

# (Re)Righting History: Deconstructing the Court’s Narrative of Hawai‘i’s Past

Troy J.H. Andrade\*

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*In a recently published article, Chief Judge James S. Burns (retired) contends that the Hawaiian Crown Lands were owned by all the people of Hawai‘i and were not held in trust for Native Hawaiians as Professor Jon Van Dyke argued in his book, Who Owns the Crown Lands. Although this author, as with many others, takes issue with the research and conclusions of that article, this Article focuses upon the larger issue of the reliance on the Supreme Court of the United States’ jaded recitation of Hawai‘i’s complex political and legal history. The article specifically relies upon two Supreme Court opinions, Rice v. Cayetano and Hawai‘i v. Office of Hawaiian Affairs—two politically charged cases that dealt large blows to the Native Hawaiian community particularly because of the Court’s skewed views of Hawai‘i’s past. Native Hawaiians, like most indigenous people, are faced with a legal system that rarely recognizes their stories and their histories. Due in large part to the enshrined principle of stare decisis, Native*

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\* Visiting Assistant Professor of Law, William S. Richardson School of Law, University of Hawai‘i at Mānoa. Of Counsel, McCorriston Miller Mukai MacKinnon LLP. Ph.D. 2016, University of Hawai‘i at Mānoa. J.D. 2011, William S. Richardson School of Law, University of Hawai‘i at Mānoa.

*Hawaiians have been left with a less than adequate narrative of their legal and political history that has ramifications for other indigenous and marginalized communities across the United States. The Court's narrative is oftentimes then interpreted, particularly by jurists and legal practitioners, as the "official" history of a people. This Article criticizes the Court's writing of Hawaiian history in its opinions and also the re-writing of history and silencing of Native voices that occurs when jurists and practitioners blindly adhere to "precedent." This Article demands careful use of history when analyzing complex issues involving Native Hawaiians, and provides methods for ensuring an accurate recitation of history.*

## I. INTRODUCTION

In February 2015, a student attending a conference in Washington, D.C., asked Associate Justice Antonin Scalia whether the United States Congress could annex an independent nation by way of a joint resolution.<sup>1</sup> Justice Scalia—perhaps one of the brightest conservative legal thinkers of his time—responded that there was nothing in the Constitution that precluded such action and that it would likely be upheld because the annexation “went through a process.”<sup>2</sup> Scalia apparently proceeded to provide “examples” of this type of “process” through the American acquisition of the Philippines and Puerto Rico following the Spanish-American War.<sup>3</sup> When prodded about the “process” for annexing Hawai‘i in 1898, the conservative firebrand implied that Hawai‘i was also a spoil of the Spanish-American War and stated that, based on international law, there has been “hundreds of years worth of problems there.”<sup>4</sup>

Justice Scalia’s response elucidated sharp criticism from Professor Williamson B.C. Chang, a scholar in Hawai‘i’s legal history and an expert in Hawaiian law.<sup>5</sup> Professor Chang argued that Scalia was “clearly wrong”<sup>6</sup> and, along with the rest of the American public, was “deeply ignorant” of the annexation of Hawai‘i.<sup>7</sup> Professor Chang crafted an argument premised

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<sup>1</sup> Jacob Bryan Aki, *Supreme Court Justice Antonin Scalia, Hawaii and Annexation*, HONOLULU CIVIL BEAT (Feb. 24, 2015), <http://www.civilbeat.org/2015/02/supreme-court-justice-antonin-scalia-hawaii-and-annexation>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> See Williamson Chang, *Darkness Over Hawaii: The Annexation Myth is the Greatest Obstacle to Progress*, 16 ASIAN-PAC. L. & POL’Y J. 70 (2015). This author takes no position on Professor Chang’s theory that Congress lacked the constitutional authority to annex Hawai‘i.

<sup>6</sup> See *id.* at 77.

<sup>7</sup> *Id.* at 71.

on a review of the legislative debates surrounding the U.S. Senate's failed efforts to ratify a treaty of annexation—the Constitutional means by which annexation is accomplished.<sup>8</sup>

Justice Scalia's remarks, while simply a cursory attempt at appeasing a college student's question, and Professor Chang's scathing response, evince the complexities of Hawaiian legal and political history. This tiff also highlights a recurring problem encountered by Native Hawaiians and other marginalized communities whose concerns are addressed before courts of law: the courts' often skewed use of history in their legal opinions. Indeed, while a Supreme Court justice can state things during a meeting with students that have no legally binding effect, he or she has the power to set harmful precedent that is often times difficult for practitioners to overcome.

As analyzed below, the Supreme Court of the United States has selectively used aspects of Hawaiian history as a means to justify its political ends. As Justice Robert H. Jackson wrote, "Judges often are not thorough or objective historians."<sup>9</sup> This selective use of laws and facts to recreate or reimagine the past is dangerous and is a highly political practice with severe consequences for those communities with little access to courts to vindicate their own history. In Part II of this Article, the Court's use of history and the evolution of the use of history in judicial opinions is briefly reviewed to show the trend of both liberal and conservative justices toward writing historical essays to justify their decisions. Part III of this Article, titled "Righting History," then critiques the conservative narrative of Hawai'i's past through the lens of two cases: *Rice v. Cayetano*<sup>10</sup> and *Hawai'i v. Office of Hawaiian Affairs*.<sup>11</sup> These two cases reveal a Court that is willing to ignore, erase, and revise history to ensure the integrity of its decisions. Finally, Part IV of this Article discusses the consequences of

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<sup>8</sup> See generally *id.* Professor Chang argued specifically that because there was no mutual treaty of annexation, the United States did not receive an "objective metes and bounds description of the islands and waters" that therefore caused a "break in the chain of sovereignty." *Id.* at 90. The Admission Act describes the lands of the newly formed State of Hawai'i as those lands "included in the Territory of Hawaii on the date of the enactment of this Act[.]" Admission Act of 1959, Pub. L. No. 86-3, § 2, 73 Stat. 4, 4. The "Territory of Hawaii" was defined in the Organic Act as "the islands acquired by the United States of America under an Act of Congress entitled 'Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States[.]'" Act of Apr. 30, 1900, Pub. L. No. 56-331, § 2, 31 Stat. 141, 141 [hereinafter Organic Act]. Therefore, according to Professor Chang, "by the combined effect of the two acts there are no lands and waters in the State of Hawaii!" Chang, *supra* note 5, at 97.

<sup>9</sup> Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 6 (1945).

<sup>10</sup> 528 U.S. 495 (2000).

<sup>11</sup> 556 U.S. 163 (2009).

relying upon the Court's biased and flawed narrative and proposes steps for addressing some of these problems for practitioners and judges. This Article concludes that practitioners and, particularly judges, should be cautious when relying upon the Court's recitation of the history of Hawai'i as authoritative.

## II. HISTORY'S COMPLEXITIES: THE JUDICIAL INCLUSION OF HISTORICAL ESSAYS

### A. *The Supreme Court's Use of History*

History and law are closely intertwined.<sup>12</sup> Indeed, history is a methodological tool that is imbedded in the principle of stare decisis; courts use history as a way to document how legal issues were decided in order to predict the outcome of future cases.<sup>13</sup> The entire premise of litigation itself is to determine what occurred in the past, who was at fault for such conduct, and whose story is more convincing. History is also used to define legislative intent. When the text of a statute is ambiguous, courts will resort to an analysis of legislative materials such as drafts of the legislation, committee reports, speeches from legislators, and testimony received during the committee hearings. These resources provide a toolkit for a court to ascertain what legislators were intending in passing the law. History, thus, serves as a way for a court to legitimize its decision. However, in *Clio and the Court: An Illicit Love Affair*, Professor Alfred H. Kelly provided a theoretical survey of the Supreme Court's misuse of history.<sup>14</sup> Kelly specifically identified two alternative ways in which the court uses history to justify its decision: judicial fiat and the "law-office history."

First, in what he termed "judicial fiat" or "authoritative revelation," Kelly stated that in order to determine the intent of a constitutional provision, the Court would issue "a simple declarative statement of a revelatory kind of what the original intent actually had been."<sup>15</sup> Once written, future courts could, under the doctrine of stare decisis, then rely upon that retelling of history: "by quoting history, the Court made history, since what it declared to be was frequently more important than what the history might actually

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<sup>12</sup> See Daniel A. Farber, *Adjudication of Things Past: Reflections on History as Evidence*, 49 HASTINGS L.J. 1009, 1030 (1998) ("The linkage between past and present is especially central in law.").

<sup>13</sup> Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 121 (1965).

<sup>14</sup> *Id.* at 122.

<sup>15</sup> *Id.* at 122–23.

have been.”<sup>16</sup> This practice of “judicial fiat” was perhaps best accomplished in the early years of the nation with Chief Justice John Marshall, who mastered “simple declarative statement[s]” to enshrine legislative intent into the meaning of the laws.<sup>17</sup> For example, in *Marbury v. Madison*, Chief Justice Marshall reviewed three clauses of the Constitution to reach the following revelatory statement: “From these, and many other selections which might be made, it is apparent, that the Framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.”<sup>18</sup> Kelly discussed the use of judicial fiat in landmark cases, like *Plessy v. Ferguson*, where the Court, without examining the evidence, stated that the “Fourteenth Amendment in the nature of things could not have been intended to abolish distinction based upon color.”<sup>19</sup>

Kelly then identified a second historical technique, the historical essay, which judges use to support their opinions. This technique, according to Kelly is employed “as an instrument of extreme political activism, involving extensive judicial intervention in contemporary political problems.”<sup>20</sup> History, in these circumstances, was used as a “precedent-breaking device” so that the Court could “return to the aboriginal meaning of the Constitution.”<sup>21</sup> Under this historical essay approach, the Court’s opinion was “partisan[.]” “used evidence wrenched from its contemporary

<sup>16</sup> *Id.* at 123.

<sup>17</sup> See, e.g., *Gibbons v. Ogden*, 22 U.S. 1, 190 (1824); *McCulloch v. Maryland*, 17 U.S. 316, 403 (1819); *Sturges v. Crowninshield*, 17 U.S. 122, 206 (1819); *Fletcher v. Peck*, 10 U.S. 87, 138 (1810).

<sup>18</sup> *Marbury v. Madison*, 5 U.S. 127, 179–80 (1803) (citing U.S. CONST. art. I, § 9, cl. 5; U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art. III, § 3, cl. 1).

<sup>19</sup> Kelly, *supra* note 13, at 125 (citing *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896)). In *Plessy*, the Court upheld racial segregation and the doctrine of separate but equal, which led to the horrors of the Jim Crow South. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 393 (1978) (Marshall, J., concurring and dissenting). Writing separately from the *Bakke* majority, Justice Marshall explained:

In the wake of *Plessy*, many States expanded their Jim Crow laws, which had up until that time been limited primarily to passenger trains and schools. The segregation of the races was extended to residential areas, parks, hospitals, theaters, waiting rooms, and bathrooms. There were even statutes and ordinances which authorized separate phone booths for Negroes and whites, which required that textbooks used by children of one race be kept separate from those used by the other, and which required that Negro and white prostitutes be kept in separate districts.

*Id.* at 835–36. In recent times, the Court has resorted to judicial fiat when it reinterpreted the pleading standards to require a recitation of detailed facts. See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

<sup>20</sup> Kelly, *supra* note 13, at 125.

<sup>21</sup> *Id.*

historical context[.]” and used “carefully selected . . . materials designed to prove the thesis at hand, suppressing all data that might impeach the desired historical conclusions.”<sup>22</sup> Kelly cited *Scott v. Sandford*, as an example of the use of the historical essay.<sup>23</sup> There, Chief Justice Roger B. Taney wrote a historical essay that described the role of “Negros” in early America to justify his assertion that the Constitution was a “white man’s document.”<sup>24</sup> In this case, the justices “wrote history for political reasons, that is, in an attempt to solve by judicial intervention some major contemporary socio-political problem upon which the case at hand could be made to bear.”<sup>25</sup>

### B. Rise of the Historical Essay

Many have analyzed the evolution of the use of the historical essay in the twentieth century.<sup>26</sup> In the early 1900s, the use of the historical essay declined primarily because the justices did not need it:

The Court was dominated by an activist philosophy in these years, as it adjusted the constitutional system to the exigencies of the industrial revolution and the new capitalism, but it has two other major instruments at hand that all but eliminated the need to resort to history for this purpose:

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<sup>22</sup> *Id.* at 126.

<sup>23</sup> *Id.* at 125 (citing *Scott v. Sandford*, 60 U.S. 393 (1856)).

<sup>24</sup> In *Scott*, the Court noted:

It becomes necessary, therefore, to determine who were citizens of the several States when the Constitution was adopted. And in order to do this, we must recur to the Governments and institutions of the thirteen colonies, when they separated from Great Britain and formed new sovereignties, and took their places in the family of independent nations. We must inquire who, at that time, were recognized as the people or citizens of a State, whose rights and liberties had been outraged by the English Government; and who declared their independence, and assumed the powers of Government to defend their rights by force of arms. In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

60 U.S. at 407.

<sup>25</sup> Kelly, *supra* note 13, at 126.

<sup>26</sup> See, e.g., William M. Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 CAL. W. L. REV. 227 (1988); Francis Stites, *Comment on “Clio as Hostage”*, 24 CAL. W. L. REV. 273 (1988); Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court’s Uses of History*, 13 J.L. & POLS. 809 (1997); Matthew J. Festa, *Applying a Usable Past: The Use of History in Law*, 38 SETON HALL L. REV. 479 (2008).

substantive due process and a “sovereign prerogative of choice” in state-federal relations.<sup>27</sup>

Substantive due process provided the Court with “immense activist flexibility” in their decision-making.<sup>28</sup> However, when both substantive due process and “sovereign prerogative of choice” waned, the Court reinvigorated its use of the historical essay.<sup>29</sup>

From the late 1940s to the 1960s, the use of the historical essay increased. Kelly examined several opinions from the Warren Court that incorporated the use of the historical essay and concluded that the “‘liberal history’ of the present Court is not much better than the business-minded vested rights ‘history’ . . . [and] fails to stand up under the most superficial scrutiny by a scholar possessing some knowledge of American constitutional development.”<sup>30</sup> For example, Kelly argued that the Court committed a “historical felony” when it “mangled constitutional history” to mandate the “one person, one vote” doctrine in *Wesberry v. Sanders*.<sup>31</sup> In *Wesberry*, Justice Hugo Black specifically concluded for a majority that “construed in its historical context, the command of Article 1, Sec[tion] 2, that Representatives be chosen ‘by People of the several States’ means that as nearly as practicable one man’s vote in a congressional election is to be worth as much as another’s.”<sup>32</sup> To reach his conclusion, Justice Black relied upon statements from the debates of the Constitutional Convention.<sup>33</sup> Those statements, however, had “nothing at all to do with the question of representation within the states.”<sup>34</sup> Instead, the statements related to the debate between those in favor of state equality in the legislature and those in favor of proportional representation within the states.<sup>35</sup> Justice Black nevertheless included the statements in his recitation of history in his historical essays to rationalize social change.<sup>36</sup>

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<sup>27</sup> Kelly, *supra* note 13, at 128.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 130–32.

<sup>30</sup> *Id.* at 132.

<sup>31</sup> *Id.* at 135 (citing *Wesberry v. Sanders*, 376 U.S. 1 (1964)).

<sup>32</sup> *Wesberry*, 376 U.S. at 7–8.

<sup>33</sup> *Id.* at 10–13.

<sup>34</sup> Kelly, *supra* note 13, at 135.

<sup>35</sup> *Id.*; see also *Wesberry*, 376 U.S. at 30–42 (Harlan, J., dissenting).

<sup>36</sup> Some have argued that the Court is constrained to bring about social change. See generally THE FEDERALIST NO. 78 (Alexander Hamilton) (Cambridge Univ. Press 2003) (noting that the judiciary was envisioned as a branch wholly dependent upon the executive and legislative branches inasmuch as the judiciary: “has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever[.]” but “may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments”); see also GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN

With the election of Ronald Reagan as President came a conservative push for a “jurisprudence of original intent.”<sup>37</sup> Reagan’s Attorney General, Edwin Meese, promised that the Justice Department would “endeavor to resurrect the original meaning of constitutional provisions [based upon the] belief that only ‘the sense in which the Constitution was accepted and ratified by the nation’ . . . provide[s] a solid foundation for adjudication.”<sup>38</sup> Under the theory of originalism, judges would ascertain the “intent” of the Founders by conducting a historical review of that particular measure, which would “supposedly result in interpretations of the Constitution that showed proper deference to the political branches of government, and would limit the degree to which judges decided cases based on their ‘ideological predilections’ or subjective policy preferences.”<sup>39</sup> History would, therefore, be used as a sword to justify a judge’s decision.<sup>40</sup>

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COURTS BRING ABOUT SOCIAL CHANGE? 10 (2008) (arguing that a court is unable to produce significant social reform because of “the limited nature of constitutional rights, the lack of judicial independence, and the judiciary’s inability to develop appropriate policies and its lack of powers of implementation”). For example, in the context of public school desegregation, Rosenberg asserted, “Congressional and executive branch action . . . was virtually non-existent until the passage of the 1964 Civil Rights Act.” *Id.* at 46. Similarly, some argued that meaningful desegregation did not occur until Lyndon B. Johnson became President over a decade after *Brown v. Board of Education*, 349 U.S. 294 (1955), and took affirmative action to secure passage of the Civil Rights Act. *See* JIM NEWTON, JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE 452 (2006). While there may have been some instances of executive support of *Brown*, there were other factors at play that precluded its wholesale adoption for the purpose of promoting racial equality within schools. For example, at Central High School in Little Rock, Arkansas, President Dwight D. Eisenhower federally deputized the Arkansas National Guard, who escorted black children into a white school. MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 151 (2000). However, “[f]rom the perspective of President Eisenhower, the core interests at stake in Little Rock had more to do with federal authority and foreign affairs than with racial equality.” *Id.* President Eisenhower’s actions were clearly intended to appease the eyes from around the world that were focused in on American society in a time when America was trying to promote democracy overseas and contain the spread of communism.

<sup>37</sup> Several scholars have written about originalism. *See, e.g.*, Edwin Meese III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455 (1986); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849 (1989); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999).

<sup>38</sup> Wiecek, *supra* note 26, at 266 (citing Attorney General Edwin Meese, III, Address to American Bar Association, July 9, 1985, *reprinted in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 9–10 (1986)).

<sup>39</sup> Festa, *supra* note 26, at 489.

<sup>40</sup> Many scholars have criticized originalism. *See, e.g.*, Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387 (2005); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 FORDHAM L. REV. 545 (2006); James H. Hutson, *The Creation of the*

Originalism came to the fore with the failed confirmation of Circuit Judge Robert Bork for a seat on the Court.<sup>41</sup>

In response to the originalism movement, judges and scholars began asserting the notion that the Constitution was a “living” document whose meaning was not fixed at the time of its enactment, but was rather defined by the aspirations it signified.<sup>42</sup> At around the same time, legal scholars began putting forth new narratives of historical events. In providing voice to the voiceless, these scholars began to critically examine the role of race in American society, and its role in history.<sup>43</sup>

Accordingly, over the course of the institution’s 200-plus-year history, the justices—both conservative and liberal—have not been coy in using history to satisfy their own political agendas.<sup>44</sup> Native Hawaiians, and their story, were not immune from this gamesmanship.

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*Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1 (1986). The conservative backlash to the Warren Court’s decisions was not unique to the *Brown* decision. In his book, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE*, William J. Stuntz discusses how the Warren Court’s decisions on criminal procedures had a similar unintended backlash from conservatives. Warren Court decisions, such as *Mapp v. Ohio*, 367 U.S. 643 (1961), turned the focus of prosecution of alleged criminals from the merits of the alleged crime to ensuring that proper procedural mechanisms were in place. According to Stuntz, the Warren Court “proceduralized criminal litigation, siphoning the time of attorneys and judges away from the question of the defendant’s guilt or innocence and toward the process by which the defendant was arrested, tried, and convicted” and “chose to ramp up the level of constitutional regulation of state and local criminal justice at a time when crime was rising sharply and criminal punishment was falling substantially.” WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 228 (2011). This dramatic shift in criminal law, combined with the conservative rallying cry for “law and order,” forced liberals toward a more punitive stance on criminality.

<sup>41</sup> See *infra* Part III.A; Jack N. Rakove, *INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT* 4–5 (1990) (asserting that “the rejection of Bork’s nomination might in part be seen as a repudiation of the theory of interpretation with which he was associated”).

<sup>42</sup> See William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 19 U.C. DAVIS L. REV. 2, 5 (1985).

<sup>43</sup> See, e.g., Derrick A. Bell, *Who’s Afraid of Critical Race Theory?*, 4 U. ILL. L. REV. 893, 893–910 (1995); Peggy Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1559–77 (1989); RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (2d ed. 2012).

<sup>44</sup> See, e.g., Aviam Soifer, *Courting Anarchy*, 82 BOSTON L. REV. 699, 700 (2002) (describing the Court’s political ruling in *Bush v. Gore*).

### III. RIGHTING HISTORY: ANALYZING THE TWENTY-FIRST CENTURY NARRATIVE OF HAWAI'I'S PAST

A unique narrative of Hawai'i's past has developed from the Court's decisions in two recent cases. These cases epitomize the Court's use of the historical essay to write out Native Hawaiians and their perspectives from the history of Hawai'i. As analyzed below, the Court has ignored, erased, and revised the history of Native Hawaiians and created a uniquely American narrative of the past.

#### A. *Erasing History*

"This is a case of ballot-box discrimination plain and simple. . . . There is no question that what Hawai['i] is attempting to do here is discrimination on the basis of race[.]" decried Theodore Olson.<sup>45</sup> John G. Roberts, Jr. argued, "[The petitioner] was not permitted to vote . . . because he is not a beneficiary of the trust[.]"<sup>46</sup> Justice Anthony Kennedy shot back, "[y]ou begin by saying, now, this is not [about] race, it's [about] a trust . . . [but] [o]f course it has to do with Hawaiian ethnicity."<sup>47</sup> Attorney Edwin S. Kneedler argued that Hawaiians are a "distinct people determined to maintain their culture, their language, and their ties to the land[.]"<sup>48</sup> "There are a lot of groups in this country like that[.]" quipped Justice Antonin Scalia.<sup>49</sup>

On October 6, 1999, inside the ornate courtroom of the United States Supreme Court, the justices peppered lawyers on the constitutionality of the Hawai'i state law that mandated that only those of Hawaiian-descent could vote in the elections for trustees of the Office of Hawaiian Affairs<sup>50</sup>—an

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<sup>45</sup> Transcript of Oral Argument, *Rice v. Cayetano*, 528 U.S. 495 (2000) (No. 98-818), 1999 WL 955376, at \*3, \*5 [hereinafter *Rice* Oral Argument].

<sup>46</sup> *Id.* at \*20.

<sup>47</sup> *Id.* at \*24.

<sup>48</sup> *Id.* at \*36.

<sup>49</sup> *Id.*

<sup>50</sup> The Office of Hawaiian Affairs' mandates is set forth in the Hawai'i Constitution: The Board of Trustees of the Office of Hawaiian Affairs shall exercise power as provided by law: to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in Section 4 of this article for native Hawaiians to formulate policy relating to affairs of native Hawaiians and Hawaiians; and to exercise control over real and personal property set aside by state, federal or private sources and transferred to the board for native Hawaiians and Hawaiians. The board shall have the power to exercise control over the Office of Hawaiian Affairs through its executive officer, the administrator of the Office of Hawaiian Affairs, who

entity created to better the conditions of Native Hawaiians and serve as a receptacle for reparations between the Hawaiian community and the State and federal governments.<sup>51</sup> Indeed, following a Hawaiian cultural and spiritual renaissance, the people of Hawai‘i—through a vote following the State’s 1978 Constitutional Convention—approved a constitutional amendment creating the Office of Hawaiian Affairs.<sup>52</sup> The agency would be funded through revenues from the public lands trust that was established at Statehood.<sup>53</sup> Pursuant to the State constitutional amendment, Native Hawaiians would elect other Native Hawaiians to serve as trustees of the entity.<sup>54</sup> The goal of the entity, which Hawai‘i’s people ratified, was truly reconciliatory: to “unite Hawaiians as a people[,]” to ensure that “Hawaiians have more impact on their future[,]” and to provide it “maximum independence.”<sup>55</sup> But, that goal would be put to the test.

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shall be appointed by the board.

HAW. CONST. art XII, § 6.

<sup>51</sup> *Id.*; see STATE OF HAWAII, 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1978 1018 (1980).

<sup>52</sup> See, e.g., TOM COFFMAN, *THE ISLAND EDGE OF AMERICA: A POLITICAL HISTORY OF HAWAII* 289–316 (2003); Davianna McGregor-Alegado, *Hawaiians: Organizing in the 1970s*, 7 AMERASIA J. 29, 29–55 (1980).

<sup>53</sup> The federal government required the State of Hawai‘i, upon its admission into the Union, to hold public lands and its associated revenue in trust for several purposes, including the betterment of the conditions of native Hawaiians:

The lands granted to the State of Hawaii . . . shall be held by said State as a public trust for the support of the public schools and other public education institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for the public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.

Admission Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 4, 6 (1959). The State subsequently delegated a portion of the Section 5(f) trust funds from these Public Trust Lands to the Office of Hawaiian Affairs. HAW. CONST. art. XII, § 4 (“The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as ‘available lands’ by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for *native Hawaiians and the general public*.” (emphasis added)); Haw. Rev. Stat. § 10-13.5 (1990) (“Twenty per cent of all funds derived from the public land trust, described in Section 10-3, shall be expended by the [Office of Hawaiian Affairs], as defined in Section 10-2, for the purposes of this chapter.”).

<sup>54</sup> HAW. CONST. art. XII, § 5, *invalidated in part by* Rice v. Cayetano, 528 U.S. 495, 522 (2000).

<sup>55</sup> STATE OF HAWAII, 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF 1978 1018 (1980); H. Journal, 17th Leg., Reg. Sess., 791 (Haw. 1993) (statement of Rep.

In March 1996, Harold “Freddy” Rice sought to register to vote for trustees of the Office of Hawaiian Affairs in the upcoming election.<sup>56</sup> The registration form contained a declaration that required the applicant to attest that: “I am also Hawaiian and desire to register to vote in OHA elections.”<sup>57</sup> Rice crossed out the phrase “am also Hawaiian and” and marked “yes” on the application.<sup>58</sup> As Rice was not of Hawaiian ancestry, his application to register to vote in the Office of Hawaiian Affairs’ election was denied.<sup>59</sup> Rice, whose great-great grandparents were part of the initial Christian missionary families that came to Hawai‘i and struck it rich, and whose great-grandfather helped to orchestrate the institution of the Bayonet Constitution and the overthrow of the Hawaiian Kingdom,<sup>60</sup> filed a lawsuit against then-Governor Ben Cayetano.<sup>61</sup> In his lawsuit, Rice alleged that the Office of Hawaiian Affairs election violated the Fourteenth and Fifteenth Amendments of the United States Constitution because it premised his right to vote on race.<sup>62</sup>

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Okamura) ( “[t]he injustice perpetrated on the Hawaiian people a century ago has been a cancer that insidiously all too silently has been destroying the fabric of our community”). Delegates of the 1978 Constitutional Convention expressly envisioned the Office of Hawaiian Affairs as a “receptacle for any funds, land or other resources earmarked for or belonging to native Hawaiians[.]” See STATE OF HAWAII, *supra*, at 644. The Committee viewed the creation of the office of Hawaiian Affairs “of utmost importance” because it “provide[d] for accountability, self-determination, [and] methods for self-sufficiency through assets and a land base[.]” *Id.* at 646; see also *infra* Section III.B; Act Relating to the Island of Kaho‘olawe, §2, 1993 Haw. Sess. Laws 804–06; Act Relating to Hawaiian Sovereignty, § 1, 1993 Haw. Sess. Laws 999.

<sup>56</sup> Rice v. Cayetano, 963 F. Supp. 1547, 1548 (D. Haw. 1997).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> See JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAII‘I? 120–24, 151–71 (2008).

<sup>61</sup> Paul G. Stader, Rice v. Cayetano: America’s Evolving Legal Debate Over Race, and the Consequences of Applying “Color-Blind” Constitutionalism to Law Affecting Indigenous Peoples (May 2013) (unpublished Ph.D. dissertation, University of Hawai‘i at Mānoa) (on file with Hamilton Library, University of Hawai‘i at Mānoa). Rice believed that by filing the lawsuit he was “helping” Native Hawaiians, whom he saw as “taking advantage of the welfare system by choosing not to work.” Eric K. Yamamoto & Catherine C. Betts, *Disfiguring Civil Rights to Deny Indigenous Hawaiian Self-Determination: The Story of Rice v. Cayetano*, in RACE LAW STORIES 545 (Moran and Carbado, eds., 2007) (citation omitted). The same attitude was reflected in Rice’s counsel, John W. Goemans, who moved to Hawai‘i prior to statehood in 1959, and who supported the elimination of federal funding for programs benefitting Native Hawaiians because of his “commitment to the civil rights laws of this country and to the Constitution.” *Id.*

<sup>62</sup> Rice, 963 F. Supp. at 1548–49; see U.S. CONST. amend. XIV (“No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”); U.S. CONST. amend. XV (“The right of citizens of the United

Both Rice and Governor Cayetano—who had tense relations with Trustees of the Office of Hawaiian Affairs<sup>63</sup>—moved separately for summary judgment in their respective favors on the claim that the Office of Hawaiian Affairs’ voting scheme violated the federal constitution.<sup>64</sup> The Governor argued that “Native Hawaiian” was a political classification that the government could treat as analogous to the status of Indian tribes.<sup>65</sup> Rice argued that Article XII, Section 5 of the Hawai‘i State Constitution, which established the Office of Hawaiian Affairs, and Hawai‘i Revised Statutes Section 10-13D, which specified that persons entitled to vote must be Native Hawaiian, were unconstitutional because Native Hawaiians “are a racial rather than a political group.”<sup>66</sup> Rice expressly rejected the notion that Native Hawaiians were akin to a recognized Indian tribe and, thus, should be afforded special status under federal law.<sup>67</sup> The distinction of whether “Hawaiian” was a racial classification or a political classification was important in establishing which test the court would apply to determine the constitutionality of the law.<sup>68</sup> Naturally, because the Governor argued that “Hawaiian” was a political classification, he asserted that the law should be reviewed under the less strenuous rational basis test.<sup>69</sup>

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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.”).

<sup>63</sup> See, e.g., BENJAMIN CAYETANO, *BEN: A MEMOIR, FROM STREET KID TO GOVERNOR* 443 (2009) (noting the animosity toward some Office of Hawaiian Affairs trustees: “They don’t listen to anyone but themselves, they sing only to the choir and that’s not going to change.”).

<sup>64</sup> *Rice*, 963 F. Supp. at 1548–49.

<sup>65</sup> *Id.* at 1549–50.

<sup>66</sup> See *id.* at 1549.

<sup>67</sup> *Id.*

<sup>68</sup> Under a Fourteenth Amendment equal protections analysis, on one end of the spectrum, a racial classification is reviewed under a strict scrutiny standard, which requires that the government show a “compelling governmental interest” in enacting the law and that the law enacted was “necessary” to further that interest. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 202 (1995). On the other end of the spectrum, a political classification is reviewed under the less stringent “rational basis test,” which requires the government to provide a rational connection between enacting the law and the legislative objective. See *Morton v. Mancari*, 417 U.S. 535 (1974). It is generally acknowledged that government action is almost always validated under a rational basis review and almost always invalidated under the strict scrutiny standard. See *Mathews v. De Castro*, 429 U.S. 181, 185 (1976) (citation omitted) (holding that under a rational basis test, laws will be upheld unless the government’s action is “clearly wrong, a display of arbitrary power, not an exercise of judgment”); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986).

<sup>69</sup> *Rice*, 963 F. Supp. at 1549.

In his May 6, 1997 decision, federal District Court Judge David A. Ezra—a Reagan appointee<sup>70</sup>—rejected Rice’s arguments.<sup>71</sup> Judge Ezra, conjuring the language of Federal Indian Law, concluded that there was a “guardian-ward” relationship between the United States and the Native Hawaiian people, which resembled that of Native Americans throughout the country.<sup>72</sup> He alluded to several federal laws, including the Apology Resolution, the Hawaiian Homes Commission Act, Section 5(b) of the Hawai’i Admission Act, and recognized the “unique obligation” of the federal government to Native Hawaiians.<sup>73</sup> As such, Judge Ezra upheld the Office of Hawaiian Affairs’ voting requirement:

the State of Hawai’i created OHA as a means to fulfill the obligation taken over from the federal government as part of the Admission Act. The State of Hawai’i did not create the trust relationship with Native Hawaiians, nor did it enact the initial legislation singling Native Hawaiians out for special treatment. Rather, the State of Hawai’i merely enacted a reasonable method to satisfy its obligation to utilize a portion of the proceeds from the [Section] 5(b) lands for the betterment of Native Hawaiians. This is clearly consistent with and pursuant to Congress’ mandate and intent.<sup>74</sup>

Dissatisfied, Rice appealed Judge Ezra’s decision.<sup>75</sup> On appeal, the Ninth Circuit Court of Appeals affirmed Judge Ezra’s ruling, holding that Hawai’i “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,” even if the Hawai’i Constitution and implementing statutes contain a racial classification on its face.<sup>76</sup>

Rice filed a petition for a writ of certiorari to the Supreme Court of the United States.<sup>77</sup> In a surprise to most observers,<sup>78</sup> the Court granted the writ and, thus, allowed Rice to appeal the Ninth Circuit’s decision.<sup>79</sup> Rice, a rancher from Hawai’i,<sup>80</sup> brought his case to the largest legal stage, and was

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<sup>70</sup> Dan Nakaso, *Judging Ezra: Ambition and Ability*, HONOLULU ADVERTISER (May 27, 2001), <http://the.honoluluadvertiser.com/article/2001/May/27/lh/lh02a.html>.

<sup>71</sup> *Rice*, 963 F. Supp. at 1559.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 1555.

<sup>75</sup> *Rice v. Cayetano*, 146 F.3d 1075 (9th Cir. 1998).

<sup>76</sup> *Id.* at 1079.

<sup>77</sup> *Rice v. Cayetano*, 526 U.S. 1016 (1999).

<sup>78</sup> The Court’s acceptance of certiorari surprised many because of the unanimous decision of the district court and Ninth Circuit affirming the election procedures. *See Rice v. Cayetano*, 963 F. Supp. at 1547; *Rice v. Cayetano*, 146 F.3d at 1076.

<sup>79</sup> *Rice*, 526 U.S. at 1016.

<sup>80</sup> Christine Donnelly, *Rice: It’s About Protecting the Constitution, Not ‘Racist’*,

not alone in the fight.<sup>81</sup> One of his supporters was conservative attorney Robert Bork.<sup>82</sup> Bork gained national attention in the 1970s when, as acting Attorney General under President Richard Nixon, he fired Watergate Special Prosecutor Archibald Cox for requesting Nixon's cover-up tapes.<sup>83</sup>

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HONOLULU STAR BULLETIN (Feb. 23, 2000), <http://archives.starbulletin.com/2000/02/23/news/story3.html>.

<sup>81</sup> Rice was also joined on appeal by a slew of conservative organizations, including the Campaign for a Color Blind America, Americans Against Discrimination and Preferences, the United States Justice Foundation, and the New York Civil Rights Coalition. See Brief for Amici Curiae Center for Equal Opportunity, New York Civil Rights Coalition, Carl Cohen, and Abigail Thernstrom in Support of Petitioner, *Rice v. Cayetano*, 528 U.S. 495 (2000) (No. 98-818), 1999 WL 345639; Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioner, *Rice v. Cayetano*, 528 U.S. 495 (2000) (No. 98-818), 1999 WL 332717; Brief of Amici Curiae Campaign for a Color-Blind America, Americans Against Discrimination and Preferences, and the United States Justice Foundation in Support of Petitioner, *Rice v. Cayetano*, 528 U.S. 495 (2000) (No. 98-818), 1999 WL 374577. These organizations, which by name suggest pro-civil rights agendas, were vehemently opposed to affirmative action programs and outright belligerent to minority causes and rights. Edward Blum of the Campaign for a Color Blind America ignored the century-long subjugation of Native Hawaiians and instead tried to frame the case as a direct challenge to other minority groups by insisting that he was "appalled that African Americans and Hispanics in Hawai'i are being turned away from the OHA voting polls because of their skin color." Pat Omandam, *Hawaiians Say Hearing Went Badly*, HONOLULU STAR-BULLETIN, Oct. 6, 1999, at A1, A8. Blum, who has chased and created cases challenging affirmative action programs around the country, saw his role "to facilitate and fund" these various lawsuits challenging affirmative action programs. Catherine Ho, *The Washington Duo Behind Texas Affirmative Action Case*, THE WASHINGTON POST, (March 4, 2012), [http://www.washingtonpost.com/business/capitalbusiness/the-washington-duo-behind-texas-affirmative-action-case/2012/02/28/gIQAefsrqR\\_story.html](http://www.washingtonpost.com/business/capitalbusiness/the-washington-duo-behind-texas-affirmative-action-case/2012/02/28/gIQAefsrqR_story.html). In his comments, and as discussed in detail below, Blum conveniently forgot to mention that Rice was a wealthy white voter whose family assisted in the theft of Hawaiian sovereignty. Blum's ability to bring funds to litigation has since been responsible for two recent decisions by the Court that struck down a portion of the Voting Rights Act in *Shelby County v. Holder*, 133 S.Ct. 2612 (2013), and reviewed affirmative action policies in college admissions in *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013). *Id.* Blum's biases were on full display in an amicus brief filed on behalf of his organization, the Campaign for a Color Blind America, and Americans Against Discrimination and Preferences, and the United States Justice Foundation. In that brief, the organizations cited authoritatively to the work of Romanzo C. Adams, the twentieth century historian who created the "melting pot" ideology, which has since been heavily criticized by contemporary scholars. See JONATHAN Y. OKAMURA, *ETHNICITY AND INEQUALITY IN HAWAII* 8 (2008) (criticizing Adams' melting pot ideology because it ignored the subjugation of Native Hawaiians, Filipinos, and Samoans to allow the narratives of Caucasians, Japanese, and Chinese to be elevated as the dominant narrative).

<sup>82</sup> See Brief for Amici Curiae Center for Equal Opportunity, New York Civil Rights Coalition, Carl Cohen, and Abigail Thernstrom in Support of Petitioner at 6, *Rice v. Cayetano*, 528 U.S. 495 (2000) (No. 98-818), 1999 WL 345639, at \*1 [hereinafter Bork Brief].

<sup>83</sup> Ethan Bronner, *A Conservative Whose Supreme Court Bid Set the Senate Afire*, N.Y.

Bork again gained national attention in 1987 when his appointment by President Ronald Reagan to serve on the Court was rejected because of his extremist ideology.<sup>84</sup> United States Senator Edward M. Kennedy characterized Bork's view of America as:

[A] land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens' doors in midnight raids, schoolchildren could not be taught about evolution, writers and artists could be censored at the whim of government, and the doors of the federal courts would be shut on the fingers of millions of citizens for whom the judiciary is—and is often the only—protector of the individual rights that are the heart of our democracy.<sup>85</sup>

Consistent with his past criticism of minority views,<sup>86</sup> Bork ignored the history of colonization against Hawaiians and instead trumpeted the conservative rallying cry that affirmative action programs and entities, such as the Office of Hawaiian Affairs, were unconstitutional.<sup>87</sup> Instead of recognizing the unique situation in Hawai'i and the clear reconciliatory purpose that the Office of Hawaiian Affairs was intended to address, Bork implicitly invoked a post-racial society in which everyone was equal: "The entire [Office of Hawaiian Affairs] scheme is infused with explicit racial quotas, exclusions, and classifications to a degree this Court has rarely encountered in the last half-century."<sup>88</sup>

On the other end of the legal battle was a diverse group of supporters of the Office of Hawaiian Affairs' voting procedures, including the National Congress of American Indians, Hawai'i's congressional delegation, and the federal government, which was asked to participate in the oral arguments before the Court.<sup>89</sup> Tasked with defending the State's position was John G. Roberts, Jr., an attorney with the Washington, D.C. law firm of Hogan & Hartson LLP. Roberts' career, which eventually led to his selection as Chief Justice of the Court by George W. Bush, traced the trajectory of the

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TIMES (Dec. 19, 2012), <http://www.nytimes.com/2012/12/20/us/robert-h-bork-conservative-jurist-dies-at-85.html>.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> See Bork Brief, *supra* note 82, at \*2–4.

<sup>88</sup> *Id.* at \*6.

<sup>89</sup> See Brief Amicus Curiae of the National Congress of American Indians in Support of the Respondent at 1, *Rice v. Cayetano*, 528 U.S. 495 (2000) (No. 98-818), 1999 WL 557271 at \*1; Brief for the Hawai'i Congressional Delegation as Amicus Curiae Supporting Respondent at 1, *Rice v. Cayetano*, 528 U.S. 495 (2000) (No. 98-818), 1999 WL 557289 at \*1; Brief for the United States as Amicus Curiae Supporting Respondent at 1, *Rice v. Cayetano*, 528 U.S. 495 (2000) (No. 98-818), 1999 WL 569475 at \*1.

conservative movement in America.<sup>90</sup> Yet, although he clerked for conservative justice William H. Rehnquist and worked in the Reagan and George H.W. Bush Justice Departments, Roberts advocated for Native Hawaiians.<sup>91</sup> Constitutional and International Law scholars and long-time duo Jon Van Dyke and Sherry Broder briefed the Court on behalf of the Office of Hawaiian Affairs.<sup>92</sup> Given the legal fire-power brought to the Court, the case was hailed as the “best briefed” case of the term.<sup>93</sup>

The Supreme Court announced its decision on February 23, 2000.<sup>94</sup> The tally was seven in favor of Rice and two in favor of Cayetano.<sup>95</sup> Writing for a five-member majority of the Court,<sup>96</sup> Justice Anthony Kennedy—who Reagan selected after Bork’s failed confirmation<sup>97</sup>—overturned the decision of the Ninth Circuit Court.<sup>98</sup> Kennedy was joined by Chief Justice William

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<sup>90</sup> See Donnelly, *supra* note 80 (noting that Roberts was a partner and Hogan and Hartson, clerked for Justice Rehnquist and then was appointed to the White House staff); Linda Greenhouse, *A Ceremonial Start to the Session as the Supreme Court Welcomes a New Chief Justice*, N.Y. TIMES (Oct. 4, 2005), <http://www.nytimes.com/2005/10/04/politics/politicsspecial1/a-ceremonial-start-to-the-session-as-the-supreme.html>.

<sup>91</sup> See Donnelly, *supra* note 80; Oral Argument at 26:49, *Rice v. Cayetano*, 528 U.S. 495 (2000) (No. 98-818), <https://www.oyez.org/cases/1999/98-818>.

<sup>92</sup> Brief of the Office of Hawaiian Affairs, Ka Lahui, Ass’n of Hawaiian Civic Clubs, Council of Hawaiian Organizations, Native Hawaiian Convention, Native Hawaiian Bar Ass’n, Native Hawaiian Legal Corp., Native Hawaiian Advisory Council, Ha Hawai’i, Hui Kali’aina, Alu Like, Inc., and Papa Ola Lokahi as Amici Curiae Supporting Respondent at 1, *Rice v. Cayetano*, 528 U.S. 495 (2000) (No. 98-818), 1999 WL 557287 at \*1.

<sup>93</sup> Pete Pichaske, *Attorneys Spar in OHA Case*, HONOLULU STAR-BULLETIN, Oct. 6, 1999, at A1, A6.

<sup>94</sup> *Rice v. Cayetano*, 528 U.S. 495, 495 (2000).

<sup>95</sup> *Id.*

<sup>96</sup> The Rehnquist Court continued the Burger Court’s conservative bent, but shifted the legal landscape. In regard to America’s indigenous people, the Rehnquist Court has been criticized for its hostility particularly toward Native American interests, which have been a radical departure from Courts of the past:

In the last ten terms, Indian tribal interests have lost seventy-seven percent of all their cases before the Rehnquist Court; they lost only thirty-six percent of their cases before the Burger Court. Tribal interests have not won a single case before the Supreme Court involving state jurisdiction over non-Indians, and they have lost seventy-three percent of the cases involving tribal jurisdiction over nonmembers. It is difficult to find another class of cases or type of litigant that has fared worse before the Supreme Court.

Jeanette Wolfley, *Rice v. Cayetano: The Supreme Court Declines to Extend Federal Indian Law Principles to Native Hawaiians Sovereign Rights*, 3 ASIAN-PAC. L. & POL’Y J. 359, 359–60 (2002).

<sup>97</sup> See Linda Greenhouse, *Reagan Nominates Anthony Kennedy to Supreme Court*, N.Y. TIMES (Nov. 12, 1987), <http://www.nytimes.com/1987/11/12/us/reagan-nominates-anthony-kennedy-to-supreme-court.html?pagewanted=all>.

<sup>98</sup> *Rice*, 528 U.S. at 497.

Rehnquist and Associate Justices Sandra Day O'Connor, Antonin Scalia, and Clarence Thomas.<sup>99</sup> Rehnquist, who was initially selected as an associate justice by President Richard Nixon,<sup>100</sup> was elevated to the position of Chief Justice by President Reagan.<sup>101</sup> Reagan's stacking of conservative voices on the Court continued with his appointment of the first female justice, O'Connor,<sup>102</sup> originalist guru, Scalia,<sup>103</sup> and Bork's replacement selection, Kennedy.<sup>104</sup> The fifth member of the conservative majority was Thomas, the former chair of the Equal Employment Opportunity Commission who was appointed by President George H.W. Bush to fill the vacancy left by the retirement of liberal firebrand Thurgood Marshall.<sup>105</sup> Thomas' former position in the EEOC was one of the positions filled by Reagan to ensure an anti-affirmative action regime in federal enforcement.<sup>106</sup> Thomas had adamantly opposed all racial preference programs and saw affirmative action as "social engineering."<sup>107</sup> In this matter, the right-leaning Court concluded that the voting requirement for the Office of Hawaiian Affairs under Hawai'i law violated the Fifteenth Amendment inasmuch as it was based entirely on a racial preference.<sup>108</sup>

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<sup>99</sup> *Id.*

<sup>100</sup> Linda Greenhouse, *Chief Justice Rehnquist Dies at 80*, N.Y. TIMES (Sept. 4, 2005), <http://www.nytimes.com/2005/09/04/politics/chief-justice-rehnquist-dies-at-80.html>.

<sup>101</sup> *Id.*

<sup>102</sup> Linda Greenhouse, *When Sandra Day O'Connor Broke Into the Men's Club*, N.Y. TIMES (Aug. 4, 2016), <https://www.nytimes.com/2016/08/04/opinion/when-sandra-day-oconnor-broke-into-the-mens-club.html>.

<sup>103</sup> Josh Gerstein, *Supreme Court Justice Antonin Scalia Dead at 79*, POLITICO (Feb. 13, 2016), <http://www.politico.com/story/2016/02/breaking-news-supreme-court-justice-antonin-scalia-dead-at-the-age-of-79-219246>.

<sup>104</sup> See *supra* note 97.

<sup>105</sup> Adam Liptak, *Reticent on the Bench, But Effusive About It*, N.Y. TIMES, Nov. 1, 2016, at A15.

<sup>106</sup> TERRY H. ANDERSON, *THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION* 208 (2004).

<sup>107</sup> *Id.*

<sup>108</sup> Paul Finkelman contends that Court opinions are the product of decisions by individual justices because the justices of the Court are not social actors, but are either "heroes or villains" in that they bring their own perspective, prejudices, and attitudes to the bench. See Paul Finkelman, *Civil Rights in Historical Context: In Defense of Brown*, 118 HARV. L. REV. 973, 994 (2005). The result in *Plessy v. Ferguson*, 163 U.S. 537 (1896), and other racial cases were, according to Finkelman, a reflection of the personal views of the justices and their decision to support Southern, rather than Northern, notions of race. Finkelman, 118 HARV. L. REV. at 978–94. For instance, Finkelman argues that "[v]irtually all scholars agree that the death of Chief Justice Vinson in 1953 and his replacement with Chief Justice Earl Warren made it possible for the Court to reach a unanimous decision in *Brown* with a single opinion and a unified voice." *Id.* at 995. Richard Kluger similarly asserts that judges indeed bring their own biases to bear on their decisions. See RICHARD

While the outcome was not unexpected given the composition of the Court and their prior decisions, serious harm came from the Court's biased and selective narrative of Hawaiian history. The Court's piece-meal narrative was, in their own words, their way to "recount events" in Hawaiian history relevant to the case.<sup>109</sup>

Ignoring Hawaiians' own creation story, the Court began with a patronizing tale of an island people whose life was "not altogether idyllic" and who simply found "beauty and pleasure in their island existence[.]"<sup>110</sup> Despite noting that the Native Hawaiian people had "well-established traditions and customs[.]" the Court was quick to point out that Native Hawaiians practiced a "polytheistic religion."<sup>111</sup> The Court could have simply stated that Native Hawaiians developed their own religion; instead it chose to highlight the difference between the Native Hawaiians' polytheistic religious belief and the Euro-centric and monotheistic religious view (Christianity) of the majority justices. In what way was noting that Native Hawaiians had a polytheistic religion relevant to deciding the case? It was not. Thus, the reference was a subtle, yet implicit, swipe at the lack of Christianity, and therefore morality, of the Native Hawaiians. Moreover, instead of characterizing the New England missionaries as cultural and religious intruders, the Court found that those missionary families, which included Rice's ancestors, were simply attempting to "teach Hawaiians to abandon religious beliefs and customs that were contrary to Christian teachings and practices."<sup>112</sup>

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KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 295–305 (2004). Kluger recounts the story of J. Waties Waring, a white federal district court judge, who was raised by ex-slaves and, after reaching the upper echelon of society in South Carolina, was shocked at the treatment of blacks. *Id.* Judge Waring took small steps toward addressing the inequality against blacks, such as making it easier for a black individual to sit on a jury. *Id.* After several deplorable cases, Judge Waring became "the black man's friend" and set precedence for future cases. *Id.* at 305. Finkelman's and Kluger's positions are in stark contrast to that of Michael Klarman, who described the Court as playing a "vanguard role" in the school desegregation decision, *Brown v. Board of Education*, noting that "[m]any of [the justices] had to overcome serious legal doubts to invalidate segregation, but fundamental changes in the extralegal context of race relations had rendered a contrary result too unpalatable to most of them." MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 343 (2004).

<sup>109</sup> *Rice v. Cayetano*, 528 U.S. 495, 500 (2000).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 501.

Significantly, the Court's narrative implied Native Hawaiian acquiescence to the significant political changes that occurred in the Kingdom from the institution of the Bayonet Constitution in 1887 through the annexation of Hawai'i. The Court noted "[t]ensions" between the "anti-Western, pro-native bloc" and the "Western business interests and property owners[.]"<sup>113</sup> The Court specifically alluded to tensions in response to "an attempt by the then monarch, Queen Lili'uokalani, to promulgate a new constitution restoring monarchical control over the House of Nobles and limiting the franchise to Hawaiian subjects."<sup>114</sup> The Court simplified and mischaracterized the efforts of Lili'uokalani and Native Hawaiians. In essence, the Court accused Native Hawaiians of attempting an illegal overthrow of the government and ignored American business interests' involvement in Kingdom governance. While Lili'uokalani did seek to promulgate a new constitution, she did so in response to the calls of the Hawaiian people, who had been effectively written out of society with the foreign-imposed Bayonet Constitution in 1887.<sup>115</sup> Whereas the Kingdom's 1852 Constitution provided universal suffrage to all regardless of race, the Bayonet Constitution effectively disenfranchised Asians because of its literacy requirements, created an income requirement that effectively removed Native Hawaiians as eligible voters, and enfranchised white foreigners without any requirement that they renounce their former allegiance or naturalize as subjects of the Kingdom.<sup>116</sup> Put simply, the Bayonet Constitution, which received its name because of the threat of violence that the white instigators promised if then-monarch Kalākaua refused to sign, provided "grossly disproportionate political power" to white business interests.<sup>117</sup> It was all a part of the "Anglo-Saxonizing Machine" that the missionary descendants viewed as supreme:

We declare to [Native Hawaiians] that the Anglicized civilization is settled in this country and is inevitably to prevail. Their only good prospect is heartily to fall in line with it, earnestly to study and diligently to practice all that is pure, just, true, lovely, and of good report in these thoughts, customs and habits of the haole.<sup>118</sup>

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<sup>113</sup> *Id.* at 504.

<sup>114</sup> *Id.*

<sup>115</sup> LILI'UOKALANI, HAWAII'S STORY BY HAWAII'S QUEEN 226–36 (1898).

<sup>116</sup> *See, e.g.*, HAW. KINGDOM CONST. arts. 59, 62 (1887).

<sup>117</sup> Yamamoto and Betts, *supra* note 61, at 560 (citation omitted).

<sup>118</sup> S.E. Bishop, *Anglo-Saxonizing Machines*, THE FRIEND, August 1887, at 63.

Conspirator Lorrin A. Thurston understood the illegality of his actions and attempted to justify their treasonous acts by alluding to images of the American Revolution: “Unquestionably, the [Bayonet] constitution was not in accordance with law; neither was the Declaration of Independence from Great Britain. Both were revolutionary documents, which had to be forcibly effected and forcibly maintained.”<sup>119</sup> This “tension” was erased from the *Rice* majority’s opinion.

The Court noted that a Committee of Safety with the “active assistance” of an American minister to Hawai‘i, John Stevens, and American armed forces “replaced the monarchy with a provisional government,” and that Queen Lili‘uokalani “could not resume her former place,” which led to the establishment of the Republic of Hawai‘i.<sup>120</sup> Again, the Court simplified history and wholly ignored that “replac[ing]” the monarchy involved direct threats of violence to the Native Hawaiian people.<sup>121</sup> Indeed, the characterization of American involvement in the overthrow as “active assistance” downplayed the landing of American Marines and Lili‘uokalani’s formal protests to President Grover Cleveland and the American Congress.<sup>122</sup> The Court ignored the American investigation and July 1893 Blount Report that found that the “United States diplomatic and military representatives had abused their authority and were responsible for the change in government.”<sup>123</sup> The Court ignored the subsequent effort by members of the Senate Foreign Relation Committee to discredit the findings of the Blount Report by cobbling together pro-annexationist testimony in Hawai‘i into another report.<sup>124</sup> That subsequent Morgan Report, made at the request of Foreign Relations Chairman,<sup>125</sup> racial segregationist and Ku Klux Klan leader John Tyler Morgan,<sup>126</sup> attempted to exonerate American involvement in the overthrow.<sup>127</sup> While it may have swayed some uninformed and pro-annexationist leaders at the time, the

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<sup>119</sup> LORRIN THURSTON, *MEMOIRS OF THE HAWAIIAN REVOLUTION* 153 (1936)

<sup>120</sup> *Rice v. Cayetano*, 528 U.S. 495, 505 (2000).

<sup>121</sup> *Id.*

<sup>122</sup> LILI‘UOKALANI, *supra* note 115, at 335–40.

<sup>123</sup> S.J. Res. 19, 103d Cong. (1993), Pub. L. No. 103-150, § 1, 107 Stat. 1510, 1513 [hereinafter *Apology Resolution*]; see also James Blount, Report of the Commissioner to the Hawaiian Islands, S. EXEC. DOC. No. 53-47 (1893).

<sup>124</sup> See SENATE COMMITTEE ON FOREIGN RELATIONS, REPORT ON HAWAIIAN ISLANDS, S. Rep. No. 227 (1894) [hereinafter *Morgan Report*].

<sup>125</sup> PETER TRUBOWITZ, *DEFINING THE NATIONAL INTEREST: CONFLICT AND CHANGE IN AMERICAN FOREIGN POLICY* 267 n. 103 (1998) (noting that Morgan was chairman of the Senate Foreign Affairs Committee “and a champion of imperialism”).

<sup>126</sup> SUSAN LAWRENCE DAVIS, *AUTHENTIC HISTORY: KU KLUX KLAN, 1865–1877*, at 45 (1924).

<sup>127</sup> See *Morgan Report*, *supra* note 124.

Morgan Report has been sternly criticized for its slanted and imperialist agenda.<sup>128</sup> Yet, instead of recounting these American investigations, Justice Kennedy's opinion simply ignored them.

The Court failed to mention the overwhelming resistance to American annexation by Lili'uokalani and Native Hawaiians. Following the overthrow, Lili'uokalani made several trips to the United States to seek assistance in reinstating her government.<sup>129</sup> While the Court mentioned a "Joint Resolution" that annexed Hawai'i to the United States in 1898,<sup>130</sup> it failed to justify how such a "Joint Resolution" could annex another sovereign entity and have binding effect like a treaty. The Court wholly ignored the 21,000 Native Hawaiian signatures, which represented well over half of the adult Hawaiians at the time, obtained on a petition protesting an annexation treaty that was sent to the United States Senate and ultimately led to the proposed-treaty's defeat.<sup>131</sup>

The Court's biases were also on full display through its description and characterization of Plaintiff Freddy Rice. First, in a very different way that a citizen of California is a Californian, the Court characterized Rice as a "citizen of Hawai['i] and thus himself a Hawaiian in a well-accepted sense of the term."<sup>132</sup> The characterization of Rice as "Hawaiian" trivialized what it means to be "Hawaiian" as most Hawai'i citizens recognize that "Hawaiian" refers to a person of Native Hawaiian ancestry. It was, as Professor Chris Iijima noted, "misinformed, biased, and plainly wrong."<sup>133</sup> Second, the Court described Rice as a "descendant of pre-annexation residents of the islands."<sup>134</sup> It failed to account for the role played by the Rice family in the subjugation of Native Hawaiians throughout the nineteenth century. For example, it was Rice's great-great grandparents William Harrison Rice and Mary Sophia Hyde Rice who voyaged to Hawai'i to preach their religious values—values that they believed needed to be taken to the "savage" indigenous people in much the same way that Mary's father brought Christian values to the Seneca Indian tribe.<sup>135</sup> After arriving in Hawai'i, William ended up doing well by amassing land and

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<sup>128</sup> See VAN DYKE, *supra* note 60, at 168–69.

<sup>129</sup> LILI'UOKALANI, *supra* note 115, at 313–40.

<sup>130</sup> "Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States," ch. 55, 30 Stat. 750, 751 (1898).

<sup>131</sup> VAN DYKE, *supra* note 60, at 209–11.

<sup>132</sup> Rice v. Cayetano, 528 U.S. 495, 499 (2000).

<sup>133</sup> Chris K. Iijima, *Race Over Rice: Binary Analytical Boxes and a Twenty-First Century Endorsement of Nineteenth Century Imperialism in Rice v. Cayetano*, 53 RUTGERS L. REV. 91, 104 (2000).

<sup>134</sup> Rice, 528 U.S. at 510.

<sup>135</sup> HAWAII MISSION CHILD. SOC'Y, PORTRAITS OF AMERICAN PROTESTANT MISSIONARIES TO HAWAII 75 (1901).

money from the growing sugar industry on Kaua'i.<sup>136</sup> William, who supervised the creation of the first irrigation ditch in Hawai'i, was also responsible for diverting the natural flow of water from native farmers to ensure the sustainability of the sugar plantation.<sup>137</sup> That diversion, when repeated throughout the Hawaiian Islands, effectively cut-off native farmers from water and all but ensured the demise of their crops, ensured a reliance on a western economic structure, and eviscerated the Hawaiian culture and way of life.<sup>138</sup> When combined with the results of western land tenure in the Māhele,<sup>139</sup> William's diversion of water in favor of plantations closed the door on native control of their land and resources.<sup>140</sup>

William's children immersed themselves in the fabric of western control in Hawai'i. William's daughters, Maria and Anna, married white-missionary descendants that went on to form companies like AMFAC and Castle & Cooke<sup>141</sup>—two of the “Big Five” companies that controlled the Hawaiian economy for decades, in what some have characterized as the most consolidated system of power throughout the United States.<sup>142</sup> William's son (and Freddy Rice's great-grandfather), William Hyde Rice, continued the family business and amassed a large portion of land on Kaua'i (at one point being one of the top ten lands owners on the island).<sup>143</sup> William Hyde eventually entered politics and became a member of the Kingdom's House of Representatives.<sup>144</sup> Despite his role as a politician for the Kingdom, William Hyde was instrumental in drafting the Bayonet Constitution of 1887, which, forced upon Kalākaua, stripped the monarch of substantial power and disenfranchised native voters in favor of white control.<sup>145</sup> Clearly, generations of the Rice Family played key roles implementing and enforcing laws and practices that benefitted white-Americans at the expense of Native Hawaiians. The *Rice Court*, however, conveniently left this context out of its decision.

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<sup>136</sup> *Id.*

<sup>137</sup> CAROL WILCOX, SUGAR WATER: HAWAII'S PLANTATION DITCHES 70 (1996).

<sup>138</sup> *Id.*

<sup>139</sup> See Jonathan K.K. Osorio & Kamanamaikalani Beamer, *Sullying the Scholar's Craft: An Essay and Criticism of Judge James S. Burns' Crown Lands Trust Article*, 39 U. HAW. L. REV. 469, 470 (2017).

<sup>140</sup> See WILCOX, *supra* note 137 at 70.

<sup>141</sup> EDWARD T. JONES, NOTABLE AMERICAN WOMEN, 1607–1950: A BIOGRAPHICAL DICTIONARY 377–78 (1971).

<sup>142</sup> *Id.*

<sup>143</sup> GEORGE F. NELLIST, THE STORY OF HAWAII AND ITS BUILDERS 171–73 (1925).

<sup>144</sup> *Id.*

<sup>145</sup> HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAII 14 (1993).

These glaring omissions are likely the result of a majority on the Court who had clear political and historical biases.<sup>146</sup> Indeed, the Court's bias was epitomized in its description of the historical background, in which the Court noted two "important matters[.]"<sup>147</sup> First, the Court concluded that the introduction of western diseases was "no doubt" a "cause of the despair, disenchantment, and despondency . . . in descendants of the early Hawaiian people."<sup>148</sup> In other words, disregard America's involvement in the overthrow and subjugation of the Hawaiian political body, disregard America's suppression of Hawaiian language, culture, and history, disregard the theft of Hawaiian land and resources, and instead accept that the current socio-economic struggles were the result of a people that could not survive that Darwinian notion of survival of the fittest. Second, the Court concluded its re-telling of Hawaiian history by highlighting the influx of immigrants to the islands.<sup>149</sup> Justice Kennedy highlighted the following immigrant groups that were brought to Hawai'i: "Chinese, Portuguese, Japanese, and Filipinos[.]"<sup>150</sup> At no time did the Court refer to Americans and other Western individuals as "immigrants." In the eyes of the Court, Americans—including Freddy Rice's missionary ancestors—were "settlers" not "immigrants"; Americans were, as Professor Iijima interpreted the Court's specific terminology, the "rightful and natural heirs to the land of Hawai[']i" and not just another ethnic group coming to the islands for work.<sup>151</sup> It is then not surprising that the Court concluded: "Each of these ethnic and national groups has had its own history in Hawai[']i, its own struggles with societal and official discrimination, its own successes, and its own role in creating the present society of the islands."<sup>152</sup> The Court's message was clear: if everyone else could do it, so too could the Native Hawaiians.

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<sup>146</sup> The legitimacy of the Court is in jeopardy with its cherry-picked narratives of the history of oppressed communities. One scholar noted, "[i]t is the judiciary that is the gatekeeper of how history is relevant to the respective case or controversy, the manner in which history in law is applied, and what historical evidence is to be admitted." Patrick J. Charles, *History in Law, Mythmaking, and Constitutional Legitimacy*, 63 CLEVELAND STATE L. REV. 23, 37 (2014). That responsibility is severely curtailed when the Court selectively decides what occurred in the past. When the Court (and the judiciary in general) lose legitimacy, the public is less likely to accept its pronouncements as authoritative. The Court is no longer respected as a neutral arbiter, but rather as a political body subject to the fanciful whims of the majority of its members.

<sup>147</sup> *Rice v. Cayetano*, 528 U.S. 495, 506 (2000).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Iijima, *supra* note 133, at 103.

<sup>152</sup> *Rice*, 528 U.S. at 506.

As if the Court's stinging mischaracterization of nineteenth and early twentieth century Hawaiian history were not enough, it then made a decision regarding the Office of Hawaiian Affairs without adequately analyzing the agency's unique history and its role in the Hawaiian community.<sup>153</sup> Surprisingly, the Court failed to mention the reconciliatory purpose for which the Office of Hawaiian Affairs was created and conveniently left out from its opinion the fact that the Office of Hawaiian Affairs (and its constitutional foundation) was voted for and approved by a majority of citizens of the multi-ethnic State of Hawai'i in 1978.<sup>154</sup>

When it pleased the Court, it found certain Congressional and jurisprudential "historical conclusions . . . persuasive[.]"<sup>155</sup> For example, the Court ignored the Congressional mandate in the Admissions Act that the State hold lands in trust for the native Hawaiians.<sup>156</sup> As the dissenting opinion of Justices John Paul Stevens and Ruth Bader Ginsburg noted, "it is a painful irony indeed to conclude that native Hawaiians are not entitled to special benefits designed to restore a measure of native self-governance because they currently lack any vestigial native government—a possibility of which history and the *actions of this Nation have deprived them*."<sup>157</sup> In another example of the Court's selective nature, while quick to cite to legislative history from the enactment of the Hawaiian Homes Commission Act that declared Native Hawaiians as "wards,"<sup>158</sup> the Court all but ignored the federal Apology Resolution that set forth Congressional and Presidential apologies for the actions of Americans with the overthrow of the Kingdom and called for reconciliatory efforts between Native Hawaiians and the United States.<sup>159</sup> The Court failed to recognize that an American law clearly stated that Native Hawaiians "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[.]"<sup>160</sup> It, therefore, is not surprising that Justice Scalia had the following colloquy with Rice's attorney, Ted Olson, about the significance (or lack thereof) of the Apology Resolution:

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<sup>153</sup> See Troy J.H. Andrade, *Changing Tides: A Political and Legal History of the Office of Hawaiian Affairs* (May 2016) (unpublished Ph.D. dissertation, University of Hawai'i at Mānoa) (on file with author).

<sup>154</sup> See *supra* note 53.

<sup>155</sup> *Rice*, 528 U.S. at 501.

<sup>156</sup> Admission Act of 1959, Pub. L. No. 86-3, § 2, 73 Stat. 4, 4.

<sup>157</sup> *Id.* at 535 (Stevens, J., dissenting) (emphasis added).

<sup>158</sup> *Id.* at 511 (citation omitted).

<sup>159</sup> See Apology Resolution, *supra* note 123.

<sup>160</sup> *Id.*

- Scalia: You mean you're contradicting the congressional resolution that said we're guilty? Do we have to accept that . . . resolution as an accurate description of history?
- Olson: Of course, and this Court . . .
- Scalia: Can't Congress make history? [Laughter in the audience]
- Olson: Congress does make history, but Congress, of course, can't change history. I'm . . . not accepting everything that's in the so-called Apology Resolution.<sup>161</sup>

For some, like Scalia and his conservative colleagues, Congress' recitation of Hawaiian history was not binding and the Court could, on its own, write history.

Given its tailored view of Hawai'i political and legal history, it was clear the direction that the Court was headed. It concluded that the voting scheme for the Office of Hawaiian Affairs, although argued as being based on ancestry, was a racial classification: "The State, in enacting the legislation before us, has used ancestry as a racial definition and for a racial purpose."<sup>162</sup> The Court then made the bold pronouncement that reflected the conservative mantra of picking oneself up by the bootstraps: "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."<sup>163</sup>

Justice Kennedy concluded with a stinging rebuke of Hawaiians and a paternalistic and patriotic message:

When the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations; and their dismay may be shared by many members of the larger community. As the State of Hawai[']i attempts to address these realities, it must, as always, seek the political consensus that begins with a sense of shared purpose. One of the necessary beginning points is this principle: The Constitution of the United States, too, has become the heritage of all the citizens of Hawai[']i.<sup>164</sup>

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<sup>161</sup> Rice Oral Argument, *supra* note 45, at \*14.

<sup>162</sup> Rice v. Cayetano, 528 U.S. 495, 515 (2000).

<sup>163</sup> *Id.* at 517. The Court added that the State's argument failed because it rested on the "demeaning" premise that citizens of a particular race are somehow more qualified than others to vote on certain matters. *Id.* at 498.

<sup>164</sup> *Id.* at 524.

The harm from the *Rice* decision, much like that of the successive generations of the Rice Family, comes from a legitimization of American superiority over indigenous peoples. The *Rice* Court “turned a blind eye to history.”<sup>165</sup> As Justice Stevens, in his scathing dissent, wrote: “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 Hawai[‘i].”<sup>166</sup> Another scholar argued that “[i]f there is a textbook case in which majoritarian perspectives and racial norms masquerade as neutral narrative, it is the *Rice* decision.”<sup>167</sup>

Following the decision, Rice boldly professed, “I’m proud to be part of Hawai[‘i]’s history . . . It was good for Hawaiians, and certainly good for the state. Got everybody thinking. Hawaiians took advantage of being able to play the part of victim and get entitlements based on race. They stepped over the line. The *Rice* decision made everyone step back.”<sup>168</sup> Rice and the Court’s decision indeed made Hawaiians “step back.”<sup>169</sup>

### B. *Revising and Copying History*

Nine years later, Native Hawaiians and the Office of Hawaiian Affairs again appeared before the Court.<sup>170</sup> This time, the State of Hawai‘i applied and was granted certiorari on a decision by the Hawai‘i Supreme Court that enjoined the sale of Ceded Lands until Native Hawaiian claims to the land were settled.<sup>171</sup> While the Hawai‘i Supreme Court recounted a Hawaiian past reflecting the effects of colonialism on Hawaiians, the history told by the United States Supreme Court in its opinion downplayed the procedural history of the case and, again, provided a jaded view of Hawai‘i’s legal and political history.

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<sup>165</sup> Eric K. Yamamoto, *The Colonizer’s Story: The Supreme Court Violates Native Hawaiian Sovereignty—Again*, COLORLINES (August 20, 2000), <http://www.colorlines.com/articles/colonizers-story-supreme-court-violates-native-hawaiian-sovereignty-again>.

<sup>166</sup> *Rice*, 528 U.S. at 527–28 (Stevens, J., dissenting).

<sup>167</sup> Iijima, *supra* note 133, at 98.

<sup>168</sup> Yamamoto & Betts, *supra* note 61, at 546 (citation omitted).

<sup>169</sup> Attorney Roberts saw the decision as a victory: “The good news is that the majority’s opinion was very narrowly written and expressly did not call into question the Office of Hawaiian Affairs, the public trust for the benefit of Hawaiians and native Hawaiians, but only the particular voting mechanism by which the trustees are selected.” Helen Altonn & Christine Donnelly, *Top Court Backs Rice in OHA Vote Challenge*, HONOLULU STAR-BULLETIN, Feb. 23, 2000, at A1, A8–A9.

<sup>170</sup> *Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Hawai‘i*, 117 Hawai‘i 174, 177 P.3d 884 (2008) [hereinafter *HCDCH I*].

<sup>171</sup> *Id.*

In 1987, the Housing Finance and Development Corporation ("HFCD")—an entity created by the State of Hawai'i to remedy the critical housing shortage facing the community—examined parcels around the State and selected two sites for future development of housing projects.<sup>172</sup> The two sites, Leiali'i in West Maui and La'i 'Ōpua in North Kona on Hawai'i Island, were both on Ceded Lands.<sup>173</sup> After obtaining the necessary approvals, the HFDC began a residential housing development project at Leiali'i.<sup>174</sup> Pursuant to State law, specifically Hawai'i Revised Statutes Section 10-13.6, and consistent with the determination of its share of Ceded Land revenues, the Office of Hawaiian Affairs was to be compensated twenty-percent of the fair market value of both parcels.<sup>175</sup> Following passage of the Apology Resolution (acknowledging that "the indigenous Hawaiian people never relinquished their claims . . . over their national lands to the United States"),<sup>176</sup> the Office of Hawaiian Affairs demanded "that a disclaimer be included as part of any acceptance of funds from the sale so as to preserve any native Hawaiian claims to ownership of the ceded lands[.]"<sup>177</sup>

In October 1994, the State balked at putting in such a disclaimer because "to do so would place a cloud on title, rendering title insurance unavailable to buyers in the [Leiali'i] project."<sup>178</sup> The State Department of Land and Natural Resources thereafter transferred the land to HFDC for \$1.00, and sent the Office of Hawaiian Affairs a check for \$5,573,604.40 as its twenty-percent share of the fair market value of the land.<sup>179</sup> The Office of Hawaiian Affairs refused to accept the check, and, along with several Native Hawaiian individuals, filed suit in State court seeking to halt the sale of all ceded lands because the "alienation of the land to a third-party would erode the ceded lands trust and the entitlements of the native Hawaiian people."<sup>180</sup> As one attorney asserted, "Those lands may be part of some major settlement, so to lease them now or dispose of them will definitely affect what's available for a settlement in the future[.]"<sup>181</sup> Then-Chairman Clayton Hee provided the rationale for filing suit against the State:

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<sup>172</sup> *Id.* at 896.

<sup>173</sup> *Id.* at 897.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 895.

<sup>177</sup> *Id.* at 897.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 897–98.

<sup>180</sup> *Id.* at 898.

<sup>181</sup> Gary Kubota, *On Hold: Land Disposition Issues at the Proposed Site of a Maui Subdivision Leave Potential Buyers Out in the Cold*, HONOLULU STAR-BULLETIN, July 28, 2000, at A1, A8 (quoting Melody K. MacKenzie).

What is being disputed is whether the state had the legal right to dispose of ceded lands at no compensation to the public land trust. . . . This is the first case where the Office of Hawaiian Affairs has taken a proactive step to prevent the state from reducing the inventory of public lands.<sup>182</sup>

The trial court heard evidence regarding the transfer of the land, the importance of the land to the Hawaiian community, analogies to Native American property rights, and evidence from the State that it was authorized to sell ceded lands from the public land trust.<sup>183</sup> The court issued an opinion concluding that the Office of Hawaiian Affairs' claims were barred by various legal doctrines and that the "State had the express authority to alienate ceded lands from the public lands trust."<sup>184</sup> The Office of Hawaiian Affairs appealed.<sup>185</sup>

Writing for a unanimous court, Chief Justice Ronald T.Y. Moon—the nation's first Korean-American Chief Justice<sup>186</sup>—reversed the trial court's decision by relying upon a reading of State laws and the Apology Resolution. The court first reviewed the language of the Apology Resolution, in which Congress and the President determined:

Whereas the Republic of Hawai['i] 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 of Hawai['i] 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;

\* \* \* \*

Whereas the Native Hawaiian people are determined *to preserve, develop and transmit to future generations their ancestral territory*, and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions.<sup>187</sup>

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<sup>182</sup> *Id.*

<sup>183</sup> *HCDCH I*, 117 Hawai'i at 188, 177 P.3d at 898.

<sup>184</sup> *Id.* at 899.

<sup>185</sup> *Id.*

<sup>186</sup> Nicole Kato, *Ronald Moon*, MIDWEEK (Jan. 1, 2014), <http://www.midweek.com/ronald-moon/>.

<sup>187</sup> Apology Resolution, *supra* note 123, at §3, 107 Stat. 1512–13.

Although the Apology Resolution contained a statement that “Nothing in [it] is intended to serve as a settlement of any claims against the United States,” the political branches (Congress and the President) undoubtedly expressed a “commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawai‘i, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people.”<sup>188</sup> Thus, under a plain reading, the standard used to interpret legislative intent,<sup>189</sup> the Apology Resolution was, as others have recognized, “more than a policy statement.”<sup>190</sup> While it expressly did not constitute a settlement, it evidenced a federal intent to reconcile with the Hawaiian community.

Chief Justice Moon latched onto that concept and held that although the Apology Resolution did not, on its face, constitute a settlement of claims, it did serve as a “foundation (or starting point) for reconciliation,” which he then noted included “the future settlement of the plaintiffs’ unrelinquished claims.”<sup>191</sup> With that one sentence, the Hawai‘i Supreme Court took a step where no other court had gone before; it recognized that the words of the Apology Resolution created a direct acknowledgment and acceptance by the United State of a commitment to reconciliation with Native Hawaiians. The Hawai‘i Supreme Court, thus, halted the sale or transfer of ceded lands to third parties “until the claims of the native Hawaiians to the ceded lands have been resolved.”<sup>192</sup> The pronouncement by a unanimous court was a victory for the Hawaiian community; there was an official stop to the alienation of ceded lands and, more importantly, a judicial recognition that Native Hawaiians had outstanding claims that needed to be dealt with by the State.

But, the brilliance of the decision was that it firmly situated its rationale upon federal law *and on independent State law grounds*. Specifically, the Hawai‘i Supreme Court relied upon Acts 354, 359, 329 and 340 to conclude that the State has made commitments to reconcile with Native Hawaiians that need to be adhered to.<sup>193</sup> In Act 354, the State recognized that “many native Hawaiians feel there is a valid claim for reparations[.]” acknowledged that “the actions by the United States were illegal and

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<sup>188</sup> *Id.* § 3, 107 Stat. 1514.

<sup>189</sup> See *State ex rel. Louie v. Hawaii Gov’t Emps. Ass’n*, 133 Hawai‘i 385, 400, 328 P.3d 394, 409 (2014) (citations omitted) (“It is well-established that the ‘fundamental starting point for statutory interpretation is the language of the statute itself.’”).

<sup>190</sup> Eric K. Yamamoto & Sara D. Ayabe, *Courts in the “Age of Reconciliation”*: Office of Hawaiian Affairs v. HCDCH, 33 U. HAW. L. REV. 503, 517 (2011).

<sup>191</sup> *HCDCH I*, 117 Hawai‘i at 192, 177 P.3d at 902.

<sup>192</sup> *Id.* at 218, 177 P.3d at 928.

<sup>193</sup> *Id.* at 193–94, 177 P.3d at 903–04.

immoral,” and “pledge[d] its continued support to the native Hawaiian community by taking steps to promote the restoration of the rights and dignity of native Hawaiians.”<sup>194</sup> In Act 359, the State recognized in 1993 that “the indigenous people of Hawai‘i were denied . . . their lands,” and committed to “facilitate the efforts of native Hawaiians to be governed by an indigenous sovereign nation of their own choosing.”<sup>195</sup> In 1997, the Legislature passed Act 329, in which the State recognized:

that the lasting reconciliation so desired by all people of Hawai‘i is possible only if it fairly acknowledges the past while moving into Hawai‘i’s future. . . . [O]ver the last few decades, the people of Hawai‘i through amendments to their state constitution, the acts of their legislature, and other means, have moved substantially toward this permanent reconciliation.<sup>196</sup>

The State also recognized its continued commitment “toward a comprehensive, just, and lasting resolution” with the Native Hawaiian community.<sup>197</sup> Finally, upon return of the island of Kaho‘olawe to the State from bombing activities by the federal government, the State committed in Act 340 to “transfer management and control of the island and its waters to the sovereign native Hawaiian entity upon its recognition by the United States and the State of Hawai‘i.”<sup>198</sup>

For the Moon Court, taking these various State laws together evidenced a commitment by the State to reconciliation with Native Hawaiians; it was a commitment that the court took seriously to enforce. For the Hawai‘i Supreme Court, the issue of ceded lands was fundamental to reconciliation between the State and the Native Hawaiian community because of the importance of land to Hawaiians:

Aina, or land, is of crucial importance to the Native Hawaiian People—to their culture, their religion, their economic self-sufficiency and their sense of personal and community well-being. Aina is a living and vital part of the Native Hawaiian cosmology, and is irreplaceable. The natural elements—land, air, water, ocean—are interconnected and interdependent. To Native Hawaiians, land is not a commodity; it is the foundation of their cultural and spiritual identity as Hawaiians. The aina is part of their ohana, and they are for it as they do for other members of their families. For them, the land and the natural environment is alive, respected, treasured, praised, and even worshiped.<sup>199</sup>

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<sup>194</sup> Act Relating to Hawaiian Sovereignty, 1993 Haw. Sess. Laws 999–1000.

<sup>195</sup> *Id.* at 1010.

<sup>196</sup> *Id.* at 956.

<sup>197</sup> *Id.*

<sup>198</sup> Act Relating to the Island of Kaho‘olawe, §2, 1993 Haw. Sess. Laws 806.

<sup>199</sup> *HCDCH I*, 117 Hawai‘i at 214, 177 P.3d at 924.

The Moon Court also enshrined in precedent the Hawaiian cultural importance of land to Hawaiians and their identity by quoting testimony of Native Hawaiian cultural practitioner, Olive Kanahele:

The land itself is the deity, Pele. The land itself was made from fire and it comes from out of the earth. And, you know, I can give you a little genealogy of the Pele family. The Pele family comes from—the mythological genealogy of the Pele family is that the mother is Haumea, she is the Mother Earth, she is the earth and all of these children are born from different parts of her. Pele is born from the natural channel of a female, she comes from the womb. And so her responsibility is to go back into the womb of the mother and—and bring out all of these things that we call land, that we call magma and lava and eventually will become land. One of the—one of the most amazing literary work that we have is the kumulipo. The kumulipo spans generations of people. And the first era of the kumulipo, the very first line of the kumulipo talks about the making of the earth. And why does it have to be earth, you ask me? It has to be earth because as man we need—we need land to live on. That is—that is our foundation. And for the native Hawaiian, more than the family, land is their foundation. Land is their identity.<sup>200</sup>

Given the State and federal governments' commitments to true reconciliation with the Hawaiian community and the clear harm that would come to Native Hawaiians by the sale or transfer of the land, Chief Justice Moon determined that the State could no longer alienate the ceded lands: "we believe, and therefore, hold that the Apology Resolution and related state legislation . . . give rise to the State's fiduciary duty to preserve the corpus of the public lands trust, specifically, the ceded lands, until such time as the unrelinquished claims of the native Hawaiians have been resolved."<sup>201</sup> The decision was a victory for the Office of Hawaiian Affairs and the Hawaiian community.

Celebration for the watershed decision, however, was quickly quelled when Governor Linda Lingle and her administration appealed the decision to the United States Supreme Court.<sup>202</sup> The Office of Hawaiian Affairs requested that Lingle withdraw the appeal, but the Administration refused.<sup>203</sup> Lingle's attorney general, Mark Bennett, argued that the State should have unfettered discretion to sell or transfer ceded lands.<sup>204</sup>

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<sup>200</sup> *Id.* at 215, 177 P.3d at 925 (ellipses omitted).

<sup>201</sup> *Id.* at 195, 177 P.3d at 905.

<sup>202</sup> *Hawai'i v. Office of Hawaiian Affairs*, 554 U.S. 944 (2008).

<sup>203</sup> Rowena Akana, *State of Hawai'i v. OHA: Showdown in Washington, D.C.*, KA WAI OLA O OHA (Mar. 2009), <http://www.rowenaakana.org/state-of-hawai%e2%80%99i-v-oha-showdown-in-washington-d-c/>.

<sup>204</sup> Ken Kobayashi, *Battle Over Ceded Lands*, HONOLULU STAR-BULLETIN, Feb. 22, 2009, at 1, 11.

In an opinion by Associate Justice Samuel Alito, a unanimous Supreme Court struck down the Hawai‘i Supreme Court’s decision to the extent that it relied upon the Apology Resolution.<sup>205</sup> Justice Alito began his opinion by first citing to the *Rice* decision’s discussion of Hawaiian political history<sup>206</sup>—thereby demonstrating the Court’s commitment to the principle of stare decisis. Although *Rice* and *HCDCH* dealt with two wholly separate issues—elections and land alienation, respectively—the Court’s recitation of history in *Office of Hawaiian Affairs* mirrored the tact taken in *Rice*.<sup>207</sup> As in *Rice*, in *Office of Hawaiian Affairs*, Justice Alito noted how the Committee of Safety—again, the organization of white citizens opposed to the Queen’s push for, among other things, the enfranchisement of her people—“replaced” the Hawaiian monarchy with the provisional government.<sup>208</sup> The Court, again, failed to acknowledge that “replac[ing]” the Kingdom government meant the American threat of violence upon a sovereign independent country that was a fully integrated member of the family of nations.<sup>209</sup>

The Court then articulated the chain of title to the lands of Hawai‘i, beginning with the Newlands Resolution, the Organic Act, and the Admissions Act.<sup>210</sup> Again, missing from its discussion of the United States’ “absolute fee” in Hawai‘i was the Hawaiian opposition to annexation.<sup>211</sup> Omitted from the Court’s historical recitation was the vehement opposition to the Newlands Resolution as a proper means to annex a sovereign government.<sup>212</sup> Also missing from the Court’s history was the Territory of Hawai‘i’s clear project of Americanization, in which Hawaiian language was banned in schools and a program of patriotism was adopted to indoctrinate the youth.<sup>213</sup>

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<sup>205</sup> See generally *Hawai‘i v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009).

<sup>206</sup> *Id.* at 166–67.

<sup>207</sup> See *supra* Section III.C.

<sup>208</sup> *Office of Hawaiian Affairs*, 556 U.S. at 166–67.

<sup>209</sup> See Apology Resolution, *supra* note 123, at 1510–11.

<sup>210</sup> *Office of Hawaiian Affairs*, 556 U.S. at 167–68.

<sup>211</sup> See generally NOENOE K. SILVA, *ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM* 145–59 (2004) (detailing the 1897 petitions protesting annexation).

<sup>212</sup> See Chang, *supra* note 5, at 78–83 (citations omitted).

<sup>213</sup> See Act of June 8, 1896, § 30, 1896 Haw. Sess. Laws 189. The Act states:

The English Language shall be the medium and basis of instruction in all public and private schools, provided that where it is desired that another language shall be taught in addition to the English language, such instruction may be authorized by the Department, either by its rules, the curriculum of the school, or by direct order in any particular instance. Any schools that shall not conform to the provisions of this section shall not be recognized by the Department.

*Id.*

After its historical diatribe on the political history of Hawai'i, the Court then discussed the "various observations" about Hawaiian history contained in the Apology Resolution.<sup>214</sup> In other words, the Apology Resolution, which was enacted by Congress and signed by President Clinton on November 23, 1993, was not, according to the Court, a valid narrative of historical facts; they were simply "observations."<sup>215</sup> The Court held that these statements did not create any substantive rights.<sup>216</sup> Erased from this narrative of history were the steps that the Clinton Administration took, because of the Apology Resolution, to begin the process of reconciliation with Native Hawaiians, including the publishing of a joint report of the federal Justice and Interior Departments noting that "passage of the Apology Resolution was the first step in the reconciliation process."<sup>217</sup> Nevertheless, based upon its opinion that the Apology Resolution contained only "preambular" clauses and "conciliatory or precatory" language, the Court made it clear that the Apology Resolution did not provide a basis for Native Hawaiian claims to the ceded lands: "the State Supreme Court incorrectly held that Congress, by adopting the Apology Resolution, took away from the citizens of Hawai'i the authority to resolve an issue that is of great importance to the people of the State."<sup>218</sup>

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<sup>214</sup> *Office of Hawaiian Affairs*, 556 U.S. at 168.

<sup>215</sup> *Id.*

<sup>216</sup> The Office of Hawaiian Affairs, again represented by a slew of attorneys, including Professor Van Dyke, argued that they had "broader moral and political claims for compensation for the wrongs of the past." Brief for the Respondents at 18, 40, *Hawai'i v Office of Hawaiian Affairs*, 556 U.S. 163 (2009) (No. 07-1372), 2009 WL 181534 (U.S.), at \*\*18, 40. ("There is nothing unusual about such moral and political claims; when Congress established the Indian Claims Commission, it expressly conferred authority on the Commission to consider that type of claims." (citations omitted)). The Court simply rejected the argument, stating, "But we have no authority to decide questions of Hawaiian law or to provide redress for past wrongs except as provided for by federal law." *Office of Hawaiian Affairs*, 556 U.S. at 177.

<sup>217</sup> See U.S. DEP'T OF THE INTERIOR AND U.S. DEP'T OF JUSTICE, FROM MAUKA TO MAKAI: THE RIVER OF JUSTICE MUST FLOW FREELY: REPORT ON THE RECONCILIATION PROCESS BETWEEN THE FEDERAL GOVERNMENT AND NATIVE HAWAIIANS i (Oct. 23, 2000). The Report states:

In 1993, with Public Law 103-150, the Apology Resolution, the United States apologized to the Native Hawaiian people for the overthrow of the Kingdom of Hawai'i in 1893 and expressed its commitment to acknowledge the ramifications of the overthrow in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people. *The passage of the Apology Resolution was the first step in this reconciliation process.*

*Id.* (emphasis added).

<sup>218</sup> *Office of Hawaiian Affairs*, 556 U.S. at 177.

Interestingly, the Court also concluded that it did not have jurisdiction to rule on the State law bases for the moratorium on the sale of ceded lands, and remanded the case to the Hawai'i Supreme Court.<sup>219</sup> But before the Hawai'i Supreme Court could affirm its holding on solely a State law rationale, the Office of Hawaiian Affairs, the State, and most of the individual Native Hawaiian plaintiffs reached a settlement agreement through passage of Senate Bill 1677, which required the vote of two-thirds of both chambers of the Legislature and the signature of the Governor to alienate ceded lands.<sup>220</sup> In a joint statement, Attorney General Bennett and Office of Hawaiian Affairs Chairwoman Apoliona stated:

There is no question that OHA and the state had significant differences with regard to this lawsuit. This settlement resolves those differences in a way we believe is beneficial to all citizens of Hawai'i. We can now concentrate on working together on matters we all believe are crucially important to Hawai'i. . . . We look forward to doing so.<sup>221</sup>

One plaintiff, Professor Jonathan K. Osorio, refused to settle the lawsuit because he believed, accurately so, that the Hawai'i Supreme Court could reaffirm its moratorium solely on State law grounds and without reference to the Apology Resolution.<sup>222</sup> However, the Hawai'i Supreme Court's reconsideration of their decision in regards to Osorio was dismissed on procedural grounds because the political branches had reached a settlement in which the Leialii parcels would not be sold, and therefore, the claims for a moratorium were no longer ripe for adjudication.<sup>223</sup> It was, thus, clear that the political settlement reached usurped the Hawai'i Supreme Court's opportunity to affirm the moratorium solely under Acts 354, 359, 329 and 340.

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<sup>219</sup> *Id.* The insistence on ruling on only the federal law grounds was likely the result of the liberal bloc's insistence on narrowing the opinion. *See, e.g.,* Transcript of Oral Argument at 6, *Hawai'i v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009) (No. 07-1372) 2009 WL 462660, at \*6 ("JUSTICE GINSBURG: . . . Why isn't it sufficient just to say that this resolution has no substantive effect, period, and then remand to the Hawai'i Supreme Court?").

<sup>220</sup> *See* Act Relating to Lands Controlled by the State, § 2, 2009 Haw. Sess. Laws 706–07.

<sup>221</sup> Gordon Y.K. Pang, *State, OHA, 3 Plaintiffs Settle Ceded Lands Suit*, HONOLULU ADVERTISER, May 6, 2009, at A2.

<sup>222</sup> *Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp.*, 121 Hawai'i 324, 328, 219 P.3d 1111, 1115 (2009).

<sup>223</sup> *Id.*

Instead, in regards to the alienation of ceded lands, the Hawaiian community was left to the mercy of State lawmakers. The settlement, which the Office of Hawaiian Affairs agreed to, while politically expedient, harmed the Native Hawaiian interest in ceded lands. The Moon decision represented a paradigm shift in the push for justice and reconciliation for Native Hawaiians as it broadcasted unified support from Hawai'i's highest court that it would hold the State to its reconciliation commitments. The Office of Hawaiian Affairs ignored the Hawai'i Supreme Court's opinion and simply gave up after its fifteen-year legal battle. As Osorio stated, "I hope they understand how much they have betrayed not just the interests of the (Hawaiian) nation but their own interests, because they are not willing to fight."<sup>224</sup> The Office of Hawaiian Affairs unfortunately underestimated the true reconciliatory power that the Hawai'i Supreme Court asserted and would have likely asserted again.

### C. *Consequences of Flawed History*

*Rice* and *Office of Hawaiian Affairs* illustrate the significant flaws in the Court's recitation of history and its use of history as a tool to reach its desired outcome. The harm from the Court's contorted recitation of history is twofold: first, it enshrines an inaccurate history that is binding, unless overturned, on all other courts within the federal system; and second, it mandates a history that instills fear for future repercussions and, thereby, forces a people to take action that may not be consistent with their interests.

#### 1. *Stare Decisis and Lawyering Complications*

The harm from decisions like *Rice* and *Office of Hawaiian Affairs* is the binding effect that they have on future decisions of any federal court. As one scholar noted, "The United States Supreme Court is the only institution in human experience that has the power to *declare* history: that is, to articulate some understanding of the past and then compel the rest of society to conform its behavior to that understanding."<sup>225</sup> In addition, "Principles of *stare decisis* operate upon these essays to render them extremely difficult to overrule."<sup>226</sup> For example, as of the writing of this Article, *Rice* has been cited for various propositions in over one hundred cases. While a significant portion of the cases citing *Rice* deal with Native

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<sup>224</sup> David Shapiro, *Ceded Lands: It's Time to Move On*, HONOLULU ADVERTISER, May 27, 2009, at A12.

<sup>225</sup> Wiecek, *supra* note 26, at 227–28.

<sup>226</sup> Richards, *supra* note 26, at 889.

Hawaiian issues,<sup>227</sup> the harms of which were discussed *supra* section III.B of this Article, a large amount deal with non-Hawaiian issues—thereby showing the larger implications of the opinion.<sup>228</sup> As analyzed below, the *Rice* decision with its underlying historical flaws is being used as a tool to oppress other colonized peoples struggling for justice.

In *Davis v. Commonwealth Election Commission*,<sup>229</sup> for example, the Ninth Circuit relied heavily upon *Rice* to justify its conclusion that the voting restrictions for constitutional amendments in the Commonwealth of the Northern Mariana Islands (“Commonwealth” or “CNMI”) was unconstitutional.<sup>230</sup> In so doing, the court dismantled a key component of the Covenant between the Commonwealth and the United States.<sup>231</sup> Indeed, a “key aspect of the Covenant negotiations involved land use and ownership.”<sup>232</sup> Section 805 of the Covenant specifically mandated that the CNMI government regulate and restrict land ownership to persons of Northern Marianas descent (“NMD”) for twenty-five years after termination of the Trusteeship Agreement and then “may” choose to continue the restrictions after the twenty-five year period.<sup>233</sup> An individual of NMD was defined in Article XII, section 4 of the CNMI Constitution as:

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<sup>227</sup> See, e.g., *Doe v. Kamehameha Schools*, 470 F.3d 827 (9th Cir. 2006) (en banc).

<sup>228</sup> See *Fisher v. Univ. of Texas*, 133 S.Ct. 2411, 2418 (2013) (citing *Rice v. Cayetano*, 528 U.S. 495, 517 (2000)) (“Distinctions between citizens solely because of their ancestry are by their nature odious to a free people.”); *Shelby County v. Holder*, 133 S.Ct. 2612, 2629 (2013) (citing *Rice*, 528 U.S. at 512) (“Consistent with the design of the Constitution, the [Fifteenth] Amendment is cast in fundamental terms, terms transcending the particular controversy which was the immediate impetus for its enactment.”).

<sup>229</sup> 844 F.3d 1087 (9th Cir. 2016) [hereinafter *Davis II*].

<sup>230</sup> See *id.* at 1091-95.

<sup>231</sup> See Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, N. Mar. I.-U.S., Feb. 15, 1975, 90 Stat. 263 (1976) [hereinafter Covenant to Establish the CNMI]. Prior to the Covenant, CNMI was part of a Trusteeship Agreement, in which the United States administered various islands in the Pacific for the purpose of, among other things, promoting independence and self-government among those people. See *Davis v. Commonwealth Election Comm’n*, No. 1-14-CV-00002, 2014 WL 2111065, at \*1 (N. Mar. I. May 20, 2014) [hereinafter *Davis I*].

<sup>232</sup> Nicole Manglona Torres, Comment, *Self-Determination Challenges to Voter Classifications in the Marianas After Rice v. Cayetano: A Call for a Congressional Declaration of Territorial Principles*, 14 ASIAN-PAC. L. & POL’Y J. 152, 162 (2012); see also Jose P. Mafnas, Jr., *Applying the Insular Cases to the Case of Davis v. Commonwealth Election Commission: The Power of the Covenant and the Alternative Result*, 22 U.C. DAVIS J. INT’L L. & POL’Y 105 (2016).

<sup>233</sup> Covenant to Establish the CNMI, *supra* note 231, art. VIII, § 805.

[A] person who is a citizen or national of the United States and who is of at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof or an adopted child of a person of Northern Marianas descent if adopted while under the age of eighteen years. For purposes of determining Northern Marianas descent, a person shall be considered to be a full-blooded Northern Marianas Chamorro or Northern Marianas Carolinian if that person was born or domiciled in the Northern Mariana Islands by 1950 and was a citizen of the Trust Territory of the Pacific Islands before the termination of the Trusteeship with respect to the Commonwealth.<sup>234</sup>

It is critical to note that the Northern Marianas Chamorro descend primarily from late nineteenth and early twentieth century immigrants from Guam, who “constituted a racially diverse group deriving from centuries of intermarriage, on Guam, . . . composed of Spanish, Chamorro, Kanaken, Tagalogs, Chinese, Japanese, German and other blood[.]”<sup>235</sup>

To regulate the land alienation provision of Section 805, which the Ninth Circuit upheld,<sup>236</sup> a constitutional provision required that one must be of NMD in order to vote to amend Article XII.<sup>237</sup> Accordingly, the “NMD classification is specifically intended for the political question of whether persons of NMD want to continue land alienation restrictions in the CNMI.”<sup>238</sup> In order to effectuate Section 805 of the Covenant, the CNMI government passed legislation that created the Northern Marianas Descent

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<sup>234</sup> N. MAR. I. CONST. article XII, § 4.

<sup>235</sup> Brief Amicus Curiae of Northern Marianas Descent Corporation in Support of Defendants-Appellants and Reversal at 11, 844 F.3d 1087 (9th Cir. 2016) (No. 14-16090), 2014 WL 5510536, at \*11 (citing HERMANN H.L.W. COSTENOBLE, *THE MARIANAS* 46–47 (1905)).

<sup>236</sup> See *Wabol v. Villacrusis*, 958 F.2d 1450, 1462 (9th Cir. 1992). In *Wabol*, the court stated the following regarding the Covenant:

Its bold purpose was to protect minority rights, not to enforce homogeneity. Where land is so scarce, so precious, and so vulnerable to economic predation, it is understandable that the islanders' vision does not precisely coincide with mainland attitudes toward property and our commitment to the ideal of equal opportunity in its acquisition. We cannot say that this particular aspect of equality is fundamental in the international sense. It therefore does not apply *ex proprio vigore* to the Commonwealth. Accordingly, Congress acted within its power in enacting sections 501(b) and 805 of the Covenant, and Article XII is not subject to equal protection attack.

*Id.*

<sup>237</sup> N. MAR. I. CONST. art. XVIII(5)(c) (“In the case of a proposed amendment to Article XII of this Constitution, the word ‘voters’ as used in subsection 5(a) above shall be limited to eligible voters under Article VII who are also persons of Northern Marianas descent as described in Article XII, Section 4, and the term ‘votes cast’ as used in subsection 5(b) shall mean the votes cast by such voters.”).

<sup>238</sup> Torres, *supra* note 232, at 157.

Registry within the Commonwealth Election Commission.<sup>239</sup> That law required that a Northern Marianas Descent Identification verification “that will be issued only to persons who are qualified pursuant to Art. XII, [section] 4” be produced to register for an election that requires only persons of NMD to vote, pursuant to Article XVIII, Section 5.<sup>240</sup>

John H. Davis, Jr., an American citizen and registered CNMI voter, maintained that the NMD classification in Article XVIII of the CNMI Constitution and Public Law 17-40 violated, among other provisions, the Fourteenth and Fifteenth Amendments of the United States Constitution, and requested an injunction to allow him to vote in a 2014 special election to consider changes to the definition of NMD.<sup>241</sup> Relying upon *Rice*, the United States District Court for the District of the Northern Mariana Islands concluded that the Article XVIII used ancestry as a proxy for race, which ran afoul of the Fifteenth Amendment.<sup>242</sup>

The Ninth Circuit reviewed the district court’s decision and affirmed the judgment: “The restriction is invalid and may not be enforced. Our analysis is controlled by the Supreme Court’s decision in [*Rice*].”<sup>243</sup> The court specifically held: “Just as the definitions of Hawaiian and native Hawaiian in the *Rice* statute referred to specific ethnic or aboriginal groups, the definition of NMD in Article XII, section 4, ties voter eligibility to descent from an ethnic group.”<sup>244</sup>

The court then concluded that *Davis* “cannot be distinguished from *Rice*.”<sup>245</sup> First, it held that *Rice* was about ancestry, which according to the Court was a “proxy” for race, and so too was *Davis*.<sup>246</sup> Despite the court acknowledging that “some persons who were not of Chamorro or Carolinian ancestry lived on the islands in 1950,”<sup>247</sup> thereby precluding the notion that the NMD definition was based on race, the Ninth Circuit pitted the classification with *Rice*, where the Court rejected the argument that the classification based upon the 1778 date of western contact in Hawai‘i was race-neutral.<sup>248</sup>

<sup>239</sup> See Act of March 31, 2010, 2011 N. Mar. I. Pub. L. 40.

<sup>240</sup> *Id.* §§ 2(c)(1)–(4).

<sup>241</sup> *Davis I*, 2014 WL 2111065, at \*1.

<sup>242</sup> *Id.* at \*\*11–18 (citing *Rice v. Cayetano*, 528 U.S. 495, 514–15 (2000)).

<sup>243</sup> *Davis II*, 2016 WL 7438633, at \*3.

<sup>244</sup> *Id.* at \*4 (citing *Rice*, 528 U.S. at 509–10; *Davis I*, 2014 WL 2111065, at \*15).

<sup>245</sup> *Id.* at \*5.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at \*5 (citing *Rice*, 528 U.S. at 516).

Second, and ignoring the clear mandate of Section 805 of the Covenant, the court brazenly stated that persons of NMD are not “quasi-sovereign or otherwise distinct from the Commonwealth citizenry as a whole . . . [.]”<sup>249</sup> In much the same way that the Court used “glittering generalities” in *Rice* to conclude that Native Hawaiians did not have a political status,<sup>250</sup> the Ninth Circuit tried to fit the CNMI’s own unique history into the box of *Rice*.<sup>251</sup>

Third, the *Davis* court held that the voting classification “would divide the citizenry of the Commonwealth between NMDs and non-NMDs when voting on amendments to a property restriction that affects everyone.”<sup>252</sup> Again, the court used *Rice* to foreclose the argument that those of NMD have a “specialized interest” in Article XII’s alienation restrictions: “That position . . . rests, in the end, on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters.”<sup>253</sup> Akin to *Rice*, the Ninth Circuit failed to acknowledge that those of NMD should be the only individuals to vote on amendments to the definition of NMD, particularly given the validity of the alienation restrictions.<sup>254</sup>

Clearly, *Rice* was the standard by which the federal court needed to fit the Commonwealth’s efforts to preserve their land for their people. However, it was as if the Ninth Circuit was comparing apples and oranges. *Rice*, for example, was decided within the context of a State law that governed a State entity, whereas, *Davis* dealt with an independent sovereign government with a wholly separate and distinct Covenant relationship. In the end, the Ninth Circuit used *Rice* as precedent to dismantle a key component of the CNMI’s effort to control the alienation of their limited land.<sup>255</sup> *Davis*, thus, directly demonstrates the harm of *Rice* and its use as a tool to oppress marginalized communities.

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<sup>249</sup> *Id.* at \*5 (emphasis added) (quotation marks omitted).

<sup>250</sup> *Rice*, 528 U.S. at 527–28 (Stevens, J., dissenting).

<sup>251</sup> See *supra* text accompanying note 235 (discussing the uniqueness of the CNMI people).

<sup>252</sup> *Davis II*, 2016 WL 7438633, at \*6.

<sup>253</sup> *Id.* (citing *Rice*, 528 U.S. at 523).

<sup>254</sup> See *Wabol v. Villacrusis*, 958 F.2d 1450, 1462 (9th Cir. 1992).

<sup>255</sup> Even assuming *arguendo* that one adopts *Rice* as precedent, it should only be binding in Hawai'i as that case dealt specifically with the State of Hawai'i's relationship with the indigenous community.

## 2. *Mandating Fear*

Another consequence of the Court's slanted narrative of Hawaiian history and its decision is the sense of fear that it instilled.<sup>256</sup> The Hawaiian sovereignty discussion prior to and after *Rice* provides an apt illustration of the consequences of the decision.

Prior to the decision in *Rice*, there appeared to be building momentum toward some form of an independent governing nation of Hawaiians.<sup>257</sup> The State of Hawai'i passed various laws to study the issue of Hawaiian sovereignty,<sup>258</sup> and in 1993 co-sponsored a centennial observation of the overthrow of the Kingdom of Hawai'i.<sup>259</sup>

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<sup>256</sup> In a similar light, some have argued that the Court's decision in *Brown v. Board of Education*, 344 U.S. 1 (1952), actually slowed the progress that was being made in the South on civil rights, particularly stymying the strides in integration that was taking shape in the South. See KLARMAN, *supra* note 108, at 389 (arguing that "before *Brown* focused attention on school desegregation, southern politics was generally controlled by moderates, who downplayed race while accommodating gradual racial change. *Brown* turned that political world upside down"). Political rhetoric immediately shifted after *Brown*. For example, Georgia Governor-elect Marvin Griffin announced, "come hell or high water, races will not be mixed in Georgia schools." *Id.* at 390. Mississippi Senator James Eastland stated that the South "will not abide or obey this legislative decision by a political court indoctrinated and brainwashed by Left-wing pressure groups." LUCAS A. POWE, *THE WARREN COURT AND AMERICAN POLITICS* 38 (2000). Klarman concluded that *Brown* radicalized southern politics: first, because it was harder to ignore than earlier changes; second, it represented federal interference in southern race relations; and third and most important, it commanded that racial change take place in a different order than might otherwise have occurred. See KLARMAN, *supra* note 108, at 391. Finkelman, however, challenged Klarman's critique and noted that the desegregation of public elementary schools had nothing to do with the ultimate violence that occurred at the University of Mississippi, the mob violence against the freedom riders, or even the terrorist bombing of the home of Martin Luther King, Jr. See Finkelman, *supra* note 108, at 1010–12. These events, Finkelman argued, are not direct results of the *Brown* decision, but are in fact specific responses to other specific events. See *id.*; see also POWE, *supra*, at 37 (citing urban Southern press coverage of the decision in two leading newspapers and arguing that in general, the Southern response to *Brown* was "surprisingly mild" and suggesting that ending segregations "was not the end of the world and, more important, not a call for violence").

<sup>257</sup> In the late-1980s, Ka Lāhui Hawai'i was established by and for native Hawaiians, without the interference of State or Federal agencies, to effectuate a multi-step approach toward achieving sovereignty. See KA LĀHUI HAWAI'I, MASTER PLAN 1–11 (1995).

<sup>258</sup> See, e.g., Act Relating to the Island of Kaho'olawe, §2, 1993 Haw. Sess. Laws 806.

<sup>259</sup> Act Relating to Hawaiian Sovereignty, 1993 Haw. Sess. Laws 999–1000.

Following *Rice*, however, there was a clear push for federal recognition.<sup>260</sup> United States Senator Daniel K. Akaka and the rest of Hawai'i's congressional delegation formed a Task Force on Native Hawaiian issues because the *Rice* decision had created a "sense of urgency" for Hawaiians.<sup>261</sup> The Task Force's immediate goal was to clarify the relationship between Hawaiians and the federal government.<sup>262</sup> The Task Force's solution was federal legislation—an idea that the Office of Hawaiian Affairs trustees vigorously latched onto in an attempt to save their agency.<sup>263</sup>

On July 20, 2000, following the work of his Task Force, Senator Akaka introduced "A Bill to Express the Policy of the United State Regarding the United States' Relationship with Native Hawaiians, and for Other Purposes[.]" which proposed to recognize Hawaiians as indigenous people that have a right to self-determination under federal Indian law.<sup>264</sup> Specifically in response to *Rice*, Senator Akaka's bill, later referred to as the Native Hawaiian Government Reorganization Act or the Akaka Bill, sought to clarify the political status of Native Hawaiians with the federal government, establish a process to create a Hawaiian governing entity that would be federally recognized, and protect various Hawaiian-serving programs from constitutional challenges.<sup>265</sup> Federal recognition, for some, meant the conveyance of a special status to a Native Hawaiian government that could come with a broad array of federal protections and benefits.<sup>266</sup> Federal recognition implies a level of self-determination for Native Hawaiians. The Akaka Bill, which has gone through various iterations and has been introduced in every Congress for well over a decade, represented an admirable effort by Hawai'i's congressional delegation to facilitate and codify in American law self-governance and self-determination for

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<sup>260</sup> The fears were not unfounded as lawsuits streamed in challenging the political status of Native Hawaiians. See *Arakaki v. Lingle*, 477 F.3d 1048 (9th Cir. 2007) (challenging various State of Hawaii programs that provide preferential treatment to Native Hawaiians); *Carroll v. Nakatani*, 342 F.3d 934 (9th Cir. 2003) (alleging that various provisions of the Hawai'i Constitution violated the equal protection clause); *Arakaki v. Hawai'i*, 314 F.3d 1091 (9th Cir. 2002) (challenging the requirement that Office of Hawaiian Affairs trustees be Native Hawaiian).

<sup>261</sup> Melody K. MacKenzie, *Native Hawaiians and U.S. Law*, in *NATIVE HAWAIIAN LAW: A TREATISE* 264, 312 (MacKenzie et al. eds., 2015).

<sup>262</sup> J. Kēhaulani Kauanui, *The Politics of Blood and Sovereignty in Rice v. Cayetano*, 25 *POL. & LEGAL ANTHROPOLOGY REV.* 110, 120 (2002).

<sup>263</sup> See *A Bill to Express the Policy of the United State Regarding the United States' Relationship with Native Hawaiians*, S. 2899, 106th Cong. (2000).

<sup>264</sup> *Id.*

<sup>265</sup> See MacKenzie, *supra* note 261, at 312–16.

<sup>266</sup> COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.02[3] (Nell Jessup Newton et al. eds., 2005).

Hawai‘i’s indigenous people. Through the Akaka Bill, as then-Office of Hawaiian Affairs Chairperson Haunani Apoliona expressed:

the Native Hawaiian people seek the restoration of their government, because they know and have witnessed how the Federal policy of self-determination and self-governance has not only had a dramatic impact on the ability of Native communities to take their rightful place in the American family of governments, but also how that policy has enabled Native people to grow and thrive.<sup>267</sup>

For over a decade, from 2000 through 2012, the Office of Hawaiian Affairs championed federal legislation to grant Hawaiians self-determination to enable the establishment of a government-to-government relationship between the federal government and Native Hawaiians.<sup>268</sup> The costly effort mired the agency in conflict with nationalist Hawaiians, who believed that recourse should be obtained on the international stage, and pro-American conservatives, who believed that the entity was wasting funds to benefit a portion of the State’s citizenry. With its decision in *Rice*, the Court changed the trajectory of the movement for sovereignty in forcing the hands of the Office of Hawaiian Affairs to scramble for recognition.

#### IV. (RE)RIGHTING HISTORY

If advocates are going to deal with precedent that contains history (and they have a lot of it to deal with), or urge a court to adopt their positions based on historical arguments, they had better understand the principles of historical scholarship. If legal scholars are going to analyze cases that include history, they had better know something of the history that they propose to explain.<sup>269</sup>

While there is considerable harm from the Court’s writing of Hawaiian history, that harm is exponentially increased when the opinions are used to then buttress a scholarly retelling of history. Legal practitioners and scholars, particularly those in Hawai‘i, must carefully disaggregate the Court’s “truth” with the current historical scholarship.

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<sup>267</sup> *Hearing on S. 1011 Before the S. Committee on Indian Affairs*, 111th Cong. 13 (2009) (statement of S. Haunani Apoliona, Office of Hawaiian Affairs).

<sup>268</sup> See MacKenzie, *supra* note 261, at 312–16.

<sup>269</sup> Buckner F. Melton, Jr., *Clio at the Bar: A Guide to Historical Method for Legists and Jurists*, 83 MINN. L. REV. 377, 384 (1998).

In a recently published article,<sup>270</sup> James S. Burns,<sup>271</sup> retired and respected Chief Judge of the Hawai'i Intermediate Court of Appeals, takes on constitutional scholar Jon Van Dyke's conclusion that the Crown Lands belong in trust to the Native Hawaiian people.<sup>272</sup> As other authors have alluded, and which will not be elaborated on here, there are errors with the article's recitation of history and conclusion.<sup>273</sup> Relevant here, however, is the article's reliance on both the *Rice* and *Office of Hawaiian Affairs* decisions for various historical points.<sup>274</sup> Relying upon the Court's slanted recitation of Hawai'i's past, as described above, does considerable harm because it legitimizes what the Court stated,<sup>275</sup> and effectively silences a people pursuing justice.

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<sup>270</sup> James S. Burns, *The Crown Lands Trust: Who Were, Who Are, the Beneficiaries?*, 38 U. HAW. L. REV. 213, 251, 259 (2016).

<sup>271</sup> Judge Burns passed away on March 9, 2017. Press Release, Hawai'i State Judiciary, Joint Statements on the Passing of Chief Judge James S. Burns (Mar. 9, 2017), [http://www.courts.state.hi.us/news\\_and\\_reports/featured\\_news/2017/03/joint-statements-on-the-passing-of-chief-judge-james-s-burns](http://www.courts.state.hi.us/news_and_reports/featured_news/2017/03/joint-statements-on-the-passing-of-chief-judge-james-s-burns). The author met with Judge Burns prior to his passing to discuss the contents of Burns' article and the author's perspective. Judge Burns was gracious and encouraged further dialogue about the subject matter.

<sup>272</sup> Professor Van Dyke passed away on November 29, 2011. Press Release, University of Hawai'i William S. Richardson School of Law, Obituary: John Markham Van Dyke (Dec. 9, 2011), <https://www.law.hawaii.edu/news/2011/12/09-0>. Professor Van Dyke was a well-respected scholar and intellectual, who committed a large part of his life's work to understanding and educating about the legal and political struggles of Native Hawaiians. See *id.* As noted above, Professor Van Dyke served as counsel to the Office of Hawaiian Affairs in the *Rice* case. See *supra* note 216.

<sup>273</sup> See Melody Kapilialoha MacKenzie & D. Kapua'ala Sproat, *Conflicting Histories: Reclaiming Hawai'i's Crown Lands Trust in Response to James S. Burns*, 39 U. HAW. L. REV. 481, 482–87 (2017) (discussing collective memory); Avis Kuipoleialoha Poai, *Tales From the Dark Side of the Archives: Making History in Hawai'i Without Hawaiians*, 39 U. HAW. L. REV. 537, 554–65 (2017) (discussing the reliance on dubious sources); see Osorio & Beamer *supra* note 139, at 469 (discussing errors regarding the Māhele and the agency of the sovereigns).

<sup>274</sup> See Burns, *supra* note 270, at 251, 259.

<sup>275</sup> Scholars and practitioners of the laws of the State of Hawai'i have a particular responsibility to ensure that Hawai'i's history does not succumb to the American narrative of the past. As shown in Section III.B, the Hawai'i Supreme Court has done a commendable job at recognizing the unique history of Hawai'i. See Yamamoto & Ayabe, *supra* note 190, at 517.

### A. *Silencing Marginalized Voices*

When regurgitating the Court's warped narrative of Hawaiian history without correcting the errors or clarifying the shortcomings, judges and practitioners silence the people trying to right historical wrongs that have plagued them for well over a century. Burns' article provides an apt example. There, the article cites to *Rice* for its discussion regarding the Section 5(f) funds and the federal set aside of 200,000 acres under the Hawaiian Homes Commission Act for "native Hawaiians[.]"<sup>276</sup> Although one would expect such a discussion in a piece discussing Hawaiian land issues, there is no recognition in the essay of the considerable harm of the Act and the issue of blood quantum in dividing families and the Hawaiian people from the land.<sup>277</sup>

In 1921, with years of returning lands to Native Americans as precedent and with a strong Native Hawaiian presence in Delegate (Prince) Jonah Kalaniana'ole Kūhiō and Territorial Senator John H. Wise as representatives advocating for rights of the indigenous people, the United States Congress reluctantly decided to gift lands back to native Hawaiians, those individuals of "any descendent of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778."<sup>278</sup> Congress defined these people by the then-conventional method of blood quantum.<sup>279</sup> Hearings were held about the conditions of Hawai'i's indigenous peoples and the United States Congress learned that Hawaiians were a "dying race" with the number of "full-blooded Hawaiians" dropping from 142,500 in 1826 to 22,500 in 1919.<sup>280</sup> Territorial Senator Wise noted:

The Hawaiian people are a farming people and fishermen, out-of-door people, and when they were frozen out of their lands and driven into the cities they had to live in the cheapest places, tenements. That is one of the reasons why the Hawaiian people are dying. Now, the only way to save them, I contend, is

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<sup>276</sup> See Burns, *supra* note 270, at 259.

<sup>277</sup> There is no question that blood quantum has been an issue that has haunted Hawaiians and other indigenous communities throughout the United States. Indeed, Native Hawaiians have criticized the Act: "The blood quantum issue is intentionally divisive," decried Adelaide "Frenchy" DeSoto. Ron Stanton, *Hawaii's Own: A Look at a Century of Annexation*, HAW. TRIB. HERALD, Aug. 10, 1998, at 1. "It was a devious plot, but it has survived for decades." *Id.*

<sup>278</sup> Hawaiian Homes Commission Act, Pub. L. No. 67-34, § 201(a)(7), 42 Stat. 108, 108 (1921).

<sup>279</sup> See *id.*

<sup>280</sup> See H.R. REP. NO. 66-839, at 2 (1920).

to take them back to the lands and give them the mode of living that their ancestors were accustomed to and in that way rehabilitate them.<sup>281</sup>

Following the failed attempt to pass the "Rehabilitation Bill" the first time, Prince Jonah Kalaniana'ole Kūhiō framed the failure on procedural grounds.<sup>282</sup> Kūhiō did little to mention the substantive objections to the bill that echoed through the chambers of the United States Capitol.<sup>283</sup> Nevertheless, Congress subsequently enacted the Hawaiian Homes Commission Act,<sup>284</sup> and Kūhiō and Wise's goal of putting Hawaiians back on the land was achieved. The harsh result of the Act, however, is a system in which the diminution of individuals of "not less the one-half" blood through interracial procreation ultimately leads to a lack of beneficiaries and the subsequent returning of lands to the government,<sup>285</sup> further separating Hawaiians from their lands. Put another way, this Act was established with the intention of rehabilitation, but the reality is that eventually there will be no more native Hawaiians to rehabilitate. As American Studies Professor J. Kēhaulani Kauanui asserted, the Act and the issue of "[b]lood quantum is a manifestation of settler colonialism that works to deracinate—to pull out by the roots—and displace indigenous peoples."<sup>286</sup>

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<sup>281</sup> *Id.* at 4.

<sup>282</sup> Prince Jonah Kalaniana'ole Kūhiō reported:

Though the Bill itself died with the passing of the last Congress on March 4, I am able to state to you that many of its provisions met no opposition and that the much discussed sections opening the way for the Hawaiians to return to the land were looked upon favorably by the members of both Houses of Congress. . . . Yes, the Bill is dead; but it failed at the last movement in the Senate owing to the congestions of business at the short session of Congress."

J. KĒHAULANI KAUANUI, *HAWAIIAN BLOOD: COLONIALISM AND THE POLITICS OF SOVEREIGNTY AND INDIGENEITY* 150 (2008)

<sup>283</sup> The notion of rehabilitating Hawaiians resonated with some federal legislators. *Id.* at 109–13. Others, questioning the constitutionality of a race-based legislation, found comfort in analogizing native Hawaiians with Native Americans of the continent. *Id.* at 113–16. For example, United States Secretary of the Interior Franklin K. Lane analogized native Hawaiians to Native Americans when he articulated, "the natives of the [Hawaiian] islands . . . are our wards . . . and for whom in a sense we are trustees." H.R. Rep. No. 66-839, at 4 (1920).

<sup>284</sup> Pub. L. No. 67-34, 42 Stat. 108 (1921).

<sup>285</sup> *See id.* § 201(a)(7), 42 Stat. 108.

<sup>286</sup> KAUANUI, *supra* note 282, at 9.

The Act is inherently flawed because it is “rooted in racism and shot through with paternalism.”<sup>287</sup> During the debates that surrounded enactment of the Act, various issues of inherent racism and paternalism were raised. First, in order to achieve passage of the bill, the proposed Act was portrayed as an Anti-Asian law that would prevent individuals of Asian decent from acquiring lands in the U.S. and prevent them from being more successful than indigenous Hawaiians.<sup>288</sup> Second, the Act, originally intended for indigenous Hawaiians of 1/32 part Hawaiian blood,<sup>289</sup> was amended to be one-half part.<sup>290</sup> On this issue of part Hawaiians, A.G.M. Robertson pronounced that:

the part-Hawaiian[s] . . . are a virile, prolific, and enterprising lot of people. They have large families and they raise them - they bring them up. These part Hawaiians have had the advantage, since annexation especially, of the American viewpoint and the advantage of a pretty good public school system, and they are an educated people. They are not in the same class with the pure bloods.<sup>291</sup>

Paternalism is reflected in the Act because native Hawaiians become wards of the government by having to pay rent for the lands, instead of being given lands fee simple.<sup>292</sup> The Dawes Act did the same for Native Americans; it reflected the federal government’s efforts at the time to deal with the indigenous communities of the United States.<sup>293</sup>

The racist and paternalistic issue of blood quantum would again resurface in *Rice*. In a concurring opinion in *Rice*, Justices Stephen Breyer and David Souter joined the result of the majority’s decisions, but specifically concluded that the Office of Hawaiian Affairs’ electorate did not sufficiently resemble an Indian tribe.<sup>294</sup> The usually consistent liberal

<sup>287</sup> Lesley Karen Friedman, *Native Hawaiians, Self-Determination, and the Inadequacy of the State Land Trusts*, 14 U. HAW. L. REV. 519, 562 (1992).

<sup>288</sup> KAUANUI, *supra* note 282, at 107–08 (noting that Congressional leaders and Judges had unfavorable and racist views of Asians).

<sup>289</sup> *Id.* at 152–53 (noting the proposal for a blood quantum of one-thirty-second degree Hawaiian blood).

<sup>290</sup> See Hawaiian Homes Commission Act, Pub. L. No. 67-34, § 201(a)(7), 42 Stat. 108, 108 (1921).

<sup>291</sup> KAUANUI, *supra* note 282, at 127.

<sup>292</sup> Hawaiian Homes Commission Act, Pub. L. No. 67-34, § 207(b), 42 Stat. 108, 111 (1921) (“The title to lands so leased shall remain in the State.”).

<sup>293</sup> The Act’s blood quantum requirement is considered “more stringent than the membership requirements imposed by most mainland tribes.” Friedman, *supra* note 287, at 565.

<sup>294</sup> *Rice v. Cayetano*, 528 U.S. 495, 525 (2000) (Breyer, J., concurring). For Justice Breyer, the Office of Hawaiian Affairs was nothing more than “a special purpose department of Hawaii’s state government.” *Id.* at 526.

voices addressed blood quantum and how the State's definition of "Hawaiian" was so "broad" that it went "well beyond any reasonable limit" because it included all individuals of Hawaiian ancestry without regard to blood quantum.<sup>295</sup> For Justices Breyer and Souter, a line *needed* to be drawn to determine who qualified for benefits and those that did not—and that line would be based upon percentage of blood.<sup>296</sup> During oral arguments in *Rice*, Justices Kennedy and Scalia pressed the federal government about the acceptability of someone with 148th, 196th, "195th Hawaiian blood" to participate in the Office of Hawaiian Affairs' elections.<sup>297</sup>

Justice Breyer also suggested the arbitrariness of ancestry: "It seems to me . . . that everyone who has one Hawaiian ancestor at least gets to vote, and more than half of those people are not native Hawaiians. They just have a *distant ancestor*."<sup>298</sup> Justice Breyer then asked "How do we extend that to people [ten] generations later, who had [ten] generations ago one Indian ancestor? I mean that might apply to everybody in the room. We have no idea."<sup>299</sup> In much the same way that opponents of the one thirty-second blood quantum quota argued that such dilution of blood made a Hawaiian individual "to all intents and purposes a white person[.]"<sup>300</sup> Justice Breyer's line of questioning and decision implied that dilution of blood quantum disqualified individuals from being members of a sovereign indigenous body. The Court, with both conservative and liberal support, thus, reaffirmed the early twentieth century doctrine and again tied indigeneity, and thus sovereignty, to blood quantum, which has enabled "white American economic, political, and social domination" to endure.<sup>301</sup>

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<sup>295</sup> *Id.* at 526–27.

<sup>296</sup> The Court, thus, "relied on the logics of dilution to undermine inclusive conceptualizations of Nativeness." Kauanui, *supra* note 262, at 118.

<sup>297</sup> *Rice* Oral Argument, *supra* note 45, at \*40.

<sup>298</sup> *Id.* at \*29. (emphasis added).

<sup>299</sup> *Id.* at \*35; *See Rice*, 528 U.S. at 501 (Breyer, J., concurring). In his concurring opinion, Justice Breyer declared the connection to one Native ancestor as meaningless:

There must . . . be . . . some limit on what is reasonable, at the least when a State (which is not itself a tribe) creates the definition. And to define that membership in terms of 1 possible ancestor out of 500, thereby creating a vast and unknowable body of potential members—leaving some combination of luck and interest to determine which potential members become actual voters—goes well beyond any reasonable limit.

*Rice*, 528 U.S. at 501 (Breyer, J., concurring).

<sup>300</sup> Kauanui, *supra* note 262, at 118 (citation omitted).

<sup>301</sup> KAUANUI, *supra* note 282, at 183.

Missing from Justice Breyer's recitation of blood logic (as well as Judge Burns' use of *Rice* and the HHCA) was a recognition of the ways in which Hawaiians themselves viewed the issue of blood quantum.<sup>302</sup> For Hawaiians, the connection to a people is not based upon blood quantum, but rather a deep connection to the land.<sup>303</sup> But, clearly, missing from Justice Breyer's concurrence (and Judge Burns' piece) is the true goal of the Hawaiian Homes Commission Act: displace Hawaiians from the land.

The willingness to simply accept the mandates of the Act without criticizing or even simply acknowledging the divisiveness of the issue and its validity is unacceptable and silences the indigenous perspective of these racist laws. This type of omission does a disservice to the advancement of justice for all. Judges and practitioners must keep a sensitivity to the stories of marginalized communities and must be vigilant in ensuring that the little they have is protected.

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<sup>302</sup> The issue of blood quantum has also divided the Hawaiian community and pitted those with one-half part Hawaiian blood against all others. See *Day v. Apoliona*, 616 F.3d 918 (9th Cir. 2010); *Kealoha v. Machado*, 131 Hawai'i 62, 315 P.3d 213 (2013). While American blood logic emerged in *Rice* through Justice Breyer's concurrence, so too did the argument of native Hawaiians who challenged the agency's expenditure of section 5(f) trust funds for both native Hawaiians and Hawaiians. In an amicus brief to the Court, the Hou Hawaiians (a self-described tribal body of native Hawaiians, as defined by the Hawaiian Homes Commission Act) criticized the Office of Hawaiian Affairs' expenditures and compared Hawaiians to dogs:

Suppose wolves were an endangered species and Congress had given the state of Virginia 1.4 million acres of land in trust to provide habitat and funding to preserve them. If Virginia installed the American Kennel Club as trustees of this land and they, in turn, proposed that the definition of wolf be changed to include all breeds of domestic dogs, it would be a clear breach of trust. OHA is doing the same thing. OHA wants a person who is one-half Filipino, one-quarter Japanese, one-eighth Caucasian, one-sixteenth Chinese and one-sixteenth Hawaiian to be given the same benefits as a person who is one-half Hawaiian. How can such a person make a claim to participate as an equal beneficiary with a person who is one-half Hawaiian?

Brief of Amici Curiae, The Hou Hawaiians and Maui Loa, Native Hawaiian Beneficiaries at 10, *Rice v. Cayetano*, 528 U.S. 495 (2000) (No. 98-818), 1999 WL 374578, at \*10. The Hou Hawaiians' analogy conjures images of a pack of ravaging dogs fighting over scraps. The Hou Hawaiians were unfortunately ingratiated with the American blood logic and the notion that they were more worthy of resources than those of less than fifty percent Hawaiian blood.

<sup>303</sup> See Friedman, *supra* note 287, at 564–65. Friedman states:

People in Hawaii were predominantly identified by their relationship to the country or to the society or to the 'aina [land]. Thus people were called by the terms Kama'aina (adopted to the land); Hoa'aina (friend of the land); Kua'aina (backbone of the land); or Maka'ainana (eyes of the land). The person who had no such relationship was a Malihini (stranger, newcomer).

*Id.* (citation omitted).

### B. *Vigilance for the Future*

It is not reasonable to bifurcate history from the law. Indeed, as Judge Richard A. Posner stated, “Law is the most historically oriented, or if you like the most backward-looking, the most ‘past dependent,’ of the professions.”<sup>304</sup> With no other choice but to use history, a compromise must be made to ensure that the history that is used is accurate. As this Article has shown, Hawaiian history is unique and highly complicated. How is it then that practitioners and judges ensure that their recounting of Hawai‘i’s unique history is adequate? Are there structural changes that can be made to the legal system to ensure that attorneys and jurists are educated and sensitive to Native Hawaiian issues? How do scholars and lawyers stay vigilant given the uncertain times ahead?<sup>305</sup>

To ensure accuracy of the recitation of Hawaiian history, practitioners and judges should adhere to these guiding principles: first, acknowledge the tremendous wrongs committed against the Native Hawaiian people;<sup>306</sup> second, be open to using non-legal resources;<sup>307</sup> third, consistently update the historical narrative based upon the scholarship available to ensure that the narrative accounts for the stories of all people;<sup>308</sup> and fourth, use both

<sup>304</sup> Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 573 (2000); see also Kelly, *supra* note 13, at 157. Kelly notes:

[T]he essential nature of the judicial process, as already observed, is too close to that of history-writing for the Court [to] ever abandon entirely either the use of history or the writing of history. But a historian might observe that the historical evidence seems to indicate the Court’s history to be [the] most dubious in those instances in which an appeal to the past has been recruited for activist purposes of interventionist political implications. It is on those occasions that the worst kind of law-office history makes its appearance in the Court’s opinions.

Kelly, *supra* note 13 at 157.

<sup>305</sup> Indeed, with the election of Donald J. Trump as President of the United States, there is a legitimate concern for the future of Native Hawaiian programs. See Troy J.H. Andrade, *Legacy in Paradise: Analyzing the Obama Administration’s Efforts of Reconciliation with Native Hawaiians*, 22 MICH. J. RACE & L. (forthcoming 2017).

<sup>306</sup> Legal scholars, jurists, and attorneys have a moral obligation to, at the very least, acknowledge the harms that have come from colonization. See HAW. R. SUP. CT. 1.5(c) (“I will faithfully discharge my duties as attorney, counselor, and solicitor in the courts of the state to the best of my ability, *giving due consideration to the legal needs of those without access to justice.*” (emphasis added)).

<sup>307</sup> See Melton, *supra* note 269, at 435 (“The number of possible sources for historical study, consequently, is staggering; the number of finding aids alone is daunting.”).

<sup>308</sup> See Joshua Stein, *Historians Before the Bench: Friends of the Court, Foes of Originalism*, 25 YALE J.L. & HUMAN. 359, 387 (2013) (“[C]ourts who use historical knowledge [or] arguments ought to use history accurately and responsibly, avoiding if possible the ‘lawyer’s history’ . . . . Our job is to provide the Court with the best historical

primary and secondary sources, so long as the biases of these sources are analyzed.<sup>309</sup>

The last point is particularly important given the vast variety of resources available on Hawaiian history. For example, the *Rice* majority relied heavily upon the biased writings of non-native historian Ralph S. Kuykendall.<sup>310</sup> Kuykendall authored a multi-volume book of Hawaiian history.<sup>311</sup> Kuykendall wrote these texts at the request of the Historical Commission of the Territory of Hawai‘i,<sup>312</sup> and, by virtue of his methodological approach, writes as if he was the sole authority on the topic. Kuykendall was tasked to write these works as textbooks that would paint the territorial government in a favorable light and the monarchy in a negative light.<sup>313</sup> One of the methodological choices made by Kuykendall was to use little, if any, native sources of information; he also chose not to use any non-English sources.<sup>314</sup> Unsurprisingly, Kuykendall presents a biased view of history and often portrays the dramatic transformation in Hawaiian legal, political, and economic landscape as gradual and welcomed by the Hawaiians. At some points, he improperly rationalized actions of natives. Kuykendall, as an example, writes that the monarchy’s resistance to takeover by the United States was, among other things, anti-haole racism,<sup>315</sup> as opposed to simple resistance against a takeover of their

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knowledge available[.]” (citation omitted)); *see also* Robinson v. City of Detroit, 462 Mich. 439, 464, 613 N.W.2d 307, 320 (Mich. 2000) (“We must also recognize that stare decisis is a ‘principle of policy’ rather than ‘an inexorable command,’ and that the Court is not constrained to follow precedent when governing decisions are unworkable or are badly reasoned.” (citations omitted)). For example, Hawaiian language resources have not been fully mined to provide historians and scholars with a full picture of Hawaiian history. Poai, *supra* note 273, at 575–82.

<sup>309</sup> *See* Melton, *supra* note 269, at 435 (“Once the researcher has begun to locate documents of interest, the next step is that of determining the accuracy of the document’s contents, and to understand how the information in those sources relates to other information.”); *id.* at 457 (noting that the trend in historical research is to rely on primary sources, but finding that there is also value to using secondary sources).

<sup>310</sup> *Rice v. Cayetano*, 528 U.S. 495, 500 (2000).

<sup>311</sup> *See* R.S. KUYKENDALL, *THE HAWAIIAN KINGDOM, 1778–1854: FOUNDATION AND TRANSFORMATION* (1938); R.S. KUYKENDALL, *THE HAWAIIAN KINGDOM, 1854–1874: TWENTY CRITICAL YEARS* (1953); R.S. KUYKENDALL, *THE HAWAIIAN KINGDOM, 1874–1893: THE KALAKAUA DYNASTY* (1967) [hereinafter *THE KALAKAUA DYNASTY*].

<sup>312</sup> *See Publisher’s Note*, in *THE KALAKAUA DYNASTY*, *supra* note 311, at v.

<sup>313</sup> *See* MICHAEL K. DUDLEY & KEONI K. AGARD, *A HAWAIIAN NATION II: A CALL FOR HAWAIIAN SOVEREIGNTY* 110–11 (1990).

<sup>314</sup> *See* Charles H. Hunter, *Preface to THE KALAKAUA DYNASTY*, *supra* note 311, at vii.

<sup>315</sup> For example, Kuykendall writes:

In the succeeding period, we observe what was apparently a deliberate effort to separate natives and foreigners and to foment race hatred. The cry was raised, “Hawai[‘]i for the Hawaiians”; and this slogan was used to promote the political

homeland. Yet, Kuykendall's books were widely read and cited, including by the federal government. For instance, the Native Hawaiians Study Commission,<sup>316</sup> which was commissioned by Congress to assess the federal government's responsibility and recommend further reparatory action, drew significantly on Kuykendall's work in the early 1980's.<sup>317</sup> A majority of the Native Hawaiians Study Commission—all political appointees in the Reagan Administration—determined that the federal government was not responsible for the illegal overthrow of the monarchy and recommended that Native Hawaiians did not need an apology or reparations.<sup>318</sup> Kuykendall's methodological approach and ultimate product, while helpful to synthesize the entire history of Hawai'i from 1778 to 1893, lends itself to criticism.

Native scholars are not immune from similar criticism. Indeed, renowned historian Samuel Manaiakalani Kamakau's life may have influenced his view of Hawaiian history. Educated at the missionary high school at Lahainaluna, Kamakau offers a unique and sometimes jaded glimpse of life in the eighteenth and nineteenth centuries. Throughout Kamakau's *Ruling Chiefs of Hawai'i*,<sup>319</sup> one can see the major influence of Western religion. Kamakau provides a sermon on sacrifice and the deeds of past rulers to which future generations will be punished.<sup>320</sup> Additionally, when a group of Hawaiian individuals were spared by the volcano's fire, they claimed their safety was ensured because of the taboo flags that they carried in front and behind them.<sup>321</sup> Kamakau quickly rebuts the individual's story and criticizes them: "They did not think of Jehovah and give credit to him for their escape!"<sup>322</sup> When Kamakau recounts the final acts of Kamehameha to solidify his rule of the island of Hawai'i, specifically the sacrifice of his cousin Keoua Kūahu'ula, he again attributes this unification to a foreign god: "They may not have known that it was the power of Jehovah which united these small dominions into a single

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interests of various persons. That a feeling of racial antagonism existed is clearly apparent. That this feeling was intensified in the reign of Kalakaua is equally clear.

THE KALAKAUA DYNASTY, *supra* note 311, at 187

<sup>316</sup> See Native Hawaiians Study Commission Act, Pub. L. No. 96-565, § 302, 94 Stat. 3321, 3324 (1980) (establishing the Native Hawaiians Study Commission).

<sup>317</sup> See, e.g., NATIVE HAWAIIANS STUDY COMM'N, REPORT ON THE CULTURE, NEEDS AND CONCERNS OF NATIVE HAWAIIANS 320-21 (1983).

<sup>318</sup> *Id.* at 28 ("[T]he Commission concludes that, as an ethical or moral matter, Congress should not provide for native Hawaiians to receive compensation either for loss of land or of sovereignty.").

<sup>319</sup> SAMUEL H. KAMAKAU, *RULING CHIEFS OF HAWAI'I* (1992).

<sup>320</sup> *Id.* at 140-41.

<sup>321</sup> *Id.* at 152.

<sup>322</sup> *Id.*

kingdom.”<sup>323</sup> Thus, although Kamakau offers a Hawaiian perspective, parts of his work are influenced by his teachings in the Western and Christian discipline.

Aside from following the principles articulated above, there are also structural changes that, if made, would likely impact the recitation of Hawaiian history or at least instill competency in and sensitivities to Native Hawaiian issues for all attorneys and judges in Hawai‘i.<sup>324</sup> For judges, the Hawai‘i Supreme Court could require that all judges attend mandatory sessions on Hawai‘i’s political and legal history.<sup>325</sup> Much like the State Judiciary’s conference on implicit biases for judges,<sup>326</sup> a training on Hawai‘i’s unique history can be beneficial to ensuring accuracy in the future. For practicing attorneys, the Hawai‘i Supreme Court could require a mandatory continuing legal education course on Hawai‘i’s history.<sup>327</sup> For future attorneys, the Hawai‘i Supreme Court, in conjunction with the State’s Board of Bar Examiners, should require knowledge of Hawaiian legal issues on future bar examinations.<sup>328</sup> For all, Hawaiian language

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<sup>323</sup> *Id.* at 157–58.

<sup>324</sup> As one scholar noted, “If judges are going to write history, they should strive to do a competent job of it.” Melton, *supra* note 269, at 384.

<sup>325</sup> Relatedly, training on Native Hawaiian issues is currently provided to all State Department leaders and members of various boards and commission that have a stake in Hawaiian issues. See HAW. REV. STAT. §§ 10-41, 10-42 (2015) (requiring certain state councils, boards and commission to attend a legal training course on Hawaiian customs and rights).

<sup>326</sup> HAW. ACCESS TO JUST. COMM’N, REPORT TO THE ABA RESOURCE CENTER FOR ACCESS TO JUSTICE INITIATIVES 6–7 (2014), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/lscslaid\\_atj\\_rept\\_re\\_grant\\_2\\_27\\_14.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/lscslaid_atj_rept_re_grant_2_27_14.authcheckdam.pdf) (last accessed Jan. 6, 2017) (noting that Chief Justice Mark E. Recktenwald approved an all-day training for all State judges to understand how implicit bias may influence a judge’s decisions, understand the different scenarios or trial stages that could raise possible bias, and understand the different techniques that may help change stereotypical perceptions).

<sup>327</sup> The Rules of the Hawai‘i Supreme Court provide:

Except as otherwise provided herein, every active member of the Bar shall complete at least 3 credit hours of approved continuing legal education (CLE) during each annual reporting period. “Continuing legal education,” or “CLE,” is any legal educational activity or program that is designed to maintain or improve the professional competency of lawyers or to expand an appreciation and understanding of the ethical and professional responsibility of lawyers and is approved for credit by the Hawai‘i State Bar, including those listed in Rule 22(b) of these Rules.

See HAW. R. SUP. CT. 22(a).

<sup>328</sup> The Hawai‘i Supreme Court (Supreme Court) shall appoint a Board of Examiners (Board) to administer the process of admission to the bar of the state. Nothing in this rule, however, shall be construed to alter or limit the ultimate authority of the Supreme Court to oversee and control the privilege of the practice of law in this state.”).

See HAW. R. SUP. CT. 1.1. The idea of incorporating the indigenous rights law into the bar

courses should be taken so that Hawaiian words are pronounced and spelled correctly, and to better appreciate the richness of the Hawaiian culture.<sup>329</sup> These structural changes would, again, instill a sensitivity to Native Hawaiian issues and will stand as a firm commitment by the State's judicial branch to truly reconciling with Native Hawaiians for the past injustices. These simple actions could also go a long way in educating the federal court judges and justices of the need for accuracy when addressing Native Hawaiian issues.

## V. CONCLUSION

History is complicated. Law is complicated. But, those complications are no excuse for silencing the voice of a community that, by all accounts, have been disadvantaged because of the colonizing efforts of the United States. Attempting to justify legal disputes by resorting to false narratives of Hawai'i's history is a dangerous practice that has repercussions to all people. These "glittering generalities" are then enshrined and used repeatedly thereafter to quash those seeking justice. These voices cannot and will not be silenced. The legal community must no longer stand idle.

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examination or admission process would not be a new concept as New Mexico and Washington require knowledge of federal Indian law as part of their bar admission process. See N.M.R.A. 15-107(A)(10) ("An applicant who meets the requirements of Rules 15-103 and 15-104 NMRA and this rule may, upon motion, be admitted to the practice of law in New Mexico if the applicant . . . submits evidence of in-person attendance at, and successful completion of, a course approved by the Supreme Court, which shall include Indian law, New Mexico community property law, and professionalism, before being approved for admission."); WA. A.P.R. 5(b)(1) (noting that "[b]efore an applicant who has passed the bar examination, or who qualifies for admission without passing the bar examination, may be admitted, the applicant must . . . take and pass the Washington Law Component[,]" which includes a section on Indian law). This author firmly believes that the bar examination should not be used as a measure to admit candidates to the practice of law in a jurisdiction. See Troy J.H. Andrade, *Ke Kānāwai Māmalahoe: Equality in Our Splintered Profession*, 33 U. HAW. L. REV. 249 (2010).

<sup>329</sup> The Hawaiian language is an official language of the State of Hawai'i. See HAW. CONST. art. XV, § 4 ("English and Hawaiian shall be the official languages of Hawaii, except that Hawaiian shall be required for public acts and transactions only as provided by law."); Poai, *supra* note 217, at 582–98.

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- Parallel citations are still required for cases decided by Hawai‘i state courts; and
- Words of Hawaiian origin should incorporate diacritical marks (‘okina and kahakō) as stated in the most current editions of *Hawaiian Dictionary* (Mary Kawena Pukui & Samuel H. Elbert eds., rev. ed. 1986), or *Place Names of Hawai‘i* (Mary Kawena Pukui, Samuel H. Elbert & Esther T. Mookini eds., rev. ed. 1974).



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