

An Introduction to the Rights of the Native Hawaiian People

by Jon M. Van Dyke and Melody K. MacKenzie

More¹ than 200,000 people now living in Hawai`i² are descendants of the Polynesian people who had a thriving isolated culture in the Hawaiian islands³ until Westerners started arriving at the end of the eighteenth century. The Native Hawaiians⁴ had a stable political order, a self-sustaining economy based on agriculture and fishing, and a rich artistic life in which they created such things as vividly colorful feathered capes, substantial temples, carved images, formidable voyaging canoes, tools for fishing and hunting, surf boards, weapons of war, and dramatic and whimsical dances.⁵ The newcomers from Europe and the United States brought

¹ Some of the material in the introductory section is adapted and updated from Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POLICY REV. 95-147 (1998).

² OFFICE OF HAWAIIAN AFFAIRS, NATIVE HAWAIIAN DATA BOOK--1996 at 12 (Mark Eshima ed., 1996) (hereafter cited as NATIVE HAWAIIAN DATA BOOK). At least another 60,000 people of Hawaiian ancestry live in other parts of the United States, with about half of those living in California. *Id.* at 20.

³ See generally PATRICK VINTON KIRCH, FEATHERED GODS AND FISHHOOKS (1985); SAMUEL MANAIKALANI KAMAKAU, THE WORKS OF THE PEOPLE OF OLD (1976); DAVID MALO, HAWAIIAN ANTIQUITIES (1951); JOHN PAPA II, FRAGMENTS OF HAWAIIAN HISTORY (1959); E.S. CRAIGHILL HANDY AND ELIZABETH GREEN HANDY, NATIVE PLANTERS IN OLD HAWAII (1972); LILIKALA KAME`ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES--PEHEA LA E PONO AI? (1992).

⁴ The term "native Hawaiian" is defined in section 201(7) of the Hawaiian Home Commission Act, 1920, 42 Stat. 108 (1921), as referring primarily to persons with 50% or more Hawaiian blood, but in other federal statutes this term is used to cover all persons who are descended from the people who were in the Hawaiian Islands as of 1778, when Captain James Cook "discovered" the islands for the Western world. In this article, "Native Hawaiian" is used to refer to all persons descended from the Polynesians who lived in the Hawaiian Islands when Captain Cook arrived.

⁵ See, e.g., JOSEPH FEHER, HAWAII: A PICTORIAL HISTORY 36-132 (1969).

their technology, their religions, their ideas about property and government, and their diseases to the islands.⁶ By the end of the nineteenth century, the Native Hawaiian population had plummeted,⁷ their traditional practices and communal land structures had been replaced by Western models,⁸ the independent Kingdom of Hawai`i had been illegally overthrown,⁹ Hawaiian

⁶ See, e.g., Melody K. MacKenzie, *Historical Background*, IN NATIVE HAWAIIAN RIGHTS HANDBOOK 3-25 (Melody K. MacKenzie ed. 1991); KAME'ELEIHIWA, *supra* note 3; DAVID E. STANNARD, *BEFORE THE HORROR* (1989).

⁷ Estimates of the population of the Hawaiian Islands prior to the arrival of Captain Cook in 1778 range from 300,000 (NATIVE HAWAIIAN DATA BOOK, *supra* note 2, at 4) to 800,000 (Stannard, *supra* note 6). By 1850, the population in the Islands had dropped to 84,165, and by 1872 it had dropped further to 56,897. This population decline was due in part to venereal disease—resulting in sterility, miscarriages, and death—and epidemics such as small pox, measles, whooping cough and influenza. Decline was also accelerated by a low fertility rate, high infant mortality, poor housing, inadequate medical care, inferior sanitation, hunger and malnutrition, alcohol and tobacco use. Over two centuries after European contact many of these situations still exist.

NATIVE HAWAIIAN DATA BOOK, *supra* note 2, at 4.

⁸ See, e.g., MacKenzie, *supra* note 6, at 3-10; Neil Levy, *Native Hawaiian Land Rights*, 63 CALIF. L. REV. 848 (1975); Jon Van Dyke, Williamson B.C. Chang, Nathan Aipa, Kathy Higham, Douglas Marsden, Linda Sur, Manabu Tagamori, and Ralph Yukumoto, *Water Rights in Hawaii*, in LAND AND WATER RESOURCE MANAGEMENT IN HAWAII 146-66 (1979); NATIVE HAWAIIANS STUDY COMMISSION, REPORT ON THE CULTURE NEEDS AND CONCERNS OF NATIVE HAWAIIANS (1983); RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM 1778-1854 (1979).

⁹ Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. 103-150, 107 Stat. 1510 (1993) (hereafter cited as Apology Resolution), Section 1(1), which refers to the "*illegal overthrow* of the Kingdom of Hawaii on January 17, 1893" (emphasis added). The Senate passed this public law on Oct. 27, 1993, the House passed it on Nov. 15, 1993, and President Clinton signed it on Nov. 23, 1993. "Congress drafted the joint resolution with great care because it is an enforceable statute." Lisa Cami Oshiro, Comment, *Recognizing Na Kanaka Maoli's Right to Self-Determination*, 25 N.M.L. REV. 65, 86 (1995).

lands had been taken without compensation to or consent of the Hawaiian people,¹⁰ and Hawai'i had been annexed by the United States as a territory.¹¹ Native Hawaiians are now at the bottom of the socio-economic scale in their own islands.¹²

Ever since the illegal overthrow and annexation, the native people of Hawai'i -- who call themselves "Kanaka Maoli," or "Native Hawaiians," or just plain "Hawaiians" -- have been struggling to regain their culture, recover their lands, and restore their sovereign nation.¹³ Some argue that this process should be undertaken without any governmental assistance while others believe accepting financial support from the state and federal governments is appropriate because these governments have benefitted from their possession of lands that should belong to the

¹⁰ Apology Resolution, *supra* note 9: "Whereas the Republic of Hawaii also ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii, *without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government*" (emphasis added).

¹¹ Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, ch. 55, 30 Stat. 750 (1898) (hereafter cited as the Annexation Resolution).

¹² The average family income for Native Hawaiians in 1989 was nearly \$9,000 below the average income for all families in the State of Hawai'i, and the family income for about one-fifth of the Native Hawaiian families was under \$15,000. NATIVE HAWAIIAN DATA BOOK, *supra* note 2, at 470. During this period, 14% of all Native Hawaiian families were below the poverty level, compared to only 6% of all families in the state. *Id.* at 486. The unemployment rate for Native Hawaiians was 1.5 times higher than the unemployment rate for the statewide population. *Id.* at 545.

¹³ See, e.g., MacKenzie, *supra* note 6; S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309 (1994); Noelle M. Kahanu and Jon M. Van Dyke, *Native Hawaiian Entitlement to Sovereignty: An Overview*, 17 U. HAW. L. REV. 427 (1995); Karen Blondin, *A Case for Reparations for Native Hawaiians*, 16 HAW. B.J. 13 (Winter, 1981); Mililani B. Trask, *Historical and Contemporary Hawaiian Self-Determination: A Native Hawaiian Perspective*, 8 ARIZ. J. INT'L AND COMP. L. 2:77 (1991).

Native Hawaiian people.¹⁴ Some have focused on regaining a land base and becoming economically self-sufficient while others have argued that restoring the Native Hawaiian Nation should come first before any negotiations take place regarding the return of lands. Some favor complete independence from the United States while others favor the establishment of a “nation within a nation” similar to the sovereign status of the large Indian tribes in the 48 contiguous states. Although considerable disagreement exists among different Native Hawaiian groups, the momentum behind the movement for a return of land and a restoration of sovereignty appears to be irreversible.

The 1893 Overthrow and the Uncompensated Seizure of Ceded Lands.

Throughout the nineteenth century until 1893, the United States (A) recognized the independence of the Hawaiian Nation; (B) extended full and complete diplomatic recognition to the Hawaiian Government; and (C) entered into treaties and conventions with the Hawaiian monarchs to govern commerce and navigation in 1826, 1842, 1849, 1875 and 1887.¹⁵ In the year 1893, the United States Minister assigned to the sovereign and independent Kingdom of Hawai‘i, John L. Stevens, conspired with a small group of non-Hawaiian residents of the Kingdom, including citizens of the United States, to overthrow the indigenous and lawful Government of

¹⁴ In 1994, the Hawai‘i State Legislature created the Hawaiian Sovereignty Elections Council as a semi-autonomous body to conduct an election to determine the views of the Native Hawaiian people regarding self-determination. In 1996, this Council conducted a mail-ballot in which 73% of the voters indicated that they favored moving toward self-determination. HAWAIIAN SOVEREIGNTY ELECTIONS COUNCIL, FINAL REPORT 28 (Dec. 1996). Some Native Hawaiian groups boycotted this process because they felt it was tainted because it was financed by the state government, and some have criticized its result, because fewer than half of the Native Hawaiians who received a mail ballot cast their vote.

¹⁵ The description of historical events in this paragraph and the paragraphs that follow is taken from Apology Resolution, *supra* note 9.

Hawai'i. In pursuance of that conspiracy, the United States Minister and the naval representative of the United States caused armed naval forces of the United States to invade the sovereign Hawaiian Nation in support of the overthrow of the indigenous and lawful Government of Hawai'i. The United States Minister thereupon extended diplomatic recognition to a provisional government formed by the conspirators without the consent of the native people of Hawai'i or the lawful Government of Hawai'i in violation of treaties between the two nations and of international law.

Although the Provisional Government was able to obscure the role of the United States in the illegal overthrow of the Hawaiian monarchy, it was unable to rally the support of two thirds of the Senate needed to ratify a treaty of annexation. On July 4, 1894, the Provisional Government declared itself to be the Republic of Hawai'i. In a message to Congress on December 18, 1893, U.S. President Grover Cleveland reported fully and accurately on these illegal actions, and admitted that the government of a peaceful and friendly people was illegally overthrown. "A substantial wrong has thus been done," concluded the President, "which a due regard for our national character as well as the rights of the injured people requires that we should endeavor to repair."

Queen Lili'uokalani, the lawful monarch of Hawai'i, and the Hawaiian Patriotic League, representing the aboriginal citizens of Hawai'i, promptly petitioned the United States for redress of these wrongs and for restoration of the indigenous government of the Hawaiian nation. This petition was not acted upon.

Annexation and Territorial Period.

In 1898, the United States annexed Hawai'i through the Joint Resolution to Provide for

Annexing the Hawaiian Islands to the United States,¹⁶ “without the consent of or compensation to the indigenous people of Hawai‘i or their sovereign government who were thereby denied...their lands and ocean resources.”¹⁷ The Native Hawaiian people actively opposed the annexation of Hawai‘i as evidenced by the petitions signed by 21, 269 people representing more than 50% of the Native Hawaiian population at the time.¹⁸ Through the 1898 Newlands Resolution and the 1900 Organic Act,¹⁹ the United States Congress received 1.8 million acres of lands formerly classified as Crown and Government Lands during the Hawaiian Kingdom and exempted these lands from then existing public land laws of the United States by mandating that the revenue and proceeds from these lands be “used solely for the benefit of the inhabitants of the Hawaiian Islands for education and other public purposes,”²⁰ thereby establishing a special trust relationship between the United States and the inhabitants of Hawai‘i.²¹ These lands are referred to as the “Ceded Lands” or the “Public Lands Trust.”

The 1959 Admission Act.

When Congress admitted Hawai‘i as the 50th state of the United States in 1959, it enacted

¹⁶ Annexation Resolution, *supra* note 11.

¹⁷ Apology Resolution, *supra* note 9.

¹⁸ See Ku‘e: The Hui Aloha ‘Aina Anti-Annexation Petitions 1897-1898.

¹⁹ Act to Provide a Government for the Territory of Hawai‘i, ch. 339, 31 Stat. 141 (1900), *reprinted in* 1 Hawai‘i Revised Statutes (HRS) 43 (hereafter cited as Organic Act)).

²⁰ Annexation Resolution, *supra* note 11, paragraph 3.

²¹ See *Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 159, 737 P.2d 446, 449 (Haw. 1987), *cert. denied*, 484 U.S. 898 (1987).

an Admission Act,²² which required the new state government to accept responsibility – as a condition of statehood -- for the Hawaiian Homes Commission Act of 1920.²³ Congress also conveyed in trust to the state another 1,200,000 acres of the lands that had been ceded to the United States in 1898. The Admission Act reaffirmed the trust relationship between the United States and the Hawaiian people and transferred part of the trust responsibility to the new State of Hawai‘i.²⁴ The Act imposed upon the State the responsibility to use the revenues from these lands for the betterment of the conditions of native Hawaiians, as well as for general public purposes, under section 5(f),²⁵ but in fact, “no benefits actually went to native Hawaiians until the state constitution was amended in 1978 to establish the Office of Hawaiian Affairs.”²⁶

Because of this neglect, the delegates to Hawai‘i’s 1978 Constitutional Convention proposed a series of amendments to Hawai‘i’s Constitution which were subsequently adopted by Hawai‘i’s people. One of these amendments affirmed that the State holds the ceded lands as a

²² An Act to Provide for the Admission of the State of Hawai‘i into the Union, approved March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4 (hereafter cited as Admission Act).

²³ Hawaiian Homes Commission Act of 1920 (HHCA), 42 Stat. 108 (1921). This statute set aside about 200,000 acres of the lands the United States received in the 1898 annexation to provide residences and farm lots exclusively for persons of Native Hawaiian ancestry. See *Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 640 P.2d 1161 (1982).

²⁴ *Id.* at 162-163, 737 P.2d at 451. The Hawaii Supreme Court held that by virtue of Section 5(f) of the Admission Act, the ceded lands are “held by the State as a public trust for native Hawaiians and the general public.”

²⁵ *Id.* at 160, 737 P.2d at 450.

²⁶ *Rice v. Cayetano*, 146 F.3d 1075, 1077 (9th Cir. 1998), *rev’d on other grounds*, 528 U.S. 495 (2000). The State had interpreted the Admission Act as allowing it to use the revenues for any one of the five purposes and allocated all of it to public education. MacKenzie, *supra* note 6, at 19.

Public Land Trust with Native Hawaiians as one of the two named beneficiaries, along with the general public.²⁷ Other amendments created the Office of Hawaiian Affairs (OHA) and required the State to allocate a pro rata share of the revenues from the Public Land Trust to OHA to be used explicitly for the betterment of native Hawaiians.²⁸ In 1980, the Hawai`i Legislature determined that OHA should receive 20% of the revenues generated from the ceded lands held in trust by the State of Hawai`i.²⁹ Although substantial disputes remain regarding how much revenue OHA is owed, this revenue stream has already allowed OHA to accumulate more than \$300,000,000 in funds.

Since the early 1970s, Congress has enacted numerous statutes providing separate programs for Native Hawaiians or including them in benefit programs that assist other native people.³⁰ “The inclusion of Native Hawaiians in legislation promulgated primarily for the benefit of Native American Indians and the promulgation of legislation solely for the benefit of Native Hawaiians constitutes further compelling evidence of the continuing trust relationship between

²⁷ Haw. Const. art. XII, sec. 4; *see generally* MacKenzie, *supra* note 6, at 19-20; Jon Van Dyke, *The Constitutionality of the Office of Hawaiian Affairs*, 7 U. HAW. L. REV. 63 (1985); Kahanu and Van Dyke, *supra* note 13, at 446-51.

²⁸ Haw. Const. art. XII, secs. 5-6. The term "native Hawaiian" in this provision refers to those entitled to benefit under the Hawaiian Homes Commission Act, primarily those with 50% or more Hawaiian blood.

²⁹ Haw. Rev. Stat. secs. 10-3(1), 10-13.5.

³⁰ *See* Van Dyke, *Political Status*, *supra* note 1, at 106 n. 67 (listing statutes); and *see also* the complete list found in Appendix A in the *Amicus Curiae* brief of Hawai`i's Congressional Delegation in *Rice v. Cayetano*.

Native Hawaiians and the Federal Government.”³¹

The 1993 U.S. Apology Resolution.

The most important recent enactments are the 1993 Apology Resolution³² and the Native Hawaiian Education Act of 1994,³³ in which Congress has explicitly acknowledged the "special relationship" that exists between the United States and the Native Hawaiian people. Congress confirmed in the Apology Resolution that Native Hawaiians are an “indigenous people,” which is the key characterization that establishes that a “political” (rather than “racial”) relationship exists between the Native Hawaiians and the United States government.³⁴ This characterization is important because U.S. courts have distinguished explicitly between statutes authorizing separate or preferential treatment for native or indigenous people and those that grant separate or

³¹ *Rice v. Cayetano (II)*, 963 F. Supp. 1547, 1553-54 (D. Haw. 1997), *rev'd* 528 U.S. 495 (2000).

³² Apology Resolution, *supra* note 9.

³³ Pub. L. 103-382 (1994), 108 Stat. 3794 (1994), now codified in 20 U.S.C. sec. 7902.

³⁴ The Apology Resolution, *supra* note 9, states that U.S. military and diplomatic support was essential to the success of the 1893 overthrow of the Hawaiian Monarchy and that this aid violated “treaties between the two nations and international law.” Among the other findings in the Apology Resolution are the following:

Whereas the Republic of Hawai’i also ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii without the consent of or compensation to *the native Hawaiian people* of Hawaii or their sovereign government

Whereas *the indigenous Hawaiian people* never directly relinquished their claims to *their inherent sovereignty as a people* or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum

After documenting in detail the wrongs done to the Hawaiian people at the time of the illegal overthrow -- including "the deprivation of the rights of Native Hawaiians to self-determination," the Apology Resolution urges the President of the United States to "support reconciliation efforts between the United States and the Native Hawaiian people."

preferential treatment for other racial or ethnic categories.

Although styled as a “joint resolution,” the Apology Resolution was enacted by Congress as a public law and signed by President William Clinton. It is therefore a statute of the United States and has the same effect as any other law enacted by Congress.³⁵ In the 1993 Apology Resolution, Congress said that the Hawaiian people “never directly relinquished their claims to their inherent sovereignty as a people,” and listed among the wrongs done to them “the deprivation of the rights of Native Hawaiians to self-determination.”³⁶ The right to self-determination is the most basic of human rights under federal and international law,³⁷ and efforts to facilitate the exercise of this right are mandated by fundamental principles of human rights and human decency. The U.S. Congress also acknowledged that (1) the Republic of Hawai‘i 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, (2) the Native Hawaiian people never directly relinquished their claims to their inherent sovereignty over their national lands to the United States, and (3) the overthrow was illegal.

The Congress thereby expressed its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation

³⁵ See, e.g., *Ann Arbor R. Co. v. United States*, 281 U.S. 658, 666 (1930) (treating a joint resolution just as any other legislation enacted by Congress).

³⁶ Apology Resolution, *supra* note 9; similar language is in the 1994 Native Hawaiian Education Act, which reconfirmed that “Native Hawaiians are a distinct and unique indigenous people,” and that the United States had apologized for “the deprivation of the rights of Native Hawaiians to self-determination.” 20 U.S.C. sec. 7902(1), 7902(8).

³⁷ See, e.g., Jon M. Van Dyke, Carmen Di Amore-Siah, and Gerald W. Berkley-Coats, *Self-Determination for Nonself-governing Peoples and for Indigenous Peoples: The Cases for Guam and Hawai‘i*, 18 U. HAWAI‘I L. REV. 623 (1996).

between the United States and the Native Hawaiian People, and urged the President of the United States to support reconciliation efforts between the United States and the Native Hawaiian People.³⁸ This reconciliation process is now underway. In 2000 the U.S. federal government released a substantial study of the current plight of Native Hawaiians,³⁹ in 2004 Congress established the Office of Native Hawaiian Relations in the Office of the Secretary of the Interior with the responsibility to “continue the process of reconciliation with the Native Hawaiian people,”⁴⁰ and the U.S. Congress is now considering a bill⁴¹ that would establish formal federal recognition of the Native Hawaiian People as indigenous people under U.S. law and lead to negotiations that would return lands and resources to a reestablished autonomous Native

³⁸ See Apology Resolution, above n. 47, sec. 1: Acknowledgment and Apology, paras. 4-5. The Hawai‘i State Legislature approved of the Apology Resolution and agreed that the actions of the United States to be illegal in Act 359 (1993) and Act 329 (1997)

³⁹ U.S. Dept. of the Interior and U.S. Dept. of Justice, *From Mauka to Makai: The River of Justice Must Flow Freely* (2000), available at <<http://www.doi.gov/nativehawaiians/pdf/1023fin.pdf>>. The principal recommendation contained in this Report is as follows:

As matter of justice and equity, this report recommends that the Native Hawaiian people should have self-determination over their own affairs within the framework of Federal law, as do Native American tribes....To safeguard and enhance Native Hawaiian self-determination over their lands, cultural resources, and internal affairs, the Departments believe Congress should enact further legislation to clarify Native Hawaiians’ political status and to create a framework for recognizing a government-to-government relationship with a representative Native Hawaiian governing body.

⁴⁰ Consolidated Appropriations Act of 2004, Pub.L. 108-199, 118 Stat. 3, div. H, sec. 148 (2004). This Office was established by the Secretary of the Interior in Order No. 3254, June 24, 2004, and the Interior Department began recruiting staff members for this office in January 2005.

⁴¹ The “Native Hawaiian Government Reorganization Act of 2005,” generally referred to as the “Akaka Bill,” after Hawaii’s Senator Daniel Akaka., which is discussed *infra* in text at notes 48-51.

Hawaiian Nation.

Rice v. Cayetano (2000)

Despite the compelling arguments that can be and have been made to support the unique political status of the Native Hawaiian People, the U.S. Supreme Court ruled in February 2000⁴² that the election procedure for the nine-member Board of Trustees of the Office of Hawaiian Affairs was unconstitutional, in violation of the Fifteenth Amendment of the U.S. Constitution,⁴³ because the only people allowed to vote were those of Native Hawaiian ancestry. The Court was careful to avoid undercutting the *Morton v. Mancari*⁴⁴ line of cases, which allow Congress to “fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs.”⁴⁵ But it concluded that the election process for OHA did not qualify under this doctrine because the OHA election was administered by the State to elect “public officials” rather than being an election run by the natives themselves to select their leaders, which would be “the internal affair of a quasi-sovereign.”⁴⁶

The Court’s majority thus appeared to recognize that the outcome would be different if the Native Hawaiians formed a “quasi-sovereign” political entity and conducted election of their leaders themselves, because it is solely on this basis that Justice Anthony Kennedy (writing for

⁴² *Rice v. Cayetano*, 528 U.S. 495, 120 S.Ct. 1044 (2000).

⁴³ The Fifteenth Amendment says that “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.”

⁴⁴ *Morton v. Mancari*, 417 U.S. 535 (1974).

⁴⁵ 120 S.Ct. at 1058.

⁴⁶ *Id.* at 1059.

the majority) distinguished the OHA election from the many elections conducted by natives across the country to select their leaders.⁴⁷ Hawai`i's Congressional delegation acted swiftly to facilitate the process of establishing such a "quasi-sovereign" entity by drafting a new statute⁴⁸ designed to (a) reconfirm the special political relationship between the United States and the Native Hawaiian People and (b) establish a process to create a self-governing autonomous

⁴⁷ *Id.* at 1058-59. The Court seems to have invited the Native Hawaiians to pursue that solution, but then in an enigmatic paragraph also says that it is unclear whether Congress "has determined that native Hawaiians have a status like that of Indians in organized tribes," 120 S.Ct. at 1057, that "[i]t is a matter of some dispute...whether Congress may treat the native Hawaiians as it does the Indian tribes," *id.*, and that it is a "question[] of considerable moment and difficulty" whether Congress has or could "delegate to the State a broad authority to" establish preferential or separate programs for Native Hawaiians. *Id.* To illustrate the competing views on this question, Justice Kennedy cited Van Dyke, *Political Status*, *supra* note 1, and Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537 (1996).

Justice Kennedy's majority opinion closes by explaining that the "essential ground" for the Court's holding is that any classification utilizing a racial criteria is "demeaning," that it is improper to assume that a non-Hawaiian would cast an "unprincipled vote" on the selection of leaders to make decisions regarding Native Hawaiian resources and policies, and that the State of Hawai`i's initiative to promote Native Hawaiian self-governance by facilitating their election of their own leaders "would give rise to the same indignities, and the same resulting tensions and animosities, [that] the [Fifteenth] Amendment was designed to eliminate." 120 S.Ct. at 1060. This characterization is based either on an ideological perspective that rejects the value of diversity in our pluralistic country and the obligation to rectify the injustices imposed on the Native Hawaiian People, or on a complete misunderstanding of the careful balance that has been achieved in Hawai`i – based on the respect and honor that all races have toward the Native Hawaiians – and the widespread support that exists in Hawai`i for a just resolution of the claims of the Native Hawaiian People. In a poll of 429 Hawai`i voters conducted September 5-9, 2000, for instance, those expressing an opinion supported the proposed bill described below by a two-to-one margin (49% in favor, 25% opposed, with 27% expressing no opinion). Pat Omandam, *Most Isle Voters Plan to Take Part in OHA Ballot*, HONOLULU STAR-BULLETIN, Sept. 15, 2000, at A1, col. 1.

⁴⁸ This bill is formally called the Native Hawaiian Reorganization Act of 2005 and is denominated as Senate Bill 147. See generally John Heffner, *Between Assimilation and Revolt: A Third Option for Hawaii as a Model for Minorities World-Wide*, 37 TEXAS INTERNATIONAL LAW JOURNAL 591, 600-01 (2002).

political entity to enable the Native Hawaiian People to achieve self-governance and make progress toward their goal of self-determination. This law, usually called “The Akaka Bill” after Hawaii’s Senator Daniel Akaka, complies with the road map set forth in Justice Kennedy’s opinion,⁴⁹ where he cites the Menominee Restoration Act⁵⁰ and the Indian Reorganization Act⁵¹ as examples of appropriate Congressional enactments to establish quasi-sovereign political entities within which natives-only votes are permissible. If this statute, which is pending before the Congress as of this writing, is enacted, then the Native Hawaiian People will take their place among other Native Americans, with sovereignty over their internal affairs, and authority over their own resources. If it is not enacted, then Native Hawaiians will face constant challenges to the programs that have been established for them.

The ambiguities in the Supreme Court’s *Rice v. Cayetano* opinion have invited such challenges, and several cases are now pending before federal and state courts. One challenge against the constitutionality of the Office of Hawaiian Affairs and the Department of Hawaiian Home Lands was dismissed by the U.S. Court of Appeals for the Ninth Circuit because the plaintiffs lacked sufficient personal injuries to have “standing” to bring this challenge and because the United States was an indispensable party but could not be sued because of its sovereign immunity.⁵² A similar challenge brought subsequently by taxpayers is still pending as of this writing, while the Supreme Court is determining the extent to which state taxpayers can

⁴⁹ 20 S.Ct. at 1058.

⁵⁰ 25 U.S.C. sec. 903b.

⁵¹ 25 U.S.C. sec. 476.

⁵² *Carroll v. Nakatani*, 342 F.3d 934 (9th Cir. 2003).

challenge state expenditure programs in federal courts.⁵³ A challenge has also been filed against the admissions policy of the Kamehameha Schools, which effectively limits admission to persons of Native Hawaiian ancestry. These Schools were established by the will of one of the revered Hawaiian chiefs during the Kingdom period and are funded largely by lands of the Hawaiian royalty which were put into a trust. In August 2005, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit ruled two-to-one that the Hawaiians-only admission policy violated the 1866 Civil Rights Act prohibiting racial discrimination with regard to the making of contracts, but in February 2006, the Ninth Circuit agreed to establish an *en banc* panel of 15 judges to reevaluate this decision.⁵⁴

A case is now pending before the Hawaii Supreme Court seeking a moratorium on the sale or transfer of any of the lands that were “ceded” to the United States through the 1898 annexation until the claims of the Native Hawaiian people are resolved.⁵⁵ The Hawaii Supreme Court has rejected previous claims brought by the Office of Hawaiian Affairs regarding the revenue stream it should be receiving, ruling that these claims present nonjusticiable political questions that are not appropriate for judicial resolution.⁵⁶

⁵³ *Arakaki v. Lingle*, 423 F.3d 954 (9th Cir. 2005), *cert petition pending*.

⁵⁴ *Doe v. Kamehameha Schools*, 416 F.3d 1025 (9th Cir. 2005), *opinion set aside for en banc rehearing*.

⁵⁵ *Office of Hawaiian Affairs v. Housing and Community Development Corporation of Hawaii*, now pending before the Hawaii Supreme Court.

⁵⁶ *Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 69 Hawaii 154, 737 P.2d 446 (1987), *cert denied*, 484 U.S. 898 (1987) ; *Office of Hawaiian Affairs v. State*, 96 Hawaii 388, 31 P.3d 901 (2001); *Office of Hawaiian Affairs v. State*, 2005 WL 2175872 (Hawaii 2005), *rehearing granted and now pending*.

Conclusion.

The Native Hawaiian People are one of the largest groups of indigenous peoples in the United States, but they stand alone in never having been granted a settlement or access to a claims commission. The deprivations and injustices they have suffered have been well-documented. Congress acknowledged in the 1993 Apology Resolution⁵⁷ that the United States violated international law when it provided the crucial support to the overthrow that allowed it to succeed, and Congress called for a “reconciliation” between the United States and the Native Hawaiian People. Although some steps have been taken in that direction, the return of land and resources to the Native Hawaiian People remains as unfinished business, and the failure of the United States to address and resolve the claims of the Native Hawaiians remains as a significant blemish on our national character.

⁵⁷ Apology Resolution, *supra* note 9.