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Colonizing History: *Rice v. Cayetano* and the Fight for Native Hawaiian Self-Determination

ABSTRACT. *Rice v. Cayetano* involved a challenge to the voting qualifications for Hawai'i's Office of Hawaiian Affairs (OHA). Created during the 1978 Hawaiian Constitutional Convention, OHA manages lands held in trust for Native Hawaiians. To ensure OHA was representative of its constituents, voting for OHA trustees was initially restricted to Hawaiians—persons who had one ancestor in Hawai'i in 1778. In *Rice*, the Supreme Court held that OHA's voting restriction impermissibly used ancestry as a proxy for race in violation of the Fifteenth Amendment.

This Comment sets out the history of OHA, which the Supreme Court crucially omitted in *Rice*. Using contemporary newspaper accounts and archival documents, I show that the creation of OHA was the direct result of the Hawaiian land and sovereignty movements of the 1970s. The idea to create OHA emerged from grassroots sessions in which Hawaiians came together to consider a path to self-governance. From the beginning, Hawaiians did not understand OHA as simply a state agency but rather as an initial step toward Native Hawaiian self-determination.

Recognizing the origins of OHA calls into question the Court's decision to frame *Rice* as a case of racial discrimination and to evade the more complex question whether Native Hawaiians constitute a political community entitled to electoral self-governance. On the twentieth anniversary of *Rice*, the time is ripe to reconsider the historical account that underpinned the Supreme Court's opinion.

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INTRODUCTION

> "Historians, I realized, were very like missionaries. They were a part of the colonizing horde. One group colonized the spirit; the other, the mind."[1]

In 2014, a grant from the State of Hawai'i's Office of Hawaiian Affairs enabled the foundation of Na'i Aupuni, a nonprofit seeking to hold a Native Hawaiian constitutional convention.[2] Those elected as delegates to the convention would be tasked with determining a path forward for Native Hawaiian self-determination, and their proposed constitution would then be put to the voters.[3] Na'i Aupuni had sought to limit voting to persons of Hawaiian ancestry.[4] Despite the fact that Na'i Aupuni is a private organization, the election was challenged as

1. HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI'I 114 (Univ. of Haw. Press rev. ed. 1999) (1993). It is appropriate that this Comment is published in the *Yale Law Journal*, given the longstanding historic connections between Yale College, the *Yale Law Journal*, and Hawai'i. Yale College President and Christian missionary Timothy Dwight played a key role in the colonization of Hawai'i. *See* Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95, 98 n.22 (1998). Moreover, in 1894, the *Yale Law Journal* regrettably published a racist commentary in which A.F. Judd, a missionary's son and Chief Justice for the Republic of Hawai'i, wrote that certain constitutional measures were appropriate only for a "civilized and enlightened constituency" and unsuitable for Hawai'i's "polyglot communities." A.F. Judd, *Constitution of the Republic of Hawaii*, 4 YALE L.J. 53, 57 (1894); *see also* Van Dyke, *supra,* at 98 n.22. Additionally, one of the main academic sources cited in *Rice* was an article published in the *Yale Law Journal*. *See Rice v. Cayetano*, 528 U.S. 495, 518 (2000) (citing Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537, 540 (1996) (arguing that "there is no 'special relationship' between Native Hawaiians and the federal government pursuant to which programs singling out Native Hawaiians would be subject to rational basis review" rather than the often-fatal strict scrutiny)). This Comment aims to start a more accurate and inclusive conversation about Native Hawaiian people and their right to self-determination.

2. Brittany Lyte, *Na'i Aupuni Defends Election*, GARDEN ISLAND (Nov. 14, 2015), https://www.thegardenisland.com/2015/11/14/hawaii-news/nai-aupuni-defends-election [https://perma.cc/YRY6-QPF6]; *About Na'i Aupuni*, NA'I AUPUNI, http://www.naiaupuni.org/about.html [https://perma.cc/4X87-XXQM].

3. Lyte, *supra* note 2.

4. Lorelei Laird, *Native Hawaiians Wage an Ongoing Battle to Organize Into a Sovereign Nation*, ABA J. (Nov. 1, 2017), https://www.abajournal.com/magazine/article/native_hawaiians_wage_an_ongoing_battle_to_organize_into_a_sovereign_nation [https://perma.cc/878T-WCTS]. Voters had to be registered with the Native Hawaiian Roll Commission to be eligible. *See Over 80% of Voters Excluded: Tribal Notice of Election to be Mailed Monday*, HAWAI'I FREE PRESS (July 31, 2015), www.hawaiifreepress.com/ArticlesMain/tabid/56/ID/15656/Over-80-of-Hawaiians-Excluded—Tribal-Notice-of-Election-to-be-Mailed-Monday.aspx [https://perma.cc/JG59-37CA].

racially restrictive in violation of the Fifteenth Amendment.[5] Na'i Aupuni attempted to hold an election for delegates in November 2015 but was stopped after the Supreme Court issued an order permanently enjoining the counting of ballots or the announcement of election winners.[6]

Na'i Aupuni's efforts had been rendered constitutionally problematic almost twenty years prior in the Supreme Court case *Rice v. Cayetano*.[7] *Rice* addressed whether voting for Hawai'i's Office of Hawaiian Affairs (OHA) could be restricted to indigenous Hawaiians. Created in the 1978 Hawaiian Constitutional Convention, OHA manages lands held in trust for indigenous Hawaiians (Kānaka Maoli), among other duties.[8] To ensure OHA was representative of the people whose trust it was charged to protect, voting for OHA trustees was initially restricted to Hawaiians—persons who had at least one ancestor in Hawai'i in 1778.[9] *Rice* posed the question of whether restricting voting for OHA trustees

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5. *See* Keli'i Akina v. Hawai'i, 141 F. Supp. 3d 1106, 1122 (D. Haw. 2015).

6. *See* Keli'i Akina v. Hawai'i, 136 S. Ct. 581, 581 (2015) (mem.); Noe Tanigawa, *Rough Waters for Na'i Aupuni Elections*, HAW. PUB. RADIO (Nov. 25, 2015), https://www.hawaiipublicradio.org/post/rough-waters-na-i-aupuni-elections [https://perma.cc/43RN-QTB5]. Na'i Aupuni ultimately proceeded with the convention, allowing all those who had run as delegates to participate. *See* Press Release, Na'i Aupuni, Na'i Aupuni Terminates Election Process (Dec. 15, 2015), www.naiaupuni.org/docs/NewsRelease-NaiAupuniTerminatesElectionProcess-121515.pdf [https://perma.cc/JP4J-69QC].

7. 528 U.S. 495 (2000).

8. *See* HAW. CONST. art. XII, § 5; *see also Legal Basis*, OHA, https://www.oha.org/about/abouthistory/aboutabouthistoryconstitution [https://perma.cc/ELV7-U8FL]. Additionally, a note on the terminology used here when referring to indigenous Hawaiians is necessary. The terms "Hawaiian" and "Native Hawaiian" have specific legal definitions. Under the Hawaiian Homes Commission Act (which is codified in the Hawaiian State Constitution), a "Hawaiian" is a person who had one ancestor living in Hawai'i in 1778, while a "Native Hawaiian" is "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." Hawaiian Homes Commission Act of 1921, ch. 42, § 201, 42 Stat. 108, 108. Throughout this Comment, I use the terms "Hawaiian" and "Native Hawaiian" in accordance with their legal definitions. For the sake of clarity, I refer to indigenous Hawaiians using the Hawaiian term "Kānaka Maoli." As used in the Comment, the term Kānaka Maoli encompasses all persons who are of indigenous Hawaiian ancestry, regardless of blood quantum, excluding only those residents of Hawai'i who do not have indigenous Hawaiian ancestors. *See* Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA L. REV. 1747, 1767 (2000); Judy Rohrer, *"Got Race?" The Production of Haole and the Distortion of Indigeneity in the* Rice *Decision*, 18 CONTEMP. PAC. 1, 1 (2006); Jon M. Van Dyke & Melody K. MacKenzie, *An Introduction to the Rights of the Native Hawaiian People*, HAW. BAR J., July 2006, at 63.

9. ANNE FEDER LEE, THE HAWAI'I STATE CONSTITUTION: A REFERENCE GUIDE 177-78 (1993). The year 1778 is meaningful because it is when Captain James Cook arrived in Hawai'i. JUDY ROHRER, HAOLES IN HAWAI'I 3 (2010).

to Hawaiians violated the Fifteenth Amendment's bar on race-based voting qualifications. The Supreme Court held that the voting restrictions impermissibly used ancestry as a proxy for race, particularly since the stated purpose of OHA was to "treat the early Hawaiians as a distinct people."[10] The Court declined to hold that Kānaka Maoli were entitled to similar treatment as federally recognized tribes, which would have given OHA the status of "a separate quasi sovereign."[11] Instead, it considered OHA a state agency and therefore deemed racial restrictions on voting for OHA trustees impermissible.[12] Moreover, it held that even if Kānaka Maoli were entitled to separate quasi-sovereign status, the Fifteenth Amendment would prevent Congress from "authoriz[ing] 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."[13]

Justice Kennedy's majority opinion in *Rice* is vulnerable to critique on multiple fronts. Many scholars have criticized its equal-protection analysis.[14] Others have argued that the Court's holding that Hawaiian ancestry was being used as a proxy for race erroneously imposes American understandings of race onto an importantly different culture: "genealogy carries a very specific historical and cultural weight in the Hawaiian context" and does not "inherently carry [the] racial, genetic, or blooded meanings" it might on the mainland.[15] Critics have also condemned the *Rice* opinion for "rel[ying] heavily on key colonialist tropes" to frame the Court's account of Hawaiian history.[16]

Although the critiques are numerous, they remain incomplete. One crucial flaw in the opinion is its neglect of the history of OHA, which even historically focused critics have thus far overlooked.[17] This oversight is surprising given how

10. *Rice*, 528 U.S. at 514-15.

11. *Id.* at 522.

12. *Id.*

13. *Id.* at 520.

14. *See, e.g.*, Cheryl I. Harris, *Equal Treatment and the Reproduction of Inequality*, 69 FORDHAM L. REV. 1753, 1777 (2001); Chris K. Iijima, *Race over* Rice*: Binary Analytical Boxes and a Twenty-First Century Endorsement of Nineteenth Century Imperialism in* Rice v. Cayetano, 53 RUTGERS L. REV. 91, 91-92 (2000); Ellen D. Katz, *Race and the Right to Vote After* Rice v. Cayetano, 99 MICH. L. REV. 491, 496-98 (2000).

15. J. KĒHAULANI KAUANUI, HAWAIIAN BLOOD: COLONIALISM AND THE POLITICS OF SOVEREIGNTY AND INDIGENEITY 38 (2008).

16. AMY L. BRANDZEL, AGAINST CITIZENSHIP 109 (2016).

17. Most commentators merely observe that OHA was established as part of the 1978 Constitutional Convention. *See, e.g.*, Iijima, *supra* note 14, at 98-108; Katz, *supra* note 14, at 496-98. Some scholars have explicitly noted the link between the Hawaiian land and sovereignty movements and the creation of OHA, but only in passing. *See, e.g.*, Joanne Barker, *Recognition*, 46 AM. STUD. 133, 145 (2005); Harris, *supra* note 14, at 1776; Hom & Yamamoto, *supra* note 8,

heavily the majority's holding relies on OHA's status as a state agency. This Comment exposes this crucial flaw in the opinion by tracing the history of OHA. Using contemporary newspaper accounts and archival documents, I show that the creation of OHA during the 1978 Constitutional Convention was the direct result of the Hawaiian land and sovereignty movements of the 1970s. The idea to create OHA emerged from grassroots sessions in which Kānaka Maoli came together to consider a path to self-governance. From the beginning, OHA was understood to be not simply a state agency but rather an initial step towards Kānaka Maoli self-determination.

Recognizing the origins of OHA as an outgrowth of the Hawaiian land and sovereignty movements has two main implications for our understanding of *Rice*. First, it calls into question the Court's decision to frame *Rice* as a case of racial discrimination and to evade the more complex question of whether Kānaka Maoli constitute a political community entitled to electoral self-governance. Second, by striking down the voting restrictions for OHA trustees, the Court proved unwilling to recognize indigenous self-governance as possible outside of the traditional tribal-government format. *Rice* presented Kānaka Maoli — and similarly situated indigenous groups like the Chamorros and Carolinians in Guam and the Commonwealth of the Northern Mariana Islands — with a binary choice: either forgo government aid and pursue independence or become a federally recognized tribe. In doing so, the Court failed to consider that indigenous groups outside the U.S. mainland, which have distinct experiences from those of American Indians, might be entitled to a "third classification."[18]

Part I of this Comment evaluates *Rice* from a doctrinal standpoint, explaining how OHA's status as a state agency is key to the Court's holding. Part II critiques the majority's historical account and argues that OHA should not have been treated as an ordinary state agency. It discusses Kānaka Maoli resistance to U.S. colonization efforts leading up to the 1978 Hawai'i Constitutional Convention and describes the work of the Convention, with a particular focus on the creation of OHA. Part III describes OHA's work towards Kānaka Maoli self-determination in the two decades leading up to the *Rice* case, and argues that this work further highlights OHA's unique status.

As the twentieth anniversary of *Rice* approaches, the impact of the decision has become clear. The case has not only led to widespread challenges to Native

at 1773; R. Hokulei Lindsey, *Akaka Bill: Native Hawaiians, Legal Realities, and Politics as Usual*, 24 U. HAW. L. REV. 693, 703-04 (2002).

18. Christine Donnelly, *In Wake of* Rice vs. Cayetano, *What Happens Now?*, HONOLULU STAR-BULL. (Mar. 20, 2000), http://archives.starbulletin.com/2000/03/20/special/transcript.html [https://perma.cc/REH6-TSMY] (quoting statement by Robin Danner, Hawaiian self-determination activist).

Hawaiian programs administered by the State of Hawai'i but also frustrated recent attempts to hold political-status plebiscites in both Hawai'i (2015) and Guam (2019).[19] Thus, Part IV considers the impact *Rice* has had on the territories.

I. THE DOCTRINAL BASIS FOR THE *RICE* DECISION

The Court's decision in *Rice* involved three lines of reasoning. First, the Court rejected Hawai'i's arguments that the voting restriction was based on beneficiary status — not race — and thus should be treated as creating a special-purpose electoral district.[20] The Court highlighted the fact that, although most of OHA's funding was meant to be used for the benefit of "native Hawaiians," the broader category of "Hawaiians" was originally eligible to vote for OHA trustees.[21] In the Court's view, the use of this broader category to define OHA's electorate suggested that beneficiary status was a kind of post hoc rationalization for restricting voting along racial lines.

This conclusion is somewhat perplexing. At the time *Rice* reached the Supreme Court, OHA administered two separate trusts: one for the benefit of Native Hawaiians and the other for the benefit of Hawaiians.[22] Even if the first trust was larger, meaning the bulk of OHA funds were designated for the benefit of Native Hawaiians, it seems difficult to justify excluding Hawaiians from control over the second fund. In other words, because OHA administers funds for both Native Hawaiians and Hawaiians, allowing all beneficiaries to vote for OHA trustees did indeed require allowing the broader class of Hawaiians to vote — but not allowing all residents of Hawai'i to vote.

Second, the Court concluded that the State's definition of "Hawaiian" was a racial classification, with ancestry being used as a "proxy" for race in order to "treat the early Hawaiians as a distinct people."[23] To support this conclusion, the

19. *See infra* notes 168-170, 172-189 and accompanying text.

20. Rice v. Cayetano, 528 U.S. 495, 522-24 (2000). The Court noted that the "special purpose district" exception it recognized in *Salyer* emerged in the context of the Fourteenth Amendment's one-person, one-vote requirement, and was not controlling in the Fifteenth Amendment context. *Id.* at 522.

21. *Id*. at 523.

22. Brief for Respondent at 10, Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818).

23. *Rice*, 528 U.S. at 514-15.

Court focused on a prior statutory provision defining "Hawaiian" as "any descendant of the *races* inhabiting the Hawaiian Islands, previous to 1778."[24] While later definitions used the word "peoples," the Court relied on committee reports to show that this term was actually a synonym for the term "races."[25] The Court went on to state that "[a]n 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."[26]

This line of reasoning failed to acknowledge that tribal membership is typically defined in ancestral terms.[27] Congress—which, as discussed more below, has repeatedly included Native Hawaiians in programs designed to benefit federally recognized tribes—similarly chose to define "Native Hawaiians" as persons descended of the Islands' inhabitants prior to 1778.[28] Congress's definition, like Hawai'i's, is patently an ancestral classification. Under the Court's logic, it would appear that the federal definition of "Native Hawaiian" must also constitute an impermissible proxy for race. After all, Hawai'i patterned its definition of "Native Hawaiian" on the federal definition. The only difference between the definitions is the fact that the federal definition never included the words "races" or "peoples," which seems too thin to support a distinction.[29]

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24. *Id*. at 515-16 (quoting CHIEF CLERK OF THE CONVENTION, PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAW., COMM. OF THE WHOLE REP. NO. 13, at 1018 (1980) (emphasis added)).

25. *Id*.

26. *Id*. at 517.

27. Eric Henderson, *Ancestry and Casino Dollars in the Formation of Tribal Identity*, 4 WASH. & LEE J. CIV. RTS. & SOC. JUST. 7, 9 (1998) ("Tribal membership criteria usually includes some showing of tribal ancestry and nearly all tribes specify some 'quantity' of tribal or Indian heritage, usually designated as a threshold blood quantum.").

28. *See, e.g.*, National Park Service and Related Programs Act of 2014, Pub. L. No. 113-287, § 300313, 128 Stat. 3094, 3190 ("'Native Hawaiian' means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in . . . Hawai'i."); 20 U.S.C. § 80q-14(11) (2018) (using similar terms); 20 U.S.C. § 4402(6) (2018) (also using similar terms); 20 U.S.C. § 7118(b) (2018) (same); 20 U.S.C. § 7912(1) (2018) (same); 25 U.S.C. § 3001(10) (2018) (same); 42 U.S.C. § 254s(c) (2018) (same); 42 U.S.C. § 2992c(4) (2018) (same); 42 U.S.C. § 3057k (2018) (same); Act of Nov. 23, 1993, Pub. L. No. 103-150, § 2, 107 Stat. 1510, 1513 (same); *see also* Brief for Respondent, *supra* note 22 (noting that the Court has long recognized that legislation focusing on indigenous peoples is not race-based).

29. As discussed later on, *Rice* found the *Mancari* exception inapplicable because Hawaiians are not a federally recognized tribe. *Rice*, 528 U.S. at 518-20. Under this view, Congress should not be able to enact any racial classifications granting specific privileges to Hawaiians, since the class is defined by its ancestry. Thus, *Rice* calls into question the constitutionality of all congressional programs designed to benefit Hawaiians. *See* Kimberly A. Costello, Note, Rice v. Cayetano*: Trouble in Paradise for Native Hawaiians Claiming Special Relationship Status*, 79

Crucially, the Court rejected Hawai'i's argument that the ancestral classification was political rather than racial. Hawai'i relied heavily on *Morton v. Mancari*, a case in which the Court rejected a constitutional challenge to the Federal Bureau of Indian Affairs's (BIA) employment preference in favor of Indian applicants.[30] The Court upheld the preference because it was "reasonably and directly related to a legitimate, nonracially based goal"[31]—that of enabling Indian self-governance. This is a permissible goal because the federal government has a trust relationship with federal tribes.[32]

The *Mancari* Court reasoned that the BIA's preference for Indian applicants was not racial because it was designed "to make the BIA more responsive to the needs of its constituent groups . . . [and was] directed to participation by the governed in the governing agency."[33] The Court placed great emphasis on the relationship between the BIA and Indian tribes, writing,

> The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities *whose lives and activities are governed by the BIA in a unique fashion*. In the sense that there is no other group of people favored in this manner, the legal status of the BIA is truly *sui generis*.[34]

In *Rice*, both the district court and the Ninth Circuit followed the reasoning of *Mancari*.[35] As the district court observed, *Mancari* "is premised upon the existence of a guardian-ward relationship, and the requirement that the indigenous people be part of a recognized tribe is important as evidence of this continuing

N.C. L. Rev. 812, 828 (2001) ("Presumably, the ancestry requirement constitutes a racial classification under all circumstances; to interpret [it] as legal or political in another context would be inconsistent.").

30. 417 U.S. 535 (1974).

31. *Id*. at 554.

32. Tribal recognition is meaningful precisely because it is an acknowledgement of the existence of this guardian-ward relationship between the federal government and a tribal government. *See* Mark D. Myers, *Federal Recognition of Indian Tribes in the United States*, 12 STAN. L. & POL'Y REV. 271, 272 (2000).

33. 417 U.S. at 554.

34. *Id*. (emphasis added).

35. *See* Rice v. Cayetano, 146 F.3d 1075 (9th Cir. 1998); Rice v. Cayetano, 963 F. Supp. 1547, 1554 (D. Haw. 1997).

relationship."[36] Federal recognition formally establishes a "government-to-government relationship[]" between the relevant tribe and the United States[37] and acknowledges the tribe as a "domestic dependent nation[]" that may "exercise limited self-determination."[38] However, as the district court observed, *Mancari* does not require that there be formal recognition of this guardian-ward relationship.[39] Thus, the district court concluded that the absence of a formally recognized guardian-ward relationship need not be controlling where, as in the case of Native Hawaiians, there is other evidence establishing the existence of a trust relationship.[40]

The Supreme Court in *Rice* distinguished *Mancari* on the ground that "Hawaiians" are not a federally recognized tribe. But this distinction does not hold water. Although the Kānaka Maoli are not a federally recognized tribe, Congress has repeatedly granted indigenous Hawaiians similar benefits as those given to American Indians and Alaska Natives.[41] In addition, Congress has explicitly recognized that Kānaka Maoli constitute "a distinct and unique indigenous people" who have a "trust" relationship with the United States.[42] The Court gave little explanation for why, given Congress's plenary power over Indian affairs, it should be limited to granting benefits only to recognized tribes — especially given the long congressional practice to the contrary.[43] This practice reflects the reality

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36. 963 F. Supp. at 1554.

37. Rachael Paschal, *The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgement Process*, 66 WASH. L. REV. 209, 209 (1991).

38. J. Kēhaulani Kauanui, *Precarious Positions: Native Hawaiians and US Federal Recognition*, 17 CONTEMP. PAC. 1, 2 (2005).

39. 963 F. Supp. at 1554.

40. *Id.*

41. Brief for Respondent, *supra* note 22, at 31 (citing 20 U.S.C. § 7902(13)); *see also* National Park Service and Related Programs Act of 2014, Pub. L. No. 113-287, § 101924, 128 Stat. 3094, 3150 (seeking to promote the sale of Indian, Alaska Native, and Native Hawaiian handicrafts); 20 U.S.C. § 80q-9a (2018) (establishing a program to repatriate Native American and Native Hawaiian sacred objects and cultural patrimony); 20 U.S.C. § 4441 (2018) (authorizing a program for Native Hawaiian and Alaska Native culture and arts development); 20 U.S.C. §§ 7401-7602 (2018) (establishing programs to support Indian, Native Hawaiian, and Alaska Native education).

42. Brief for Respondent, *supra* note 22, at 8.

43. *Id.* at 31-32 ("Congress has historically exercised its Indian affairs power over indigenous people not organized into tribes in an anthropological sense, not recognized as tribes under then-prevailing definitions, or whose tribal status had been terminated . . . ." (citing Alaska Natives and Pueblo Indians as examples)).

that many extant eligible tribes never undergo the burdensome federal-recognition process and remain unrecognized.[44] In short, the Court failed to explain why the applicability of *Mancari* should turn on formal tribal designations rather than, as the district court held, congressional recognition of a special relationship to a given indigenous group.[45]

In distinguishing *Mancari*, the Court placed great weight on the argument that OHA is a state agency, whereas the BIA is a federal agency.[46] The Court deemed this distinction meaningful because federal recognition amounts to an acknowledgement that there is a trust relationship between the relevant tribe and the United States government.[47] According to the Court, *Mancari* allowed a federal agency like the BIA to administer the government's trust relationship with Indian tribes, which may at times require granting special benefits. But the Court rejected the notion that Congress could allow state agencies to play such a role.[48]

Had *Rice* involved any other state besides Hawai'i, the Court's conclusion on this point would have been correct. However, as a condition of its admission to statehood, the State of Hawai'i assumed the federal trust obligation to manage the ceded lands on behalf of Kānaka Maoli.[49] It is the only state to have been given this responsibility.[50] Therefore, OHA stands in a relationship to Hawaiians that is strikingly similar to that of the BIA: both agencies are tasked with administering a trust on behalf of a defined class of beneficiaries.[51] Given this context, the Court plainly erred in distinguishing *Mancari*.

Third and finally, the Court rejected the idea that a state could constitutionally limit the electorate for public officials to a class of tribal Indians. Limiting

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44. *See* Myers, *supra* note 32, 271, 280-83; Paschal, *supra* note 37, at 209-10.

45. Brief for Respondent, *supra* note 22, at 34 n.13.

46. Rice v. Cayetano, 528 U.S. 495, 519 (2000) ("Even were we to . . . find[] authority in Congress . . . to treat Hawaiians or native Hawaiians as tribes, Congress may not authorize a State to create a voting scheme of this sort.").

47. Paschal, *supra* note 37, at 209.

48. As Justice Stevens's dissent noted, this holding is somewhat at odds with the Court's decision in *Washington v. Confederated Bands & Tribes of the Yakima Nation*, 439 U.S. 463 (1979) (upholding a state law assuming jurisdiction over Indian tribes within a state because it was consistent with federal aims). *See Rice*, 528 U.S. at 537 (Stevens, J., dissenting).

49. LEE, *supra* note 9, at 171. However, the federal government retains the power to enforce the trust by suing the State of Hawai'i for breach of trust. Hawaii Admission Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 4, 6 (1959).

50. The State theorized in its brief that this unique concession may be because "[t]he pulls of federalism are particularly strong in the case of the most isolated land mass in the world, some 5000 miles from our national Capital." Brief for Respondent, *supra* note 22, at 9.

51. *See, e.g.*, Barker, *supra* note 17, at 146 (noting that OHA was established to administer the trust relationship between the federal government and Kānaka Maoli).

the electorate is permissible for tribal elections, the Court reasoned, only because tribes are "quasi-sovereign" entities that are not part of the state itself.[52] In doing so, the Court set up a dichotomy, differentiating between the governments of formally recognized tribes, on the one hand, and agencies that constitute part of state government, on the other hand.

The trouble is that OHA did not neatly fit into either of these buckets. OHA was clearly not a formally designated tribal government, but it did have certain unique features that made it functionally independent from the state in ways that set it apart from other state agencies. OHA was established as a corporate body, a "separate entity independent of the executive branch" that could acquire property, enter into contracts,[53] and sue and be sued by the state.[54] Additionally, OHA received its funding from the public-trust land revenues to insulate the agency from state officials' financial pressure.[55] Allowing Hawaiians to vote for OHA trustees—rather than, say, having trustees be appointed by the governor—was also meant to ensure that the agency would be accountable only to its constituents.[56]

Rather than recognize the ways in which current doctrinal categories did not accurately describe OHA, the *Rice* Court summarily concluded that OHA was a state agency because it was formally labeled as such. This conclusion was possible only because the Court overlooked the rich history of OHA's creation. From the beginning, OHA was not simply a state agency but rather an initial step towards Kānaka Maoli self-determination. In fact, as discussed more below, the idea of creating OHA emerged from unprecedented grassroots sessions in which Kānaka Maoli came together to consider a path to self-governance. OHA was meant to be the first step along this path. The next Part turns to OHA's history to fill the blind spots in the Court's portrayal of OHA as an ordinary state agency.

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52. *Rice*, 528 U.S. at 520. Tribes are subject to plenary federal authority, but they retain some aspects of sovereignty. For instance, tribes can punish tribe members who commit a crime, *see* United States v. Wheeler, 435 U.S. 313 (1978), though they cannot try nonmembers in tribal courts, *see* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

53. Melody Kapilialoha MacKenzie, *Native Hawaiians and U.S. Law*, *in* NATIVE HAWAIIAN LAW: A TREATISE 267, 275 (Melody Kapilialoha MacKenzie et al. eds., 2015) (citation omitted).

54. Brief for Respondent, *supra* note 22, at 10.

55. LEE, *supra* note 9, at 171.

56. Brief for Respondent, *supra* note 22, at 24-25.

II. RETELLING THE HISTORY: OHA AS AN EXPRESSION OF HAWAIIAN RESISTANCE TO U.S. COLONIALISM IN HAWAIʻI

Justice Kennedy's majority opinion in *Rice* provides an account of Hawaiian history that reduces American intervention in Hawai'i to the actions of specific individuals, minimizing the role of the U.S. government.[57] Additionally, the opinion repeatedly omits key facts and misleadingly suggests that Hawaiians either consented to or did not resist annexation as a U.S. Territory.[58]

Most relevant here are the errors and omissions in Justice Kennedy's account of postannexation Hawaiian history. Justice Kennedy claims that, after annexation and out of "concern[] [for] the condition of the native Hawaiian people," Congress passed the 1921 Hawaiian Homes Commission Act (HHCA). This Act "set aside about 200,000 acres" out of the 1.8 million acres of "ceded" land to "rehabilitate the native Hawaiian population."[59] After Hawai'i was admitted to the Union, the State "agreed to adopt the Hawaiian Homes Commission Act as part of its own Constitution."[60] Though Justice Kennedy does not mention this, the HHCA is widely believed to have been adopted to ensure congressional support for Hawai'i's admission as a state.[61]

In the Admissions Act, the United States granted the Hawaiian state government title to the 200,000 acres set aside under the HHCA, plus an additional 1.2 million acres of land to be held "as a public trust" for one of five purposes:

> [1] for the support of the public schools and other public educational institutions, [2] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, [3] for the development of farm and home ownership on as widespread a basis as possible[,] [4] for the making of public improvements, and [5] for the provision of lands for public use.[62]

Justice Kennedy then writes that, after admission, "the State apparently continued to administer the lands that had been set aside under the [HHCA] for the benefit of native Hawaiians," though he acknowledges that "[t]he income from the balance of the public lands . . . 'by and large flowed to the department of

57. *See, e.g.*, BRANDZEL, *supra* note 16, at 121 (providing examples of Hawaiian resistance that were omitted from the majority's account in *Rice*).

58. *Id.*

59. Rice v. Cayetano, 528 U.S. 495, 507 (2000).

60. *Id*.

61. *See* LEE, *supra* note 9, at 171.

62. Act of Mar. 18, 1959, Pub. L. No. 86-3, § 5(f), 73 Stat. 4, 6.

education'" and not to Native Hawaiians.[63] Then, "[i]n 1978 Hawaii amended its Constitution to establish the Office of Hawaiian Affairs [OHA]," believing this would "provide Hawaiians the right to determine the priorities which will effectuate the betterment of their condition and welfare and promote the protection and preservation of the Hawaiian race."[64] From there, the majority opinion moves on to discuss the OHA's governance structure in more detail.[65]

A few crucial omissions are worth noting here. First, Justice Kennedy neglects to describe that the lands set aside for the Department of Hawaiian Homelands by the HHCA were of extremely low quality relative to other land on the island.[66] Second, the Hawai'i state government utterly failed to administer the "ceded" lands properly.[67] Third, the HHCA's restrictive definition of the term "Native Hawaiian" was intended to minimize the number of persons eligible to claim land, ensuring much of it could still be leased for commercial use.[68] (As discussed more below, this is partly what motivated the Convention to task OHA with developing programs for the benefit of "Hawaiians," not the artificially restrictive category of "Native Hawaiians").[69] And lastly, Justice Kennedy completely omits continued Kānaka Maoli resistance to U.S. colonialism.[70] However,

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63. *Rice*, 528 U.S. at 508 (quoting S. JOURNAL, 10th Leg., 1979 Sess., at 1350-51 (Haw.)).

64. *Id.* (quoting CHIEF CLERK OF THE CONVENTION, 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAW. OF 1978, COMM. OF THE WHOLE REP. NO. 13, at 1018 (1980)).

65. *Id.* at 509-10.

66. *See* LEE, *supra* note 9, at 170-71; ROHRER, *supra* note 9, at 86.

67. *See, e.g.*, LEE, *supra* note 9, at 170-71.

68. As mentioned before, to qualify as Native Hawaiian, a person must be a "descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." Hawaiian Homes Commission Act of 1921, Pub. L. No. 67-34, § 201, 42 Stat. 108, 108. The original HHCA did not include this blood-quantum requirement until plantation owners pushed for a more restrictive definition. BRANDZEL, *supra* note 16, at 121. For context, many tribes have blood-quantum requirements that are lower than 1/2. In fact, according to one estimate, only 18 out of over 160 federally recognized tribes have blood-quantum requirements over 1/4. C. MATTHEW SNIPP, AMERICAN INDIANS: THE FIRST OF THIS LAND 362-65 (1989). The Comanche, Kiowa, and Tonkawa tribes require 1/4 blood quantum for membership, and the Eastern Band of Cherokee Indians requires 1/16 blood quantum for enrollment. *See* Gavin Clarkson, *Not Because They Are Brown, but Because of EA: Why the Good Guys Lost in* Rice v. Cayetano*, and Why They Didn't Have to Lose*, 7 MICH. J. RACE & L. 317, 344 & n.188 (2002). Members of the Choctaw nation can have a 1/512th blood quantum. *See id.* at 343-44 & n.183.

69. 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAI'I OF 1978, at 634-35 (1980) [hereinafter CONVENTION PROCEEDINGS].

70. *See infra* Section II.A. Unfortunately, the dissent failed to rectify many of the opinion's historical omissions. While Justice Stevens at least emphasized that the United States had forcibly annexed Hawai'i, *see Rice*, 528 U.S. at 532 (Stevens, J., dissenting), he implicitly suggested that

as the next Section shows, it is from this legacy of resistance that the idea for OHA was born.

A. The 1970s Hawaiian Land and Sovereignty Movements

In the early twentieth century, Hawai'i was essentially under the oligarchic government of the "Big Five" corporations, which wielded immense legislative influence and controlled the sugar industry, transportation, banking, insurance, and utilities.[71] After statehood in 1959, Hawai'i became less economically dependent on sugar and pineapple crops, and tourism became the major driver of the state's economy.[72] However, concentrated land ownership—a legacy of the Big Five's control over the economy—led large landowners to drive up the price of land, which by the 1970s had grown unaffordable for many Hawaiians.[73] Hawaiians and Asian locals were increasingly displaced by rapid development aimed at building tourist facilities such as hotel complexes.[74]

In response, Hawaiians organized, holding protests against evictions related to the construction of the Aloha Stadium, as well as evictions in Chinatown and the Ota Camp eviction.[75] One of the largest rallies ever held at the Hawaiian State Capitol was organized by Save Our Surf in 1971 to protest evictions and threats to surfing sites in O'ahu.[76] That same year, nonviolent protesters were arrested while trying to prevent the bulldozing of homes in Kalama Valley.[77]

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colonization of Native Hawaiians had ceased. For instance, by referring to "a history of subjugation at the hands of colonial forces," Justice Stevens framed United States colonialism not as an ongoing harm, but as a harm that occurred in some distant past and that now entitles Native Hawaiians to a federally administered trust relationship. *Id.* at 534. Thus, like Justice Kennedy, Justice Stevens ultimately failed to engage with Hawaiians' continued attempts to resist U.S. colonialism and establish a self-governing nation.

71. ROHRER, *supra* note 9, at 29.

72. *See* Haunani-Kay Trask, *The Birth of the Modern Hawaiian Movement: Kalama Valley, O'ahu*, 21 HAW. J. HIST. 126, 127 (1987).

73. *Id.*

74. *See* J. Kēhaulani Kauanui, *The Politics of Blood and Sovereignty in* Rice v. Cayetano, 25 POL. & LEGAL ANTHROPOLOGY REV. 110, 113 (2002).

75. *See* Davianna Pōmaika'i McGregor & Ibrahim Aoudé, *"Our History, Our Way!": Ethnic Studies for Hawai'i's People*, *in* A NATION RISING: HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND SOVEREIGNTY 66, 70 (Noelani Goodyear-Ka'ōpua et al. eds., 2014).

76. *Id.* at 71-72.

77. Trask, *supra* note 72, at 126 ("[S]ome three dozen non-violent protestors were arrested for trespassing . . . as they sat atop the last unbulldozed house in rural Kalama Valley . . . .").

Around the same time, the statewide group "The Hawaiians" was formed to protest abuses by the Department of Hawaiian Homelands.[78] Reflecting the deep connection between the Hawaiian land and sovereignty movements, the group's mission later came to include "a concern for greater self-determination through . . . political power, and a sense of pride in being Hawaiian."[79] Similar sovereignty-oriented organizations continued to spring up throughout the early 1970s.[80] By the mid-1970s, Kānaka Maoli began "assert[ing] their rights as indigenous and historically unique from other 'locals,'"[81] emphasizing the cultural value of love of the land.[82]

In 1976, the Protect Kahoʻolawe ʻOhana (PKO) movement sought to force the U.S. Navy to stop bombing the island of Kahoʻolawe by staging high-profile illegal landings on the island,[83] which sparked a "dramatic explosion of Hawaiian political consciousness."[84] Within the next couple of years, PKO broadened its focus beyond Kahoʻolawe, joining with the nonprofit organization Alu Like to hold meetings (*puwalu*) about Hawaiian public lands and reparations issues.[85]

In 1977, Alu Like and the Council of Hawaiian Organizations sponsored the Puwalu sessions to "develop[] a clearer understanding of a Hawaiian agenda, with land, water, language, cultural preservation, and political action at its

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78. Norman Meller & Anne Feder Lee, *Hawaiian Sovereignty*, 27 PUBLIUS 167, 172 (1997). On the myriad causes of the failures of the land trusts, which included misuse of resources by the state, insufficient funding, the poor quality of the land, and repeated breaches of the trust duty by the Hawaiian Homes Commission, see Lesley Karen Friedman, *Native Hawaiians, Self-Determination, and the Inadequacy of the State Land Trusts*, 14 U. HAW. L. REV. 519, 541-50 (1992).

79. Myra Jean F. Tuggle, The Protect Kahoʻolawe ʻOhana: Cultural Revitalization in a Contemporary Hawaiian Movement 30 (May 1982) (unpublished M.A. thesis, University of Hawaii) (citing ETHNIC STUDIES PROGRAM, UNIV. OF HAW., HAWAIIANS: ORGANIZING OUR PEOPLE (1974)), https://scholarspace.manoa.hawaii.edu/bitstream/10125/21133/1/Tuggle_1982_r.pdf [https://perma.cc/DN78-QRAM].

80. Meller & Lee, *supra* note 78, at 172.

81. Kauanui, *supra* note 74, at 113 (citing TRASK, *supra* note 1, at 91 (1993)).

82. Trask, *supra* note 72, at 126-27.

83. *See* Noelani Goodyear-Kaʻōpua, *Introduction* to A NATION RISING: HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND SOVEREIGNTY, *supra* note 75, at 1, 6; Kekuni Blaisdell, *I Hea Nā Kānaka Maoli? Whither the Hawaiians?*, 2 HŪLILI 9, 16 (2005).

84. TOM COFFMAN, THE ISLAND EDGE OF AMERICA: A POLITICAL HISTORY OF HAWAIʻI 299 (2003).

85. *See id.* at 298; Tuggle, *supra* note 79, at 93.

core."[86] The Puwalu sessions were the first forums "devoted to the discussion of Hawaiian issues by the Hawaiian community" since the early 1900s,[87] and Puwalu participants "increasingly had in mind" the looming 1978 Constitutional Convention as a possible avenue for creating change.[88] In fact, it was in the Puwalu sessions that the idea for the Office of Hawaiian Affairs was born.[89]

A number of the most influential Convention delegates were present at the Puwalu sessions. Notably, Adelaide Keanuenueokalaninuiamamao "Frenchy" DeSoto — the Chair of the 1978 Convention's Hawaiian Affairs Committee, commonly called the "mother" of OHA — was a participant in one of the illegal landings on Kahoʻolawe and in fact attended the Puwalu sessions as a representative of PKO.[90] John Waiheʻe, who became one of the most prominent Convention participants despite being only two years out of law school, likewise participated in the Alu Like Puwalu. He and other future Convention delegates also met with Alu Like organizer Norma Wong to strategize about how to maximize their influence on the Convention.[91]

B. Organizers' Influence on the 1978 Constitutional Convention

An opportunity for Alu Like to influence events arose in the critical early days of the Convention. Initially, the 1978 Convention was split: nearly half of the delegates were "loosely aligned" with status quo state politics, while another near half identified independently with "new cause[s] or suggested reform[s]."[92] In the midst of the early maneuvering for leadership, one of the independents, Jeremy Harris, suggested that Waiheʻe take the presidency; instead, Waiheʻe and

86. COFFMAN, *supra* note 84, at 298; *see* Christopher A. Erickson, Hawaiian Resilience: Social Movements, Social Work, and the Nonprofit Industrial Complex 92 (Jan. 12, 2015) (unpublished Ph.D. dissertation, American University), https://auislandora.wrlc.org/islandora/object/auislandora%3A10417/datastream/PDF/view [https://perma.cc/R3TP-8FPQ].

87. Erickson, *supra* note 86, at 92.

88. COFFMAN, *supra* note 84, at 298.

89. *See* Curt Sanburn, *OHA: The Beginning — Part One*, KA WAI OLA O OHA, Apr. 1991, at 11, 12; Erickson, *supra* note 86, at 92; Office of Hawaiian Affairs, *Kukulu Hou: Rebuilding a Nation*, YOUTUBE (Nov. 2, 2013), https://www.youtube.com/watch?v=qWzAV723A5M [https://perma.cc/5JU9-WMMQ].

90. Erickson, *supra* note 86, at 123-24. Interestingly, though PKO and Alu Like affiliates were highly involved in the creation of OHA, PKO released a press release denouncing OHA in 1980. Tuggle, *supra* note 79, at 103. This may be because Ritte's faction ultimately split from PKO around 1978. *Id.* at 56.

91. COFFMAN, *supra* note 84, at 305-07.

92. *Id.* at 307.

his group decided to tip the scales towards William Paty of the "status quo group."[93] In exchange, Waihe'e's friends received key committee chairmanships. Though DeSoto was "a step removed" from Waihe'e's group, Waihe'e also managed to get her appointed as Chair of the Hawaiian Affairs Committee.[94]

Alu Like and its members provided significant support to the Hawaiian Affairs Committee. For example, the group funded several committee staff positions in addition to "provid[ing] a priceless community network for getting input and educating Hawaiians about the many issues involved in the committee's work."[95] A contingent of Alu Like volunteers brought overworked Hawaiian Affairs Committee members stew and poi to ensure they were well fed.[96] Meanwhile, Waihe'e soon became the Convention's unofficial "majority leader," chairing meetings, whipping votes, and meeting with DeSoto often to review her Committee's work and to make sure proposals could get sufficient support.[97] Additionally, DeSoto received significant assistance from Walter Ritte, who as one of the founders of the PKO movement had the prominence to obtain access to most delegates' offices and to advocate for the Hawaiian Affairs Committee's proposals.[98]

Recognizing this background, scholars have argued that the 1978 Convention was an outgrowth of the Hawaiian land and sovereignty movements.[99] At least some Convention delegates seem to agree. In a speech at the thirty-year reunion of the 1978 Convention, delegate Walter Ikeda stated that "[t]he Hawaiian sovereignty movement was making its presence felt and in fact was a significant factor in creating an Office of Hawaiian Affairs."[100] Similarly, delegate James Shon declared, "In 1978, we were riding the waves of grassroots movements on the environment, a Hawaiian renaissance, land-use protection, state planning and open government. Citizen participation was intense and widespread."[101]

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93. *Id.* at 308.

94. *Id.*

95. Sanburn, *supra* note 89, at 13.

96. *Id.*

97. COFFMAN, *supra* note 84, at 310.

98. *See id.* at 309-10.

99. *See, e.g.*, Goodyear-Ka'ōpua, *supra* note 83, at 14-15; Meller & Lee, *supra* note 78, at 171-76.

100. Walter Ikeda, Hawaii Constitution Making, 1978, at 5 (2008) (on file with the Jon Van Dyke Collection, Box BB1B1, Folder 24) (transcription of a speech at the thirty-year reunion of 1978 Constitutional Convention delegates).

101. Jim Shon, *ConCon Vote Requires Thoughtful Analysis*, HONOLULU ADVERTISER, June 12, 2008, at A14 (on file with the Jon Van Dyke Collection, Box BB1B1, Folder 26).

In a broader reflection of the grassroots spirit of the 1978 Convention, delegates were overall younger than previous convention delegates, with fewer lawyers and legislators participating.[102] While the 1978 Convention was mostly composed of lawyers, businesspeople, and educators, it drew from more segments of society relative to the two previous conventions and also included retirees, students, and civil-service employees.[103] DeSoto, for instance, had worked as a janitor at the Hawai'i State Capitol before becoming a delegate to the 1978 Convention.[104] Additionally, a higher proportion of the delegates serving in the 1978 Convention were Kānaka Maoli.[105]

Interestingly, despite the blossoming of Kānaka Maoli activism during the 1970s, and the higher proportion of indigenous Hawaiians elected as delegates, contemporary accounts suggest that Kānaka Maoli sovereignty and land claims were not popularly recognized as one of the major pre-Convention issues.[106] While there was high public approval for calling a convention, with seventy-four percent of voters in favor, this interest was attributed to "no single overriding or pressing issue" other than general dissatisfaction with government.[107] Public debate before the Convention appears to have been focused on the question of whether the state constitution should include a provision for initiative and referendum similar to California's.[108] The *Honolulu Star-Bulletin* predicted a "conservative convention," as delegates said "in overwhelming numbers that they want to make only a few changes in the existing constitution."[109]

Once it began, however, the 1978 Convention "spent more time [debating] proposals concerning Hawaiian affairs than on any other subject area."[110] After

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102. *See* Ikeda, *supra* note 100, at 4.

103. *See* Richard H. Kosaki, *Constitutions and Constitutional Conventions of Hawaii*, 12 HAW. J. HIST. 120, 132 (1978).

104. Ben Gutierrez, *Frenchy DeSoto, Founding Force of OHA, Dies at 81*, HAW. NEWS NOW (Jan. 22, 2011), https://www.hawaiinewsnow.com/story/13889888/frenchy [https://perma.cc/VX2Z-M6XV].

105. LEE, *supra* note 9, at 16-17.

106. A.A. Smyser, *Issues for a Constitutional Convention*, HONOLULU STAR-BULLETIN (Nov. 7, 1996) (on file with the Jon Van Dyke Collection, Box BB1B1, Folder 7) ("One of the most important products in 1978 was the creation of an Office of Hawaiian Affairs that was not even a pre-convention issue."); *see also* JOHN D. BELLINGER, CHART IT DON'T CHANCE IT (on file with the Jon Van Dyke Collection, Box BB1B1, Folder 45) (listing probable major issues in a speech given to business leaders that did not mention Hawaiian affairs).

107. Kosaki, *supra* note 103, at 126.

108. CONVENTION PROCEEDINGS, *supra* note 69, at ix.

109. Kosaki, *supra* note 103, at 134.

110. LEE, *supra* note 9, at 171.

the close of the Convention, President Paty would refer to Hawaiian Affairs as the Convention's "sleeper committee," reflecting the general sense that the Committee had been more influential than expected.[111] This was an understatement: the two previous conventions not only failed to include such a committee, but also appear not to have taken Hawaiian affairs particularly seriously.[112] At the 1968 Convention, a modest proposal requiring the state to "preserve and enhance Hawaiian conditions" was met with amusement and defeated by a 46-26 vote.[113] Thus, for the Hawaiian Affairs committee to emerge as a major committee of the 1978 Convention was surprising, to say the least.

C. The Hawaiian Affairs Package

The work that was ultimately produced by the Hawaiian Affairs Committee is scattered throughout Hawai'i's constitution. It includes provisions that adopt a state motto and King Kamehameha's "Law of the Splintered Paddle," limit the use of adverse possession, and require the teaching of Hawaiian culture in schools.[114] However, the overwhelming majority of the Committee's work was codified in Article XII of the Hawai'i Constitution—the focus of this Section.[115]

The current Article XII is titled "Hawaiian Affairs." The 1978 Convention made some changes to the first three sections, which were included in the 1950 Constitution's Article XI.[116] These original sections adopt the federal Hawaiian Homes Commission Act as state law and limit the state legislature's ability to amend or repeal it.[117]

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111. Lee Gomes, *835 Proposals Face Con Con*, HONOLULU STAR-BULLETIN (Aug. 1, 1978) (*John Van Dyke Collection* scrapbook, archival collections, William S. Richardson School of Law, University of Hawai'i Manoa).

112. CONVENTION PROCEEDINGS, *supra* note 69, at viii.

113. Sanburn, *supra* note 89, at 13.

114. LEE, *supra* note 9, at 19.

115. *Id*. at 171.

116. HAW. CONST. art. XIII (1950).

117. For more on the changes made by the 1978 Convention to these sections, see LEE, *supra* note 9, at 171-76. Importantly, Section 3 appears to require congressional consent to change the definition of Native Hawaiian in the HHCA, which is "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." *Id*. Delegates to the 1978 convention discussed changing this definition but ultimately decided against it. Instead, the Convention proposed codifying definitions of Native Hawaiian and Hawaiian in the state constitution. However, this Section was held to be not validly ratified in *Kahalekai v. Doi*. 590 P.2d 543 (Haw. 1979); *see* LEE, *supra* note 9, at 175, 178.

The remaining sections of Article XII were all added by the 1978 Constitutional Convention:

- Section 4 provides that the "ceded" lands are held by the State "as a public trust for native Hawaiians and the general public."
- Sections 5 and 6 establish the Office of Hawaiian Affairs. OHA holds title to the property held in trust for "native Hawaiians and Hawaiians."[118] Section 5 provides that board members must be Hawaiian, and are to be elected "by qualified voters who are Hawaiians," with each island having at least one representative.
- Section 7 protects the "traditional and customary rights" of Native Hawaiians.[119]

These changes to the former Article XII were among the most publicly controversial proposals made by the 1978 Convention, receiving a substantial number of votes against ratification when put to the general public.[120] However, the Convention record reveals a striking level of internal agreement on these proposals, illustrating the dominance of the Waihe'e-DeSoto-Ritte coalition over the Convention.

The Convention records belie Justice Kennedy's conclusion that the OHA was simply a state agency. In establishing OHA, the Hawaiian Affairs Committee sought to "create a body that could formulate policy relating to all native Hawaiians and make decisions on the allocation of those assets belonging to native Hawaiians," including potentially administering reparations.[121] Moreover, the Committee expressed that it was "unanimously and strongly of the opinion that people to whom assets belong should have control over them."[122] Providing for the election of the board of trustees was a way to "avoid the much-justified criticism which has been directed at the Hawaiian homes commission for . . . its inability to respond adequately to the needs of native Hawaiians," to enable direct participation, and to "strengthen the fiduciary relationship" between the trust administrators and the Native Hawaiian beneficiaries.[123] The Committee emphasized that "[beneficiaries] would best protect their own rights."[124]

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118. As noted above, "Hawaiians" are persons descended from persons living in Hawai'i in 1778, with no blood-quantum requirement.

119. LEE, *supra* note 9, at 177-180.

120. *Id.* at 19.

121. CONVENTION PROCEEDINGS, *supra* note 69, at 644.

122. *Id*.

123. *Id.*

124. *Id*. at 645.

The Committee explicitly noted that, although OHA would formally constitute a state agency, it would be "unique and special," because its power to hold title would give it control over its budget, assets, and personnel that would essentially render OHA "independent from the executive branch and all other branches of government."[125] OHA's structure would "provide for accountability, self-determination, methods for self-sufficiency through assets and a land base, and the unification of all native Hawaiian people."[126] Moreover, creating OHA would recognize "the right of native Hawaiians to *govern themselves* and their assets by their *assumption of the trust responsibility* imposed on the State to better their condition."[127]

Reflecting on the creation of OHA in 2013, University of Hawai'i law professor Melody MacKenzie concluded that "[i]t really was a step towards self-determination on a Native Hawaiian government, and that's how people at [the 1978 Constitutional Convention] saw it. . . . [I]t was really beginning the process of self-determination and creating a government for ourselves."[128]

Presenting the proposal on the floor in 1978, Delegate DeSoto described it as an "attempt[], in good faith and honesty, to afford the Hawaiian community a chance for—or at least the opportunity for—self-determination."[129] One additional delegate spoke in favor of the proposal. Strikingly, with no further debate, the motion passed.[130]

The Committee also decided to leave the HHCA's definition of the term "Native Hawaiian" in place. While such a restrictive definition "seemed unfair," in light of the lengthy waiting list for homesteads, the Committee felt that adding further applicants "without more hearings and input from the beneficiaries . . . would be irresponsible."[131] Moreover, the Committee believed it was more appropriate for OHA to consider the issue because its board would be composed of indigenous Hawaiians. The Committee concluded that "it might not be appropriate for this type of question to be submitted to the general public because

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125. *Id.*

126. *Id.* at 646.

127. *Id.* (emphasis added).

128. Office of Hawaiian Affairs, *Kukulu Hou: Rebuilding a Nation*, YOUTUBE, at 8:58 (Nov. 2, 2013), https://www.youtube.com/watch?v=qWzAV723A5M [https://perma.cc/ZU7W-D5HP] (showing an interview with Melody Kapilialoha MacKenzie, director of the Ka Huli Ao Center for Excellence in Native Hawaiian Law); *see also id.* at 8:30 (showing former Hawai'i Governor and 1978 delegate John Waihe'e's statement that "[t]he idea [behind OHA] was, we would start with a Hawaiian election, establish a Hawaiian entity").

129. CONVENTION PROCEEDINGS, *supra* note 69, at 285.

130. *Id.*

131. *Id.* at 633-34.

it involved the inheritance rights of [indigenous] Hawaiians only," and "rightfully the affected parties should decide."[132]

The proposal was signed by all but one member of the Hawaiian Affairs Committee.[133] Once the proposal was presented to all delegates, the Convention concluded that "it [had] taken all too long to even arrive at" the proposal, and passed the measure with no amendments offered nor nay votes heard.[134] Writing a decade later, reporter Curt Sanburn would attribute this to the "hundreds of Hawaiians who travelled from all the islands to march from ʻIolani Palace to Kawaiahaʻo Church, accompanied by chanting and the pealing of Kawaiahaʻo's bells. The lively demonstrators packed the crucial . . . hearing and effectively silenced whatever opposition there might have been with their moral righteousness."[135]

Later, during debate, only two delegates spoke against the OHA proposal.[136] However, their primary objections were not to the proposal itself but to passing the proposal as a constitutional amendment rather than an act of the legislature. One delegate felt that money should be appropriated through the legislative process and that the proposal was too specific to be placed in the constitution.[137] Delegate Hale's statement is representative of the debate: "Although my heart goes out—my sympathies go out, . . . I just don't think this is the proper vehicle."[138]

The response was blistering. As Chair DeSoto put it, "We have history repeating itself when a non-native gives us sympathy . . . and doesn't want to do anything else. . . . [U]nless somebody here or in the world shows me how you eat sympathy, with or without salt, I strongly recommend that this Convention adopt [the proposal]."[139] The proposal passed.[140]

Recalling the Convention, Hawaiian Affairs Committee staff member Martin Wilson later stated:

> There were no batallions [sic] of brains coming to Frenchy's aid[] during Con Con . . . . The State didn't help, the UH Law School didn't help,

132. *Id.* at 634.

133. *Id.*

134. *Id.* at 1015.

135. Sanburn, *supra* note 89, at 13.

136. CONVENTION PROCEEDINGS, *supra* note 69, at 271-73.

137. *Id.* at 272 (statement of Del. Burgess).

138. *Id.* at 271 (statement of Del. Hale).

139. *Id.* at 271-72 (statement of Del. De Soto).

140. *Id.* at 273.

> Bishop Street didn't help . . . . Very few people rushed to the aid[] of the Hawaiians. Nobody really worked *against* OHA or the idea of OHA, but they didn't go out of their way to help it, either. This was Hawaiian. The Hawaiians did it.[141]

It is no overstatement, then, to say that OHA was born out of the movement for Kānaka Maoli self-governance. The support provided by Alu Like and PKO activists behind the scenes, as well as the Convention record, demonstrate that OHA was an attempt to enable Kānaka Maoli self-determination by enshrining it in the state constitution. The discussion of OHA at the Convention—both in committee reports and during debate—makes clear that the *Rice* Court erred in treating OHA as an ordinary state agency.

III. THE LEAD-UP TO *RICE V. CAYETANO*: HAWAIIAN SELF-DETERMINATION AND OHA

In the early years, getting OHA off the ground proved far from easy. DeSoto later stated that leaving the implementation of OHA to the legislature was "a horrendous mistake."[142] Veterans of the 1978 Convention were eventually forced to create a group called Volunteers of the Office of Hawaiian Affairs (VOHA) to organize the election for OHA trustees. With help from Alu Like and the Council of Hawaiian Organizations, VOHA registered over 50,000 Hawaiians to vote for OHA trustees.[143] More than 100 candidates registered to run for the OHA board.[144] It was the first time that Kānaka Maoli had an opportunity to elect their own leaders and "probably the first mass political action by native Hawaiians" since the United States forcibly annexed Hawai'i in 1898.[145]

After OHA was finally formed in 1980, DeSoto became the first OHA Board Chairperson. Walter Ritte, who had volunteered to assist the Hawaiian Affairs Committee throughout the Convention, joined DeSoto as one of the first members of the OHA Board of Trustees.[146] And in 1986, Convention delegate John Waihe'e became the first Kānaka Maoli governor of Hawai'i.[147]

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141. Sanburn, *supra* note 89, at 13.

142. *Id*. at 14.

143. *Id*.

144. *Id*.

145. *Id*.

146. *Id*.

147. *See* COFFMAN, *supra* note 84, at xiv.

With a sympathetic governor on its side, OHA continued its advocacy for self-determination. However, as discussed in more detail below, OHA's efforts soon became controversial.[148] This was to be expected: the Hawaiian sovereignty movement was deeply fractured, with multiple organizations advocating for different approaches. Some organizations wanted Hawai'i to declare independence from the United States and be recognized as a sovereign nation, while others favored a nation-within-a-nation approach — that is, federal recognition of a "domestic-dependent, reorganized, and ethnically defined Hawaiian nation."[149] Moreover, particularly in the early years, OHA functioned without a clear sense of its mission, which at times caused it to alienate other Hawaiian sovereignty organizations.[150]

Criticism notwithstanding, OHA recommended in 1989 that Kānaka Maoli elect delegates to draft a governing document for submission to Hawaiians for their approval.[151] The Hawai'i legislature ultimately established the Hawai'i Sovereignty Elections Council (HSEC) to administer a 1996 Native Hawaiian Vote, asking: "Shall the Hawaiian People elect delegates to propose a Native Hawaiian government?"[152] Both the state and OHA funded the HSEC vote.[153]

Some Hawaiian sovereignty organizations regarded this effort with skepticism. The Nation of Hawai'i — which favors separating from the United States, and in fact declared independence from the United States in 1994 — opposed the initial framing of the 1996 HSEC vote as a "plebiscite," arguing that it did not meet international-law standards.[154] Ka Lahui Hawai'i, which sought federal

148. Opponents of OHA have argued that the agency was created to "co-opt" the Hawaiian sovereignty movement. Blaisdell, *supra* note 83, at 16.

149. Goodyear-Ka'ōpua, *supra* note 83, at 14.

150. Carl Sanburn, *OHA: The Beginning — Part Two*, KA WAI OLA O OHA, May 1991, at 11, 12-13.

151. Meller & Lee, *supra* note 78, at 177. For more background, see MACKENZIE, *supra* note 53, at 276-79.

152. MacKenzie, *supra* note 53, at 276-77; Carey Goldberg, *Native Hawaiian Vote Favors Sovereignty*, N.Y. TIMES (Sept. 14, 1996), https://www.nytimes.com/1996/09/14/us/native-hawaiian-vote-favors-sovereignty.html [https://perma.cc/QJ6K-RANW].

153. Pat Omandam, *Hawaiian Convention Vote to be Held in 10 Days*, HONOLULU STAR-BULL. (Jan. 7, 1999), http://archives.starbulletin.com/1999/01/07/news/story8.html [https://perma.cc/GCS4-CWXA].

154. Bill Weinberg, *Land and Sovereignty in Hawai'i: A Native Nation Re-Emerges*, 13 NATIVE AM. 30 (1996); *see also* Letter from Francis A. Boyle, Professor of Int'l Law, Univ. of Ill. at Urbana-Champaign, to Pu'uhonua Kanahele (Mar. 9, 1995), https://bumpykanahele.com/plebiscite [https://perma.cc/5BLJ-ZMHD] (declaring that the vote did not qualify as a genuine plebiscite under international law); Smyser, *supra* note 106 (urging that a 1998 convention be given information on Hawaiian sovereignty, including merging OHA and the Hawaiian Home

recognition of a Native Hawaiian nation, rejected the 1996 HSEC vote, decrying it as a lose-lose proposition: "If we say yes, we approve a paper government with no land. If we say no, we legitimize the status quo."[155]

Around seventy-three percent of respondents ultimately voted in favor of holding a Native Hawaiian convention.[156] However, because voter turnout was only forty percent, this meant that seventy percent of eligible Hawaiians either voted against the convention or declined to vote.[157] Given the forty percent voter turnout, Ka Lahui Hawai'i argued that native Hawaiians had boycotted the vote.[158] By contrast, election officials argued that this was an average turnout for a mail-in election.[159]

The state legislature disbanded HSEC following the 1996 vote. Some HSEC leaders then united to form Ha Hawai'i, a private nonprofit that raised funds to hold the election of delegates for the Native Hawaiian convention.[160] Although Ha Hawai'i was formally independent, Hawaiians remained suspicious about the election's ties to the state,[161] and election turnout was low.[162] Ha Hawai'i was forced to postpone the Native Hawaiian convention, initially scheduled for the summer of 1999, in order to gather more funds and spend more time educating Native Hawaiians about the different paths to sovereignty.[163] Ha Hawai'i applied for OHA funds, but OHA leadership was split on whether to support the convention. Instead, OHA ultimately approved funding for a year-long educational campaign on Kānaka Maoli self-determination.[164]

Lands Department, revenue and rights issues, and the fifty percent blood-quantum requirement).

155. Weinberg, *supra* note 154.

156. Meller & Lee, *supra* note 78, at 183.

157. Yasmin Anwar, *Hawaiians Split Again in Seeking Self-Rule*, HONOLULU ADVERTISER, Nov. 18, 1998, at A1.

158. Goldberg, *supra* note 152.

159. MacKenzie, *supra* note 53, at 278.

160. Anwar, *supra* note 157, at A1.

161. Yasmin Anwar, *Not All Hawaiians Eager to Vote*, HONOLULU ADVERTISER, Jan. 13, 1999, at A1.

162. Lori Tighe, *Ha Hawaii's Election Doesn't Draw a Crowd*, HONOLULU STAR-BULL., (Jan. 18, 1999) http://archives.starbulletin.com/1999/01/18/news/index.html [https://perma.cc/9J8W-322E].

163. Yasmin Anwar, *Hawaiian Convention Postponed Until 2000*, HONOLULU ADVERTISER, Mar. 11, 1999, at A1.

164. Pat Omandam, *OHA Trustees Decide to Fund Sovereignty Educational Campaign*, HONOLULU STAR-BULL. (Sept. 1, 1999), http://archives.starbulletin.com/1999/09/01/news/index.html [https://perma.cc/C48L-Q9ZU].

In addition to the Convention records, OHA's work in the 1980s and 1990s attempting to facilitate the holding of a Native Hawaiian constitutional convention demonstrates that OHA understood its mission to include further strides towards Kānaka Maoli self-governance. Others understood this as well—in fact, *Rice*'s challenge to the voting requirements for OHA trustees was part of the backlash to this surging Hawaiian sovereignty movement.[165]

What does it mean for the Court to have read this history out of the case entirely? At one level, erasing OHA's history is yet another example of the *Rice* majority's repeated minimization of Kānaka Maoli resistance to U.S. colonization. Erasing OHA's history as an outgrowth of a remarkably effective Hawaiian sovereignty movement furthers the Court's colonialist narrative by continuing to deny Kānaka Maoli agency.

At another level, erasing this history allowed the Court to ignore the sovereignty implications of its decision in *Rice*. The Court framed the case as involving race discrimination, triggering a well-developed doctrine. If, by contrast, the Court had recognized that OHA emerged from efforts to allow Kānaka Maoli to exercise self-governance, it would have had to confront difficult questions: How do we differentiate between indigeneity and race? Can indigenous groups exercise some measure of self-determination without needing to organize into tribes? What does it mean to apply the tribal framework—which emerged in the context of the mainland United States—to indigenous groups outside the mainland with vastly different histories of colonization?

By setting up a dichotomy between tribal governments and state agencies and treating OHA like any other state agency, the Court sidestepped the fact that OHA did not neatly fit into either of these buckets. As I discuss in the following Part, the Court's ahistoric refusal to acknowledge OHA's unique features has continued to stymie other indigenous groups' efforts to pursue self-determination.

IV. THE ONGOING CONSEQUENCES OF *RICE*

After the Court invalidated OHA's election process in *Rice*, all nine OHA trustees resigned,[166] seeking to "show . . . solidarity in defense of the right of

165. J. Kēhaulani Kauanui, *Colonialism in Equality: Hawaiian Sovereignty and the Question of U.S. Civil Rights*, 107 S. ATLANTIC Q. 635, 643 (2008).

166. Pat Omandam & Rosemarie Bernardo, *OHA Trustees Resign*, HONOLULU STAR-BULL. (Sept. 8, 2000), http://archives.starbulletin.com/2000/09/08/news/story1.html [https://perma.cc/X7X3-LUZ7].

native Hawaiians to elect their own representatives to the trust."[167] Since then, OHA has faced a continuing barrage of legal challenges to its programs.[168]

The Court's decision in *Rice* has repeatedly stymied OHA's efforts to support the fight for Kānaka Maoli sovereignty. In perhaps the most salient example, OHA provided funding for the Native Hawaiian Roll Commission, created by the state legislature in 2011 to enroll Native Hawaiians for the organization of a sovereign entity.[169] But because of *Rice*, Na'i Aupuni's attempt to use this voter roll to let Native Hawaiians elect delegates to a constitutional convention proved unsuccessful.[170]

In the two decades since it was issued, *Rice* has frustrated attempts to exercise indigenous sovereignty in other U.S. territories as well. Indigenous inhabitants of the territories have limited legal avenues to exercise sovereignty to begin with because federal regulations limit tribal recognition through the BIA process to the forty-eight contiguous U.S. states and Alaska.[171] Thus, even if indigenous inhabitants of the territories could agree to pursue federal recognition over other approaches (such as independence from the United States), they—just like Kānaka Maoli in Hawai'i—could not form federally recognized tribes through the BIA process. *Rice*, by prohibiting territorial governments from holding elections in which only indigenous people vote, further restricts the indigenous inhabitants of U.S. territories in important ways. As long as they remain part of

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167. Michael Tsai, *Tough OHA Activist Had "Heart of Gold"*, HONOLULU STAR ADVERTISER (Jan. 23, 2011), https://www.staradvertiser.com/2011/01/23/hawaii-news/tough-oha-activist-had-heart-of-gold [https://perma.cc/9D8Z-8R9B].

168. In 2002, OHA programs once again came under challenge in *Arakaki v. Lingle*. The plaintiffs argued that several state and federal programs focused on native Hawaiians (including OHA itself) were unconstitutional. The case was ultimately dismissed for lack of standing. *See* Arakaki v. Lingle, 305 F. Supp. 2d 1161 (D. Haw. 2004); Arakaki v. Lingle, 299 F. Supp. 2d 1129 (D. Haw. 2003); Arakaki v. Lingle, 299 F. Supp. 2d 1114 (D. Haw. 2003); Arakaki v. Cayetano, 299 F. Supp. 2d 1107 (D. Haw. 2002); Arakaki v. Cayetano, 299 F. Supp. 2d 1090 (D. Haw. 2002); Arakaki v. Cayetano, 198 F. Supp. 2d 1165 (D. Haw. 2002); *see also* Carroll v. Nakatani, 342 F.3d 934 (9th Cir. 2003) (dismissing for lack of standing an equal-protection challenge to Article XII of the Hawai'i Constitution).

169. Catherine Cluett, *Hawaiian Election Continues Amid Concerns*, MOLOKAI DISPATCH (Nov. 25, 2015), https://themolokaidispatch.com/hawaiian-election-continues-amid-concerns [https://perma.cc/9RB6-GFSP].

170. *See supra* note 1.

171. 25 C.F.R. § 83.3 (2020) provides that the federal-recognition process applies only to "indigenous" entities. The term "indigenous" means "native to the continental United States," which is defined as encompassing "the contiguous 48 states and Alaska." *See* 25 C.F.R. § 83.1 (2020); Kahawaiolaa v. Norton, 222 F. Supp. 2d 1213, 1215 (D. Haw. 2002). However, tribes can also be recognized through executive action or congressional recognition. *See* Myers, *supra* note 32, at 272-73.

the United States, they cannot exercise self-determination on matters impacting their own communities.

Guam offers perhaps the most striking example of the ongoing limitations posed by *Rice*.[172] Since the 1980s, Chamorro activists have pushed for a Guam political-status plebiscite in which the vote is limited to Chamorros as the native inhabitants of Guam.[173] In 1997, these efforts finally proved successful: the Guam Legislature enacted a law providing for a commission to conduct a political-status plebiscite to "ascertain the desire of the Chamorro people of Guam as to their future political relationship with the United States."[174] In keeping with this goal, voting in the plebiscite was limited to "Chamorro People," defined as "[a]ll inhabitants of Guam in 1898 and their descendants who have taken no

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172. Though it is worth noting that Guam is far from the only territory that has been negatively affected by the decision. Notably, in 2009, the Fourth Constitutional Convention for the Virgin Islands proposed what would have been the territory's first constitution. *Make the Constitutional Convention Fix Its Draft, St. Thomas Residents Say*, ST. THOMAS SOURCE (July 26, 2012), https://stthomassource.com/content/2012/07/26/make-constitutional-convention-fix-its-draft-st-thomas-residents [https://perma.cc/TMV5-6838]. The Department of Justice raised concerns about the proposed constitution, specifically because certain provisions would have restricted certain government offices and the right to vote in specific elections to Native Virgin Islanders and Ancestral Native Virgin Islanders, which under *Rice* would constitute a violation of the Fifteenth Amendment. *U.S. Virgin Islands, Republic of the Marshall Islands, Puerto Rico, and Political Status Public Education Programs: Hearing before the Sen. Comm. on Energy and Natural Resources*, 111th Cong. 55 (2010) (statement of Jonathan G. Cedarbaum, Deputy Assistant Att'y Gen., Department of Justice). After years of delay, the proposed constitution was never put to the U.S. Virgin Islands electorate. *Constitutional Convention Deadlocked*, ST. THOMAS SOURCE (Oct. 28, 2012), https://stthomassource.com/content/2012/10/28/constitutional-convention-deadlocked/ [https://perma.cc/3VGT-5TQV].

Rice has also posed a barrier to legal efforts to protect indigenous land ownership. In order to protect indigenous land ownership, the Commonwealth of the Northern Mariana Islands (CNMI) Constitution imposes stringent restraints on the alienation of land. In 1999, the CNMI enacted a provision stating that land-alienation restrictions cannot be changed through the ordinary constitutional-amendment process but rather would be subject to a special election in which only persons of Northern Marianas descent would be eligible to vote. In 2016, the Ninth Circuit invalidated the voting restriction, citing *Rice* for the proposition that "[a]ncestry can be a proxy for race." Davis v. Commonwealth Elec. Comm'n, 844 F.3d 1087, 1089-90, 1092 (9th Cir. 2016).

173. The Chamorro Organization of People for Indigenous Rights (OPI-R) led an unsuccessful campaign to limit the 1982 political status plebiscite to Chamorros. Laurel A. Monnig, "Proving Chamorro": Indigenous Narratives of Race, Identity, and Decolonization on Guam (2007) (unpublished Ph.D. dissertation, University of Illinois at Urbana-Champaign), https://search.proquest.com/docview/304854150?pq-origsite=gscholar [https://perma.cc/LD4Q-VU7E].

174. Guam Pub. L. No. 23-147, § 5 (1997) (codified at I GUAM CODE ANN. § 2110 (2019)), *repealed in part by* Guam Pub. L. No. 25-106, § 11 (2000).

affirmative steps to preserve or acquire foreign nationality."[175] Like the definitions of "Hawaiian" and "Native Hawaiian," the definition of "Chamorro" had its roots in federal law: Guam's Organic Act, which in 1950 extended U.S. citizenship to Chamorro inhabitants of the island.[176]

A month after *Rice* was decided in 2000, the Guam legislature amended the plebiscite law to replace all references to "Chamorro" with "Native Inhabitants of Guam,"[177] defined as "those persons who became U.S. Citizens by virtue of the authority and enactment of the 1950 Organic Act of Guam and descendants of those persons."[178] The legislature further explained that their intent was "to permit the native inhabitants of Guam, as defined by the U.S. Congress' 1950 Guam Organic Act to exercise the inalienable right to self-determination of their political relationship with the United States of America," a "right [that] has never been afforded."[179]

The plebiscite was initially delayed by inadequate funding and low voter registration,[180] and then by years of litigation challenging the restriction of the plebiscite to "Native Inhabitants of Guam."[181] In July 2019, citing *Rice*, the Ninth Circuit affirmed a district court's order permanently enjoining Guam from conducting a plebiscite in which voting was restricted to "Native Inhabitants of Guam."[182] Following the Supreme Court's approach in *Rice*, the Ninth Circuit looked to the legislative history of the plebiscite law and found that the Act's original references to the Chamorro as a "distinct people" sharing a "common

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175. *Id.* § 2(b).

176. Organic Act of Guam, Pub. L. No. 81-630, 64 Stat. 384 (1950) (codified at 48 U.S.C. §§ 1421-1424 (2018)). The Organic Act granted U.S. citizenship to three classes of people, of which 98.6 percent were Chamorro. Davis v. Guam, 932 F.3d 822, 840 (9th Cir. 2019) ("[A]s of 1950, 98.6% of people who were non-citizen nationals . . . were categorized as 'Chamorro.'").

177. *Davis*, 932 F.3d at 828; Recent Case, *Ninth Circuit Holds that Guam's Plebiscite Law Violates Fifteenth Amendment*, 133 HARV. L. REV. 683, 684 (2019).

178. 1 GUAM CODE ANN. §§ 2101-02, 2104-05, 2110 (2019). For the definition of "Native Inhabitants of Guam," see 3 GUAM CODE ANN. § 21001(e) (2000).

179. 3 GUAM CODE ANN. § 21000 (2000).

180. *See* Anne Perez Hattori, *Guam, Micronesia in Review: Issues and Events, 1 July 2001 to 30 June 2002*, 15 CONTEMP. PAC. 150, 161 (2003).

181. The litigation that culminated in the recent Ninth Circuit opinion began in 2011. *Davis*, 932 F.3d at 828.

182. *Id.* The Fifteenth Amendment was made applicable to Guam by Pub. L. No. 90-497, § 10, 82 Stat. 847 (Sept. 11, 1968). The Ninth Circuit reasoned that the political status plebiscite was an election covered by the Fifteenth Amendment because, while the territory's political status would not actually change as a result of the vote, the results of the plebiscite would commit government entities to take certain actions, which constitutes a "decision on a public issue" covered by the amendment. *Davis*, 932 F.3d at 829-32.

culture" constituted a racial classification.[183] Additionally, the court observed that the definition of "Native Inhabitants of Guam" was "nearly indistinguishable" from other statutory definitions of Chamorro.[184] Thus, the court concluded that the term "Native Inhabitants of Guam" was "a proxy for 'Chamorro,' and therefore [a proxy] for a racial classification."[185]

Guam argued that its classification was distinguishable from that in *Rice* because it was "tethered not to presence in the Territory at a particular date but to the passage of a specific law—the Organic Act—which altered the legal status of the group to which the ancestral inquiry is linked."[186] But the court of appeals rejected this argument, reasoning that the Fifteenth Amendment proscribes not only direct racial classifications but also indirect classifications that arise from tethering a voting scheme to "prior, race-based legislative enactments" like the Organic Act's naturalization provision.[187] The court also summarily rejected the argument that the classification was a political one, concluding based on *Rice* and its own decision in *Commonwealth Election Commission* that *Mancari* does not apply to "non-Indian indigenous groups."[188] The court's terminology is perplexing, but presumably it meant indigenous groups that are not federally recognized tribes.[189]

As Guam Special Assistant Attorney General Julian Aguon eloquently put it, *Rice* renders it "impossible for a colonized people under U.S. rule to exercise any measure of self-determination because the mere act of designating . . . who constitutes . . . a colonized class would collapse automatically into a racial categorization."[190] Aguon captured the *Rice* Court's fundamental error with these words. Despite its extensive recounting of Hawai'i's history as a colonized nation, the Court treated Hawai'i as if it were an ordinary state on the U.S. mainland; and it treated Kānaka Maoli without any recognition of the group's unique claim to self-governance. The civil-rights frame applied by the Court simply "cannot address the nation-to-nation governance and land issues" facing colonized peoples

183. *Davis*, 932 F.3d at 839-40.

184. *Id.* at 840.

185. *Id.*

186. *Id.* at 841.

187. *Id.* at 841-42.

188. *Id.* at 842.

189. In a footnote, the *Davis* court reserved the question of whether *Mancari* might allow Guam to classify the "Native Inhabitants of Guam" for differential treatment in areas other than voting. *Id.* at 842 n.18.

190. Amanda Pampuro, *Guam Argues for Native Voting Law Before 9th Circuit*, COURTHOUSE NEWS SERV. (Oct. 11, 2018), https://www.courthousenews.com/guam-argues-for-native-voting-law-before-9th-circuit [https://perma.cc/8TVR-K7EF].

such as the Kānaka Maoli and Chamorros.[191] The civil-rights demand for inclusion in the body politic obscures the fact that for Native peoples, "democracy's intolerance of difference has operated through inclusion as much as exclusion."[192] Treating indigenous groups like any other ethnic or racial group, without recognizing their special claims to self-governance, is an assimilationist strategy that serves to further America's ongoing colonial project. Had the *Rice* Court engaged with OHA's history as an outgrowth of the Hawaiian land and sovereignty movements and with OHA's work to affirm Kānaka Maoli sovereignty in the years after it was created, it could have avoided its error.

CONCLUSION

As this Comment has shown, OHA constituted an attempt by the State of Hawai'i to enable Kānaka Maoli self-determination. By rejecting this model, the Court in *Rice* demonstrated a troubling inability to understand indigenous self-governance as possible outside of federally recognized tribal governments — an oversight that continues to stifle indigenous self-governance in the U.S. territories to this day.

Ultimately, as Hawaiian scholar Noelani Goodyear-Ka'ōpua writes, by invalidating Hawaiian-only voting for OHA trustees, *Rice* eliminated "the small measure of electoral control over resources Kānaka Maoli could collectively exercise within the settler state system."[193] OHA may or may not have been the best path for pursuing Kānaka Maoli self-determination, but, as Frenchy DeSoto put it, OHA "was the beginning of creating a political machine that could be heard. Otherwise Hawaiians are never heard, unless perhaps they're wearing a holoku and strumming an 'ukulele.'"[194] By erasing OHA's history, the Court silenced Kānaka Maoli voices.

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191. Kauanui, *supra* note 165, at 636.

192. Leti Volpp, *The Indigenous as Alien*, 5 U.C. IRVINE L. REV. 289, 292 (2015) (quoting Patrick Wolfe, Reflections Prepared for the Fifth Annual Critical Race Studies Symposium: Race and Sovereignty, UCLA School of Law (April 2011) (unpublished manuscript) (on file with author)).

193. Goodyear-Ka'ōpua, *supra* note 83, at 29.

194. Dan Nakaso, *Frenchy DeSoto*, HONOLULU ADVERTISER (Aug. 16, 2009), http://the.honoluluadvertiser.com/article/2009/Aug/16/ln/hawaii908160314.html [https://perma.cc/LFX2-2SYC].