

groups to petition their own states represent their interests in trade disputes. But whether that's a real gain remains to be seen.

Thank you.

PROFESSOR LAVERDURE: Thank you. Professor Van Dyke.

PROFESSOR JON VAN DYKE: Thank you very much. Along with the other speakers, of course, I want to thank Aaron and the other students who have worked so hard to bring us together this afternoon. And thank all of you for your loyal participation in the face of all the other options that might have tempted you: Moot courts, volleyball games across the street, hula-hoop contests, and so on.

In any event I'm going to try to give you a very quick introduction to the native Hawaiian situation that I deal with, and then try to segway into the intellectual property issues that Gavin was dealing with and try to raise some questions. Hawaii, of course, is an isolated archipelago, and so until two hundred years ago it was without any contact with the rest of the world. In 1778, Captain James Cook stumbled across the islands. Soon other adventurers and missionaries and whalers and profiteers came to the islands, and now instead of looking like this [slide], Honolulu looks like this [slide]. Quite a dramatic change. Yet there are still lovely and more or less untouched parts of the islands where native peoples still live in a traditional way, trying to maintain their culture and live according to their heritage. But they are frustrated and angry because they really haven't had any vindication of their claims and rights.

Native Hawaiians are among the largest of any indigenous group in the United States. About two-hundred thousand people of Hawaiian ancestry. I guess the Navajos are pretty big as well.

Native Hawaiians are unique in that they've never had any settlement or any claims commission established for them by the federal government, and they don't even have formal federal recognition at this time. In fact, the way the U.S. law is written, to get federal recognition as an Indian tribe or a native group you have to be in the continental United States. It's hard to come up with a more blatant discriminatory enactment. But there we are.

The Kingdom of Hawaii was overthrown with the active participation of the United States in 1893. The Congress has apologized for this and in 1993 has acknowledged that the overthrow was illegal—and that it would not have been successful without the participation of the United States. The resolution says that this resulted in the suppression of the inherent sovereignty of the native Hawaiian people—interesting and important phraseology—and deprivation of their right to self-determination. At several points it says it was illegal, it says it was a violation of international law, and then, very significantly, it acknowledges that 1.8 million acres, about two-fifths of the entire land of the archipelago, was transferred to the United States without the consent of and without compensation to the Native Hawaiian people or their sovereign government. So that's all documented.

But what to do about it under the Commerce Clause? Under the Indian Commerce Clause, as we discussed today, Congress should have the power to deal with this. There's no formal treaty with the native people because in 1871 Congress prohibited any further treaties to be negotiated with native people. Since Hawaii was annexed in 1898, it would have been illegal to have a separate treaty with them. But there have been 140 or more federal statutes that do identify Native Hawaiians as Native Americans and that grant them some type of rights. They're not federally recognized,

but we do have the Office of Hawaiian Affairs (OHA). Here you see the nine trustees with our governor as she's signing a bill reopening the revenue stream to the OHA that the previous governor had cut off [slide]. The problem they're facing, though, comes from this group of people [slide of Supreme Court photo] [laughter] who in the year 2000 issued a very regrettable decision, *Rice v. Cayetano*,⁴⁸ which said that a provision limiting the persons eligible to vote for OHA trustees to people of Hawaiian ancestry was a violation of the 15th Amendment. The decision was limited in the sense that it focused only on the 15th Amendment. But is also has some very mischievous language about the use of Hawaiian ancestry as the criteria being a proxy for race and thus establishing a racial classification. They did not determine whether Hawaiians should be given deferential level of judicial review under *Morton v. Mancari*,⁴⁹ calling that a "difficult terrain" that they decided not to maneuver through. So the decision is limited—but it's still sort of an open invitation to the challenge the limited but important programs that do exist.

The Court said "we assume the validity of the underlying administrative structure and trusts." This might include the Hawaiian homelands, which were set up in 1921 and which set aside about two hundred thousand acres of not very good land, but at least some land, for Native Hawaiians. These are at risk. We also have the Kamehameha Schools, which has control over another 400,000 acres that are to some extent at risk as well because of *Rice v. Cayetano*. Princess Pauahi set aside these lands for the children of Hawaiian ancestry and that's being challenged.

⁴⁸ 528 U.S. 495 (2000)

⁴⁹ 417 U.S. 535 (1974).

The challenges thus far have been pushed aside on procedural issues. We've got a very nice decision from the Ninth Circuit recently to get rid of one case for lack of standing. More recently, we got a District Court decision saying that the level of judicial review that applies, whether *Morton* applies or not, is itself a non-justiciable political question because we have pending legislation in Congress aimed at resolving the this issue. The court felt that it was Congress' job to make the decision. We've also brought a case asking for a moratorium on the transfer of any of the ceded lands until this is resolved. This case is in state court, and at trial Jim Anaya and I and Dave Getches testified at some length about both international principles and domestic principles that should apply to Native Hawaiians. The judge gave us a very interesting 100-page decision, the first half of which says, yes, there are terrible problems and the Native Hawaiians should have rights as other Native Americans do, but then goes on to say, sorry, I can't help because of sovereign immunity, waiver, estoppel, the political question doctrine, so on and so forth. That's a frustration. We're also are working on resource issues, particularly water rights cases. I've been working on *Molokai*, in particular. We get a very nice decision where the Hawaii Supreme Court said that, before any water allocation decisions are to be made, the developer must satisfy the burden of proof that the proposed wells will not affect the rights of Native Hawaiians. We're happy that there has been some recognition of that priority. Another angle: Senator Daniel Akaka is trying to push a piece of legislation through Congress—the Akaka Bill, which has been sort of stuck there for some time—which would provide federal recognition in the formal sense that the Supreme Court seems to need, and would then initiate negotiations for the transfer of land and assets.

Native Hawaiians, like other native groups, have been focusing on the kinds of issues that we're talking about in this final panel, namely the intellectual property type resource rights that are so important. They're doing this in a number of different ways, but in particular they anything of value found on this 1.8 million acres of ceded land—they want Native Hawaiians to share in the benefit, just as the Hawaiians now get 20% of other revenues from that land. This leads leads to the question of what are sort of intellectual property rights native people can realistically claim and pursue. I was intrigued by Gavin's attempt to quantify that and I want to just sort of raise some questions about how we can pursue that quantification in a rigorous way.

Just as he did, I'm going to skip through these provisions that you're all pretty familiar with, which establish that indigenous people do of course have property rights, and that they can be collective in nature. The Convention on Biodiversity has helped us by focusing on the whole cultural matrix of indigenous groups that should be protected, not just sort of picking and choosing among the various rights. Hawaiians have always had sense of collective ownership of land. Professor Rosen was talking about how there is diversity, of course, and native peoples are nomadic, and so on. But perhaps because they lived on small islands, the Hawaiians didn't have any place to go; they more or less stayed put and definitely developed a very special relationship with their land. Their story of creation is that the first child born of the Earth Mother died and was planted and came up as a taro plant. The next child produced all the people of Hawaii. So the taro plant is the older brother of all of the Hawaiian people. All this gives them a sense of a spiritual relationship and a responsibility to nurture the land, to nurture the taro, very carefully, and to make their lands

prosper and thrive. They did not think of the land as something you would own or buy or sell. It was a stewardship—something you cared for because it was a living thing and because it was your link to the gods.

As you know, Erica-Irene Daes has tried to document and list the various kinds of intellectual property claims that native people can make. Some are fairly straightforward: sacred sites and burial sites and so on. But when we start dealing with traditional designs and performing arts and things of that sort, it becomes more complex. Professor Clarkson was acknowledging that it is particularly difficult to figure out what to do about things that were created hundreds of years ago, some of which have entered into the mainstream of our thinking. In her principles, Daes goes through a lot of straightforward things, but then it becomes a little trickier. For example: “All forms of tourism based on indigenous peoples’ heritage must be restricted to activities which have the approval of the peoples and communities concerned.” Well, everything in Hawaii is to some extent based on the indigenous peoples’ heritage—so how do we do this? Another quote: “Artists and writers should refrain from incorporating elements derived from indigenous heritage into their works without the informed consent of the owner.” Again, how as a practical matter do we do this? The Hawaiians were great artists; for example, they made these wonderful feathered capes. These were made from the feathers of little birds—little birds which basically had one or two yellow feathers per. It took zillions of them to make these feathered capes. Here’s a cape that’s now in Copenhagen [slide]. This is easy one; this should come back to Hawaii, right? Sort of a no-brainer. This Hawaiian god sculpture is at the British Museum in London [slide]. Yes, these things should come back. Certainly the sites in

Hawaii should be protected and preserved—as they are, more or less.

But then it starts getting trickier. Professor Cruz mentioned the Crazy Horse case, which is instructive. Crazy Horse Malt Liquor started manufacture in the 1990s. The Sioux who revere Crazy Horse as a great leader were upset and started challenging that. There was an Eighth Circuit case that focused on the authority and jurisdiction of the tribal courts, which is an important part of this, but there was then subsequently a settlement where John Stroh gave seven horses and a bunch of woolen blankets and so on, and a formal apology, and more importantly they've stopped making this malt liquor now.

More recently, there's been a to-do in Hawaii over a new vehicle the Daimler-Chrysler people are putting out called the "Dodge Kahuna," which is being marketed with surf boards on top, to give people that beach-boy flavor. Hawaiian groups are telling Dodge not to use the word "kahuna," which is an Hawaiian word for spiritual leader or elder, but has become slang in the modern world for a big, jolly Hawaiiin man. How realistically can we deal with these things? The hula hula is another creation of the Native Hawaiian people. It was suppressed by the missionaries. It takes many forms and beautiful representations. It has of course been dramatically misinterpreted. This is one of my favorite quotes, from a Yale professor writing in 1906, who referred to Captain Vancouver's journal, where Captain Vancouver described seeing a performance of "indescribable lasciviousness." The hula hula. I keep wondering if it was more lascivious in those days. [Laughter.] In any event, we don't get to see it in its original form. Instead, we see it through Lilo & Stitch. But realistically, can we claim some rights to this? John Osorio, a professor at our Center

for Hawaiian Studies, has provided a scholarly version of the typical reaction that Hawaiians have toward this, where he argues it's a modification, a monstrous desecration, and so on. Of course it is—but how realistically can one sort of put these sorts of things back in the bottle? Is it realistic to think that we can control how people deal with the hula or surfing? The Hawaiians invented surfing and introduced it to the world. Now it's commodified by Disney. This happens all the time. The Indian Motorcycle Company, one of the more outrageous desecrations of the native name. We all know what's happening with the Cleveland Indians. I'm actually just looking for ideas here about how one can realistically deal with this range of things.

The bone issue in Hawaii is very important. You're all familiar I know with the Kennewick Man dispute, as to who should control this extremely interesting skeleton and skull, the native people or the scientists. The skeleton may teach us things about how people came to North America. The Ninth Circuit just last month ruled that the scientists get it, because the native people couldn't show the requisite link between the bones and their current status.

How do we figure out what it is that we're trying to protect, and how do we best protect it? Professor Clarkson was very good trying to show us that equity and justice is a part of efficiency. But how do we really bring that to bear in these complex situations? We need first to define indigenous knowledge. There is a fairly bland definition that the World Bank has been using. And folklore: how do we define that? People are trying their best to come up with such definitions.

Personally, I think it is fair to conclude that indigenous peoples are now distinct legal personalities. Previous speakers have mentioned that this has happened just in the last couple of

decades—but that it's clear that they have rights to their cultural artifacts, their sacred sites, their biological resources, and their traditional knowledge. Having said that, how do we make it meaningful? We're being asked to establish practical programs. Is knowledge public property? Native people, most of them, would not have thought that this is something with which you make money. You might share it with worthy people, but you don't make money off of it, exactly. So to some extent, we're turning away from the traditional view of these traditional assets. We're basically imposing western concepts of intellectual property law on something really doesn't fit. And can we protect things that have already passed into mainstream consciousness? Here is a quote I found from Professor Jack Forbes, professor at the University of California-Davis, in their Native American Rights program. He proposes a "First Nations Intellectual Property Act" to provide royalties to be paid for the use of Native American inventions and products, everything including kayaks, toboggans, rubber plants, squash, beans, tobacco, tomatoes. This is an attractive idea—but do we also do it for things that Europeans created, that Asians created, that Africans created? Is there going to be a royalty applied to everything that we use? How do we sort this out? Anyway, sorry to have more questions than answers but thank you very much for including me in the program.

PROFESSOR LAVERDURE: Thank you. Our last speaker is Eric Wilson. I know we're running behind on time but I still also want to leave time for a handful of questions afterwards, and then we've got the concluding remarks after that. I think, Aaron, since you've returned—how did you do by the way?

MR. PAGE: I didn't melt.