

**TO DWELL ON THE EARTH IN UNITY:  
*Rice, Arakaki,*  
AND THE GROWTH OF  
CITIZENSHIP AND VOTING RIGHTS IN  
HAWAII**

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“*God hath made of one blood all nations of men to dwell on the earth in unity.*” Thus began the first Constitution of the Kingdom of Hawai‘i in 1840.<sup>2</sup> As reflected in these words, Hawai‘i has a long tradition of political inclusion: of including as citizens all people born on the `aina,<sup>3</sup> no matter where their families came from; and of including as voters a growing proportion of those who dwell in Hawai‘i. When Hawai‘i was an independent country, everyone born in Hawai‘i (except children of foreign diplomats) was a citizen.<sup>4</sup> The government of the Kingdom of Hawai‘i actively encouraged immigration and offered immigrants easy naturalization and full political rights. Race and ethnicity did not matter.

Current proposals to create a racially exclusive government or agency for ethnic Hawaiians<sup>5</sup> alone contradict Hawai‘i’s historical tradition. In 1978, in a departure from Hawai‘i’s long tradition of inclusion, a state agency, the Office of Hawaiian Affairs (“OHA”) was created with voting and office-holding restricted to ethnic Hawaiians.<sup>6</sup> The United States Supreme Court, in *Rice v. Cayetano*,<sup>7</sup> and the federal District Court, in *Arakaki v. State*,<sup>8</sup> recently drew Hawaii back to the Hawaiian tradition of inclusion, as well as to the American constitutional principle of equal protection, by striking down that racial dis-

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<sup>2</sup> Hawai‘i Constitution of 1840, Preamble, in LYDECKER, ROSTER OF LEGISLATURES OF HAWAII, 1842-1918 (hereinafter “LYDECKER”) at 8 (1918) (emphasis added). This provision was first enacted as the opening of the Declaration of Rights of 1839, Hawai‘i’s first bill of rights. It paraphrases Acts, 17:24-26, in the King James Version of the Bible.

<sup>3</sup> *I.e.* the land of Hawai‘i. M.K. PUKUI AND S.H. ELBERT, HAWAIIAN DICTIONARY, 11 (1986).

<sup>4</sup> “Citizen” is used here in the broad sense of a member of a political community, owing allegiance to that community. See BLACK’S LAW DICTIONARY 237(7th ed., 1999). The word can also be used in a narrower sense in which it refers to a member of a political community that has a republican form of government. In this narrower sense, it can be said that republics have “citizens,” monarchies have “subjects,” and tribes have “members.” This article will refer to citizens of the United States and the Republic of Hawaii and to subjects of the Kingdom of Hawaii and the United Kingdom. “Citizenship” will be used in the broad sense signifying the status of a member of a political community.

<sup>5</sup> The term “ethnic Hawaiian” is used to refer to any person who can trace his ancestry back to one or more persons who inhabited Hawai‘i in 1778, before the first Europeans arrived. See Haw. Rev. Stat. § 10-2, defining “Hawaiian” as “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 Hawai‘i.” As discussed in part V below, there are numerous competing proposals that would variously give ethnic Hawaiians exclusive control of all or part of the government of Hawai‘i, and all or part of the public land of Hawai‘i.

<sup>6</sup> Hawai‘i State Constitution Art. XII, §§ 5, 6, enacted in 1978.

<sup>7</sup> 528 U.S. 495, 120 S.Ct. 1044, 145 L.Ed. 2d 1007 (2000).

<sup>8</sup> Haw. No. CV-00-00514 HG-BMK (September 19, 2000). The author of this article was one of the attorneys representing the Plaintiffs in *Arakaki*.

crimination. Opponents of *Rice* have responded with proposals for racial separatism in the name of “recognizing” or “restoring” a race-based Hawaiian nation.<sup>9</sup> However, a racially exclusive government would not be a revival of the Kingdom of Hawai‘i. On the contrary, the successors to the Kingdom, a polity with a multi-racial citizen body, are the multi-racial State of Hawai‘i and United States of America.

This article surveys the historical development of the Hawaiian tradition of political inclusiveness and draws some implications for the current debate concerning proposals to create a government exclusively for ethnic Hawaiians. The rule that everyone born in Hawai‘i is a citizen derives both from the Anglo-American common law and from traditional Hawaiian custom. Voting rights expanded as the Kingdom of Hawai‘i developed from an absolute monarchy to a constitutional monarchy. However, coups by contending factions sometimes succeeded in reducing the electorate to those likely to support the regime in power. The period of coups ended and voting rights expanded when the United States annexed Hawai‘i and extended American citizenship and constitutional rights to the citizens of Hawai‘i. This article discusses the application of the federal constitutional right to vote to OHA in *Rice v. Cayetano*, and *Arakaki v. State of Hawai‘i*, which voided the first laws in the history of Hawai‘i that restricted voting and candidacy to a single ethnic group. The final section of this article analyzes proposals to revive racially exclusive government by manufacturing an Indian tribe and argues that such government would contradict both the Hawaiian tradition of inclusion and the American Constitution.

## I. THE COMMON LAW RULE: CITIZENSHIP BY PLACE OF BIRTH

Hawai‘i, when it was independent, followed the Anglo-American common law rule of “*jus soli*”: everyone born in the country and subject to its jurisdiction is a citizen.<sup>10</sup>

The common law rule traces back to the Norman Conquest of England in 1066. When William of Normandy made himself William the Conqueror of England, he insisted that everyone in England was his subject and owed loyalty directly to him as the King. To be the King’s loyal subject, a person necessarily had to be the King’s legal subject. Hence, the rule developed at common law that almost everyone born in England was a subject of the King.<sup>11</sup> The exceptions were children of foreign diplomats and occupying armies.<sup>12</sup> Under the common law, a child born outside England was not an English subject, even if his parents were English subjects.<sup>13</sup> However, Parliament passed statutes that made most such children subjects.<sup>14</sup>

The English common law rule lasted through the 19th century as Britain built an empire that circled the globe and that was largely populated by people who were not of English ancestry. Under British law, anyone born in the Empire was a British subject and any British subject living in a parliamentary constituency (*i.e.* in the British Isles) could vote if he met the voter requirements (being male, satisfying property qualifications, if any, etc.). For instance, an Indian who moved from Calcutta to London had the same rights as a British subject born in London.<sup>15</sup>

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<sup>9</sup> *E.g.* United States Senate Bill No. 2899, introduced in 106th Congress, 2d Session, in July 2000 and Senate Bills 81 and 746 in the 107th Congress; see U.S. Senate Committee Report 106-424. These bills are discussed in Part V below.

<sup>10</sup> GORDON, MAILMAN & YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE, § 92.04[3] (1999).

<sup>11</sup> BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Bk. I, Chapter 10 \*366-374 (1765); *United States v. Wong Kim Ark*, 169 U.S. 649, 655 (1898); IMMIGRATION LAW AND PROCEDURE, § 92.03[a].

<sup>12</sup> See *Wong Kim Ark*, 169 U.S. at 655 (discussing English common law rule).

<sup>13</sup> BLACKSTONE at \*373.

<sup>14</sup> See *Wong Kim Ark*, 169 U.S. at 668-671 (discussing English statutes); BLACKSTONE at \*373 (discussing English statutes).

<sup>15</sup> DICEY, THE LAW OF THE CONSTITUTION, p. liv n. 43 (1982 reprint of 1914 edition).

The English common law rule was adopted in the United States as part of the American common law, with royal “subjects” becoming republican “citizens.”<sup>16</sup> In 1856, in *Dred Scott v. Sandford*,<sup>17</sup> the Supreme Court invented an exception to the common law: the Court barred blacks from citizenship, even if they were born free in the United States. That decision was widely condemned in the North and helped spark the Civil War. After the North won the Civil War, the Fourteenth Amendment overruled *Dred Scott* by constitutionalizing the common law rule that, “[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”<sup>18</sup>

Applying the Fourteenth Amendment in light of the long history of common law rule of citizenship by birth, the United States Supreme Court held in *United States v. Wong Kim Ark*<sup>19</sup> that children born in the United States are native-born American citizens, even if their parents are aliens who are not eligible for citizenship. “The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens . . . of whatever race or color.”<sup>20</sup>

## II. THE KINGDOM OF HAWAII

### A. Hawaiian Custom

Before contact with the outside world, Hawaiian custom was in accord with the rule that all people living in a kingdom were subjects of the king, no matter where they had come from. As in England, a person became a subject either by being born on land that was within the kingdom’s territory or by pledging his loyalty to the king.

When, in 1778, Captain James Cook became the first European to reach Hawai‘i, it was divided into four kingdoms.<sup>21</sup> The aristocratic ali‘i<sup>22</sup> and their retainers moved freely among these kingdoms, taking the best jobs they could find from whichever king or high-ranking ali‘i that would hire them.<sup>23</sup> The maka‘ainana (the commoners) generally remained on the land where they were born but they, too, had

<sup>16</sup> *United States v. Wong Kim Ark*, 169 U.S. at 658; IMMIGRATION LAW AND PROCEDURE, § 92.03[b]. The Constitution gives Congress the power to enact uniform rules for naturalization. U.S. Constitution, Art. I, sec 8, clause 4.

<sup>17</sup> 60 U.S. 393, 19 How. 393 (1856).

<sup>18</sup> U.S. Constitution, Fourteenth Amendment, § 1.

<sup>19</sup> 169 U.S. 649 (1898).

<sup>20</sup> *Id.*, 169 U.S. at 693.

<sup>21</sup> 1 R.S. KUYKENDALL, THE HAWAIIAN KINGDOM (hereinafter “HAWAIIAN KINGDOM”) 30 (1938). The four contending kingdoms were based on the islands of (1) Hawai‘i; (2) Maui and surrounding islands; (3) Oahu; and (4) Kauai and Niihau. Captain Cook was a British Royal Navy officer who led an expedition on orders of the British Admiralty to explore the Pacific and to report back on what he found. He was killed in a brawl during his second visit to Hawai‘i in 1779. His crew returned to Britain and reported the existence of Hawai‘i to the Admiralty and the world.

<sup>22</sup> The “ali‘i” were the traditional Hawaiian chiefs, i.e. the hereditary aristocracy. They claimed the right to govern the commoners based on their alleged descent from the gods. 1 KUYKENDALL, HAWAIIAN KINGDOM at 8; M. BECKWITH, HAWAIIAN MYTHOLOGY 376-77 (1940). Some ali‘i (including the family of Kamehameha the Great, founder of the unified Kingdom of Hawai‘i) claimed descent from relatively recent immigrants from the magical land of “Kahiki” (a mythologized Tahiti) who had introduced new religious beliefs and had taken power from earlier lines of ali‘i. M. SAHLINS, HISTORICAL METAPHORS AND MYTHICAL REALITIES 9-12, 24 (“usurpation . . . was the very principle of political legitimacy in the Hawaiian system”) (1981); V. VALERI, KINGSHIP AND SACRIFICE: RITUAL AND SOCIETY IN ANCIENT HAWAII, 8-9, 143 (1985); BECKWITH, HAWAIIAN MYTHOLOGY 369-73; M. BECKWITH, THE KUMULIPO 141 (1972).

<sup>23</sup> MALO, HAWAIIAN ANTIQUITIES 58-59, 61, 65 (1951 reprint of 1898 ed.). This tradition was an ancient precedent for the Kingdom of Hawai‘i’s practice of advancing some immigrants to prominent political positions.

the right to move about in search of better economic conditions.<sup>24</sup> “Maka`ainana” literally means “people who attend the land.”<sup>25</sup> The maka`ainana were generally “kama`aina,” i.e. persons who were born in the area where they dwelled.<sup>26</sup>

The king expected the people who tended the land that he governed, whether born there or immigrants, to be his loyal subjects and to follow the rules that he laid down. When a king extended his kingdom by conquering an area from another king, the maka`ainana living on the conquered land became subjects of the conqueror. King Kamehameha I, like William the Conqueror, was a feudal overlord who demanded loyal obedience from all the subjects that he had conquered in his rise to unchallenged power over Hawai`i, wherever they had been born.<sup>27</sup> He rewarded his loyal followers with grants of land populated by peasants who paid rents and taxes. In return, his ali`i followers were obliged to support him in his wars and pass on to him as much as he demanded of the profits of peasant labor.<sup>28</sup>

Kamehameha also hired immigrant European and American advisors, such as John Young and Isaac Davis, to help him conquer and govern the islands. Although there was as yet no written law of citizenship, Kamehameha made his advisors prominent members of the political community. He rewarded them with ali`i status and prominent government positions.<sup>29</sup> For instance, Kamehameha made Young the governor of the island of Hawaii and made Oliver Holmes governor of Oahu.<sup>30</sup>

## B. The Common Law Rule of *Jus Soli* Adopted in Hawai`i

In the mid-nineteenth century, the king and subjects of the Kingdom of Hawai`i transformed the feudal monarchy of Kamehameha I into a constitutional monarchy based on ideas of law and democ-

<sup>24</sup> HANDY & HANDY, NATIVE PLANTERS IN OLD HAWAII 288 (1972); CHINEN, THE GREAT MAHELE 5-6 (1958) MACKENZIE, NATIVE HAWAIIAN RIGHTS HANDBOOK 4 (1991).

<sup>25</sup> PUKUI AND ELBERT, HAWAIIAN DICTIONARY, 224.

<sup>26</sup> *Id.* at 124. “Kama`aina” literally means child of the land. *Id.* In common parlance, it is extended to refer to all long-time residents of the land. Testimony of such long-time residents can be used to prove custom and usage of an area. *State v. Hanahi*, 89 Haw. 177, 187 n. 12, 970 P.2d 485, 486 n. 12 (1998); *Application of Ashford*, 50 Haw. 314, 316, 440 P.2d 76, 79 reh’g denied, 50 Haw. 452, 440 P.2d 76 (1968); *In re Boundaries of Pulehunui*, 4 Haw. 239 (1879).

<sup>27</sup> Kamehameha I, sometimes called Kamehameha the Great, founded the Kingdom of Hawai`i by conquest. He was the cousin of the king of the Island of Hawai`i and led a successful revolt, making himself king of that island. Moving quickly to acquire guns, western ships and advisors, he disrupted the balance of power among the four kingdoms and successfully invaded the kingdoms of Maui and Oahu. Repeated threats of invasion persuaded the king of Kaua`i to acknowledge Kamehameha as overlord of Kaua`i. 1 KUYKENDALL, HAWAIIAN KINGDOM at 29-60. Kamehameha the Great founded a dynasty and was succeeded by four kings of the same name: his sons Kamehameha II and Kamehameha III; and his grandsons Kamehameha IV and Kamehameha V.

<sup>28</sup> CHINEN, THE GREAT MAHELE 5-6 (1958); Principles Adopted by the Board of Commissioners to Quiet Land Titles, in their Adjudication of Claims Presented to Them, Laws 1848, p. 81, reprinted in R.L.H. 1925, Vol. II, p. 2124 (describing feudal land tenure system and explaining that all tenants, whether native or foreign, owed obedience to the king); *In re Estate of His Majesty Kamehameha IV*, 2 Haw. 715, 718-719 (1864) (describing feudal system). See generally MALO, HAWAIIAN ANTIQUITIES 52-64, 187-204 (discussing the pre-contact system of government); 1 KUYKENDALL, HAWAIIAN KINGDOM at 9-10, 269-70 (same). The pre-contact Hawaiian political economy cannot be distinguished from feudalism on the ground that the maka`ainana were not serfs bound to the land, compare M. MACKENZIE, NATIVE HAWAIIAN RIGHTS HANDBOOK at 4. Many medieval European peasants were not serfs either. See H.J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 317 (1983) (a third to a half of the medieval peasants were not serfs). To compare the pre-contact Hawaiian system with the wide variety of medieval European customs and legal systems that fall under the label “feudal”, see *id.* at 295-332; M. BLOCH, 1 and 2 FEUDAL SOCIETY (1961); F.W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND, 23-39, 141-64 (1963 reprint of 1908 ed.).

<sup>29</sup> 1 KUYKENDALL, HAWAIIAN KINGDOM at 25. Young married an ali`i who was the niece of Kamehameha I; his son John Young II, also known as Keoni Ana, became minister of the interior and premier of the Kingdom in the 1840s and his granddaughter Emma became Queen as the wife of Kamehameha IV. 1 KUYKENDALL, HAWAIIAN KINGDOM at 263; 2 KUYKENDALL, HAWAIIAN KINGDOM at 78, 83.

<sup>30</sup> 1 KUYKENDALL, HAWAIIAN KINGDOM at 54.

racy inspired by England and America. With the cooperation of the king and his ali'i advisors, the new court system was designed and managed by American lawyers such as John Ricord and William Lee, who had been trained in the common law.<sup>31</sup> An early statute expressly authorized the courts to apply common law rules,<sup>32</sup> and the judges, most of them trained in America and England, typically did so. Like the courts of every common law jurisdiction, the courts of Hawai'i adapted the common law to local conditions.

The common law rule that everyone born in a country and subject to its jurisdiction is a subject accorded with the Hawaiian tradition and was readily adopted as part of the new Hawaiian legal system. An early statute, I Statute Laws of Kamehameha III, § III, expressly enacted the common law rule:

All persons born within the jurisdiction of this kingdom, whether of alien foreigners, of naturalized or of native parents, and all persons born abroad of a parent native of this kingdom, and afterwards coming to reside in this kingdom, shall be deemed to owe native allegiance to His Majesty. All such persons shall be amenable to the laws of this kingdom as native subjects.<sup>35</sup>

In 1850, H.W. Whitney, born in Hawaii of foreign parents, asked the Minister of the Interior, John Young II, about his status. The question was referred to Asher B. Bates, legal adviser to the Government, who replied that, “not only the Hawaiian Statutes but the Law of Nations, grant to an individual born under the Sovereignty of this Kingdom, an inalienable right, to all of the rights and privileges of a subject.”<sup>36</sup>

In 1856, the Kingdom's Supreme Court decided *Naone v. Thurston*,<sup>37</sup> recognizing that persons born in Hawai'i of foreign parents were Hawaiian subjects. The defendant Asa Thurston challenged a law that required foreigners to pay \$5 extra a year to educate their children in English language schools. The court's statement of the facts shows that the junior Thurstons, born in Hawai'i, were subjects of the Kingdom by birth.<sup>38</sup> This may have been the first equal protection case in Hawai'i's history. Thurston lost for two reasons. First, there was no equal protection clause in the 1852 Constitution.<sup>39</sup> Second, the Supreme Court believed that the law advantaged, rather than disadvantaged Hawaiian-born children of foreigners because it gave them a better education than children in the Hawaiian language schools and “a better style of education must . . . cost a better price.”<sup>40</sup> The court quoted the legislative preamble to the challenged statute, which explained that the reason for the special education was

<sup>31</sup> 1 KUYKENDALL, HAWAIIAN KINGDOM, at 236-37, 241-45; Silverman, *Imposition of a Western Judicial System in the Hawaiian Monarchy*, 16 THE HAWAIIAN J. OF HISTORY, 48, 56-61 (1982).

<sup>32</sup> Third Act of Kamehameha III, An Act to Organize the Judiciary Department of the Hawaiian Islands, ch. 1, § IV (September 7, 1847). See *Hawai'i v. Mankichi*, 190 U.S. 197, 211 (1903) (noting that 1847 marked the beginning of the common law system in Hawai'i). The statute also authorized the courts to apply civil law principles.

<sup>33</sup> *Thurston v. Allen*, 8 Haw. 392, 398-99 (1892) (noting that in only about 9 of 900 reported cases did the courts of the Kingdom depart from the Anglo-American common law rules).

<sup>34</sup> *Id.* at 398; *Branca v. Makuakane*, 13 Haw. 499, 505 (1901) (Hawai'i courts departed from English common law rules when rules were based on conditions that did not apply to Hawai'i or were excessively technical). See generally, Paul Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai'i*, 20 U. HAW. L. REV. 99 (1998); Damien P. Horgan, *On the Reception of the Common Law in the Hawaiian Islands*, 3 HAW. BAR J. No. 13, 87 (1999).

<sup>35</sup> I Statute Laws of Kamehameha III, p. 76, § III (1846).

<sup>36</sup> JONES, NATURALIZATION IN HAWAII 18 (1934) (citing Interior Department files from the Archives of Hawai'i).

<sup>37</sup> 1 Haw. 220 (1856).

<sup>38</sup> *Naone v. Thurston*, 1 Haw. at 220-221 (referring to “subjects of foreign birth or parentage” and citing I Statute Laws, p. 76).

<sup>39</sup> *Id.* at 221.

<sup>40</sup> *Id.* at 222.

that children born in the Kingdom of foreign parents were "destined to have a great influence, for good or evil, on the community."<sup>41</sup>

In 1859, the Kingdom's statutes were codified and the provision of I Statute Laws of Kamehameha III, § III, was dropped. However, the common law principle of *jus soli* remained.<sup>42</sup> Moreover, the 1859 Civil Code continued to provide that every naturalized subject would "be deemed to all intents and purposes a native of the Hawaiian Islands and entitled to all the rights, privileges and immunities of an Hawaiian subject."<sup>43</sup> Thus, Hawaiian subjects were either native-born or naturalized.<sup>44</sup>

In 1868, the Minister of the Interior rendered an official opinion that:

In the judgment of His Majesty's government no one acquires citizenship in this Kingdom unless he is born here, or born abroad of Hawaiian parents (either native or naturalized) during their temporary absence from the Kingdom, or unless having been the subject of another power, he becomes the subject of this Kingdom by taking the oath of allegiance.<sup>45</sup>

The effect of the repeal of the citizenship provision of I Statute Laws of Kamehameha III, § III, was that if a Hawaiian subject permanently relocated out of Hawai'i and had a child in a foreign country, then that child was not a Hawaiian subject. Under the common law, a foreign-born child of a citizen is not a citizen.<sup>46</sup> Although the common law can be altered by statute, if no statute makes a foreign born child a citizen, then the child is not a citizen.<sup>47</sup> In *Wong Foong v. United States*, a child born in China in 1894 of a naturalized Hawaiian subject claimed that he had inherited his father's status and therefore had become a citizen of the United States when the Organic Act<sup>48</sup> converted Hawaiian citizens into American citizens.<sup>49</sup> The Ninth Circuit rejected the argument because it could not find any applicable Hawaiian law that varied the common law rule of *jus soli*.<sup>50</sup> The court interpreted the Minister of the Interior's 1868 ruling to apply only if *both* of a child's parents were Hawaiian citizens temporarily living abroad.<sup>51</sup> Thus, if a Hawaiian subject of ethnic Hawaiian ancestry moved to the United States, married, and had a child in the United States after 1859, then that child and the child's descendants would not have been Hawaiian subjects, even though they were ethnically Hawaiian. This illustrates the basic point that a person could be a subject of the Kingdom only by being born in Hawaii or by

<sup>41</sup> *Id.*

<sup>42</sup> *Wong Foong v. U.S.*, 69 F.2d 681, 682-683 (9th Cir. 1934).

<sup>43</sup> 1859 Civil Code § 432.

<sup>44</sup> See *United States v. Wong Kim Ark*, 169 U.S. at 664 (quoting Kent's Commentaries on the common law defining "natives" as "all persons born within the jurisdiction").

<sup>45</sup> Letter ruling from Minister of Interior F.W. Hutchinson, in response to inquiry from H.H. Parker, regarding his citizenship status. HAWAIIAN GAZETTE (official publication of the Government of the Kingdom) Vol. IV, No. 1, January 22, 1868, p. 2, col. 2; PACIFIC COMMERCIAL ADVERTISER, January 25, 1868, p. 2, col. 4, quoted in *Wong Foong v. U.S.*, 69 F.2d at 682. In *Cummings v. Isenberg*, 89 F.2d 489 (D.C. Cir. 1937), the court expressed doubt about the official status of Minister Hutchinson's letter because plaintiff cited it to the court only by citing *Wong Foong* which itself only cited the PACIFIC COMMERCIAL ADVERTISER account. However, the Minister's ruling was published in the HAWAIIAN GAZETTE, which was the official publication announcing governmental actions. See HAWAIIAN GAZETTE, January 25, 1868, p. 2, col. 1 (setting out its status as official government publication).

<sup>46</sup> *Wong Kim Ark*, 169 U.S. at 670; *Wong Foong*, 69 F.2d 681.

<sup>47</sup> *Wong Kim Ark* at 668-671.

<sup>48</sup> Act of April 30, 1900, 31 Stat. 141. See discussion of Organic Act in Part IV below.

<sup>49</sup> *Wong Foong v. United States*, 69 F.2d at 682.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*, 69 F.2d at 683. In *Cummings v. Isenberg*, 89 F.2d at 493-96, the District of Columbia Circuit Court declined to decide whether a person born in Germany in 1880 whose father was a naturalized Hawaiian subject had acquired his father's status as a Hawaiian subject and so had become an American citizen by virtue of the Organic Act. The court found that, even if he had been an American citizen, he gave up that citizenship by his own actions.

being naturalized. Except for the rare case of the child born while its parents were temporarily outside the Kingdom, ancestry was irrelevant to citizenship.<sup>52</sup>

In 1892, “the common law of England as ascertained by English and American decisions” was declared to be the common law of Hawai‘i except where a different rule had been “fixed by Hawaiian judicial precedent, or established by Hawaiian usage.”<sup>53</sup> This included the common law rule of *jus soli*.<sup>54</sup> The English, American and Hawaiian precedents, as well as Hawaiian usage, all coincided on a rule of citizenship by place of birth. By 1893, about 1 out of 5 native-born subjects was not ethnic Hawaiian and the proportion was rapidly increasing.<sup>55</sup>

### C. Citizenship Rights for Immigrants to the Kingdom

In its last half century, the government of the Kingdom actively sought immigrants from around the world, to replenish a population sadly depleted by disease,<sup>56</sup> to recruit persons with modern skills, and to provide labor for the growing sugar industry. As part of this effort, the Kingdom’s statutes provided for easy naturalization of immigrants and offered political rights even to immigrants who did not wish to give up their citizenship in the countries from which they had come.<sup>57</sup>

The Kingdom’s first written law code, published in Hawaiian in 1841 and in English translation in 1842, provided for naturalization of foreigners who married Hawaiian subjects.<sup>58</sup> In 1846, the Kingdom’s Civil Code provided for naturalization of any alien immigrant who applied after living in

<sup>52</sup> By contrast, the United States did have statutes providing that the child born abroad of an American citizen was an American citizen if the child’s American father had resided in the United States before the child was born. Act of March 26, 1790, 1 Stat. 103, 104; Act of January 29, 1795, § 3, 1 Stat. 414, 415; Act of April 14, 1802, § 4, 2 Stat. 153, 155; Act of Feb. 10, 1855, § 1, 10 Stat. 604; *Montana v. Kennedy*, 366 U.S. 308, 311-12 (1961) (before 1934, a child could inherit American citizenship only through his father, not his mother); *Weedin v. Chin Bow*, 274 U.S. 657 (1927) (father must have resided in U.S. before child born). Thus, a person such as Sanford B. Dole (legislator and judge under the Kingdom and President of the Republic) who was born in Hawai‘i of a male American citizen who had immigrated to Hawaii was both a citizen of Hawai‘i and of the United States. American citizenship could pass down to a second generation born in Hawai‘i if (1) the grandchild’s father had dual American and Hawai‘i citizenship by virtue of being born in Hawai‘i of an American father; (2) the grandchild’s father had resided in America for some period of time, e.g. while attending college; and (3) the grandchild’s father had not formally renounced his American citizenship before his child was born. Since 1934, American law has provided that a child born abroad of an American citizen is an American citizen, without regard to the gender of the American parent. Act of May 24, 1934, § 1, 48 Stat. 797.

<sup>53</sup> L. 1892, c. 57, § 5 (now codified at Haw. Rev. Stat. § 1-1).

<sup>54</sup> *Wong Foong v. United States*, 69 F.2d at 682.

<sup>55</sup> The 1890 census reported 40,622 ethnic Hawaiians and 7,495 native-born subjects who were not ethnic Hawaiians. Assuming that all of the ethnic Hawaiians were born in Hawai‘i, native-born subjects who were not ethnic Hawaiians comprised about 15.58% of all native-born subjects. The next census, in 1896, reported 39,504 ethnic Hawaiians and 13,733 native-born subjects who were not ethnic Hawaiians. The percentage of native-born subjects who were not ethnic Hawaiians had increased to about 25.8% of the native born population in just six years. It was probably about 20% in 1893, midway between the 1890 and 1896 censuses. Statistics from THURM’S 1900 HAWAIIAN ANNUAL 39 (1900).

<sup>56</sup> See 2 KUYKENDALL, HAWAIIAN KINGDOM 177-195 (1953); 3 KUYKENDALL, HAWAIIAN KINGDOM 116-85 (1967). The ethnic Hawaiian population fell throughout the period of the Kingdom, due to a number of causes, including exposure to diseases introduced from around the world, but has been rising ever since the United States annexed Hawai‘i and introduced modern medicine and public health measures and as ethnic Hawaiians have intermarried with members of other ethnic groups. See E.C. NORDYKE, THE PEOPLES OF HAWAII, 174, 178, 190-93 (2d ed. 1989); R.C. SCHMITT, HISTORICAL STATISTICS OF HAWAII 9, 25-27 (1977).

<sup>57</sup> See JONES, NATURALIZATION IN HAWAII (summarizing the naturalization statutes of the Kingdom).

<sup>58</sup> Hawaiian Laws 1841-1842, Chapter X, § IX at 47 (1995 reprint of 1842 translation by William L. Richards, a naturalized subject and a member of Kamehameha III’s cabinet).

Hawai'i for at least one year.<sup>59</sup> The Civil Code created a Bureau of Naturalization within the Ministry of Interior.<sup>60</sup>

The statute went on to provide that aliens who did not want to give up their citizenship in the country they came from could become “denizens,” entitled to full legal rights of Hawaiian subjects.<sup>61</sup> The status of denizen, like the rule that aliens can be naturalized, goes back to the English common law. The King of England, by exercise of his royal authority, could make an alien a “denizen” of England, having most of the rights of an English subject.<sup>62</sup> In the Kingdom of Hawai'i, denizen status amounted to dual citizenship: a denizen had the rights of a subject of Hawai'i without ceasing to be a citizen of his native country.<sup>63</sup> Denizens had the right to vote and hold public office.<sup>64</sup> Similar provisions for naturalization and denization can be found in the subsequent Civil Codes of the Kingdom.<sup>65</sup>

Between 1844 and 1894, using these provisions, 3,239 foreigners became naturalized.<sup>66</sup> The Kingdom government granted another 143 foreigners letters of denization.<sup>67</sup> Naturalized subjects and denizens held high public office, including cabinet posts, legislative seats, and judgeships.<sup>68</sup>

#### D. Voting Rights in Kingdom Elections

Under the constitutions of the Hawaiian Kingdom, being a subject was neither necessary nor sufficient to be a voter. Denizens could vote if they met applicable qualifications of gender, literacy and wealth.<sup>69</sup> Women could not vote, even if they were Hawaiian subjects.<sup>70</sup>

Kamehameha III and the leading ali'i, with the help of their American and English advisors, transformed Hawai'i into a constitutional monarchy, loosely modeled on Great Britain, when they adopted

<sup>59</sup> I Statute Laws of Kamehameha III, § X at 78.

<sup>60</sup> *Id.*, at Chapter V, § 1.

<sup>61</sup> *Id.*, § Sec. XIV (“letters patent of denization conferring upon such alien, without abjuration of native allegiance, all of the rights, privileges, and immunities of a native”). At least after 1868, and perhaps before, an American citizen who took an oath to become a naturalized citizen of a foreign country thereby gave up his American citizenship. Act of July 27, 1868, ch. 249, 15 Stat. 223; 14 Op. Atty Gen. 295, 296 (1873).

<sup>62</sup> According to Blackstone, a “denizen is an alien born, but who has obtained ex donatione regis letters patent to make him an English subject: a high and incommunicable branch of the royal prerogative.” BLACKSTONE at \*374. By contrast, naturalization of aliens was accomplished by acts of Parliament. *Id.* The same distinction continued into the nineteenth century, even after Parliament enacted a general naturalization act delegating to the Secretary of State the power to naturalize immigrants. F. W. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND, 426-28 (1963 reprint of 1908 edition of lectures first given in 1887-88).

<sup>63</sup> 3 G. H. HACKWORTH, DIGEST OF INTERNATIONAL LAW, 126-127 (1942).

<sup>64</sup> Aliens and Denizens, 5 Haw. 167 (1884).

<sup>65</sup> 1859 Civil Code, §§ 428-434; 1884 Civil Code, §§ 428-434.

<sup>66</sup> INDEX TO THE NATURALIZATION RECORD BOOKS FOR INDIVIDUALS NATURALIZED BY THE MINISTER OF THE INTERIOR OF THE HAWAIIAN ISLANDS, 1844-1894 (no date) (available in Hawai'i State Archives). This total included 1105 Americans; 763 Chinese; 596 British subjects; 242 Portuguese; 230 Germans; 47 French citizens; 68 other Europeans; 136 from Pacific Islands; 27 from South America; and 25 others. *Id.* Three Japanese were naturalized. Historical note appended to Organic Act, § 4 in 15 MICHIE'S HAWAII REVISED STATUTES ANNOTATED at 30.

<sup>67</sup> H. ARAI, INDICES TO CERTIFICATES OF NATIONALITY 1846-1854, DENIZATION 1846-1898, OATHS OF LOYALTY TO THE REPUBLIC FROM OAHU 1894, AND CERTIFICATES OF SPECIAL RIGHTS OF CITIZENSHIP 1896-1898 (1991). This index is on file in Hawai'i State Archives (Ref. 351.857 H3). It is unpaginated and the number given in the text is derived from a hand count of the indexed names.

<sup>68</sup> See list of cabinet members in 1891 THRUM'S HAWAIIAN ANNUAL 92-95; GAVIN DAWS, SHOAL OF TIME, 214 (1968) (26 of 37 cabinet appointees between 1874 and 1887 were not ethnic Hawaiians); 3 KUYKENDALL, HAWAIIAN KINGDOM at 188, 248 (discussing numbers of cabinet members and legislators who were not ethnic Hawaiians); see LYDECKER (listing members of each legislature); see the list of judges in the opening pages of each of the first 10 volumes of the Hawaii Reports.

<sup>69</sup> Aliens & Denizens, 5 Haw. 167 (1884); 1852 Const. Art. 78.

<sup>70</sup> *Id.*; 1852 Const. Art. 78; 1864 Const. Art. 62.

the 1839 Declaration of Rights – the “Hawaiian Magna Charta”<sup>71</sup> – and the Constitution of 1840.<sup>72</sup> The Declaration of Rights, which was incorporated into the 1840 Constitution declared:

God hath made of one blood all nations of men to dwell on the earth in unity and blessedness. God has also bestowed certain rights alike on all men and all chiefs, and all people of all lands.

. . .

God has also established government, and rule, for the purpose of peace; but in making laws for the nation, it is by no means proper to enact laws for the protection of the rulers only, without also providing protection for their subjects.<sup>73</sup>

The adoption of the 1840 Constitution, incorporating the Declaration of Rights, marked Hawai‘i’s transition to constitutional monarchy and the adoption of the ancient common law principle that, “The King must not be under man but under God and under the law because law makes the King.”<sup>74</sup> The Hawai‘i Supreme Court later explained that “Kamehameha III originally possessed, in his own person, all the attributes of absolute sovereignty. Of his own free will he granted the Constitution of 1840, as a boon to his country and people, establishing his Government upon a declared plan.”<sup>75</sup> That constitution introduced the innovation of representatives chosen by the people.<sup>76</sup> “This for the first time gave the common people a share in the government – actual political power.”<sup>77</sup> A subsequent statute defined the procedure of choosing the representatives by a petition system.<sup>78</sup>

The 1852 Constitution placed elections on a more formal basis.<sup>79</sup> Advancing ahead of Britain, Hawai‘i adopted universal manhood suffrage: “Every male subject . . . whether native or naturalized, and every denizen of the Kingdom, who shall have paid his taxes, who shall have attained the full age of twenty years, and who shall have resided in the Kingdom for one year . . . shall be entitled to one vote.”<sup>80</sup>

<sup>71</sup> 1 KUYKENDALL, HAWAIIAN KINGDOM at 160.

<sup>72</sup> “Foreign contacts in general, and especially the work of the American missionaries over a period of twenty years led to the development of liberal ideas, if not an actual liberal movement, among the Hawaiian people; and this was viewed rather sympathetically by the Kings and several of the influential chiefs.” KUYKENDALL, CONSTITUTIONS OF THE HAWAIIAN KINGDOM, (hereinafter, “CONSTITUTIONS”) Hawaiian Historical Society Papers, No. 21 (1940) at 7. See W.D. Alexander, A Sketch of the Constitutional History of the Hawaiian Kingdom, 1894 THRUM’S HAWAIIAN ANNUAL 46-49 (Declaration of Rights and Constitution were originally composed in Hawaiian by Hawaiians and show influence of Bible and American Declaration of Independence).

<sup>73</sup> Constitution of 1840, Declaration of Rights Both of the People and Chiefs in LYDECKER at 8.

<sup>74</sup> 2 HENRY DE BRACON, ON THE LAWS AND CUSTOMS OF ENGLAND, 33 (S. Thorne ed. 1968), which can be found on the Internet at [bracton.law.cornell.edu/bracton/common/index.html](http://bracton.law.cornell.edu/bracton/common/index.html) (visited October 2, 2001).

<sup>75</sup> *Rex v. Booth*, 2 Haw. 616, 630 (1863).

<sup>76</sup> KUYKENDALL, CONSTITUTIONS at 14. Constitution of 1840, “Respecting the Representative Body,” LYDECKER at 12.

<sup>77</sup> 1 KUYKENDALL, HAWAIIAN KINGDOM at 167.

<sup>78</sup> Laws of the Hawaiian Islands (1842), Chapter II, Of the Representative Body. The procedure was more like a petition drive than an election. “Whosoever pleases” could nominate a candidate by writing a letter addressed to the King and circulating it for signature in the district. The nominees who got the most signatures on their nominating letters were elected. No qualifications were specified as to who could sign the nominating letters. The statute provided that there would be seven representatives (two each from Hawai‘i, Maui and adjacent islands, and Oahu, and one from Kauai. *Id.* By contrast, there were fourteen members of the House of Nobles, each named in the Constitution of 1840 (“House of Nobles”).

<sup>79</sup> In accordance with the 1840 Constitution’s provision for constitutional amendment (entitled “Of Changes in this Constitution,” LYDECKER at 15), the 1852 Constitution was adopted by agreement of the King and both houses of the Legislature. 1 KUYKENDALL, HAWAIIAN KINGDOM at 267.

<sup>80</sup> Constitution of 1852, Art. 78, in LYDECKER at 44.

In 1864, Kamehameha IV died without naming an heir.<sup>81</sup> The 1852 Constitution provided that the Legislature had the power and right to elect his successor.<sup>82</sup> However, without waiting for an election, Kamehameha IV's brother Lot seized the throne and took the title of Kamehameha V.<sup>83</sup> He refused to take the required oath to the Constitution and did not convene the Legislature.<sup>84</sup> He called a constitutional convention to consider his proposals to amend the Constitution of 1852.<sup>85</sup> When the constitutional convention met, he instead proposed replacing the Constitution of 1852 with a new constitution that would impose a property qualification to disenfranchise poorer voters, most of them ethnic Hawaiian.<sup>86</sup> In Kamehameha V's opinion, universal manhood suffrage was "'altogether beyond the political capacity' of the Hawaiian people in the state of development which they have attained."<sup>87</sup> Kamehameha V had the support of the upper house of the legislature (the "Nobles" who were appointed by the King) and other wealthy residents; but the elected members of the constitutional convention, disagreeing with his opinion of their constituents' political capacity, rejected his proposal to disenfranchise the poor.<sup>88</sup> Kamehameha V, proclaiming that voting "is not a right belonging to the people," launched a bloodless coup d'état, dissolved the convention, and abrogated the 1852 Constitution.<sup>89</sup> He imposed a new constitution that substantially increased the power of the monarch.<sup>90</sup> It included the property qualification for voting that the elected convention had rejected.<sup>91</sup> Depriving poorer citizens

<sup>81</sup> 2 KUYKENDALL, HAWAIIAN KINGDOM at 124.

<sup>82</sup> *Id.* Constitution of 1852, Art. 25, in LYDECKER, at 38.

<sup>83</sup> 2 KUYKENDALL, HAWAIIAN KINGDOM at 124-125.

<sup>84</sup> *Id.* at 125; KUYKENDALL, CONSTITUTIONS at 27. Constitution of 1852, Art. 94 (King to swear to govern in conformity with the Constitution and laws), in LYDECKER at 46. Alexander, A Sketch of the Constitutional History of the Hawaiian Kingdom, 1894 THRUM'S HAWAIIAN ANNUAL at 53.

<sup>85</sup> 2 KUYKENDALL, HAWAIIAN KINGDOM at 128-29; KUYKENDALL, CONSTITUTIONS at 32.

<sup>86</sup> 2 KUYKENDALL, HAWAIIAN KINGDOM at 130-31.

<sup>87</sup> *Id.* at 127, quoting Cabinet Council Minute Book, March 3, 1864.

<sup>88</sup> 2 KUYKENDALL, HAWAIIAN KINGDOM at 131; KUYKENDALL, CONSTITUTIONS at 35, 37.

<sup>89</sup> 2 KUYKENDALL, HAWAIIAN KINGDOM at 131-32. KUYKENDALL, CONSTITUTIONS at 35-36. The Latin Americans call this kind of coup an "autogolpe" – a coup d'état by the head of government to overthrow constitutional limits on his own power, as President Alberto Fujimori did in Peru.

<sup>90</sup> 2 KUYKENDALL, HAWAIIAN KINGDOM at 133-34 ("by his coup d'état, the king had accomplished his purpose to make 'the influence of the 'Crown' pervade 'every function of the government,'" quoting Kamehameha V); KUYKENDALL, CONSTITUTIONS at 39.

<sup>91</sup> Constitution of 1864, Art. 62, in LYDECKER at 95. Voters had to have paid their taxes, and had to hold "Real Property in the Kingdom to the value over and above all incumbrances of One Hundred and Fifty Dollars--or of a Lease-hold property on which the rent is Twenty-Five Dollars per year—or of an income of not less than Seventy-Five Dollars per year, derived from any property or some lawful employment." Article 61 imposed a new property qualification on representatives: a man had to own real estate of an unencumbered value of at least \$500 or have an annual income of at least \$250. KUYKENDALL, CONSTITUTIONS at 39-40. Measured by buying power and income of the time, these were substantial amounts. People who still lived by traditional Hawaiian subsistence agriculture had little or no cash income. A worker on a sugar plantation (the chief source of cash wages for ethnic Hawaiians at that time) made about \$7-\$10 per month. G.W. Willfong, Sugar Plantations in the Early Days in the Hawaiian Islands, 1 PLANTER'S MONTHLY 226, 228 (1882) (giving statistics from 1863). Land prices in the 1850s were in the range of 25 cents to \$1.50 an acre. T. MORGAN, HAWAII: A CENTURY OF ECONOMIC CHANGE, at 133 n.38 (1948). In the 1860s the Government sold thousands of acres at average prices that generally fell below \$1 per acre. In 1864 it sold 92,715 acres at an average price of 16 cents per acre. LEGISLATIVE REFERENCE BUREAU, PUBLIC LAND POLICY IN HAWAII: A HISTORICAL ANALYSIS 186-87 (1969) (summarizing government land sales 1846-1893). Thus, \$150 worth of land in 1864 would have been a hundred acres or more, far more than needed for subsistence and family farming. Given that most of the voters before the 1864 coup were ethnic Hawaiians, and that most commoners who were employed in jobs that paid cash income worked in low-wage plantation jobs, it is highly likely that most of the voters disenfranchised by Kamehameha V's property qualification were ethnic Hawaiians. The Constitution of 1864, Art. 62, also included a literacy requirement for voters born after 1840.

of the right to vote was understandably unpopular and, in 1874, after Kamehameha V died, that property qualification was removed by constitutional amendment.<sup>92</sup>

The 1864 Constitution lasted until 1887 when another coup imposed another Constitution.<sup>93</sup> By 1887 the coalition of ali'i and wealthy planters who had supported Kamehameha V in the 1864 coup had broken down over disputes about government spending and the exercise of royal powers.<sup>94</sup> The leaders of the 1887 coup, the self-proclaimed Reform Party, were wealthy, mostly white subjects and denizens who accused King Kalakaua and his prime minister, Walter Murray Gibson, of corruption.<sup>95</sup> They wanted to reduce the King's powers as defined in the 1864 Constitution.<sup>96</sup> After threatening to overthrow the monarchy, they settled for driving Gibson out of the country and forcing Kalakaua to sign a new constitution that drastically reduced the monarch's powers.<sup>97</sup>

The leaders of the coup designed the provisions of the 1887 Constitution to reshape the electorate to maximize the chances of the Reform Party winning elections and to increase the power of the wealthier members of the community at the expense of the King.<sup>98</sup> Until 1887, the King had appointed the upper half of the Legislature, the "Nobles."<sup>99</sup> The 1887 Constitution broadened voting rights by making the Nobles elected officials for the first time, but there was a stiff property qualification for voting for Nobles.<sup>100</sup> As in the amended version of the 1864 Constitution, there was no property qualification for voting for representatives under the 1887 Constitution,<sup>101</sup> but there were literacy requirements.<sup>102</sup> Any male resident who met the voting qualifications could vote.<sup>103</sup> Broadening the electorate for representatives to include all male residents would have created a new electoral majority: recent immigrants from Japan and China, most of them field workers in the sugar plantations.<sup>104</sup>

However, because there was no reason to think that these immigrants would support the Reform Party, the 1887 Constitution, for the first time in the history of Hawai'i, imposed a racial qualification on voting: persons of Asian ancestry were denied the right to vote, even if they had been able to vote

<sup>92</sup> 2 KUYKENDALL, HAWAIIAN KINGDOM at 134; 3 KUYKENDALL, HAWAIIAN KINGDOM at 192; KUYKENDALL, CONSTITUTIONS at 36, 41-43. After Kamehameha V died in 1872 without appointing an heir, the legislature elected King Lunalilo, who had won a non-binding popular election. Lunalilo died in 1874 and the legislature elected King Kalakaua without holding a popular election.

<sup>93</sup> See 3 KUYKENDALL, HAWAIIAN KINGDOM at 344-372.

<sup>94</sup> 3 KUYKENDALL, HAWAIIAN KINGDOM at 246-304, 344-356.

<sup>95</sup> *Id.* at 344-356; T.M. Spaulding, Cabinet Government in Hawai'i 1887-1893 at 4-5, HAWAII UNIVERSITY OCCASIONAL PAPERS NO. 2 (1924); SANFORD BALLARD DOLE, MEMOIRS OF THE HAWAIIAN REVOLUTION 45-55 (1936). Gibson was a naturalized Hawaiian subject who had previously been a British subject and an American citizen. See J. MICHENER AND A. GROVE DAY, RASCALS IN PARADISE 112-46 (1957).

<sup>96</sup> 3 KUYKENDALL, HAWAIIAN KINGDOM at 348-49; KUYKENDALL, CONSTITUTIONS at 46.

<sup>97</sup> 3 KUYKENDALL, HAWAIIAN KINGDOM at 365-372. WILLIAM ADAM RUSS, JR., THE HAWAIIAN REVOLUTION at 19 (1992 reprint, first published 1959); DOLE, MEMOIRS OF THE HAWAIIAN REVOLUTION at 49-58.

<sup>98</sup> The imposition of this constitution by coup d'état led to its nickname, the "Bayonet Constitution." *Id.* at 370.

<sup>99</sup> RUSS, HAWAIIAN REVOLUTION at 20-21.

<sup>100</sup> 1852 Const. Art. 72; 1864 Const. Art. 57.

<sup>101</sup> 1887 Const. Art. 59. To vote for Nobles a voter had to "own and be possessed, in his own right, of taxable property in this country of the value of not less than three thousand dollars over and above all encumbrances, or shall have actually received an income of not less than six hundred dollars during the year." *Id.* No voter lost the right to vote as a result of the property qualification because no one had ever had the right to vote for Nobles. Art. 63 of the 1887 Constitution empowered the Legislature to increase the property qualifications and add a qualification for voting for representatives. The Legislature never exercised its power under this article.

<sup>102</sup> *Id.* Art. 62.

<sup>103</sup> 1887 Const. Arts 59, 62 (literacy in Hawaiian, English or a European language); 1864 Const. Art. 62 (literacy, no specification of the language).

<sup>104</sup> 1887 Const. Arts. 59, 62 in LYDECKER at 166-168.

<sup>105</sup> According to the 1890 Census, Chinese and Japanese accounted for 51.8% of all males of voting age but none of the registered voters. R. C. Schmitt, *Voter Participation Rates in Hawai'i Before 1900*, 5 THE HAWAIIAN J. OF HISTORY 50, 56 (1971).

under the prior constitutions.<sup>105</sup> In *Ahlo v. Smith*,<sup>106</sup> naturalized citizens of Chinese ancestry who had voted before 1887 challenged this provision on equal protection grounds. They lost because the Hawai'i Supreme Court said that it could not do anything about a qualification written into the Constitution itself.

The number of Hawaiian subjects who could claim descent from pre-contact inhabitants of Hawai'i continued to decline throughout the history of the Kingdom while the number of immigrants grew. By 1893, ethnic Hawaiians were a minority of about 40% of the population.<sup>107</sup> Since almost all of the Asian immigrants were adults, the ethnic Hawaiian portion of the voting age population was even lower.<sup>108</sup> At the end of the Kingdom, about three out of four ethnic Hawaiians could not vote at all because of the gender, literacy, property, and age requirements.<sup>109</sup> However, because of the racial disenfranchisement of Asians, ethnic Hawaiians still amounted to about two-thirds of the electorate for representatives and about one-third of the electorate for Nobles.<sup>110</sup>

Had the Kingdom endured another generation, most of its adult citizens would have been the native-born children of Asian immigrants. It is hard to imagine that they would have put up with being disenfranchised on racial grounds. It is likely that they would have become either voters or revolutionaries. Thus, if an independent Kingdom had lasted into the mid-twentieth century, it is very likely that most of its voters would not have been ethnic Hawaiians.

However, the Kingdom did not last into the twentieth century; conflict within the ruling oligarchy ended it in 1893. The 1887 Constitution was a rush job<sup>111</sup> that failed to resolve the conflict. Despite the Reform Party's efforts to change the voting rules to ensure itself a majority, no party could secure a stable majority in the legislature.<sup>112</sup> The King's powers were reduced but he could still appoint the cabinet<sup>113</sup> and veto legislation.<sup>114</sup> Abrogating and imposing constitutions by coup d'état discouraged respect for constitutional law. All factions were increasingly willing to use illegal and violent means to change the fundamental structure of the government.<sup>115</sup>

<sup>105</sup> 1887 Const. Arts. 59, 62.

<sup>106</sup> 8 Haw 420 (1892).

<sup>107</sup> See SCHMITT, HISTORICAL STATISTICS OF HAWAII 74 (1977) (reporting statistics from 1890 census showing ethnic Hawaiians and part-Hawaiians were 45% of the population and statistics from 1896 census showing ethnic Hawaiians and part-Hawaiians were 36% of the population).

<sup>108</sup> See R. C. Schmitt, *Voter Participation Rates in Hawai'i Before 1900*, 5 THE HAWAIIAN J. OF HISTORY at 56.

<sup>109</sup> See 1890 census statistics reported in THRUM'S HAWAIIAN ANNUAL FOR 1892 p. 16, showing that 23.5% of all ethnic Hawaiians were registered voters in 1890; see generally, Hanifin, *Hawaiian Reparations: Nothing Lost, Nothing Owed*, 17 HAW. BAR J. No. 2, p. 107, 118-21(1982) (discussing limitations on voting rights under 1887 Constitution).

<sup>110</sup> 3 KUYKENDALL, HAWAIIAN KINGDOM at 453. The rest of the voters were male residents of European or American ancestry.

<sup>111</sup> The Bayonet Constitution was drafted in five days to present Kalakaua with an offer he could not refuse; its framers did not have time to deliberate over the details. 3 KUYKENDALL, HAWAIIAN KINGDOM at 367; KUYKENDALL, CONSTITUTIONS at 45-46; DOLE, MEMOIRS OF THE HAWAIIAN REVOLUTION at 56-57. As Talleyrand is reputed to have warned Napoleon, "You can do anything with bayonets except sit on them."

<sup>112</sup> 3 KUYKENDALL, HAWAIIAN KINGDOM at 514-20.

<sup>113</sup> 1887 Constitution, Art. 41.

<sup>114</sup> 1887 Constitution, Art. 31; *Everett v. Baker*, 7 Haw. 229 (1887).

<sup>115</sup> See, e.g., 3 KUYKENDALL, HAWAIIAN KINGDOM at 424-30 (Robert Wilcox's 1889 coup attempt); 509, 523-25, 528 (ethnic Hawaiians Wilcox and J.E. Bush calling for overthrow of monarchy and institution of republic); 533-41 (Annexation Club working for annexation of Hawai'i to U.S.); 582 (Queen's attempt to overthrow 1887 Constitution); RUSS, HAWAIIAN REVOLUTION at 92 (Wilcox's 1892 coup attempt), 66-67 (Queen's attempt to overthrow 1887 Constitution).

Kalakaua's sister Liliuokalani succeeded him on the throne in 1891.<sup>116</sup> In January 1893, she precipitated the long-brewing final crisis of the Kingdom by announcing her intent to impose a new constitution by royal fiat.<sup>117</sup> She denied the legitimacy of the 1887 Constitution and asserted a royal power to abrogate and grant constitutions, citing the precedent of Kamehameha V.<sup>118</sup> Her Constitution would have gone back to Kamehameha V's model, greatly increasing her power at the expense of all others in the political system: she would have had an absolute veto, the power to appoint most of the legislators, and to hire and fire the cabinet at will. She would have disenfranchised many voters by re-imposing the property qualification on voting for representatives and by denying denizens and other non-citizen residents the right to vote.<sup>119</sup> More fundamentally, a monarch who can alter the Constitution as she thinks best when she thinks best is an absolute monarch operating above the highest law of the land.<sup>120</sup> Liliuokalani's own cabinet refused to support her in overthrowing the 1887 Constitution.<sup>121</sup> She announced that she would delay the imposition of her new constitution.<sup>122</sup> Her opponents seized the opportunity to launch their own coup. They overthrew her, bringing the Kingdom of Hawai'i to an end.

It is not the purpose of this article to defend the overthrow of the Monarchy, nor to take sides among the contending factions of the 1890s.<sup>123</sup> Even assuming that the overthrow was illegal (as all revolutions are) and undemocratic, nonetheless the Kingdom that was overthrown was not a nation of ethnic Hawaiians alone. The Kingdom had thousands of citizens and voters of other ancestries and their numbers were growing toward a majority. Just as the Kingdom included them, so its overthrow affected them in ways that took decades to unfold.

### III. VOTING RIGHTS AND CITIZENSHIP UNDER THE REPUBLIC

#### A. Voting Rights

As in 1864 and 1887, the winners in 1893 tried to ensure that they would have an electoral majority by limiting the franchise to their likely supporters. The victorious leaders of the 1893 coup created

<sup>116</sup> 3 KUYKENDALL, HAWAIIAN KINGDOM at 473-74. Liliuokalani succeeded to the throne because she was specifically named as Kalakaua's heir in Article 22 of the 1887 Constitution. She took the oath to the 1887 Constitution as required by Article 24. 3 KUYKENDALL, HAWAIIAN KINGDOM at 474.

<sup>117</sup> 3 KUYKENDALL, HAWAIIAN KINGDOM at 582; KUYKENDALL, CONSTITUTIONS at 56.

<sup>118</sup> LILIUOKALANI, HAWAII'S STORY BY HAWAII'S QUEEN at 238 (1964 reprint of 1898 ed.).

<sup>119</sup> United States Commissioner James H. Blount acquired a copy of the Queen's draft constitution and published it in his report which supported the Queen's side of the dispute about her overthrow. J.H. BLOUNT, REPORT OF THE COMMISSIONER TO THE HAWAIIAN ISLANDS at 581-90 (1893) ("BLOUNT REPORT"); 3 KUYKENDALL, HAWAIIAN KINGDOM at 585-86; RUSS, HAWAIIAN REVOLUTION at 66-67. Under Liliuokalani's proposed constitution, the Queen would have appointed the Nobles and the cabinet members who would sit as legislators in a one-house legislature with the representatives of the people; thus her appointees would be a majority of the legislature. Kamehameha V's property qualification would have been restored.

<sup>120</sup> Compare 2 BRACON, ON THE LAWS AND CUSTOMS OF ENGLAND at 33 (king is under God and the law because the law makes the king).

<sup>121</sup> 3 KUYKENDALL, HAWAIIAN KINGDOM at 584-85; W. Russ, THE HAWAIIAN REVOLUTION 66-68 (1992; original edition 1959).

<sup>122</sup> 3 KUYKENDALL, HAWAIIAN KINGDOM at 585-86.

<sup>123</sup> The history of the overthrow of the monarchy is intensely controversial but the controversy is beyond the scope of this article. Particularly controversial is the role of the American minister, John Stevens, and American sailors and marines landed from the U.S.S. Boston during the crisis. For various views on these events, see 3 KUYKENDALL, HAWAIIAN KINGDOM at 582-650; RUSS, THE HAWAIIAN REVOLUTION; T. COFFMAN, NATION WITHIN (no date); T. TWIGG-SMITH, HAWAIIAN SOVEREIGNTY: DO THE FACTS MATTER? (1998); NATIVE HAWAIIAN STUDY COMMISSION, REPORT ON THE CULTURE NEEDS AND CONCERNS OF NATIVE HAWAIIANS, Vol. I at 293-300, Vol. II at 54-79 (1983); BLOUNT REPORT; SENATE REPORT 227, 53D CONGRESS, 2D SESSION ("MORGAN REPORT") (1894); LILIUOKALANI, HAWAII'S STORY BY HAWAII'S QUEEN; DOLE, MEMOIRS OF THE HAWAIIAN REVOLUTION.

a “Provisional Government” and sought annexation by the United States.<sup>124</sup> When a change of administration in Washington blocked annexation, they organized the Republic of Hawai‘i.<sup>125</sup> The nineteen members of Provisional Government’s governing councils appointed themselves to the convention that wrote the Republic’s constitution.<sup>126</sup> Eighteen more delegates were elected by voters who had to swear loyalty to the new regime and forswear any intent to restore the monarchy.<sup>127</sup> This loyalty requirement reduced the size of the electorate by about two-thirds compared to the 1890 election.<sup>128</sup>

Voting under the 1894 Constitution of the Republic was restricted to those the governing group trusted. Like Kamehameha V, the self-appointed leaders of the Republic believed that universal suffrage was “altogether beyond the capacity”<sup>129</sup> of the people of Hawai‘i. As one leader of the Provisional Government explained, “the problem to be solved is, how to combine an oligarchy with a representative form of government so as to meet the case.”<sup>130</sup> The Constitution of the Republic solved the “problem” by imposing a loyalty oath specifically disavowing the Monarchy,<sup>131</sup> and creating a voter registration board with broad discretion to determine who should be allowed to vote.<sup>132</sup>

The Republic’s Constitution removed the express racial exclusion of Asians from voting rights that the last constitution of the Kingdom had imposed. There were no subsequent racial qualifications on voting in Hawai‘i law until the Office of Hawaiian Affairs (“OHA”) was created in 1978 with a racially discriminatory franchise.<sup>133</sup> However, voting rights under the Republic were limited to citizens and denizens. Because very few Japanese immigrants had become naturalized citizens or denizens, this rule excluded nearly all of them from voting but avoided offending the Japanese government by openly discriminating against Japanese.<sup>134</sup>

## B. Citizenship

Citizenship under the Republic extended far beyond the narrow boundaries of voting rights. The 1894 Constitution of the Republic, Art. 17, included an explicit provision, copied from the Fourteenth Amendment of the United States Constitution, that everyone born in Hawai‘i was a citizen of the Republic: “All persons born or naturalized in the Hawaiian Islands, and subject to the jurisdiction of the Republic are citizens thereof.” In *McFarlane v. Collector*,<sup>135</sup> the Supreme Court held that a person of foreign parentage born in Hawai‘i in 1847 was a citizen by birth. The Supreme Court not only relied on the Republic’s Constitution, citing American Fourteenth Amendment cases to interpret it, but also

<sup>124</sup> See generally, RUSS, HAWAIIAN REVOLUTION at 135-53; KUYKENDALL, 3 THE HAWAIIAN KINGDOM at 605-16.

<sup>125</sup> See generally, W. RUSS, THE HAWAIIAN REPUBLIC (1962).

<sup>126</sup> *Id.* at 15.

<sup>127</sup> *Id.* at 20, 26-27.

<sup>128</sup> *Id.* at 26-27.

<sup>129</sup> 2 KUYKENDALL, HAWAIIAN KINGDOM at 127 (quoting Kamehameha V).

<sup>130</sup> RUSS, HAWAIIAN REPUBLIC at 15 (quoting comment of Attorney General W.O. Smith).

<sup>131</sup> 1894 Const. of the Republic, Art. 101.

<sup>132</sup> 1894 Const. of the Republic, Arts. 77-78. In addition, the Constitution of the Republic required literacy in English or Hawaiian. Art. 74, § 7.

<sup>133</sup> *Rice v. Cayetano*, 528 U.S. 495 (limiting voting rights to persons descended from inhabitants of Hawai‘i in 1778 is unconstitutional racial classification).

<sup>134</sup> Japan in the 1890s was a rising naval power; it sent a warship to Hawai‘i for a lengthy visit. RUSS, HAWAIIAN REPUBLIC at 136-38, 143, 166. The Japanese government insisted that its citizens should be given the same treatment as American and European immigrants to Hawaii: if the latter were to be given the vote, then Japanese in Hawai‘i should be given the vote. *Id.* at 23-25, 136. That would have given the Japanese close to an electoral majority, which the leaders of the Republic wanted to avoid. *Id.* at 31. The voting laws of the Republic offered the possibility of carefully selected Japanese being given the vote as denizens, while effectively maintaining the control of the governing faction. *Id.* at 32.

<sup>135</sup> 11 Haw 166 (1897).

quoted an American case that said that the rule of citizenship by birth went back to the common law.<sup>136</sup> The Hawai'i Supreme Court also relied on the lower court's decision in *United States v. Wong Kim Ark*,<sup>137</sup> recognizing that American-born children of Chinese immigrants are citizens.

The laws of the Republic, like the laws of the Kingdom, provided for naturalization of foreigners and offered denization as a status of dual citizenship.<sup>138</sup> The Republic also offered the privileges of citizenship by special certificate to aliens who had supported the Provisional Government.<sup>139</sup> The Republic granted denization and special certificates to 362 aliens.<sup>140</sup>

The Republic was not a democracy, yet it laid the groundwork for a democracy. If it had endured, its citizenship law would likely have led to a multi-racial democracy in about a generation, when the children of the Asian immigrants reached voting age. More significantly, the leaders of the Republic aimed to persuade the United States to annex Hawai'i and accomplished their aim.<sup>141</sup> Annexation brought Hawai'i under the Constitution of the United States, including the Fourteenth Amendment, peacefully establishing a democracy in the long run.<sup>142</sup>

#### IV. AMERICAN CITIZENSHIP FOR HAWAIIAN CITIZENS

##### A. Territory and State

Annexation to the United States led to full democratic government in Hawai'i. "The Constitution of the United States . . . [became] the heritage of all the citizens of Hawai'i."<sup>143</sup> Annexation ended the series of coups and attempted coups that had disrupted the politics of Hawai'i.<sup>144</sup> It eliminated the option of re-writing the voting laws to exclude voters that the ruling faction disliked.<sup>145</sup>

After Hawai'i was annexed to the United States in 1898, Congress passed the Organic Act making Hawai'i a territory in 1900.<sup>146</sup> Sec. 4 of the Organic Act granted American citizenship to everyone who had been a subject or denizen of the Kingdom and everyone who had been a citizen of the Republic of Hawaii, i.e., everyone who was born or naturalized in Hawai'i during the Monarchy and its successor governments.<sup>147</sup> Persons who had obtained denizen status under the Kingdom or the Republic also became American citizens because the United States recognized denization as being dual citizenship.<sup>148</sup>

<sup>136</sup> *Id.*, quoting *Ex parte Chin King*, 35 F. 355 (1888).

<sup>137</sup> 71 F. 382 (D. Or. 1896). The United States Supreme Court's decision, *United States v. Wong Kim Ark*, 169 U.S. 649, affirming the district court, had not yet been decided.

<sup>138</sup> Constitution of the Republic Art. 17, Art. 19.

<sup>139</sup> *Id.* Art. 17, § 2.

<sup>140</sup> H. ARAI, INDICES TO CERTIFICATES OF NATIONALITY 1846-1854, DENIZATION 1846-1898, OATHS OF LOYALTY TO THE REPUBLIC FROM OAHU 1894, AND CERTIFICATES OF SPECIAL RIGHTS OF CITIZENSHIP 1896-1898 (hand count of indexed names for period of the Republic).

<sup>141</sup> See RUSS, THE HAWAIIAN REPUBLIC at 372-379 (summarizing the history and policy of the Republic).

<sup>142</sup> Of course, in the long run, the leaders of the Republic were all dead. The attitude of the government of the Republic to democracy is reminiscent of St Augustine when he was a wild young man and prayed to God, "Make me chaste . . . but not yet." AUGUSTINE, CONFESSIONS, Bk. 8, Chap. 7. The Republic wanted Hawai'i to be a democracy, but not yet.

<sup>143</sup> *Rice v. Cayetano*, 528 U.S. at 524.

<sup>144</sup> The Kingdom experienced successful coups in 1864, 1887, and 1893 and unsuccessful attempted coups in 1889, 1892, and 1893. The Republic suppressed a coup attempt in 1895.

<sup>145</sup> See J. MADISON, A. HAMILTON & J. JAY, THE FEDERALIST PAPERS, No. 10, at 77-84 (Rossiter ed. 1961) (a federal union tends to "break and control the violence of faction"); *Rice v. Cayetano* (striking down exclusion of voters from OHA elections).

<sup>146</sup> Act of April 30, 1900, c. 339, 31 Stat. 141.

<sup>147</sup> IMMIGRATION LAW AND PROCEDURE, § 92.04[3] n. 41; 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW, 125, 126.

<sup>148</sup> 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW, 126-127, quoting Memorandum of the Office of the Solicitor for the Department of State, Oct. 17, 1924, file 130 Hackfeld, John F. (concerning the claim of Clarence W. Ashford, a British subject who claimed American citizenship based on having been granted Hawaiian denization in 1883).

In 1901, Ching Tai Sai arrived in Honolulu from China, claiming to be an American citizen even though he had never set foot in America and his parents had been Chinese subjects. In *United States v. Ching Tai Sai*,<sup>149</sup> the court held he was an American because (1) he had been born in Hawai'i during the days of the Kingdom; (2) therefore, he had been a Hawaiian citizen under Hawaiian law; (3) therefore he became an American citizen under the Organic Act.<sup>150</sup>

Furthermore, by virtue of the Fourteenth Amendment, persons born in Hawai'i after Annexation were native American citizens, regardless of their ancestry or the citizenship of their parents.<sup>151</sup> The Organic Act removed all property qualifications for voting that had applied in the Kingdom and the Republic as well as the political disqualifications imposed by the Republic.<sup>152</sup>

In 1920, for the first time in the history of Hawai'i, women obtained the right to vote.<sup>153</sup>

During this period, while ethnic Hawaiians were American citizens, tribal American Indians generally were not citizens. Ethnic Hawaiians who had been born in Hawai'i had been Hawai'i citizens and so became American citizens as a result of the Organic Act. The Fourteenth Amendment made everyone born in Hawai'i after the Organic Act was passed a citizen by birth because they had been born subject to the jurisdiction of the United States. By contrast, the Supreme Court held that tribal American Indians generally were not American citizens because, although they were born in the United States, they were not directly "subject to the jurisdiction" of the United States, but rather were subject to the jurisdiction of their tribes.<sup>154</sup> It was not until 1924 that an act of Congress made all American Indians American citizens.<sup>155</sup> Because Hawaiians were never members of a tribe, they were not affected by this discriminatory rule denying tribal Indians citizenship under the Fourteenth Amendment.<sup>156</sup>

During most of the Territorial period, Asian immigrants (except for those who had become naturalized in Hawai'i before Annexation) were barred from voting because they were not citizens and could not become citizens. Although persons of Asian descent who had been Hawaiian citizens before Annexation became American citizens under the Organic Act,<sup>157</sup> Asian immigrants were not eligible to become naturalized American citizens at that time. The racial restriction on naturalization of Asians predated Annexation.<sup>158</sup> American citizenship was a requirement for voting in Territorial elections.<sup>159</sup> The result of the racially discriminatory naturalization laws was that ethnic Hawaiians, although they were a minority of the population, were a majority of the electorate until the 1930s.<sup>160</sup>

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<sup>149</sup> 1 U.S. Dist. Ct. Haw. 118 (1901).

<sup>150</sup> Accord, *United States v. Dang Mew Wan Lum*, 88 F.2d. 88, 89 (9th Cir. 1937) (woman born of Chinese parents in Hawaii during period of Provisional Government became American citizen under Organic Act); 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW at 120.

<sup>151</sup> *United States v. Wong Kim Ark*. 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW at 120. Everyone born in the United States and subject to its jurisdiction is a native American citizen. BLACK'S LAW DICTIONARY 1047 (7th ed. 1999) (a "native" is "a person who is a citizen of a particular . . . nation by virtue of having been born there").

<sup>152</sup> Organic Act §§60, 62.

<sup>153</sup> U.S. Constitution, Nineteenth Amendment (ratified 1920).

<sup>154</sup> *Elk v. Wilkins*, 112 U.S. 94 (1884).

<sup>155</sup> *Indian Citizenship Act*, 43 Stat. 253 (1924).

<sup>156</sup> See *MacFarlane v. Collector*, 11 Haw. at 175 (distinguishing *Elk* on the grounds that "the relation of Indians to the United States is peculiar" and so is irrelevant to "the general principle of nationality of birth" applicable in Hawai'i).

<sup>157</sup> Organic Act, § 4, *United States v. Ching Tai Sai*, 1 U.S. Dist. Ct. Haw. 118 (1901).

<sup>158</sup> Chinese Exclusion Act of May 6 1882, 22 Stat. 58; *Toyota v. United States*, 268 U.S. 402, 408 (1925) (discussing history of racial restriction on naturalization).

<sup>159</sup> Organic Act, §§ 60 and 62.

<sup>160</sup> In 1930, Asians accounted for 64% of the population but only 26% of adult citizens. The percentage of voters who were of Japanese ancestry rose from 3% in 1920 to 8% in 1926 to 25% in 1936. R.C. PRATT & Z. SMITH, HAWAII POLITICS AND GOVERNMENT 37 (2000).

However, the children of Asian immigrants were American citizens by birth and eligible to vote when they came of age.<sup>161</sup> Eventually, Congress allowed Asian immigrants to become naturalized citizens. Chinese immigrants became eligible for naturalization in 1943.<sup>162</sup> Japanese and other Asian aliens became eligible for naturalization under the Immigration and Nationality Act of 1952.<sup>163</sup>

In 1959, when Hawai'i became a state, its citizens gained the equal right with all other Americans to elect congressional representatives and senators and vote for president.<sup>164</sup> Just as there is only one class of American citizen, there is only one class of American state.<sup>165</sup> The citizens of Hawai'i took their equal place with the citizens of the other forty-nine sovereign states of the Union.

### **B. *Rice* and *Arakaki*: Voting Rights Lost and Restored**

In 1978, a state constitutional amendment created OHA, a state agency, to administer state resources for the benefit of Hawaiians.<sup>166</sup> Another proposed constitutional amendment that would have limited OHA's beneficiaries, voters, and office-holders to ethnic Hawaiians failed to gain ratification because the constitutional convention failed to disclose that racial limitation to the voters.<sup>167</sup> However, the legislature added that limitation by a statute that defined the constitutional term "Hawaiian" in terms of ancestry and race.<sup>168</sup> This denied the right to vote in OHA elections to the vast majority of Hawai'i's voters.<sup>169</sup>

In *Rice v. Cayetano*, the United States Supreme Court held that the "State's electoral restriction enacts a race-based voting qualification"<sup>170</sup> that violates the Fifteenth Amendment to the United States Constitution.<sup>171</sup> Noting that 1778, the date in the statutory definition of Hawaiian was the date that Hawai'i's long isolation ended,<sup>172</sup> the Court drew the conclusion that "[t]he State, in enacting the legis-

<sup>161</sup> *United States v. Wong Kim Ark; Terada v. Dulles*, 121 F.Supp. 6, 8 (D. Haw. 1954) (person born in Hawaii of Japanese parents was by birth an American citizen by virtue of being born in the United States and a Japanese citizen by virtue of having Japanese parents).

<sup>162</sup> Pub. L. No. 78-199, 57 Stat. 600 (Dec. 17, 1943) amending Naturalization Act of 1940 § 303, 54 Stat. 1140.

<sup>163</sup> Pub. L. No. 82-414, 66 Stat. 163.

<sup>164</sup> An Act to Provide for the Admission of the State of Hawaii into the Union, Act of March 18, 1959, Pub. L. 86-3, 73 Stat. 4.

<sup>165</sup> Under the "equal footing doctrine" new states are admitted on terms of equality with existing states and every state is equally self-governing. U.S. Constitution, Art. IV, § 3; *Coyle v. Smith*, 221 U.S. 558, 565 (1911).

<sup>166</sup> Haw. State Const. Art. XII, §§ 5, 6 (added 1978).

<sup>167</sup> *Kahalekai v. Doi*, 60 Haw. 324, 342 (1979). In addition, blank ballots were counted as votes in favor of all of the proposed constitutional amendments, *id.* at 328-329, making it impossible to determine how many voters actually intended to cast ballots in favor of creating OHA. After the effect of blank ballots was publicized in subsequent litigation, *id.*, the voters amended the state constitution in 1980 to prohibit counting blank ballots as "yes" votes. Haw. Constitution, Art. XVII, § 2 "Ratification," as amended in the Nov. 4, 1980 general election.

<sup>168</sup> Haw. Rev. Stat. § 10-2. The definition of "Hawaiian" proposed by the Constitutional Convention in 1978 and not ratified was "any descendant of the races inhabiting the Hawaiian Islands previous to 1778." 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, Committee of the Whole Rep. No. 13, at 1018 (emphasis added). In Haw. Rev. Stat. § 10-2, the legislature substituted "peoples" for "races" but the legislative history shows that the meaning was unaltered. *Rice v. Cayetano*, 528 U.S. at 516, quoting 1979 HAWAII SENATE JOURNAL, Standing Comm. Rep. No. 784 at 1350, 1353-54; *id.* Conf. Comm. Rep. No. 77 at 998.

<sup>169</sup> In 1998, the last election held under the racially discriminatory rules struck down in *Rice*, there were 601,404 registered voters, of whom 100,143 (16.65%) were ethnic Hawaiians registered to vote in OHA elections. STATE OF HAWAII DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT AND TOURISM, STATE OF HAWAII DATA BOOK 1998 252, 261 (1999).

<sup>170</sup> *Rice v. Cayetano*, 528 U.S. at 517.

<sup>171</sup> The Fifteenth Amendment, § 1 provides that "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude."

<sup>172</sup> *Rice* 528 U.S. at 500, 514-15.

lation before us, has used ancestry as a racial definition and for a racial purpose.”<sup>173</sup> The State and OHA argued that the restriction of voting rights to descendants of people who lived in Hawaii in 1778 was part of a program to compensate the descendants of those who were harmed when the United States assisted in the overthrow of the Kingdom in 1893.<sup>174</sup> However, as discussed above, the subjects and voters of Hawai‘i in 1893 were not limited to descendants of inhabitants in 1778, i.e. to ethnic Hawaiians. In 1893, most ethnic Hawaiians could not vote but some persons who were not ethnic Hawaiians were subjects, voters, and even prominent public officials. The Petitioner Harold F. Rice was himself a descendant of a subject and public official of the Kingdom of Hawai‘i.<sup>175</sup> The Court observed that the State’s use of the 1778 date had nothing to do with the overthrow of the monarchy 115 years later; rather it was selected to use ancestry as “a proxy for race.”<sup>176</sup> Because the Fifteenth Amendment’s prohibition on using racial classifications to deny or abridge the right to vote in state and federal elections is “explicit and comprehensive,”<sup>177</sup> the Court concluded that denying persons who are not ethnic Hawaiians the right to vote in OHA elections violates the Fifteenth Amendment.

More broadly, the Court reaffirmed the basic democratic principle that whether the classification is called “racial,” “ethnic,” “political,” or something else, discrimination based on ancestry is wrong:

One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. An inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens.<sup>178</sup>

The Supreme Court rejected the three justifications that the State of Hawai‘i and OHA offered for the racially discriminatory voting laws.<sup>179</sup> First, the Court squarely rejected the argument that ethnic Hawaiians are analogous to an Indian tribe so that the restriction is like restricting voting in tribal elections to tribal members.<sup>180</sup> Second, the Court rejected the justification that OHA elections are “special purpose” elections, such as those for water districts, as to which the Fourteenth Amendment permits

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<sup>173</sup> *Id.* at 515. The term “race” in the Fifteenth Amendment, enacted in 1870, encompasses ancestry-based groups that are now commonly referred to as “ethnic groups.” *Id.* at 515. It would surely be implausible to suggest that there would be no constitutional violation if a state disenfranchised Japanese-Americans while allowing Chinese-Americans to vote.

<sup>174</sup> Brief for Respondent Benjamin J. Cayetano at 5-8, 34-35, 40, 46-49; Brief of Amicus Office of Hawaiian Affairs, et al., at 3, 6-8, 14, 24. The State and OHA repeated essentially the same argument in *Arakaki*. State Defendants’ Memorandum in Opposition to Plaintiffs’ Motion for Temporary Restraining Order and Injunctive Relief and in Support of Defendants’ Motion for Summary Judgment filed August 3, 2000, at 5-10, 19, 32-33; and OHA’s Proposed Intervenor-Defendants Memorandum in Support of Defendants’ Motion for Summary Judgment and in Opposition to Plaintiffs’ Cross-Motion for Summary Judgment filed September 5, 2000, at 19-24 (on file with author).

<sup>175</sup> *Rice*, 528 U.S. at 510; Brief for Petitioner, at 2, 8.

<sup>176</sup> *Rice*, 528 U.S. at 514.

<sup>177</sup> “The purpose and command of the Fifteenth Amendment are set forth in language both explicit and comprehensive. The National Government and the States may not violate a fundamental principle: They may not deny or abridge the right to vote on account of race.” *Rice*, 528 U.S. at 511-12.

<sup>178</sup> *Rice*, 528 U.S. at 517. The origins of this principle go back to the original Constitution. See U.S. Constitution Art. I, § 9, clause 8 (United States forbidden to grant titles of nobility); Art. I § 10, clause 1 (states forbidden to grant titles of nobility), Art. III, § 3, clause 2 (prohibiting hereditary criminal status: “no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted”). Some of the advocates of limiting voting rights by ancestry revived the idea of “Corruption of Blood” by arguing that plaintiff Rice should not be allowed to vote in OHA elections because his grandfather had opposed King Kalakaua and Queen Liliuokalani. See H. Trask and M. Trask, *Rice’s discrimination claim reveals legacy of overthrow*, HONOLULU ADVERTISER, October 3, 1999.

<sup>179</sup> Justice Kennedy wrote the majority opinion, joined by Chief Justice Rehnquist, and Justices O’Connor, Scalia, and Thomas. Justice Breyer wrote a concurrence joined by Justice Souter. Justices Stevens and Ginsberg dissented.

<sup>180</sup> *Rice*, 528 U.S. at 518-22. The Indian tribe analogy is discussed in the last section of this article.

departures from the one-person one-vote rule; there is no such exception to the Fifteenth Amendment.<sup>181</sup> Finally, the Court rejected the argument that the racial restriction ensured an alignment of interests between the trustees and the beneficiaries of a racially restricted trust. Without reaching the question of whether the federal or state government has a trust obligation to ethnic Hawaiians or whether such a trust would itself be constitutional, the Court rejected the trust argument for two distinct reasons. First, it was inconsistent with the OHA statutory scheme because, although the bulk of OHA's trust funds are earmarked for the benefit of "native Hawaiians" (i.e. those with 50% ethnic Hawaiian blood quantum), both "native Hawaiians" and "Hawaiians" (those with any degree of Hawaiian ethnicity) could vote for trustees.<sup>182</sup> More significantly, the trust argument failed because it rested "on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters."<sup>183</sup> The government "may not assume, based on race, that . . . its citizens will not cast a principled vote."<sup>184</sup> Justices Breyer and Souter concurred on the ground that there is no federal trust relationship with ethnic Hawaiians and that the class of ethnic Hawaiians are not analogous to an Indian tribe.<sup>185</sup> Justices Stevens and Ginsberg dissented, accepting the analogy between Hawaiians and members of recognized Indian tribes.<sup>186</sup>

Because the decision was grounded on the Fifteenth Amendment, which absolutely prohibits racial discrimination in voting, the case turned on the determination that the classification "descendants of the inhabitants of Hawaii in 1778" is a racial classification. *Rice* has been criticized for disregarding the history of Hawai'i,<sup>187</sup> but that misses the true historical significance of the decision. The historical fact that mattered was that 1778 was the year that Hawai'i's long isolation from the outside world ended and therefore had been selected as a proxy for race. "Descendants of the inhabitants of Hawai'i in 1778" singles out ethnic Hawaiians as clearly as "descendants of the inhabitants of sub-Saharan Africa in 1492" singles out blacks.<sup>188</sup> Beyond its Fifteenth Amendment rationale, the holding in *Rice*, by striking down the first express racial exclusion since the Bayonet Constitution, advances Hawai'i's historical tradition of expanding the right to vote.

In *Arakaki v. State of Hawai'i*,<sup>189</sup> the United States District Court for the District of Hawai'i extended the principle of *Rice* to hold that state laws that denied to non-Hawaiians the right to run for the office of OHA trustee were also unconstitutional racial discrimination violating the Fourteenth

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<sup>181</sup> *Id.*, 528 U.S. at 522.

<sup>182</sup> *Id.*, 528 U.S. at 523.

<sup>183</sup> *Id.* Compare the premise, advanced by Kamehameha V to justify his coup, that universal suffrage was "altogether beyond the political capacity of the Hawaiian people." 2 KUYKENDALL, HAWAIIAN KINGDOM at 127 (quoting Kamehameha V).

<sup>184</sup> *Id.* Having decided the case under the Fifteenth Amendment, the Court did not reach *Rice*'s claims that the State had also violated his rights under the Fourteenth Amendment Equal Protection Clause.

<sup>185</sup> *Id.*, 528 U.S. at 525-27. Justice Breyer noted that the statutory definition of the favored class of "Hawaiians" included everyone with the slightest descent from the pre-contact inhabitants of Hawai'i. He concluded that to define membership in the class "in terms of 1 possible ancestor out of 500, thereby creating a vast and unknowable body of potential members -- leaving some combination of luck and interest to determine which potential members become actual voters -- goes well beyond any reasonable limit" and does not resemble "any actual membership classification created by any actual tribe." *Id.*, 528 U.S. at 527.

<sup>186</sup> *Id.*, 528 U.S. at 528-48.

<sup>187</sup> S.K. Hom & E.K. Yamamoto, *Symposium: Race and the Law at the Turn of the Century: Collective Memory, History and Social Justice*, 47 U.C.L.A. L. REV. 1747, 1766-76 (2000).

<sup>188</sup> Hawai'i is not the first state to have selected a date to define a racial classification. See *Guinn v. United States*, 238 U.S. 347, 360-63 (1915) (invalidating as racially discriminatory an Oklahoma statute that imposed a literacy requirement on voters but contained a "grandfather clause" exempting individuals entitled to vote "on January 1, 1866," a date prior to passage of the Fifteenth Amendment when only whites could vote, as well as the lineal descendants of such voters).

<sup>189</sup> D. Haw. No. 00-00514 HG-BMK (September 19, 2000) (appeal pending). The author of this article is one of the attorneys representing the Plaintiffs in *Arakaki*. The appeal by the State of Hawai'i has been briefed in the 9th Circuit.

Amendment, as well as the Fifteenth Amendment.<sup>190</sup> The court pointed out that “ours is a political system that strives to govern its citizens as individuals rather than as groups” and “[r]acial classifications are particularly harmful when used with respect to voting as they threaten to ‘balkanize us into competing racial factions.’”<sup>191</sup>

The United States Constitution protects Hawai‘i from such balkanization. In *Arakaki*, the court held that under the Equal Protection Clause of the Fourteenth Amendment “individuals have the constitutional right to be considered for public office without the burden of invidious discrimination.”<sup>192</sup> The State’s discriminatory scheme could not survive strict scrutiny because it was not narrowly tailored to any compelling state interest. Just as “Hawai‘i may not assume, based on race, that . . . any . . . of its citizens will not cast a principled vote” *for* trustee, it “may not assume, based on race, that . . . any of . . . its citizens will not cast a principled vote” *as* trustees.<sup>193</sup> The court also held that the state’s discrimination against candidates violated the Fifteenth Amendment by abridging the right to vote on account of the race of the candidates.<sup>194</sup>

Although OHA’s racial restriction applied only to the elections for OHA trustees, nonetheless it was the first narrowing of the Hawai‘i electorate since the Organic Act restored voting rights to all male citizens. The only parallel in Hawai‘i’s history to OHA’s explicit racial discrimination in voting rights was the provision of the Bayonet Constitution that disenfranchised Asians.<sup>195</sup> Of both exercises in disenfranchisement, it can be said that “the use of racial classifications is corruptive of the whole legal order democratic elections seek to preserve.”<sup>196</sup>

It is corruptive of democracy, not only because “it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities,”<sup>197</sup> but because racial classifications encourage racial partisanship. In *Wright v. Rockefeller*,<sup>198</sup> Justice William O. Douglas compared an alleged racial gerrymander to the electoral register system formerly used in Lebanon, Cyprus and colonial India to ensure that each racial or religious group got its own little piece of the government. Under an electoral register system, as under the OHA laws, certain offices are set aside for certain ethnic or religious groups and only members of those groups can vote for those offices. Justice Douglas said:

When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here.<sup>199</sup>

<sup>190</sup> H.R.S. § 13D-2 required that to be eligible for election or appointment to the OHA Board of Trustees, a person must be qualified to vote under H.R.S. § 13D-3, which in turn required that the person be Hawaiian, HRS § 13D-3(a)(1). “Hawaiian” is defined in H.R.S. §§ 10-2 and 11-1 in the sense of descent from inhabitants of Hawai‘i in 1778, which *Rice* holds defines a racial classification.

<sup>191</sup> *Id.*, slip op. at 4-5, quoting *Shaw v. Reno*, 509 U.S. 630, 657 (1993).

<sup>192</sup> *Arakaki*, slip op. at 26.

<sup>193</sup> *Id.* slip op. at 20.

<sup>194</sup> *Id.* slip op. at 20-22, relying on *Rice* and on *Hadnot v. Amos*, 394 U.S. 358 (1968) (holding that excluding candidates from the ballot because of their race violated the Fifteenth Amendment). The District Court also held that the racial discrimination against candidates in OHA elections violated the Voting Rights Act of 1965, 42 U.S.C. § 1973. *Arakaki*, Slip op. at 22-25.

<sup>195</sup> 1887 Constitution, Art. 59, 62, in LYDECKER at 166-168. The racial exclusion imposed by the 1887 Constitution applied to all elections and so was more extreme than the racial restriction in OHA elections.

<sup>196</sup> *Rice*, 528 U.S. at 517.

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

<sup>198</sup> 376 U.S. 52 (1964).

<sup>199</sup> *Wright v. Rockefeller*, 376 U.S. at 67 (Douglas, J. dissenting), quoted in *Shaw v. Reno*, 509 U.S. 630, 648 (1993).

The rise of racial partisanship as a result of Hawai'i's version of an electoral register is illustrated by OHA's argument in *Arakaki* that a particular candidate should be excluded from the ballot because he had criticized OHA as being racially discriminatory, an opinion that OHA contended was incompatible with exclusive fiduciary devotion to the class of "Hawaiians."<sup>200</sup> Compare the Republic's use of a loyalty oath and a voter registration commission to exclude voters who had expressed royalist opinions: in both cases, the group in power wanted to exclude voters and candidates that it did not trust. In a democracy, the people choose the government, but under this strategy, the government chooses the people.<sup>201</sup> The District Court rejected OHA's argument because "barring a candidate from the ballot as a result of that candidate's public comments would strike a blow to one of our system's most fundamental principles—the right to robust public debate on matters of self-government."<sup>202</sup> Racial discrimination is not immunized from constitutional challenge by combining it with political discrimination.<sup>203</sup>

*Rice* restored the historic trend toward equal voting rights by overturning the racial discrimination in the OHA voting laws and rejecting "the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters."<sup>204</sup> *Arakaki* extended *Rice* to running for office and rejected the first attempt in Hawai'i since Annexation to exclude candidates based on their expressions of political beliefs.<sup>205</sup> In the first OHA election after *Arakaki* opened the ballot, 97 candidates of different ethnic backgrounds ran, advocating views ranging from ending discrimination in OHA programs to restoring an independent Hawaiian kingdom; one candidate who is not of ethnic Hawaiian ancestry was elected.

## V. RACIALLY EXCLUSIVE GOVERNMENT VIOLATES HAWAII'S TRADITION OF INCLUSION.

Dissatisfied with *Rice* and *Arakaki* opening OHA elections to all citizens, various factions have advanced competing proposals to create a governmental entity with citizenship, voting rights, and office

<sup>200</sup> Proposed Intervenor-Defendants' Memorandum in Support of Defendants' Motion for Summary Judgment and Opposition to Plaintiffs' Cross Motion for Summary Judgment at 24-34, filed September 5, 2000 (both arguing that Plaintiff Kenneth R. Conklin should be barred from running for OHA trustee because of public statements he had allegedly made critical of OHA and racial preferences for ethnic Hawaiians).

<sup>201</sup> Reacting to the 1953 East German revolt against the Communist government, the poet Bertold Brecht wrote:

The Secretary of the Writers' Union  
Had leaflets distributed in the Stalinallee  
Stating that the people  
Had forfeited the confidence of the government  
And could win it back only  
By redoubled efforts. Would it not be easier  
In that case for the government  
To dissolve the people  
And elect another?

"The Solution." B. BRECHT, POEMS, 440 (1976).

<sup>202</sup> *Id.*, slip op. at 37. The court relied on *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441 (1974), which held that the First Amendment is violated by a state law requiring a political party to file a statement that it will not advocate the overthrow the government by force.

<sup>203</sup> See *Hadnot v. Amos*, 394 U.S. 358 (denying candidates right to run because of their race and because of their political beliefs violated both the Fifteenth and the First Amendments).

<sup>204</sup> *Rice*, 528 U.S. at 523.

<sup>205</sup> *Arakaki*, slip op. at 36-37. Following the District Court decision in *Arakaki*, one of the plaintiffs in that case brought a new case challenging the racial restriction on eligibility for OHA's programs and for homesteads offered by the Department of Hawaiian Home Lands. *Barrett v. State of Hawai'i*, CV00-00645 DAE-KSC. It has been consolidated with another case raising similar claims, *Carroll v. Nakatani*, Civil No. CV00-00641 DAE-KSC. *Barrett* has been dismissed on standing grounds. An appeal is pending in the Ninth Circuit. The author is one of the attorneys representing Mr. Barrett.

holding restricted to ethnic Hawaiians. Because they define themselves by ethnicity, they necessarily define themselves as a minority in a state that has no ethnic majority. Like the factions that launched the coups in 1864, 1887 and 1893, to gain the power they seek, they must somehow disenfranchise the majority. Numerous factions propose a wide range of plans on how to accomplish this, from secession and reestablishment of a monarchy to a federal statute that would create a “quasi-sovereign” agency modeled on an Indian tribe.<sup>206</sup> Each of these plans would give the new minority government exclusive power over some or all of Hawai‘i’s public lands and funds. All of these proposals depart from the constitutional principle of equal protection and the centuries-old Hawaiian tradition of inclusiveness.

### A. Ethnic Hawaiians Are Not an “Indian Tribe.”

In response to *Rice*, Hawai‘i’s Senator Daniel Akaka sponsored a bill that would have created a federal equivalent of OHA modeled on a federally recognized Indian tribe.<sup>207</sup> Sen. Akaka and other supporters of the bill argue that Hawaiians are like federally recognized Indian tribes and ought to be recognized as such. They also claim that creating a governmental entity restricted to ethnic Hawaiians would be proper redress for the overthrow of the monarchy in 1893.<sup>208</sup> The bill, submitted late in the 2000 session, died at the end of the 106th Congress but Senator Akaka introduced it again in the next Congress.<sup>209</sup> Under the bill, the Department of the Interior would create a roll of “Native Hawaiians.”<sup>210</sup> The criterion for qualifying for the Secretary’s roll is the same criterion that the Supreme Court in *Rice* held is a racial classification: descent from inhabitants of Hawai‘i in 1778.<sup>211</sup> Anyone

<sup>206</sup> Under some of the more extreme proposals Hawai‘i would secede from the Union and an independent government would be set up that would be exclusively controlled by ethnic Hawaiians or in which ethnic Hawaiians would be guaranteed control of key positions. More moderate proposals would create a racially exclusive governmental agency within the state or federal government or would create a racially exclusive government modeled on an Indian tribe that would control all or part of Hawai‘i’s public lands. The class of proposals modeled on Indian tribes is sometimes called the “nation within a nation” model. Surveys of the wide range of proposals that use the slogan “Hawaiian sovereignty” can be found in S.P. King, *Hawaiian Sovereignty*, HAW. BAR. J. July 1999, p. 6; J.C.F. WANG, HAWAII STATE AND LOCAL POLITICS, 105-108 (1998); T. Castanha, *The Hawaiian Sovereignty Movement: Roles of and Impacts on Non-Hawaiians* (1996), www.hookele.com/non-hawaiians (visited Oct. 2, 2001). Links to the websites of many of these organizations can be found at www.hawaii-nation.org (visited Oct. 2, 2001).

<sup>207</sup> S. 2899 and S. 81 (106th Congress, 2d Session, 2000). An identical bill, H.R. 4904 (106th Congress, 2000), was sponsored in the House of Representatives by Rep. Neil Abercrombie of Hawai‘i.

<sup>208</sup> On the debate over the overthrow of the monarchy, see the sources cited in n. 122, *supra*, and Hanifin, *Hawaiian Reparations: Nothing Lost, Nothing Owed*, 17 HAW. BAR. J. No. 2 107(1982)

<sup>209</sup> Susan Roth, *Native Legislation Dies in Senate*, HONOLULU ADVERTISER, Dec. 14, 2000 p. A1. The bill has been reintroduced in the 107th Congress as S. 81 and H.R. 617.

<sup>210</sup> S. 2899 § 7.

<sup>211</sup> S. 2899 § 2(1), (6) (7). Sec. 7(a)(1)(A)(i) limits the roll to “the lineal descendants of the aboriginal, indigenous, native people who resided in the islands that now comprise the State of Hawaii on or before January 1, 1893, and who occupied and exercised sovereignty in the Hawaiian archipelago.” At first glance this would suggest that the key date is January 1, 1893, and the criterion is linked to the overthrow of the monarchy in January 1893. However “aboriginal, indigenous, native people” is defined in § 2(1) to mean “those people whom Congress has recognized as the original inhabitants of the lands and who exercised sovereignty prior to European contact in the areas that later became part of the United States.” Sec. 1(2) of the bill says that Congress finds that “Native Hawaiians, the native people of the Hawaiian archipelago, . . . are indigenous native people of the United States.” Sec. 2(6) defines “indigenous native people” as “the lineal descendants of the aboriginal, indigenous native people of the United States.” For Hawai‘i, first European contact occurred in 1778, when Captain Cook arrived. In short, to qualify for the roll, a person must be descended from someone who lived in Hawai‘i in 1778. Compare the state statutory definition of “Hawaiian” that the Supreme Court held in *Rice* is a racial classification: “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. The reference to persons who “exercised sovereignty,” copied from the state statute to the federal bill, was intended to avoid the “shipwrecked sailor” problem. As the Hawai‘i legislature’s conference committee report on the 1979

could apply for inclusion on the roll but anyone else could challenge the applicant's ethnic qualification.<sup>212</sup> A federal commission with membership restricted to ethnic Hawaiians would then examine applicants' genealogies to determine if they are really ethnic Hawaiians.<sup>213</sup> The Secretary of the Interior would establish a process by which questions regarding an individual's ethnic purity could be appealed.<sup>214</sup> The roll of federally approved ethnic Hawaiians would be the voting roll for an election for a "Native Hawaiian Interim Governing Council" which would act as a constitutional convention to draft "organic governing documents" for a "Native Hawaiian Government."<sup>215</sup> The ethnic Hawaiians on the Secretary's roll would vote again on the draft constitution.<sup>216</sup> Both elections would be paid for and managed by the Department of the Interior.<sup>217</sup> If the racially restricted electorate approves the constitution, then the "Native Hawaiian Government" would be officially recognized by the federal government that had created it, as if it were a pre-existing Indian tribe.<sup>218</sup> The Secretary of the Interior and the State could then negotiate with the "Native Hawaiian Government" to transfer land and money to that agency without further congressional authorization.<sup>219</sup>

Later in the 2001 session, Senator Akaka filed an alternative version of the bill that deleted the specification of a process for creating an ethnic Hawaiian government.<sup>220</sup> The essential structure remained: the definition of "native Hawaiian" picks out the same classification that the *Rice* Court determined is a racial classification: descent from inhabitants of Hawai'i in 1778. No knowledge or interest in Hawaiian culture is required; the membership test is purely one of ancestry. The federal government would empower the members of the racial class to form a government, "the Native Hawaiian governing entity," which would be granted unspecified "governmental authorities" and would be entitled to negotiate with the federal and state governments to receive lands and other assets.<sup>221</sup> The process would be funded by the federal government.<sup>222</sup>

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OHA laws explains, it is "conceivable that persons descended from any race which may have been shipwrecked on Hawai'i before 1778" could claim to be "descended from races inhabiting the Hawaiian Islands previous to 1778." Stand. Comm. Rep. No. 784, in 1979 Sen. J. at 1353. To ensure that OHA would be racially exclusive, the legislature revised the definition of "Hawaiian" to include the reference to those who "exercised sovereignty." *Id.* at 1353-55. Sen. Akaka's bill also defines "Native Hawaiian" to include persons "who were eligible in 1921 for the programs authorized by the Hawaiian Homes Commission Act (42 Stat. 108, chapter 42) and their descendants." S. 2899 § 2(7)(A). This incorporates by reference the definition of Native Hawaiian in that act, a definition which again points back to 1778 and to race: "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." Hawaiian Homes Commission Act § 201(a)(7) (emphasis added). The Supreme Court held that this definition is a racial classification. *Rice*, 528 U.S. at 516-517.

<sup>212</sup> S. 2899 and S. 81 § 7(a)(1), 7(a)(3)(C).

<sup>213</sup> *Id.*, § 7(a)(2).

<sup>214</sup> *Id.*, 7(a)(3)(C).

<sup>215</sup> *Id.*, § 7(c).

<sup>216</sup> *Id.*, § 7(c).

<sup>217</sup> *Id.* §§ 7, 8.

<sup>218</sup> *Id.*, § 7(d). The bill would expressly override the Department's rules for recognizing genuine Indian tribes, 25 C.F.R. §§ 83.1, 83.7, and any other law that would prevent recognition of the Native Hawaiian Government. S. 2899, § 7(d)(2)(A). The racially exclusive constitutional convention and electorate could choose to expand the definition of "Native Hawaiian" beyond the racial definition in the bill.

<sup>219</sup> *Id.*, § 9.

<sup>220</sup> S. 746, introduced April 6, 2001. On May 16, 2001, the House Natural Resources Committee amended the original House bill, H.R. 617, to substitute the language of S. 746 and approved that version. "Hawaiian Bill takes first step in House," HONOLULU ADVERTISER, May 16, 2001, <http://the.honoluluadvertiser.com/article/2001/May/16/br/br03p.html>. House Report 107-140. On July 24, 2001 the Senate Indian Affairs Committee approved S. 746. "U.S. Senate to Consider Akaka Bill," HONOLULU STAR BULLETIN, July 24, 2001, <http://starbulletin.com/2001/07/24/news/story1.html>. The provisions defining the process for creating the "Native Hawaiian governing entity" may have been deleted to make it less evident that that entity would be created by an exercise of congressional power subject to the Constitution.

<sup>221</sup> S. 746, § 6(b)(2)(A)(iii); § 8(b). The definitions of "Native Hawaiian," "indigenous, native people," and "aboriginal, indigenous, native people" remain the same as in S. 81. S. 746, §2(1), (4), (6).

<sup>222</sup> S. 746 § 7.

Because there is no detail about how the “Native Hawaiian governing entity” is to be organized, several organizations could claim the title.<sup>223</sup> That would force the Secretary of the Interior to choose a government for Native Hawaiians by any method she thinks appropriate.<sup>224</sup> Thus, any governmental authority exercised by the new government would be derived from federal law and a decision of a federal official. The bill does not say whether the “Native Hawaiian governing entity” chosen by the Secretary will be able to exercise governmental authority over all ethnic Hawaiians or only on those who voluntarily join it. This creates the possibility that some people might be forced to accept the authority of the “Native Hawaiian governing entity” over them based solely on their race.

S. 746 would also create a troublesome loophole: under § 6(b)(2)(D), if the Secretary does not certify the “organic documents” of a putative “Native Hawaiian governing entity” within 90 days of its application, then the certification “shall be deemed to have been made.” Any organization claiming to be the “Native Hawaiian governing entity” which is not so certified by the Secretary could invoke this provision to claim that the Secretary’s inaction has effectively certified it as the “Native Hawaiian governing entity.” This could be a fruitful source of litigation among numerous claimants and the federal government.

These bills (and any other plan based on creating an analog to an Indian tribe) all suffer the same fatal constitutional defect as did OHA’s voting scheme: they are racially discriminatory and violate the Fifteenth Amendment. The Fifteenth Amendment expressly applies to the United States, just as it applies to the states.<sup>225</sup> Federal governmental action is clear: the new government would be defined in a federal statute and federal regulations, paid for with federal money, and its creation would be managed by a federal agency. The definition of “Native Hawaiian” in terms of ancestry tracing back to inhabitants of Hawai‘i in 1778 is the same racial classification that the Supreme Court detected in the OHA statutes.<sup>226</sup> That racial classification would be used to determine a voting roll for elections or an

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<sup>223</sup> S. 746 avoids an express racial limitation on who could be a citizen of the “Native Hawaiian governing entity.” That permits an argument that the entity would not necessarily be racially exclusive. However, it also creates the possibility that any group of ethnic Hawaiians could create a “Native Hawaiian governing entity” with a citizenship restricted in any way they please. The bill provides that when “the duly elected officers of the Native Hawaiian governing entity” submit “the organic governing documents of the Native Hawaiian governing entity” to the Secretary of the Interior, the Secretary is to review those documents and determine whether they “establish the criteria for citizenship in the native Hawaiian governing entity” and whether they were “adopted by a majority vote of the citizens of the Native Hawaiian governing entity.” S. 746, §6(b). There is no requirement that the documents creating the “native Hawaiian governing entity” have been adopted by a majority vote of ethnic Hawaiians or any group other than the group specified in the documents themselves. Mutually antagonistic “sovereignty” groups may organize several contending “Native Hawaiian governing entit[ies].” Any two ethnic Hawaiians could form a group, draft “organic governing documents” which specify that citizenship is limited to themselves, vote for those documents, elect themselves officers, and then submit the documents to the Secretary, who would be required to certify that the documents do indeed specify a rule of citizenship and have been adopted by a majority of the citizens so defined. Other groups might form that included among their citizens persons who are not ethnic Hawaiians.

<sup>224</sup> S. 746 refers to “the Native Hawaiian governing entity” (emphasis added), apparently contemplating that there will be only one such entity. However, the bill gives the Secretary no guidance as to how to choose which one of several contenders is to be granted governmental powers, including the power to negotiate with the federal and state governments for land and other assets. The bill provides for the Hawai‘i state legislature to “support[] the recognition of a Native Hawaiian governing entity,” §6(b)(2)(B), but does not require the legislature to act. Rather, the bill provides that if the state legislature does not act within 90 days, the Secretary will be deemed to have certified that the legislature endorsed groups that submit organic documents in the proper form. S. 746, §6(b)(2)(D). The certification that organic documents have been filed in proper form is distinct from the certification of legislative endorsement. More than one group could qualify for either or both certifications. Thus, in the likely event that there is more than one contending candidate for “Native Hawaiian governing entity,” the Secretary of the Interior, could exercise discretion to choose a government for “Native Hawaiians.” The Senate Committee Report approving S. 746, Report S 107-66 at 43, states that the Committee on Indian Affairs “does not intend that the State of Hawaii have any role in determining the Native Hawaiian governing entity that is to be recognized by the United States.”

<sup>225</sup> The Fifteenth Amendment is “binding on the National Government, the States, and their political subdivisions.” *Rice*, 528 U.S. at 498.

<sup>226</sup> *Id.*, 528 U.S. at 514-16.

initial group of voters who can participate in the creation of the new government. Therefore, like the OHA statutes, it denies the right to vote on account of race, contrary to the Fifteenth Amendment. The possibility that the racially exclusive electorate might subsequently choose to adopt a constitution that broadens the franchise does not save the racially discriminatory rules for the elections that initiate and define the entire process.<sup>227</sup>

The Constitution's requirement that elections be open to all without regard to race cannot be avoided by analogizing ethnic Hawaiians to an Indian tribe and invoking Congress's power under the Commerce Clause to "regulate commerce" with "Indian Tribes."<sup>228</sup> Both the State of Hawai'i and OHA argued that analogy in their briefs in *Rice* and the Supreme Court rejected it.<sup>229</sup> As the Supreme Court pointed out in *Rice*, an Indian tribe can impose an ancestry restriction on voting because "various tribes retained some elements of quasi-sovereign authority, even after cession of their lands to the United States" and that "retained tribal authority relates to self-governance."<sup>230</sup> Therefore, "[i]f a non-Indian lacks a right to vote in tribal elections, it is for the reason that such elections are the internal affair of a quasi-sovereign"<sup>231</sup> government that was not created by the federal government or by a state but predates contact with non-Indians.<sup>232</sup> What is essential is a government and distinct political community with a continuous existence dating back so far that they does not derive their "quasi-sovereign" status from the United States. A group of Indian individuals that lacks such a government and continuous political community is not a tribe, even if its members can claim a common descent.<sup>233</sup> Because Indian tribes are governmental entities that are not creatures of the federal or state governments, the federal Constitution generally does not apply to them.<sup>234</sup> By contrast, the United States, like the states, is constitutionally barred from authorizing racial discrimination in voting.<sup>235</sup> In *Rice*, the Court rejected the analogy between Indian

<sup>227</sup> The Fifteenth Amendment applies to referenda about public policies as well as to election of candidates; it bars discrimination in "elections to determine public governmental policies or to select public officials, national, state or local." *Rice*, 528 U.S. at 514 quoting *Terry v Adams*, 345 U.S. 461, 467 (1953).

<sup>228</sup> U.S. Constitution, Art. I, § 8, clause 3, gives Congress power, "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The committee reports of the Indian Affairs Committee, Sen. Report 106-424 at 21-34 (September 27, 2000), and S. Report 107-66 at 21-34 (September 21, 2001) rely on Congress' power over Indian tribes under the Commerce Clause as the constitutional power supporting the bill.

<sup>229</sup> *Rice*, 528 U.S. at 517-22.

<sup>230</sup> *Id.* 528 U.S. at 518 (emphasis added).

<sup>231</sup> *Id.* 528 U.S. at 520.

<sup>232</sup> See, *Montoya v. United States*, 180 U.S. 261, 266 (1901), defining an "Indian tribe" as "a body of Indians of the same or similar race, united in a community under one leadership or government and inhabiting a particular, though sometimes ill-defined territory." (Emphasis added.) In *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978), the Supreme Court held that because "powers of Indian tribes" are "inherent powers of a limited sovereignty which has never been extinguished," tribes and federal government are dual sovereigns that can both prosecute an Indian without violating the constitutional prohibition on double jeopardy. (Emphasis in original). By contrast, a territory is a federal creature that cannot prosecute a defendant who has been prosecuted by the United States. *Id.* See, *Atkinson Trading Co. v. Shirley*, -- U.S. --, 121 S.Ct. 1825, 1830-31, 149 L.Ed. 2d 889, 896-99 (2001) (tribe's surviving inherent sovereignty as a domestic dependent nation is generally limited to its members). Under the Department of the Interior regulations governing recognition of Indian tribes, an applicant organization must prove that it "has maintained political influence or authority over its members as an autonomous entity from historical times until the present." 25 C.F.R. § 83.7(c). Historical times are defined as times going back to the first sustained contact with non-Indians. 25 C.F.R. § 83.1.

<sup>233</sup> *Miami Nation of Indians of Indiana, Inc. v. United States*, 2001 U.S. App. LEXIS 13277, \*19 - \*20 (7th Cir. 2001). See *Montoya v. U.S.* 180 U.S. at 266 (tribe is community united under one leadership or government); *Worcester v. Georgia*, 31 U.S. 515, 559 (1832) (tribes are "distinct independent political communities"). A tribe that ceases to maintain political unity under a distinct tribal government ceases to be a tribe and its former members have no special status different from other citizens. *Miami Nation of Indians of Indiana, Inc. v. U.S.*; *Worcester v. Georgia*, 31 U.S. at 593 (McLean, J. concurring); see *Mashpee Tribe v. Secretary of the Interior*, 820 F.2d 480, 482-83 (1st Cir. 1987); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 582-87 (1st Cir. 1979)

<sup>234</sup> CANBY, AMERICAN INDIAN LAW, 327-28 (1998); see *Talton v. Mayes*, 163 U.S. 376 (1896) (tribe not limited by Fifth Amendment to US Constitution when dealing with its members).

<sup>235</sup> Fifteenth Amendment, § 1; *Rice*, 528 U.S. at 519-20.

tribal elections and race-based voting laws enacted under the Constitution.<sup>236</sup> Like any other governmental agency, an agency under the authority of state or federal legislation for an Indian group would be bound by the constitutional requirements of equal protection.<sup>237</sup>

The lack of any historical precedent for a Hawaiian “Indian tribe” is fatal to the Indian tribe analogy. The federal government cannot recognize or restore a Hawaiian tribe because no such tribe has ever existed. Neither ethnic Hawaiians nor any other citizens of Hawaii were ever organized as tribes.<sup>238</sup> The Kingdom of Hawai‘i was not a tribe, but was the government of an independent country, a foreign country from the American perspective. Just as an Indian tribe is not a foreign nation, a foreign nation is not an Indian tribe.<sup>239</sup> Tribesmen are tribesmen because their parents were tribesmen.<sup>240</sup> However, under the laws of the Kingdom, everyone born or naturalized in Hawai‘i was a subject, no matter where his family came from.<sup>241</sup> Many of the Kingdom’s cabinet members, legislators, governors, and judges were not ethnic Hawaiians; some never even chose to become subjects.<sup>242</sup> By contrast, the leaders of a tribe are members of the tribe and descendants of members.<sup>243</sup> The annexation of Hawai‘i was not the incorporation into the United States of a tribe with a pre-existing membership restriction based on ancestry. Under the terms of the Annexation Treaty<sup>244</sup> and Annexation Resolution,<sup>245</sup> the inde-

<sup>236</sup> The Court emphasized that OHA is a state agency, not an Indian tribe. *Id.* 528 U.S. at 520-21. Discussing *Morton v. Mancari*, 417 U.S. 535 (1974), a leading case on the scope of Congress’ plenary power over Indians that was heavily relied upon by the State and OHA, the Court said that, “it does not follow from *Mancari* . . . that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens.” *Id.* at 520. *Mancari* upheld a hiring preference in the Bureau of Indian Affairs in favor of enrolled members of federally recognized Indian tribes. In *Rice*, the Court stressed that the hiring preference at issue in *Mancari* was political rather than racial because it was “not directed towards a “racial” group consisting of “Indians,” but rather “only to members of “federally recognized” tribes.” 528 U.S. at 519-20 quoting *Mancari*, 417 U.S. at 553, n.24.

<sup>237</sup> See *Mancari* (analyzing affirmative action program in Bureau of Indian Affairs for conformity with Constitution and interpreting it as favoring the political class of enrolled members of federally recognized tribes); *Rice*, 528 U.S. at 519-20 (Congress cannot authorize state to establish voting scheme for state office that limits electorate to tribal Indians).

<sup>238</sup> As the State of Hawaii acknowledged before the U.S. Supreme Court, the tribal concept has no place in the context of Hawaiian history. *Rice v. Cayetano*, Respondent’s Brief in Opposition to Petition for Writ of Certiorari (Dec. 29, 1998), p. 18. Jon Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE LAW & POLICY REVIEW 95 (1998) (“Native Hawaiians have never organized themselves into tribal units”). To establish that a group of Indians exists as an Indian tribe, the group’s membership must consist of individuals who descend from a historical tribe. See Interior Dept. regulations defining criteria for tribal status, 25 C.F.R. § 83.7(b)(1), (c). Ethnic Hawaiians are not descended from members of a historical tribe because there never was a tribe in Hawaii. They are not a federally recognized Indian tribe. *Price v. Hawai‘i*, 764 F.2d 623, 626-28 (9th Cir. 1985). Ethnic Hawaiians as a group do not meet the criteria for recognition as an Indian tribe, particularly in that they are not descended from a historical tribe and they are not descendants of the aboriginal inhabitants of North America. 25 C.F.R. §§ 83.1, 83.7. For a detailed explanation of why ethnic Hawaiians are not an “Indian tribe” for constitutional purposes, see Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537 (1996).

<sup>239</sup> See *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) (Indian tribe does not have standing to bring suit against under original jurisdiction of Supreme Court because it is neither a State nor a foreign nation but merely a domestic dependent nation); *Montoya v. United States*, 180 U.S. 261, 265 (1911) (Indians tribes do not and never have constituted “nations” as that term is used in international law).

<sup>240</sup> See Interior Dept. regulations defining criteria for tribal status, 25 C.F.R. § 83.7(b)(1), (c).

<sup>241</sup> See *supra*, text at notes 35 - 55.

<sup>242</sup> See *supra*, text at notes 31 -33, 68, 95.

<sup>243</sup> See 25 C.F.R. § 83.7(c) (requiring that the Indian group claiming to be a tribe must prove that it has maintained political authority over its members since contact with non-Indians), § 83.7(d) (the groups members must be able to prove descent from members of a historical Indian tribe).

<sup>244</sup> Treaty of Annexation of Hawai‘i (1893) in L. THURSTON, FUNDAMENTAL LAWS OF HAWAII 243 (1904).

<sup>245</sup> Resolution No. 55 of July 7, 1898, 30 Stat. 750 (known as the “Annexation Resolution” or “Newlands Resolution”). Some opponents of Annexation argued that the Annexation Treaty could not constitutionally be approved by a majority vote of both houses of Congress but only by a two-thirds majority of the Senate. RUSS, HAWAIIAN REPUBLIC at 324-30. The question became moot when the Annexation Resolution, which expressly ratified the treaty, won a two-third majority in the Senate, as well as an even greater majority in the House of Representatives. *Id.* at 340-41, 353. Moreover,

pendent country of Hawai'i merged into the United States, transferring all its property and sovereignty to the federal government, and leaving no "quasi-sovereign" behind.<sup>246</sup> "If a nation doesn't exist, it can't be recognized, whether or not it ceased to be a nation voluntarily."<sup>247</sup>

Because there has never been a Hawaiian tribe, there is not and cannot be any tribal government with "retained quasi-sovereign" powers. Any government created for ethnic Hawaiians would be created *de novo* by the State of Hawai'i or the United States. Groups of individual citizens can form voluntary political organizations but they cannot invest their private organizations with sovereign public power.<sup>248</sup> The Organic Act made all of citizens of Hawaii American citizens, at a time when tribal Indians were generally denied citizenship.<sup>249</sup> Like all American citizens, individual American citizens of Hawaiian ancestry do not retain any mysterious "sovereignty" that they could use create a new sovereign distinct from the federal and state governments. Like all Americans, they exercise their rights of self-government by participating in the sovereign federal and state governments. Unlike Indian tribes on reservations, ethnic Hawaiians do not live in segregated communities that could make and enforce laws without affecting others; rather, they are integrated with their fellow citizens in the politics and society of the State of Hawai'i.

The law creating a "Native Hawaiian governing entity" would be legislated by Congress. The federal government and all of its creatures are subject to the Fifteenth Amendment's ban on racial discrimination in voting. Congress has no power to manufacture a tribe out of a racial classification by *ipse dixit*.<sup>250</sup> Congress' power under the Commerce Clause to "regulate commerce" with "Indian Tribes" is a special power of Congress over Indian tribes, not a special privilege of Indian tribes.<sup>251</sup> If Congress's power were cut loose from the requirement of a pre-existing Indian tribal organization, then it would become a power to discriminate for or against millions of individuals based solely on their racial ancestry, even if their Indian or ethnic Hawaiian heritage is only "1 possible ancestor out of 500."<sup>252</sup> That would contradict the principle of equal protection, which applies to the federal government as well as to the States.<sup>253</sup> All of Congress's powers under the original Constitution are limited by the Fifteenth

it is now well-established that "[t]he President, with the authorization or approval of Congress may make an international agreement dealing with any matter that falls within the powers of Congress and the President under the Constitution." RESTATEMENT OF THE LAW: FOREIGN RELATIONS LAW OF THE UNITED STATES § 303(2). *B. Altman & Co. v. United States*, 224 U.S. 583 (1912); *Weinberger v. Rossi*, 456 U.S. 25 (1982). Congress's powers include regulating the territory and property of the United States and admitting new States to the Union. U.S. Constitution, Art. IV, § 3. Accordingly, annexations of territory by joint resolution have been held to be effective in the case of Hawai'i, *United States v. Fullard-Leo*, 331 U.S. 256, 276 (1947) (all of the territory of Hawai'i annexed to U.S., including Palmyra Island), and Texas, *Texas v. White*, 74 U.S. 700 (1868) (Texas annexed by joint resolution, subsequently made a state by another resolution, and cannot quit the Union).

<sup>246</sup> *Compare, Rice*, 528 U.S. at 520 (Indian tribes can restrict voting to tribal members because the tribes have retained elements of original quasi-sovereign powers predating American annexation of their territories).

<sup>247</sup> *Miami Nation of Indians of Indiana, Inc. v. United States*, 2001 U.S. App. LEXIS 13277, \*19 (7th Cir.) (applying same principle to tribe when its governmental organization lapsed).

<sup>248</sup> By contrast, a tribe "must be something more than a private, voluntary organization." *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 582 (1st Cir. 1979), citing *United States v. Mazurie*, 419 U.S. 544, 557 n.3 (1975).

<sup>249</sup> Organic Act, § 4; *compare Elk v. Wilkins*, 112 U.S. 94.

<sup>250</sup> *See United States v. Sandoval*, 231 U.S. 28, 39-47 (1913) (Congress cannot "bring a community or body of people within the range of" its special power over Indians "by arbitrarily calling them an Indian tribe"); *United States v. Candelaria*, 271 U.S. 432, 439 (1926) (same). *Rice* establishes that the terms "Hawaiian" and "Native Hawaiian" are racial classifications when defined in terms of ancestry. 528 U.S. 515-17.

<sup>251</sup> Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. at 586.

<sup>252</sup> *Rice*, 528 U.S. at 527 (Breyer, J. concurring). Approximately fifteen million Americans can trace part of their ancestry back to the pre-Columbian inhabitants of the Americas but only about 1.4 million are members of federally recognized Indian tribes. G. RUSSELL, NATIVE AMERICAN FAQs HANDBOOK, 44 (2000).

<sup>253</sup> *Adarand Constructors Inc. v. Peña*, 515 U.S. 200, 204 (1995) (same test of strict scrutiny applies to federal race-based programs as to state race-based programs, including programs that give preference to "American Indians, Eskimos," and "Aleuts."). In addition, reading "Indian tribe" as if it meant "members of an ethnic group that lived in America before

Amendment and the Bill of Rights, including the equal protection principle implicit in the Due Process Clause of the Fifth Amendment.<sup>254</sup> Just as Congress cannot racially segregate school children, it cannot racially segregate voters by inventing an Indian tribe.

### **B. All of the People of Hawai'i Are the Heirs of the Kingdom.**

All plans for racially exclusive government, whether organized as a state agency, a federal agency, a tribal government, or a government of an independent country with race-based citizenship, conflict with the Hawaiian tradition of political inclusion as much as they conflict with the constitutional principle of equal protection. From Kamehameha I's appointment of westerners as governors to *Rice's* declaration that "[r]ace cannot qualify some and disqualify others from full participation in our democracy,"<sup>255</sup> none of Hawai'i's governments has ever restricted citizenship to a single racial ancestry. Except for OHA before *Rice*, there has never been an elected body with membership and voting rights limited to a single racial group. The citizens of the Kingdom of Hawaii included everyone born in Hawaii plus naturalized subjects and denizens.<sup>256</sup> When Hawaii was an independent nation in the international system it was, like the United States, a multiracial nation defined by a common citizenship. No ethnic group of citizens had any special legal status placing its members above their fellow citizens.

For two centuries, the trend in Hawai'i has been toward expanding the numbers of people who have a say in all parts of their government: from Kamehameha I's near-absolute monarchy to a hereditary oligarchy, to an oligarchy open to men with money, to American democracy. Although the Kingdom was not a democracy by today's standards, political rights were not limited to a particular ethnic group or to the lineal descendants of a founding group. Voting was never limited to ethnic Hawaiians.<sup>257</sup> Decisions about how government land was to be used were made by the people in charge of the government, and indirectly by the voters. No individual or ethnic group owned the Government Lands; the government did.<sup>258</sup> No individual subject could have sold or willed a personal share of the

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the white men arrived" ignores the rule of Indian law that a member of a tribe can voluntarily quit the tribe. See *Montoya v. United States*, 180 U.S. 261 (members of tribes quit and joined another tribe; their original tribes not responsible for their subsequent crimes); *Nagle v. United States*, 181 F. 141 (9th Cir. 1911). One can quit a political organization but one cannot quit an ethnic group.

<sup>254</sup> *Bolling v. Sharpe*, 347 U.S. 497 (1954) (Congress' power to legislate for the District of Columbia is circumscribed by the equal protection principle implicit in the Due Process Clause of the Fifth Amendment and does not extend to legislation requiring segregated schools). Congress' exercise of its Indian Commerce Clause Power is limited by the Fifth Amendment. *Hodel v. Irving*, 481 U.S. 704 (1987) (statute barring inheritance of fractionated Indian land allotments unconstitutionally effected taking of Indians' property); *Babbitt v. Youpee*, 519 U.S. 234 (1997) (amended version of same statute also unconstitutional).

<sup>255</sup> *Rice*, 528 U.S. at 523.

<sup>256</sup> See *supra*, text at notes 31 - 68.

<sup>257</sup> See *supra*, text at notes 69 - 110.

<sup>258</sup> The Hawaii Supreme Court during the Monarchy repeatedly interpreted the King's 1848 grant of land to the government and the Legislature's acceptance of it as vesting land ownership in the Government alone. See, *In the Matter of the Estate of His Majesty Kamehameha IV*, 2 Haw. 715 (1864) (interpreting the Mahele between the Crown lands and Government lands and the Act of June 7, 1848, which accepted the King's grant, as vesting ownership of the Government lands in the Government and the Crown lands in the King); *Harris v. Carter*, 6 Haw. 195, 201 (1877) (per Judd, C.J.); *Kenoa v. Meek*, 6 Haw. 63 (1871); *Thurston v. Bishop*, 7 Haw. 421, 430 (1888). Statutes passed during the Monarchy confirm this view. See Act of July 11, 1851 to Provide for the Appointment of Agents to Sell Government Lands to the People, 1851 Sess. Laws 52, reprinted at 2 R.L.H. (1925) 2196; Act of July 6, 1853 to Amend the Second Section of the Act to Provide for Appointment of Agents to Sell Government Lands to the People, L. 1853 p. 55, reprinted at 2 R.L.H. (1925) 2197; Disposition of Government Lands, CC 1859 §§ 39, 46, 47; Cp. L §§. 39, 46, 47, C.L. §§ 166, 174, 175, reprinted in 2 R.L.H. (1925) 2198; 1874 Sess. L. c. 24 (allowing Minister of Interior as agent for the Government to lease sell or transfer land owned by Government); 1876 Sess. L. c. 44 and 1878 Sess. L. c. 5 (regulating sale of Government land); Act to Facilitate the Acquiring and Settling of Homesteads. 1884 Sess. Laws c. 45 (regulating sale of government land to the people), amended by 1888 Sess. Laws c. 54 and 1890 Session Laws c. 85; Act to Determine the Status of the Landings of the Kingdom

Government Lands to another person; nor could a subject have excluded anyone from any part of the Government Lands.<sup>259</sup> Nor did ethnic Hawaiians, individually or as a group, have any special legal privileges to use those lands.<sup>260</sup> Thus, a racially exclusive government for ethnic Hawaiians would not be a revival of the Hawaiian Kingdom or the independent nation of Hawai'i. Rather, it would be a novel and unconstitutional creature of the federal or state government.

All of the proposals to create an exclusive group of heirs of the Kingdom defined by ancestry, including both versions of the Akaka bill, ignore the Kingdom's own laws. To determine the members of an organization, look to the organization's membership rule. To determine the members of a political community, look to its citizenship laws. If one were to apply to people living today the citizenship laws of the Kingdom of Hawai'i to determine who would be a citizen of a successor of that Kingdom, then everyone born in Hawai'i would be a citizen and everyone who moved to Hawaii would be eligible to become a citizen. That is basically the rule for citizenship in the State of Hawai'i. The citizens of Hawai'i jointly exercise sovereignty<sup>261</sup> by participating in the sovereign governments of the State of Hawai'i and the United States of America, and so share in decisions about how the land of Hawai'i will be used.<sup>262</sup> All adult citizens of Hawaii now have the same right to participate equally in the multi-ethnic state and federal governments that rich men in 1893 had to participate in the multi-ethnic Kingdom of Hawai'i. No one deserves more than equality. All of the people of Hawai'i are heirs of the Kingdom and its tradition of political inclusion. The citizens of Hawai'i can say: "We are all sovereign now."

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and the Rights of the Public Therein, 1892 Sess. Laws c. 44 (granting private persons the right to use government landings).

<sup>259</sup> The right to exclude others is the hallmark of a property interest. *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 673 (1999) (right to exclude is hallmark of property interest); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (right to exclude from privately owned former Hawaiian fishpond).

<sup>260</sup> A statute enacted at the time that land in Hawai'i was first privatized preserved the rights of "tenants of the ahupua'a" to gather specified items in the ahupua'a on public as well as private lands. Act of July 11, 1851, reprinted in LAWS OF HIS MAJESTY KAMEHAMEHA III, 98-99 (1851), now codified at Haw. Rev. Stat. § 7-1; *Oni v. Meek*, 2 Haw. 87 (1858). An "ahupua'a" is a traditional land division, generally corresponding to a valley from the mountains to the sea. All occupants and residents of the ahupua'a are "tenants of the ahupua'a," without regard to race. *Haalelea v. Montgomery*, 2 Haw. 62, 71 (1858); *Dowssett v. Maukeala*, 10 Haw. 166, 170-71 (1895); *Halton v. Piopio*, 6 Haw. 334, 335-36 (1882); *Damon v. Tsutsui*, 31 Haw. 678, 687-90 (1930). *Compare Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission*, 79 Haw. 425, 903 P.2d 1246 (1995) (extending gathering rights to other unspecified items but adding a racial restriction to ethnic Hawaiians based on a provision of the Hawai'i State Constitution, Art. XII, § 7, enacted in 1978, which uses the racial definition of "Hawaiian" that was at issue in *Rice*). See Paul M. Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai'i*, 20 U. HAW. L. REV. 88 (1998) (discussing gathering rights under Hawai'i law).

<sup>261</sup> "Sovereignty" has become a controversial term in Hawai'i politics. This article will not spoil "sovereignty" by defining it. Words mean what they are used to mean. Because "sovereignty" is used inconsistently, it can have no single, consistent meaning. Indeed, its vagueness is its value: people who agree on nothing else can agree to use "sovereignty" as a slogan and so can appear to agree on substance (until they begin to discuss specifics). If someone could decree a precise definition, everyone else would abandon "sovereignty" for something vaguer. Nonetheless "sovereignty" is not utterly meaningless. Its varying uses in the current debate are contradictory precisely because they point to contrary proposals regarding the same subjects. There are two broad themes: individual freedom of choice and collective political power. Individual freedom of choice encompasses freedoms of thought, expression, religion, and association. It includes the right to try to learn a culture and a language and so make them your own. The federal and state Constitutions guarantee all of these rights equally to everyone. U.S. Constitution, First Amendment; Hawai'i State Constitution, Art. I §§ 3 (equality of rights), 4 (freedom of religion, speech, press, assembly and petition), 6 (privacy) 7 (voting, privileges of citizenship). See, *Meyer v. State of Nebraska*, 262 U.S. 390 (1923) (statute forbidding parents to educate their children in foreign language is unconstitutional).

<sup>262</sup> As Justice Breyer noted in his concurrence in *Rice*, 528 U.S. at 525, the land formerly held by the Kingdom and the Republic is held in public trust for all of the people of Hawai'i, not just for ethnic Hawaiians, and is managed for the public by the State government and the federal government. See Resolution No. 55 of July 7, 1898, 30 Stat. 750 (known as the "Annexation Resolution" or "Newlands Resolution") (providing that except as to land reserved for federal use, e.g. national defense, all land and all revenues from land ceded by the Republic of Hawai'i to the United States "shall be used

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solely for the benefit of the inhabitants of the Hawaiian Islands for education and other purposes”); An Act to Provide for the Admission of the State of Hawai‘i into the Union (Act of March 18 1959), Pub. L. 86-3, 73 Stat. 4, § 5(f) (land formerly held by the Kingdom and the Republic and transferred by the federal government to the State is to be held in public trust); Hawai‘i State Constitution, Art. XI, § 1 (public natural resources held in trust by the State for the benefit of the people).