and President Harrison’s term ended with no resolution of the issue. The Queen had also
written to President elect Grover Cleveland explaining the circumstances of the overthrow, and one
of his first acts as President was to withdraw the treaty and send representative James Blount to
Hawai‘i to investigate and ascertain the facts. 69

The Queen’s people also organized in protest of the overthrow, forming the Hui Hawai‘i Aloha
ʻĀina and its sister organization, the Hui Aloha ʻĀina o Nā Wāhine. Both groups were among the
many associations and individuals that submitted prepared testimony to Commissioner Blount in regards to the Hawaiian peoples’ desire to restore their independence and autonomy, and if that were not possible, to at least secure legally the civil rights of the Hawaiian people. The Hui also presented Blount with documents affirming their association represented the interests of the majority of Hawaiian citizens, both male and female, who desired justice through the restoration of their sovereign. The women of Hui Aloha ‘Āina were particularly outspoken for the time, especially considering, as Silva notes, that although some were married to white men, “their love for their land was greater than their worry about political disagreement with their husbands.”

The testimony Blount received from both sides in the overthrow of Queen Lili’uokalani is contained in the Blount Report, a 1200 page congressional document used by Congress to draft the 1993 Joint Resolution apologizing to Hawaiians for the role of Minister Stevens and the United States in the overthrow of their government. The report concluded that American diplomatic and military representatives had abused their authority and this had resulted in the illegal change of government. Stevens was recalled from his post and the Commander of the Boston was disciplined and forced to resign his commission, and in an impassioned message to Congress Cleveland made it clear that he felt the overthrow of the legitimate government of Hawai‘i was not only a stain on our nations’ honor, but an act of war against a friendly nation and people.

President Cleveland’s efforts on behalf of the Hawaiian people were thwarted when the Provisional Government refused to yield, knowing full well there was backing for annexation in the divided Congress. Cleveland was portrayed in racist political cartoons of the time alongside the Queen, who invariably had a scowl on her face, a ring in her nose, and a bone in her hair, while his defense of native rights led some to say his logic would lead to giving Washington D. C. back to the Indians. As a result of Cleveland withdrawing the annexation treaty, the Provisional Government in Hawai‘i found it necessary to establish a permanent government in order to legitimize their control over Hawai‘i’s resources, and announced there would be a constitutional convention held in May of 1894.
In order to vote in this election one had to sign an oath of loyalty to the Provisional Government promising to oppose any attempt to restore the Queen, which most Hawaiians refused to do, leaving about 4,000 men of mostly foreign birth to vote in the election.  

The Supreme Court summarizes the above with the following,

President Cleveland, unimpressed and indeed offended by the actions of the American Minister, denounced the role of the American forces and called for restoration of the Hawaiian monarchy. The Queen could not resume her former place, however, and, in 1894, the provisional government established the Republic of Hawai‘i. The Queen abdicated her throne a year later.

With the establishment of the Republic of Hawai‘i, the conspirators in the overthrow of the Queen essentially became an oligarchy that ruled Hawai‘i as though it were their fiefdom. The franchise was limited by property and language requirements, plus the aforementioned oath of loyalty to the government of the Republic. Some scholars have remarked that the Republic acted to recreate the South in Hawai‘i, and indeed, the constitution of the Republic made use of “Mississippi laws” that had kept blacks from voting in the South. These laws required the voter to explain the details of the constitution before being allowed to vote, and restricted rights to freedom of speech and the press by enacting laws against sedition.

Many Hawaiians felt betrayed by the failure of the Cleveland Administration to act, and in despair over the prospect of a diplomatic solution, planned an armed takeover of the government led by Robert Wilcox, who had previously spearheaded the “Wilcox Rebellion” of 1889. The attempt failed when the Republic found out of the plan through paid spies, and many were arrested, including the Queen when it was claimed by the Republic that arms had been found buried in her garden. Lili‘uokalani was subsequently imprisoned in one room of ‘Iolani Palace for several months where she was forced to abdicate her throne before being pardoned by the government.

An event happened when the Queen was arrested that relates to Silva’s critique of Western historiography, and the importance of documenting Hawaiian resistance to colonialism. According to Lili‘uokalani, on the day she was arrested and charged with treason she saw Chief Justice Albert Francis Judd, a missionary descendant and member of the sugar plantation oligarchy that ruled
Hawai‘i, enter her home, Washington Place. Having entered her home illegally and without a search warrant, Judd then appropriated all of the Queen’s documents, putting them into bags and carrying them to a storeroom where they were not opened for inspection until 1924.  

To quote Queen Lili‘uokalani,

All the papers in my desk, or in my safe, my diaries, the petitions I had received from my people, all things of that nature which could be found were swept into a bag and carried off by the chief justice in person. My husband’s private papers were also included in those taken from me...to this day, the only document which has been returned to me is my will.

As Silva suggests, silencing the history of native resistance to colonial takeover was a powerful weapon in the colonizer’s arsenal, weakening the Hawaiian people’s belief in their heritage of resistance, and making it more difficult to recover from the violence done to their past by the colonial enterprise.

This at least answers the question of why Judd would perpetrate the act of silencing Hawaiian voices of protest against the overthrow, as signed petitions of Hawaiian voters constituted public records which could have assisted Cleveland in his efforts to restore the Queen. However, as Michael Dougherty documents in his work *To Steal a Kingdom: Probing Hawaiian History*, these important papers were in effect hidden for almost 30 years by members of the Judd family itself, which since 1828 has held more than 307 positions related to creating, controlling, and preserving the history of the Hawaiian Islands.

In the meantime, the debate in Washington D. C. over the annexation of Hawai‘i and the establishment of American territories overseas was heated. There were many in Congress who opposed the annexation of Hawai‘i because of the circumstances of the overthrow, which were made so clear in the Blount Report and accentuated by the anti-annexation petitions delivered to Washington by members of the Hui Kālai‘aina; while those in favor gave the argument that controlling Hawai‘i was crucial to American interests in trade and commerce across the Pacific, regardless of how the territory was acquired. As a result, ratification of annexation did not occur until the advent of the Spanish-American War in 1898, and then only under a joint resolution as Congress could not muster
the two-thirds majority necessary to ratify a treaty. The annexation of Hawai‘i was emblematic of American imperialism, but not exclusive, as the United States also claimed dominion over American Sāmoa, Guam, and the Philippines as a result of the Spanish-American War. 80

The Supreme Court’s history does not mention this development in their narrative, but relates the following regarding the annexation of Hawai‘i,

In 1898, President McKinley signed a Joint Resolution, sometimes called the Newlands Resolution, to annex the Hawaiian Islands as territory of the United States. According to the Joint Resolution, the Republic of Hawaii ceded all former Crown, government, and public lands to the United States. 81

The 1993 Joint Congressional Resolution referred to above apologizing to Hawaiians for America’s role in the overthrow of Queen Lili‘uokalani, and subsequent loss of Hawaiian sovereignty offers considerably more details regarding the results of the Newlands Resolution, and cites the following provisions. First, the self-declared Republic of Hawai‘i ceded sovereignty over the Hawaiian Islands to the United States, the Republic also ceded 1,800,000 acres of Crown, government and public lands of the Kingdom of Hawai‘i, without the consent of or compensation to the Native Hawaiian people or their sovereign government. In addition, through the Newlands Resolution Congress ratified the cession, annexed Hawai‘i as part of the United States, vested title to the lands in Hawai‘i in the United States, and stipulated as well that treaties existing between Hawai‘i and foreign nations were to cease immediately and be replaced with United States treaties with these nations. 82

Congress, though fully aware of the details contained in the Blount Report regarding the illegal regime change in Hawai‘i, seemed to be willing to overlook them in the Newlands Resolution, although the circumstances related in the Apology Bill clearly place the United States in the awkward position of having accepted stolen goods from the thieves. The Supreme Court’s historic section continues,

The resolution further provided that revenues from the public lands were to be “used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.” Two years later the Hawaiian Organic Act established the Territory of Hawaii, asserted United States control over the ceded lands, and put those lands “in the possession, use, and control of the government of the Territory of Hawaii...until otherwise
provided for by Congress.  

The Newlands Resolution and Organic Act, by putting the ceded lands “in the possession, use, and control of the government of the Territory of Hawaii”, in actuality handed back control of Hawai‘i to the original conspirators in the overthrow and their descendants. For example, Sanford B. Dole, member of the Committee of Safety that overthrew the Queen, and President of the Republic of Hawai‘i that instituted a constitution reminiscent of the South, was appointed the first Governor of the Territory in 1900, to be replaced in 1903 with another missionary family descendant, George R. Carter, a member of the Judd family.

With the missionary descendant plantation owners essentially in charge of the new Territory, white economic and cultural interests were well looked after. The sugar and pineapple plantations continued to thrive, co-existing with the expanding military presence in the islands. The “Big Five”, which consisted of Alexander & Baldwin, AMFAC, C. Brewer & Co., Castle & Cooke, and Theo. H. Davies, held control of the economy, while the interlocking directorships between the plantations and the banks, public utilities, steamship navigation companies, and newspapers worked to ensure their continued dominance. Author Hal Hanna offers a stunning diagram of this phenomenon, where the interlocking directorships resemble a spider web, in his work Big Five Monopoly in Hawaii.

The consequences of annexation for Hawaiians were diametrically opposed. As Haunani-Kay Trask explains,

As a result of these actions, Hawaiians became a conquered people, our lands and culture subordinated to another nation. Made to feel and survive as inferiors when our sovereignty as a nation was forcibly ended, we were rendered politically and economically powerless by the turn of the century. Cultural imperialism had taken hold with conversion to Christianity in the 19th century, but it continued with the closing of all Hawaiian language schools and the elevation of English as the only official language in 1896.

In the year 1896 the Republic of Hawaii passed a law which decreed that “the English language shall be the medium and basis of instruction in all public and private schools.” As Silva notes, the passage of this law marked the beginning of generations of Hawaiian children who were immersed in
the English language, and thus were unable to benefit from the mo’olelo (stories) or ‘ōlelo no’eau (wisdom) of their grandparents. And as African scholar Ngugi Wa Thiongo has shown, the cultural devastation visited on native peoples when their language is denigrated as a relic of “barbarism”, while the tongue of the colonizer is elevated to the status of a “civilizing” force, is rather like dropping a bomb on the native culture, thereby weakening it greatly as a transmitter of indigenous cultural values.  

Having traced the rationale of the colonizers, the resistance of the colonized, and the results that came to each from the Bayonet Constitution of 1887, the Overthrow of 1893, and the Annexation of Hawai‘i in 1898, let us now turn to the Rice family history in order to better understand the development of white privilege in the Hawaiian context.

Benefits to the Rice Family of the Bayonet Constitution of 1887, the Overthrow of 1893, and Annexation in 1898

The previous section detailing the benefits to the Rice family of the Māhele of 1848 and Kuleana Act of 1850 left off with the second generation of Rice’s and their connections to power and privilege in Hawai‘i. As a result of the Māhele and Kuleana Act, the family became landowners, with two of William Harrison Rice’s daughters marrying into two of the “Big Five” companies that controlled the economy, while his son, William Hyde Rice, entered politics and served in the Hawaiian House of Representatives. It was while serving in the government that William took part in the legislature dominated by the sugar plantation owners that gave the election of 1874 to Kalākaua over Queen Emma, who had received the majority of the popular Hawaiian vote. Although this election subverted the wishes of the Hawaiian people, the Rice family benefitted greatly as a result of the profits the sugar plantation owners accrued as a result of the Reciprocity Treaty negotiated in 1875. 88 In 1887 William, who was a member of the “Hawaiian League”, helped to write the Bayonet Constitution that
took power from the sovereign and disenfranchised Hawaiians while allowing foreign nationals to vote, and was one of thirteen men on the committee who gave the King 24 hours to sign the constitution under threat to his life. As Governor of Kaua‘i, in 1893 William participated in the conspiracy to overthrow the Queen, and while serving in the Senate of the Republic of Hawai‘i from 1895 to 1898 under President Sanford B. Dole, a childhood friend and fellow missionary descendant, participated in the convention which drew the constitution that Hawaiians protested so vigorously as recreating the South, and which was later used as the foundation for the Organic Act of 1900 which defined the laws of the new Territory. 89

Before William died in 1924, he was appointed a special commissioner in 1918 by the Territorial Governor to dedicate land to the Hawaiian Homes Commission Act (HHCA). In this position he was able to ensure the lands chosen for the Homesteads did not include prime ranching or agricultural land that might hurt the families’ business interests. 90 Two of his eight children continued the practice of intermarriage with other missionary families and members of the “Big Five”. Daughter Anna Charlotte married Ralph Lyman Wilcox, descendant of the Lyman and Wilcox missionary families and also wealthy landowners, while son Harold Waterhouse married Charlotte Baldwin, daughter of Henry Perrine Baldwin, founder of Alexander & Baldwin another of the “Big Five”. Both Harold Waterhouse Rice and his brother Charles Atwood Rice served in the Territorial Legislature where they influenced the terms of the HHCA in 1921. 91

Now, having placed the second generation of the Rice family in historic context with the events of the Bayonet Constitution of 1887, the overthrow of 1893, and the annexation of Hawai‘i in 1898, I will continue with an analysis from the perspective of CRT where it is applicable in the Hawaiian context.

White Privilege in Hawai‘i as related to the Bayonet Constitution of 1887, the Overthrow of 1893, and the Annexation of 1898
Returning to Omi and Winant’s theory of racial formation in America and how it might help us to better understand the development of white privilege in Hawai‘i, we must look further into the question of how the author’s term “racial dictatorship” can be applied to the Bayonet Constitution of 1887, the 1893 overthrow of Queen Lili‘uokalani, and the 1898 annexation of the Hawaiian Islands. As discussed earlier in this work, Omi and Winant believe the establishment of this “racial dictatorship” in America had the effect of eliminating most non-whites from politics while subjugating them to legally sanctioned segregation and denying their civil rights. As a consequence of this, American identity was defined as white as opposed to the racialized other, allowing a divisive color line to develop in American institutions and in the American psyche, thereby fully consolidating an oppositional race consciousness that could be seen in black and native resistance to colonial subjugation.  

In Hawai‘i, the imposition of the Bayonet Constitution of 1887 which served to disenfranchise most of the Hawaiian and Asian population because of its property restrictions and income requirements to vote, while giving white men, even those without Hawaiian citizenship the franchise, definitely falls into Omi and Winant’s category of “racial dictatorship”. While the overthrow of Queen Lili‘uokalani in 1893, and subsequent imposition of the Republic of Hawai‘i’s racialized constitution in 1895 that utilized what have been termed “Mississippi laws”, more commonly known as “Jim Crow” laws, in order to keep non-whites from voting, would also qualify under Omi and Winant’s definition of a “racial dictatorship”.  

The closing of all Hawaiian language schools, and the mandating of English as the only language of instruction in 1896 under the Republic of Hawai‘i, served to solidify white identity and culture with privilege, and the oath of loyalty to the Republic Hawaiians were obliged to sign in order to vote or be hired by the government also illustrates Omi and Winant’s usage of the term “racial dictatorship”. The resistance by the Hawaiian people to the overthrow of the Queen and annexation of the Hawaiian Islands by the United States, as seen in the activities of the Hui Kālai‘āina, can also be taken
as an example of the race consciousness Omi and Winant propose native people develop in opposition to colonial subjugation. 94

The dynamic of colonial subjugation and the subsequent subordination of the racialized other that Harris develops in her article *Whiteness as Property*, can be applied to the Bayonet Constitution, and the period of time between the overthrow and annexation as well. Harris maintains that subordination based on white privilege leads to exclusion, as legal privileges accorded to white people by law, simply by virtue of their whiteness, came to embody usable property that the possessors were granted the right to exclude others from. The courts played a role in this by enforcing this right of exclusion through the law, thereby protecting whiteness as a form of property. 95

In Hawai‘i the subjugation and subordination of the Hawaiian people as a consequence of the loss of land in the Māhele of 1848 and Kuleana Act of 1850, and the concomitant benefits to the colonizer that resulted from these events, led to the situation in 1887 where the sons of the original missionaries did not hesitate to force the Bayonet Constitution on the Hawaiian ruler and his people. As discussed previously, this event led to the exclusion of most common Hawaiians and Asian immigrants from the franchise, while allowing wealthy white foreigners to vote. This exclusion only intensified after the overthrow of Lili‘uokalani in 1893, and under the constitution ratified by the Republic of Hawai‘i in 1895, with its use of “Mississippi laws” that continued to exclude non-whites from the democratic process. 96

The annexation of Hawai‘i to the United States in 1898 under the terms of the Newlands Resolution and Organic Act of 1900 only intensified the subordination and exclusion of the racialized other, Hawaiians and Asians, as the missionary descended sugar plantation owners and their business partners represented by the “Big Five”, were now given virtually exclusive control over the new territory and its resources. These examples illustrate how the formation of white privilege in Hawai‘i evolved from one of subjugation and subordination of non-whites, to their exclusion as enforced by
the law, and the subsequent protection of whiteness as a form of property that Harris investigates in her work. These events also illuminate the intensely racialized past in Hawai‘i that has been downplayed by the Court vis-à-vis its reliance on authors of the “melting pot” analogy. ⁹⁷

Having applied the concept of racial formation and the term “racial dictatorship” as enunciated by Omi and Winant to the Hawaiian context, and shown how Harris’ idea of whiteness as a form of property interest affected the racial dynamics between whites, Hawaiians, and Asian immigrants to the islands in the later part of the 19th century, the work will now move forward to the last of the historic events that are connected to the present day controversy surrounding the Rice v. Cayetano decision, the enactment of the Hawaiian Homes Commission Act (HHCA) of 1921.

The Hawaiian Homes Commission Act of 1921

In the previous sections of this chapter dealing with the Māhele of 1848, the Kuleana Act of 1850, and the events between the imposition of the Bayonet Constitution of 1887 and the annexation of Hawai‘i in 1898, we have examined how Western law, whether imposed or adopted, acted to transform Hawaiian society by subjugating Hawaiians while serving as a core instrument of colonial control and white identity. As of 1900 and the adoption of the Organic Act, the Territory of Hawai‘i was under the control of white American sugar plantation owners represented by the “Big Five”, most of whom were missionary descendants of the original colonial sugar industry.

The focus of this section of the chapter will be on the period of time encompassing the passage of the HHCA in 1921, the rationale and consequences of the law, the continuing involvement of the Rice family, the problematic nature of a CRT analysis of the events, and how the passage of the HHCA relates to the Rice v. Cayetano decision today. The Supreme Court, after two brief paragraphs devoted to the effects of disease and immigration on the Hawaiian people and demographics of the state, introduces the topic of the HHCA. ⁹⁸
Not long after the creation of the new Territory, Congress became concerned with the condition of the native Hawaiian people. Hearings on the Rehabilitation and Colonization of Hawaiians and Other Proposed Amendments to the Organic Act of the Territory of Hawaii began before the House Committee on the Territories, 66th Cong., 2d Sess. (1920) Reciting its purpose to rehabilitate the native Hawaiian population, Congress enacted the Hawaiian Homes Commission Act, which set aside about 200,000 acres of the ceded public lands and created a program of loans and long-term leases for the benefit of native Hawaiians. The Act defined “native Hawaiian[s]” to include “any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.” 99

Congress actually became aware of the conditions of the Hawaiian people due to the efforts of Prince Jonah Kūhiō Kalanianaʻole, the only royal Congressional Delegate in American history. After the overthrow of the Hawaiian Kingdom in 1893, Kūhiō had taken part in the aborted attempt to oust the oligarchy of white sugar plantation owners who had formed the Republic of Hawaiʻi, and was jailed for one year by the Republic. When released, Kūhiō and his wife Princess Kahanu travelled abroad, where he continued to hear of his peoples’ hardships under the Territorial government in Hawaiʻi, and so returned home in 1901 and became active in politics. Kūhiō was elected as Congressional Delegate Kalanianaʻole in 1903, and served in that position until his death in 1922. During his tenure in office Kalanianaʻole worked tirelessly for his people, helping to organize local government at home while representing Hawaiian interests in Washington D. C. 100

The HHCA was a great compromise from the original intent of Kalanianʻole and other advocates of the homestead program, who wanted all Hawaiians regardless of blood quantum, to be eligible for land in fee simple for the purposes of rehabilitation. However, as Kauanui remarks, the hearings in Washington D. C. regarding the HHCA and who would qualify took place, “within the context of U.S. colonial land appropriation”, a phenomenon which had been taking place since the middle of the 19th century in one form or another. 101

The debates in Congress over the law were influenced by the white business elite in Hawaiʻi, the “Big Five”, who were aligned with the Republican Party that ruled the Territory. The plantation owners and ranchers who would be affected by the law if cultivated lands were made available for homesteading to Hawaiians made sure that only a small amount of poor quality land was identified
for Hawaiian leasing, while positioning themselves to claim the majority of the prime land. To make the proposed law palatable to this powerful consortium of business and political elites, Kalanianaʻole was forced to negotiate with those in Hawaiʻi whose interests in plantation agriculture and ranching were at complete odds with the rehabilitative purpose of homesteading for Hawaiians. As part of these concessions to the powerful colonial elites who ran the Territory, Kalanianaʻole eventually agreed to a 50% blood quantum, while a 99 year lease replaced fee simple land. 102

As Kauanui relates, the original intent of the legislation was for the rehabilitation of native Hawaiians, and focused on indigenous survival as it related to reoccupying the lands stolen in the overthrow of the Hawaiian Kingdom. However, the problem of articulating historic land claims through the confines of American law, citizenship, and racial categories led to the 50% blood quantum, which emerged as a way to avoid the recognition of Hawaiian entitlement to the land, while actually serving as a policy of land dispossession by limiting the number of Hawaiians eligible. Furthermore, the negotiations of the HHCA hearings served to redefine who was in need of rehabilitation, with those Hawaiians defined by the 50% blood quantum being deemed incapable of taking care of themselves, thereby reframing the Hawaiian connection to the land from a legal claim to one based on charity. 103

This quote from the hearings of 1920 speaks to the shift in the discussion of Hawaiian claim to the land from one of law to charity by its framing of the Hawaiian character. The quote is also indicative of the reframing of history itself, as the statement does not accurately portray the facts and details of native Hawaiian land dispossession in the 19th century, but instead seeks to blame the victims.

Under the homestead laws somewhat more than a majority of the lands were homesteaded to Hawaiians, but a great many of these lands have been lost through improvidence and inability to finance framing operations. Most frequently, however, the native Hawaiian, with no thought of the future, has obtained the land for a nominal sum, only to turn about and sell it to wealthy interests for a sum more nearly approaching its real value. The Hawaiians are not business men and have shown themselves unable to meet competitive conditions unaided. 10

The “homestead Laws” refer to the Māhele and Kuleana Act, while the reframing of the debate over the legislation and the manner in which this compromise was portrayed in Congress is indicative
of the power dynamics in the Territory of Hawai‘i at the time. According to the House Congressional Records from 1920 “certain parts”, of the 1.8 million acres of ceded land taken in the overthrow of 1893 and annexed by the Newlands Resolution of 1898, would be set aside for “at least a number of Hawaiian people”, and goes on to explain that,

The bill under consideration provides for the establishment of a commission in the Territory to be known as the Hawaiian homes commission, this commission to be composed of five members appointed by the governor of the Territory, with the consent of the senate of the legislature of the Territory, with the governor as chairman of the commission. At least two of the appointed members must be native Hawaiian.105

Thus, the Territorial governor appointed from Washington D.C., who was invariably affiliated with the interests of the “Big Five”, appointed commissioners with the approval of the legislature of the Territory, which also consisted of members involved with, or related to, the “Big Five”. It is understandable from this lopsided power dynamic, where only two of the five members of the commission were to be Hawaiian, and then only appointed at the governor’s discretion, why the implementation of the HHCA was such a “massive failure”, according to Kauanui.106

Furthermore, the Act provides a loophole allowing non-Hawaiians to lease homestead land. To quote the House Congressional Record of 1920,

The commission is authorized to return any of these lands not used for homesteading by native Hawaiians to the commissioner for public lands, to be leased temporarily until they are needed for homesteading, at which time they are to be returned to the Hawaiian homes commission for that purpose.107

The Record explains that because most of the Hawaiians eligible for homestead land would not be able to build a home and improve the land for cultivation, a means of financing the homesteaders was necessary. A revolving fund, known as the Hawaiian home-loan fund, was created and paid for by leasing highly cultivated lands and the revenues from water licenses. Furthermore, the legislation altered the Organic Act so that valuable land could be leased by non-Hawaiians without the withdrawal clause which stipulated that agricultural land could be withdrawn from the lessee with a properly filed petition by 25 or more people desiring to homestead the land.108

The legislation would allow the commissioner of public lands, with the approval of the governor
and at least two-thirds of the land board, which was three-fifths white, to lease cultivated and ranch lands to non-Hawaiians in the future without the withdrawal clause. This would increase the estimated value of the land from $200 per acre to $1,000 per acre, thereby leading to more lease rent, 30% of which would fund loans to Hawaiian homesteaders. The Record justifies this scheme in the following statement.

The bill merely authorizes the land commissioner, as indicated, when he deems it advantageous to the Territory of Hawaii, thus leaving it to the commissioner of public lands and the land board to meet conditions as they exist or might arise from time to time. 109

Keeping in mind the power structure of the Territorial government and the land commission, it seems clear the interests of the colonizer took precedence over those of Hawaiians in the legislation, and, as Kauanui affirms, this was how the “Big Five” positioned themselves through the legislation to claim the majority of the prime homestead lands for themselves and their business interests. 110

Kalanianaʻole’s testimony takes six pages of the Record, and speaks to the Prince’s feelings towards his people, and the history of Hawaiʻi from a Hawaiian perspective, elite though it was. He reminds Congress of important milestones in that history that had relevance to, and created the need for the homestead legislation. He speaks with force and passion, reminding the United States of its responsibility to the Hawaiian people without seeming to berate. In one telling passage, Kalanianaʻole speaks of the missionary role in the Māhele of 1848.

It is regrettable, however, that from the very beginning the missionaries did not use their influence to safeguard the title to this land, making it inalienable in years to come, as they had, no doubt, used their influence to have the division made on the plea that it would assist in Christianizing the islands, for, as time has showed, the shrewd newcomer, who saw far ahead the industrial possibilities of the islands, outwitted the Hawaiian, who for generations had looked only upon the land as a means of producing his sustenance. 111

Kalanianaʻole’s remarks imply the missionaries had the power to make sure the Māhele would ensure Hawaiians controlled the land, but did not, allowing the colonizer to profit from the Hawaiians loss. And although he does not specifically connect the missionaries with the “shrewd newcomer” who “outwitted the Hawaiian”, Kalanianaʻole’s audience would probably not have missed his allusion to the “Big Five” and their missionary ancestors. In his closing remarks, Kalanianaʻole also rebuts the
hearings in Congress that reframed the issue of Hawaiian land rights from a legal claim to an act of charity when he says,

Perhaps we have a legal right, certainly we have a moral right, to ask that these lands be set aside. We are not asking that what you are to do be in the nature of a largesse or as a grant, but as a matter of justice...belated justice, and extend a helping hand, without cost to the Government of the United States, to the Hawaiians in their endeavor to rehabilitate themselves. 112

The HHCA was passed, and as a result of the compromises discussed above, those Hawaiians who had the 50% blood quantum were required to wait on a list, as much of the 200,000 acres promised them under the law lay unimproved, without roads, utilities or water. Many Hawaiians wait for decades, and some die while waiting for the land promised for their rehabilitation. The Hawaiian population the legislation was supposed to benefit holds less than 20% of the land at present, while 60% remains in the hands of non-Hawaiians, many of whom are descendants of wealthy and powerful families that have been in Hawai‘i for generations. Still other parcels of homestead land have been leased to multi-national corporations for quarrying and mining, the United States military, sewage treatment plants, airports, cemeteries, and private investors who have sub-leased the land for many times the original lease rent to auto dealerships and shopping malls. 113

Over 20,000 Hawaiians are on the list, and though various agencies, including a joint Federal-State task force and several courts have concluded the government has consistently violated the terms of the HHCA, little has been done. This is primarily because the Act only authorizes the Federal government to sue the State for violations to the law, which it has declined to do, partially to protect its own violations of the law in the years from 1921 to 1959 under the Territory. Because native Hawaiians cannot sue either the Federal or State agencies responsible for violations to the Ceded Lands trust, the issue has continuing relevance to unresolved Hawaiian land claims today. 114

At this juncture, having discussed the history and rationale of the legislation, the compromises that led to it becoming law, and the consequences stemming from its enactment for both the colonizer and the colonized, a narrative of the Rice family and their involvement with the HHCA can be used as a case study of the development of white privilege in Hawai‘i.
Benefits to the Rice Family of the Hawaiian Homes Commission Act of 1921

As a special commissioner appointed by the governor of the Territory to dedicate land to the HHCA, William Hyde Rice was part of the decision making process regarding the 200,000 acres to be set aside for the rehabilitation of Hawaiians. In this position, he was integral to the means discussed above by which the “Big Five” positioned themselves to retain control over most of the prime land for plantation agriculture and grazing. Two of his sons, Charles Atwood Rice and Harold Waterhouse “Pop” Rice, also served in the Territorial government, Charles first in the legislature from 1905 to 1911, and then in the senate from 1913 to 1937; while Harold served in the Territorial senate from 1918 to 1947. 115

Both Charles and Harold used their positions in the Territorial government to influence the outcome of the negotiations with Kalanianaʻole, and the hearings in Washington D.C. that decided the terms of the compromise and blood quantum discussed above that so benefitted colonial interests as represented by the “Big Five”. Indeed, considering they were both related through blood or marriage to the AMFAC, Castle & Cooke, and Alexander & Baldwin dynasties, it would have been considered unnatural for them to act otherwise. As a result of these connections to privilege and power, Harold Waterhouse “Pop” Rice was able to lease over 6,000 acres of HHCA land on Maui for 50 years at 25 cents per acre. 116

Charles and Harold represent the third generation of the Rice family to benefit from the laws of the colonizer, laws their family helped to create and enforce that worked to dispossess the Hawaiian people from the land, and subjugate them to a foreign government. This generation also continued to intermarry with other wealthy missionary descended land owners, such as the Wilcox family, when Charles and Harold’s sister, Hannah Charlotte married Ralph Lyman Wilcox, a descendant of the Lyman and Wilcox missionary families. 117 As this history makes clear, the Rice family was part of the
development of white privilege in Hawai‘i, and fully participated in and had influence over the political and business interests of the Territorial government and its implementation of the HHCA. With this history in mind, we can now apply a CRT analysis of white privilege to the events, and enlarge the discussion of how CRT can be useful in the context of the HHCA of 1921, and where it may need intervention.

White Privilege and the Hawaiian Homes Commission Act of 1921

In the section above dealing with the events of the Bayonet Constitution of 1887, the overthrow of Liliʻuokalani in 1893, and the annexation of Hawai‘i in 1898, Omi and Winant’s theory of racial formation and how it relates to white privilege in Hawai‘i through the establishment of a “racial dictatorship” was explored. In this section dealing with the HHCA, the discussion will focus on Omi and Winant’s claim that once the “racial dictatorship” has been established through violence and coercion, there is slow and uneven progress made towards what they call a “racial democracy”, where hegemonic forms of racial rule based on consent eventually replace those based on force.

Omi and Winant are careful to acknowledge two important qualifications to this theory, however, that resonate in the Hawaiian context: the United States has not established an ideal racial democracy, and coercion is by no means a thing of the past. The first qualification is seen in the socio-economic statistics of Hawaiians, which are poor compared with other ethnicities living in Hawai‘i. If the United States had established an ideal racial democracy, there would certainly be less inequity between the different peoples that presently live in Hawai‘i. The second qualification regarding coercion is not always evident to white settlers in Hawai‘i, but the fact the American military took part in the illegal overthrow of the Queen in 1893 and has occupied the Hawaiian Islands ever since is ample evidence that coercion still exists in America. 118

Although the Hawaiian people were unquestionably forced to become part of America against
their will, and as Silva’s work demonstrates, protested the actions of the United States vehemently, their petitions of protest against the colonizer were enacted within the hegemonic system of the law that had over the course of the 19th century become accepted. In this, we can see a turn towards racial rule based on consent, as the Hawaiian protestors were acting within what they considered to be a legitimate democratic value in America, the consent of the governed. That their protests were not able to alter the United States from its decision to annex the islands does not undermine the fact that Hawaiian resistance to American colonialism took place within the parameters of the law, rather than resorting to violence. 119

This dynamic can also be applied to Prince Kūhiō, who during the reign of the Republic of Hawai‘i was ready to participate in a violent coup against the oligarchy of conspirators in the overthrow who had taken control of the islands. However, during his time in Europe after his release from jail, Kūhiō came to believe that he could not assist his people unless he worked within the hegemonic system of the American government, and so returned home to be elected Delegate Kalaniana‘ole. His work on the HHCA also speaks to Omi and Winant’s theory of racial rule based on consent. Although the power structure of the Territorial government was corrupted by the influence of the “Big Five”, and ultimately compromised the ability of the HHCA to actually achieve its purpose of rehabilitating Hawaiians, Kalaniana‘ole never gave up working for the legislation he believed would offer some justice to the Hawaiian people in the less than ideal racial democracy of America. 120

The legislative action of the Congress in enacting the 50% blood quantum required by the HHCA to qualify for leases can also be examined through Harris’ theory of whiteness forming a property interest that the courts actively upheld by erecting racial classification standards based on hypodescent. This term is used to describe a system where the child of a white parent and a black parent is considered black in America, which Harris maintains is essentially an act of race subordination the courts reproduced at the institutional level. Though the 50% blood quantum requirement of the HHCA may seem a perfect analogy, as Kauanui’s interrogation of Harris’ theory
shows, there is more to the racialization of indigenous peoples through blood quantum requirements than the subjugation and domination ethnic minorities are subjected to in American society.  

Though Kauanui accepts much of Harris’ argument regarding how racial identity and property rights were interrelated concepts involved with the exploitation of slave labor and the dispossession of native land, and agrees with Harris the courts played an active role in enforcing the right to exclude, she adds a dimension to the discussion Harris neglects to consider, the effect of blood quantum on native peoples. Although Harris stresses the racial domination of American Indians entailed the seizure and appropriation of land that racialized the conception of property rights, Kauanui criticizes her failure to examine the effect of blood quantum policies that were imposed on the tribes. For Kauanui, the inclusion of a discussion of Indian racialization would need to engage the classifications of percentage of Indian blood and how they compare with notions of black blood.

Based on Harris’ use of two cases involving people of mixed race, Kauanui concludes that notions of blood can have both inclusive and exclusive properties, depending on whether the blood is native or black. Kauanui’s point is layered, and indicates the lack of a coherent response by the courts when faced with issues of racial identity in America. For example, a man in Louisiana who wanted to annul his marriage because his wife had black blood and was therefore tainted, was given the annulment even though his wife had never identified herself as white, but as Native American. In another case, the Mashpee tribes identity was dismissed by a court when they filed a suit asserting indigenous land rights, because the Mashpee had intermarried with other races, and therefore the tribes identity had been subsumed. Kauanui asserts that Indian blood has more often than not been disregarded because of its potential property value, a value that can be diluted by whiteness to selectively assimilate indigeneity, while black blood was more often used to completely preclude one’s ability to claim identity as a Native American, for those with both black and native ancestry.

It is within this dynamic of selective exclusion and inclusion in relation to Harris’ theory of whiteness as property that Kauanui bases her intervention in the field of CRT. She likens this type
of assimilation of indigenous people to a usufructuary right of “honorary whiteness”, where the owner, in this case white society, transfers the rights of use and enjoyment of property, in this case “honorary whiteness”, but retains the right to alienate the property. In essence, usufructuary rights do not grant ownership but convey privileges of use, which implies the complicity of those wanting access to the right. Kauanui feels this concept gives opportunity to discuss the simultaneous process by which the selective inclusion of racially mixed Hawaiians as white acted to exclude them from eligibility for land under the terms of the HHCA. 124

For Kauanui, the negotiations over the HHCA, with the debates over who would and would not qualify as a Hawaiian, were even more problematic due to their being conducted against the background and history of a stolen nation. The racialization of indigenous peoples when defined by blood quantum, as Hawaiians were through the HHCA, leads to a genocidal logic of disappearance according to Kauanui, as those Hawaiians lacking the required 50% are tied to the selective process of assimilation, which acts to dispossess native people of their land while working to serve the interests of the colonizer. 125

If scholars in the field of CRT considered the implications of Kauanui’s critique and how it could be used to enlarge and deepen the scope of their analysis when applied to Native law, the field would benefit by proving more relevant to indigenous peoples. For example, by recognizing the politics of blood quantum and its effects on Native law and institutions, CRT could provide a more thoughtful, critical, and meaningful analysis, thereby strengthening the field by making it more applicable to the issues facing Native people in America.

The purpose of this chapter and its discussion of the of the Māhele and Kuleana Act, the Bayonet Constitution, the overthrow and annexation of the Hawaiian Kingdom, and the enactment of the HHCA, has been to illustrate how these events are all related to the controversy surrounding the Rice decision. The dispossession of native land, the disenfranchisement of the native people, the forced annexation of Hawai’i by the United States, and the imposition of a blood quantum on Hawaiians, are
all relevant to the background of the case, as is the history of the Rice family, which is inexplicably entwined with these events that helped to form white privilege in Hawai‘i.

The importance of including the details of the Rice families’ participation in the colonization of Hawai‘i during the 19th century is critical in order to place the Rice v. Cayetano case in the correct historic context, and thereby facilitate an interrogation of the case from the perspective of CRT. The following chapter will examine the concerns of the Supreme Court majority and dissenting opinions in the case, and explore how CRT can be helpful to our understanding the consequences of applying “color-blind” concepts of jurisprudence to law affecting indigenous peoples, and how the field could expand its focus beyond the issues of discrimination and subjugation in the area of native law.

Endnotes Chapter 1

2. Ibid.
3. Ibid. See sections I and II of Court History.
18. Ibid. P 297.
23. Ibid. P. 111.
27. Ibid.
29. William Hyde Rice office Record, State of Hawai‘i Digital Archives.
33. Ibid. VIII.
34. Ibid. Pgs. 65-66.
37. Ibid. P. 69.
39. Ibid. P. 155.
42. Ibid. Pgs. 280-281.
43. Ibid. Pgs. 282-282.
46. Ibid. Pgs. 9-10.
58. Ibid. P. 127.
59. Ibid. P. 129.
65. Ibid. P. 282.
94. Ibid. Pgs. 133-134.
102. Ibid. P. 34.
103. Ibid. P. 39.
105. Heinonline 59th Congressional Record ((1920) P 7749.

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106. Ibid. P. 7449.
107. Ibid. P. 7449.
108. Ibid. P.7449.
109. Ibid. P. 7449.
111. Heinonline, 59th Congressional Record (1920) P. 7449.
112. Ibid. P 7453.
114. Ibid.
120. Heinonline 59th Congressional Record (1920) P. 7453.
123. Ibid. p. 24.
124. Ibid. P. 25.
125. Ibid. P. 25.
Chapter 2:
The Supreme Court’s Decision:
“Color-Blind” Constitutionalism in the Hawaiian Context

The focus of this chapter will be to acknowledge the major concerns and legal reasoning of both the majority and dissenting opinions in the Rice v. Cayetano case, in order to explore the effects of “color-blind” constitutionalism on laws affecting indigenous peoples in America. As in the preceding chapter, the work of CRT scholars who have written on “color-blindness” in the law will be used to interrogate the Court’s reasoning. The present day issue of racial justice in America is complex and not easily resolved considering the racialized past of African American slavery, Native American genocide, and racism against Latino and Asian immigrants that worked to install a system of white privilege and power that influenced most important institutions in American culture, including the law. ¹

As illustrated in chapter 1, the issue of racial justice is even more complicated in Hawai‘i, as any attempt to compensate Hawaiians for past injustice is juxtaposed against the unresolved question of the loss of Hawaiian sovereignty as a result of the overthrow and annexation, and the problematic nature of the blood quantum requirements in the HHCA that serve to divide and diminish the Hawaiian people. ² Prior to analyzing the decision of the Supreme Court, however, a review of the legal history of “color-blind” constitutionalism, which was used by the Court in the Rice case, is in order to help the reader better understand how the concept and its use in the law has changed over the years.

As Derrick Bell observes in his work Race, Racism, and American Law, the first use of the terminology of “color-blindness” came in the case of Plessy v. Ferguson in 1896 over race segregated railroad cars, where the Supreme Court upheld the infamous “separate but equal” ideology now universally viewed as racist. The lone dissenting opinion of Justice John Harlan focused on his
understanding that the guarantee of equal protection pertain to real life circumstances, not a theoretical model. As he explained at the time,

Everyone knows that the statute in question had its origins in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons... 

Justice Harlan considered racial segregation, even if it was a product of a race-neutral classification, to be inherently subordinating, and it was this subordinating purpose that led him to write the words that have spurred so much legal debate in recent times.

In view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.

The identical rationale was used by the Court in the Brown v. Board of Education decision 50 years later when it struck down racially segregated school systems, relying on the premise that racial classifications used for the specific purpose of subordinating members of a particular racial category violate the equal protection mandate.

Critics of the use of “color-blind” jurisprudence today cite both the Brown opinion and the Plessy dissent, as neither support the proposition that race is an irrelevant characteristic. The use of strict scrutiny because of any racial classification, which is done presently in the name of “color-blindness”, denies the specific purpose and effect of the segregationist policies under review in those cases. CRT scholars point out the problematic nature of allowing present day legal rules governing equal protection to continue placing communities of color at a disadvantage by leaving in place a status quo based on hundreds of years of racism and legal discrimination.

The debate in the United States over racial justice often takes on a political tone as well, as Omi and Winant explore in their work on racial formation in America. Liberals and conservatives, such as Thurgood Marshall and Charles Murray, take opposing views. Murray, speaking in reference to repealing all legislation requiring deferential treatment according to race wrote, “Race is not a morally admissible reason for treating one person differently from another. Period.” While Marshall,
writing in dissent in an important case backing “color-blind” jurisprudence, *City of Richmond v. J. A. Croson Co.*, “A profound difference separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism.” From Murray’s perspective we must act in a “color-blind” manner, not requiring, recommending or rewarding different status according to race, while Marshall’s perspective seems to recognize that because government has treated people differently in the past because of their race, it cannot retreat from responsibility and declare itself “color-blind” without perpetuating racist policies. 7

Omi and Winant observe that proponents of “color-blind” ideology have rearticulated certain egalitarian commitments, which played a different role in a previous historic context, in order to oppose a more open ended concept of equality; while opponents stress the state has a responsibility, because of its former role in upholding racially biased laws, to back a more robust and capacious concept of equality. The authors clarify that racial projects in America will always be contested because they were not “invented out of the air, but exist in a definite historic context, having descended from previous conflicts.” 8

As mentioned above, in reference to Marshall’s dissent, the case *City of Richmond v. J. A. Croson Co.* is an important legal precedent supporting “color-blindness” in the law, as is *Adarand Constructors Inc. v. Pena*. Both acted to establish the standard of strict scrutiny in all race based legislation that “color-blind” constitutionalism rests upon. Prior to these two cases decided by the Supreme Court, race based classifications were categorized by the courts as either invidious or benign, depending on whether the court felt they harmed certain groups or remedied past discrimination by promoting diversity. The other category for race based classifications depended on the lawmaking body enacting them, whether federal, state, or local, and for decades these two categories determined if a race based law could survive an equal protection challenge. Because of the previous history of state and local authorities enacting invidious laws such as “Jim Crow”, there were less stringent qualifications required to justify federal legislation as benign. 9

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Since the Supreme Court decisions in *Croson* and *Adarand*, however, all federal, state, and local laws enacted as race based remedies for past discrimination face the challenge of strict scrutiny being applied as it would to laws enacted with the purpose of invidious discrimination. The cases at issue here involved white owned firms filing suit against federal contracting programs that gave preference to racial minorities who had been disadvantaged because of past discriminatory state laws. At issue for the court in these cases was the standard of review for race based classifications, which because of disjointed precedent led the lower courts to decide on intermediate scrutiny, which the Supreme Court vacated, holding that “strict scrutiny applies to every race-based classification, regardless of its purpose or whether it is enacted by federal, state, or local lawmakers.”¹⁰

Justice Sandra Day O’Connor, writing for the majority in *Adarand* reasoned that because racial distinctions are “by their very nature odious to a free people”, they must viewed with skepticism, and need a uniform standard because equality “is not dependent on the race of those burdened or benefitted by a particular classification.” The opinion also called for congruence between federal, state, and local authorities, even though that requirement would overturn previously settled cases. From the majorities’ perspective these principles reflect the constitutional premise to protect the rights of individuals, not groups, and therefore government action based on race must be used judiciously, which could only be guaranteed by invoking strict scrutiny.¹¹

Justices Stevens and Ginsburg in their dissent in *Adarand* and *Croson* expressed the opinion that applying strict scrutiny to all race based legislation, regardless of intent or authority would undermine legitimate anti-discrimination efforts, and that evaluating the stated motives of race based laws involved little more than objective reasoning. Stevens criticized the Court majorities’ rationale as being consistent with disregarding the difference between a “No Trespassing” sign and a “Welcome” mat, while Ginsburg made an eloquent distinction between the politics of inclusion and those of exclusion, noting the historic patterns of discrimination against minorities in areas including employment, income, housing, education, and health services. Based on this logic, both Stevens and
Ginsburg proposed the Constitution be interpreted to allow for a limited use of benign race based classifications.  

Similar legal dynamics were involved in the *Rice* case, where Stevens and Ginsburg were again the two dissenting justices, and used similar arguments against the majority as they did in the race-based cases of *Adarand* and *Croson*, but with a focus on the governments’ responsibility towards indigenous peoples as tied to the *Mancari* decision. With this introductory background into the genesis and metamorphosis of “color-blind” constitutionalism and its current role in America’s evolving legal debate over race, the following section will focus on the three major findings used by the Supreme Court majority in their legal reasoning, and the dissent’s arguments in rebuttal. The dissenting opinion also provides the opportunity to apply CRT themes to the Hawaiian context, while allowing for an intervention in the field where it may lack insight regarding issues facing indigenous peoples in America.

**Supreme Court Findings, Dissenting Opinion, and History of Rice v. Cayetano**

The Supreme Court majority opinion relied on three legal findings, two that overlap and are related to the Fifteenth Amendment, and one solely related to the issue of blood quantum and who qualifies as Hawaiian under the law. First, the Court found that as the OHA trustee elections were administered by the state, not a separate quasi-sovereign government, the Fifteenth Amendment applied, which led to the second finding, that by limiting the voting franchise to Hawaiians the state in turn was not in compliance with the Fifteenth Amendment. The third finding was that the voting classification was not in line with the classification of beneficiaries of OHA programs because all Hawaiians could vote, while only those with the required 50% blood quantum are supposed to benefit, as per the HHCA.

The dissenting opinion’s arguments in rebuttal follow accordingly. First, the Federal Government
has been given latitude by the courts to carry out trust obligations because of the special relationship it has with aboriginal peoples, which includes Hawaiians. Second, the state has a fiduciary responsibility towards Hawaiians arising from the establishment of a public trust for administering the assets granted by the Federal Government under the Admission Act; and finally, the dissent found no “invidious discrimination” was present in the state’s effort to compensate for past wrongs to the indigenous people of Hawai‘i and preserve the “distinct and vibrant culture” of the islands. 14

The Admission Act is a crucial part of the legal considerations in this case, and is introduced by the Court in this passage.

Hawaii was admitted as the fiftieth State of the Union in 1959. With admission, the new State agreed to adopt the Hawaiian Homes Commission Act as part of its own Constitution. (Admission Act) In addition, the United States granted Hawaii title to all public lands and property within the boundaries of the State, save those which the Federal Government retained for its own use. This grant included the 200,000 acres set aside under the Hawaiian Homes Commission Act and almost 1.2 million acres of land. 15

The 1.2 million acres referred to are the Crown and Government lands taken in the overthrow and subsequently transferred to the United States at the time of annexation by the Newlands Resolution, and which became the trust responsibility of the State of Hawai‘i through the Admission Act in 1959. The Act authorized the state to use the revenues from these lands as a public trust to be managed for five purposes: the support of public schools and other public educational institutions, the betterment of the conditions of native Hawaiians as per the HHCA, the making of public improvements, and the provision of lands for public use. 16

The Court then introduces the creation of OHA in 1978 through an amendment to the state Constitution, and offers the rationale of the committee that drafted the amendment.

Members of the Committee of the Whole were impressed by the concept of the Office of Hawaiian Affairs which establishes a public trust entity for the benefit of people of Hawaiian ancestry. Members foresaw that it will provide Hawaiians the right to determine the priorities which will effectuate the betterment of their condition and welfare and promote the protection of the Hawaiian race, and that it will unite Hawaiians as a people. 17

Considering the previous discussion of the 50% blood quantum requirement of the HHCA, which the State was required to adopt as per the Admission Act, it is difficult to see how OHA could serve to
“unite Hawaiians as a people”, as the HHCA had not done so since its enactment in 1921, and now OHA was bound by the same restrictions. Nevertheless, the opinion then elaborates on the specifics of the OHA mandate, which include authority to administer two categories of funds, one derived from the 20% share of the ceded lands trust devoted to the “betterment of the conditions of native Hawaiians”, while the other came from “any state or federal appropriations or private donations that may be made for the benefit of native Hawaiians and/or Hawaiians.” OHA was tasked by the legislature with the development, coordination, and assessment of programs related to native Hawaiians and Hawaiians, and with conducting advocacy efforts while serving as a receptacle for reparations.18

As mentioned in the introduction, through OHA the State was able to position itself to maintain control over the ceded lands trust and the revenues derived from such, while positioning OHA as the representative of the Hawaiian people in negotiations regarding unresolved issues related to the loss of land and sovereignty in the overthrow. But more importantly in regards to the Rice decision, the majority seized on the 50% blood quantum requirement as creating a misalignment in classification between the beneficiaries of the trust and those benefitted by OHA programs, the third major finding of the Court, and yet another reminder of the legacy of the HHCA and its ties to the colonial past.

The majority opinion then addresses the voting qualifications that brought the present case before the Court.

OHA is overseen by a nine-member board of trustees, the members of which “shall be Hawaiians and presenting the precise issue in this case—shall be “elected by qualified voters who are Hawaiians as provided by law.” The term “Hawaiian” is defined by statute: “Hawaiian means any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii. The statute defines “native Hawaiian” as follows: “Native Hawaiian” means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands prior to 1778, as defined by the Hawaiian Homes Commission Act, 1920.19

Here the opinion makes direct reference to their second finding regarding limiting the franchise as failing to comply with the Fifteenth Amendment, and its third concern involving the misalignment of
the voter classification, again using the HHCA as reference.

The opinion then introduces Harold Frederick Rice, the instigator of the lawsuit and the fifth generation of the Rice family to reside in Hawai‘i, in the most neutral of terms.

Petitioner Harold Rice is a citizen of Hawaii and a descendant of pre-annexation residents of the islands. He is not, as we have noted, a descendant of pre-1778 natives, and so he is neither “native Hawaiian” nor “Hawaiian” as defined by the statute. 20

This statement is problematic considering that Justice Kennedy, who delivered the majority opinion, had referred to Harold Rice in his introductory comments in the following manner.

Petitioner Rice, a citizen of Hawaii and thus himself a Hawaiian in a well-accepted sense of the term, does not have the requisite ancestry even for the larger class. He is not, then, a “Hawaiian” in terms of the statute; so he may not vote in the trustee election. The issue in this case is whether Rice may be so barred. 21

While the implications of Kennedy’s reference to Rice being “himself a Hawaiian in a well-accepted sense of the term” are unclear, his comments could be ascribed to the discussion in the introduction of the “melting pot” ideology that permeates Hawaiian history, and certainly influenced the members of the Court as it did the rest of the country. Kennedy’s comment could also be related to the discussion in the previous chapter regarding the formation of white privilege in Hawai‘i, whereby the colonization of Hawai‘i by white settlers in the 19th century was naturalized as part of the civilizing and modernizing process, thereby making Harold Rice “Hawaiian” in Kennedy’s view. Regardless, both references to Harold Rice quoted above make note of the second finding of the Court, that limiting the franchise to Hawaiians fails to comply with the Fifteenth Amendment of the Constitution.

The opinion continues with a detail of Harold Rice’s complaint that is relevant to the historic context of the case, as the denial of his application by the state to vote in OHA elections also prohibited him from voting in a special election related to Hawaiian sovereignty held in 1996. 22 Given that Harold Rice is descended from a family who influenced and benefitted from the Māhele and Kuleana Act, the imposition of the Bayonet Constitution, the overthrow of the Hawaiian Government, the establishment of the Republic of Hawai‘i, the annexation of Hawai‘i, and the HHCA, it could be said Harold Rice’s motivation lay in his discomfort at having his material interests threatened and his
white privilege questioned. Kauanui speaks to this when discussing the comments of Justice Breyer in the *Rice* case, ridiculing the concept of native people tracing their ancestry through lineal descent, when she explains that this is “precisely what makes many people uneasy about indigeneity since this rootedness throws into question the place of neocolonial settlers.”  

The Court’s narration then follows the case from 1996, when it was first heard in the United States District Court in Hawai’i, which rejected the challenge to the OHA voting restriction under the Fifteenth Amendment and granted summary judgment to the State. The District Court, after surveying the history of the islands and people, determined that Congress and the State of Hawai’i had recognized a guardian-ward relationship with native Hawaiians analogous to that of the Indian tribes, and citing *Morton v. Mancari* examined the case with the latitude given legislation passed under Congress’ power over Indian affairs. As such, the court found the OHA electoral scheme was “rationally tied to the State’s responsibility under the Admission Act to better the conditions of native Hawaiians”, and therefore did not violate the Constitution’s ban on racial classifications.

In 1998, the Court of Appeals for the Ninth Circuit affirmed, noting that Harold Rice had not challenged the constitutionality of OHA itself or its underlying programs, but only the voting restriction. The court found that because the Admission Act mandated the State use a portion of the proceeds from the public lands trust for the benefit of native Hawaiians, the State “may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be.” The Supreme Court granted certiorari in 1999, and reversed the decision in 2000.

Having reviewed the background of the legislation enacted by the State of Hawai’i that led to the formation of OHA and its voting structure, applied a reasonable theory about the source of Harold Rice’s settler unease at being excluded from the vote, and given a chronology of the case as it wound its way to the Supreme Court, the work will now focus on each of the three major findings of the Court and the rebuttals of the dissent. A CRT analysis will be utilized when it is appropriate, and an
effort to expand the field of CRT by acknowledging the negative effects of blood quantum on indigenous peoples will be applied to the majority’s concern over the classification of beneficiaries.

Majority Findings: The Fifteenth Amendment and Rice v. Cayetano

There is considerable disagreement between the Court majority and dissenting opinions in the *Rice v. Cayetano* case as to the exact meaning of the Fifteenth Amendment, and how it should be interpreted and applied in the context of present day race based legislation. This disagreement over the basic purpose of the Fifteenth Amendment is at the heart of the controversy regarding “color-blind” ideology, and can be traced throughout the *Rice* decision. According to the United States Constitution, 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. 26

Although the letter of the law may be clear, the different perspectives of the Court regarding the spirit of the Fifteenth Amendment are striking to note in the context of the decision. The section of the majority opinion regarding the Fifteenth Amendment (III) begins with Justice Kennedy referring to the fundamental principle behind the Amendment, which is the Federal Government and the States may not deny the right to vote on account of race, the second of the three major findings of the Court.

Color, and previous condition of servitude, too, are forbidden criteria or classifications, though it is unnecessary to consider them in the present case. 27

This separation of the of the concept of “race” from “color” and “previous condition of servitude” is a central tenet of “color-blind” ideology, but ignores the historic context of the Amendment, which Kennedy then explains was to “guarantee to the emancipated slaves the right to vote, lest they be denied the civil and political capacity to protect their new freedom.” Kennedy states that although this objective is vital, the Amendment, like the Constitution, is cast in fundamental terms that
transcend the particular controversy that provided impetus for its enactment, and protects all persons, not just members of a particular race. 28

Kennedy continues his general explanation of the Amendment as being designed to “reaffirm the equality of races at the most basic level of the democratic process, the exercise of the voting franchise.” He states that the Amendment’s inherent power caused the word “white” to be removed from the voting laws of the United States, citing Guinn v. United States (1915) and Neal v. Delaware (1881) as examples of such power. Kennedy then acknowledges the Amendment’s commitment to neutrality, quoting from United States v. Reese (1876), “If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be.” 29

Kennedy then catalogues the “manipulative devices and practices” that were put in place to deny blacks the vote in the 20th century, citing the cases and listing the variety of practices such as the use of the “grandfather clause” in Guinn v. United States (1915) and Myers v. Anderson (1915), “procedural hurdles” in Lane v. Wilson (1939), “white primary” in Terry v. Adams (1953) and Smith v. Allwright (1944), “registration challenges” in United States v. Thomas (1960), “racial gerrymandering” in Gomillion v. Lightfoot (1960), and “interpretation tests” in Louisiana v. United States (1965). He makes the statement that although progress to rid the law of these practices was slow, the Fifteenth Amendment was sufficient to eventually invalidate all such schemes, to which he compares the OHA voting restrictions. 30

Comparing the OHA voting restrictions to the cases above, Kennedy asserts that, “Unlike the cited cases, the voting structure now before us is neither subtle nor indirect. It is specific in granting the vote to persons of defined ancestry and to no others.” 31 He rejects the State’s argument that the restriction is not racial, but reflects a classification limited to people whose ancestors were in Hawai‘i prior to 1778, regardless of their race, maintaining that ancestry can be a proxy for race, and that it is being used as such here. Kennedy then compares the State’s effort to preserve the common physical and cultural characteristics of the Hawaiian people through the OHA voting provisions, to the Court’s
interpretation of Reconstruction era civil rights laws, insisting that it is racially discriminatory to single out identifiable classes of people based on their ancestry or ethnic characteristics. He then refers to the enactment of the HHCA, with its specific definition of Hawaiian, as proof of the explicit tie to race in the OHA voting restrictions.  

Kennedy finishes this section regarding the Fifteenth Amendment and its purpose by reminding the reader that one of the principal reasons race is treated as a forbidden category is that it is demeaning to the “dignity and worth of a person to be judged by their ancestry instead of by his or her own merit and essential qualities”, and is not “consistent” with the respect each of us deserves as individuals that the Constitution secures for its citizens. Furthermore, Kennedy states the use of racial classifications serves to corrupt the legal order democratic elections seek to preserve, and allows the law to become the “instrument for generating the prejudice and hostility all too often directed against persons whose particular ancestry is disclosed by their ethnic characteristics and cultural traditions.” He maintains these racial distinctions are “odious to a free people whose institutions are founded upon the doctrine of equality” citing Hirabayashi v. United States (1943), and ends by stating the OHA voting restrictions used the “same mechanisms” and caused the “same injuries, as laws or statutes that use race by name.”

With this summary of the majority opinions' finding as expressed by Justice Kennedy regarding the application of the Fifteenth Amendment to the circumstances of the Rice v. Cayetano case, let us now examine the dissenting opinion and rebuttal of Justice Stevens to the majority's analysis in the context of the Fifteenth Amendment.

Dissenting Opinion: The Fifteenth Amendment and Rice v. Cayetano

Justice Stevens begins his rebuttal of the majority opinion by stating “the terms of the Amendment itself do not here apply”, as the OHA voter qualification refers to “ancestry and current
residence”, not race or color. Stevens then makes a distinction between blood-based characteristics and lineal descent, saying the right to vote is contingent on the later, rather than on the “blood-based proximity of that resident to the peoples from whom that descendant arises.” His point is that the distinction between race and ancestry is manifest, as the ability to trace one’s ancestry to a particular individual in time may not correlate with one’s acknowledged race today, and that ancestry was not included in the Amendments prohibitions. 34

Stevens then states that cases such as Giunn v. United States (1915), where ancestry was used as a proxy for race were very different from the Rice v. Cayetano case, as they were blatant attempts to exclude blacks from voting and enforce racial exclusion. He states the voting laws cited by the majority that were held to be unconstitutional under the Fifteenth Amendment were seen from a perspective that was “honed in specific detail to reveal the realities of time, place, and history behind the voting restrictions being tested”, and that this perspective obscures the realities of the Rice v. Cayetano case. Stevens then cites the cases Terry v. Adams (1953) and Smith v. Allwright (1944), which struck down blatant discrimination against blacks as having “no application to a system designed to empower politically the remaining members of a class of once sovereign, indigenous peoples.” 35

Stevens rebuttal of the majority’s finding regarding the Fifteenth Amendment is firmly based on his perspective that the case law on which the majority relied dealt with a different set of circumstances of time and place than those in Hawai’i presented by the Rice case. The former recalled an age of abject discrimination against blacks in the South, while the later represented a “political consensus” that was “determined to recognize the special claim to self-determination of the indigenous peoples of Hawaii.” Furthermore, he agreed with the opinion of the United States District Court, and the Ninth Circuit Court of Appeals, that the challenged part of the law did not keep non-Hawaiians from voting in general, nor was it relevant to their legal interests. On these grounds, Stevens agreed with the lower courts in their judgment that Harold Rice’s right to vote was not
denied in violation of the Fifteenth Amendment. 36

Majority Finding: The Fifteenth Amendment, Rice v. Cayetano, and Morton v. Mancari

The majority opinion continues in section IV with a refutation of the State’s argument that the exclusion of non-Hawaiians from voting is permissible under previous Supreme Court cases allowing the differential treatment of certain members of Indian tribes. This falls under the first of the Court’s major findings, that the OHA trustee elections are administered by the State, not a quasi-sovereign government, and therefore the Fifteenth Amendment applies. Kennedy notes the cases referred to by the State held that the tribes retained elements of quasi-sovereign authority, even after their lands had been ceded to the United States, and this tribal authority relates to self-governance. Relying on that theory the Supreme Court sustained a federal provision allowing employment preferences to people of tribal ancestry in the case Morton v. Mancari (1974), which Kennedy takes great pains to dismiss as relevant to the State’s case. 37

Kennedy maintains that sustaining the OHA voting restriction under Mancari would require accepting premises “not yet established in our case law”, postulating that Congress, in reciting the purposes of the Admission Act, the HHCA, and the Joint Resolution of 1993 (Apology Bill), had determined that native Hawaiians had a similar status to that of tribes, which Congress has not. However, Kennedy is adamant that even if Congress had the authority to designate Hawaiians a tribe, they could not delegate the authority to “a State to create a voting scheme of this sort.” As examples of Congress’ ability to fulfill treaty obligations and responsibilities to the tribes, he cites cases where the Supreme Court had upheld legislation dedicated to this end. However, these cases did not restrict the franchise in any way, but were related to fishing rights, crimes committed by Indians in Indian country, distribution of tribal property, immunity from state taxes, tribal adoptions, and hiring practices, all governed by the Bureau of Indian Affairs. 38
Kennedy explains that because the BIA preference was “tied rationally” to Congress’ obligation to the Indians and the furtherance of tribal self-government, it did not “offend the Constitution”, but was, however, confined to the authority of the BIA, an agency described as “sui generis”. Kennedy questions the State’s contention that because one of OHA’s purposes was to afford Hawaiians a measure of self-government it fits the model of Mancari, finding that it does not follow from Mancari that Congress could authorize a state to establish a voting scheme where non-Indian citizens are excluded. He then lists the tribal elections cited by the state as illustrative of this error, as they all relate to the internal affairs of quasi-sovereign entities, not state agencies, which he correctly observes OHA to be. Kennedy ends this section of the majority opinion by reiterating his rejection of the State’s claim that the OHA elections are protected under Mancari, and thus are elections to which the Fifteenth Amendment applies.39

Dissenting Opinion: The Fifteenth Amendment, Rice v. Cayetano, and Morton v. Mancari

Justice Stevens’ rebuttal to the above argument made by the Court majority appears in Section II of the dissenting opinion, and focuses on the analogy between the latitude given the Federal Government to carry out trust obligations to the tribes under Mancari, and his assertion that this responsibility was given to the State Government upon admission, which was thereby acting to fulfill those obligations to the Hawaiian people through the OHA trustee elections.

Stevens begins by recognizing the United States has a responsibility to native Americans which the Court has recognized as both plenary and fiduciary due to the history of American military conquest that made the tribes “wards of the nation”. He explains that because of this history the tribes became largely dependent on the United States for their political rights and daily sustenance, and from this “arises the duty of protection, and with it the power.” 40 Stevens then gives examples where the plenary power of Congress has been used to provide native Americans with care and protection,
citing the many BIA programs that respond to such pragmatic concerns as health, education, housing, and poverty, and those that protect cultural values, such as the Native American Graves Protection and Repatriation Act.

The dissent is critical of the majority for focusing on issues such as racial origins, allotment of tribal lands, the existence of tribal self-government, or the various definitions of “Indian” Congress has used, and states that the Supreme Court has always upheld “special treatment” of native Americans as long as it can be tied to the fulfillment of Congress’ unique obligation towards them, as per the *Morton v. Mancari* decision. Stevens then gives a summary of the history of events in Hawai’i that shows the grounds for recognizing the existence of Federal trust power are overwhelming. He begins with the Republic of Hawai’i expropriating 1.8 million acres of land which it then ceded to the United States upon annexation in 1898, then moves to the creation of the HHCA in 1921, which the State was required to adopt in the Admission Act, and which held that 1.2 million acres of land was to be held in trust for the “betterment of the conditions of native Hawaiians”, and the other public purposes. 41

Stevens refers next to the Joint Resolution passed by Congress in 1993, with its formal apology to the Hawaiian people for the overthrow of their Kingdom, and the loss of 1.8 million acres of land “without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government.” He asserts there is no need to rely on this official Congressional apology to “discern a well established federal trust relationship with the native Hawaiians”, and refers to over 150 laws passed by Congress that expressly include native Hawaiians as beneficiaries alongside American Indian and Alaskan Native peoples such as the Eskimo and Aleut. 42

Stevens is critical of the of the majority not recognizing the relationship between the Federal government and Hawaiians. Although the majority opinion acknowledged the history of agreements and enactments that created the “guardian-ward” relationship between the Government of the United States and Hawaiians, primarily due to what Stevens refers to as their “subjugation at the
hands of colonial forces”, he feels they failed to recognize the import of this acknowledgment. Namely, that legislation intended to benefit native Hawaiians must be evaluated on the same understanding of equal protection given to the tribes, as this “special treatment” can be rationally tied to Congress’ unique obligation towards the native peoples of America. 43

The dissent then acknowledges the majority’s concerns regarding the fact Hawaiians have not been recognized by Congress as a tribe and because of this the OHA elections are an affair of the State, thereby invoking the Fifteenth Amendment, but states,

In my view, neither of these reasons overcomes the otherwise compelling similarity, fully supported by our precedent, between the once subjugated, indigenous peoples of the continental United States and the peoples of the Hawaiian Islands whose historical sufferings and status parallel those of the continental Native Americans. 44

Stevens next takes issue with the majority’s finding that tribal membership has been the “sine qua non” of governmental authority in the realm of Indian law, referring to constitutional scholars who have demonstrated that the BIA preferences upheld in Mancari also extended to non-tribal member Indians, and required Native Americans to possess a certain blood quantum in order to qualify. Because native Hawaiians are identified by the HHCA through blood quantum, Stevens remarks it is a “painful irony” to conclude native Hawaiians are not entitled to special treatment designed to restore a measure of self-governance because they no longer have a government, a circumstance which he reminds the majority was due to the actions of the United States. 45

Stevens then tackles the majority’s concern that the OHA voting restrictions are part of a state constitution and legislation enacted by a majority vote of the population, not a law passed by Congress or a tribe itself. He states the Court has repeatedly held that federal power to pass laws fulfilling the trust relationship with Indians may be delegated to the states, citing the Court’s opinion in Washington v. Confederated Bands and Tribes of Yakima Nation (1979), which upheld a challenge to a state law that allowed jurisdiction over Indian tribes within the State because the law was enacted in response to a federal measure intended to achieve the same result. Stevens argues that the link between the Federal Government and the State of Hawai’i is analogous to the Washington
case, as the Admission Act mandated that the provisions of the HHCA be adopted by the State which then had the discretion to manage the trust as the State’s laws provided. 46

The final point Stevens addresses in this section is whether the OHA voting requirements “rationally further the purpose identified by the State”, which refers to the standard of promoting self-government among the descendants of the indigenous Hawaiians, and to make OHA more responsive to the needs of its constituents. He finds that because the OHA board of trustees is elected by the beneficiaries of the trust, the voting requirement is reasonable as it directly relates to a “legitimate, nonracially based goal.” 47 Stevens’ arguments in this section of the dissent rest on three premises: the similar histories of colonial subjugation and loss of sovereignty experienced by Native Americans and Hawaiians, the federal government’s trust responsibility to indigenous peoples as a result of military conquest, and the federal government’s ability to transfer that trust responsibility to the states. The next section will examine the last major finding of the Court regarding the misalignment of the voting classification as a result of the 50% blood quantum requirement established by the HHCA.

Majority Finding: Differential Alignment of Identity in Rice v. Cayetano

The majority opinion’s third major finding deals with what Kennedy refers to as “the differential alignment between the identity of OHA trustees and what the State calls beneficiaries.” 48 This is in rebuttal to the State’s argument that the voting restriction only ensures an alignment of interests between the fiduciaries and beneficiaries of a trust, and is based on this status rather than race. Kennedy refers to the fact that it is unclear the classification is in symmetry with the beneficiaries of OHA programs, as most of the funds appear to benefit “native Hawaiians”, while allowing both “Hawaiians” and “native Hawaiians” to vote in the trustee elections. 49

Kennedy is referring to the 50% blood quantum definition in the HHCA of 1921 subsequently
adopted by the State in the Admission Act of 1959 which preserves the explicit tie to race.

Native Hawaiian means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes 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. 50

Kennedy notes that although “peoples” was added to the definition at a later date, the drafters of revised definition openly admitted the substitute was merely technical, and that “peoples” in effect means “races”. Thus, the classification “appears to create, not eliminate” the differential alignment of the majority finding.

Dissenting Opinion: Differential Alignment and Invidious Discrimination

Stevens’ rebuttal of the majority’s contention that the State’s definition creates a differential alignment between the OHA trustees and beneficiaries again takes us to the issue of blood quantum. However, as mentioned above, the different perspectives between the majority and minority opinions in the Rice decision are striking, and Stevens’ rebuttal illustrates the point. Rather than viewing the different definitions of native Hawaiian and Hawaiian as creating a misalignment which would require those without the 50% blood quantum to be excluded from the terms of the trust, Stevens contends there is nothing “racially invidious” regarding a decision to enlarge a class of eligible voters to include “any descendant” of a resident in Hawai’i in 1778. 51

Stevens’ reasoning rests on the fact that including the broader class of eligible voters ensures there will always be a voting interest who can trace their ancestors to the indigenous people of Hawai’i, and who have inherited “through participation and memory” the cultural traditions the trust seeks to protect. He is adamant that the “putative mismatch” objected to by the majority actually “underscores” the fact that the voting restriction is not based on racial characteristics, as the political and cultural interests shared by native Hawaiians and Hawaiians are “unlike” racial survival. 52
Stevens’ also distinguishes between the old voting schemes of the South and that of OHA when he mentions that the former excluded any potential voter with a “taint” of black blood, while the later excludes no one who is descended from a resident in 1778 because they are part European, Asian, or African. Stevens’ states this makes the classification “both too inclusive and not inclusive enough” to be categorized as racial. His final point regarding the majority’s claim that race is a forbidden classification because it “demeans the dignity and worth of a person to be judged by ancestry instead of his or her own merit and essential qualities”, again reverses the perspective of the majority opinion, as Stevens’ agrees this would be true when ancestry was used to deny one’s right to vote or “share in the blessings of freedom”, but not when it comes to claiming an interest in trust property or “a shared interest in a proud heritage”, as Hawaiians do.  

The last concern the dissent explores in rebuttal of the majority in regards to their statement that the OHA election requirements will “become the instrument for generating the prejudice and hostility all too often directed against persons whose particular ancestry is disclosed by their ethnic characteristics and cultural traditions”. Stevens’ dismisses this argument by explaining that the entire electorate of the State of Hawai’i, a majority of whom are not Hawaiian, voted to establish OHA because of their interest in preserving the rights of the Hawaiian people. He is incredulous that a majority of the electorate would establish a law that represented prejudice and hostility towards themselves, and states the best insurance against this rests in the power of the majority to revise the law.  

Now, having reviewed the major findings of the Court and the minority’s dissenting rebuttals in the Rice v. Cayetano decision, a discussion of how CRT can help us to better understand the effects of applying “color-blind” constitutionalism in the Hawaiian context, and an intervention in the field regarding blood quantum and indigenous peoples, will finish the chapter.

Critical Race Theory and Rice v. Cayetano
Scholars in the field of CRT object to “color-blind” constitutionalism on various grounds, one of the strongest being the application of strict scrutiny to race based laws regardless of their intent, which they view as handicapping legitimate efforts to remedy past societal discrimination, and in the worst case scenario, reifying a status quo they feel is essentially racist (Bell 2004). In addition, CRT scholars remind us that in America the history of slavery, racial immigration restrictions, enforced segregation, and disparities in socio-economic status, all make the concept of race salient and highly charged, proving the very idea of being “color-blind” insupportable (Kreiger 1995). Furthermore, opponents of “color-blind” jurisprudence worry about the effects unconscious racism and racial stereotypes can have on the law and the legislative process (Lawrence 1987, Hernandez 1998).

Another concern for CRT scholars is the judicial focus on formal equality practiced under “color-blind” jurisprudence that places the types of laws enacted above their consequences, and treats race neutrality as a present day norm rather than an ideal yet to be achieved (Freeman 1995, Gotanda 1995). Finally, and of telling significance to scholars in the field of CRT, “color-blind” constitutionalism, by maintaining that all racial identities are symmetrical and thereby hold no significance, is actually embracing the same logic as the Court employed in the Plessy decision upholding segregation in 1896 by denying that separate was unequal (Harris 2003). This part of the work will endeavor to apply these critiques to the Rice v. Cayetano decision in order to better understand the impact of “color-blind” jurisprudence on Hawaiians and other indigenous peoples.

Because the central issue in the Rice case focused on voting rights as a race-neutral policy that required strict scrutiny review, this seems a natural place to begin a discussion of how CRT critique can be applied to the decision. Another compelling argument for this point stems from the majority opinion of Justice Kennedy, where he made clear that the cases in which the Court had upheld a racial classification under Mancari dealt with a variety of issues related to tribal sovereignty and self-governance such as fishing rights, distribution of tribal property, criminal justice, tax immunity, and
tribal adoptions, but not voting rights.  

Kimberle Crenshaw’s work “Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law”, expresses concern that the intent requirement that falls under the parameters of strict scrutiny can be a double edged sword. While recognizing the need to subject overt acts of discrimination to strict constitutional review in order to discourage the exploitation of minorities through the perpetuation of “Jim Crow” laws that denied people of color the same rights as whites, Crenshaw expresses concern that the intent requirement makes it virtually impossible to deal with inequality that arises when lawmakers advance legitimate race-neutral policies, such as voting rights, that can impact minorities negatively, the main point of disparate impact theory.

I would argue the Rice decision exemplifies this dynamic, but somewhat in reverse. Although the United States District Court and the Court of Appeals for the Ninth Circuit found the OHA voting restrictions did not deny or abridge Harold Rice’s right to vote in violation of the Fifteenth Amendment, the Supreme Court in relying on principles central to “color-blind” jurisprudence found they did, and accordingly struck them down. In doing so, as Justice Stevens’ dissent observes, the Court majority cited case law that was applicable to dismantling racist legislation in the South that blatantly discriminated against black citizens by denying them the franchise, with “a system designed to empower politically the remaining members of a class of once sovereign, indigenous people.”

Assuming the judgment of Stevens and the lower Courts was correct, and that the OHA voting requirements embodied the goal of empowering a group of indigenous people whose sovereign rights had been taken from them as a result of American intervention, and were “not contrived to keep non-Hawaiians from voting in general, or in any respect pertinent to their legal interests” 58, the Supreme Court’s decision to disallow the law has, from the perspective of CRT as expressed by Crenshaw, made it more difficult for the State to deal with the conditions of inequality that exist between Hawaiians and non-Hawaiians as a result of the colonial and post-colonial past. In addition, the Rice decision has generated several other lawsuits that threaten programs designed to benefit
Hawaiians, which will be examined in further detail in the next chapter.

The problematic nature of the intent requirement under judicial strict scrutiny is explored by Charles Lawrence III in “The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism”. Lawrence feels the intent requirement is somewhat misplaced, as society discourages overt acts of racism and takes measures to remedy them. However, Lawrence’s discomfort stems from the fact that unconscious racial bias in government decisions is often hard to identify because of the difficulty proving intent. As an example he points to the case *Arlington Heights v. Metropolitan Development Corp.*, where a white upper-middle class neighborhood blocked construction of a low-income housing development by refusing to amend their zoning restrictions, thereby excluding most minorities from moving to the area. Black plaintiffs sued, and the Supreme Court agreed the zoning restrictions effectively excluded them, but rejected the equal protection claim because there was no proof the town acted with the intent to maintain a segregated community.\(^{59}\)

For Lawrence, the racist subtext of whites reflexively associating poverty and lower property values with minorities is extremely problematic, as it avoids review under “color-blind” constitutionalism which requires proof of intent that is often hard to identify, and therefore difficult to prove. There is also a racist subtext in Harold Rice’s claim of discrimination that can be explored in the context of the Rice family’s participation in Hawaiian history, which the Court has ignored. I would posit that Harold Rice’s unconscious racial bias stems from the pride he takes in his family’s role in helping to establish white power and privilege in Hawai’i, and because of this he reflexively associates Hawaiians with the inability to govern themselves, although he claims the lawsuit was “all about protecting the Constitution and everyone’s right to vote.”\(^{60}\)

Here, as with the *Arlington Heights* case cited by Lawrence, the intent of Harold Rice’s unconscious racism born of white privilege may be difficult to prove in a court of law, but considering the prominent role the Rice family played in the pivotal events discussed in the first chapter that led to the loss of self-determination for Hawaiians and the connection they have to Rice’s claim against the
state over the OHA voting requirements, it is certainly conceivable that Lawrence’s theory could be applicable. The irony of Harold Rice suing the State over the OHA voting election scheme is notable, however, considering his great-grandfather William Hyde Rice not only participated in the imposition of the Bayonet Constitution that disenfranchised many Hawaiians, but the overthrow which divested them of their government, the Republic of Hawai‘i with its Constitution that employed “Mississippi Laws” to keep non-whites from voting, and the establishment of the HHCA, which both he and his sons Charles Atwood Rice and Harold Waterhouse Rice influenced for the benefit of the “Big Five”, many of whom were relatives.  

The topic of unconscious racism is related to that of racial stereotypes and their effect on the adjudication of the law. Tanya Kateri Hernandez interrogates this concept in her article “Multiracial Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence”, in which she studied the effect of negative racial stereotypes on the outcome of cases where the race of the victim and the perpetrator was different. According to the “Baldus Study” which analyzed over 230 variables on capitol sentencing outcomes, the chances of a black defendant receiving the death sentence increased substantially when the victim was white.

Hernandez’ criticism centers on the law and its preoccupation with intentional discrimination, which she states can cause jurors, prosecutors, judges, and legislators to overlook the effects of racial stereotypes on the justice system. According to Hernandez, the creation of stereotypical oppositional dualities in America between whites and non-whites has created certain racial images that are deeply ingrained in the American psyche. Whites are often characterized as industrious, intelligent, responsible, and virtuous, while non-whites are often characterized as lazy, unintelligent, irresponsible, and immoral, leading Hernandez to suggest that these racial stereotypes have a significant influence government actions that appear neutral but in actuality disadvantage people of color because they are beyond the reach of constitutional adjudication because of the difficulty of proving intent.
Linda Hamilton Kreiger investigates the cognitive antecedents to discriminatory behavior in the workplace in her article “The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity”. ⁶⁴ Kreiger notes that while Title VII jurisprudence sufficiently addresses the more deliberate types of discrimination associated with an earlier age, it does not adequately address the more subtle and unconscious forms of bias most prevalent today. Kreiger’s work is based on Social Cognition Theory, which states that stereotyping, although a form of categorization normal to cognitive functioning, once in place can bias intergroup judgment and decision making. However, because these biases are cognitive rather than motivational, they operate beyond the reach of the decision maker’s self-awareness, which empirical research suggests is poor, creating a situation whereby the normal cognitive processes can lead to the creation and maintenance of social stereotypes. ⁶⁵

Kreiger suggests that in America the history of slavery, race-based immigration restrictions, “Jim Crow” laws, enforced segregation, and wide disparities in economic status, all make race a salient and highly charged category where the notion that racial, ethnic, or gender distinctions can be ignored is not empirically supportable. Moreover, these distinctions and the effect they have on how we judge people have resulted in social schemas that subtly distort our ability to process information that can result in inter-group bias. The highly racialized colonial past in Hawai‘i, which also included race-based immigration restrictions, “Mississippi Laws” to enforce the continued disenfranchisement of most of the non-white population, and great disparities in wealth and privilege, suggest that Kreiger’s cognitive bias approach could be applied to the Court’s “color-blind” reasoning in Rice. ⁶⁶

According to Kreiger’s analysis, “color-blind” decision makers would be susceptible to these same sources of cognitive bias even if their conscious inferential process is “color-blind”, because the categorical structures through which they collect, sort, and recall information, are not. As Kreiger states,

Our decisionmaker is not colorblind, he is simply “color-clueless”, likely unaware that his perceptions, judgments, and decisions are being distorted by cognitive sources of intergroup bias. And, would be shocked and offended if accused of discrimination, especially under a legal and popular construction which equates discrimination with invidious intent. ⁶⁷
In this context, the disparate impact of “color-blind” jurisprudence on Hawaiians can be evidenced in the Court’s decision, as without the OHA voting restrictions the Court struck down as being discriminatory, Hawaiians may find themselves unable to elect their chosen trustees due to the possible effects of vote dilution by allowing non-Hawaiians to participate. Thus stereotypes, whether unconscious or cognitive based, continue to effect the adjudication of the law through “color-blind” constitutionalism.

Merry speaks to this concept of racial stereotypes in the Hawaiian context in her book *Colonizing Hawai‘i: The Cultural Power of Law*, when describing the self-representation of the white missionary descended plantation owners in the 19th century. She details how whites defined themselves in opposition to both Hawaiians and Asians, with whites described as powerful, authoritative, and masculine, while Hawaiians and Asians were characterized as powerless, subordinate, and feminine in comparison. As Merry notes, these stereotypes were seen as biological by the whites who dominated the Hawaiian economy in the later part of the 19th century, and had a functional place in the plantation hierarchy, where the Hawaiian was seen as “childlike, benign, and foolish”, while the Asian plantation laborers were seen as lacking the “self-restraint and self-control” found among their white overseers.  

I would suggest these 19th century racial stereotypes, used by the missionaries and their descendants to solidify and maintain the colonial power structure in Hawai‘i that so benefitted themselves while serving to denigrate the indigenous Hawaiians and Asian immigrants, have been so deeply ingrained into the minds of most Americans they do not think to question or examine them at all. As Trask relates, elements of these stereotypes have been incorporated with great success by the tourist industry in its commodification of the Hawaiian culture.

Hawai‘i—the word, the vision, the sound in the mind—is the fragrance and feel of soft kindness. Above all, Hawai‘i is “she”, the Western image of the Native “female” in her magical allure. And if luck prevails, some of “her” will rub off on you, the visitor.
This racialized stereotyping is evident in the *Rice* decision as well, where Hawaiians are characterized in the Congressional report of 1920 related to the HHCA as improvident, unable, and thoughtless in regards to holding onto their lands, competing in business, or planning to meet the needs of the future, while the colonial settlers, who helped to create the situation whereby Hawaiians were dispossessed of their land and systematically stripped of their political power, are viewed as representing modernity and Western civilization. How much these stereotypes influenced the Court in their decision in the *Rice* case is uncertain, however, the implications of the possible effects of the theories of Lawrence, Hernandez, and Kreiger on the adjudication of the law cannot be ignored.  

Another topic of interest and concern related to strict scrutiny is the rule of consistency, and how it is being used by “color-blind” proponents as a tool to maintain what CRT theorists would label “white privilege” in American society. As previously mentioned, legal rules that see both invidious and benign racial classifications as suspect serve to stabilize existing racial disparities, while making it difficult for lawmakers to provide a means of compensation through the law for victims of race based discrimination according to CRT.

Alan David Freeman’s work, “Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine”, considers the implications of this through the lens of college admissions criteria that rely on a students’ GPA and SAT scores. White students consistently outscore non-white students in these criteria, for reasons Freeman cites as being related to disparities in wealth and privilege, yet these criteria are considered facially neutral under the law, and therefore speak to disparate impact. Because of this, Freeman accuses the Court of taking an approach focusing on the types of laws enacted rather than their consequences, especially as related to promoting diversity through education.

Criticism of this “color-blind” focus on the type of law enacted rather than its consequences is evidenced by Steven’s dissenting opinion in the *Rice* case, in which he stated that “The Court’s
holding today rests largely on the repetition of glittering generalities that have little, if any, application to the compelling history of the State of Hawaii.” Stevens also pointed to the disparities in socio-economic statistics between Hawaiians and non-Hawaiians, and I would argue this is the issue that allows for the application of Freeman’s concept in the context of the Rice decision. Again, the most important concern for the Court was the facially neutral issue of the franchise not being denied to citizens because of race. However, when viewed in the context of Hawaiian history, the circumstances of which arguably led to the present day disparities in wealth and privilege in Hawai‘i, this criteria could be seen as stabilizing the existing status quo by not allowing the compensatory purposes of the OHA voting restrictions to stand, and ignoring the disparate impact of Rice on Hawaiians.

Of equal importance to this argument are Harold Rice’s connections to the “Big Five” and their access to tremendous power and privilege in Hawai‘i. As Merry notes, during the territory period the small interrelated group of white businessmen who controlled almost half of the Territories’ land, the government controlling most of the rest, produced a concentration of wealth and power more extreme than anywhere else in the United States. As Harold Rice is connected by blood or marriage to four of the families that constitute the “Big Five”, I would argue he illustrates Freeman’s point regarding facially neutral laws stabilizing and perpetuating a racist status quo quite well.

The intent requirement of the law under “color-blind” jurisprudence is also the focus of the work of Neil Gotanda in “A Critique of ‘Our Constitution is Color-Blind’”, that has relevance in the context of the Rice decision. Gotanda asserts that approaching benign and invidious racial classifications as equal treats race neutrality as a present day norm, rather than an ideal yet to be achieved, the exact sentiment expressed by Justice O’Connor writing for the majority in the University of Michigan cases of 2003 when she declared, “We expect that 25 years from now, the use of racial preferences will no longer be necessary.”

The Court’s action in these cases seems in conflict with their decision in Rice, however, Kennedy’s
comments in the majority opinion make clear the Court has a different standard for voting rights than other areas of the law dealing with racial preferences. As Kennedy states regarding the Fifteenth Amendment, its design was to “reaffirm the equality of the races at the most basic level of the democratic process, the exercise of the voting franchise.” For Gotanda though, the significance of race in America leads to a different understanding of how the law should be used that can be applied in the context of the *Rice* case as an illustrative example. He states,

> The history of segregation is not the history of blacks creating racial categories to legitimate slavery, nor is it a history of segregated institutions aimed at subordinating whites. Indeed, racial categories themselves, with the metaphorical themes of white purity and non-white contamination, have different meanings for blacks and whites. If judicial review is to consider the past and continuing character of racial subordination, then an affirmative action program aimed at alleviating the effects of racial subordination should not automatically be subject to the same standard of review as Jim Crow segregation laws. Judicial review using historical-race should be asymmetric because of the fundamentally different histories of whites and blacks.

As the history of events in Hawai‘i clarifies, there are many parallels between Gotanda’s quote above in the context of the *Rice* decision. Hawaiians did not create institutions and racial categories that served to subordinate whites, nor did they institute metaphorical themes of Hawaiian purity and white contamination, therefore, the racialized history of Hawai‘i has a different meaning for Hawaiians than whites. In addition, because this history can be tied to the continuing character of racial subordination in Hawai‘i, the affirmative action goal of the OHA voting requirements should not be automatically subject to the same standard of review as invidious race based laws. From Gotanda’s perspective then, judicial review using historic-race should be asymmetric because of the fundamentally different histories of whites and Hawaiians.

As the above critique of the *Rice* decision from the perspective of CRT shows, there are several strong points that can be made in the Hawaiian context regarding the problematic nature of applying “color-blind” constitutionalism to the events of Hawaiian history which the history of the Rice family serves to illustrate. However, there is one topic that CRT does not engage that would be remiss to ignore in this work, and that is blood quantum and its effects on the Hawaiian people and other indigenous peoples in America. The work of Kauanui, *Hawaiian Blood: Colonialism and the Politics of*
Sovereignty and Indigeneity is crucial to this understanding.

In her discussion of the Rice case and the implications it holds for Hawaiians, Kauanui first examines the nature of the amicus briefs presented to the Court by the State in defense of the OHA voting restrictions, noting that all but one relied on the argument Stevens used in his dissent, that the United States Congress’ plenary power over Indians, based on the Court’s interpretation of the commerce clause of the Constitution, also applies to Hawaiians. For Kauanui this represents a threat to Hawaiian interests, as the Court’s interpretation of the commerce clause as related to congressional plenary power has been “used to justify American Indian dispossession as well as American Indian tribal nations as domestic dependent sovereigns” 77, thereby precluding more comprehensive forms of compensation for the loss of sovereignty available to indigenous peoples under international law. This perspective, it is worth noting, allows for a more critical analysis of Stevens’ dissent, for although he plainly empathizes with the complexity of the injustice facing Hawaiians, he does so within the parameters of the American legal system by asserting Congress’ power to delegate authority to the State in regards to obtaining justice for the Hawaiian people.

Kauanui also questions the Court’s focus in the Rice case on the distinction between who counts as a Hawaiian and who does not, especially since the issue was “vehemently interrogated” by the justices of the Court. She maintains that both Breyer and Scalia focused on the construction of blood quantum requirements under the HHCA as justifying what she terms the “logic of dilution”, whereby blood quantification is used to undermine native peoples conceptualization of who they are and where they belong. Indeed, Scalia invoked hypothetical numbers such as having “195th Hawaiian blood” to suggest that definitions of one’s ancestry based on kinship and lineal descent are arbitrary, while Breyer evoked the figure of the “remote” ancestor to dismiss as irrelevant indigenous peoples identification based on an inclusive regard for ancestry. 78

Kauanui contends the outcome of the Rice case was “predicated on the politics of race and entitlement” inscribed by the HHCA, which has served the function of erasing indigeneity and alienating
Hawaiians from their land. Such blood quantum policies imposed on tribal people on the continent have had similar consequences, but in Hawai‘i, Kauanui maintains the blood quantum requirement has enabled “white American economic, political, and social domination” to endure through such manifestations as the Rice decision. 79 I would suggest Kauanui’s point can be extended even further within the context of the effects of Western law on Hawaiian history. As noted in the first chapter of this work, the dispossession of Hawaiian land as a consequence of the Māhele and Kuleana Act can be tied to the rise of white privilege and power that led to the overthrow of the Hawaiian Kingdom and annexation by the United States, which resulted in the enactment of the HHCA that was subsequently adopted by the State of Hawai‘i as a requirement of the Admission Act, all of which manifested themselves in the Rice v. Cayetano decision. From a historic perspective this sequence contains a valuable lesson, as it clearly shows how the events of the colonial era affected those of the post-colonial, and continue to affect the events of the present neo-colonial era.

As an intervention in CRT, Kauanui’s work provides another perspective through which to view the effects of race and “color-blind” ideology as related to indigenous peoples, that should prove valuable to the field and allow it to more fully interrogate the role race and racism play in American society and law today. This does not mean the field of CRT holds little value for native peoples, however, but that it must enlarge the scope of its vision if it is to be of greater value to indigenous communities in America that face not only discrimination and subordination, but dispossession and a certain genocidal logic of disappearance as represented by blood quantum requirements in the law.

In closing this chapter, I would like to return again to the CRT argument against “color-blind” ideology as it presently exists in America as expressed by Cheryl Harris. In her view, the present day use of this “color-blind” jurisprudence used by the Court in the Rice case, which maintains that all racial identities are symmetrical and thereby hold no social significance, actually embraces the same logic the Court relied on in the Plessy case of 1896 that served to uphold segregation under the law. I would suggest that any CRT analysis of this circular evolution in the law from the 1890’s to the 1990’s,
when “color-blind” constitutionalism began to negatively affect affirmative action programs across the United States, would benefit from, and be strengthened by an understanding of the chain of events related to the effects of the law in Hawaiian history that led Harold Rice to file his claim.

Endnotes Chapter 2

4. Id. at 559
11. Id. at 226-227.
14. Id. Dissenting opinion Sec. I. Par. 3.
15. Id. Majority Opinion Sec. II. Par. 2.
16. Id. Sec. II. Par. 4.
17. Id. Sec. II. Par. 6.
18. Id. Sec. Sec. II. Par. 7.
19. Id. Sec. II. Par. 8.
20. Id. Sec. II. Par. 9.
21. Id. Introduction Majority Opinion Par. 3.
22. Id. Sec. II. Par. 10.
25. Id. Sec. II. Par. 12.
26. Id. Dissenting Opinion Sec III. Par. 2.
27. Id. Majority Opinion Sec.III. Par.1.
28. Id. Sec. III. Par. 2.
29. Id. Sec. III. Par. 2.
30. Id. Sec. III. Par. 3.
31. Id. Sec. III. Par. 6.
32. Id. Sec. III. Par. 8.
33. Id. Sec. III. Par. 9, 10.
34. Id. Dissenting opinion Sec. III. Par. 2, 3.
35. Id. Sec. III. Par. 5.
36. Id. Sec. IV. Par. 1, 2.
37. Id. Majority Opinion Sec. IV. Par. 1.
38. Id. Sec. IV. Par. 2, 3, 4.
39. Id. Sec. IV. Par. 5, 7.
40. Id. Sec. II. Par. 5.
41. Id. Sec. II. Par. 5.
42. Id. Sec. II. Par. 6, 7. “Apology Bill” Public Law 103-150 U. S. Congress 1993.
43. Id. Sec. II. Par. 8.
44. Id. Sec. II. Par. 9.
45. Id. Sec. II. Par. 10.
46. Id. Sec. II. Par. 11.
47. Id. Sec. II. Par. 12.
48. Id. Majority Opinion. Sec. Sec. IV. Sub. Sec. C. Par. 2.
49. Id. Sec. IV. Sub. Sec. C. Par. 2.
50. Id. Sec. III. Par. 10.
51. Id. Dissenting Opinion Sec. III. Par. 7,8.
52. Id. Sec. III. Par. 9.
53. Id. Sec. III. Par. 10.
54. Id. Sec. III. Par. 12.
55. Id. Majority Opinion Sec. IV. Sub. Sec. A. Par. 4.
58. Id. Sec. IV. Par. 2.
61. See Ch. 1 for details.
63. Ibid. at 1340.
65. Ibid. at 1165-1166, 1188.
66. Ibid. at 1201-1202.
67. Ibid. at 1242.
78. Ibid. P. 183.
79. Ibid. P. 183.
Chapter 3:
Legal Challenges to Hawaiian Programs and Effects on Political Activity in Hawai‘i

The *Rice v. Cayetano* decision of 2000 has led to eight subsequent legal challenges to legislation and programs benefitting Hawaiians, while intensifying the sense of urgency among Hawaiian political activists and the State of Hawai‘i to pursue their varying plans to resolve outstanding sovereignty claims. This chapter will first discuss the nature of the legal cases filed, and the reaction of the Court’s to their claims in comparison to the *Rice* decision, which all eight cases cited as precedent. The effects of the case on sovereignty politics and initiatives by the State to resolve outstanding land claims will also be examined in order to better understand the disparate strategies incorporated by each to reach their stated goals.  

The eight legal challenges filed since the *Rice* decision in 2000 all cite the case as legal precedent for their claims, and all refer to the historic chain of legal events discussed previously, especially the HHCA and the blood quantum requirement, which the plaintiffs claim discriminates against non-Hawaiians. The irony of this claim is underscored by comparison with the blood quantum’s negative consequences for Hawaiians, but again exemplifies the nature of “color-blind” constitutionalism as understood presently by opponents of affirmative action programs. The plaintiffs in these cases, who are not Hawaiian in any sense of lineal descent, all claim they are “Hawaiian”, referring to the fact they were either born in Hawai‘i or reside here now, and therefore deserve the same benefits as Hawaiians.  

Like Harold Rice, some are descended from missionary families associated with the “Big Five”, most notably Thurston Twigg-Smith, descendant of Lorrin Thurston, arch annexationist and member of the “Committee of Safety” that overthrew Queen Lili‘uokalani.  

This fact, combined the nature of the legal challenges filed, all of which aim to dispossess Hawaiians of land or dismantle programs designed to compensate for past discrimination, allows for a continued analysis of these events from
the perspective of CRT. Of particular relevance to this discussion is the work of Mari Matsuda, “Looking to the Bottom: Critical Legal Studies and Reparations”, in which she lays out a framework by which the courts could better determine the difference in status between victims and perpetrators, and thereby better serve justice. In the context of the Rice decision this framework could allow for further clarity in perspective regarding the rights of the victim as compared to the perpetrator, and the connection between Matsuda’s theory and the dismissal by the courts of some of these cases due to the fact they found the plaintiffs lacked standing will be explored when applicable.

Matsuda’s theory of distinguishing between victims and perpetrators discusses means to establish whether plaintiffs have standing that can be applied in the Hawaiian context, and incorporates some basic principles of reparations the courts could employ. The concept of reparations for past wrongs challenges what Matsuda describes as the “close and ordered relations between the disputants”, as it situates group rights against those of the individual, suggesting the victim group members would be the plaintiffs and the perpetrator descendants and beneficiaries of past wrongs the defendants. In the cases filed against Hawaiian programs since Rice, the plaintiffs voice a prime concern of those opposed to a reparations model of justice, that people who were not involved in perpetrating the injustices of the past are being burdened equally with the descendants of those who were. I would say this objection can be overcome in the context of the creation of OHA, where a majority of the population voted to approve the voting restrictions struck down by Rice.

Matsuda’s theory maintains that because the experience of discrimination against Hawaiians as a group is verifiable and continues to affect their demographics, the connection between the victims and the perpetrators must exist, with this evidence of continuing group damage serving to satisfy the idea of “horizontal unity” in the law. She states that because non-Hawaiians continue to benefit from the wrongs of the past that injured Hawaiians, such as the loss of land and resources, educational opportunity, and political recognition, they would fall into the defendant class based on the continuing stigma and harm to the plaintiffs stemming from the historic wrong. Finally, Matsuda’s theory
of a model of reparations considers the issue of “foreseeability”, which requires the contemplation of the consequences resulting from a particular act, which she claims, “would have required no clairvoyant skill” in the Hawaiian context of loss of political sovereignty and land base. To those who would argue these events happened too long ago to be relevant to the present, such as the plaintiffs in the cases citing Rice, Matsuda’s theory of victim reparations requires the time only be limited to “the ability to identify a victim class that continues to suffer a stigmatized position enhanced or promoted by the wrongful act in question.”

Eric K. Yamamoto offers a perspective on reparations that is relevant to Matsuda’s theory in his article “Racial Reparations: Japanese American Redress and African American Claims”. Yamamoto bases the discussion of reparations around the topic of Japanese American redress, noting that claims for reparations by African Americans and Hawaiians invariably cite the reparations given to Japanese Americans. He also states that African Americans and Hawaiians can learn how to best structure their claims by looking to the Japanese American model as legal precedent, moral compass, and political guide. Yamamoto states that the vantage point of his work is that of groups seeking reparations, with a focus on helping these groups to frame concepts, craft language, and determine a strategy for the journey of reparations.

Yamamoto states there are both positive and negative aspects to the process of redress. Though reparations are assumed to have a salutary impact on the groups receiving them, and can be transformative for these groups in their struggle against oppression, the process also risks the dangers of entrenched victim status, image distortion, and mainstream backlash. Instead of viewing reparations as “compensation”, Yamamoto offers a view of reparations as “repair” of broken relationships through justice. He notes that reparations that repair are costly and require change, which entails the loss of some advantages for the powerful in society and therefore creates resistance. The resistance takes the same forms discussed above in relation to Matsuda’s work, the reliance on existing civil rights laws, lack of intent by the wrongdoers, lack of standing of the claimants, and the difficulty of
calculating exact damages. The problem with this kind of formal legalism is that it works poorly to deal with inter-group conflict, as groups seek to preserve their dominance and privilege by denigrating other groups and excluding them from economic, political, and social opportunities through systematic racial oppression. ⁸

Yamamoto states that without a shift away from the individual rights and remedies paradigm that presently governs the law, claims of reparations face formidable challenges unless they can recast their claims to fit the traditional form. He makes the argument that Japanese Americans only succeeded in their reparations claims because they were able to fit them within the individual rights paradigm. The Japanese claims addressed a specific executive order, were based on the existing constitutional norms of equal protection and due process, the claimants were easily identifiable, their imprisonment caused damage and injury, the damages were limited to a fixed time, and payment meant finality to the issue. Yamamoto writes that because of this framing of the case, the traditional legal rights and remedies paradigm actually bolstered the internees’ claims for reparation. ⁹

Because legal arguments against reparations for Hawaiians appear compelling when claims are cast within this narrow legal framework and carry a heavy burden of proof, Yamamoto counsels a dual strategy. The first path would focus on legal claims with limited numbers of claimants that are well defined in time and place, similar to the internment of Japanese Americans, while the second, and simultaneous strategic path would focus on the distortions of narrow legal framing and reconceptualize the law broadly as a key component of a larger political strategy that entails communicating counter-narratives to the dominant story, and attracting media attention to help organize the Hawaiian community politically in support of reparations claims. Yamamoto states that when law and the process of litigation are recast in these terms so that reparations claims are framed both within the narrow law-based paradigm, and beyond it in terms of moral, ethical, and political dimensions of “repair”, reparations can address the present-day conditions of the historically oppressed group, and
act to heal the breaches in the larger social polity. Reparations claims can thereby be justified as essential to the health and welfare of the community of color, in this case Hawaiians, but also to the nation.  

Opponents of reparations, however, have underlying political and social objections that relate to money, power, and privilege. Critics wonder where the money will come from and whether the cost of “doing justice” will damage the economy, they calculate how reparations could be shaped to advance the interests of mainstream America, and they question how reparations will alter the existing racial order. Yamamoto writes that these objections by the dominant interests illumine questions regarding the likely impacts of reparations. Will the benefits to claimants have a lasting or temporary effect? Will the process reopen old wounds and inflame them rather than healing? Will there be political and societal backlash against beneficiaries by disgruntled dominant group members and other groups of marginalized people who have not received reparations? Yamamoto has no clear answers to these questions, but notes they are part of the dilemma and ideology of reparations that need to be sorted through rather than avoided.

Regardless of the legal and political objections to reparations, Yamamoto states the socio-psychological benefits of apologies and reparations is significant. Japanese Americans who received redress responded with a collective sigh of relief, and one woman said the process had “freed her soul”. For Hawaiians, who have received an apology but no redress, the process is still unfinished and requires two insights into specific reparations efforts, one that Yamamoto defines as normative, and the other as descriptive. The normative goal should be aimed at restructuring the institutions and relationships that gave rise to the injustice, otherwise the root problems of power and privilege that led to oppressive systemic structures cannot be addressed by reparations. The descriptive goal entails that those seeking reparations draw on the moral force of their claims, while simultaneously recasting reparations in a way that benefits those harmed while furthering some larger interest of mainstream America.
For Hawaiians, who are seeking reparations from the United States and the State of Hawai‘i for the loss of their land base and sovereign government, these concerns are very real. Reparations that restore the land base and alter the governing structures are seen by increasing numbers of Hawaiians as essential to creating and maintaining functional and positive relationships among themselves, the federal and state governments, and the non-Hawaiian citizens of Hawai‘i. The repair paradigm Yamamoto suggests is remarkably similar to that of Matsuda. It entails the recognition of historic wrongs by one group that harmed and continues to harm another group, and that has damaged present-day relationships between the groups, which in turn has damaged the larger community. Within this framework, Yamamoto states that,

“reparations by the polity and for the polity are justified on moral and political grounds—healing social wounds by bringing back into the community those wrongly excluded.”

Yamamoto notes that the legacy of Japanese American reparations may well be tied to their support for repairing other groups’ wounds and mending the tears in the fabric of society. However, the fact that so many lawsuits have been filed against programs that benefit Hawaiians brings up a darker question: Just how important is it to Americans to participate in repairing the tears in the fabric of society and mending other peoples’ wounds?

Because the suits were all designed to dismantle federal and state supported programs that assist Hawaiians in areas including education, health, and housing, Matsuda and Yamamoto’s analysis and critique are valuable and relevant, however, as noted previously, CRT has little to say regarding the issue of blood quantum which relates to these cases, as they all refer back to the HHCA and its 50% definition of who counts as “Hawaiian”. Kauanui’s critique of these developments will be included here, as the issue of blood quantum in these cases is inescapable, and illustrates not only its divisive nature among the Hawaiian population, but also how non-Hawaiians can use it as a weapon against Hawaiians in the continuing legal debate over issues of citizenship, identity, land, monetary revenues, and legal rights.

While researching the cases, a noticeable pattern emerged that gives insight into the nature of the
conflict over race in Hawai‘i, and the role history plays in influencing both federal and district courts in their consideration of the claims. Whether brought by those in favor of dismantling programs established to benefit Hawaiians, or filed by Hawaiians in defense of these programs, the legal justification for these cases all fell along lines of “color-blind” constitutionalism, while their resolution often relied on the “guardian-ward” relationship Justice Stevens referred to in his dissent of the Rice verdict. Unfortunately, both of these categories serve to deny Hawaiians the right to define themselves under the law, as both ultimately rest on the HHCA blood quantum definition and the recognition of the federal government assigning the obligation of its trust relationship to the state as required by the Admission Act.  

For example, in the first suit filed in the United States District Court in 2001 following the Rice decision, *Carroll v. Nakatani*, two non-Hawaiian residents of Hawai‘i sued the state over the creation of OHA and the Hawaiian Homestead Commission, and the implementation by the two state agencies of particular programs benefitting Hawaiians. The District Court found the first resident, who had filed an incomplete loan application with OHA and never responded to requests for additional information, could not demonstrate he had been denied equal treatment because he was not able and ready to compete on an equal basis for an OHA loan. This process would have required a change in the qualifications of the lease program, which in turn would require the participation of both the State of Hawai‘i and the United States, a reference to the adoption of the HHCA as per the Admission Act. The second resident, who had never filed a loan application with OHA, could not establish standing because he had only presented a generalized grievance which the United States Supreme Court has repeatedly refused to recognize as a basis for establishing standing. In 2003 the Ninth Circuit Court of Appeals affirmed the judgment of the District Court in each case.  

The next suit, *Arakaki v. Cayetano*, was first filed in 2002 in the United States District Court, but was not resolved until 2007 under the name *Arakaki v. Lingle* in the Ninth Circuit Court of Appeals, as the governor’s office had changed hands in the intervening years. Arakaki, joined by Thurston Twigg-
Smith, who was mentioned above in reference to his missionary and “Big Five” connections, filed the lawsuit against the State of Hawai’i challenging the provision of benefits by OHA, the Department of Hawaiian Homelands (DHHL), and the HHCA to “native Hawaiians” and “Hawaiians”, citing the Rice decision and its ruling regarding race-based voting restrictions under the Fifteenth Amendment as precedent for their claim. This occurred in the beginning of March and was followed by two separate motions to intervene by late March, filed by native-Hawaiians seeking to protect their interests. The State Council of Hawaiian Homestead Association (SCHHA), and Josiah L. Hoʻohuli and other native-Hawaiians were both granted their motions to intervene. However, the motion filed by Hoʻohuli and the others brings to light the ability of the blood quantum to divide Hawaiians, as the two interests in their motion included ensuring native-Hawaiians continued to receive benefits, and limiting the class of eligible beneficiaries to native-Hawaiians and exclude the broader class of “Hawaiians”.

The shadow of the Rice decision can be seen in this strategy of native-Hawaiians to protect their interests, even at the expense of other Hawaiians, because of the Court’s reliance on the misalignment of beneficiaries that was a major finding in their ruling. However, the legal journey of the Arakaki case had just begun. In May of 2002, the district court dismissed the suit on the basis of the plaintiff’s lack of standing, ruling that their claim for relief, invalidating the stated purpose of the Admission Act trust, amounted to a generalized grievance rather than a direct injury. In June of 2002, the district court denied Hoʻohuli’s motion to intervene for two reasons, first, the plaintiff’s public land trust claims had been dismissed, therefore Hoʻohuli had no protectable interest in those claims at the time, and that his intervention asserting that benefits should be limited to native-Hawaiians was not raised by the parties, and therefore separable from the plaintiff’s remaining equal protection challenge. Furthermore, in regards to that challenge, the court ruled that because the State of Hawaiʻi had the same ultimate objective, defending the State laws upholding its responsibilities under the Admission Act, Hoʻohuli and the other native-Hawaiians were adequately protected.

The case went to the Ninth Circuit Court of Appeals, where the judge removed the HHCA from the
case declaring that element to be a political question, but stopped short of dismissing the lawsuit, instead sending the case back to the United States District Court to determine if the plaintiffs were able to prove standing in any other capacity. In 2007 the court ruled the plaintiffs had no standing, and the case was finally put to an end. However, as Kauanui mentions regarding the case, the plaintiffs, in disregard “of the blood identity particular to Hawaiians, argue that ‘Hawaiian’ should be used to describe all Hawai’i residents.”

The Arakaki case thereby represents both perspectives of the negative consequences of the imposition of blood quantum on Hawaiians, dividing Hawaiians amongst each other, while providing legal fodder for proponents of “color-blind” jurisprudence. The element of the “guardian-ward” relationship is also exemplified in two ways, first by the court finding Hawaiians were adequately represented by the State of Hawai’i because of their similar interest, and second by the court removing the HHCA from the suit because this was deemed a political question that involved the government of the United States. The next case to be filed, Kahawaiola’a v. Norton, can also be seen as an example of the “guardian-ward” status that keeps Hawaiians from asserting self-determination. As the Kahawaiola’a decision demonstrates, the “guardian-ward” principle when recognized by the courts can determine the level of scrutiny applied to the case, which can be the determining factor in the outcome.

The ruling in the Rice case, coupled with the threats to Hawaiian programs brought about by the continuing litigation, caused some Hawaiians to pursue federal recognition arguing that it would protect them, in the manner it does Native Americans, from constitutional challenges of equal protection. The Kahawaiola’a case, first filed in the United States District Court in 2002, had this as its goal. Patrick L. Kahawaiola’a and other Hawaiians, including Ka Lāhui Hawai’i, a group dedicated to ending the “guardian-ward” status, brought suit against Gale A. Norton in her capacity as Secretary of the Department of the Interior (DOI), seeking the right to apply for federal acknowledgment as an Indian tribe. The court was presented with the question of whether excluding native Hawaiians from
the DOI’s regulations acknowledging the federally recognized status of tribes comprised discrimination under the equal protection component of the due process clause of the Fifth Amendment.  

The court found that because of the history of Supreme Court decisions deferring to Congressional plenary power over the tribes, including the power to grant, modify, or eliminate tribal rights, a suit seeking to direct Congress to federally recognize a tribe would be considered non-justiciable as a political question, and that this also applied to the federal government’s recognition or failure to recognize a tribe. Because of this, and because the Supreme Court upheld the federal government’s right to legislate for the tribes as “political” due to their quasi-sovereign nature, rather than “racial” in the Mancari decision, the Kahawaiola’a case was judged under the standard of rational basis, the most deferential basis of scrutiny as opposed to the suspect scrutiny standard invoked by racial classifications. The court thus found it was rational for Congress to provide different types of entitlements and protection to Hawaiians than Indian Tribes recognized by the federal government. Subsequently, in 2005 the Supreme Court denied certiorari, and the case was over.

The results of this case illustrate both the power of the “guardian-ward” relationship, and the relative weakness of the doctrine when compared to the power of federal “tribal” recognition. The “guardian-ward” status did not protect Hawaiians from the “strict scrutiny” standard of judicial review the OHA voting requirements were subject to in the Rice case, while the court’s deference to Congress in regards to granting “tribal” recognition contained the Kahawaiola’a suit seeking such recognition to the “rational basis” standard of review applied when there are no “suspect” grounds. The subject of voting rights, however, when combined with racial classifications, as was the case in Rice, can serve to corrupt otherwise legitimate grounds for limiting the franchise.

The next suit, John Doe v. Kamehameha Schools, was first filed in the United States District Court in 2003, but rather than proving divisive among Hawaiians because of the blood quantum definition discussed previously, the case served as a rallying point of unification. The reason for this has much to do with the school’s history and what it represents to Hawaiians, whether they attend Kamehameha
or not. Kamehameha Schools are supported by the charitable trust of Princess Bernice Pauahi Bishop, a great-granddaughter of Kamehameha I who had inherited vast amounts of land from her cousin Princess Ruth Keʻelikōlani. Because the school is situated on lands that represent the heritage of the Kamehameha’s, and was founded in 1887 prior to the overthrow of the Hawaiian Kingdom, Hawaiians consider the resources used to fund the school as part of a collective inheritance, and rallied in unity when it was threatened by the lawsuit. 23

The suit was filed on behalf of John Doe, who was not named because of his status as a minor, by his non-Hawaiian parents, who claimed their son’s civil rights had been violated because he had not been admitted to the school due to its policy preferring Hawaiians. In response to John Doe v.Kamehameha Schools, defenders pointed to the United States Internal Revenue Service’s decision to approve the schools’ admissions policy favoring Hawaiians when it deemed the school a charitable trust, primarily because of the diversity represented by the student body. As of 2001, the Hawaiian students enrolled at Kamehameha Schools identified with several different races, including white, Chinese, Japanese, African American, Native Alaskan, American Indian, East Indian, Arab, and Brazilian. This exemplifies the inclusive nature Hawaiians feel towards each other, regardless of appearance or blood quantum, that stems from the Hawaiian cultural emphasis on genealogy, ancestry, and kinship, and speaks to the recognition referred to by Kauanui in her comments regarding the case, that “Hawaiian only does not mean only Hawaiian”. 24

The United States District Court found the school’s admissions policy valid, stating the design of the policy was to redress the significant educational deficits Hawaiian children faced, and that Congress had recognized the importance of such action. To quote from the case,

Congress intended that a preference for Native Hawaiians, in Hawaii, by a Native Hawaiian organization, located on the Hawaiian monarchy’s ancestral lands, be upheld because it furthers the urgent need for better education of Native Hawaiians, which Congress has repeatedly identified as necessary. 25

The case went to the Ninth Circuit Court of Appeals in 2005, where the court ruled that the admissions program’s racial preference for Hawaiians, if serving as a complete bar to non-Hawaiians,
violated the Civil Rights Act of 1991. However, the court granted an en banc review of the case in 2006, in which they vacated the 2005 decision and upheld the school’s policy based on the rationale quoted above. The Supreme Court subsequently denied certiorari in 2007 and the case of John Doe v. Kamehameha Schools was put to rest.  

The continuing conflict between the “color-blind” ideology that led John Doe’s parents to file suit against Kamehameha Schools, and the “guardian-ward” relationship that exists between the federal government and Hawaiians can be clearly seen in the resolution to the case. It is interesting to note, however, that unlike the case of Kahawaiola’a, where the government’s “guardian-ward” stance precluded Hawaiians suing for tribal recognition, in the John Doe case the “guardian-ward” relationship served to protect Hawaiian interests in the area of educational opportunity, thus illustrating the complex and somewhat unpredictable nature of the relationship between Hawaiians and the federal government.

The next lawsuit to be filed, Day v. Apoliona, renewed similar dynamics of the Arakaki case discussed previously, as it involved some of the same native Hawaiians, namely Ho’ohuli and Kahawaiola’a, who joined with Day in this effort to sue the current and former trustees of OHA pursuant to 42 U.S.C.S. § 1983, for breach of trust for providing services to Hawaiians that did not meet the HHCA blood quantum requirement of 50%. The suit was first filed in the United States District Court in 2006, and alleged that OHA misspent trust funds in a manner inconsistent with the purposes listed in the Admission Act. The district court dismissed the complaint, holding that it failed to allege an Admission Act violation that was enforceable under § 1983, and that the law in the court’s opinion had been effectively overruled by a United States Supreme Court decision, Gonzaga University v. Doe of 2002.  

The case next went to the Court of Appeals for the Ninth Circuit, which found the district court in error, noting the considerable line of precedent by which the circuit court had held that Native Hawaiians as beneficiaries of the trust have a right to sue under the Admission Act, and that contrary to
the district court’s opinion the recent Supreme Court cases had not overturned the prior case law. The court concluded that violations of this right may include expenditure of funds for purposes not enumerated under the Admission Act, but left it to the district court to interpret those purposes and whether or not Day’s allegations were true. The appellate court in deciding to remand the case back to the district court made reference to the legal confusion surrounding the issue when it stated,

In doing so, we recognize the sore lack of judicial guidance on this point and the uncertainty this lack of guidance has injected into the policymaking environment. Cases related to the OHA’s expenditure of funds for Native Hawaiians have reached our court on numerous occasions, but we and the district court have shed little light on the merits of § 5 (f) claims. 28

The case was remanded back to the district court for further proceedings in 2007, where a motion to intervene Kuroiwa v. Lingle was filed by six non-Hawaiians, including Thurston Twigg-Smith, seeking to dismantle OHA altogether rather than force it to use its resources only for native Hawaiians. Their claim was similar to previous claims of discrimination against non-Hawaiians by the state and OHA over being denied benefits of the trust as “citizens” of Hawai’i, and the motion was denied for lack of standing, bringing an end to the case in 2008. 29 The case therefore represented an affirmation for native Hawaiians in their attempts to secure their trust rights, even at the expense of Hawaiians they sought to exclude from these rights, and a continuation of the “color-blind” quest by non-Hawaiians to intervene in the legal process and assert what they claim are their rights as “citizens” of Hawai’i.

As the history of the litigation that followed the Rice decision makes evident, every law suit has been related to issues of land and resources that can be connected back to the events that served to legally dispossess Hawaiians of their land and government, while reminding them they have little power to act as a result of the “guardian-ward” relationship forced upon them by the federal government. In the next case to be discussed, Hawai’i v. OHA, the state of Hawai’i itself, which the courts had said would protect Hawaiian interests when denying the motion to intervene in the Arakaki case by Ho’ohuli, would argue that it could sell ceded land parcels, even though Hawaiian claims to the lands remained unresolved. 30
The case *Hawai‘i v. OHA* was brought to the supreme Court of Hawai‘i on a writ of certiorari in 2008 by then Governor Lingle and the Housing Finance and Development Corporation, who argued that enjoining the removal of a parcel of land from the public land trust without first resolving native Hawaiian claims, was in error. This move by the state was in response to OHA asking for a disclaimer that required the preservation of Hawaiian claims based on Public Law 103-150, the Joint Resolution passed by Congress in 1993 apologizing to Hawaiians for their loss of sovereignty, which stated that 1.8 million acres of land had been ceded to the United States as a result of the Newlands Resolution without the consent of or compensation to the Native Hawaiian people or their sovereign government. 31

The issue was which law took precedence, the Admission Act, which gave the State of Hawai‘i title to all public lands and authorized the state to use or sell the ceded lands, as long as the proceeds were held in trust for the benefit of the citizens of Hawai‘i, or the Congressional Joint Resolution, which although apologizing to Hawaiians for the loss of sovereignty and land, contains a disclaimer stating that “nothing in the Joint Resolution is intended to serve as a settlement of any claims against the United States.” 32 Because the state court decision stated it was dictated by the Joint Resolution of 1993, the United States Supreme Court was given jurisdiction, and it found that the Resolution’s conciliatory language was not the kind that Congress used to create substantive rights enforceable against a State, and that the state court was in error as the “Whereas” clauses in the Resolution were not operative and did not indicate an intent to amend or repeal the rights given to the State under the Admission Act. The Supreme Court reversed and remanded the Hawai‘i Supreme Court’s judgment in a unanimous decision. 33

Although Governor Lingle said at the time the state had no plans of selling ceded land parcels, but only wanted to clarify its legal right to do so, the case brought to the forefront the inherent conflict in interest between the State of Hawai‘i and Hawaiians regarding the resolution of ceded land claims that stem from the overthrow and annexation, while undermining the court’s claim in the *Arakaki*
case that Hawaiian interests were adequately protected by the state. Though the Joint Resolution of 1993 takes great care to relate the history of dispossession of Hawaiian land and sovereignty, the case of Hawai‘i v. OHA shows the continuing relevance of the Newlands Resolution and the Admission Act to circumvent legal challenges to the state’s jurisdiction over the ceded lands trust.

The last of the cases filed since 2000 that cite the Rice decision in their claim, Corboy v. Louie, was brought to the Hawai‘i Supreme Court in 2011 by non-Hawaiians seeking the elimination of property tax exemptions available for Hawaiians leasing Homestead land. As previously, the plaintiffs argued the tax exemptions involved race-based discrimination and violated their civil rights under the law. The State effectively argued that the exemptions were not based on race, but on leaseholder status. The Hawai‘i Supreme Court found again that the plaintiffs lacked standing, as they were not interested in participating in the homestead lease program, and dismissed the case. Subsequently, the United States Supreme Court denied a writ of certiorari in 2012, and the case was put to rest. 34

Of the cases reviewed above, four involved litigation brought by non-Hawaiians seeking to prove the benefits afforded to Hawaiians under the various laws that govern the state discriminated against them in violation of their civil rights, Arakaki v. Cayetano/Arakaki v. Lingle, Carroll v. Nakatani, John Doe v. Kamehameha Schools, and Corboy v. Louie. Three of these four were dismissed by the courts when they found the plaintiffs lacked standing, while the Kamehameha Schools case was decided in favor of the school’s admission policy, partly on the basis of the diversity of the student body, but primarily based on the need to counteract significant educational deficits affecting Hawaiian students. In the three other suits claiming racial bias against non-Hawaiians, the “color-blind” ideology underlying the claim was successfully deterred by the power of the “guardian-ward” relationship that exists between the government and Hawaiians which was recognized by the courts.

Aside from the power of the “guardian-ward” relationship to protect Hawaiian interests against proponents of “color-blind” constitutionalism, it can also be seen as limiting Hawaiian efforts to stand independently before the law, as was the case in Arakaki when Ho‘ohull’s motion to intervene was
denied, and in *Kahawaiola‘a* where Hawaiians were precluded from suing for tribal recognition. In addition, it is of interest to note that the historic circumstances surrounding the cases where the plaintiffs were denied standing closely parallels the model of identifying victims and perpetrators Matsuda proposes.

For example, the plaintiffs under her model become the defendants, as they represent the descendants of those who perpetrated the past wrongs, such as Thurston Twigg-Smith, Harold Rice, and those who continue to benefit from those wrongs, which would include the non-Hawaiians involved in the claims. While the defendants in turn become the plaintiffs, due to the evidence of continuing damage suffered as a result of the loss of land, resources, and sovereignty brought about by the historic wrongs of the perpetrators, which would also allow the courts to identify Hawaiians as the victim class. Whether these considerations were part of the court’s decision to find the plaintiffs lacked standing in the cases or not, the results of their decision indicate that Matsuda’s theory could be applied to the law with positive consequences for groups of people who have suffered historic wrongs.

The three cases where blood quantum issues served to divide Hawaiians, *Arakaki v. Cayetano*, *Kahawaiola‘a v. Norton*, and *Day v. Apoliona*, can be more clearly understood when viewed through the lens provided by Kauanui’s work, in which she utilizes a letter to the editor of the *Maui News* written in 2005 by Samuel L Kealoha Jr., who, it should be noted, was a party to all three cases. In the letter Kealoha criticizes the state and OHA for their efforts to establish a “Native Hawaiian governing entity” that has no blood quantum requirements, and voices concern this policy would lead to a “tsunami wave of Hawaiians” that would “endorse the obliteration of indigenous Hawaiians” 35

Kauanui discusses five areas related to the concerns “native Hawaiians” such as Kealoha express in regard to “Hawaiians”, over the issue of blood quantum and entitlements. First, Hawaiians with the required 50% feel that Hawaiians with less than 50% constitute a threat to entitlements, such as Hawaiian Homestead land, where the waiting list of Hawaiians that qualify by virtue of blood
quantum continues to be backlogged. Secondly, because Hawaiians with 50% are considered “real”, it follows they should be the most entitled in regards to political claims against the United States, as they are most in need of protection, which Kauanui points out was part of the rationale of the colonizers when negotiating the blood quantum requirement of the HHCA in 1921 based on the logic of dilution.  

This logic of dilution illustrates the conflict between concepts of indigeneity that emphasize inclusivity versus those focused on the exclusive nature of blood quantum, which Kauanui’s work shows has been used since the creation of the HHCA to “enact, substantiate, and disguise” the appropriation of Hawaiian land, while obscuring and erasing sovereignty claims and “conceptions of identity as a relation of geneology to place.” Another troubling legacy of blood quantum related to the concept of identity Kauanui is questioning through Kealoha’s letter, is that the 50% rule has left non-Hawaiians with an exclusive perception of who counts as a real Hawaiian because of being enshrined in the Admission Act, the creation of OHA, and was also cited as a major factor in the Court’s decision in the *Rice v. Cayetano* case which received wide notoriety in Hawai‘i and on the continent.

Finally, Kauanui notes that as a result of the *Rice* decision defenders of Hawaiian specific sources of funding and institutions cite the HHCA as proof of the United States trust obligation towards Hawaiian people that is foundational to their efforts to gain federal recognition, which again is mired in the concept of blood quantum requirements because of its reliance on the HHCA. Kauanui’s analysis of Kealoha’s letter thus helps to clarify the most important issues that divide Hawaiians as a people, and stem from being defined by blood quantum rather than lineal descent, and also goes a long way in helping to explain the troubling divisiveness among “native Hawaiians” and “Hawaiians” exhibited in the three cases cited above. The final part of the chapter will examine the effects of the *Rice v. Cayetano* decision on sovereignty politics and state initiatives in order to better understand which groups favor a resolution of Hawaiian claims through federal recognition, and which prefer the arena of international law.
Effects of Rice v. Cayetano on Sovereignty Politics and State Initiatives

The previous section discussing how the issue of blood quantum affected the cases reviewed in which it was cited, and the problematic effects it has had on Hawaiian unity ended with Kauanui’s finding that the defenders of Hawaiian institutions and funding sources were motivated by the *Rice* case and the Supreme Court’s references to the HHCA in their findings to push for federal recognition of the Hawaiian people. This was in reference to the State of Hawai‘i and its representative agency OHA and their efforts to organize a “Hawaiian” government entity, and has a dual motivation.

First, in order to avoid the inconsistency, pointed out by the Court in the *Rice* case, of implementing OHA programs including all Hawaiians under the rubric of the HHCA, which only provided by definition for native Hawaiians of 50% or more, the state government is proposing to have Hawaiians federally recognized through a Native Hawaiian governing entity. The paradox for Hawaiians is that the United States government and the state of Hawai‘i are not invested in this goal for the sake of enabling Hawaiians to establish true sovereignty, but the opposite, as federal recognition would serve to limit the claim Hawaiians have to full sovereignty and extinguish title to the lands that were taken in the events leading to annexation to the United States. This land consists of the 1.8 million acres of kingdom, crown, and government land the Joint Resolution of 1993 refers to as being taken without any compensation to the Hawaiian people or their government. 39

Although federal recognition would thereby resolve the state’s unresolved problems regarding Hawaiian land claims, it could also be used to dispossess Hawaiians of more land in the name of protecting them from more litigation like the cases discussed above. Another serious problem with federal recognition is that it could establish the 50% rule within the context of the potential Hawaiian governing entity, as the HHCA did in 1921, which restricted the identity of the Hawaiian people by “redefining the relationship of the people to the lands in question.” 39 As Kauanui makes clear, the
issue of Hawaiians being identified by blood quantum is again at stake, as proponents of the Akaka Bill, sponsored by Senator Daniel Akaka, are restricting the form the nation may take by redefining the lands kingdom, crown, and government lands spoken of above as “public lands”. 41

Two claims back the legal rationale for the legislation that would change Hawaiian political status. First, the history of the overthrow of the Hawaiian monarchy in which United States military forces took part, and for which the Joint Resolution passed by Congress in 1993 calls for reconciliation. The second that the HHCA is already evidence of an existing trust relationship between the United States government and the Hawaiian people, and federal recognition is understood as an extension of this relationship. As Kauanui notes, relying on the HHCA as evidence of a political relationship, when it clearly constructed “native Hawaiians” as beneficiaries based on a racial blood quantum, is highly problematic. Another ironic juxtaposition of the proposed legislation is that it portrays Hawaiians with the 50%, who were once deemed as the most incompetent and therefore the most in need of protection, as the “bearers of the nation and carriers of the Akaka bill.” 42

The Akaka bill’s reliance on the HHCA presents other problems as well, the first of which is related to its legislative status. The HHCA is a congressional act, not a treaty, which the United States and the Hawaiian Kingdom had affirming friendship, and regulating trade and commerce. Although these treaties have never acknowledged by federal policy towards Hawaiians, they were never viewed in the same manner as those made with Indian tribes, and constitute a strong argument that the kingdom should still be viewed as a foreign nation under the commerce clause of the United States Constitution. The second major problem is related to the Rice case and the lawsuits filed subsequently which charge the HHCA is a race-based classification. As a result, the measure is opposed by many senators who are reluctant to expand rights for indigenous Hawaiians based on racial lines. 43

Since the Akaka bill was first proposed the nature of the definition regarding “Native Hawaiians” has concerned both opponents and proponents of the legislation, as it would serve to determine and possibly limit which of the Hawaiian people could participate in the creation of the governing
body recognized by the United States as the Hawaiian nation. There is evidence as well that the Department of the Interior, tasked with overseeing any Hawaiian governing entity, wants to limit the definition to those Hawaiians acknowledged by the definition in the HHCA, thereby continuing the legacy of the blood quantum. Although Senators Akaka and Inouye have portrayed the bill as giving Hawaiians sovereignty, Kauanui’s assessment regards the push for federal recognition as a move to compel Hawaiians to surrender title to their lands.  

The framework described above certainly evokes past efforts to “rehabilitate” Hawaiians, while maintaining control over the land and resources that were taken over 100 years ago, and continue to be a source of legal contention. In addition, the creation of a beneficiary group defined by blood quantum and the race of its people, as opposed to the creation of a sovereign entity that defines its collective by genealogical practices that serve to bind people to one another and to their place on the land, also creates contention. Those who support Hawaiian independence under international law have been galvanized by this development, as it restricts claims to unresolved issue of land and resources to United States domestic policy and law.  

The group Ka Lāhui Hawai‘i, which has long advocated for the termination of the “guardian-ward” relationship between Hawaiians and the federal and state governments, favors a form of the “nation-within-a-nation” model resembling American Indian nations, and has formed a constitution and political agenda that poses an alternative to the state and OHA’s vision. The group argues for federal recognition of Hawaiian sovereignty and self-government on an identifiable land base, and opposes efforts by the State legislature, OHA, and the Department of Hawaiian Homelands, to settle sovereignty claims through financial remuneration rather than land. Ka Lāhui Hawai‘i also favors Hawaiians having standing to sue in both state and federal courts for breaches of trust, and insists that the best way to help Hawaiians flourish in their homeland and practice their cultural traditions is to sever the continuing wardship of the Hawaiian people that effectively keeps them under federal and state control.
The Joint Resolution passed by the United States Congress in 1993 to commemorate the 100 year anniversary of the illegal overthrow of the Hawaiian Kingdom also provides impetus for those who favor a restoration of Hawaiian sovereignty under international law. Specifically, it contains two elements that could benefit any reconstituted Hawaiian nation, first, it defines “Native Hawaiian” as, “any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii”, and that the Hawaiian people had never “relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States”, whether through their monarchy, plebiscite, or referendum. 47

Accordingly, as Hawaiian sovereignty was not lost through conquest or cession, the rights so referred to in the Joint Resolution are still in place under international law, and have led to still more debate among Hawaiians as to the best course to pursue. Keanu Sai, who represents the Hawaiian Patriotic League of the Hawaiian Kingdom which supports the restoration of the kingdom, points out that the United Nations process of decolonization is aimed at peoples who have not already attained independence, and notes that Hawai‘i had been recognized as a nation-state in 1842 when the United States, France, and Britain had recognized Hawai‘i’s independence through treaty relations. Sai argues that because the American Congress annexed Hawai‘i unilaterally through its own domestic law, the kingdom was never really annexed and is currently being “occupied” by the United States in violation of international law principles created during the Hague Convention IV in 1907, under which regulations Sai argues the recovery process should occur. 48

This stance entails a detail that creates tension between indigenous and non-indigenous claims to Hawaiian sovereignty, as the Hawaiian Kingdom allowed non-Hawaiians citizenship, thereby posing the question of whether non-Hawaiians would be eligible for citizenship in the modern Hawaiian nation. Henry Noa, representing the group Reinstated Kingdom, also supports the restoration of an independent Hawaiian nation, however, in a manner that would certainly preclude non-Hawaiian participation as citizens. The most obvious manifestation of this was the group’s logo that appeared
on t-shirts asking “Got Koko?”, the koko being a reference to Hawaiian blood, under which were printed the words “Jus solis, Jus sanguinis, Jus because”, a direct and humorous reference to place of birth, right of blood, and the pidgin dialect so commonly used in Hawai’i. 49

This tension may between indigenous and non-indigenous claims regarding Hawaiian sovereignty may be more theoretical than substantive, however, as clearly non-Hawaiian citizens of the kingdom did not suffer the same indignities as Hawaiians under United States rule, as exemplified by the imposition of the 50% blood quantum and its negative consequences to Hawaiian unity in the face of the colonial oppressor. Kauanui proposes a model for independence that could resolve the issue without forfeiting Hawaiian claims under international law, whereby descendants of non-Hawaiian citizens of the kingdom would be protected by the kingdom’s sovereign jurisdiction, which in turn would fall under the right of self-determination of the Hawaiian people, who consented to nationhood in the form of the monarchy that was overthrown in 1893. 50

The discussion above once again brings to the forefront the issue of race and the law that is the primary focus of this work. The split in the sovereignty movement between Hawaiians who favor federal recognition similar to that of native Americans and those who would see the restoration of an independent nation-state through the decolonization or de-occupation of the Hawaiian Islands, does not relieve Hawaiians of the persistent and troublesome question that Kauanui’s work explores regarding who counts as Hawaiian, and thus whom to include and exclude in the modern Hawaiian nation, regardless of which model of self-governance and sovereignty Hawaiians choose. 51

This chapter has examined the effects of Rice v. Cayetano locally in Hawai’i through the law suits filed since 2000 that cite the case, and the affect the decision has had on sovereignty activities and state initiatives towards federal recognition. The next chapter will focus on comparing the means used by the colonizers to dispossess Native peoples on the continent of their lands, with the methods used by the colonizers in Hawai’i to accomplish that same end. The chapter will also discuss how the Rice case could possibly impact the Mancari decision that protects tribal legislation on the continent.
Endnotes Chapter 3


2. Ibid. P. 175.


5. Ibid. Pgs. 70-71.


8. Ibid. p. 488.


10. Ibid. p. 493.

11. Ibid. p. 495.

12. Ibid. p. 518.

13. Ibid. p. 522.


15. Rice v. Cayetano (98-818) 528 U. S. 495 92000) Dissenting Opinion, Sec. II.


18. Id. Sec. I. Par. 7.


21. Id. P. 1.


26. Id. Case History.


28. Id. Conclusion.

29. Id. Subsequent History.


32. Id. P. 4.


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35. Ibid. Pgs. 172-173.
36. Ibid. P. 174.
37. Ibid. Pgs. 174-175.
38. Ibid. P. 175.
40. Ibid. P. 195.
41. Ibid. P 196.
42. Ibid. P. 184.
43. Ibid. P. 186.
44. Ibid. P. 188.
45. Ibid. P. 189.
49. Ibid. P. 193.
50. Ibid. P. 193.
51. Ibid. P. 189.
Chapter 4:

The impact of colonialism and Western law on indigenous peoples around the world has been interrogated by scholars interested in understanding the dynamics of oppression that assisted the European and American colonizers in their goals of conquest and domination. The law not only served the needs of commerce and capitalism by producing free labor and privatized land, it was also seen by the colonizers as part of the “civilizing” process by which the “uncivilized” peoples of the world could benefit. The law could provide the colonized with ways of resisting the capitalist appropriation of land and labor brought by the colonizers, but only for those who understood its form and function, and who were thus already part of the process of change the law represented for native peoples. ¹

The focus of the first part of this chapter will be on comparing the means used by the colonizers to dispossess Native Americans of their land with those used in Hawai‘i, and to illustrate how the law was used in both contexts to rationalize the appropriation of Native lands. The influence of United States laws for Native Americans on laws affecting Hawaiians will also be discussed. On the American continent, the United States built on models already tested by the Spanish, French, and British to take lands held by Native Americans, resorting to treaties easily made and broken, outright warfare, and genocidal policies of extermination that more often than not used the law as a justification. Alexis de Tocqueville commented on this in his work Democracy in America, when he compared the policies of the Spanish, who exterminated Native Americans as though they were animals, with that of the Americans, who accomplished the same end “without violating a single great principle of morality in the eyes of the world. It is impossible to destroy men with more respect for the laws of humanity.” ²

Although de Tocqueville’s observation contains much sarcasm, his comments give voice to how the law was manipulated to justify whatever means necessary for removing Indians from lands Americans
considered were part of the “manifest destiny” of the nation. Studies of this phenomenon have led scholars in the field to observe that American Indian law was tied to the means by which whites displaced Indians, and the courts adopted policies that served to rationalize that displacement. This heavy reliance on the law is seen as typical in colonial settler societies where there were “extreme imbalances of power”, and the law was used to execute oppressive policies of acquiring native lands for settlement. Rather than being used to gain the consent of the dominated indigenous populations, which is a poor explanation considering the violence employed by the colonizers, the law was used in this context to meet the needs of the colonial groups to maintain cohesion and morale while also serving to “gain international approval for their policies.”

In the United States, congressional plenary power over the tribal nations is primarily reliant on the commerce clause of the Constitution, but can also be linked to the powers of Congress to make war and treaties, adjudicate property, and regulate foreign affairs. These powers were seen as vesting Congress with almost unlimited power in contexts not involving tribes, but gradually through the law, came to characterize Congress’ power over Indians as well. The absence from the Constitution of any general power over tribal affairs stems from the fact that Founding Fathers regarded the tribes as sovereign nations, and thus the powers that gave the federal government authority in the international arena were deemed sufficient to deal with the Indian tribes. President Washington and the first Secretary of War, Knox, followed the policy of the British Crown of dealing with the Indian tribes as sovereign nations for practical reasons, as attempts by some states under the Articles of Confederation to seize tribal lands had resulted in conflict, and the new nation could hardly afford the expense of a drawn out conflict with the tribes.

Washington and Knox advocated that new treaties should be negotiated with the tribes in order to acquire land by consent, promising the treaties would protect the tribes and their land from the incursion of white settlers in exchange for the land cessions. The treaty powers of Congress and the executive branch were also implemented by means of the Trade and Intercourse Acts of 1790, which
were designed to effectuate treaty promises by imposing sanctions on states and individuals who infringed on Indian land or violated the treaties with the tribal nations. This arrangement was solidified by the Supreme Court in the case of Worcester v. Georgia in 1832, in which Chief Justice John Marshall upheld the power of the federal government over that of the states in regards to tribal matters. Marshall’s defense of federal power over the tribes was premised on his view the tribes were sovereign nations whose rights to govern themselves predated the Constitution, and therefore tribal treaties with the United States were governed by principles of international as well as constitutional law.  

The Court’s decision in Worcester, although recognizing the tribes possessed sovereign rights, actually served to subjugate those rights to Congress, thereby setting the stage for judicial deference to congressional power over Indian affairs similar to that accorded to Congress in foreign affairs. This application by the courts of federal foreign affairs power, without distinguishing the status of the tribes as domestic foreign nations, had the unfortunate consequence of allowing Congress to abrogate treaties the United States no longer found desirable by passing a subsequent statute that conflicted with the treaty under the last-in-time rule. This doctrine was applied throughout the history of American relations with the tribes, and is still used by the courts today when the federal government wants to alter treaty rights with Indian tribes, even though tribes are no longer regarded as foreign nations.  

Another result of the court’s application of foreign affairs power to the tribes was the frequent use of the political question doctrine as justification for failing to question Congress’ power in cases that involved the tribes. Although the courts made an analogy between the tribes and foreign nations in allowing Congress to deal with them, they did not view the tribes as possessing the same attributes of sovereignty of a foreign nation, but held in the case of Cherokee Nation v. Georgia in 1831, that tribes were considered to be “domestic dependent nations”, and that their relations with the United States “resembles that of a ward to his guardian”, and had no standing to sue.  Therefore, despite the protests of
the majority of the Cherokee people to the President and Congress of the United States that the treaty had been made by a minority of the tribe, they were removed from their land and forced to march to Indian Territory along what has come to be known as the “Trail of Tears”. Despite the obvious injustice of this act, judicial recourse was unavailing, as the political question doctrine barred the courts from questioning the procedures of the treaty that led to the removal of the Cherokee Nation.  

This period where treaties could be made or broken based on the plenary power of Congress and the establishment of the “guardian-ward” relationship between the federal government and the tribes, which took place due to the Court’s deference to Congress in the exercise of foreign affairs power, left the tribes in the truly anomalous position of being viewed by the United States as foreign nations and dependent subjects simultaneously. This resulted in the forced removal of the eastern tribes West of the Mississippi by the 1850’s, but as white settlers began pouring into the west after the Civil War continued removal came to be seen by the government as impossible, and the movement to assimilate Native Americans into American culture began in the 1870’s when treaty making ceased.

The colonizers had different reasons to coalesce behind this new policy of assimilation, some benign, though most were rationalizations to dispossess the Native Americans of more land. Regardless, both sides of the debate in white society over assimilating the tribes into society agreed it would help to “civilize” the Native Americans and lead them from their “barbaric” practices. The colonial projects of the 19th century were founded on the ethnocentric conviction of the colonizers that people who lived in different ways than they did were in need of “civilizing”, which would have a transforming effect on them and their culture, moving them forward into the modern world of the colonizers. Equality, however, was another matter as the white colonizers of the time saw biological differences between themselves and the non-white people they were concerned with “civilizing” as immutable markers of innate character, which presented a barrier the colonized could not cross.
Those Americans moved by more benign motivations argued that by becoming citizens, voters, and land owners, Native Americans could protect themselves from the depredations of settlers, and from the federal government, which had by then broken several hundred treaties with the tribes over the previous 100 years. While those moved by more cynical motives saw that the end of the reservation system meant large portions of surplus reservation land could then be sold to settlers after the Native Americans had received their “allotments”. For the remaining territories, the end of the reservation system meant they could then incorporate the land and become states, as the federal promise to the tribes that reservation land could never be contained within a state had now disappeared. The new “Era of Allotment and Assimilation” began when the House of Representatives decreed in a rider to the Appropriations Act of 1871 that Indian nations and tribes would no longer be recognized as independent nations with whom the United States could make treaties, making Native Americans subject to domestic law.  

With the end of the treaty era, Congress began to enact laws designed to implement the new assimilationist policies, however, as many of these new laws could not be seen as effectuating treaty promises or regulating trade, the Court was forced to develop new rationales of law to justify federal actions towards Native Americans. The concepts of property interest and guardianship were gradually developed in the late 19th century into a firm “guardian-ward” relationship of power between the tribes and the federal government, even though the Court acknowledged the power to be extra-constitutional. The central element resulting in the guardianship power of the federal government over Native Americans relied on the notion that the government had a property interest in tribal land, the source of which was the Doctrine of Discovery, first used by Chief Justice Marshall in 1932 in the case of Johnson v. McIntosh of 1823.  

Marshall held that the European discovering nations, and America as their successor, by virtue of discovering a nation of non-Europeans, obtained a property interest which he described as “ultimate title” to that land. This title gave the government the right to purchase Native American land or con-
fiscate it after a war, but that the Native Americans remained the occupants of the land, with a legal and just claim to retain possession of the land. Because of this doctrine, no one purchasing land from Native Americans could obtain title in fee simple to the land without obtaining the government’s interest as well. Though the concept as expressed by Marshall provided some protection to Native Americans in theory, in practice it worked to support virtually unreviewable federal power over the lands Native Americans held. Subsequent Court decisions worked to name the government’s interest as a title interest and the tribes’ as a possessory one, which led the courts to regard the ownership of the land as giving the government the right to govern the tribes. 14

The case of United States v. Kagama in 1886 added to the government’s ownership interest the role of protector, where the Court, in reaffirming federal power over that of the states relied on the presumption that the federal government’s ownership of the land the Native Americans lived on which gave the government the right to govern them, also generated a duty of protection. The Court reasoned this duty of protection arose because of the tribes reliance on the government for daily food and the protection of their political rights from the states, which had given them no protection. The very weakness of the tribes, largely due to the federal governments dealings with them in the course of 100 years of broken treaty promises, has made them wards of the nation, and with this duty of protection, comes the power. Thus, Kagama, through firmly establishing the federal government’s power over Native Americans, who were not citizens and therefore could not vote, allowed policymakers to deny tribal people the basic rights and freedoms accorded to other Americans. 15

Racial and cultural prejudice undoubtedly played a role in the federal government’s policies towards Native Americans during this time, for although the actions taken were justified by the “guardian-ward” relationship, one key factor in the Court’s finding in Kagama was its view of Native Americans as being racially and culturally inferior to the white man. There was undisguised contempt for indigenous people and their cultures in the colonial enterprise, and it showed in the judicial opinions of the day, where Native Americans were described as “semibarbarous, savage, primitive,
degraded, and ignorant”, while the white race was characterized in terms of being “superior, intelligent, and highly developed”. In addition, the representatives of the government believed implicitly that white civilization was justly replacing the ways of a passing race whose existence could no longer be justified. This ethnocentric perspective helps explain the Court’s acquiescence to the more egregious violations to Native American tribal and individual rights that occurred during this time.  

In the years following the Kagama decision, forced allotment of tribal lands and the assimilation of Native Americans into the dominant culture of the colonizer became the primary policy of the federal government. With the assistance of the courts tribal property was subdivided, with some apportioned to individual members without compensation to the tribe, while the rest was sold to white settlers often at less than market value, with the proceeds from the land sales placed in trust funds to be distributed by the government at its discretion, and as it deemed wise. For example, tribal trust funds were often spent paying missionaries to teach the Native American children the ways of Christianity and white society, without any consultation with tribal leaders. Kagama’s legacy also overshadowed Native America sovereignty efforts, allowing the Court to take tribal jurisdiction from the tribes in crimes involving tribal members, and abrogating tribal self-government rights, the dissolution of tribal governing structures being the ultimate goal.

All of this took place under the General Allotment Act of 1887, also known as the Dawes Act, and which was signed into law by President Grover Cleveland. The subdivisions mentioned above were in tracts broken into various amounts, heads of family receiving 160 acres, single people 80 acres, with all others given 40 acre allotments of land, and the remainder sold to non-Native settlers. At the time of the passage of the Dawes Act tribal lands amounted to nearly two billion acres, which by 1924, through the act and its amendments related to the sale of “surplus” lands, lease arrangements, and other policies the government approved had been reduced to 150 million acres.

Citizenship, which had previously been denied to Native Americans, was now viewed by those who
favored the new assimilationist policy as a means of ensuring the well-being of those who received allotments. As a result, the Dawes Act provided that Native Americans who received allotments under the statute become citizens, permitting them to take part in the political process, and reaffirming the power of the democratic process to mold all citizens to a common standard. President Theodore Roosevelt spoke to this aim in 1901 in his message to Congress when he said,

> The General Allotment Act is a mighty pulverizing engine to break up the tribal mass. It acts upon the family and the individual. Under its provisions some sixty thousand Indians have already become citizens of the United States...The effort should be steadily to make the Indian work like any other man on his own grounds. 19

Citizenship did not alter Congress’ power to legislate aggressively in Native American matters, which it continued to do as the Court had ruled that citizenship did not end the “guardian-ward” relationship, and that individual Native Americans did not have the power to terminate the “guardian-ward” relationship unilaterally. In addition, the Dawes Act made no provision for possible increases in the Native American population, which led critics to charge that it was predicated in a heartless manner on assumptions of a continuing decline in the Native American population. Still, in order to sell the “surplus” land to white settlers there needed to be a determinate population of Native Americans so that the land could be distributed once and for all. This duality of purpose built into the Dawes Act caused it to be internally inconsistent, and again the consequences favored the colonizers at the expense of the colonized. 20

The Dawes Act of 1887 that privatized the communal land of the indigenous peoples on the continent and then made it available for purchase by whites closely paralleled but post-dated the Māhele of 1848 and Kuleana Act of 1850 in Hawai‘i. As discussed in chapter one, the Hawaiian government, in an effort to retain the sovereignty of the Kingdom in the face of European and American threats, adopted western concepts of law and property rights as expressed by the New England missionaries who advised them on matters of political importance. This appropriation of Anglo-American law enabled Hawaiians to retain their sovereignty throughout most of the 19th century, whereas the sovereignty of the tribes on the continent had been systematically eroded through warfare and
broken treaty promises by the United States. Regardless of these differences in context, the results of dividing and privatizing land once held by Natives and allowing settlers to purchase the remainder had similar consequences for Hawaiians and Native Americans.  

Aside from the obvious comparison regarding the loss of indigenous land to colonial settler interests, there were other transformational aspects to the Māhele of 1848, Kuleana Act of 1850, and the Dawes Act of 1887 for the indigenous people affected. The change in land tenure broke apart the relations between the ali’i and the maka’āinana in Hawai‘i, and substituted them with relations of inequality based on the ownership of property rather than on rank and geneology; while on the continent similar dynamics of privatization, individualization, and dispossession greatly weakened the power of tribal leaders over their people, replacing it with that of the federal government. Similarly, although the maka’āinana and the Native American both acquired rights through these laws, including the right to own their own land, their lives were in many cases worsened considerably, finding themselves increasingly displaced from their Native cultures and struggling to survive in the alien culture of the colonizers.

While comparing the effects of the Dawes Act with those of the Māhele and Kuleana Act offers insight into the dispossession of native land and its appropriation by white settlers, a comparison of the Dawes Act with the HHCA of 1921 illuminates other similarities, and an intriguing contrast between the two. The allotment of land to native Hawaiians under the HHCA offered a different form of Native assimilation than occurred under the Dawes Act. Unlike the Dawes Act, which had the goal of detribalizing and assimilating Native Americans by giving them individual land title and making them citizens, the initial goal of the HHCA was to return Native Hawaiians to the land, and rather than helping Hawaiians to assimilate, created concentrated communities of Natives that were almost exclusively Hawaiian. Even though the HHCA promoted individualism, it also instituted a form of racial segregation that marginalized the native Hawaiians who occupied Hawaiian Homelands, rather than serving to promote societal integration in the form of the Dawes Act.
One important similarity between the Dawes Act and the HHCA that should not be overlooked is related to the historic chronology of relations between the United States government, Native Americans, and Hawaiians. Because the annexation of Hawai‘i closely followed the conquest and displacement of Native Americans on the continent, policies implemented by the American government towards Hawaiians were often modeled on prototypes that had been applied previously to Native Americans. The most important of these was the emphasis in the HHCA on blood quantum requirements the Natives must meet in order to qualify for entitlements under the law.  

Although the Dawes Act is often cited as implementing blood quantum classifications among Native Americans, it was not until the Burke Act of 1906 which amended the Dawes Act, that the use of blood quantum was implemented to determine eligibility. Prior to this Congress had made eligibility for allotments under the act dependent, “exclusively on the tribes’ own independent membership determinations.” However, the Burke Act gave the Secretary of the Interior discretion to determine the competency of the Native Americans to own land, which led to a scheme that tied such competency to a percentage of Native blood, which was usually set at 50%. This policy was in use and circulating as the normative standard of United States administrative practice from this time until the enactment of the HHCA in 1921 and had direct influence on the blood quantum provisions in the act that determined Hawaiian leasing eligibility.  

The connection between blood quantum at first being used as an evaluative index of competency, rather than an exclusionary tool, has been established by scholars and speaks to the correlation of scientific theories of social evolution dominant in the United States at the turn of the 20th century with the government’s policies related to allotment. The work of Joanne Marie Barker that Kauanui refers to illustrates that at the time of the implementation of the Burke Act in 1906, “the equation between blood-culture identity and so the ability to quantify it had been naturalized as an accepted scientific truth and so could be institutionalized in policy and administration.”  

The work of Thomas Biolsi is another cited by Kauanui in regards to his comparison of how blood
quantum was used as an administrative technique to facilitate the process of assimilation in regards to the racialization of Native Americans, while the blood principle of hypodescent was utilized against African Americans to ensure segregation of the races. The contradictions in American legal policies based on assumptions that identity is somehow based on blood can be seen in the different ways racial categories were defined, and their respective aims to segregate or assimilate.  

The period of allotment and assimilation of Native Americans that was marked by the adoption of blood quantum criteria subsequently enacted in the HHCA lasted until the 1930’s when Congress, which had been severely criticized for the assimilationist policy, shifted its policy to one of protecting tribal cultures and encouraging self-government among the tribes. The Court in response began to be more receptive to Native American legal claims, with tribes being granted the right to sue as of 1943, followed by Congress in 1946 passing the Indian Claims Commission Act, which removed the barrier of sovereign immunity to monetary claims against the government. As a result of these actions, the Court began to narrow the Plenary Power Doctrine, holding that Congress’ power over Native Americans did not give the United States government the right to appropriate tribal lands for their own purposes without providing just compensation.

As a consequence of this narrowing of the Plenary Power Doctrine, the Court began to rely on specific provisions of the Constitution such as the Commerce clause, the power to effectuate treaties, or both as the source of congressional power over Native Americans. During this process the Court began to redefine the source of congressional power, the “guardian-ward” relationship, which had previously viewed the government’s responsibilities towards the tribes as a moral duty unenforceable by the law. Courts now began to impose duties on the government akin to those imposed on ordinary fiduciaries, with the result that the trust relationship, although not constitutionally based and thereby not enforceable against Congress, in modern day law is regarded as a source of enforceable rights against the executive branch of government and can be used in support of Native American rights.

Unfortunately, the judicial attitude of nonintervention in regards to Congress’ authority over
Native Americans that developed during the era of plenary power remains in the areas of tribal sovereignty and property rights. Tribal sovereignty is characterized as existing “only at the sufferance of Congress”, which also holds “paramount power over the property of the Indians”, which the Court explains is derived “by virtue of Congress’s superior position over the tribes.” This extraordinary congressional power over the affairs of Native Americans has been upheld by the Court in cases where Congress reduced the boundaries of a reservation without tribal consent or compensation, divested tribes of criminal, civil, and regulatory jurisdiction, abrogated treaties, and subjected tribal laws to federal approval. It bears mentioning that these actions by the United States are in opposition to trends in international law, which recognizes the right of indigenous peoples, including Native Americans, to native title in their historic homelands. 29

According to Derrick Bell, the most formidable task in constructing a constitutional framework designed to protect the rights of Native Americans lies in two barriers that must be overcome. First, the legacy of plenary power and the Court’s deference to Congress that impedes the application of meaningful judicial scrutiny of federal actions, and secondly, the long history of discrimination against Native Americans that Bell states has “yet to be fully acknowledged and dealt with by the dominant society.” 30 This is evidenced by the legal issues facing Native Americans today, many of which are shared by Hawaiians, such as the power of federal regulations on Native land, fishing rights, water rights, and the area of blood quantum that continues to define, and divide indigenous peoples in America.

The purpose of the discussion above regarding the means used by the colonizers to dispossess Native people of their lands, and the role of the law in providing justification for these actions, was to provide a basis of comparison between the Native American and Hawaiian historic contexts. By illustrating how the Dawes Act legislation of 1887 influenced the terms of the HHCA of 1921, resulting in negative consequences for both Native Americans and Hawaiians, it could be said that the perspective through which American law views indigenous peoples continues to deny them some of the basic
rights enjoyed and taken for granted by most non-Native Americans. The next section of the chapter will show how this dynamic could be continued by the *Rice* decision with an examination of how the ruling might be used to undermine the *Mancari* precedent that protects tribal interests from race-based litigation.

**Implications of Rice v. Cayetano for Morton v. Mancari**

Legal scholars have expressed concern over the continuing viability of *Morton v. Mancari* to reconcile the body of federal law concerning Native Americans with the ideals of equal protection enshrined in the Constitution as a result of recent Supreme Court decisions such as *Rice*. Their concerns relate to the topic of “color-blind” constitutionalism that presently influences jurisprudence in America, and how it could affect laws concerning Native Americans. The issues involved in the legal debate over equal protection and federal laws that protect Native Americans, such as congressional plenary power over the tribes, the nature of the “guardian-ward” relationship, and the role blood quantum plays in defining Native identity, are all shared by Hawaiians, and therefore can provide insight into the laws’ perspective regarding these issues of common concern for the Native Americans and Hawaiians.

The connection between tribal sovereignty and the effort to eliminate racially discriminatory or preferential policies across the levels of the government might not be obvious, as modern America, conditioned by anti-racist sentiments and the ideal of a “color-blind” society, would expect that the destruction of policies that make racial distinctions would similarly free Native Americans from the legally sanctioned forms of oppression the government had visited on minorities in the past. This symmetrical view of equality, however, is challenged by the Supreme Court’s ruling in the *Mancari* case, which indicates a political rather than racial relationship exists between Native Americans and the federal government, and thereby protects programs that give preference to Native Americans.
If the preferences upheld under *Mancari* were in harmony with the principles of equal protection, there would be no legal challenges claiming racial preferences for Native Americans, however, suits attacking federal programs targeted specifically for Native Americans for using racial criteria have continued to be pursued since *Mancari* was decided in 1974. 32

Although Native Americans also benefitted from the remedial civil rights legislation passed in the 1960’s, including the affirmative action programs the Court struck down in the cases *Regents of the University of California v. Bakke*, and *Adarand Constructors Inc. v. Pena*, the benefits accrued from their status as members of one of the minority groups named as beneficiaries of the affirmative action program, not their membership in quasi-sovereign tribal entities. The concern shared by many in the legal community is that under the “color-blind” rationale, legislation enacted to benefit Native Americans is seen to be congruent to affirmative action programs, and therefore unconstitutional for violating equal protection guarantees under the Constitution. 33

The trouble arises from the fact that the federal government has legally defined Native Americans using both political and racial criteria, as evidenced by the blood quantum requirements discussed previously, and that *Mancari* has served to protect federal programs benefitting Native Americans from equal protection challenges by downplaying the racial component and emphasizing the political element of the federal government’s relationship with the tribes and people they represent. This solution has become increasingly unstable due to the challenges brought to federal policies using racial criteria since the *Adarand* and *Rice* cases, which were decided by the Court using “color-blind” jurisprudence. The concern for legal scholars is that the *Mancari* ruling, by failing to acknowledge the racial component of the federal relationship with Native Americans may “prove to be its undoing.” 34

Of particular interest to note is that the *Adarand* holding, and Justice Steven’s dissent, are seen as dangerous to *Mancari*’s stability as precedent due to their composite interpretation as questioning *Mancari* in subsequent cases, such as *Williams v. Babbitt*, where the Ninth Circuit Court of Appeals denied a challenge to a law that created obstacles to non-Native reindeer ownership in Alaska, but
in the process made potentially damaging remarks concerning the effects of *Adarand* on *Mancari* that legal scholars find misleading, and could provide ammunition for a later court to view *Adarand* as weakening or overruling *Mancari*. In addition, Stevens’ dissent in the *Rice* case, by acknowledging the racial aspects of the federal governments’ relationship with Native Americans, could also lend support to the Ninth Circuit Court’s claims as stated by Judge Kozinski in the *Williams* case when he said, “If Justice Stevens is right about the logical implications of *Adarand* in his dissent in that case, *Mancari*’s days are numbered.”  

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The main concern of legal scholars is that the rationale behind the *Mancari* decision is at a crossroads due to the recent cases that have both ambiguously supported and attacked the principles underlying the case. The case was filed when white employees of the BIA filed suit against Secretary of the Interior Rogers Morton, claiming that the BIA preference for hiring Native Americans violated the newly enacted Equal Opportunity Employment Act of 1972 (EEOA), and the Fifth Amendment. Although the district court held that the EEOA had implicitly repealed the preference at issue, the Supreme Court on appeal reversed, noting that Congress did not intend to repeal the preference with the EEOA, and the preference did not violate the Fifth Amendment. Though the Court in *Mancari* made reference to the unique legal and political status of tribal members, and acknowledged the development of plenary power and its accompanying “guardian-ward” relationship, it refused to admit the BIA preference contained a racial component.  

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Justice Blackmun, writing for the unanimous Court explained the Court’s reasoning in this manner.

Contrary to the characterization made by the appellees, this preference does not constitute “racial discrimination”. Indeed, it is not even a “racial” preference. Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups.  

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Blackmun’s argument in essence makes a distinction between racial preferences and racial discrimination, implying the Court had contemplated there could be racial preferences that were not racially discriminatory, although arguing the preference at issue here was neither. In a related footnote Blackmun argued that the preference was not directed toward a “racial” group, but only applied to
members of “federally recognized” tribes, thus making it a political rather than a racial preference, even though to be considered eligible for the preference one had to be at least “one-fourth or more degree of Indian blood and be a member of a Federally-recognized tribe.”

Blackmun’s opinion acknowledges the blood quantum requirements of tribal membership, however, maintains the preferences do not benefit a racial group, but members of a political group who also happen to be members of that racial group. This kind of legal maneuvering around race is indicative of the problematic nature underlying the Mancari opinion that concerns legal scholars presently. The Court was faced with a difficult decision in the case: it could hold the preference to be racial and thereby in violation of the Fifth Amendment, which would destroy the nation-to-nation relationship between the federal government and the tribes, and intrude into areas where the Court had previously given deference to Congress, or it could choose to explain why the preference was political rather than racial in nature, and thus not subject to the same Constitutional scrutiny as racial preferences. The Court chose to defend the latter position.

Although subsequently the Court made racial distinctions of all types and purposes illegal, it has upheld that race can be one criteria of a selection process, but only one. As the BIA preference used race as only one criteria, Mancari remained on firm legal ground. The Court has generally used Mancari for three purposes: to define the limits of implicit repeals in majority opinions, to justify special federal programs and the legal status of Native Americans, and, in dissenting opinions in cases reforming affirmative action programs, to argue that different types of racial preferences are permissible. The Court has not explicitly questioned Mancari, rather, use of its dissenting opinions has been associated with cases that struck down preference programs, such as Stevens’ dissents in Adarand, and more recently, in Rice. This complicated situation has led legal scholars to believe that Mancari is in urgent need of re-explanation in order to affirm its stability, or be replaced with a law that better harmonizes the relationship between equal protection and federal laws protecting Native Americans.
This situation has led the courts to interpret *Mancari* and its relationship to equal protection rights in different ways. For example, in the case of *Fisher v. District Court*, which involved the jurisdiction of the Northern Cheyenne tribal court over adoption proceedings involving members of the tribe, the Court found the tribal court had exclusive jurisdiction using *Mancari* to justify denying the parties access to non-tribal courts, thereby affirming the concept of the primacy of a tribe’s political sovereign status over the racial categorization of the Native Americans composing the tribe.  

Whereas, the District Court for the District of Columbia in *American Federation of Government Employees v. United States*, a case decided a few months after the Supreme Court’s *Rice* decision, the district upheld a racial preference for Native Americans, but interpreted *Adarand* and *Rice* as changing the level of scrutiny applicable, making strict scrutiny applicable to federal programs benefitting Native Americans in at least some circumstances.

The use of Stevens’ dissents in *Adarand* and *Rice* to weaken *Mancari* is troubling, especially in light of the Ninth Circuit Court’s interpretation in *Williams*, where Kozinski pronounced *Mancari*’s days as “numbered”. In both cases, Stevens argued that the Court should make a distinction between benign programs designed to eradicate racial subordination and invidious programs designed to perpetuate such subordination, rejecting the concept of “consistency” espoused by the majority. As the discussion of the *Rice* case in chapter two illustrated, Stevens’ rationale parallels the anti-“color-blind” argument given by many CRT scholars, however, as misinterpreted by the circuit court in Kozinski’s opinion, the argument becomes one in favor of “color-blind” jurisprudence. Taken in context, Stevens was not referring to the “logical implications of *Adarand*”, but to the unconsidered implications of the majority’s application of the concept of consistency to all race-based programs. This apparent contradiction is what has led to the uncertainty concerning the principles that underlie *Mancari*, and the suggestion it be re-evaluated and reformulated to better harmonize equal protection with federal policy concerning Native Americans.

In the *Rice* case, the majority distinguished *Mancari* from *Rice* when it argued that the OHA
elections were State elections not the elections of a separate quasi-sovereign, and thereby subject to Fifteenth Amendment protections against discrimination in voting, not the exceptions under *Mancari*. Stevens’ dissent argued the State of Hawai‘i was implementing a legitimate program under the trust obligation delegated to the State by the federal government in their relationship with Native Hawaiians, and accordingly used *Mancari* in support of his point. In disagreeing with the majority, however, Stevens implicates blood quantum in his argument, for example when he states,

> But as scholars have often pointed out, tribal membership cannot be seen as the decisive factor in this Court’s opinion upholding the BIA preferences in *Mancari*; the hiring preference at issue in that case not only extended to non-tribal member Indians, it also required for eligibility that Native Americans possess a certain quantum of Indian blood.  

Stevens here makes a cogent argument that although *Mancari* elevated the political aspect of Native Americans’ relationship with the federal government over that of its racial aspect, it did not prohibit consideration of race as a defining aspect of the relationship. He elaborates on this by acknowledging that although the OHA voting qualification had a racial aspect, its function was rooted in the political empowerment of a “once sovereign indigenous class”, that he states eclipses any racial aspect of the classification. Stevens makes a compelling argument for the recognition of a federal trust relationship between Hawaiians and the government as delegated to the State of Hawai‘i in arguing to uphold the OHA voting restrictions, although legal scholars are divided among themselves regarding the issue.

It is Stevens’ willingness to recognize that *Mancari* is not what the Court claimed it to be, and that the government does use race as well as political status to define its relationship with Native Americans, that may work to the advantage of those who wish to interpret *Adarand* as weakening or overruling *Mancari*, as the blood quantum requirement is an unavoidable obstacle to a strict political classification of the preferences. Although blood quantum requirements most often have the deleterious effect of diluting indigenous peoples claims to land by limiting the number of prospective claimants, the issue of what is a racial criterion and what is a political criterion was further clouded by the case of *Harrison v. Department of Justice*, where Sharon Harrison, a descendant of a white
member of the Choctaw tribe who had been adopted was denied a Certificate of Degree of Indian Blood by the BIA, which rejected her claim that her ancestor had become an “Indian” by joining the tribe. 56

The case brings to light the complicated nature of race and the law concerning the legality of the Court considering tribal members to not be Native American for some purposes, and accepting the designation for others, while confirming the necessity of certain racial criteria in Native American law. This in turn provides ammunition to proponents of “color-blind” constitutionalism who favor termination of tribal sovereignty and the federal trust relationship under the pretense of equal protection, and leads to the question of precisely how to define “Native blood”. This issue causes considerable disagreement in the legal community because of the various definitions included in the law regarding defining who qualifies as “Native” for the purposes of federal recognition. Does it depend on having an ancestor who was a member of a recognized tribe, such as in the Harrison case above, or must the ancestor have been a member of the tribe at the time of first contact with Europeans (as is the case with Hawaiians, although blood quantum requirements are also included in the HHCA definition)? Does it refer to recognizable physical or cultural characteristics, living in a particular location, or having a particular lifestyle? All of these questions are implicated in the legal arguments over defining who is a “Native” under the law, and all have been used by the colonizers to deprive Native Americans and Hawaiians of their land, cultural identity, and sovereignty. 57

The inherent malleability of race and how it complicates the issue of justice for Native peoples under the law could be greatly streamlined, and perhaps made less controversial if blood quantum requirements were discarded and replaced by the concept of indigeneity as exposited by Kauanui. This development, however, is unlikely as most non-Native settlers are made distinctly uncomfortable by the sense of rootedness to the land indigeneity implies. Other solutions to the problem might include allowing Native Americans to determine their own tribal membership criteria, or for Congress to eliminate the plenary power doctrine that entails describing tribes as “domestic
dependent nations”, and recognize them as fully sovereign entities, thereby avoiding the conflict between racial criteria and equal protection under the Constitution. However, as the history of federal involvement with the tribes and other indigenous people like Hawaiians suggests, the probability of Congress taking such a normative step towards a solution is highly unlikely.\textsuperscript{58} Another more disturbing alternative to the possible solutions suggested above that has been contemplated by Congress, the courts, and the executive over the last 200 years of American history is to end the special relationship between Native Americans and the federal government altogether, thereby completing the dispossession and assimilation of tribal people by the termination and divestment of their sovereignty altogether. Fortunately, the current Congress and Supreme Court do not favor such a solution, however, there are three developments from the \textit{Rice} case that may arise in future litigation that are important to recognize. First, a differently comprised Court could overrule \textit{Mancari} altogether, secondly, the Court could explain \textit{Mancari} in a major case that affirms the ruling, and finally, the Court could partially overrule \textit{Mancari} and overhaul its principles to better resist the arguments made against it by proponents of “color-blind” constitutionalism, who would like to disassemble the structure of affirmative legislation protecting the rights of indigenous peoples.\textsuperscript{59} As legal scholars have noted, the area of federal law concerning Native Americans and other indigenous peoples in America is contradictory at best, and serves to radically curtail just compensation for past injustices. Sharon L. O’Brien states the matter succinctly in the following quote.

> The government’s inability to acknowledge or rectify these inconsistencies in administering its relationship with American Indians has led to inequitable treatment among the tribes and Indian peoples, has resulted in the courts continuing divestment of tribal authority in an era of self-determination, and has placed the United States in the position of violating evolving international legal norms of indigenous rights.\textsuperscript{60}

As the quote illustrates, in this situation created by the United States government, Native Americans lose when the courts try to harmonize the conflict between racial criteria and federal law affecting policies related to them. Regardless of whether the underlying strategy of the federal government be assimilation or termination, the end result for indigenous peoples is the same: disappearance. The
consequences of the *Adarand, Williams,* and *Rice* decisions will only be fully realized as the courts grapple with these issues in future cases, but certainly denying indigenous people the right to define themselves deprives them of the opportunity of self-determination that would allow for a true consideration of the needs of Native American communities, including Hawaiians.

The discussion above of the implications the *Adarand, Williams,* and *Rice* cases hold for *Mancari,* and the role of protection it provides for Native Americans from equal protection claims, indicates the danger of the *Rice* decision being used to deny the sovereign interests of Hawaiians, and also to undermine the legal grounds by which Native Americans on the continent are protected from such claims. Through this development we can trace the tragic irony of history come full circle, as the enactment of the HHCA in 1921 with its blood quantum requirements on Hawaiians was directly influenced by the Burke Act of 1907 which imposed blood quantum requirements on Native Americans, and now, the decision by the Court in the *Rice* case affecting Hawaiians has served to undermine and could overturn the *Mancari* ruling that protects Native American interests on the continent. Although this modern day scenario is unfolding under the rationale of “color-blind” constitutionalism instead of “civilization”, “rehabilitation”, or “assimilation”, as did events of the colonial and post-colonial past, the fact that the law continues to serve the interests of the colonizer over those of the colonized is a reality that cannot be ignored.

End Notes Chapter 4:

4. U. S. Const. art. I§8, cl. 3, cls. 11-16, art. II§2, art. IV§3.

10. Ibid. P. 68.


17. Ibid. Pgs. 72-73.


22. Ibid. P. 95.


29. Ibid. Pgs. 76-77.

30. Ibid. P. 78.


38. Id. at 554.
40. Id at 297.
48. Id. at 311.
49. Id at 311.
Conclusion

The focus of this work on the topic of the *Rice v. Cayetano* case and the application of “color-blind” constitutionalism to law affecting Native peoples is to examine the effects of the decision on Hawaiian interests, so as to better understand the effects “color-blind” jurisprudence could have as applied to law affecting tribal interests on the continent. The topic fits into the larger historic context of how the law was used by the European and American colonizer societies as a tool of dispossession, while also being appropriated by indigenous societies in the service of Native resistance to colonial aggression.

Part of the interest and relevance of studying the law as a functioning part of colonial, post-colonial, and present day neo-colonial societies, is to interrogate how the law reflects and acts to perpetuate the cultural values of the dominant system, whether implemented by force by the colonizers or adopted as a strategy of survival or protection by the colonized. The *Rice* case also allows for a critical case study of how one white family of influence representing the dominant culture can affect the law over several generations, and continue to do so as the *Rice* decision travels through the American legal system and affects the federal governments relationship with both Hawaiians and Native Americans.

The work also exemplifies how a CRT analysis of “color-blind” constitutionalism can provide critical insight into the issues of discrimination, subordination, and exclusion that affect indigenous peoples and ethnic minorities in America, but how CRT also fails to fully examine the unique consequences this form of jurisprudence has on indigenous peoples. The connection of blood quantum to the dynamics of dilution, assimilation, and the eventual disappearance of Native people in America is an issue Critical Race theorists should include in their analysis in order to widen the fields’ useful nature in helping to better understand issues of race and racism in American culture.

Another relevant area the work examines is the effect of the *Rice* decision on sovereignty politics
and activism by Hawaiians, and initiatives backed by the State of Hawai‘i, which have both been given a new sense of urgency to resolve the outstanding land claims that stem from the overthrow of the Hawaiian Kingdom and annexation by the United States. How these issues will be decided is uncertain as the Hawaiian community remains divided over the path sovereignty should take. The latest initiatives by the State of Hawai‘i and Governor Abercrombie to control that path, and Hawaiians’ mixed reaction to these moves help to illustrate the problem.

Kaka’ako Makai and Kana’iolowalu are the two state initiatives under consideration presently, and a discussion of their intent, how they have been framed by the State of Hawai‘i and OHA, and how they have been received by the Hawaiian people will bring this work to a close. Kaka’ako Makai is a land deal between the State of Hawai‘i and OHA designed to settle the debt the state owes to OHA for back rent on ceded lands, which has been agreed to be approximately 200 million dollars, and has been left unsettled for over 30 years. Although OHA would prefer cash in order to fund the many educational and community outreach programs it sponsors, Governor Abercrombie instead offered 10 parcels of land in Kaka’ako. According to the OHA website video presentation, OHA plans to develop the parcels and use the income stream to fund their programs, and views the land swap and the “trickle down” effect of these programs as an investment in the Hawaiian economy. ¹

The parcels currently generate approximately 1.1 million dollars per year, and cost more than 200 thousand dollars per year to manage and maintain. OHA holds the title to the parcels, which include waterfront and mixed use commercial zoning. Though the OHA representative Mālia Ka‘aihue notes that OHA is still researching the land and its’ provenance, she admits that two of the parcels are part of the ceded lands trust that OHA receives rent from already. In addition, there are serious environmental issues involved that will complicate developing the parcels into commercially viable properties. Much of the land is loose landfill that would require costly engineering to develop safely, and the parcels are also polluted by ash and lead from two incinerators that operated in the 20th century. ²
Although Ka‘aihue minimizes the impact these environmental and political issues will have, the OHA website specifically states that these parcels will not be sold, and considers them to be part of the land base of the new Hawaiian nation. In light of the compromises that were part of the creation of the HHCA in 1921 that allowed the Territorial government to maintain control over the prime agricultural and ranching lands at the behest of the “Big Five, while allocating poor and unimproved land to the Hawaiian homesteaders, the Kaka‘ako Makai land swap reminds us that the State is still manipulating the situation for its’ own benefit. Similar dynamics are at work here as in the 1920’s, with the State maintaining control of 1.2 million acres of ceded land, yet offering to the Hawaiian people, through its’ proxy OHA, ten parcels of marginal property as the basis of the nation.

Kana‘iolowalu, also known as the Native Hawaiian Role Commission, is part of Act 195 and originated with the State’s effort to recognize Native Hawaiians as the indigenous people of Hawai‘i as per SB1520. Act 195 began the process of federal recognition by creating a commission responsible for enrolling Native Hawaiians and their supporters on a list that will be used as the basis of participation in the National Hawaiian governing entity. However, once again the State of Hawai‘i remains involved, with Governor Abercrombie appointing the commission, and OHA supporting it with funding. According to Act 195, the definition of a “qualified Native Hawaiian” is an individual who is descended from the “aboriginal” people who lived in the islands prior to 1778, or who was one of the “indigenous” people who were eligible in 1921 under the HHCA or a lineal descendant of that individual, or someone who has maintained a “significant cultural, social, or civic connection to the Native Hawaiian community and wishes to participate in the Native Hawaiian governing entity”, and is eighteen years of age or older.  

This muddy definition of a “qualified Native Hawaiian” could therefore include all Hawaiians regardless of blood quantum, only those Hawaiians descended from the beneficiaries of the HHCA in 1921, or as the act reads, non-Hawaiians who want to participate in the new governing entity and that have cultural ties with the Hawaiian community. The act further stipulates that once the roll of
qualified “Hawaiians” is finalized by the commission, they will participate in a convention to organize the new Hawaiian nation under the auspices of OHA. Once the commission has published notice of the updated roll of qualified Native Hawaiians it will be dissolved by the governor, who has reaffirmed the delegation of federal authority to the State of Hawai‘i to address the conditions of the Hawaiian people as per the Admission Act of 1959, and has acknowledged the members of the qualified Native Hawaiian roll to be the “indigenous, aboriginal, maoli population of Hawai‘i.”

At first glance, certain problematic issues with the act are readily apparent, first and foremost being that OHA is responsible for funding the initiative. Because OHA is a creature of the State of Hawai‘i and is dependent on it for resources, the State in essence controls the process. Of equal importance is the division in the Hawaiian community over the role of OHA positioning itself as the nation, as those Hawaiians who oppose the initiative and do not join the role are by definition excluded from participating in the creation of the new governing entity, and thereby the nation. This development has again served to divide the Hawaiian community, as those who approve of OHA as representing the Hawaiian nation remain in conflict with those who do not.

For example, former governor John Waihe‘e, who favors the initiative, insists that it would not preclude independence, and is not restricted to supporters of the Akaka Bill, but to those who want to see a Hawaiian “self-governing entity pursue its’ dream”. In this statement Waihe‘e is urging the Hawaiian people to unify around the “nation”, but that nation is represented by OHA. Other Hawaiians, such as Lana Ululani Robbins, a graduate of Kamehameha Schools, portray Kana’iolowalu as a scam that would dishonor the memory of Queen Lili’uokalani, cleverly associating the roll with the oath of loyalty Hawaiians were forced to sign during the Republic, and the mele ‘ai pohaku Kaulana nā Pua, the famous song of resistance where Hawaiians said they would rather eat rocks than sign the paper of the enemy. 5

An article on the issue written by Adam Keaweoka‘i Kīna’u carefully illustrates the problematic nature of Kana’iolowalu and the Native Hawaiian Rolls Commission. He begins with the name itself,
which if spelled “Kanai Olowalu” means a simultaneous wave or wellspring of support, but when spelled as it is presently refers to the American sea captain Simon Metcalf, who in 1790 massacred the village of Olowalu on Maui, earning the name “Ka Na’i Olowalu” or “the Butcher of Olowalu”.

The second point Kīna’u makes is that the initiative reminds him of other informal plebiscites on self-determination that have been promulgated by the state in recent years, such as the Hawaiian Sovereignty Elections Commission (HSEC) and Kau Inoa. His point is that these initiatives are more about the State of Hawai’i measuring how much support it has from Native Hawaiians, than providing any real form of sovereignty.  

Kīna’u goes on to say that unless the State formally adopts the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), thereby proving it has no ulterior motives, then the Hawaiian people will be faced with registering themselves every time a new governor is elected, because there is no standard by which the State and the Native Hawaiian people can be held accountable. He also takes issue with the process of registration, which allows people to submit their documents of ancestry for verification, but also allows people to register their relatives. Kīna’u correctly observes that this could lead to a situation where people who oppose the list could be registered without their knowledge, or that dead people could be registered to pad the roll.

The final unresolved issue that he raises concerns those Hawaiians on the waiting list for Hawaiian Homelands who feel they are being intimidated to register as a way of proving their Hawaiian blood, and have not been given assurances their lack of registration would not affect their place on the list. In sum, Kīna’u states that “there are too many unresolved issues that should have been taken care of first before moving to this step, if this step is even necessary at all”, and that he hopes this “Kana’iolowalu does not turn into another Ka Na’i Olowalu.”

Given my research into Hawaiian history and the insights gained from a CRT analysis of the events that led to the present circumstances, I would state that the two developments of Kaka’ako Makai and Kana’iolowalu should be viewed with great caution. Hawaiians have good reason to be suspicious
of the latest moves by the State of Hawai‘i to control the ceded land trust by framing OHA as the nation, especially considering the unsavory nature of the historic record of American actions in Hawai‘i. Although the outcome of these events is not certain, and Hawaiians remain divided over the best path to choose for the future, it is my hope that this critical analysis of the effects and consequences of the Rice decision will allow for insights that will prove beneficial to the cause of true Hawaiian sovereignty, and justice for the Hawaiian people.

Conclusion Endnotes:

1. OHA.org/page/Kaka‘ako Makai-faqs.
2. Ibid.
3. ACT 195 Kana‘iolowalu, SB 1520 P. 3.
4. Ibid. Pgs. 4-5.
7. Ibid. Pgs. 3-4.
8. Ibid. P. 4.
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25. Trask, Haunani-Kay. *From a Native Daughter: Colonialism and Sovereignty in Hawai‘i*. Honolulu:
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