I. INTRODUCTION

In 1893, when the Hawaiian Kingdom's government was overthrown, the inherent self-governing rights of Kānaka Maoli (Native Hawaiians) were severely restricted. Native Hawaiians also lost control of their traditional lands. Chapters 2, 3, and 4 in this treatise have discussed the subsequent history of the Government and Crown Lands, including the island of Kahoʻolawe, and the rights that Native Hawaiians still retain in those lands. This chapter examines the basis of sovereignty claims and reviews the evolution of the Native Hawaiian movement from reparations to reconciliation, including self-determination and self-governance. It analyzes recent cases challenging Native Hawaiian benefits and programs and examines federal recognition as a possible resolution to restructuring the relationship between Kānaka Maoli and the United States. Chapter 6 of this treatise analyzes international law claims and possible avenues for redress.

The claims of Kānaka Maoli have often been analogized to those of Native American groups.[1] While there certainly are similarities, there also are significant differences. By 1831, the U.S. Supreme Court had held that the Indian nations were "domestic, dependent nations" that possessed some, but not all, aspects of sovereignty.[2] The Kingdom of Hawaiʻi, however, possessed all of the attributes of sovereignty and was recognized by the world community of nations. Native Hawaiians were citizens of an organized, self-governing nation whose status as an independent sovereign entity was acknowledged by other nations, including the United States. Nevertheless, reconciliation efforts between Kānaka Maoli and the United States have often focused on issues of "special rights" and equal protection, leading to current challenges to benefits and programs designated for Native Hawaiians.

Part II of this chapter discusses the Hawaiian Kingdom's recognition as a sovereign nation and the ways in which this sovereignty was undermined by the illegal overthrow of the monarchy and Hawaiʻi's subsequent annexation to the United States by joint resolution. Part III describes early attempts to seek reparations from the federal government, state actions to address the status of Native Hawaiians, and subsequent federal reconciliation efforts. Part IV analyzes important judicial decisions impacting the legal status of Native Hawaiians under U.S. law. Part V describes the federal recognition process for Native American nations, attempts by some Kānaka Maoli to secure recognition, and congressional efforts toward recognition. Part VI examines the state recognition of Native Hawaiians under Act 195, a state law enacted in 2011. Part VII discusses recent actions that could lead to federal recognition.

II. SOVEREIGNTY OF THE HAWAIIAN KINGDOM[3]

The most basic right of a nation is its right to exist.[4] From this first right, a nation derives all of its other rights: the rights to control internal affairs, to choose a form of government, to make and amend laws, to provide for its citizens, and to administer its domain.[5] In international affairs, the right to exist gives rise to the rights to enter into intercourse with other nations, to conclude special relationships and agreements with other nations, to acquire territory, and to admit and expel aliens.[6] Perhaps the primary right arising from the right to exist is the right of independence. A corollary *duty* arising from the right of independence is the principle of nonintervention: the duty not to intervene in the internal affairs or the external sovereignty of another nation.[7]

As early as 1826, the first formal agreement between the United States and the Hawaiian Kingdom was negotiated.[8] The U.S. Senate never ratified the treaty, as required by the U.S. Constitution. The document, however, was

> clearly an international act, signed as such by the authorities of the then independent Hawaiian government, and by a representative of the United States, whose instructions, while vague, must be regarded as sufficient authority for his signature, in view of the then remoteness of the region from the seat of government and the general discretion which those instructions granted[.][9]

Further, "for more than a decade [after the treaty was signed], American officials and residents of the Hawaiian Islands were seeking to impress upon the perplexed chiefs the sanctity of this agreement which the government of the United States had refused to accept."[10] The first section of the unratified treaty acknowledged that "the peace and friendship" between the United States and the sovereign and people of Hawai'i "[are] hereby confirmed, and declared to be perpetual."[11]

In 1842, President John Tyler recognized the sovereignty of Hawai'i and declared it the official policy of the United States to support Hawaiian independence.[12] As a result, Congress appropriated funds for the appointment of a minister from the United States to Hawai'i.

In 1849, the U.S. Senate ratified the first formal treaty between the United States and the Kingdom of Hawai'i.[13] That treaty dealt with friendship, commerce, and navigation. Article I provided for the "perpetual peace and amity between the United

States and the King of the Hawaiian Islands, his heirs and successors."[14] The initial duration of the friendship treaty was ten years. After the initial ten years, each party had the right to terminate the treaty after a year's notice. This treaty was still in effect when the Hawaiian monarchy was illegally overthrown in 1893.

In 1875, another treaty between the United States and the Kingdom of Hawai'i was signed, providing duty-free entry of certain American goods and products into Hawai'i and vice versa.[15] In 1887, this "reciprocity treaty" was amended to give the United States the exclusive right to enter and use Pearl Harbor as a coaling and repair station.[16] The reciprocity treaty was also still in effect in 1893. The treaties signed between the Kingdom of Hawai'i and the United States had not been canceled; nevertheless, the U.S. government violated the international standards of conduct between sovereigns bound by their treaties.[17]

As other chapters have demonstrated, the government formed by and for the benefit of Native Hawaiians was deprived of the most basic right of a nation, the right to exist. This deprivation was accomplished with the assistance of the U.S. minister to Hawai'i and the aid of American troops and was based upon a pretense that not even a special commissioner appointed by the newly elected President Grover Cleveland could accept.[18] Those actions represented a clear violation of the Kingdom of Hawai'i's right to independence and the principle of nonintervention. In 1893, the actions were condemned by the president's special envoy, by U.S. Secretary of State Walter O. Gresham, and ultimately by President Cleveland.[19] While time may have changed the circumstances of the native people, it has not changed the initial wrong, made it any less reprehensible, or alleviated the consequential damage.

As a result of that initial wrong, Kānaka Maoli lost both the internal and external rights and control that are paramount to a sovereign nation. Hawaiians lost the right to choose a form of government, to make laws, to oversee their domain, and to provide for their common good. They lost the right to stand as an equal in the international community, to make agreements and treaties with other nations, and to exhibit the external manifestations of sovereignty. While these losses may not be actionable in the U.S. judicial system, they nevertheless require redress.[20]

These losses resulted not solely from the acts of the U.S. minister to Hawai'i but also from prior events leading up to annexation. As early as 1887, a significant number of Native Hawaiians had been disenfranchised due to restrictive voting qualifications contained in the 1887 Constitution.[21] This constitution had been forced upon King David Kalākaua by a small but powerful group of Western businessmen. It is clear that the moving force in overthrowing the monarchy was this same group of businessmen, most of whom were American or European.[22] There was no pretense

on their part that the native population supported their cause. Indeed, they took the paternalistic attitude that the natives did not know what was best for them and that, ultimately, Native Hawaiians would benefit from annexation to the United States.[23]

When union with the United States did not immediately occur, the annexationists formed the Republic of Hawai'i.[24] Again, there was no significant representation of native views in forming that government,[25] and there was minimal participation by Kānaka Maoli once that government was formed.[26] In the first election under the republic's constitution in October 1894, only 1,917 people registered to vote on O'ahu. Of those, 509 had been born in Hawai'i and 54 were naturalized citizens, as opposed to the 1,331 who had received certificates for providing "substantial service . . . [to] the Provisional Government" and the 23 who had received letters of denization.[27] Moreover, the republic's constitution set such strict voting qualifications, including property restrictions, that few Native Hawaiians could have participated even if they had wished to do so.[28] As one historian has stated, the legislature of the republic was "predominately American, republican, and Annexationist."[29]

In 1895, when an attempt was made to restore the monarchy, Native Hawaiians constituted the overwhelming majority of those arrested for participation in the "rebellion."[30] In 1897, when an annexation treaty that had been signed by U.S. agents and the Republic of Hawai'i was being considered by the U.S. Senate, Native Hawaiians presented petitions and resolutions to the republic's president, to the U.S. minister to Hawai'i, and ultimately to the U.S. Senate, protesting annexation and requesting, at the very least, a vote on the subject.[31]

The senate of the Republic of Hawai'i ratified this same treaty of annexation on September 8, 1897. The U.S. Senate did not ratify the treaty. In the summer of *the following year,* a Joint Resolution of Annexation, which contained many of the same provisions as the annexation treaty, passed both houses of the U.S. Congress and was signed by the president.[32] The joint resolution made no provision for a vote by Kānaka Maoli or other citizens of Hawai'i to accept annexation. It was merely assumed that the action of the republic's senate in ratifying an annexation treaty almost *a year earlier* was sufficient to show assent of the people.[33] Moreover, as scholars have pointed out, although some have argued that the combination of the 1897 treaty and the 1898 joint resolution resulted in the annexation of Hawai'i, there is no viable legal argument leading to that conclusion.[34]

In the U.S. Congress, the annexation of Hawai'i by joint resolution rather than by treaty was hotly debated. Many argued that the United States could acquire territory only under the treaty-making power of the Constitution, requiring a ratification vote by two-thirds of the U.S. Senate.[35] Those favoring annexation pointed to the annexation of Texas in 1845 as a precedent.

Several significant factors, however, differentiated the Texas situation.[36] The Texas joint resolution merely signified the willingness of the United States to admit Texas as a state if it fulfilled certain conditions, one of which was acceptance of annexation.[37] There was a time limit imposed on Texas in that it had to adopt a duly ratified state constitution on or before January 1, 1846. The Texas legislature accepted annexation, and subsequently a special convention approved annexation and wrote a state constitution. Finally, the people of Texas ratified the constitution in a referendum and also voted to accept annexation. Thus, Texas accepted annexation not just once but three times. In a technical sense, then, a joint resolution did not admit Texas to the Union; it merely invited Texas to accept annexation and form a state. In contrast to the process regarding Hawai'i, the Texas joint resolution required Texas to act *after* the United States had first acted. In the case of Hawai'i, the United States required neither a vote on annexation nor further acceptance of the joint resolution.

The entire process of annexation, from the 1887 Bayonet Constitution to the 1898 Joint Resolution of Annexation, denied Kānaka Maoli the most fundamental right of self-determination. As expressed simply and most eloquently by Ka Pākaukau, a coalition of Hawaiian sovereignty groups:

> [Sovereignty] is the right possessed by a culturally distinct people inhabiting and controlling a definable territory . . . to make all decisions regarding itself and its territory free from outside interference. It is what Hawaiians enjoyed under their own culture and constitution before armed U.S. intervention brought about the overthrow of the Hawaiian Kingdom in 1893. Sovereignty is not something that can be given to us—we can only assert it or give it up. . . . We Native Hawaiians have never voluntarily surrendered our sovereignty. We were never allowed to vote on the Republic or Annexation, and we had no chance to vote separately on statehood. We can achieve sovereignty when nations of the world accept the fact that a people make their own decisions and refuse to allow others to decide their fate for them.[38]

III. FROM REPARATIONS TO RECONCILIATION

As discussed below, in the early stages of the Hawaiian redress movement beginning in the early 1970s, financial compensation and reparations were seen as the most viable forms of settling Native Hawaiian claims and advancing the interests of

the Native Hawaiian community. Over the years, however, the call for compensation and reparations has turned into a call for reconciliation, recognition, and sovereignty.

A. EARLY EFFORTS

In the early 1970s, several organizations were formed in Hawai'i to examine and reassess the historical and legal relationship between Native Hawaiians and the federal government. The ALOHA Association[39] was one of the most active among the groups that called attention to the United States' involvement in the overthrow of the Hawaiian government. In a 1975 hearing, the president of the ALOHA Association noted the growth of the Hawaiian reparations movement:

> [T]he ALOHA Association . . . was founded in 1972 by Louisa K. Rice. . . . First there were only a handful of members . . . who joined, because the Hawaiian natives felt that the United States of America is such a powerful Government and they would not listen to the native Hawaiians, who claimed their kingdom was lost over 80 years ago.
>
> The native Hawaiians were made aware of the Alaskan Native Claims Bill and that the Alaskan natives were successful in their claims. The membership and interest in the ALOHA Association began to increase and the native Hawaiians started to investigate the basis of the claim, which they found to be true. . . . The mission of ALOHA is to get legislation to justly and fairly compensate the Hawaiian natives for what the United States of America took from them.[40]

As a result of these efforts, a series of "reparations" bills[41] was introduced in Congress. These bills were modeled after the Alaska Native Claims Settlement Act[42] and called for the creation of a Hawaiian Native corporation that would receive monetary reparations in the amount of one billion dollars from the federal government.[43]

During the hearings on the bills, the complexity of the issues and related social concerns emerged. When it became clear that Congress was not ready to address Native Hawaiian claims by direct legislation, advocates suggested other forums,[44] including a model loosely based on the Indian Claims Commission Act (ICCA).[45] That act, passed in 1946, established a "judicial" commission, which was given a specific grant of jurisdiction by Congress to hear and determine claims of American Indian groups.[46] Native Hawaiians were not eligible to file claims under the ICCA,

because only identifiable groups of Indians were allowed to make claims. The ICCA, however, did allow native groups to bring some types of claims that had not been previously allowed, including claims based on "fair and honorable dealings [between the United States and the native group] not recognized by any existing court of law or equity[.]"[47]

Rather than attempting to enact a special jurisdictional statute for Native Hawaiian claims, the Hawai'i congressional delegation sought to establish a Hawaiian Native claims settlement study commission.[48] In 1977, resolutions were introduced in Congress[49] that would have created a commission to "conduct a study of the culture, needs, and concerns of the Hawaiian Natives; the nature of the wrong committed against and the extent of injuries to Hawaiian Natives by reason of the actions set forth in the preamble of this resolution; and various means to remedy such wrong."[50] The preamble of the resolutions basically acknowledged the involvement of U.S. Minister John L. Stevens and U.S. troops in the 1893 overthrow. However, while a settlement study commission measure passed the U.S. Senate, it died in the House.[51]

These early attempts to obtain federal reparations were unsuccessful. In retrospect, it was perhaps to the benefit of Native Hawaiians that Congress did not resolve these claims at the time. Most Kānaka Maoli now believe that mere monetary settlement is insufficient, es pecially in li ght of the st rong sovereignty cl aims cu rrently being advanced. One positive result of these early reparations efforts, however, was the attention that they brought to Native Hawaiian claims on the national and state levels, encouraging a more searching inquiry into the events of 1893.

B. STATE ACTIONS

1. Office of Hawaiian Affairs

While self-governance and self-determination efforts have been focused primarily on the relationship with the federal government, Native Hawaiians appeared to achieve a measure of self-governance and autonomy on the state level in 1978 when the Hawai'i electorate amended the Hawai'i Constitution to establish the Office of Hawaiian Affairs (OHA).[52]

Native Hawaiian participants in the 1978 Constitutional Convention saw the convention as an opportunity to further the goal of self-determination. Their vision was to establish a governing entity and to reaffirm the state's obligation with regard to the public land trust, the former Government and Crown Lands of the

Hawaiian Kingdom.[53] A substantial portion of these lands had been transferred to the state in the 1959 Admission Act and impressed with five trust purposes, including the "betterment of conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act[.]"[54] The U.S. Congress had passed the Hawaiian Homes Commission Act (HHCA) in 1921 to "rehabilitate" Native Hawaiians of not less than 50 percent Hawaiian ancestry through a homesteading program.[55] The HHCA had set aside approximately 203,500 acres of the former Government and Crown Lands for the homesteading program. The 1959 Admission Act, in addition to transferring the public land trust, had also transferred the trust established by the HHCA to the state, requiring the state to adopt the HHCA in the state constitution.[56]

The delegates contemplated that OHA would be an independent entity, as reflected in the report of the Hawaiian Affairs Committee:

> The committee intends that the Office of Hawaiian Affairs will be independent from the executive branch and all other branches of government although it will assume the status of a state agency. . . . The status of [OHA] is to be unique and special. The establishment by the Constitution of [OHA] with power to govern itself through a board of trustees . . . results in the creation of a separate entity independent of the executive branch of government.[57]

The Constitutional Convention delegates also examined the rights of Native Americans and found that they "traditionally enjoyed self-determination and self-government[,]" retained power to make their own substantive laws on internal matters, and were a "separate people with the power of regulation over their internal and social problems[,]" although no longer possessed of all attributes of sovereignty.[58] By establishing OHA, the Constitutional Convention delegates intended to further the cause of Hawaiian self-government and grant similar rights to Kānaka Maoli.[59]

Another noteworthy aspect of the Hawaiian Affairs Committee report was its express statement that the OHA amendments were intended to be sufficiently broad to include the administration and management of the Hawaiian home lands program. The delegates envisioned that one day, the public land trust and Hawaiian home lands trust would be combined and the elected OHA board of trustees would assume the trust responsibility to administer the HHCA and manage the Hawaiian home lands.[60]

After the 1978 amendments were adopted, the Hawai'i state legislature was charged with their implementation. The legislature, however, declined to follow the express language of the Constitutional Convention committee reports. For instance, the Senate Judiciary Committee stated:

> In dealing with all bills addressed to implementation of Constitutional amendments, we have considered only the text to have been ratified by the voters and therefore entitled to consideration as mandatory. Conversely, matters in the committee reports were considered entitled to serious consideration, but were nonetheless only advisory.[61]

Consequently, even though the Constitutional Convention delegates had stated the rationale for OHA's independent status in the relevant committee reports, the legislature ignored those statements and determined that "the voters did not intend to give the board of trustees . . . exclusive jurisdiction over its internal organization and management."[62] The legislature also chose to ignore the Hawaiian Affairs Committee's recommendation that the administration of the Hawaiian home lands be transferred to OHA. Instead, the OHA legislation specifically *excluded* administration of the HHCA from OHA's jurisdiction.[63]

Nonetheless, the main elements of the OHA amendments were implemented by the legislature. Chapter 10 of the Hawai'i Revised Statutes (HRS) sets out the powers and duties of the office. Section 10-4 of the HRS established OHA as a corporate body to be "a separate entity independent of the executive branch."[64] OHA has a wide range of powers, including the power to acquire, hold, and manage property; to enter into contracts and leases; to manage and invest funds; and to formulate public policy relating to Hawaiian affairs.[65] When compared with other state agencies, OHA is a unique entity, established by the state constitution and independent from other branches of state government.

The electoral process for choosing the board of trustees was designed to ensure OHA's independence. As originally conceived, OHA was to be a vehicle for Native Hawaiian self-determination, with trustees elected solely by voters of Hawaiian ancestry.[66] The original language of article XII, section 5 of the Hawai'i Constitution also required the trustees to be of Hawaiian ancestry, forming a nine-member board with one member residing on each of the islands of Kaua'i, O'ahu, Moloka'i, Maui, and Hawai'i and the remaining four "at-large" trustees residing on any of the islands.[67] The trustees were then to elect a chair and vice-chair from among their members. Trustees are elected for four-year staggered terms.[68]

Although imperfect, the creation of OHA was seen as a step toward self-governance. Indeed, in analyzing how Native Hawaiians could obtain a status similar to that of other Native Americans, a staff attorney with the U.S. Senate Select Committee on Indian Affairs commented: "[I]t appears that the logical starting point for such a change might rest with the Hawaiian Homes Commission and the Office of Hawaiian

Affairs (OHA). Both entities are institutions that are responsible for certain benefits and protections to native Hawaiians. Their origins are in Federal law."[69]

As discussed more fully below, the U.S. Supreme Court's 2000 decision in *Rice v. Cayetano,*[70] which struck down the Hawaiians-only voter provision, and the subsequent *Arakaki v. State*[71] decision, which applied the same reasoning to the Hawaiians-only trustee provisions, dealt a severe blow to OHA's autonomy. OHA's independence has been limited by the U.S. Supreme Court's characterization of trustee elections as state elections in which the entire electorate should participate, and OHA's viability as a vehicle for Native Hawaiian self-determination has diminished. Nevertheless, OHA and the trustees still play an important role in the Native Hawaiian community as guardians of significant resources and examples of Hawaiian leadership.[72]

2. "Native Hawaiian Vote" Process

In 1993, the state took several important actions in recognition of the one hundredth anniversary of the overthrow of the Hawaiian Kingdom and in response to a consensus in the Hawaiian and general communities that reconciliation efforts must be renewed. The state legislature adopted a powerful statement of its commitment to reconciliation in House Concurrent Resolution 179,[73] whose language was substantially incorporated into an Apology Resolution, discussed in detail below, that was passed by the U.S. Congress in November 1993.

The state also adopted Act 359 "to acknowledge and recognize the unique status the native Hawaiian people bear to the State of Hawaii and to the United States and to facilitate the efforts of native Hawaiians to be governed by an indigenous sovereign nation of their own choosing."[74]

Act 359 established the Hawaiian Sovereignty Advisory Commission (HSAC) to advise the legislature on a voting process to determine the will of the Native Hawaiian people regarding a convention.[75] The convention would then seek to achieve a consensus on an organic governing document and decide on a form and structure for a native government. For some Hawaiians, Act 359 was viewed as an appropriate response to Native Hawaiian calls for self-government. Others, however, questioned the legitimacy of a state-sponsored process that would further Native Hawaiian self-governance and self-determination.[76]

The HSAC was charged with (1) conducting special elections related to the purpose of the act; (2) apportioning voting districts; (3) establishing the eligibility of convention delegates; (4) conducting educational activities for Hawaiian voters, a voter registration drive, and research activities in preparation for the convention;

(5) establishing the size and composition of the convention delegation; and (6) establishing the dates for any special elections.[77] Act 359 also proposed a specific question that would be put to qualified voters in the 1994 general election but left the matter open for further consultation with the HSAC. The proposed ballot question asked, "Shall a Hawaiian convention be convened to propose an organic document for the governance of a Hawaiian sovereign nation?"[78]

In 1994, however, Act 200 amended Act 359 in order to establish the Hawaiian Sovereignty Elections Council (HSEC) and effectively postponed any vote on Hawaiian sovereignty.[79] One purpose of Act 200 was to "[p]rovide for a fair and impartial process to determine the will of the indigenous people to restore a nation of their own choosing."[80] The HSEC was required to "[h]old a plebiscite in 1995, to determine the will of the indigenous Hawaiian people to restore a nation of their own choosing" and, "[s]hould the plebiscite be approved by a *majority of qualified voters,* provide for a fair and impartial process to resolve the issues relating to [the] form, structure, and status of a Hawaiian nation."[81] A requirement in Act 200 made it clear that the native government formed through this process would not affect the operations or laws of the state.[82]

The legislature postponed the 1995 plebiscite and in 1996 passed Act 140, which called instead for a "Native Hawaiian Vote" in 1996.[83] Act 140 gave the HSEC the authority to provide election guidelines and procedures for the Native Hawaiian Vote[84] and also amended the requirements so that a positive response to the ballot question would be based on "a majority of ballots cast"[85] instead of a majority of qualified voters.

The HSEC was tasked with facilitating the efforts of the indigenous Hawaiian people to be self-governing; supervising the Native Hawaiian Vote; maximizing voter registration; educating eligible voters on registration and voting; holding hearings and public forums; disseminating information and discussion respecting the Native Hawaiian Vote; and, if the vote approved actions leading to self-government, developing a plan for a special election of delegates to a convention.[86]

Kānaka Maoli were eligible to register to vote as long as they were at least eighteen years old by September 2, 1996, the date on which the results were to be announced.[87] There were no citizenship or residency requirements, and current or prior criminal convictions, as well as incarceration, were not a basis for a denial of voting rights.[88] Each ballot required the voter to affirm Hawaiian ancestry.[89] In July 1996, more than eighty-one thousand ballots, with an August 15 ballot return deadline, were sent throughout the world.[90] The ballot question asked, "Shall the Hawaiian people elect delegates to propose a Native Hawaiian government?"[91]

Two lawsuits were filed seeking to stop the vote. One alleged that the election was an attempt to undermine the constitutional ability of Native Hawaiians to independently seek redress from the federal government. The second suit alleged that the Native Hawaiian Vote discriminated against those who could not vote because they were not of Hawaiian ancestry. In *Rice v. Cayetano* (1996),[92] U.S. District Court Judge David Ezra denied a motion for preliminary injunction, determining, inter alia, that the plaintiffs were not likely to prevail on their constitutional claims.[93] An appeal filed with the Ninth Circuit Court of Appeals delayed announcement of the election results, but on September 11, 1996, the court of appeals lifted an order preventing the release of the election results.[94]

The next day, election results were announced, with 30,423 eligible ballots returned to the HSEC to be counted. Of these ballots, 22,294, or 73.28 percent of voters, had voted yes on the question.[95] The voter response was celebrated by some as a victory for the Hawaiian people, but others believed that the state should not be involved in any decision regarding Native Hawaiian sovereignty.[96] In spite of criticism that only around 40 percent of voters chose to participate in the election, election officials believed that this was a respectable turnout for a mail-in election.[97] In compliance with state law, HSEC disbanded on December 31, 1996.[98]

In the summer of 1995, HSEC members, concerned about the state's failure to support funding for the proposed Native Hawaiian Convention, had organized a nonprofit corporation, Hā Hawai'i, to hold the election of delegates. Hā Hawai'i had been tasked with raising funds for the election of delegates and the convention; providing a transition between the HSEC and the election of delegates; and networking with Hawaiian organizations, OHA, and the state legislature to raise funds for the election of delegates and the convention.[99] The Native Hawaiian Convention, also called 'Aha Hawai'i 'Ōiwi, was formed through an election process whereby each moku (large district) of an island elected delegates, with deliberations to start in July 1999.[100] Eventually, seventy-seven delegates were elected to represent the Hawaiian community.[101]

With the delegates in place, the Native Hawaiian Convention began at the Hawai'i State Capitol on July 31, 1999. Delegates worked for more than a year exploring different options for Native Hawaiian self-governance.[102] On July 29, 2000, the convention delegates selected two conceptual models to present to the people for their advice and recommendations.[103] The two models were for a Hawaiian nation within the United States (an integration model) and an independent Hawaiian nation-state (an independence model).[104] Other models were considered (including kingdom models and a free association model), but the delegates decided to focus

on the integration and independence models.[105] The two models differed in terms of detail and length, reflecting greater interest and advocacy efforts for the independence model and the assumption that those people who were already working on federal recognition would provide the basis for an integration model.[106]

Lack of funding, continued opposition from some vocal Native Hawaiian organizations, and the 2000 *Rice v. Cayetano* decision from the U.S. Supreme Court, discussed below, brought a halt to the process. The convention did not permanently adjourn and thus still exists at this writing, but it has not been able to function due to a lack of funding and an inadequate support system.[107] At the last delegate meeting before publication of this chapter, there was a consensus to present the two options, but the delegates were not able to finalize the forms or close the convention by presenting the final version of the two options.[108] Although this process has not resulted in the establishment of a self-governing Native Hawaiian entity, it has set the stage for the Native Hawaiian community's ongoing efforts and highlighted both the aspirations and the obstacles faced by Kānaka Maoli in moving forward.

C. FEDERAL ACTIONS

1. Native Hawaiians Study Commission

In 1980, the initial efforts to establish a commission to study Native Hawaiian claims appeared to come to fruition. Congress created the Native Hawaiians Study Commission (NHSC) to study the "culture, needs and concerns of Native Hawaiians."[109] The act appeared to be a weakened version of earlier proposals, because there was no specific mention of the events of 1893, of the "wrong" committed, or of a remedy for the wrong.

The NHSC act called for the president to appoint a nine-member commission, including three Hawai'i residents.[110] Nine members were appointed by President Jimmy Carter during the last week of his administration. These commissioners were dismissed when President Ronald Reagan took office. It was not until eight months later that new commissioners were appointed.[111]

Although the NHSC act did not specifically so state, it is clear from the legislative history of earlier proposals for a settlement commission that the NHSC's primary mission was to conduct an inquiry into the extent of U.S. involvement in the 1893 overthrow of the Hawaiian monarchy and the validity of Native Hawaiian claims resulting from those actions. The commission held eight public hearings in Hawai'i,

and it heard testimony and received written statements from hundreds of individuals during dozens of hours of hearings.[112] The NHSC's draft report was issued in September 1982, and a five-month comment period was allowed.[113] Almost one hundred written comments on the draft report were received, and many of them were quite critical of the draft report's findings on the Native Hawaiian claim.[114] Finally, in March 1983, the NHSC met in Washington DC to finalize its report.[115]

At the conclusion of the commission's meeting, the nine members found themselves irreconcilably divided on fundamental issues involving the overthrow of the Hawaiian Kingdom's government. The three Hawai'i commissioners filed a separate report,[116] which disputed the majority's finding that the U.S. government was blameless in connection with the overthrow of the Hawaiian monarchy.[117] However, the majority concluded that there was no basis for federal action to redress the claims of Native Hawaiians stemming from the events of 1893.[118]

Significantly, the majority report acknowledged the involvement of U.S. Minister Stevens and American troops in the events leading to the overthrow of the Hawaiian monarchy.[119] In spite of this finding, however, it determined that the actions of U.S. agents and military personnel were not based on "express authority from the United States Government."[120] Thus, the majority concluded, no reparations were owed to the Native Hawaiian people.

In subsequent hearings before the Senate Committee on Energy and Natural Resources, the findings of the majority were soundly repudiated. Numerous legal scholars and historians questioned the methodology and motives of the majority.[121] As one witness pointed out, "As a general rule of international law, a government is responsible for the illegal acts of its agents . . . regardless of whether such acts were authorized by the government or not."[122] In a 1988 hearing on Hawaiian claims before the Senate Select Committee on Indian Affairs, OHA Chair Moses Keale Sr. summarized the applicable law:

> The issue is not one of express authority to act, as the majority report attempts to frame it, but whether the apparent and inherent authority of the United States possessed by its agent, Stevens, was rightfully or wrongfully exercised. Under international and domestic law, the United States is *responsible for the actions of its agents when they act within areas where they appear to others to have authority even if the United States Government did not specifically authorize those acts*. . . . If we apply this principle to the actions of Minister Stevens in 1893, it is clear that the United States is liable for the harm suffered by Native Hawaiians. The United States had the capacity to select its agents carefully and the opportunity to train them about the proper use of U.S. authority.

> If a government sends agents to an island kingdom over 5,000 miles away from the government's capital, the government must expect the agents to exercise discretion when using their power. A government must therefore anticipate the types of actions that are appropriate and instruct the agent with some care. If the government fails to instruct its agents and the agents use their power to harm the citizens of the Kingdom, the government that sent the agents with their military power must logically bear responsibility for the agents' actions.[123]

Unfortunately, the report of the majority commissioners stood as an additional obstacle to congressional action on Native Hawaiian claims. The NHSC, however, did serve a useful purpose. The resulting report provided needed statistical and background information on the education, health, and social welfare needs of Native Hawaiians. More importantly, the process revealed that Kānaka Maoli had turned their focus from a mere monetary settlement of their claims and instead were seeking restoration of their land and their self-governing powers.[124]

2. 1993 Apology Resolution

In November 1993, the U.S. Congress passed, and President Bill Clinton signed into law, a joint resolution apologizing to the Native Hawaiian people for U.S. participation in the overthrow of the Hawaiian Kingdom.[125] Although styled as a "joint resolution," the Apology Resolution was enacted as a public law and signed by the president. Consequently, it is a statute of the United States and has the same effect as other laws enacted by Congress.[126]

The Apology Resolution explicitly acknowledged the "special relationship" that exists between the United States and the Native Hawaiian people. Congress confirmed in the Apology Resolution that Native Hawaiians are an "indigenous people," a key characterization that establishes that a political relationship, rather than one based on race, exists between the Native Hawaiian people and the United States government.[127]

In the resolution, Congress stated that the Hawaiian people had "never directly relinquished their claims to their inherent sovereignty as a people," and it apologized for the participation of agents and citizens of the United States in the overthrow and "the deprivation of the rights of Native Hawaiians to self-determination."[128] The right to self-determination is the most basic of human rights under federal and international law, and efforts to facilitate the exercise of this right are mandated by fundamental human rights principles.[129]

Congress also acknowledged in the resolution that the Republic of Hawai'i had ceded 1,800,000 acres of Crown Lands, Government Lands, and public lands of the Kingdom of Hawai'i without the consent of or compensation to the Native Hawaiian people or their sovereign government;[130] that the Native Hawaiian people had never directly relinquished their claims over their national lands to the United States;[131] and that the overthrow had been illegal.[132]

Congress thereby expressed its 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," and it urged the president of the United States to "support reconciliation efforts between the United States and the Native Hawaiian people."[133]

The Apology Resolution's authoritative findings and commitment to reconciliation, however, have been undermined by the U.S. Supreme Court's decision in *Hawaii v. Office of Hawaiian Affairs* (2009).[134] In that case, the court determined that the Apology Resolution's findings had no "operative effect"[135] and that its substantive provisions were merely conciliatory or precatory.[136]

3. Other Reconciliation Efforts[137]

At the request of Hawai'i's U.S. Senator Daniel K. Akaka, the U.S. Department of the Interior and the U.S. Department of Justice announced in October 1999 that representatives from their departments would be conducting meetings in Hawai'i to further reconciliation efforts pursuant to the Apology Resolution.[138] Their purpose was to investigate progress on the reconciliation called for in the Apology Resolution and to solicit input from the Kānaka Maoli community so that the community's concerns could be included in a forthcoming report to Congress. In late 1999, representatives of the Departments of Justice and the Interior consulted the Native Hawaiian communities on Kaua'i, O'ahu, Maui, Moloka'i, and Lāna'i and in Hilo and Kona on Hawai'i Island. On O'ahu alone, more than three hundred people attended the meetings. Hundreds testified, and 265 submitted written statements. These statements touched on topics such as sovereignty, community and economic development, health, education, and housing.

In August 2000, the departments jointly issued a detailed report, titled *From Mauka to Makai: The River of Justice Must Flow Freely,*[139] which outlined the reconciliation process based on community input. The *Mauka to Makai* report encouraged acts of reconciliation to heal the wounds of Kānaka Maoli. According to the report:

> Reconciliation is an evolving and continuing process to address the political status and rights of the Native Hawaiian people, based on dialogue among the Federal and State Governments, Native Hawaiians, and Hawai'i's Congressional delegation, and further action by the United States Congress. This document contains recommendations with respect to the continuation of the reconciliation process and should be read as merely the next step, as the United States and Native Hawaiians move forward in further dialogue.[140]

In acknowledging the 1993 Apology Resolution and formally recommitting the U.S. government to reconciliation efforts, the departments cast their recommendations in terms of moral responsibility and justice. The report's first and most significant recommendation related to federal recognition. This recommendation stated, "To safeguard and enhance Native Hawaiian self-determination over their lands, cultural resources, and internal affairs, the Departments believe Congress should enact further legislation to clarify Native Hawaiians' political status and to create a framework for recognizing a government-to-government relationship with a representative Native Hawaiian governing body."[141] The four other recommendations were to (1) establish an office in the Department of the Interior to address Native Hawaiian issues, (2) assign a representative from the Department of Justice's Office of Tribal Justice to maintain dialogue with Kānaka Maoli on pertinent issues, (3) create a Native Hawaiian Advisory Commission to consult with agencies under the Department of the Interior that manage land in Hawai'i, and (4) continue to address past wrongs to promote the welfare of Native Hawaiians.[142]

At least one of the *Mauka to Makai* recommendations has been implemented. Congress, in a section of the 2004 appropriations act that was identical to a provision in the pending federal recognition bill at the time, established the Office of Native Hawaiian Relations (ONHR). ONHR, housed in the Office of the Secretary of the Interior, is charged with "continu[ing] the process of reconciliation with . . . the Native Hawaiian people[.]"[143] The purpose of ONHR is to effectuate and implement the "special legal relationship" between the Native Hawaiian people and the United States; continue the process of reconciliation with the Native Hawaiian people; and fully integrate the principle and practice of meaningful, regular, and appropriate consultation with the Native Hawaiian people by assuring timely notification of and prior consultation with the Native Hawaiian people before any federal agency takes any actions that may have the potential to significantly affect Native Hawaiian resources, rights, or lands.[144]

IV. JUDICIAL INTERPRETATIONS

In the twenty-year period after OHA was established, the Native Hawaiian community exercised a limited form of self-governance, electing the nine OHA trustees from members of the community. Although a number of disputes that arose with the state regarding the allocation of revenues from the public land trust hampered OHA's effectiveness in its early years,[145] OHA gradually became a strong and respected voice for the Kānaka Maoli community at both the state and federal levels. In 2000, however, the U.S. Supreme Court's decision in the *Rice v. Cayetano* case severely undercut OHA's role as a vehicle for self-governance.

A. *RICE V. CAYETANO* (2000)[146]

In 1996, Hawai'i Island rancher Harold "Freddy" Rice, a missionary descendant and a Hawai'i citizen without Hawaiian ancestry, attempted to vote in an OHA trustee election.[147] On the application, which included a section to register to vote, Rice had to attest, "I am also Hawaiian and desire to register to vote in OHA elections."[148] Rice scratched out the words "am also Hawaiian and" and checked "yes" on the form.[149] Rice was later denied eligibility to vote because he was not Hawaiian.[150] As a result, Rice sued Benjamin Cayetano in his official capacity as governor of the State of Hawai'i, claiming that the voting exclusion was invalid pursuant to the Fourteenth[151] and Fifteenth Amendments[152] to the U.S. Constitution. The Fourteenth Amendment's Equal Protection Clause provides, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[153] Under the Fifteenth Amendment, the right "to vote shall not be denied or abridged . . . on account of race, color, or previous condition of servitude."[154]

The U.S. District Court of Hawai'i ruled in favor of the state.[155] Reviewing the history of Hawai'i and its people, the court determined that both Congress and the State of Hawai'i had recognized a guardian–ward relationship with Native Hawaiians, a relationship analogous to that between the United States and Native American tribes.[156] Consequently, it examined OHA's voting limitation with the wide latitude that courts have applied to congressional legislation dealing with Native Americans[157] and found that the electoral scheme was rationally related to the state's responsibility under the Admission Act to utilize a part of the proceeds from certain public lands for the benefit of Native Hawaiians.[158] The Ninth Circuit Court of Appeals affirmed this ruling, finding that the state could "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."[159]

Rice petitioned the U.S. Supreme Court seeking further review. The Supreme Court accepted the petition and ultimately reversed the lower court's ruling, holding that the voting limitation denied Rice's right to vote under the Fifteenth Amendment to the U.S. Constitution.[160]

1. Majority Opinion

Justice Anthony Kennedy, writing for the majority,[161] began his opinion by detailing select portions of Hawaiian history, from dramatic changes of land ownership during the nineteenth century to the United States' and European powers' "constant efforts to protect their interests and to influence Hawaiian political and economic affairs in general[;]"[162] from the four treaties between the United States and the Kingdom of Hawai'i[163] to the forced reduction of native power resulting from the adoption of a new constitution in 1887 (the Bayonet Constitution), which "reduced the power of the monarchy and extended the right to vote to non-Hawaiians[;]"[164] and from the (illegal) 1893 overthrow[165] and 1898 annexation by joint resolution[166] to the HHCA[167] and statehood.[168] Further, the majority opinion expressly emphasized two demographic changes resulting directly from outsiders' contact with the islands.[169] The first was the introduction of Western diseases that decimated the Native Hawaiian population within a century after Captain James Cook's arrival.[170] The second was the immigration of Chinese, Portuguese, Japanese, and Filipino laborers for Hawai'i's sugar industry, concerning which the court observed that each group "has had its own history in Hawaii, its own struggles with societal and official discrimination, its own successes, and its own role in creating the present society of the islands."[171]

Justice Kennedy then surveyed the history of the Fifteenth Amendment.[172] Specifically, the majority cited a precedent in which the Fifteenth Amendment invalidated an electoral scheme that did not mention race but instead used ancestry in a "subtle" attempt to limit voting.[173] In this instance, the court stated, "The voting structure now before us is neither subtle nor indirect. It is specific in granting the vote to persons of defined ancestry and to no others."[174] Although the state argued that "Native Hawaiian" and "Hawaiian" are not racial classifications but classifications "limited to those whose ancestors were in Hawaii at a particular time,"[175] the court rejected this argument, maintaining: "Ancestry can be a proxy for race. It is that proxy here."[176] According to Kennedy, "An inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution

itself secures in its concern for persons and citizens."[177] Thus, Kennedy concluded that "the State's argument is undermined by its express racial purpose and by its actual effects."[178]

The state argued that OHA's voting structure was valid even if considered to be racial, because Native Hawaiians comprised a political group similar to Native Americans, whose "quasi-sovereign authority" had been recognized by the U.S. Supreme Court.[179] The state relied on a 1974 case, *Morton v. Mancari,*[180] in which the court had upheld a federal provision offering employment preferences in the Bureau of Indian Affairs (BIA) to members of federally recognized Indian tribes.[181] The majority rejected this as well, saying that in order to accept this argument, it would have to conclude that Congress had granted Native Hawaiians "a status like that of Indians in organized [(federally recognized)] tribes" and had "delegated to the State [of Hawai'i the] broad authority to preserve that status."[182] According to the court, "These propositions would raise questions of considerable moment and difficulty."[183] The majority noted that, although Congress could fulfill its obligations to Indian tribes by enacting legislation for their benefit,[184] it could not authorize a voting structure like OHA's.[185] The court differentiated the facts in *Mancari* from the current set of facts, emphasizing that a "preference which favored individuals who were 'one-fourth or more degree Indian blood and . . . member[s] of a Federally-recognized tribe'"[186] was not directed at a racial group but instead at a political one and was thus political and not racial in nature.[187] Because the preference was political rather than racial, the court subjected it to rational basis review.[188] Since the employment preference was rationally related to the government's "unique" obligations to Native Americans and was "reasonably and rationally designed to further Indian self-government," it was upheld.[189] Because OHA was considered an "arm of the State" and not a quasi-sovereign entity, however, the court determined that "[t]o extend *Mancari* to this context would be to permit a State, by racial classification, to fence out whole classes of its citizens from decisionmaking in critical state affairs[,]" an act forbidden by the Fifteenth Amendment.[190]

The state also argued that a limited voting scheme had been approved in several cases in which the court had held that the rule of one person, one vote did not pertain to certain special-purpose districts such as water or irrigation districts.[191] The court quickly rejected this argument, noting that at issue here was not the Fourteenth Amendment's one-person, one-vote requirement but the Fifteenth Amendment's racial neutrality mandate.[192]

The state's final argument was that the voting restriction was based on a fiduciary/beneficiary trust relationship.[193] Justice Kennedy rejected this argument, citing two

reasons. The first was that "it is not clear that the voting classification is symmetric with the beneficiaries of the programs OHA administers."[194] The bulk of OHA funds were earmarked for "native Hawaiians," but both "native Hawaiians" and "Hawaiians" were allowed to vote for OHA trustees. The court's second reason for dismissing this argument was that the state's assertion rested "on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters."[195] According to the court, this reasoning "attacks the central meaning of the Fifteenth Amendment."[196]

Justice Kennedy concluded:

> When the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations; and their dismay may be shared by many members of the larger community. As the State of Hawaii attempts to address these realities, it must, as always, seek the political consensus that begins with a 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 Hawaii.[197]

2. Concurring Opinion

Justice Stephen Breyer, in a concurring opinion joined by Justice David Souter, elaborated on the problematic analogy between OHA and a trust for the benefit of an Indian tribe.[198] According to Breyer, such a trust did not exist for Native Hawaiians under present circumstances, because OHA's electorate "does not sufficiently resemble an Indian tribe."[199] Breyer discussed the Admission Act's use of the word "trust" to refer to the 1.2 million acres of trust lands but quickly added that the lands were to "benefit all the people of Hawaii" and not just those who were "native."[200] Breyer then noted that OHA's funds came from different sources but were authorized by ordinary state statutes, rendering OHA "simply a special purpose department of Hawaii's state government."[201] Further, although Breyer admitted that Native Hawaiians resembled Native Americans as a group, the voting scheme at issue did not limit its electorate to "Native Hawaiians" and instead extended voting rights to "Hawaiians," which was "defined as including anyone with one ancestor who lived in Hawaii prior to 1778, thereby including individuals who are less than one five-hundredth original Hawaiian (assuming nine generations between 1778 and the present)."[202]

Breyer then noted that there was no other Native American tribal definition this broad.[203] He cited the definition of "Native" under the Alaska Native Claims

Settlement Act as an example of a more reasonable definition, explaining that it was limited to a "person of one-fourth degree or more Alaska Indian" or a person "who is regarded as an Alaska Native by the Native village or Native group of which he claims to be a member and whose father or mother is . . . regarded as Native by any village or group[.]"[204] Breyer also stated that some tribes defined membership based on whether an ancestor's name appeared on a tribal roll.[205] Although Breyer acknowledged the broad authority of tribes to define membership, he also opined:

> There must, however, 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. It was not a tribe, but rather the State of Hawaii, that created this definition; and, as I have pointed out, it is not like any actual membership classification created by any actual tribe.[206]

Thus, Justice Breyer concluded, the inclusion of the broader class of Hawaiians in the OHA electorate went beyond any "reasonable" definition of tribal status.[207]

3. Dissenting Opinions

Justice John Paul Stevens' dissent, joined in part by Justice Ruth Bader Ginsburg, viewed the majority opinion as "rest[ing] largely on the repetition of glittering generalities that have little, if any, application to the compelling history of the State of Hawaii."[208] Consequently, Stevens took a more sympathetic view of the special relationship between Kānaka Maoli and the United States. According to Stevens, "two centuries of Indian law precedent" justified OHA's voting restrictions under the Constitution, as "there is simply no invidious discrimination present in this effort to see that indigenous peoples are compensated for past wrongs[.]"[209] He believed that under *Mancari,*[210] justifiable preferential treatment "can be tied rationally to the fulfillment of Congress' unique obligation towards the Indians[.]"[211] In Stevens' view, such an obligation was implicit in the 1993 Apology Resolution and in "the many and varied laws passed by Congress in carrying out its duty to indigenous peoples, more than 150 [of which] today expressly include native Hawaiians as part of the class of Native Americans benefited."[212]

Addressing the majority and concurrence's broad dismissal of Native Hawaiians as a quasi-sovereign entity deserving of reparatory programs such as OHA's electoral scheme, Stevens further argued that rejecting the state's claims simply because Native Hawaiians were not technically a "tribe" demonstrated a failure to understand the significance of history.[213] According to Stevens, there existed a "compelling similarity, fully supported by our precedent, between the once subjugated, indigenous peoples of the continental United States and the peoples of the Hawaiian Islands[.]"[214] Stevens contended that in *Mancari,* tribal membership was not the decisive factor.[215] He explained that "the hiring preference at issue in that case not only extended to nontribal member Indians, it also required for eligibility that ethnic Native Americans possess a certain quantum of Indian blood."[216] According to Stevens, prior case law had not limited the federal government in its "special dealings" with native peoples.[217] Stevens stated:

> In light of this precedent, 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.[218]

Stevens then maintained that OHA's trustee system and election provisions complied with the Fourteenth Amendment.[219] He stated, "As I have explained, OHA and its trustee elections can hardly be characterized simply as an 'affair of the State' alone; they are the instruments for implementing the Federal Government's trust relationship with a once sovereign indigenous people."[220] Stevens then argued that the OHA voting structure stood up under *Mancari,* explaining: "[T]he OHA voting requirement is certainly reasonably designed to promote 'self-government' by the descendants of the indigenous Hawaiians, and to make OHA 'more responsive to the needs of its constituent groups[]'. . . . In this respect among others, the requirement is 'reasonably and directly related to a legitimate, nonracially based goal.'"[221]

Finally, Stevens argued that the OHA voting structure did not violate the Fifteenth Amendment, stating, "Although the Fifteenth Amendment tests the OHA scheme by a different measure, it is equally clear to me that the trustee election provision violates neither the letter nor the spirit of that Amendment."[222] Stevens first distinguished the OHA case from prior Fifteenth Amendment cases, maintaining, "That lens not only fails to clarify, it fully obscures the realities of this case, virtually the polar opposite of

the Fifteenth Amendment cases on which the Court relies."[223] Stevens further argued:

> Ancestry surely can be a proxy for race, or a pretext for invidious racial discrimination. But it is simply neither proxy nor pretext here. All of the persons who are eligible to vote for the trustees of OHA share two qualifications that no other person old enough to vote possesses: They are beneficiaries of the public trust created by the State and administered by OHA, and they have at least one ancestor who was a resident of Hawaii in 1778.[224]

Justice Stevens concluded his dissent:

> The Court today ignores the overwhelming differences between the Fifteenth Amendment case law on which it relies and the unique history of the State of Hawaii. The former recalls an age of abject discrimination against an insular minority in the old South; the latter . . . the special claim to self-determination of the indigenous peoples of Hawaii.[225]

In one short paragraph, Justice Ginsburg agreed with Justice Stevens' dissent insofar as he explained that "Congress' prerogative to enter into special trust relationships with indigenous peoples . . . is not confined to tribal Indians."[226] Ginsburg observed that Congress had time and again recognized Kānaka Maoli as "qualifying for the special status long recognized for other once-sovereign indigenous peoples[,]" noting that this federal trust responsibility had been delegated by Congress to the State of Hawai'i.[227] Justice Ginsburg then concluded that, as such, both OHA and its electoral scheme were "'tied rationally to the fulfillment' of that obligation" and that, for that reason, the OHA voting process was valid under the Fourteenth and Fifteenth Amendments.[228]

B. SUBSEQUENT CASES

Following on the heels of the decision in *Rice v. Cayetano,* Native Hawaiian programs and benefits, particularly OHA and the Hawaiian home lands program, have been challenged in court as unconstitutional and racially discriminatory. To date, none of the challenges based on the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution have been successful, primarily because those seeking to mount such challenges have lacked "standing." As discussed below, the plaintiffs in these lawsuits have failed to show a particularized injury or, in some instances, have

failed to bring in a party necessary to pursue the claim. Thus, the ultimate question—the constitutionality of Native Hawaiian programs and benefits—has not been finally decided by the courts.

1. *Arakaki v. State* (2002)

Soon after the *Rice* decision, several Hawai'i voters challenged the constitutional and statutory provisions requiring that OHA trustees be Hawaiian.[229] In *Arakaki v. State* (2002),[230] the plaintiffs argued that the requirement violated the Fifteenth Amendment, the Voting Rights Act, and the Fourteenth Amendment's Equal Protection Clause.[231] The district court agreed, and the defendants appealed to the Ninth Circuit Court of Appeals.[232] None of the facts were at issue, so the court's task was simply to determine whether the lower court had properly applied the substantive law.[233]

The state argued that the trustee qualification did not trigger the Fifteenth Amendment, because the precondition was attached to the OHA trustee candidates and not to the voters.[234] In response, the court observed that by limiting the choice of candidates according to race, the Hawaiians-only requirement was at odds with a "fundamental principle of our representative democracy"—a voter's right to choose.[235] Therefore, the court concluded that it was appropriate to examine the constitutionality of the requirement under the Fifteenth Amendment.

The state analogized the trustee requirement with the BIA's employment preference for Native Americans,[236] upheld by the U.S. Supreme Court in *Morton v. Mancari*.[237] The appeals court, however, relied on the *Rice* decision and its holdings that "(1) OHA is an 'arm of the State'; (2) trustee elections are 'elections of the State' . . .; and (3) the Hawaiian ancestry requirement is 'race-based.'"[238] Notwithstanding the fact that *Rice* addressed the Hawaiian voter qualification, the court reasoned that the decision applied with equal force to a candidate qualification.[239] With those basic questions resolved, the court believed that the only thing left to determine was "whether the Fifteenth Amendment prohibits the use of candidate qualifications that exclude candidates from state elections on the basis of race."[240] While the Fifteenth Amendment does not explicitly address candidacy restraints, the U.S. Supreme Court has held that race-based disqualifications compromised voters' Fifteenth Amendment rights.[241] Consequently, the court held that forbidding all non-Hawaiians from running for an OHA trustee position "compels the conclusion that the candidate restriction abridges the right to vote" in violation of the Fifteenth Amendment.[242]

The court employed a similar analysis in examining the requirement's legality under the Voting Rights Act. Like the Fifteenth Amendment, the Voting Rights Act prohibits mechanisms that bring about "the denial or abridgment of the right . . . to vote on account of race[.]"[243] The court reasoned that race-based constraints on candidacy qualifications "can result in a discriminatory 'abridgment' of the right to vote . . . in violation of the Voting Rights Act."[244] With that, the court felt "compelled to conclude that the trustee qualification . . . is a clear violation" of the act.[245] According to the court, the Hawaiians-only prerequisite undermined the openness of the political process by guaranteeing full participation in a state election only to some citizens and not to others.[246]

The Fourteenth Amendment equal protection challenge was directed at the appointment, and not the election, of OHA trustees.[247] The plaintiffs argued that this qualification amounted to "invidious racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment."[248] The court did not address the merits of this claim, because the plaintiffs lacked standing to challenge the restriction on appointments.[249] None of them had suffered any demonstrable injury, and the complaint lacked an allegation that any of them had been denied a trustee appointment because he or she was not Hawaiian.[250] Without an injury in fact, the plaintiffs had no standing and the court lacked jurisdiction to decide the issue, so it vacated the district court's ruling on the Fourteenth Amendment challenge.[251]

2. *Carroll v. Nakatani/Barrett v. State* (2003)

In *Carroll v. Nakatani/Barrett v. State* (2003),[252] the plaintiffs, John Carroll and Patrick Barrett, challenged the allocation of benefits for "Native Hawaiians"[253] and "Hawaiians"[254] through OHA and for Native Hawaiians through the homesteading program of the Hawaiian Homes Commission (HHC).[255] Barrett and Carroll filed separate complaints in October 2000, and the cases were consolidated on appeal.[256] The Ninth Circuit Court of Appeal's opinion addressed each plaintiff's claim separately.

Barrett's central argument was that article XII of the Hawai'i Constitution violates the Fourteenth Amendment of the U.S. Constitution because it "permits the allocation of government benefits on the basis of race."[257] The complaint was directed at OHA and the HHC.[258] The district court granted summary judgment against Barrett for lack of standing, and he challenged the ruling on appeal.[259]

Barrett's first claim was that the lower court had erred in finding that he lacked standing to contest OHA's business loan program.[260] The Ninth Circuit Court affirmed the lower court's ruling, holding that Barrett had suffered no injury in fact.[261]

On October 19, 2000, more than two weeks after filing his complaint, Barrett had submitted a business loan application to OHA seeking start-up capital for a copying shop.[262] Barrett had provided his name and address, had indicated the amount of funds desired, and had acknowledged the fact that he had no Hawaiian blood, but the application was otherwise incomplete.[263] OHA had returned the application and had asked that he include the missing information, but Barrett had ignored the request.[264] Additional facts supported the conclusion that Barrett's entrepreneurial goals were illusory: he had not prepared a business plan, he had no cost estimates for a business, and the only evidence that suggested he was going into business was a conversation he had had with an Office Depot employee.[265]

With these facts in mind, the court specified its understanding of the "injury" required in an equal protection challenge: it "is not the inability to obtain the benefit, but the inability to compete on an equal footing."[266] Therefore, to secure standing to challenge a race-conscious program, "a plaintiff need only demonstrate that it is 'able and ready' [to compete]."[267] The sheer lack of any business preparation by Barrett belied any readiness on his part to compete for an OHA loan.[268] Without any facts to support this threshold requirement, Barrett's claim amounted to a "generalized grievance."[269] In an equal protection challenge, a generalized grievance will not secure a plaintiff standing.[270] Because Barrett had not suffered an injury in fact, the court affirmed the district court's ruling that he lacked standing to challenge OHA's business loan program.[271]

Barrett's second claim was aimed at the HHC's homestead lease program, which, he argued, violated "the Fourteenth Amendment because government benefits, leases to public lands, are available only to native Hawaiians."[272] The district court found that Barrett had suffered an injury in fact, because to get a lease, "a person need only state a desire to obtain a lease and provide certain personal information."[273] Barrett had satisfied these conditions, so the court moved on to the second standing requirement: "redressability," which is the court's ability to provide the redress sought by a plaintiff.[274]

Barrett's failure to include the United States as a party to the suit, however, was fatal to the redressability of his injury.[275] The U.S. Congress had created the homestead program in 1921 when it passed the HHCA.[276] In the 1959 Admission Act, the United States had transferred title to the approximately 203,500 acres of homestead land to Hawai'i, and as a condition of statehood, Hawai'i had adopted the HHCA into its state constitution.[277] In tandem with the transfer of the lands' ownership and management, the United States had reserved "a right of consent to any changes in the homestead lease qualifications" pursuant to section 4 of the Admission Act.[278]

Providing Barrett with relief would trigger modifications to the homestead lease qualifications; consequently, any such change would require the participation of both the State of Hawai'i and the United States.[279] Barrett, however, had failed to name the United States as party, and therefore, the court held that Barrett's claim was not redressable.[280]

Carroll was equally unsuccessful in demonstrating that he had suffered an injury in fact, which left him without standing to challenge the constitutionality of OHA and its programs.[281] Carroll presented three alleged injuries in fact,[282] none of which persuaded the Ninth Circuit Court of Appeals to rule in his favor.[283]

* * *

3. *Arakaki v. Lingle* (2007)

In *Arakaki v. Lingle* (2007),[300] the plaintiffs, all citizens of Hawai'i, contested the "preferential treatment" of Kānaka Maoli under various state programs.[301] They sued state officials and the United States,[302] stating three causes of action: (1) that OHA, the Department of Hawaiian Home Lands (DHHL) and the HHC (the state agency and its executive board that administer the HHCA), and their assorted programs were unconstitutional under the Fourteenth and Fifth Amendments; (2) that the same programs violated Title 42, section 1983 of the U.S. Code; and (3) that the administration of OHA and the HHCA constituted a breach of the public land trust.[303]

* * *

[All of the plaintiffs' claims were ultimately dismissed for lack of standing – none of the plaintiffs had applied for or indicated that they wished any of the benefits of the HHCA or to participate in OHA's programs. The plaintiffs sought to bring in the U.S. as a party based on plaintiffs' status as beneficiaries of the public land trust. The court determined, however, that the lands and any trust had clearly been transferred to the State in 1959. Thus, the plaintiffs had no standing to bring in the U.S. as a party to the case and without the participation of the U.S., under the ruling in *Carroll v. Nakatani*, plaintiffs could not challenge the terms of the HHCA. Another of the plaintiffs' primary claims was based on the use of state taxpayer funds to support OHA's programs for Native Hawaiians. The court was concerned that this portrayal of a "particularized injury" would enable "a taxpayer to challenge any governmental expenditure he does not like and for which he has not applied[.]" The Ninth Circuit Court of Appeals refused to adopt the plaintiffs' position and held that the only harm suffered was that the plaintiffs "are taxpayers and do not like OHA's programs."]

4. *Corboy v. Louie* (2011)

In *Corboy v. Louie* (2011),[360] homeowners and taxpayers living in various counties in the State of Hawai'i challenged both the initial seven-year real property tax exemption granted to Hawaiian homestead lessees under the HHCA and the county ordinances that substantially reduced real property taxes for homestead lessees after

the initial exemption period.[361] The plaintiffs brought suit in the Hawai'i State Tax Appeals Court, claiming that the state and counties' denial of an equivalent exemption to non-Hawaiian homestead property owners was a deprivation of their equal protection rights under the Fifth and Fourteenth Amendments to the U.S. Constitution and other federal civil rights laws.[362] The plaintiffs sought (1) a declaration that the exemptions from real property taxes violated the Fourteenth Amendment and other civil rights laws; (2) a declaration that the HHCA and the portions of the Admission Act and the Hawai'i Constitution incorporating the HHCA into state law were invalid; (3) a refund of real property taxes in excess of what would have been paid if the plaintiffs had been granted exemptions; and (4) an injunction barring real property tax exemptions exclusively for Hawaiian homestead lessees, which was basically a request for equal exemptions for the plaintiffs themselves.[363] The plaintiffs contended that property owners without exemptions paid proportionately more each year for the benefits of municipal services than those with exemptions, and thus declaratory and injunctive relief was necessary because a refund alone would not provide adequate relief.[364]

Initially, the case was heard in the Tax Appeals Court, which held that the tax exemptions did not involve a suspect or race-based classification.[365] Rather, the court held, the exemptions were based on whether a taxpayer was a homestead lessee and not whether he or she was Native Hawaiian. The court concluded that as an equal protection challenge, no suspect classification was involved, there was a rational basis for the classification, and no evidence had been presented to refute the rational basis for the classification.[366]

On appeal to the Hawai'i Supreme Court, Chief Justice Mark Recktenwald, speaking for the majority, held that the plaintiffs lacked sufficient standing to bring suit.[367] The majority opinion reviewed the history relevant to the creation of the HHCA and the trust obligations imposed by the federal government on the State of Hawai'i through the 1959 Admission Act.[368] The analysis then focused on the plaintiffs' claim "that the HHCA tax exemption and the HHCA, generally, violate the equal protection components of the Fifth and Fourteenth Amendments"[369] because only Native Hawaiians were eligible to receive the exemption. The court construed the plaintiffs' challenge to the tax exemption as a challenge to the eligibility provisions of the HHCA,[370] because "the county tax exemptions are . . . granted based on the same criteria as the HHCA tax exemption, i.e., they are granted to homestead lessees who meet the eligibility requirements set forth in HHCA [section] 207."[371] Ultimately, the court found that the plaintiffs had not adequately established

an injury in fact sufficient to confer standing to pursue their constitutional challenges against the HHCA.[372]

The court described its judicial power as limited to resolving those conflicts where "a plaintiff has alleged such a personal stake in the outcome . . . as to warrant his invocation of the court's jurisdiction and to justify the exercise of the court's remedial powers on his behalf."[373] The court reviewed the *Carroll v. Nakatani* case, in which the plaintiffs had asserted that they were denied equal treatment and that OHA had discriminated against them on the basis of their race.[374] In that case, the individual plaintiffs, Barrett and Carroll, had "failed to demonstrate an injury-in-fact" because no evidence had been offered indicating that they were able to, ready to compete for, or eligible to receive an OHA benefit.[375] Similarly, the plaintiffs in the instant case had failed to establish an injury in fact, because they had not applied for or otherwise established an interest in participating in the homestead lease program.[376] Not only was there no evidence in the record as to the plaintiffs' interest in participating in the homestead lease program, the court also found a lack of evidence to support the idea that any change in the homestead lease qualifications would affect the plaintiffs' position. The plaintiffs therefore had "failed to establish standing to challenge the HHCA tax exemption or the HHCA generally."[377] Thus, the court concluded that without evidence establishing "what 'specific' and 'personal' interest" had been affected, the plaintiffs' argument amounted to mere "speculation" and, thus, the plaintiffs were merely "airing a intellectual or personal grievance[.]"[378]

In a concurring opinion, Justice Simeon Acoba agreed with the result reached by the majority opinion but on different grounds. Acoba reasoned that the plaintiffs did have standing as taxpayers to challenge the tax exemption, but, drawing upon the reasoning of the Ninth Circuit Court of Appeals in *Arakaki v. Lingle,*[379] he determined that the plaintiffs had failed to name the United States as an indispensable party to the action, and thus their claims were not redressable.[380]

Subsequently, the plaintiffs' petition for writ of certiorari in the U.S. Supreme Court to review the Hawai'i Supreme Court's decision was denied.[381]

5. *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate* (2006)

In contrast to the cases discussed above, the plaintiff in *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate* (2006)[382] challenged a policy of a private Native Hawaiian organization, not of a governmental entity. Thus, the action was not based on the Fourteenth Amendment but instead on Title 42, section 1981 of the U.S.

Code, a civil rights law that prohibits discrimination in the making or enforcement of contracts.[383]

The original *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate* action was filed in June 2003 on behalf of John Doe, a non–Native Hawaiian student who had applied to Kamehameha Schools for both the 2002–3 and 2003–4 school years.[384] Both times, Doe was described as a "competitive applicant" and was placed on the waiting list but was ultimately denied admission.[385] Kamehameha Schools admitted that "were [Doe] of 'Hawaiian ancestry,' [he] would likely have been admitted to a Kamehameha [Schools] campus for the 2003–2004 school year."[386] Consequently, Doe sued Kamehameha Schools.[387] Doe claimed that Kamehameha's admissions policy, which favored children of Hawaiian ancestry, unlawfully discriminated on the basis of race, in violation of Title 42, section 1981 of the U.S. Code.[388] Doe sought three forms of relief: (1) a declaratory judgment that the schools' policy was illegal, (2) a permanent injunction against any further implementation of the challenged admissions policy or any other "preference" policy, and (3) a permanent injunction admitting him to a Kamehameha Schools campus.[389]

The case was heard before the U.S. District Court of Hawai'i,[390] the Ninth Circuit Court of Appeals,[391] and an en banc panel of fifteen judges (ordered by the Ninth Circuit Court).[392] On December 5, 2006, the en banc panel issued an eight-judge majority decision authored by Judge Susan Graber, upholding the legality of Kamehameha Schools' admissions policy under Title 42, section 1981.[393]

After providing an extensive description of Hawaiian history and modern-day educational conditions facing Native Hawaiians,[394] the majority determined that "the 'strict scrutiny' standard of equal protection does not apply to a wholly private school's race-based remedial admissions plan"; instead, the "Title VII burden-shifting system of proof" used in the employment context would be more appropriate.[395] Under that burden-shifting framework, once the plaintiff establishes a prima facie case of discrimination, "the burden shifts to the [defendant] to provide a legitimate, non-discriminatory reason for the decision."[396] The "existence of an affirmative action plan provides such a rationale." When a "relevant affirmative action plan exists, then the burden shifts back to the plaintiff to show that the justification provided was pretextual and that the plan is invalid."[397]

The court then applied a modified Title VII standard to assess the legality of Kamehameha Schools' admissions policy. The court determined that it "should use a standard for evaluating remedial racial preferences by wholly private primary and secondary schools that is akin to that used in Title VII employment cases, but

that takes into account the inherently broad and societal focus of the educational endeavor."[398]

Chapter 19, *infra,* on the ali'i trusts provides a detailed discussion of the court's analysis and application of the modified Title VII standard to Kamehameha Schools' admissions policy. Ultimately, the court concluded that Kamehameha Schools had shown that the admissions policy giving preference to students of Hawaiian ancestry was valid. The admissions policy, the court stated, satisfied the modified Title VII standard because it "offset[s] a manifest imbalance, do[es] not unnecessarily trammel others' rights or create an absolute bar, and do[es] no more than is necessary[.]"[399]

Additionally and alternatively, the court held that Congress intended to allow Kamehameha Schools to continue its preferential admissions policy when it reenacted Title 42, section 1981 of the U.S. Code in 1991. The court considered "Congress' long history of providing for Native Hawaiians through legislation" both before and after 1991.[400] It recognized that "Congress has relied on the special relationship that the United States has with Native Hawaiians to provide specifically for their welfare in a number of different contexts,"[401] including health and education, and it expressly affirmed Kamehameha Schools' mission and model elementary curriculum. The court thus held:

> It would be incongruous to conclude that while Congress was repeatedly enacting remedial measures aimed exclusively at Native Hawaiians, at the same time Congress would reject such Native Hawaiian preferences through [section] 1981. Moreover, by reenacting [section] 1981 in the midst of passing other legislation to provide specifically and particularly for the education of Native Hawaiians, Congress signaled its clear support for the Kamehameha Schools and for the validity of the Schools' admissions policy.[402]

The court found that "Congress intended that a preference for Native Hawaiians, in Hawaii, by a Native Hawaiian organization, located on the Hawaiian monarchy's ancestral lands, be upheld because it furthers the urgent need for better education of Native Hawaiians, which Congress has repeatedly identified as necessary."[403] It therefore held:

> Because the Schools are a wholly private K–12 educational establishment, whose preferential admissions policy is designed to counteract the significant, current educational deficits of Native Hawaiian children in Hawaii, and

> because in 1991 Congress clearly intended [section] 1981 to exist in harmony with its other legislation providing specially for the education of Native Hawaiians, we must conclude that the admissions policy is valid under [Title 42, section 1981 of the U.S. Code].[404]

In a concurring opinion, in which four other judges joined, Judge William Fletcher suggested an alternative analysis.[405] He asserted that "Native Hawaiians constitute a unique population that has a 'special trust relationship' with the United States," recognizing the more than one hundred fifty laws that currently provide rights and privileges to Native Hawaiians similar to those given to Native Americans.[406] He concluded:

> Congress has invariably treated "Native Hawaiian" as a political classification for purposes of providing exclusive educational and other benefits. Under the special relationship doctrine, Congress has the power to do so. I see nothing in [section] 1981 to indicate that Congress intended to impose upon private institutions a more restrictive standard for the provision of benefits to Native Hawaiians than it has imposed upon itself.[407]

In March 2007, Doe filed a petition for writ of certiorari, asking the U.S. Supreme Court to review the Ninth Circuit Court's en banc ruling.[408] Before the court could consider the petition, however, both parties agreed to settle, ending the four-year-old lawsuit.[409] At this writing, the Ninth Circuit Court's en banc ruling stands, thereby allowing Kamehameha Schools to offer admissions priority to Native Hawaiian applicants.

* * *

VIII. CONCLUSION

Native Hawaiians, like many indigenous peoples around the world, seek greater self-determination. In concrete terms, this means the ability to choose a form of government; to have control over lands, natural resources, and assets; and to be able to make decisions that have real and lasting effects on their lives and environment.

Until 2000, Kānaka Maoli had the ability to exercise a greater degree of self-determination and self-governance through OHA than they had had since the 1893 overthrow of the Hawaiian Kingdom. All Native Hawaiians recognized OHA's limitations, particularly the fact that it did not have the autonomy and independence necessary to be able to deal on a government-to-government level with either the state or federal governments. Nevertheless, OHA was an important first step toward self-governance and toward gaining more resources for the Hawaiian community. Many individual Hawaiians and Native Hawaiian organizations believe that it is possible for Kānaka Maoli to remain within the structure of the existing federal–state system and to maintain a separate native government analogous to that of Native American nations.

A Native Hawaiian government, like Native American nations, would be recognized as an independent sovereign and exercise jurisdiction over its lands and natural resources. The precedents for such a government are clearly established under federal law.

In moving forward, Kānaka Maoli must decide whether federal recognition is the appropriate vehicle to express sovereignty and self-determination. As one American Indian scholar commented in reviewing an earlier version of the Akaka Bill:

> The rights of the Native Hawaiian people are unlike those of any other group of "indigenous" people within what is now the United States, due to their distinctive history and the acknowledged political status of Hawaii as an internationally recognized Nation prior to annexation by the United States. Therefore, the question of self-determination must necessarily depend upon a clear understanding of the international and domestic legal structures and their potential impact upon the future rights of [the] Native Hawaiian people.[614]

NOTES

1 *See, e.g.,* Richard H. Houghton III, *An Argument for Indian Status for Native Hawaiians: The Discovery of a Lost Tribe,* 14 Am. Indian L. Rev. 1 (1989); Jon M. Van Dyke, *The Political Status of the Native Hawaiian People,* 17 Yale L. & Pol'y Rev. 95 (1998).

2 Cherokee Nation v. Georgia, 30 U.S. 1, 19 (1831).

3 Some of the material in this section is based on Melody K. MacKenzie, Land and Sovereignty: Honoring the Hawaiian Native Claim (1982) (unpublished report to the Office of Hawaiian Affairs) (on file with editor).

4 *See* 1 L. Oppenheim, International Law: A Treatise 193 n.3 (3d ed. 2005).

5 *See* 1 Charles Cheney Hyde, International Law, Chiefly as Interpreted and Applied by the United States, 209–12 (2d rev. ed. 1945).

6 *See id*. at 212–18.

7 *See* Oppenheim, *supra* note 4, at 221–22; see also Chapter 6, *infra,* for a discussion of the international law claims of the Native Hawaiian people.

8 Robert H. Stauffer, *The Hawaii–United States Treaty of 1826, in* 17 Hawaiian J. Hist. 40, 53 (1983); *see also id.* at 55–58; Charles I. Bevans, 8 Treaties and Other International Agreements of the United States of America, 1776–1949, at 861 (1971). See generally Houghton, *supra* note 1, at 14–19, for a comparison of the treaties negotiated between the United States and the Kingdom of Hawai'i and the treaties between the United States and Indian tribes, with the author arguing that the claims of Native Hawaiians are very similar to those of Indian tribes.

9 *Hawaiian Islands, reprinted in* U.S. State Department, Treaties and Conventions Concluded Between the United States of America and Other Powers Since July 4, 1776, at 468, 468 (John Chandler Bancroft Davis ed., rev. ed. 1873); Stauffer, *supra* note 8, at 59 (quoting 3 Treaties and Other International Agreements of the United States of America 274 (Hunter Miller ed., 1931)).

10 Harold W. Bradley, *Thomas ap Catesby Jones and the Hawaiian Islands, 1826–1827, in* Thirty-Ninth Annual Report of the Hawaiian Historical Society for the Year 1930, at 17, 25 (1931), *available at* http://evols.library.manoa.hawaii.edu/handle/10524/89.

11 Bevans, *supra* note 8, at 861.

12 *See* H.R. Exec. Doc. No. 35, 27th Cong., 3d Sess. (1842), *reprinted in* H.R. Exec. Doc. No. 1, pt. 1, 53d Cong., 3d Sess., app. II, Foreign Relations of the United States 1894: Affairs in Hawaii 39–41 (1895) [hereinafter Affairs in Hawaii], *available at* http://libweb.hawaii.edu/digicoll/annexation/blount/br1047.html; *see also* S. Exec. Doc. No. 77, 52d Cong., 2d Sess. (1892–93), *reprinted in* Affairs in Hawaii, *supra,* at 5–7 (discussing the U.S. policy in relation to the Hawaiian Kingdom).

13 Treaty of Friendship, Commerce, and Navigation Between the United States of America and His

Majesty the King of the Hawaiian Islands, 9 Stat. 977 (1849), *reprinted in* Affairs in Hawaii, *supra* note 12, at 79–85.

14 *Id.* at art. I, *reprinted in* Affairs in Hawaii, *supra* note 12, at 79.

15 *See* Convention Between the United States of America and His Majesty the King of the Hawaiian Islands, 19 Stat. 625 (1875), *reprinted in* Affairs in Hawaii, *supra* note 12, at 164–67.

16 *See* Supplementary Convention Between the United States of America and His Majesty the King of the Hawaiian Islands, to Limit the Duration of the Convention Respecting Commercial Reciprocity, Concluded January 30, 1875, 25 Stat. 1399 (1887), *reprinted in* Affairs in Hawaii, *supra* note 12, at 170–72; see also Chapter 1, *supra,* for discussion of the controversy related to and events leading to the renewal of the treaty.

17 *See* Stauffer, *supra* note 8, at 58. *See generally* Ian Brownlie, Principles of Public International Law 595 (2d ed. 1973) (discussing the termination and suspension of treaties).

18 President Cleveland appointed a special commissioner, James Blount, former chair of the House Committee on Foreign Affairs, to examine the Hawai'i situation. When Blount reached Honolulu, he found the American flag flying and American troops still ashore. He ordered the flag lowered and the troops returned to their ship. Blount, after interviewing dozens of people from different factions, concluded that Minister John Stevens had helped to overthrow the Hawaiian monarchy. He also reported that American troops had been landed not to protect American lives and property but to aid in overthrowing the existing government. *See* President's Message Relating to the Hawaiian Islands, H. Exec. Doc. No. 47, 53d Cong., 2d Sess. (1893), *reprinted in* Affairs in Hawaii, *supra* note 12, at 443–58.

19 Based on Blount's report, Secretary of State Gresham laid the blame for the "revolution" directly on Minister Stevens and recommended that action be taken to restore the government of Hawai'i. *See* Thomas J. Osborne, Annexation Hawaii: Fighting American Imperialism 50–60 (1998). President Cleveland condemned Stevens' actions in the most forceful language:

> This military demonstration upon the soil of Honolulu was of itself an act of war, unless made either with the consent of the Government of Hawaii or for the *bona fide* purpose of protecting the imperilled lives and property of citizens of the United States. But there is no pretense of any such consent on the part of the Government of the Queen, which at that time was undisputed and was both the *de facto* and the *de jure* government. In point of fact the existing government instead of requesting the presence of an armed force protested. . . . Thus it appears that Hawaii was taken possession of by the United States forces without the consent or wish of the government of the islands, or of anybody else so far as shown, except the United States Minister. . . . Therefore the military occupation of Honolulu by the United States on the day mentioned was wholly without justification[.]

H. Exec. Doc. No. 47, *supra* note 18, *reprinted in* Affairs in Hawaii, *supra* note 12, at 451–52; *see also* 9 James D. Richardson, A Compilation of the Messages and Papers of the Presidents 1789–1897, at 466–67 (1898) (Special Message of President Cleveland to Congress (December 18, 1893)).

20 *See, e.g.,* David H. Getches, *Alternative Approaches to Land Claims: Alaska and Hawaii, in* Irredeemable America: The Indians' Estate and Land Claims 331 (Imre Sutton ed., 1985), stating:

> The overthrow of the Hawaiian government itself could well be the subject of claims. . . . Other Native Americans have not been compensated for loss of sovereignty or the right of self-determination. The Hawaiians' situation may merit a different treatment, however, because their government was one fully recognized as a member of the international community. Indian tribes were seen as having some, but not all, aspects of a sovereignty.

21 See Chapter 1, *supra,* for a discussion of provisions of the 1887 Constitution.

22 See 3 Ralph S. Kuykendall, The Hawaiian Kingdom: 1874–1893, at 367 (1967), for a list of those involved with helping to draft the 1887 Constitution. Many of these same men were members of the Committee of Safety. *Id*. at 587.

23 Commissioner Blount reported to Secretary of State Gresham that "while in Honolulu he did not meet a single annexationist who expressed his willingness to submit the question to a vote of the people; he did not talk with one . . . who did not insist that if the Islands were annexed suffrage should be so restricted as to give complete control to foreigners or whites[.]" H. Exec. Doc. No. 70, 53d Cong., 2d Sess. (1894), *reprinted in* Affairs in Hawaii, *supra* note 12, at 1252; *see also* U.S. State Dep't, Papers Relating to the Foreign Relations of the United States 462 (1895).

24 See Chapter 1, *supra,* for a discussion on the formation of the Republic of Hawai'i.

25 *See generally* William Adam Russ, Jr., The Hawaiian Republic (1894–98): And Its Struggle to Win Annexation 26–34 (1961).

26 See Jon M. Van Dyke, Who Owns the Crown Lands of Hawai'i? 183–86 (2008), for a discussion of voting patterns during the republic period.

27 The Daily Bulletin, Oct. 10, 1894, page 4, *available at* http://chroniclingamerica.loc.gov/lccn/sn82016412/1894-10-10/ed-1/; *see also* Republic of Hawaii Const. of 1894, arts. 17, § 2 and 74, § 1 (certificate of service), arts. 19, § 1 and 74, § 1 (letter of denization). *See generally* Van Dyke, *supra* note 26, at 139 (noting that denizens were allowed to retain foreign citizenship but were granted rights of Hawaiian citizenship and that only 143 persons were accorded that status between 1846 and 1893).

28 *See* Van Dyke, *supra* note 26, at 183–86.

29 Russ, *supra* note 25, at 34.

30 *Id*. at 82–94; *see also id.* at 49–104.

31 See generally Noenoe K. Silva, Aloha Betrayed: Native Hawaiian Resistance to American Colonialism 123–63 (2004), for a thorough discussion of Native Hawaiian resistance to annexation. See Chapter 1, *supra,* for a discussion on the antiannexation petitions.

32 For a brief discussion of the history of the joint resolution, see Chapter 1, *supra*.

33 *See* Russ, *supra* note 25, at 328.

34 Indeed, article VII in the 1897 treaty required that *both* parties ratify the treaty. There have even been questions raised as to whether the republic's senate ever ratified the treaty.

35 Osborne, *supra* note 19, at 111–12.

36 *See, e.g.,* Justin H. Smith, The Annexation of Texas 323–33 (1911); see also Russ, *supra* note 25, at 325–30, and Osborne, *supra* note 19, at 112–13, for a discussion of the Texas annexation.

37 Russ, *supra* note 25, at 328.

38 Paul D. Lemke, member of Ka Pākaukau, Editorial, *Wants "Full Sovereignty" for Hawaiians,* Garden Isle, Mar. 21, 1990, at 4-A; see also Ka Mana O Ka ʻĀina, Vol. II, No. 1 (May 1990), for a more extensive discussion.

39 The ALOHA Association ("ALOHA" stands for "Aboriginal Lands of Hawaiian Ancestry") is generally acknowledged in the Hawaiian community as the organization that first focused congressional attention on the Hawaiian claim. In the reparations bills proposed by the Hawaiʻi congressional delegation, the ALOHA Association would have been reimbursed for fair and reasonable unpaid obligations incurred in preparing, presenting, and advancing the claim and obtaining a settlement. *See, e.g.,* H.R. 1944, 94th Cong. §§ 6(f)(14), 8 (1975). Other groups active in the reparations movement included the Council of Hawaiian Organizations, the Congress of the Hawaiian People, the Hawaiians, the Friends of Kamehameha, and the Association of Hawaiian Civic Clubs.

40 *Hawaiian Native Claims Settlement Act: Hearings on H.R. 1944 Before the Subcomm. on Indian Affairs of the H. Comm. on Interior & Insular Affairs,* 94th Cong., 1st Sess. 28 (1975) (statement of C. Maxwell, President of ALOHA Ass'n).

41 *See, e.g.,* H.R. 15666, 93d Cong., 2d Sess. (1974); H.R. 1944, *supra* note 39.

42 Pub. L. No. 92-203, 85 Stat. 688 (codified as amended at 43 U.S.C. §§ 1601–1628 (2013)). *See generally* Shannon D. Work, Comment, *The Alaska Native Claims Settlement Act: An Illusion in the Quest for Native Self-Determination,* 66 Or. L. Rev. 195 (1987); Thomas R. Berger, Village Journey: The Report of the Alaska Native Review Commission (1985).

43 H.R. 1944, *supra* note 39, § 5.

44 *See, e.g.,* Richard S. Jones, A History of the Alaska Native Claims Settlement of 1971, Together with a History of the Determination and Disposition of the Property Rights of Native Hawaiians 30–32 (1973).

45 *See* Indian Claims Commission Act of 1946, Pub. L. No. 79-726, 60 Stat. 1049 (codified at 28 U.S.C. § 1505, 25 U.S.C. § 70) (omitted from 25 U.S.C. § 70 on termination of the commission on Sept. 30, 1978).

46 Prior to 1946, Indian claims were handled by special jurisdictional acts passed by Congress allowing particular Indian tribes to sue the United States. In the period between 1881 and 1950, over 118 claims were litigated, and only 34 resulted in actual recovery. Realizing the piecemeal effect of these jurisdictional grants and the long periods of time to obtain recovery, Congress enacted a broad statutory grant of jurisdiction to hear tribal claims cases to the Indian Claims Commission for claims accruing prior to August 13, 1946, and to the Court of Claims for claims

accruing after that date. *See* Nancy Oestreich Lurie, *The Indian Claims Commission Act,* 311 Annals Am. Acad. Pol. & Soc. Sci. 56 (1957).

47 *See* Cohen's Handbook of Federal Indian Law § 5.06[3] (Nell Jessup Newton ed., 2012) [hereinafter Cohen's Handbook].

48 *See* S.J. Res. 155, 94th Cong., 2d Sess. (1975); S.J. Res. 4, 95th Cong., 1st Sess. (1977).

49 S.J. Res. 4, *supra* note 48; H.J. Res. 526, 95th Cong., 1st Sess. (1977).

50 S.J. Res. 4, *supra* note 48, § 3(a).

51 *Bill Summary & Status—95th Congress (1977–1978)—S.J.RES.4,* THOMAS (Library of Congress), http://thomas.loc.gov/cgi-bin/bdquery/z?d095:S.J.RES.4: (last visited Feb. 8, 2014).

52 *See* Haw. Const. art. XII, §§ 4–6.

53 See Chapter 2, *supra,* for discussion of the public land trust.

54 Admission Act of March 18, 1959, Pub. L. No. 86-3, § 5(f), 73 Stat. 4, 5–6 [hereinafter Admission Act].

55 Hawaiian Homes Commission Act of 1920, Pub. L. No. 67-34, 42 Stat. 108 (1921) (formerly codified as amended at 48 U.S.C. §§ 691–718 (1958)) (omitted from codification in 1959) (set out in full as amended at 1 Haw. Rev. Stat. 261 (2009)) [hereinafter HHCA]. See Chapter 4, *supra,* for a detailed discussion of the HHCA and the homesteading program.

56 Admission Act*, supra* note 54*,* § 4, 73 Stat. at 5.

57 Hawaiian Affairs Comm., Standing Comm. Rep. No. 59, *reprinted in* 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 645 (1980) [hereinafter 1 Con. Con. Pro.].

58 Comm. of the Whole Rep. No. 13, *reprinted in* 1 Con. Con. Pro., at 1017, 1019.

59 *See generally* Hawaiian Affairs Comm., Standing Comm. Rep. No. 59, *supra* note 57.

60 *See id.* at 645.

61 S. Stand. Comm. Rep. No. 784, 10th Leg., Reg. Sess., *reprinted in* 1979 Haw. Sen. J. 1350, 1352.

62 *Id.*

63 *See* Haw. Rev. Stat. § 10-3(3) (2013).

64 *Id.* § 10-4.

65 See *id.* §§ 10-4, 10-6 for the powers and duties of OHA and its board of trustees.

66 Haw. Const. art. XII, § 5.

67 *Id.*

68 *Id.*

69 Memorandum from Staff Attorney Michael Mahsetky to Sen. Daniel K. Inouye, Chair of Senate Select Comm. on Indian Affairs 9 (Aug. 19, 1987).

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

71 Arakaki v. State, 314 F.3d 1091 (9th Cir. 2002).

72 For instance, OHA's mission is to "mālama (protect) Hawai'i's people and environmental resources and OHA's assets, toward ensuring the perpetuation of the culture, the enhancement

of lifestyle and the protection of entitlements of Native Hawaiians, while enabling the building of a strong and healthy Hawaiian people and nation, recognized nationally and internationally." About the Office of Hawaiian Affairs, http://www.oha.org/content/about. *See also* Programs of the Office of Hawaiian Affairs, http://www.oha.org/content/programs.

73 *See* H.C.R. No. 179, H. Stand. Comm. Rep. No. 1438, 17th Leg., Reg. Sess., *reprinted in* 1993 Haw. House J. 1597.

74 Act of July 1, 1993, No. 359, 1993, § 2, 1993 Haw. Sess. Laws 1009, 1010–11 [hereinafter Act 359].

75 *Id.* § 4(a).

76 *See, e.g.,* Lilikalā Kameʻeleihiwa, *The Hawaiian Sovereignty Movement: Update from Honolulu (January–August 1993),* 28 J. Pac. Hist., no. 3, 1993, at 63–72.

77 Act 359, § 4(b).

78 *Id.* § 6.

79 Act of June 21, 1994, No. 200, § 6, 1993 Haw. Special Sess. & 1994 Haw. Sess. Laws 479, 480.

80 *Id.* § 2.

81 *Id.* § 6 (emphasis added).

82 *Id.* § 14. This section provided:

> Nothing arising out of the Hawaiian convention provided for in this Act, or any results of the ratification vote on proposals from the Hawaiian convention, shall be applied or interpreted to supersede, conflict, waive, alter, or affect the constitution, charters, statutes, laws, rules, regulations, or ordinances of the State of Hawaii or its political subdivisions, including its respective department, agencies, boards, and commissions.
>
> *Id.*

83 Act of June 12, 1996, No. 140, § 2, 1996 Haw. Sess. Laws 313, 313.

84 *Id.*

85 *Id.*

86 Hawaiian Sovereignty Elections Council, *Final Report* 22 (Dec. 1996) [hereinafter HSEC Final Report].

87 *Id.* at 9.

88 *Id.*

89 *Id.* at 21–22.

90 *Id.* at 9.

91 *Id.*

92 Rice v. Cayetano, 941 F. Supp. 1529 (D. Haw. 1996).

93 *Id.* at 1544–45. The court consolidated two separately filed cases, *Rice v. Cayetano* and *Kakalia v. Cayetano,* for hearing.

94 Staff Reporters, *73 Percent Say Yes to Hawaiian Sovereignty: Supporters Say the Plebiscite Is an Important Step Toward a Native Hawaiian Government,* Honolulu Star-Bulletin, Sept. 12, 1996, at A1.

95 HSEC Final Report, *supra* note 86, at 28. Ka Lāhui Hawai'i, a group supporting Native Hawaiian sovereignty, called for a boycott of the vote, but when prompted by HSEC to have its "no" ballots verified, it failed to do so. *Id.* at 31.

96 Ron Stanton, *Hawaiians Take Step Toward Self-Determination: Result of Native Hawaiian Vote Favors Convention to Propose Form of Sovereign Government,* Associated Press, Sept. 12, 1996.

97 Carey Goldberg, *Native Hawaiian Vote Favors Sovereignty,* N.Y. Times, Sept. 14, 1996.

98 Act of June 12, 1996, No. 140, § 2, 1996 Haw. Sess. Laws 313, 314 (stating, "The Council shall cease to exist on December 31, 1996.").

99 HSEC Final Report, *supra* note 86, at 57.

100 Pōkā Laenui, Chair, 'Aha Hawai'i 'Ōiwi, *A Brief Introduction to the 'Aha Hawai'i 'Ōiwi (AHO)* (Oct. 8, 2010), http://www.nhconvention.org/?page_id=2 [hereinafter Laenui, *Brief Introduction*].

101 Dep't of Interior & 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 44 (Oct. 23, 2000) [hereinafter Mauka to Makai].

102 'Aha Hawai'i 'Oiwi, *The Native Hawaiian Convention: A Consultation with the People,* http://hawaiianperspectives.org/CompleteBooklet.htm (last visited Feb. 8, 2014).

103 *Id.*

104 Pōkā Laenui, Chair, 'Aha Hawai'i 'Ōiwi, *Hawaiian Sovereignty & the Hawaiian Roll Commission* (July 17, 2012), http://www.hawaiianperspectives.org/?p=150.

105 Interview by Lindsay Kukona with Pōkā Laenui, Chair, 'Aha Hawai'i 'Ōiwi, in Wai'anae, Haw. (May 21, 2013).

106 *Id.*

107 Laenui, *Brief Introduction, supra* note 100.

108 Interview by Lindsay Kukona with Pōkā Laenui, *supra* note 105. According to Laenui, the convention

> continues to be the only native Hawaiian publicly elected body mandated to recommend to the native Hawaiians the direction to be taken in the formation of a Hawaiian government. It is struggling to conclude its work, but the members of the convention are determined to carry out its mandate, slow as it may be, and recommend to our people the course to be taken[.]

Id. Laenui believes that the convention needs to conclude its work and "[c]ome out with a proposal or multiple proposals and make recommendations on how the voting should take place. Once we have done that, then we will have concluded our mandate. What will most likely happen is the convention will appoint a committee as a transition body to carry out the election or find funding for the election." *Id.*

109 Pub. L. No. 96-565, Title III, § 303(a), 94 Stat. 3321, 3324 (Dec. 22, 1980).

110 *Id.* § 302(b).

111 The three commissioners from Hawai'i were Kina'u Boyd-Kamali'i, house minority leader of the Hawai'i legislature; Winona K. D. Beamer, noted kumu hula and teacher at Kamehameha Schools; and H. Rodger Betts, corporation counsel for the County of Maui. Five of the six non-Hawai'i members were midlevel U.S. government officials. Kina'u Boyd-Kamali'i served as chair of the commission, while Stephen Shipley, executive assistant to the U.S. secretary of the interior, held the vice-chair position.

112 1 Native Hawaiians Study Commission, Report on the Culture, Needs and Concerns of Native Hawaiians (Majority Report) 4–5 (1983) [hereinafter 1 NHSC (Majority)].

113 See *id.* at 4–6 for a synopsis of the methodology employed by the NHSC.

114 *See, e.g.,* Comments by Sen. Daniel K. Inouye on the Draft Report of Findings of the Native Hawaiians Study Commission (Nov. 23, 1982), *in* 1 NHSC (Majority), *supra* note 112, at 601; Letter to NHSC from Pauline N. King (Nov. 5, 1982), *in* 1 NHSC (Majority), *supra* note 112, at 632; Letter to NHSC by Alexander H. Raymond (Nov. 23, 1982), *in* 1 NHSC (Majority), *supra* note 112, at 692.

115 For one account of the final meeting of the NHSC, see Melody K. MacKenzie & Jon Van Dyke, *The Native Hawaiians Study Commission: A Bizarre Charade,* Honolulu Star-Bulletin, Apr. 21, 1983, at A-23:

> As we sat in the background during these two days of meetings, we had the strange sensation of seeming to see the whole 19th century of Hawaiian history pass before our eyes, in which the fast-talking and goal-oriented Westerners were succeeding in manipulating the Hawaiian [commissioners] through their efforts at imposing Western values on the situation.
>
> Like Queen Liliuokalani in 1893, the Hawaiian commissioners were unwilling to play the Western game and thus chose instead to withdraw from the battlefield, with at least their personal integrity intact, in hopes of prevailing in a subsequent forum.

Id.

116 Native Hawaiians Study Commission, Report on the Culture, Needs and Concerns of Native Hawaiians (Minority Report) v (1983).

117 1 NHSC (Majority), *supra* note 112, at 28.

118 *Id.* at 26–28.

119 *Id.* at 28.

120 *Id.* at 25.

121 *See Report of the Native Hawaiians Study Commission: Hearings Before the S. Comm. on Energy and Natural Resources,* 98th Cong. 34 (statement of Dr. Pauline Nāwahineokala'i King), 133 (statement of Jon Van Dyke, Professor of Law, University of Hawai'i), 48 (statement of David H. Getches) (1984).

122 *Id.* at 116 (statement of Cecelia Y. Chang).

123 *Oversight Hearing on Native Hawaiian Reparations Before the S. Select Comm. on Indian Affairs,* 100th Cong., 2d. Sess. (Aug. 26, 1988), at 6–7 (emphasis added) (statement of Moses Keale, Sr., Chair of the OHA Board of Trustees) (unpublished).

124 See, *e.g.,* Towards Reparations/Restitution, Office of Hawaiian Affairs (May 13, 1982), which was adopted by the OHA trustees and submitted to the NHSC, in which restoring self-governance and a land base are cited as two of the principles for reparations and restitution.

125 Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii and to Offer an Apology to Native Hawaiians on behalf of the United States for the Overthrow of the Kingdom of Hawaii, S.J. Res. 19, Pub. L. No. 103-150, 107 Stat. 1510 (1993) [hereinafter Apology Resolution].

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

127 Apology Resolution, *supra* note 125, at cls. 5, 29. The Apology Resolution states that U.S. military and diplomatic support was essential to the success of the 1893 overthrow of the Hawaiian monarchy and that this aid violated "treaties between the two nations and international law." *Id.* at cl. 8. Among the other findings in the Apology Resolution are the following:

> Whereas the Republic of Hawai'i also ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii, without the consent of or compensation to *the Native Hawaiian people* of Hawaii or their sovereign government. . . .
>
> Whereas *the indigenous Hawaiian people* never directly relinquished their claims to *their inherent sovereignty as a people* or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum. . . .

Id. at cls. 25, 29 (emphasis added). After documenting in detail the wrongs done to Kānaka Maoli at the time of the illegal overthrow—including "the deprivation of the rights of Native Hawaiians to self-determination"—the Apology Resolution urges the president of the United States to "support reconciliation efforts between the United States and the Native Hawaiian people." *Id.* at § 1(3), (5).

128 *Id.* at cl. 29 and § 1(3).

129 See Chapter 6, *infra,* for a discussion of these human rights principles.

130 Apology Resolution, *supra* note 125, at cl. 26.

131 *Id.* at cl. 29.

132 *Id.* § 1(1).

133 *Id.* § 1(4)–(5).

134 Hawaii v. Office of Hawaiian Affairs, 556 U.S. 163 (2009). For a detailed analysis of this case, see Chapter 2, *supra*.

135 *Id.* at 175 (quoting District of Columbia v. Heller, 554 U.S. 570, 577 (2008)).

136 *Id.* at 173.

137 Some of the material in this section is based on a 2007 article by Ashley Obrey. *See* Ashley Obrey,

Broken Promise? A Brief Update on the U.S. Role in Native Hawaiian Reconciliation Since the 1993 Apology, Ka Heʻe, the E-Newsletter of the Center for Excellence in Native Hawaiian Law, Issue 3, Aug. 2007, *available at* http://www2.hawaii.edu/~nhlawctr/article3-6.htm (last visited Feb. 8, 2014).

138 Mauka to Makai, *supra* note 101, at 13.

139 Mauka to Makai, *supra* note 101.

140 *Id.* at ii.

141 *Id.* at 4, 17 (Recommendation 1).

142 *Id.* at 4 (Recommendations 2–5).

143 Consolidated Appropriations Act of 2004, Pub. L No. 108-199, 118 Stat. 3, div. H, § 148(2)–(3) (2004).

144 *Id.*

145 See Chapter 2, *supra,* for a discussion of the public land trust and disputes over revenue due to OHA.

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

147 *Id.* at 510.

148 Rice v. Cayetano, 963 F. Supp. 1547, 1548 (D. Haw. 1997), *aff'd,* 146 F.3d 1075, 1078 (9th Cir. 1998), *rev'd,* 528 U.S. 495, 510 (2000).

149 *Id.*

150 *Rice,* 528 U.S. at 510.

151 U.S. Const. amend. XIV.

152 *Id.* at amend. XV.

153 *Id.* at amend. XIV, § 1.

154 *Id.* at amend. XV, § 1.

155 Rice v. Cayetano, 963 F. Supp. 1547 (D. Haw. 1997); *see also Rice,* 528 U.S. at 511.

156 *Rice,* 963 F. Supp. at 1551–54.

157 *Rice,* 528 U.S. at 511; *see* Morton v. Mancari, 417 U.S. 535, 554–55 (1974).

158 *Rice,* 528 U.S. at 511; *see also Rice,* 963 F. Supp. at 1554–55; Admission Act, *supra* note 54, § 5(f), 73 Stat. at 5–6.

159 Rice v. Cayetano, 146 F.3d 1075, 1079 (9th Cir. 1998).

160 *Rice,* 528 U.S. at 511, 524. The U.S. Supreme Court did not find it necessary to address the Fourteenth Amendment's Equal Protection Clause claims and indeed stated that it "assume[d] the validity of the underlying administrative structure and trusts, without intimating any opinion on that point." *Id.* at 521–22.

161 *Id.* at 498–524.

162 *Id.* at 501–04; *see also* Van Dyke, *supra* note 26, at 276.

163 *Rice,* 528 U.S. at 501–04.

164 *Id.* at 504.

165 *See id.* at 504–05 ("A so-called Committee of Safety, a group of professionals and businessmen,

with the active assistance of John Stevens, the United States Minister to Hawaii, acting with United States Armed Forces, replaced the monarchy with a provisional government.").

166 *See id.* at 505; Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, July 7, 1898, 30 Stat. 750.

167 *See Rice,* 528 U.S. at 507; HHCA, *supra* note 55.

168 *See Rice,* 528 U.S. at 507; Admission Act, *supra* note 54.

169 *See Rice,* 528 U.S. at 506.

170 *Id.*

171 *Id.*

172 *Id.* at 511–14.

173 *See id*. at 513 (citing Guinn v. United States, 238 U.S. 347, 357 (1915)).

174 *Id.* at 514.

175 *Id.* The state also argued (to no avail) that the restriction is nonracial in purpose, as it differentiates even among Polynesian people merely by looking to the date of an ancestor's residence in Hawaii. *See id.* The court responded by saying, "Simply because a class defined by ancestry does not include all members of the race does not suffice to make the classification race neutral." *Id.* at 516–17.

176 *Id.* at 514. Specifically, Justice Kennedy wrote:

> The ancestral inquiry mandated by the State implicates the same grave concerns as a classification specifying a particular race by name. 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.

Id. at 517.

177 *Id.*

178 *Id.*

179 *Id.* at 518 (citing Brendale v. Confederated Tribes & Bands of Yakima Nation, 492 U.S. 408, 425 (1989) (plurality opinion); Oliphant v. Suquamish Tribe, 435 U.S. 191, 208 (1978)). After ceding their lands to the United States, Native American tribes have maintained a quasi-sovereign status within the United States when it comes to self-governance. *See Rice,* 528 U.S. at 518.

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

181 *Id.* at 535–36.

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

183 *Id.*

184 *Id.* at 519 (citing Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 673 n.20 (1979) (discussing treaties securing preferential fishing rights); United States v. Antelope, 430 U.S. 641, 645–47 (1977) (establishing exclusive federal jurisdiction over crimes committed by Indians in Indian country); Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 84–85 (1977) (discussing the distribution of tribal property); Moe v. Confederated

Salish & Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 479–80 (1976) (establishing Indian immunity from state taxes); Fisher v. Dist. Court of Sixteenth Judicial Dist. of Mont., 424 U.S. 382, 390–91 (1976) (per curiam) (establishing exclusive tribal court jurisdiction over tribal adoptions)). Justice Kennedy observed, "[E]very piece of legislation dealing with Indian tribes and reservations . . . single[s] out for special treatment a constituency of tribal Indians." *Id.* (quoting *Mancari,* 417 U.S. at 552).

185 *Id.* at 520. According to Justice Kennedy, "It does not follow from *Mancari,* however, that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens." *Id.*

186 *Id.* at 519 (quoting *Mancari,* 417 U.S. at 553 n.24 (internal quotations omitted)).

187 *Id.* at 519–20 (quoting *Mancari,* 417 U.S. at 553–54).

188 *Id*. at 520.

189 *Id.* (quoting *Mancari,* 417 U.S. at 555).

190 *Id.* at 521–22.

191 *Id.* at 522.

192 *Id.*

193 *Id.* at 523.

194 *Id.*

195 *Id.*

196 *Id.*

197 *Id.* at 524.

198 *Id.* at 524–26.

199 *Id.* at 525.

200 *Id.*

201 *Id.* at 525–26.

202 *Id.* at 526.

203 *Id.*

204 *Id.* (quoting 42 U.S.C. § 1602(b)).

205 *Id.*

206 *Id.* at 527.

207 *Id.*

208 *Id.* at 527–28.

209 *Id.* at 529.

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

211 *Rice,* 528 U.S. at 531–32 (quoting *Mancari,* 417 U.S. at 554–55).

212 *Id.* at 533.

213 *Id.* at 534–35.

214 *Id.*

215 *Id.* at 535.

216 *Id.*

217 *Id.*

218 *Id.*

219 *Id.* at 538.

220 *Id.* at 536–37.

221 *Id.* at 538 (quoting Morton v. Mancari, 417 U.S. 535, 554 (1974)).

222 *Id.*

223 *Id.* at 540.

224 *Id.* at 540–41.

225 *Id.* at 546.

226 *Id.* at 548 (citation omitted).

227 *Id.*

228 *Id.* (citing Morton v. Mancari, 417 U.S. 535, 555 (1974)).

229 Arakaki v. State, 314 F.3d 1091, 1092 (9th Cir. 2002).

230 Arakaki v. State, 314 F.3d 1091 (9th Cir. 2002).

231 *Id.* at 1092.

232 *Id.*

233 *Id.* at 1094.

234 *Id.*

235 *Id.* (quoting Powell v. McCormack, 395 U.S. 486, 547 (1969)) (quotation omitted).

236 *Id.* at 1094–95.

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

238 *Arakaki,* 314 F.3d at 1095 (quoting Rice v. Cayetano, 528 U.S. 495, 515–17, 521–23 (2000)).

239 *Id.*

240 *Id.*

241 *Id.* (citing Hadnott v. Amos, 394 U.S. 358, 363–64 (1969)).

242 *Id.*

243 Voting Rights Act, 42 U.S.C. § 1973(a), *quoted in Arakaki,* 314 F.3d at 1095–96.

244 *Arakaki,* 314 F.3d at 1096 (citing Dougherty Cnty. Bd. of Educ. v. White, 439 U.S. 32, 43 (1978); Allen v. State Bd. of Elections, 393 U.S. 544, 570 (1969); *Hadnott,* 394 U.S. at 366).

245 *Id.*

246 *Id.* (quoting Voting Rights Act, 42 U.S.C. § 1973(b)).

247 *Id.* at 1097; *see* Haw. Const. art. XII, § 5 ("The board members shall be Hawaiians."). At the time, section 13D-2 of the Hawai'i Revised Statutes (HRS) stated, "No person shall be eligible for election or appointment to the board unless the person is Hawaiian[.]"

248 *Arakaki,* 314 F.3d at 1097.

249 *Id.* at 1097–98.

250 *Id.*

251 *Id.* at 1098.

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

253 As defined in section 10-2 of the HRS, "Native Hawaiians" are "those who are descendants of the races inhabiting the Hawaiian Islands prior to 1778 with at least 50% Hawaiian blood quantum." *Id.* at 938 n.1.

254 As defined in section 10-2 of the HRS, "Hawaiians" are "those who are descendants of the races inhabiting the Hawaiian Islands prior to 1778 without reference to blood quantum." *Id.* at 938 n.2.

255 *Id.* at 938.

256 *Id.*

257 *Id.*

258 *Id.*

259 *Id.* at 939.

260 *Id.* at 941.

261 *Id.* at 943.

262 *Id.* at 941.

263 *Id.*

264 *Id.*

265 *Id*.

266 *Id.* (citing Northeastern Florida Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993)).

267 *Id.* at 942 (quoting *Northeastern Florida,* 508 U.S. at 666).

268 *Id.*

269 *Id.* at 943.

270 *Id.*

271 *Id.* at 945.

272 *Id.* at 943.

273 *Id.*

274 *Id.*

275 *Id.* at 944.

276 *Id.* at 943.

277 *Id.* See Chapter 4, *supra*, discussing the trust lands set aside in the HCCA.

278 *Id*. at 943–44.

279 *Id.* at 944.

280 *Id.*

281 *Id.* at 948.

282 *Id.* at 945–46.

283 *Id.* at 948.

* * *

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

301 *Id.* at 1053.

302 *Id.*

303 *Id.* at 1055.

* * *

360 Corboy v. Louie, 128 Hawai'i 89, 283 P.3d 695 (2011), *cert. denied,* 133 S.Ct. 58 (2012). See Chapter 4, *supra,* on the HHCA for additional analysis of this case.

361 *Corboy,* 128 Hawai'i at 90, 283 P.3d at 696.

362 *Id.*

363 *Id.*

364 *Id.* at 95, 283 P.3d at 701.

365 *Id.* at 100, 283 P.3d at 706.

366 *Id.* at 100–01, 283 P.3d at 706–07.

367 *Id.* at 103, 283 P.3d at 709.

368 *Id.* at 91–93, 283 P.3d at 697–99.

369 *Id.* at 103, 283 P.3d at 709 (footnotes omitted). The Hawai'i Supreme Court noted that although the Fifth Amendment did not contain an Equal Protection Clause, "[t]he guarantee of equal protection applies to the federal government through the due process clause of the Fifth Amendment." *Id.* at 103 n.27, 283 P.3d at 709 n.27 (citation omitted). The court also noted that because no federal defendants had been named in the case and equal protection analyses under the Fifth and Fourteenth Amendments were the same, the Fifth Amendment would not be discussed further in the opinion. *Id.*

370 *Id.* at 103, 283 P.3d at 709.

371 *Id.* at 103 n.29, 283 P.3d at 709 n.29. Section 207 of the HHCA allows for leases to be made to native Hawaiians, defined in section 201 of the HHCA as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian islands previous to 1778." HHCA, *supra* note 55, §§ 201(a) (definition of native Hawaiian), 207(a) (lease requirements and size limitations), 208(1) (conditions of lease).

372 *Corboy,* 128 Hawai'i at 103, 283 P.3d at 709.

373 *Id.* at 103–4, 283 P.2d at 709–10 (citing Sierra Club v. Dep't of Transp., 115 Hawai'i 299, 319, 167 P.3d 292, 312 (2007)).

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

375 *Id.* at 942–43.

376 *Corboy,* 128 Hawai'i at 105–06, 283 P.3d at 711–12.

377 *Id.*

378 *Id.* at 106, 283 P.3d at 712 (citing Mottl v. Miyahira, 95 Hawai'i 381, 395, 23 P.3d 716, 730 (2001)) (quotation marks omitted).

379 Arakaki v. Lingle, 477 F.3d 1048, 1052 (9th Cir. 2007).

380 *Corboy,* 128 Hawai'i at 112–13, 283 P.3d at 718–19.

381 *See* Corboy v. Louie, 133 S.Ct. 58 (2012) (mem.).

382 Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate, 470 F.3d 827 (9th Cir. 2006) (en banc).

383 The statute provides, in part:

> All persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens[.]

42 U.S.C. § 1981(a) (2013).

384 Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate, 295 F. Supp. 2d 1141, 1157 (D. Haw. 2003).

385 *Id.*

386 *Id.*

387 *Id.* at 1158.

388 *Id.*

389 *Id.*

390 *See id.* at 1141.

391 Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate, 416 F.3d 1025 (9th Cir. 2005).

392 Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate, 441 F.3d 1029 (9th Cir. 2006).

393 Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate, 470 F.3d 827, 829 (9th Cir. 2006) (en banc).

394 *Id.* at 830–34.

395 *Id.* at 837 (citing Texas Dep't of Comty. Affairs v. Burdine, 450 U.S. 248, 252–53 (1981), & McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), as applied in Patterson v. McLean Credit Union, 491 U.S. 164, 186 (1989)).

396 *Id.* at 838 (citing *Patterson,* 491 U.S. at 187).

397 *Id.* (citing Johnson v. Transp. Agency, 480 U.S. 616, 626 (1987)).

398 *Id.* at 842.

399 *Id.* at 846 (noting that Kamehameha Schools' admissions policy satisfies the three criteria established in *Johnson,* 480 U.S. at 626).

400 *Id.* at 847.

401 *Id.* at 848.

402 *Id.* at 849.

403 *Id.*

404 *Id.*

405 *Id.* at 849. Judge Fletcher was joined by Judges Pregerson, Reinhardt, Paez, and Rawlinson. *Id.*

406 *Id.* at 850.

407 *Id.* at 856–57.

408 Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate, *cert. dismissed,* 550 U.S. 931 (2007) (No. 06-1202).

409 *Id.*

* * *

614 Prof. Rebecca Tsosie, Arizona State University, unpublished Native Hawaiian Bar Association conference report (Dec. 19, 2006) (on file with editor).