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# Native Hawaiians and the Ceded Lands Trust: Applying Self-Determination as an Alternative to the Equal Protection Analysis

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# NATIVE HAWAIIANS AND THE CEDED LANDS TRUST: APPLYING SELF-DETERMINATION AS AN ALTERNATIVE TO THE EQUAL PROTECTION ANALYSIS

*R. Hōkūlei Lindsey**

## *I. Introduction*

"And while we sought by peaceful political means to maintain the dignity of the throne, and to advance national feeling among the native people, we never sought to rob any citizen, wherever born, of either property, franchise, or social standing."[1] These are the words of Hawai'i's last reigning monarch, Queen Lili'uokalani. The Queen wrote these words for the benefit of the "American general reader [who] is not well informed regarding the social and political conditions" in Hawai'i.[2] The truth of the Queen's observation remains. Yet the Native Hawaiian people currently are being accused of exacting injustice upon the non-Native citizens of the State of Hawai'i: robbing them of property, franchise, and social standing.[3]

In 1996, Harold "Freddy" Rice, a descendant of missionaries who arrived in Hawai'i in the mid-1800s, filed suit against the State of Hawai'i, essentially claiming that the Hawaiians-only[4] voting qualification for elections for the

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1. LILIUOKALANI, HAWAII'S STORY BY HAWAII'S QUEEN 368 (Mutual Publ'g 1990) (1898).

2. *Id.* at 366.

3. *See* Rice v. Cayetano, 528 U.S. 495 (2000). The question left unanswered by *Rice*, and alluded to in the broader context of *Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436 (2009), deals with the distribution and use of income derived from the ceded lands trust.

4. To qualify as a member of the Office of Hawaiian Affairs (OHA) electorate, one had to at least meet the definition of "Hawaiian." HAW. CONST. art. XII, § 5. Under state law, a "Hawaiian" is "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." HAW. REV. STAT. § 10-2 (2009).

State law actually defines two groups of natives. "Hawaiian[s]" are the broader group, while "Native Hawaiian[s]" make up a narrower group consisting of

> any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act,

trustee positions of the Office of Hawaiian Affairs (OHA) deprived him of his franchise.[5] The United States Supreme Court decision in *Rice v. Cayetano* concluded that the voting requirement for the trustees for OHA used ancestry as a proxy for race,[6] thus depriving Rice of his right to vote in violation of the Fifteenth Amendment.[7] The OHA is a state agency, established by the 1978 Constitution.[8] Its purposes are to receive and administer the pro rata portion of revenue generated by certain lands in Hawai'i (the ceded lands trust) designated for the "betterment of the conditions of native Hawaiians"[9] and to serve the Hawaiian population of the state.[10] The practical effect of the ruling in *Rice* was that the direct link of accountability between trustee and beneficiary, created by the Hawaiians-only voting structure, was diluted because any citizen of Hawai'i could participate in OHA elections regardless of the individual stake in decisions made by OHA trustees. According to the Supreme Court, the voting qualification was contrary to the Fifteenth Amendment because it used a race-based voting qualification,which denied Rice, a non-Native citizen of the state, his right to vote.[11]

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> 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.

*Id.* Complicating matters, the State's definition of "Native Hawaiian" mirrors the federal definition of "native Hawaiian." *See* Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, § 201(a)(7), 42 Stat. 108, 108 (1921) (defining "native Hawaiian" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778"). The federal "native Hawaiian" is the beneficiary group identified in section 5(f) of the Hawaii Statehood Admission Act. Hawaii Statehood Admission Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 4, 6 (1959). Thus, in creating the OHA, the State created an additional beneficiary group of natives with less-than-fifty-percent blood quantum.

5. Rice v. Cayetano, 963 F. Supp. 1547, 1548-49 (D. Haw. 1997), *aff'd*, 146 F.3d 1075 (9th Cir. 1998), *rev'd*, 528 U.S. 495 (2000).

6. *Rice*, 528 U.S. at 514.

7. *Id.* at 524.

8. HAW. CONST. art. XII, § 5.

9. Hawaii Statehood Admission Act § 5(f); *see also* HAW. CONST. art. XII, § 4 (holding lands granted in the Hawaii Statehood Admission Act in trust for Native Hawaiians and the general public). Section 5(f) of the Admission Act created the ceded lands trust as it is known today. As a condition of statehood, section 5(f) mandated that the State of Hawai'i manage certain ceded lands for any number of five specific purposes, including the "betterment of the conditions of native Hawaiians." Hawaii Statehood Admission Act § 5(f). The OHA was the State's vehicle for fulfilling its duty to Native Hawaiians under section 5(f).

10. HAW. REV. STAT. § 10-3 (2009).

11. *Rice*, 528 U.S. at 517.

This article focuses on the question left unanswered by the Court in *Rice*. In dicta, the Court drew into question the validity under the Fourteenth Amendment of the use of the ceded lands trust for the benefit of native Hawaiians,[12] even though the validity of the trust was assumed for the narrow scope of the decision.[13] The dissent and concurrence both provide a glimpse into how the Court might approach an equal protection analysis of OHA and the ceded lands trust. This article analyzes the history of landholding in Hawai'i and concludes that a different approach is necessary; the use of the ceded lands trust for the benefit of native Hawaiians should not be subject to Fourteenth Amendment equal protection scrutiny.

The State of Hawai'i does not hold these lands as a state would hold public-domain lands. It has been argued that the State has only "naked" title to the ceded lands and holds these lands as a trustee.[14] Because "Congress has recognized . . . that Native Hawaiians are beneficiaries of the illegally taken Ceded Lands," native Hawaiians hold a property interest analogous to that of American Indians, whereby the government holds land "for the benefit of all members of the tribe."[15] Today, the duty to maintain this land for the benefit of native Hawaiians lies with the State. In holding this land, the State acts in a manner analogous to a trustee, just as the federal government does in holding land in trust for Native American tribes. The duty of the State, like that of the federal government to Indian trust lands,[16] is no different from the fiduciary responsibilities of an ordinary trust.[17] Thus, although the ceded lands trust exists by virtue of section 5(f) of the Hawaii Statehood Admission Act, state law provides for its management. The United States Supreme Court recently affirmed this paradigm in *Hawaii v. Office of Hawaiian Affairs*.[18]

I assert that the logic of the equal protection analysis is misplaced in the context of the ceded lands trust and its native Hawaiian purpose. The equal protection analysis applies when benefits are allocated by the State on the basis of race. The purpose of equal protection is to ensure that the government excludes no one from the privileges of American society because of race or some other immutable trait. But the core question concerning the ceded lands trust is

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12. *Id.* at 518-19.

13. *Id.* at 521-22.

14. JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? 292-93 (2008) (citing State v. Zimring, 566 P.2d 725, 737 (Haw. 1977), for use of the term "naked").

15. *Id.* at 296.

16. *Id.* at 296-97.

17. *See* Ahuna v. Dep't of Hawaiian Home Lands, 640 P.2d 1161, 1169 (Haw. 1982) (discussing the two basic trust duties and imposing them on the Hawaiian Homes Commission).

18. 129 S. Ct. 1436, 1441 (2009).

not one of equality among citizens. Instead, it is a question of Native Hawaiian self-determination and reconciliation between nations—a question of land ownership and territory, not benefits and privileges. Accordingly, this article advocates a paradigm shift that recognizes Native Hawaiians as the owners of ceded lands[19] and that the use of these lands, whether by the Native Hawaiian people or by the State for the betterment of native Hawaiians, is about Native Hawaiian self-determination.

A meaningful analysis of the question left unanswered by the majority in *Rice* requires understanding the trust itself and particularly the res of the trust. The ceded lands, and thus the trusts currently managed by the State of Hawai'i for the betterment of the conditions of native Hawaiians, are comprised of land originally set aside in 1848 by the laws and customs of the Kingdom of Hawai'i. In 1848, the lands set aside as King's land and Government land were made subject to a trust inspired by Native Hawaiian tradition.[20] In 1893, the Kingdom was overthrown, and the Crown and Government lands subsequently were stolen by the Republic of Hawaii.[21] When these land groupings were ceded to the United States by the Republic in 1898, federal law made them subject to a "special trust,"[22] and at statehood in 1959 they were placed in what is known as the ceded lands trust.[23]

The analogy to Native American tribes provides only a guidepost for the Native Hawaiian claim to ceded lands.[24] The Indian title acknowledged in *Johnson v. M'Intosh*[25] cannot be superimposed on Hawaiian land title. Under King Kamehameha III, the Kingdom of Hawai'i created the system of private

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19. Congress has recognized that the Native Hawaiian people never consented to or received compensation for the cession of the Crown and Government lands to the United States and that they never relinquished their inherent sovereignty. *See* Joint Resolution of Nov. 23, 1993, Pub. L. No. 103-150, 107 Stat. 1510, 1512.

20. *See infra* Part III-B.

21. *See* Joint Resolution of Nov. 23, 1993, 107 Stat. at 1512 (stating that "the Republic of Hawaii also ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawai'i, without the consent of or compensation to the Native Hawaiian people or their sovereign government").

22. 22 Op. Att'y Gen. 574, 576 (1899).

23. *See infra* Part III-C.

24. Ultimately, my argument that the ceded lands must be returned to the Native Hawaiian people directly raises the question of Native Hawaiian sovereignty. While the experience of Native American tribes provides guideposts, Native Hawaiians should not be bound or limited by that existing model. The issue of achieving sovereignty and what it could look like in the Native Hawaiian context is beyond the scope of this article, and it is a topic I will address in future articles.

25. 21 U.S. (8 Wheat.) 543 (1823).

ownership of land in 1848 by a process known as the Mahele.[26] Land title in Hawai'i therefore traces to the original award or grant issued by the Kingdom following the Mahele.[27] Traced to their root title, the ceded lands are lands that were designated King's land (later known as Crown land) and Government land and placed in trusts during the Mahele.[28] The ceded lands remain in trust because of their title history and the pre-annexation history of United States–Hawai'i relations.

Although the character of these lands has been obscured by their treatment since the overthrow of the Hawaiian Kingdom in 1893,[29] the appropriate analysis must begin with the Kingdom and not with the constitution of the State of Hawai'i or the Hawaii Statehood Admission Act. These land trusts, as currently perceived, are "the direct result of Hawaii's history as an independent nation-state and the complicity of the United States in the illegal overthrow of the Hawaii Kingdom."[30] Existing federal law does not "'cloud' Hawaii's title" to the ceded lands.[31] Federal law is built upon the events following the illegal overthrow.

This article explores the implications of the equal protection framework on the ceded lands trust. How do the opinions in *Rice v. Cayetano* conceptualize the relationship of the ceded lands trust to the Native Hawaiian peoples and the role of the United States in that relationship? I argue that, given the history of the lands that comprise the ceded lands trust, equal protection is not the proper analysis because the Crown and Government lands trust is not about the allocation of benefits by the government. It is about guaranteeing self-determination.

Indeed, it is the land itself that belongs to the Native Hawaiian peoples, not merely a portion of the revenue generated from the lands. The return of the lands to Native Hawaiians would further their self-determination and be consistent with international recognition of the rights of indigenous peoples. Moreover, it would be consistent with the original trust purpose under Kingdom law. Understanding the trust and the trust res through the lens of self-determination offers an alternative to the equal protection analysis that directly addresses certain moral and legal wrongs perpetrated against the Native

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26. *See infra* Part III-B-1.

27. *See* JACKIE MAHI ERICKSON, TITLE SEARCHING FOR THE NON-PROFESSIONAL 9 (1980).

28. *See infra* Part III-B.

29. See *infra* text accompanying notes 98-99 for a brief discussion of the overthrow.

30. Mililani B. Trask, Rice v. Cayetano*: Reaffirming the Racism of Hawaii's Colonial Past*, 3 ASIAN-PAC. L. & POL'Y J. 352, 355 (2002).

31. Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1436, 1445 (2009).

Hawaiian people and thus provides a means of reconciliation between the United States and the Native Hawaiian people.

Part II of this article provides background information about the *Rice* case and an analysis of each of the opinions from the perspective of self-determination. Part III provides the history of land in Hawai'i and, specifically, of the groupings that make up the ceded lands trust. This section highlights the critical legal moments that underscore the impropriety of the equal protection analysis as applied to the trusts. Moreover, it demonstrates that the Mahele secured the rights of the Native Hawaiian people to the Crown and Government lands. Lastly, Part III discusses the recent United States Supreme Court decision in *Hawaii v. Office of Hawaiian Affairs*. Part IV concludes that the purpose of the ceded lands trust is not to achieve equality among citizens. Its purpose remains as King Kamehameha III mandated in 1848: these lands are meant to provide for the Native Hawaiian people throughout time. The Native Hawaiian people own these lands. The lands are a means for Native Hawaiian self-determination.

## *II.* Rice v. Cayetano *and the Ceded Lands Trust*

The issue of contemporary Native Hawaiian self-determination is over 115 years old, spanning the years since the illegal overthrow of the Kingdom of Hawai'i in 1893.[32] The self-determination movement has survived for generations, and although it has ebbed and flowed, it has never been abandoned. There have been numerous small steps that point to increasing opportunities for self-determination. Perhaps no modern achievement is more significant than that of the citizens of the State of Hawai'i ratifying the 1978 constitution, thereby approving the structure for administering the ceded lands trust. This constitution adopted the Hawaiian Homelands program and created the Office of Hawaiian Affairs.[33] Both entities benefit native Hawaiians through the use of Crown land and Government land ceded by the Republic of Hawaii to the United States at annexation in 1898.

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32. *See* Joint Resolution of Nov. 23, 1993, Pub. L. No. 103-150, 107 Stat. 1510, 1512-13 (acknowledging the "illegal overthrow of the Kingdom of Hawaii").

33. Under the Admission Act, the State was to administer the Hawaiian homelands, a federal homesteading program created by the Hawaiian Homes Commission Act (HHCA), and the ceded lands trust established in the Admission Act. Hawaii Statehood Admission Act, Pub. L. No. 86-3, §§ 4-5, 73 Stat. 4, 5-6 (1959). For the purposes of this article, instead of treating the ceded lands trust and the HHCA program separately, I refer to both as the ceded lands trust because my argument is based on the land and the origin of title, not the trust programs created by the United States and the State of Hawai'i.

### A. The Ceded Lands Trust[34]

"As a condition of its admission into the Union, the State of Hawai'i agreed to hold certain lands granted to the State by the United States in a public land trust for five purposes . . . ."[35] Commonly referred to as the "ceded lands trust," these lands held in trust by the State of Hawai'i are the bulk of the Crown and Government lands that the Republic of Hawaii "ceded" to the United States by the joint resolution for annexation in 1898.[36]

Section 5 of the Hawaii Statehood Admission Act (Admission Act) redefined ownership of ceded and other public lands in Hawai'i. Two basic categories were created: lands to be held by the State of Hawai'i and lands to be held by the United States. Section 5(b) transferred lands to the State that were ceded to the United States at annexation. These lands are subject to the ceded lands trust created in section 5(f). Lands the State received through succession from the Territory are not subject to the ceded lands trust,[37] though they may include

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34. The background information contained in this subsection is a lightly edited version of a subsection from R. Hōkūlei Lindsey, What "Ceded Land"?: Restoring Legitimacy to Hawai'i's Crown and Government Lands Through the Recognition of Hawaiian Native Title 52-55 (2006) (unpublished LL.M thesis, University of Wisconsin) (on file with Law Library, University of Wisconsin).

35. Office of Hawaiian Affairs v. State, 31 P.3d 901, 903 (Haw. 2001). Although once on the United Nations' list of non-self-governing territories, Hawai'i was removed following a non-conforming plebiscite, which asked all Hawai'i residents, Native and non-Native, whether Hawai'i should be admitted as a state, not offering options such as free association or independence, as the decolonization process required. *See* NATIVE HAWAIIANS STUDY COMM'N, REPORT ON THE CULTURE, NEEDS AND CONCERNS OF NATIVE HAWAIIANS PURSUANT TO PUBLIC LAW 96-565, TITLE III, at 513 (June 1983) (showing a sample of the official plebiscite ballot with the question: "Shall Hawaii immediately be admitted into the Union as a State?"); G.A. Res. 1469, at 37, U.N. GAOR, 14th Sess., Supp. No. 16, U.N. Doc. A/4354 (Dec. 12, 1959); *see also* U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, *Final Report: Study on Treaties, Agreements, and Other Constructive Arrangements Between States and Indigenous Populations*, ¶ 164, U.N. Doc. E/CN.4/Sub.2/1999/20 (June 22, 1999) (*prepared by* Miguel Alfonso Martínez) (noting that Hawai'i "could be re-entered on the list of non-self-governing territories of the United Nations and resubmitted [for decolonization]" in light of the Apology Resolution).

36. Hawaii Statehood Admission Act § 5(g) (defining the lands referred to in the Act as "the lands and properties that were ceded to the United States by the Republic of Hawaii under the joint resolution of annexation . . . or that have been acquired in exchange for lands or properties so ceded").

37. *Id.* § 5(a). The State Auditor, however, has recommended that these lands, addressed in section 5(a), be included in the ceded lands trust for ease of administration because doing so would alleviate some of the specificity that an accurate inventory would otherwise require. OFFICE OF THE LEGISLATIVE AUDITOR, STATE OF HAWAII, REPORT NO. 86-17, FINAL REPORT ON THE PUBLIC LAND TRUST 111-12 (1986) [hereinafter PUBLIC LAND TRUST REPORT].

Crown and Government lands previously transferred to the Territory by the United States. Ceded land retained by the United States is not subject to the ceded lands trust unless it has since been conveyed to the State.[38] Although the amount of Crown and Government land held by the United States is unclear, in part because federal sources report conflicting figures,[39] the State Auditor reports that between August 21, 1959 and August 21, 1964, "the State of Hawaii has become vested in more than 1.4 million acres of ceded and territorial lands,"[40] including the approximately 1.5 million acres that comprise the ceded lands trust.

Section 5(f) created the contemporary trust that *Rice v. Cayetano* left open for equal protection scrutiny. Five specific trust purposes are identified in section 5(f) that guide the management of land the State received from the Federal Government under section 5(b) or 5(e):

> The lands granted to the State of Hawaii . . . together with the proceeds from the sale or other disposition . . . and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible, for the making of public improvements, and for the provision of lands for public use.[41]

The Admission Act further directed that "[s]uch lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the . . . laws of [the] State may provide, and their use for any

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Inclusion would also increase the revenue due to OHA. *Id.* at 111. Most significantly, from a Native perspective, the historic support for such inclusion dates not to annexation but to the original Crown-and-Government-land designations.

38. *See* Hawaii Statehood Admission Act § 5(d)-(e). Section 5(e) created a five-year window for piecemeal conveyance of land retained by the United States but later determined not to be needed by the federal government. Although the United States originally conveyed only 595.41 acres under 5(e), retaining 373,719.58 acres, the five-year deadline subsequently was abolished, and in theory the federal government may at any time relinquish to the State lands not needed. NATIVE HAWAIIAN RIGHTS HANDBOOK 28-29 (Melody Kapilialoha MacKenzie ed., 1991) [hereinafter HANDBOOK] (citing Act of Dec. 23, 1963, Pub. L. 88-233, 77 Stat. 472).

39. HANDBOOK, *supra* note 38, at 30.

40. PUBLIC LAND TRUST REPORT, *supra* note 37, at 25.

41. Hawaii Statehood Admission Act § 5(f).

other object shall constitute a breach of trust for which suit may be brought by the United States."[42]

To implement the trust responsibility as it pertains to native Hawaiians, Hawai'i's 1978 Constitutional Convention authored, and Native and non-Native Hawai'i voters ratified, several constitutional amendments included in article XII.[43] The new article XII, entitled "Hawaiian Affairs," adopted the Hawaiian Homes Commission Act (HHCA), dealt with the State's trust responsibility, and established an administrative structure for the ceded lands trust's purpose to benefit Native Hawaiians.[44] The State's public trust was defined as lands granted by section 5(b) of the Admission Act, excluding those lands defined as "available lands" under the HHCA,[45] which are dedicated to the Hawaiian Home Lands program created by the HHCA.[46] The trust was further defined as having two beneficiary groups: Native Hawaiians and the general public.[47] Article XII therefore committed the State specifically to fulfilling the purpose that the ceded lands trust be used to benefit native Hawaiians.[48]

Article XII created the Office of Hawaiian Affairs (OHA), an administrative agency that was to "hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians."[49] The OHA would receive a pro rata share of revenue generated by the ceded lands trust.[50] The pro rata share due to OHA

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42. *Id.*

43. *See* HANDBOOK, *supra* note 38, at 32.

44. As a compact with the United States, the HHCA was adopted as a provision of the Hawai'i State Constitution. HAW. CONST. art. XII, §§ 1-3; Hawaii Statehood Admission Act § 4. Although the federal government retained oversight by requiring consent for amendments relating to certain aspects of the Act, the State administers the program. HAW. CONST. art. XII, §§ 1-2; Hawaii Statehood Admission Act § 4. Lands that make up the Hawaiian Home Lands are Crown and Government lands.

45. HAW. CONST. art. XII, § 4.

46. *Id.* § 1; Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, § 204, 42 Stat. 108, 110 (1921).

47. HAW. CONST. art. XII, § 4.

48. *Id.*; Trustees of the Office of Hawaiian Affairs v. Yamasaki, 737 P.2d 446, 449-51 (Haw. 1987). Prior to the adoption of article XII, "public education became the primary beneficiary of the [ceded lands] trust" because State constitutional language and implementing legislation lacked specific direction. *Id.* at 451.

49. HAW. CONST. art. XII, § 5. The State adopted the HHCA definition of Native Hawaiian and expanded its responsibility by including "Hawaiians," "any descendant of the aboriginal peoples [who inhabited Hawai'i by] 1778, and which peoples thereafter have continued to reside in Hawaii," as OHA beneficiaries. HAW. REV. STAT. § 10-2 (2009).

50. HAW. CONST. art. XII, § 6.

was set by the legislature at twenty percent.[51] Two Native groups were identified as beneficiaries of OHA: (1) "native Hawaiians"[52]—the group identified by the HHCA as consisting of individuals of fifty-percent-or-more blood quantum[53]—and (2) "Hawaiians"[54]—who, like "native Hawaiians," descend from the original inhabitants who exercised sovereignty but have less than fifty-percent blood quantum.[55] Because the beneficiaries of OHA were limited to the Native population, eligible voters for the nine-member OHA board of trustees were required to be "Hawaiian."[56] The reasoning was logical—such a voting requirement would provide direct beneficiary participation and trustee accountability. *Rice v. Cayetano* challenged, and the United States Supreme Court struck down, the OHA voting prerequisite.[57]

*B.* Rice v. Cayetano

The *Rice* decision has been criticized for many reasons: its uncritical analysis of race,[58] its failure to account for the distinctive narrative of the Native Hawaiian people,[59] and its meaning in Federal Indian law.[60] The scholarly analyses of the decision and its treatment of race and sovereignty, like the case itself, are constructed within the scope of equal protection. If Native Hawaiians are congressionally recognized as an indigenous Native people, then their status is analogous to Native American tribes, and the trust is likely subject to the more lenient rational-basis analysis. If they are not recognized, then Native Hawaiians are only an ethnic or racial minority, and the trust is likely subject to strict-

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51. *See* HAW. REV. STAT. § 10-13.5. Apparently, the legislature adopted the view that OHA served one of five trust purposes, rather than one of two beneficiary groups, as the constitution envisioned. If the legislature had set the pro rata share according to the number of beneficiary groups, OHA would be entitled to fifty percent instead of twenty percent of revenue generated by the ceded lands trust.

52. HAW. CONST. art. XII, § 5.

53. HAW. REV. STAT. § 10-2.

54. HAW. CONST. art. XII, § 5.

55. HAW. REV. STAT. § 10-2.

56. HAW. CONST. art. XII, § 5.

57. 528 U.S. 495 (2000).

58. *See, e.g.*, 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 (2000-2001).

59. *See, e.g.*, David Barnard, *Law, Narrative, and the Continuing Colonialist Oppression of Native Hawaiians*, 16 TEMP. POL. & CIV. RTS. L. REV. 1 (2006).

60. *See, e.g.*, Frank Shockey, *"Invidious" American Indian Tribal Sovereignty:* Morton v. Mancari *contra* Adarand Constructors, Inc., v. Pena, Rice v. Cayetano, *and Other Recent Cases*, 25 AM. INDIAN L. REV. 275 (2000-2001).

scrutiny analysis. The unresolved status of the Native Hawaiian people divided the court, leaving the question of whether the Native Hawaiian purpose of the ceded lands trust would survive equal protection scrutiny.

The division of the Court indicates that it generally envisions two possible fates for the ceded lands trust. One outcome, hinted at by the majority, is a finding that the State's implementation of the purpose of Section 5(f)—"the betterment of the conditions of native Hawaiians"—violates the Equal Protection Clauses the Fifth and Fourteenth Amendments, and that purpose is therefore invalid. A second possibility, similar to the concepts addressed in the concurrence, is for Congress explicitly to acknowledge that Native Hawaiians and the United States have a special political relationship. Neither option is an exercise of self-determination.

*1. The* Rice *Dissent*

The dissenting opinions[61] misapplied the concept of self-determination and sided with the broadest form of the State's defense. The dissent found that the history of colonization and subjugation at the hands of the United States that is shared by Native Hawaiians and American Indians, combined with Congress's pattern of treating Native Hawaiians like American Indians,[62] should be determinative, and thus Native Hawaiians should be recognized with a status similar to that of American Indians.[63] Therefore, rational-basis analysis should be applied to OHA and the native Hawaiian purpose of the ceded lands trust.[64] This approach would maintain the status quo by protecting not only the OHA voting requirement but the ceded lands trust structure itself, as well as the more than 160 pieces of federal legislation[65] dealing with Native Hawaiians. Under this logic, OHA is the vehicle for carrying out the "special trust relationship" with Native Hawaiians. The special trust relationship exists under Federal Indian law between the United States government and recognized indigenous

61. Justice Ginsburg joined Justice Stevens in part but found it unnecessary, given the equal protection analysis, to address the Fourteenth and Fifteenth Amendments separately. *Rice*, 528 U.S. at 547-48 (Ginsburg, J., dissenting).

62. There are over 160 pieces of federal legislation treating Native Hawaiians like American Indians. *See* Brief for the Hawai'i Congressional Delegation as Amicus Curiae Supporting Respondent at 4, Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818), 1999 WL 557289 [hereinafter Hawai'i Congressional Delegation Brief]. The brief's appendix provides a table of all federal legislation affecting Native Hawaiians.

63. *Rice*, 528 U.S. at 534 (Stevens, J., dissenting).

64. *Id.*

65. *See* Hawai'i Congressional Delegation Brief, *supra* note 62, at 4.

peoples within United States borders.[66] It is because of this special trust relationship that rational-basis scrutiny is applied to programs benefiting members of recognized tribes.[67]

Congress, exercising its plenary power over Native peoples, delegated the special trust responsibility for Native Hawaiians to the State by the terms of the Admission Act.[68] Justice Stevens, joined by Justice Ginsburg, found that there was a "purposefully created and specialized 'guardian-ward' relationship" between the United States and Native Hawaiians.[69] As a result of this special trust relationship, "legislation targeting native Hawaiians must be evaluated according to the same understanding of equal protection . . . applied to the Indians on the continental United States: that 'special treatment . . . be tied rationally to the fulfillment of Congress' unique obligation' toward the native peoples."[70]

Thus, the State's several reasons for establishing OHA—"to carry out the duties of the trust relationship between the islands' indigenous peoples and the Government of the United States; to compensate for past wrongs to the ancestors of these peoples; and to help preserve the distinct, indigenous culture that existed for centuries" before Western contact[71]—are rationally tied to fulfilling Congress's unique obligation to Native Hawaiians that was delegated to the State as a condition of statehood. Accordingly, the OHA voting requirement is valid.

Although acknowledging history and the necessity of redress and reconciliation between the Native Hawaiian people and the United States, the dissent endorsed the State's structure without considering the incongruity of Native Hawaiian autonomy run by a state-created agency. Self-determination, by definition, must come from within the community concerned; at the core of the concept of self-determination is a community's right to "freely determine [its] political status."[72] Thus, to be a true manifestation of self-determination,

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66. *See Rice*, 528 U.S. at 529-31 (Stevens, J., dissenting) (explaining the fiduciary relationship and Congress's plenary power under Federal Indian law). *See generally* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 305-06 (4th ed. 1998).

67. Morton v. Mancari, 417 U.S. 535, 555 (1974). The Court found that a Bureau of Indian Affairs hiring preference for persons who were of one-fourth-or-more-degree Indian blood and members of a recognized tribe was not a "'racial' preference" but "reasonably and directly related to a legitimate, nonracially based goal," namely, "to further the cause of Indian self-government." *Id.* at 553-54.

68. *Rice*, 528 U.S. at 537 (Stevens, J., dissenting).

69. *Id.* at 534.

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

71. *Id.* at 528.

72. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, art. 3, U.N. Doc. A/Res/61/295 (Oct. 2, 2007) [hereinafter U.N. Declaration]; *see also* S. JAMES ANAYA,

OHA would need to be autonomous from the State, not merely semi-autonomous, and—more critically—created by the Native Hawaiian community, rather than the State. Even under the internal self-determination policy of the United States, Native governments are separate from state governments.

*2. The* Rice *Concurrence*

Justice Breyer, joined by Justice Souter, concurred in the result reached by the majority but went further to say "the record makes clear that (1) there is no 'trust' for native Hawaiians here, and (2) OHA's electorate, as defined in the statute, does not sufficiently resemble an Indian tribe."[73] These two points, according to the concurring opinion, "destroy the analogy" to American Indians.[74] This conclusion leaves Native Hawaiians to be classified as a racial minority. If Native Hawaiians are a racial minority under the law, strict scrutiny would apply to government programs benefitting them. That there is no trust for Native Hawaiians comes from reading the Admission Act as having four purposes that benefit "*all* of Hawaii's citizens, as well as for the betterment of those who are 'native.'"[75] Here, the concurrence seems to go further than the majority because the majority limited the issue to be decided to the Fifteenth Amendment and assumed the validity of the underlying trust for Native Hawaiians.

A second aspect of the concurrence, however, tempers that reading. The breadth achieved by including the larger group of "Hawaiians" in the OHA electorate was, according to Justice Breyer, unlike "any actual membership classification created by any actual tribe."[76] By his count, the definition of "Hawaiian" includes "individuals who are less than one five-hundredth original

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INDIGENOUS PEOPLES IN INTERNATIONAL LAW 104 (2nd ed. 2004). "In essence, self-determination comprises a standard of governmental legitimacy within the modern human rights frame." *Id.* Thus,

> [w]hen institutions are born or merged with others, when their constitutions are altered, or when they endeavor to extend the scope of their authority, these phenomena are the domain of constitutive self-determination. Constitutive self-determination does not itself dictate the outcome of such procedures; but where they occur it imposes requirements of participation and consent such that the end result in the political order can be said to reflect the collective will of the people, or peoples, concerned.

*Id.* at 105.

73. *Rice*, 528 U.S. at 525 (Breyer, J., concurring in result).

74. *Id.* at 527.

75. *Id.* at 525.

76. *Id.* at 527.

Hawaiian (assuming nine generations between 1778 and the present)."[77] Justice Breyer's opinion therefore implies that under different circumstances, such as an argument grounded in explicit congressional recognition rather than the Admission Act, and with a reasonably limited definition of membership (perhaps limited only to the smaller "native Hawaiian" group), a special trust relationship is possible.[78]

The concurring opinion's struggle with membership and its reasonable limits bears only on tangential details of the case.[79] But in terms of self-determination, the treatment of the question of Native identity is one best left to the Native community itself.[80] The significance of the definitions in *Rice* is that they are state-created, whereas the appropriate standard for membership in an indigenous community is created by the community.[81] Multiple examples exist of indigenous communities in the United States and abroad that define their membership without reference to blood quantum.[82] Their method works coextensively with the concept of self-determination, which includes a community's right to "freely determine their political status" and to "freely pursue their economic, social, and cultural development."[83] Even as understood by Federal Indian law, defining membership is a sovereign priority of the tribe itself, while a determination of indigenous status is made by Congress.[84]

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77. *Id.* at 526; *see also* VAN DYKE, *supra* note 14, at 283 n.57 ("Although [Breyer's] scenario is theoretically possible, it must be extremely rare . . . . As a practical matter, the maximum dilution of Hawaiian blood is . . . five or at most six generations, and the minimum amount of Hawaiian blood that one is likely to find today is 1/32, or rarely 1/64.").

78. *See Rice*, 528 U.S. at 527 (Breyer, J., concurring in result).

79. For example, section 5(f) identifies "native Hawaiians," meaning those of not less than fifty-percent blood quantum (as defined by the HHCA), as beneficiaries of the ceded lands trust. Hawaii Statehood Admission Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 4, 6 (1959). The OHA, however, serves those who have fifty-percent-or-greater Native Hawaiian blood quantum as well as those who are of less-than-fifty-percent Native Hawaiian blood quantum. Thus, primary reliance on the Admission Act for the creation of a trust relationship and justification for the voting prerequisite bears direct relation only to those who meet the fifty-percent blood quantum threshold. As Justice Stevens notes, however, the issue in this case is "*Congress'* power to define who counts as an indigenous person, and *Congress'* power to delegate to States its special duty to persons so defined." *Rice*, 528 U.S. at 535 n.11 (Stevens, J., dissenting).

80. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978) (noting that a "tribe's right to define its own membership . . . has long been recognized as central").

81. *See* U.N. Declaration, *supra* note 72, at art. 33 ("Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions.").

82. *See* VAN DYKE, *supra* note 14, at 283 n.57.

83. *See* U.N. Declaration, *supra* note 72, at art. 3.

84. *Rice*, 528 U.S. at 535 n.11 (Stevens, J., dissenting). Even Justice Breyer acknowledged that a tribe has "broad authority to define its membership." *Id.* at 527 (Breyer, J., concurring

*3. The* Rice *Majority*

Justice Kennedy's majority opinion, although professing to stay "far off that difficult terrain"[85] of the status of Native Hawaiian people, commented that before accepting the State's analogy comparing the status of Native Hawaiians to that of American Indians, the Court would have to conclude that "Congress, in reciting the purposes for the transfer of lands to the State . . . has determined that native Hawaiians have a status like that of Indians in organized tribes, and that it may, and has, delegated to the State a broad authority to preserve that status."[86] Before leaving the topic of what the majority characterized as the State's "most far reaching" argument,[87] the Court raised the question of whether, under the Indian Commerce Clause, Congress could treat Native Hawaiians like American Indian tribes.[88] The essence of the issue is that the Indian Commerce Clause speaks of Congress's power to deal with "Indian tribes."[89] The Native Hawaiian people are not organized as a "tribe." Nor do they identify themselves within tribal groupings. Moreover, the law treats Native Hawaiians as individuals rather than as a group governed by a sovereign entity, which is what the tribe represents in Federal Indian law. Without such an entity, with what does Congress (or the state) have a trust relationship? The majority thus seems to wonder how, if there is no tribe or governing entity for Congress to deal with, there can be a trust relationship.

The rule for organizing a government entity under the principle of self-determination is easy to apply but a challenge to realize: the governing entity must be organized by the Native Hawaiian people as an exercise of self-determination.[90] Hawaiian self-determination cannot be accomplished by congressional mandate or initiation.

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in result) (citing *Martinez*, 436 U.S. at 72 n.32).

85. *Id.* at 519 (majority opinion).

86. *Id.* at 518.

87. *Id.*

88. *Id.* at 518-19 (citing Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95 (1998); Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537 (1996)).

89. U.S. CONST. art. I, § 8, cl. 3.

90. A number of scholars and many Hawaiian nationalist groups argue that the Hawaiian Kingdom exists in exile because it was never legally overthrown. *See, e.g.*, Francis Anthony Boyle, *Restoration of the Independent Nation State of Hawaii Under International Law*, 7 ST. THOMAS L. REV. 723 (1995); David Keanu Sai, *A Slippery Path Towards Hawaiian Indigeneity: An Analysis and Comparison Between Hawaiian State Sovereignty and Hawaiian Indigeneity and Its Use and Practice in Hawai'i Today*, 10 J. L. & SOC. CHALLENGES 68 (2008).

*C. Self-Determination*

Though rooted in the United Nations Declaration on Human Rights, self-determination in the context of indigenous peoples has been used to describe their rights in relation to the nation-states in which they live rather than the "inherent and inalienable right . . . which exist[s] beyond mere recognition of governments."[91] The United Nations Declaration on the Rights of Indigenous Peoples states, "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[92] Professor S. James Anaya explains self-determination as having a constitutive aspect and an ongoing aspect. The constitutive aspect "requires that the governing institutional order be substantially the creation of processes guided by the will of the people, or peoples, governed."[93] This is the aspect that the *Rice* dissent did not question with regard to OHA. The ongoing aspect "requires that the governing institutional order, independently of the processes leading to its creation or alteration, be one under which people may live and develop freely on a continuous basis."[94]

Today, Crown and Government lands represent a means of self-determination. They provide a territorial base to establish the constitutive aspect and the land base on which to exercise the ongoing aspect: to live and develop. At the time of their creation, however, they already represented the ongoing aspect. The Crown and Government lands were intended to provide a small-scale institutional order under which Native Hawaiians could live even if the Crown should lose its sovereign authority. The Mahele maintained Native rights in land—rights that continue to exist.

## *III. "Trust" Precepts: Hawaiian Land Through Time*

By 1843, the Hawaiian Kingdom was officially recognized as an independent and civilized nation by the three Western powers in the Pacific in the mid-1800s: the United States,[95] Great Britain, and France.[96] Although arguably functioning as an independent nation in an international sense at least since the first Europeans arrived in Hawai'i, the significance of international recognition of the Kingdom's sovereignty and independence by the three nations was that each

91. ANAYA, *supra* note 72, at 98.
92. U.N. Declaration, *supra* note 72, at art. 3.
93. ANAYA, *supra* note 72, at 104-05.
94. *Id.* at 105.
95. 1 RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM, 1778-1854, at 194-96 (1938).
96. *Id.* at 203.

explicitly and implicitly agreed that the Hawaiian Kingdom would remain independent and none would try to acquire the Hawaiian Islands as a colony.

Nonetheless, in 1893 the Kingdom was overthrown by businessmen of European and American descent, supported by the military power of the United States, in violation of the treaties of peace and friendship existing between the U.S. and the Hawaiian Kingdom.[97] The perpetrators of the overthrow of the Kingdom had planned on immediate annexation to the United States, but when that was not realized they formed the Republic of Hawaii to govern in the interim.[98] In 1898, Hawai'i was annexed to the United States, and the Crown and Government lands were ceded to the U.S.[99] When Hawai'i became a state in 1959, the Admission Act purported to create a new trust regime for the Crown and Government lands (the ceded lands).[100] But the "native Hawaiian purpose" of the ceded lands trust traces to the Kingdom and is born of the Hawaiian aboriginal order.[101]

When the land trusts that became the ceded lands trust are understood in the whole context of their existence, it is clear that their purpose is not to allocate benefits to Native Hawaiians simply because they are an indigenous and native people. Rather, the purposes of the original trusts were to support the Native Hawaiian people and protect the sovereignty of the Kingdom. These trusts were created in contemplation of the land trust paradigm practiced before Western contact and codified by Kauikeaouli, who reigned as Kamehameha III from 1825 to 1854.[102]

To be valid, land title must trace to Kauikeaouli and Kingdom law.[103] In Hawai'i title does not trace to the legal fiction created by the United States Supreme Court in *Johnson v. M'Intosh*[104] or to the international-law doctrine of discovery. When Chief Justice John Marshall delivered the *Johnson* opinion in 1823, the Hawaiian Islands were a unified kingdom, and its lands were managed

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97. *See* Joint Resolution of Nov. 23, 1993, Pub. L. No. 103-150, 107 Stat. 1510, 1510 (stating that "diplomatic recognition [was extended by the United States Minister] to the Provisional Government . . . in violation of treaties between the two nations and of international law").

98. RALPH S. KUYKENDALL & A. GROVE DAY, HAWAII: A HISTORY 183 (rev. ed. 1961).

99. Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, Res. No. 55, 55th Cong., 30 Stat. 750 (1898).

100. *See* Hawaii Statehood Admission Act, Pub. L. No. 86-3, § 5, 73 Stat. 4, 6 (1959).

101. *See infra* Part III-B-2.

102. 1 KUYKENDALL, *supra* note 95, at 117.

103. ERICKSON, *supra* note 27, at 9.

104. 21 U.S. (8 Wheat.) 543, 592 (1823) (holding that the United States held title to land within its borders, while Indian tribes have a right of occupancy).

according to the aboriginal order. The Kingdom's first Constitution was granted by Kauikeaouli in 1840 and guaranteed protection under the law for the chiefs, the people, and their property.[105] Merchants in Hawai'i, however, viewed land privatization as essential to economic security.[106] The missionaries believed that privatization was key to the redemption of the Native population.[107] By design and circumstance, this coalition made certain that Kauikeaouli appreciated the urgency of land privatization, such that by 1848 the Kingdom began in earnest a process to make private land ownership a reality.[108] As part of the privatization process, Kauikeaouli created the groupings of Crown land and Government land.[109]

Land privatization had two important consequences related to a modern analysis of the ceded lands trust. First, the groupings of Crown land and Government land were created subject to explicit and implicit trusts under Kingdom law. Second, the descendants of the members of the missionary-merchant coalition inherited and acquired vast tracts of land, becoming extremely wealthy sugar-plantation owners, bankers, and businessmen.[110] Eventually, the greed and racism of some missionary-merchant descendants inspired treason. They experienced declining profits due to new tariffs on sugar

105. TRANSLATION OF THE CONSTITUTION AND LAWS OF THE HAWAIIAN ISLANDS, ESTABLISHED IN THE REIGN OF KAMEHAMEHA III 10 (1842) [hereinafter 1840 CONST. OF HAWAIIAN ISLANDS] ("Protection is hereby secured to the persons of all the people, together with their lands, their building lots, and all their property, while they conform to the laws of the kingdom, and nothing whatever shall be taken from any individual except by express provision of the laws."). The Constitution of the Kingdom of Hawaii was promulgated in 1840 in the Hawaiian language and was first published in English in 1842.

106. LILIKALĀ KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES 201 (1992).

107. *Id.* at 202.

108. *Id.* at 208.

109. *Id.* at 225.

110. The corporations they formed became known in Hawai'i as the "Big Five": Castle & Cooke, Alexander & Baldwin, American Factors, Theo H. Davies, and C. Brewer. GEORGE COOPER & GAVAN DAWS, LAND AND POWER IN HAWAII 3 (paperback ed., Univ. of Haw. Press 1990) (1985). Dating to the nineteenth century, most of them were heavily interlocked in personal and business relationships well into the twentieth century: "As late as 1959, for example, Alexander & Baldwin had directors in common with American Factors and Castle & Cooke; American Factors, in turn, had a director in common with Brewer, and Castle & Cooke with Davies." *Id.* Their power and influence is further illustrated by their interest in Matson Navigation Co., the major freight carrier in Hawai'i: "Four of the Big Five owned 74% of Matson's stock and nine Big Five directors sat on Matson's board." *Id.*

imported to the United States,[111] and they loathed a Native-controlled, nationalist government.[112] In 1893, they overthrew Queen Lili'uokalani.[113]

When the traitors' plan to win immediate annexation to the United States failed, they formed the Republic of Hawaii[114] and created a legal fiction regarding the status of the Crown land and Government land: that they were public domain.[115] Upon annexation to the United States in 1898, the Crown land and Government land were ceded to the United States subject to a "special trust."[116] In 1959, most of the "ceded lands" were transferred to the State of Hawai'i, and section 5(f) of the Admission Act created a land trust with five trust purposes.[117]

This section presents the process that began land privatization and the creation of the categories of Crown lands and Government lands. The section then traces the Crown land and Government land to the present-day 5(f) trust. The importance of this history is that it explains how these land groupings were created, the purpose they were intended to serve, and why the lands are administered as they are today. Moreover, it provides the foundation for the argument that equal protection is not the appropriate analysis to apply to the administration of the trusts for Native Hawaiians.

### *A. Mālama 'Āina: Traditional Landholding*

The Native Hawaiian worldview embodied a cosmogonic genealogy where the akua (gods),[118] 'āina (land),[119] and kanaka (people)[120] shared in an interconnected harmony that was familial in nature and marked by mutual affection but ultimately maintained by reciprocal responsibility. "[I]t [was] the duty of younger siblings and junior lineages to love, honor, and serve their elders. . . . [I]t [was] the reciprocal duty of the elder siblings to *hānai* (feed) the

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111. TOM COFFMAN, NATION WITHIN: THE STORY OF AMERICA'S ANNEXATION OF THE NATION OF HAWAII 92-93, 106-07 (1998).

112. *Id.* at 82.

113. *See id.* at 39-52.

114. *See id.* at 317, 321.

115. CONST. OF THE REPUBLIC OF HAWAII art. 95 (1894).

116. 22 Op. Att'y Gen. 574, 576 (1899) ("[T]he public lands in Hawaii [are subject] to a special trust, limiting the revenue from or proceeds of the same to the uses of the inhabitants of the Hawaiian Islands for educational or other public purposes. . . . Congress [has] the exclusive right, by special enactment, to provide for the disposition of public lands in Hawaii.").

117. *See* Lindsey, *supra* note 34, at 52-55.

118. MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 14 (1973).

119. *Id.* at 10.

120. *Id.* at 118.

younger ones, as well as to love and *ho'omalu* (protect) them."[121] Hawaiian tradition teaches that the islands were born of the 'akua and that the Native Hawaiian people are the younger siblings of the 'āina.[122] In the practice of mālama 'āina (the Native Hawaiian landholding pattern, literally "to care for the land"),[123] then, the Native Hawaiian people, as the junior lineage, honored the 'āina through careful management and cultivation. The 'āina provided an abundance of food because of proper tending by the kanaka, who were then also able to honor the akua with tribute. The akua, having the power to regulate the earth and all that was seen and unseen, would in turn keep the 'āina fertile and protect the kanaka: "So long as younger Hawaiians love, serve, and honor their elders, the elders will continue to do the same for them, as well as to provide for all their physical needs."[124] When these duties were properly exercised, a fine balance and harmony were achieved within the Hawaiian universe.

Genealogical responsibilities and metaphors defined Native Hawaiian relationships within the physical and spiritual worlds. These duties and relationships patterned traditional Hawaiian society. In practical terms they also maintained a hierarchical social order.[125] Traditional Hawaiian society had four distinct classes of people: the ali'i (chiefs),[126] the kahuna (priests),[127] the maka'āinana (commoners),[128] and the kauwā (outcasts).[129] As learned through the genealogical teachings, each subordinate class served the classes above it, and each superior class was bound to care for the lower classes. There were also several subordinate ranks within the ali'i and kahuna classes, creating a buffer between the highest-ranking ali'i and the common population, maka'āinana.[130]

> In the Hawaiian way of thinking, all directives in society emanate from the *Akua*, who on earth are represented by the *Ali'i Nui* [high chiefs], those Gods visible to humans. The role of *Ali'i Nui*, as mediators between the divine and human, was to placate and manipulate those more dangerous and unseen *Akua* whose powers regulated the earth and all the awesome forces of nature. . . .

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121. KAME'ELEIHIWA, *supra* note 106, at 25.
122. *See id.*
123. *Id.* at 25.
124. *Id.*
125. *See id.* at 22.
126. PUKUI & ELBERT, *supra* note 118, at 19.
127. *Id.* at 106.
128. *Id.* at 207.
129. *Id.* at 128.
130. KAME'ELEIHIWA, *supra* note 106, at 45-46.

> From this standpoint, *Ali'i Nui* were the protectors of the *maka'āinana*, sheltering them from terrible unseen forces. Should an *Ali'i Nui* neglect proper ritual and pious behavior, surely a famine or calamity would ensue. Should a famine arise, the *Ali'i Nui* was held at fault and deposed. Alternately, should an *Ali'i Nui* be stingy and cruel to the commoners, the cultivators of the *'Āina*, he or she would cease to be *pono* [righteous], lose favor with the *Akua* and be struck down, usually by the people. . . . A reciprocal relationship was maintained: the *Ali'i Nui* kept the *'Āina* fertile and the *Akua* appeased; the *maka'āinana* fed and clothed the *Ali'i Nui*.[131]

Within the hierarchy, great power and authority vested in the ali'i class. But with the ali'i's authority came great responsibility: the responsibility to administer a balanced, fruitful society. An intricate land system mirrored and sustained the complexity of Native Hawaiian spiritual and physical relationships.

Each island, or mokupuni, was divided into large districts called moku o loko (or moku), and each moku contained several smaller divisions and subdivisions.[132] Moku generally were divided into pie-cut pieces along natural geographic boundaries such as ridgelines and called ahupua'a.[133] Ideally, each ahupua'a extended from mountain to sea, containing within its boundaries all that was needed to sustain life—uplands for gathering fresh water, timber, and thatch; lowlands for taro cultivation; and an ocean area for fishing, all with communal access.[134] As such, the ahupua'a was the primary division for purposes of tribute to the ali'i and the akua.[135] Ultimately, it was the māla (large, dry areas),[136] lo'i (wetland taro patches),[137] and kīhāpai (small, dry areas)[138] that were cultivated by Native Hawaiian families.[139] This system of land division was accompanied by an equally detailed management structure, reflecting the overarching genealogical metaphor and satisfying the sacred responsibilities embodied in it: "[C]entral control was required to ensure plentiful food

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131. *Id.* at 26.
132. *Id.* at 27.
133. *Id.*
134. *Id.*
135. Marion Kelly, Changes in Land Tenure in Hawaii, 1778-1850, at 20 (June 1956) (unpublished M.A. thesis, University of Hawaii) (on file with the University of Washington Library); *see also* KAME'ELEIHIWA, *supra* note 106, at 29; NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM 40 (2004).
136. PUKUI & ELBERT, *supra* note 118, at 213.
137. *Id.* at 193.
138. *Id.* at 136.
139. Kelly, *supra* note 135, at 25.

production. Control and direction was [sic] the business of the *Ali'i Nui* [high chief]."[140]

When a new mō'ī (king/queen),[141] who was also the embodiment of the akua and the symbolic source of land, came to power, all land reverted to the new sovereign for distribution of land-management responsibilities among the ali'i. The mō'ī, however, did not own the land as understood in Anglo-American terms. Instead, the mō'ī was an intermediary to the akua, like a trustee over the land: "Control of the *'Āina* was not only the essence of sovereignty, but the correct distribution of *'Āina* was the first political act of a new *Mō'ī* and the key to ensuring *Mālama 'Āina*."[142] The process of distribution was called kālai'āina.[143]

Retaining lands for his own use, the mō'ī would distribute districts or subdistricts to ali'i and konohiki (headmen of an ahupua'a),[144] who then became supervisors over the received lands.[145] Those konohiki could designate lower-ranking chiefs to head smaller divisions.[146] Although the new mō'ī redistributed land holdings, maka'āinana were not dispossessed of the lands they worked; only the konohiki would change.[147] It was the duty of the konohiki to administer daily activities within the land divisions and to supervise the collection of tribute when required.[148] Under the supervision of kind and skilled konohiki, the land and people prospered because the tribute offered was bountiful.[149] Thus, redistribution of land was significant. The act affirmed both the mō'ī's sovereignty and divine authority and ensured the fulfillment of genealogical obligations, maintaining the metaphor and thus achieving universal balance and harmony.[150]

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140. KAME'ELEIHIWA, *supra* note 106, at 27.
141. PUKUI & ELBERT, *supra* note 118, at 231.
142. KAME'ELEIHIWA, *supra* note 106, at 56.
143. *See id.* at 83-84.
144. PUKUI & ELBERT, *supra* note 118, at 153.
145. *See* KAME'ELEIHIWA, *supra* note 106, at 25-31.
146. *See id.* at 29-30.
147. *See id.* at 29-31.
148. *See id.*
149. *See id.*
150. Although early historians and anthropologists often labeled the Hawaiian system feudal, it was not. *See* HANDBOOK, *supra* note 38, at 4. Central to feudalism are the feudal services owed to the sovereign. Maka'āinana owed no services, only tribute (and even then, those who had more gave more, while those who had nothing, like wanderers, gave nothing), nor were they tied to the soil—they could move freely to settle in another ahupua'a managed by a different ali'i, or the people could depose an ali'i who was brutal or unfair. *See* KAME'ELEIHIWA, *supra* note 106, at 25-31.

The time-honored metaphor governing the relationships among the akua, ʻāina, and kanaka was challenged by Western settlers in the Kingdom, particularly Americans. Some of these foreigners became advisors to Kauikeaouli, King Kamehameha III, and convinced him that a system of private property was in the best interest of the island Kingdom and its Native subjects.[151] They said that private ownership of land would provide security for merchants, increasing economic confidence and alleviating the imperialistic threats of foreign nations.[152] The King was further told that private ownership of land would save the weakened Native population by turning them into productive yeomen.[153]

The King, although raised in the Christian faith, routinely chose to engage in activities that were valued in the traditional metaphors but abhorred by the Christian missionaries.[154] His traditional responsibility was to protect his people and his sovereignty. He decided that private land ownership was the best strategy to address his obligations because, in the event of an overthrow, land held in private ownership would be respected, whereas land held by the government would become land of the new sovereign.[155] His analysis was that, to an uninformed eye, the traditional system looked as though all land was owned by the King in his role as sovereign, and if he were to lose his sovereignty, his metaphorical younger siblings would be dispossessed, and the Hawaiian world would become unbalanced.[156]

*B. The Mahele of 1848: Balancing Tradition and Land Privatization*

The Constitution of 1840 gave constitutional force to the Native precept that the mōʻī was a divine intermediary. The chiefs were stewards, and the people were caretakers of the land:

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151. KAMEʻELEIHIWA, *supra* note 106, at 201 ("Perhaps the most persuasive of the arguments for the *Māhele* was made by the Calvinist missionaries, whose opinions carried the greatest weight with the *Aliʻi Nui* because . . . they were the new *kāhuna*.").

152. *See* Kelly, *supra* note 135, at 120-27.

153. KAMEʻELEIHIWA, *supra* note 106, at 202.

154. *See id.* at 158.

155. Dr. Kameʻeleihiwa asserts that

> [t]he most important question of Kauikeaouli's life was how he would become a [righteous] *Mōʻī*. . . . Because *ʻĀina* was the most important basis of sovereignty for the Hawaiian *Aliʻi Nui*, Kauikeaouli's decisions on control and disposition of the *ʻĀina* were crucial. Ultimately, proper control of the *ʻĀina* to benefit [the Hawaiian nation] could designate the *Mōʻī* as [righteous]. We must weigh Kauikeaouli's decisions about the *ʻĀina* in light of his capacity to *Mālama ʻĀina*.

*Id.* at 49.

156. *See id.*

> KAMEHAMEHA I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I. was the head, and had the management of the landed property.[157]

Traditional landholding created, to use Anglo-American terminology, an undivided interest among the King, chiefs, and common people. A private-property regime in Hawai'i could not be created without addressing the undivided interest. For Kauikeaouli, creating a private-property regime was a creative and strategic undertaking to appease foreigners who wanted economic security through land ownership.[158] The ultimate design was to maintain the independence of the Kingdom and provide for the continued, collective well-being of the Native Hawaiian people.

*1. Mechanics of the Mahele*[159]

To begin the process of privatizing land, the Board of Commissioners to Quiet Land Titles (Land Commission) was established in April 1846.[160] The Land Commission was charged with "the investigation and final ascertainment or rejection of all claims of private individuals, whether natives or foreigners, to any landed property acquired anterior to the passage of this Act."[161] But there was a fundamental barrier left unaddressed when the Land Commission was established that prevented it from resolving claims on a widespread basis: the ali'i and maka'āinana held intertwined and undivided interests in most of the land in the Kingdom. Without the authority to divide land or create new interests, the Land Commission was limited to the determination of rights in land that had already been removed from the traditional landholding pattern.[162] Thus, before the Mahele, the Land Commission focused on leasehold land near the

157. 1840 CONST. OF HAWAIIAN ISLANDS, *supra* note 105, at 11-12.

158. *See infra* Part III-B-2.

159. The following subsection is lightly edited from Lindsey, *supra* note 34, at 20-32.

160. An Act to Organize the Executive Departments of the Hawaiian Islands: Article IV.—of the Board of Commissioners to Quiet Land Titles, pt. I, ch. VII, art. IV, § 1 (1846), *reprinted in* 2 REV. LAWS HAW. 2120 (1925).

161. *Id.* As required by law, five commissioners were appointed, including the minister of public instruction, William Richards, who headed the Commission; attorney general John Ricord; J.Y. Kānehoa; John Papa 'I'i; and Z. Ka'auwai. Richards and Ricord were non-Hawaiian. KAME'ELEIHIWA, *supra* note 106, at 185; 1 KUYKENDALL, *supra* note 95, at 280.

162. JON J. CHINEN, THE GREAT MAHELE 12 (1958).

ports of Honolulu and Lahaina.[163]

To guide its decision-making, the Land Commission conducted a study of the Hawaiian land system and produced a document establishing procedures to quiet land titles, which was subsequently ratified by the legislative council.[164] The Principles contained a history of Hawaiian landholding and a proposal for achieving division of the existing undivided interest:

> If the King be disposed voluntarily to yield to the tenant a portion of what practice has given to himself, he most assuredly has a right to do it; and should the King allow to the landlord one third, to the tenant one third, and retain one third himself, he, according to the uniform opinion of the witnesses, would injure no one unless himself . . . .[165]

A specific plan to achieve a division was not immediately settled. After more than a year of debate in the King's Privy Council[166] about how to divide the interests in land, a set of rules was adopted in December 1847. The rules envisioned an equal one-third division among the government, chiefs, and commoners of the land remaining after the King reserved his personal lands.[167] Instead, the division itself was a process more reflective of the traditional practice of kālai'āina: the King divided the land between himself and loyal chiefs, and the maka'āinana were left undisturbed and with their interest intact.

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163. Neil M. Levy, *Native Hawaiian Land Rights*, 63 CAL. L. REV. 848, 853 (1975).

164. Principles Adopted by the Board of Commissioners to Quiet Land Titles in Their Adjudication of Claims Presented to Them (Laws of 1847), *reprinted in* 2 REV. LAWS HAW. 2124 (1925).

165. *Id.* at 2126.

166. The Privy Council was created as part of the executive branch of the government. Its members were the ministers of the five executive departments, the four governors of the islands, and others appointed by the King. 1 KUYKENDALL, *supra* note 95, at 262-63. The Privy Council was once a check on the King's power because all official acts of the King, except the signing of laws, had to be approved by the Privy Council. *Id.* at 267-68.

167. CHINEN, *supra* note 162, at 15-16. Specifically, the rules outlined the following: (1) the King would retain his private lands as his own private property, subject to the rights of the native tenants; (2) the government, konohiki (here, meaning chiefs, regardless of rank), and tenant each had a one-third interest in the remaining land; (3) the konohiki and tenant would divide their interests on the initiative of either party; (4) tenants on the King's private land would receive one-third of the lands they actually possessed and cultivated in fee simple on the initiative of either party; (5) these divisions were not to interfere with any lands that had been granted in fee previously; (6) the konohiki would satisfy the government's one-third interest by a commutation fee of one-third of the undeveloped value of their lands or the equivalent in land; and (7) the King's personal lands were to be recorded in the same book as the konohiki lands, while government lands would be recorded separately. *Id.*

The Mahele of 1848 was the division of land among the King and his chiefs. In a three-month period, from January to March 1848, the King met individually with 245 chiefs to record the division of lands.[168] In these meetings the chiefs identified lands they desired from among those that they oversaw, and the King did the same.[169] All then quitclaimed their interest in the others' lands, subject to the rights of the Native tenants.[170] All the claims, including those of the King, were recorded in the *Buke Mahele* (Mahele Book) and made "subject to the rights of native tenants."[171] Therefore, when the Buke Mahele was closed, the maka'āinana interest remained undivided: the maka'āinana were not dispossessed of their lands, whether recorded in the Buke Mahele as King's land or that of a chief, and their rights to access, gather, and use natural resources could be exercised as they always had.[172]

When the Mahele concluded, two categories of land were created: King's lands, now known as Crown lands, and konohiki lands.[173] These categories accounted for all land not previously granted in fee simple by the King. Thus, of the approximately 4 million acres that comprise Hawai'i's land area, about 2.5 million acres were King's land and the remaining 1.5 million acres were divided among 245 chiefs.[174] The rule adopted by the Privy Council that the konohiki, government, and Native tenants each would hold a one-third interest in land not claimed by the King was never realized.[175]

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168. 1 KUYKENDALL, *supra* note 95, at 287-88.

169. *See* KAME'ELEIHIWA, *supra* note 106, at 221-223.

170. CHINEN, *supra* note 162, at 16, 20.

171. *Id.* at 29. Although beyond the scope of this article, all lands in Hawai'i remain "subject to the rights of native tenants." *See* HAW. CONST. art. XII; HAW. REV. STAT. §§ 1-1, 7-1 (2009); Pub. Access Shoreline Haw. v. Haw. County Planning Comm'n, 903 P.2d 1246 (Haw. 1995).

172. *See* CHINEN, *supra* note 162, at 29; KAME'ELEIHIWA, *supra* note 106, at 225; Mâivan Clech Lâm, *The Kuleana Act Revisited: The Survival of Traditional Hawaiian Commoner Rights in Land*, 64 WASH. L. REV. 233 (1989) (arguing that the Kuleana Act, which enabled land awards to commoners who claimed the lands they cultivated, did not extinguish any traditional and customary maka'āinana rights in land).

173. In order to receive a Royal Patent (fee title to their lands) the chiefs were required to pay a commutation fee to the government. KAME'ELEIHIWA, *supra* note 106, at 288, 306.

174. HANDBOOK, *supra* note 38, at 7. Lands were awarded according to their traditional names and boundaries. As a result, claims in the Buke Mahele are listed by individual place names, not by acreage. The totals are thus most accurately tabulated by parcels: at the closing of the Buke Mahele, 934 parcels were claimed by the King. He subsequently gave 790 parcels to the government and retained 144 parcels as Crown lands. KAME'ELEIHIWA, *supra* note 106, at 233.

175. *Cf.* Lâm, *supra* note 172, at 266 ("The government of Kamehameha III, I submit, contemplated this division all along, because it would have secured the traditional livelihood

*2. Creation and Purpose of Crown Land and Government Land*

Instead, Kauikeaouli made one final division that was an act of generosity for the benefit of his people—the kind of act expected of a great ali'i.[176] Kauikeaouli divided his personal lands, the King's land, into two parts: he kept 1 million acres as his personal lands, and he granted 1.5 million acres "to have and to hold to my chiefs and people forever," stipulating that "[t]hese lands are to be in the perpetual keeping of the Legislative Council . . . ."[177] The lands in this grant are known as Government lands. In making this final division the King sealed two instruments, both of which were confirmed by the Legislature.[178]

One instrument retained his personal lands, all identified and listed by name. "[T]hese lands," he decreed, "are set apart for me and for my heirs and successors forever, as my own property exclusively."[179] That Kauikeaouli wanted a clear separation between land belonging to the government and land belonging to him personally was evident since the beginning of the Mahele process; he did not want his lands to be confused with Government lands.[180] His strategy was to "free his lands from the burden of being considered public domain, and as such, subjected to the danger of confiscation in the event of his islands being seized by any foreign power."[181] Achieving this measure of protection for his personal lands meant that, in the event of an overthrow, the Native Hawaiian people would also be protected because he (or his heirs) could still provide land for their well-being.[182]

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of the maka['Ā]inana, which was the stated aim of his government, as early as 1839.").

176. KAME'ELEIHIWA, *supra* note 106, at 233.

177. *In re* Estate of His Majesty Kamehameha IV, 2 Haw. 715, 723 (Haw. 1864) (providing an English translation of the King's documents, which were written in Hawaiian).

178. *Id.* at 717.

179. *Id.* at 723.

180. KAME'ELEIHIWA, *supra* note 106, at 220.

181. *Estate of Kamehameha IV*, 2 Haw. at 722.

182. *See* KAME'ELEIHIWA, *supra* note 106, at 208, 220. Rooted in tradition, the concept of a "trust" to ensure the maka'āinana were provided for was consistently repeated by the ali'i. Several of these trusts survive today, commonly referred to as the ali'i trusts. For example, Princess Bernice Pauahi Bishop, also of the Kamehameha line, put her lands in trust and created the Kamehameha Schools, giving preference to Native Hawaiian children; Lunalilo, also a Kamehameha, reigned from 1873-1874 and left his lands to the Lunalilo Home for elderly Native Hawaiians; Queen Lili'uokalani, the last reigning monarch, left the bulk of her land in trust and created the Queen Lili'uokalani Children's Center, which provides social services for orphans and other Native Hawaiian children in need. *See* VAN DYKE, *supra* note 14, at 307-43 (discussing the ali'i trusts).

The other instrument was also intended to secure the welfare of his people. It conveyed all the King's "right, title and interest in the lands . . . inscribed on pages 179 to 225 [of the Buke Mahele] to have and to hold to my chiefs and people forever."[183] These lands were to be held by the Legislative Council "for the good of the Hawaiian Government, and to promote the dignity of the Hawaiian Crown."[184] This transfer would protect his people by "promot[ing] the prosperity of this Kingdom and the dignity of the Hawaiian Crown."[185]

Thus, the Government lands would provide for his people by strengthening the Kingdom's independence while the King's lands guaranteed the continuation of traditional responsibilities, allowing the King to protect his people directly. Through his act the King established two trusts for the Native Hawaiian people, both imbued with traditional precepts and both to be held for the benefit of the Native Hawaiian people. Like the practice of kālai'āina, the Mahele affirmed Kauikeaouli's control of 'āina: he granted the chiefs land, he created the Government lands for the benefit of the chiefs and people, and he retained the King's land as his own.[186] Moreover, it strengthened his sovereignty—land was privatized, securing Hawai'i as a civilized nation—and Kauikeaouli would be able to protect his people. His achievement was significant both in a traditional and contemporary context. To create the trusts the King balanced traditional precepts with the modern legal reality that he faced. Privatization of land was not "merely thrust upon [an] unresponsive . . . societ[y]."[187] Indeed, it was the "outcome of an interaction."[188] In modern terms, it was an act of self-determination intended to enable continued self-determination. It sealed Native Hawaiians' interests as owners, practitioners, and beneficiaries.

### *C. Hawaiian National Lands: Survival of the Crown and Government Lands' Purpose*

Today, the Crown lands and Government lands are known collectively as "ceded lands." How they came to be known as ceded lands explains why they were placed in the ceded lands trust. Moreover, this history explains why Native Hawaiians are specifically named as beneficiaries. The ceded lands trust is a direct result of the history behind the groupings of Crown and Government

183. *Estate of Kamehameha IV*, 2 Haw. at 723.

184. *Id.*

185. *Id.* at 717.

186. *Cf.* KAME'ELEIHIWA, *supra* note 107, at 217-18.

187. Heinz Klug, *Defining the Property Rights of Others: Political Power, Indigenous Tenure and the Construction of Customary Land Law*, 35 J. LEGAL PLURALISM 119, 127 (1995).

188. *Id.*

lands. Indeed, the land trusts, established by Kauikeaouli for the purpose of protecting and serving as a means for Hawaiian self-determination, still survive.

The goal of the Republic of Hawaii was not Native Hawaiian self-determination. The Republic, after all, was the creation of the same group who orchestrated the Kingdom's overthrow. Calling themselves the Committee of Safety, a band of thirteen non-Native businessmen and lawyers overthrew Queen Lili'uokalani in 1893 with the help of United States Foreign Minister John L. Stevens, who made sure United States Marines landed with their cannons aimed at 'Iolani Palace, where the Queen resided.[189] Their goal was the annexation of Hawai'i to the United States, and their strategy was to invent the air of legitimacy that they lacked immediately following the overthrow.[190] To create the look of democracy and permanence, the traitors held a constitutional convention in 1894 but made sure it functioned in a way that guaranteed their continued control.[191] Having predetermined the outcome of the convention, the traitors were free to make up law that would serve their desired ends.

The Constitution of the Republic of Hawaii manufactured a legal history for the Crown and Government lands. Article 95 declared the Crown lands public domain:

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189. *See* Joint Resolution of Nov. 23, 1993, Pub. L. No. 103-150, 107 Stat. 1510, 1510 (stating that "in pursuance of the conspiracy to overthrow the Government of Hawaii, the United States Minister and the naval representatives of the United States caused armed naval forces of the United States to invade the sovereign Hawaiian nation . . . and to position themselves near the Hawaiian Government buildings and the Iolani Palace to intimidate Queen Liliuokalani and her Government").

190. *See* KUYKENDALL & DAY, *supra* note 98, at 183.

191. 3 RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM, 1874-1893, at 649 (1967).

> There would be thirty-seven members in the convention. Automatically named to the convention were the president and members of the executive and advisory councils of the provisional government. They numbered nineteen — a clear majority of one. The voters were then privileged to choose the minority of eighteen. But the oligarchy did not stop there. Even to allow the franchise to those who had voted before the revolution, under the limitations imposed by the Constitution of 1887, was considered dangerous. Therefore, those who were allowed to vote for a minority of the convention, besides possessing a certain amount of wealth, had to take an oath of allegiance to the provisional government and to oppose any attempt to re-establish the monarchy. In the finished constitution the qualifications for voting and holding office were so stringent that comparatively few natives, and no Orientals, could vote. Fewer still were eligible to serve in either house of the legislature.

*Id.*

> That portion of the public domain heretofore known as Crown Land is hereby declared to have been heretofore, and now to be, the property of the Hawaiian Government, and to be now free and clear from any trust of or concerning the same, and from all claim of any nature whatsoever, upon the rents, issues and profits thereof. It shall be subject to alienation and other uses as may be provided by law. All valid leases thereof now in existence are hereby confirmed.[192]

The Crown lands, however, were never public domain; they were the private property of the reigning monarch. Although the lands that Kauikeaouli set aside as King's lands were, by the time of the overthrow, designated "Crown lands," declared inalienable, and their descent restricted to the wearer of the Hawaiian Crown, their private character was maintained.[193] Rather than compensate the Queen to quiet the title to the lands, the Republic wrote its own version of history where the Crown lands were public domain belonging to the Hawaiian Government and never subject to any trust. But despite the Republic's effort, it failed to appropriate the Crown lands through legal transfer. The Crown lands are the property of the Native Hawaiian peoples vis-à-vis the Kingdom.

The Republic's constitution does not directly address Government lands, but section 1 of article 92 abrogates existing laws that are inconsistent with the constitution.[194] In 1848, the Legislature confirmed the King's grant of Government lands.[195] Additionally, by not providing for the disposition of the Government lands, the Republic also relied on existing norms recognizing the public domain as passing to the succeeding sovereign of a country. Again, however, the transfer fails because no legitimate sovereign succeeded to the Kingdom. Government lands, like Crown lands, remain the property of the Native Hawaiian people.

While the Republic's motivation for wanting to conceal the true nature of the Crown and Government lands is not hard to imagine, why the United States undertook to characterize these lands as it has remains a compelling question. At three critical points in time, Congress treated the Crown and Government lands uniquely: at annexation, at statehood, and at the centennial anniversary of the overthrow of the Kingdom.

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192. CONST. OF THE REPUBLIC OF HAWAII art. 95 (1894).

193. An Act to Relieve the Royal Domain from Encumbrances, and to Render the Same Inalienable § 3 (Laws of 1864), *reprinted in* 2 REV. LAWS HAW. 2178 (1925).

194. CONST. OF THE REPUBLIC OF HAWAII art. 92, § 1 (1894).

195. *See In re* Estate of His Majesty Kamehameha IV, 2 Haw. 715, 716-17 (Haw. 1864).

When Hawai'i was annexed in 1898, the Crown lands and Government lands were ceded to the United States.[196] The joint resolution of Congress used to annex Hawai'i[197] described a "special trust"[198] to govern the ceded lands. At annexation the Republic of Hawaii ceded "the absolute fee and ownership of all public, Government, or Crown lands" to the United States.[199] The Resolution accepted the cession, providing that Congress would "enact special laws for [the] management and disposition" of the ceded lands and exempting the lands from existing federal laws dealing with public lands.[200] Further, all income from the Crown and Government lands was to be "used solely for the benefit of the inhabitants of the Hawaiian Islands."[201] In 1900, the Organic Act[202] confirmed the United States held legal title to the ceded lands but also that the Territory of Hawaii had equitable title subject to uses consistent with the joint resolution.[203]

The Hawaii Statehood Admission Act transferred the Crown and Government lands to the State of Hawai'i[204] and placed the lands in a public land trust for use consistent with five purposes, including the "betterment of the conditions of native Hawaiians."[205] As a condition of statehood the State of Hawai'i had to accept the trust, its purposes, and the responsibility of administration.[206] While this narrowed federal authority in favor of the state, it also provided greater specificity in the purposes for which trust lands could be used. In the second major action defining the relationship between the United States and Hawai'i, Congress again carried forward the concept of a trust governing the Crown and Government lands. The trust was explicit in the Admission Act and so was the inclusion of the native Hawaiian purpose.

Finally, in its 1993 apology for the illegal overthrow of the Kingdom of Hawai'i, Congress acknowledged that "1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii" were ceded to the United States

196. Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, Res. No. 55, 55th Cong., 30 Stat. 750, 750 (1898).

197. Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, 30 Stat. 750.

198. 22 Op. Att'y Gen. 574, 576 (1899).

199. Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, 30 Stat. at 750.

200. *Id.*

201. *Id.*

202. An Act to Provide a Government for the Territory of Hawaii, ch. 339, 31 Stat. 141 (1900).

203. *Id.* §§ 73, 91.

204. Hawaii Statehood Admission Act, Pub. L. No. 86-3, §5(b), 73 Stat. 4, 6 (1959).

205. *Id.* § 5(f)

206. *See id.*

"without the consent of or compensation to the Native Hawaiian people . . . or their sovereign government" and that "the indigenous Hawaiian people never directly relinquished their claims . . . over their national lands to the United States."[207] A theme emerges in U.S. law: the Crown and Government lands are to be held in trust and, after statehood, native Hawaiians have a special interest in the lands.

I submit that Crown and Government lands are subject to the 5(f) trust and have been held in trust since they were ceded to the United States as a direct result of their history. The 5(f) trust represents implicit recognition of the original disposition of the Crown and Government lands: held by the sovereign and the government for the benefit and protection of the Native people. The Republic's attempt at fictionalizing the title and character of these lands failed. The purposes that Kauikeaouli intended survive.

*D.* Hawaii v. Office of Hawaiian Affairs

On March 31, 2009, the United States Supreme Court decided *Hawaii v. Office of Hawaiian Affairs*, a recent case involving the ceded lands trust.[208] The case reversed the Hawai'i Supreme Court's decision in *Office of Hawaiian Affairs v. Housing & Community Development Corp.* that an injunction should issue barring the State of Hawai'i from selling or otherwise transferring "any . . . ceded lands from the public lands trust until the claims of the native Hawaiians to the ceded lands have been resolved."[209]

The case involved Leiali'i, a parcel of ceded Crown land located in West Maui.[210] Between 1989 and 1992, the Housing Finance and Development Corporation, the State's affordable-housing agency, obtained approval to reclassify Leiali'i from agricultural to urban use and to remove it from the ceded lands trust for the development of housing projects.[211] Article XII of the state constitution and chapter 10 of the Hawai'i Revised Statutes provide that OHA is to receive a pro rata share of income derived from the ceded lands trust.[212] Accordingly, the legislature devised a formula to compensate OHA, determining

207. Joint Resolution of Nov. 23, 1993, Pub. L. No. 103-150, 107 Stat. 1510, 1512.

208. 129 S. Ct. 1436 (2009).

209. 177 P.3d 884, 928 (Haw. 2008), *rev'd sub nom.* Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1436 (2009).

210. *Id.* at 897.

211. *Id.*

212. HAW. CONST. art. XII; HAW. REV. STAT. § 10-13.5 (2009).

that OHA should receive twenty percent of the fair market value when ceded lands such as the Leiali'i parcel were removed from the public trust.[213]

As the process of determining the fair market value of Leiali'i and removing it from the ceded lands trust continued, the one-hundredth anniversary of the overthrow of the Hawaiian Kingdom was commemorated in 1993.[214] Contemporaneous with this anniversary, the state legislature passed several statutes relating to Native Hawaiian sovereignty,[215] and Congress passed and then-President Clinton signed the Apology Resolution, expressly recognizing that "(1) the overthrow of the Kingdom of Hawaii was illegal; (2) the taking of crown, government, and public lands of the Kingdom was without consent or compensation; and (3) 'the indigenous Hawaiian people never directly relinquished their claims . . . over their national lands to the United States.'"[216] The state laws and the federal resolution characterized the overthrow as illegal, acknowledged the special relationship that Native Hawaiians share with the land, and encouraged a process for reconciliation with the Native Hawaiian people.[217]

Following these enactments, OHA requested that "a disclaimer be included as a part of any acceptance of funds from the sale so as to preserve any native Hawaiian claims to ownership of the ceded lands, of which the Leiali'i parcel was a part."[218] The Housing and Community Development Corporation refused to include the disclaimer and transmitted to OHA the $5.5 million payment representing twenty percent of the fair market value of Leiali'i.[219] OHA refused the payment and filed suit seeking injunctive relief and, alternatively, declaratory relief.[220]

OHA's claim for relief was based on the allegation that "they would suffer irreparable harm if the defendants were allowed to transfer ceded lands to third-parties inasmuch as alienation of the land to a third-party would erode the ceded lands trust and the entitlements of the native Hawaiian people."[221] In light of the

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213. *Office of Hawaiian Affairs*, 177 P.3d at 897, *rev'd sub nom.* Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1436 (2009).

214. *Id.* at 893.

215. *Id.* (analyzing 1997 Haw. Sess. Laws Act 329, at 956-58; 1993 Haw. Sess. Laws Act 359, at 1009-11; 1993 Haw. Sess. Laws Act 354, at 1000; 1992 Haw. Sess. Laws Act 340, at 805).

216. *Id.* at 897 (quoting Joint Resolution of Nov. 23, 1993, Pub. L. No. 103-150, 107 Stat. 1510, 1512).

217. *See id.* at 893-97.

218. *Id.* at 897.

219. *Id.* at 897-98.

220. *Id.* at 898.

221. *Id.* (citation omitted).

Apology Resolution and the 1993 state-legislative actions, OHA claimed that any transfer of ceded lands to third parties would be a breach of the state's trust responsibility because "such transfers would be without regard for the claims of Hawaiians to those lands to whom the State, as trustee, owes a fiduciary duty."[222] The underlying theory, then, was that in order to have a meaningful reconciliation the corpus of the ceded lands trust must be preserved because those lands, either in acreage or monetary payment, would likely represent part of a settlement between the State and the Native Hawaiian people.

The Hawai'i Supreme Court agreed, holding that "the Apology Resolution and related state legislation, give rise to the State's fiduciary duty to preserve the corpus of the public lands trust, specifically, the ceded lands, until such time as the unrelinquished claims of the native Hawaiians have been resolved."[223] The U.S. Supreme Court disagreed with the Hawai'i Supreme Court's reliance on the Apology Resolution and instead found that "the Apology Resolution has no such effect."[224]

The issue before the U.S. Supreme Court was "whether the Apology Resolution strips Hawaii of its sovereign authority to sell, exchange, or transfer the lands that the United States held in absolute fee and grant[ed] to the State of Hawaii, effective upon its admission into the Union."[225] The High Court reversed the judgment of the Hawai'i Supreme Court for two basic reasons: (1) the two substantive provisions[226] of the Apology Resolution did not create any substantive rights in Native Hawaiians or explicitly recognize any claims Native Hawaiians may have against the State of Hawai'i and (2) the Hawai'i Supreme Court based its decision on the "whereas" clauses of the Apology Resolution, which have no operative effect and therefore cannot change the rights and obligations of the State under the Admission Act or create a retroactive cloud on title.[227]

That the Apology Resolution is conciliatory and does not create any rights is not surprising, and thus it is also not surprising that the Court would find that the Resolution cannot "'chang[e] the legal landscape and restructur[e] the rights and obligations of the State.'"[228] As a matter of federal law, the "legal landscape" with regard to the State's trust obligations to Native Hawaiians is no different

222. *Id.* (citation omitted).

223. *Id.* at 927.

224. Hawaii v. Office of Hawaiian Affairs, 129 S. Ct. 1436, 1443 (2009).

225. *Id.* (citations omitted).

226. See *id.* at 1443-44 for the Court's analysis of the text of the substantive provisions of the Apology Resolution.

227. *Id.* at 1443-45.

228. *Id.* at 1445 (quoting *Office of Hawaiian Affairs*, 177 P.3d at 900).

than it was before the Apology Resolution. The Court went no further. Therefore, *Hawaii v. Office of Hawaiian Affairs*, like *Rice v. Cayetano*,[229] left unanswered the question of the validity of the Native Hawaiian purpose of the ceded lands trust and Native Hawaiian claims to self-determination and the ceded lands.

### *IV. Conclusion*

Ultimately, the current "legal landscape" fails to account for whether the United States actually acquired fee title to the Crown and Government lands to transfer to the State of Hawai'i.[230] Even Federal Indian law accounts for ownership of land prior to the United States claiming title.[231] The argument presented here fills that gap. The trust established under Kingdom law was meant to ensure that Native Hawaiians would always have a means to provide for their own self-determination. The lands remain in trust, and the state administers them under what is known as the ceded lands trust. Native Hawaiian rights to the ceded Crown and Government lands do not arise solely from section 5(f) of the Admission Act—Native Hawaiian rights in those lands derive from Native tradition and the law of the Kingdom of Hawai'i.

Equal protection is not the proper analysis for scrutinizing the Native Hawaiian purpose of the ceded lands trust because the trust purpose under Kingdom law was to provide for Native Hawaiian self-determination. Today, Hawai'i's administration of the ceded lands trust in accordance with the Native Hawaiian purpose—"the betterment of the conditions of Native Hawaiians"—serves to facilitate modern-day principles of self-determination. Originally created to provide for and protect the Native Hawaiian people, the Crown and Government lands continue to embody a means of Native Hawaiian self-determination. Unlike the equal protection analysis, the question of the ceded lands trust and its Native Hawaiian purpose, left unanswered in *Rice v. Cayetano*, is one of self-determination and reconciliation between nations. For the Native Hawaiian people, the essence of the trust is the land itself, not the allocation of revenue and benefits.

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229. 528 U.S. 495 (2000).

230. *But see Office of Hawaiian Affairs*, 129 S. Ct. at 1440 (reciting that by the Annexation Resolution the Republic of Hawaii ceded all property rights in the ceded lands to the United States).

231. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).