Rice is Right

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I. INTRODUCTION

Rice is right. The Supreme Court correctly decided *Rice v. Cayetano*,[2] both as a matter of constitutional law and as an application of basic democratic principle. The decision applies the principle that no government should single out citizens based on ancestry to deny them rights accorded to other citizens. The laws struck down in *Rice* and its successor, *Arakaki v. State,* discriminated based on racial ancestry. These

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[2] 528 U.S. 495 (2000).

laws are part of a larger scheme of racial discrimination that is alien to Hawai`i's history and hostile to American democracy. *Rice* undermined the foundation of the entire scheme: the claim of hereditary privilege for a racial group. Eventually, because of *Rice*'s defense of democracy, the entire discriminatory scheme will fall.

II. HAWAI`I'S RACE-BASED PROGRAMS

A. *Department of Hawaiian Home Lands*

The older of the programs is the Hawaiian Home Lands program, created by the Hawaiian Homes Commission Act of 1920.[3] It gives 99-year leases on house lots and agricultural lots to "native Hawaiians," defined as "descendant[s] of not less than one half part of the blood of *races* inhabiting the Hawaiian Islands previous to 1778."[4] A showing of need is not required; an applicant may already own a home. Residency in Hawai`i is not required.[5] Patience is required: the waiting list is years long, particularly for house lots in desirable urban areas (few people are interested in making their living as farmers). The lease-rent is one dollar a year. Homesteads are leased from approximately 200,000 acres set aside for the program and designated "available lands."[6] The program was created to replace an earlier homestead program that was first enacted under the Kingdom of Hawai`i and which was open to all citizens of Hawai`i without regard to ancestry.[7] Today, the Hawaiian Homes Commissioners, who head the Department of Hawaiian Home Lands ("DHHL"), have a fiduciary obligation to manage the lands exclusively

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[3] Hawaiian Homes Commission Act, Pub. L. No. 67-34, 42 Stat. 108 (1921) [hereinafter HHCA].

[4] *Id.* at § 201(a)(7) (emphasis added). In 1778, Captain Cook and his crew became the first white people known to have reached Hawai`i.

[5] HAW. REV. STAT. § 10-3-2 (2001) lists the only qualifications: being native Hawaiian and being at least 18 years old.

[6] HHCA, *supra* note 3, at § 203.

[7] The origin of the Hawaiian Homes program is recounted in MARILYN M. VAUSE, THE HAWAIIAN HOMES COMMISSION ACT, 1920: HISTORY AND ANALYSIS (1962). For the history of the earlier race-neutral homesteading programs going back to 1884, see JEAN HOBBS, HAWAI`I: A PAGEANT OF THE SOIL 105, 109-14, 118-122 (1935); ROBERT H. HORWITZ ET AL., PUBLIC LAND POLICY IN HAWAI`I: AN HISTORICAL ANALYSIS (1969).

for the benefit of native Hawaiians, not for the benefit of the public.[8]

B. *Office of Hawaiian Affairs*

In 1978, a state constitutional amendment created the Office of Hawaiian Affairs ("OHA"), a state agency, to administer state resources for the benefit of Hawaiians and native Hawaiians.[9] Everyone who cast a ballot on the constitutional amendments but who did not expressly vote against the OHA amendment was counted as voting in favor; only eighteen percent of the ballots cast on the constitutional questions were actually marked "yes."[10] Even with this edge, the amendment only passed by an official margin of 3.26 percent of the votes tallied, while twice that many votes were rejected as spoiled "overvotes" by voters who evidently did not understand the instructions. Another proposed constitutional amendment that would have limited OHA's beneficiaries, voters, and office-holders to "Hawaiians" defined as "any descendant of the races inhabiting the Hawaiian Islands previous to 1778"[11] failed to gain ratification because the constitutional convention failed to disclose that racial limitation to the voters.[12]

The definitions of "Hawaiian" and "native Hawaiian" in terms of ancestry that had failed at the polls in 1978 were enacted in substantially the same form by the legislature in 1979 and are now codified in HAW. REV. STAT. §§ 10-2 and 11-1. The legislature substituted "peoples" for "races," but the legislative history shows that the meaning was unaltered.[13]

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[8] *See* Ahuna v. Dept. of Hawaiian Homelands, 64 Haw. 327, 640 P.2d 1161 (1982) (finding that the commissioners breached their fiduciary duty by allowing parcel of home lands to be used for general public purposes).

[9] HAW. CONST. art. XII, §§ 5, 6 (added 1978).

[10] Official elections results summary from Hawai`i Elections Office (on file with author). After the effect of blank ballots was publicized in subsequent litigation, Kahalekai v. Doi, 60 Haw. 324 (1979), the voters amended the state constitution in 1980 to prohibit counting blank ballots as "yes" votes. HAW. CONST. art. XVII, § 2 "Ratification," as amended in the Nov. 4, 1980 general election.

[11] 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAI`I OF 1978, Committee of the Whole Rep. No. 13, at 1018 (emphasis added).

[12] Kahalekai v. Doi, 60 Haw. at 342.

[13] *Rice,* 528 U.S. at 516 (quoting 1979 HAWAI`I SENATE JOURNAL, Standing Comm. Rep. No. 784 at 1350, 1353-54); *Rice,* 528 U.S. at 516 (quoting Conf. Comm. Rep. No. 77 at 998).

To vote in an OHA election before *Rice*, a voter had to swear in an affidavit that he had the requisite ancestry. This denied the right to vote in OHA elections to the vast majority of Hawai`i's voters.[14]

OHA is to work for the "betterment of conditions of native Hawaiians" and "Hawaiians" in these statutory senses.[15] Its duty is to advocate for the interests of those groups. Its trustees manage separate trust funds for each of these two groups.[16] OHA gets legislative appropriations. In addition, until last year, OHA was paid twenty percent of the revenues from ceded lands for the benefit of these groups.[17] OHA trustees can be sued for breach of trust if they use the agency's resources for the benefit of the public instead of the two favored groups.[18]

This article will use the term "cognate Hawaiians" to refer to the class of people picked out by the statutory definition in HAW. REV. STAT § 10-2, *i.e.*, those who can trace at least part of their ancestry to inhabitants of Hawai`i in 1778 (including "native Hawaiians"). "Cognate" is used in the sense of "related by blood; having a common ancestor."[19] It refers to ancestry and does not imply any position as to whether any of the people that it refers to are or were "aboriginal" or have ever "exercised sovereignty"[20] or whether these people are a distinct race or nation. As a term referring to ancestry, it is distinguished from any other sense of

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[14] In 1998, the last election held under the 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 HAWAI`I DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT AND TOURISM, STATE OF HAWAI`I DATA BOOK 1998 252, 261 (1999).

[15] *See* HAW. REV. STAT § 10-3 (2001).

[16] *See id.* at § 10-13.

[17] *Id.* at §§ 10-13, 10-13.5. The ceded lands are most of the state's public lands; they are called "ceded lands" because the Republic of Hawai`i ceded them to the United States. OHA sued the state for even more money, only to be told by the Supreme Court that the provision giving OHA twenty percent of ceded land revenues had been preempted by federal law and repealed. OHA v. State, 96 Haw. 388, 31 P.3d 901 (2001).

[18] *See* HAW. REV. STAT § 10-16 (2001).

[19] THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 259 (1969). The word comes from "cognatus," Latin for "a person related to another by a common ancestor." BLACK'S LAW DICTIONARY 253 (7th ed. 1999).

[20] *See* HAW. REV. STAT. § 10-2 (2001).

"Hawaiian," such as a citizen of the State of Hawai`i.[21]

In the *Arakaki* cases, OHA's trustees and the State have denied that OHA is an affirmative action program. They defend OHA and DHHL as steps toward "sovereignty" for cognate Hawaiians. On this theory, they justify a 100 percent quota for the favored groups and zero percent for everyone else, including racial groups that are generally beneficiaries of affirmative action programs, such as African-Americans.

III. *RICE* AND ITS PROGENY: THE BAR AGAINST HEREDITARY POLITICAL PRIVILEGE

A. Rice v. Cayetano

Harold "Freddy" Rice is a citizen of Hawai`i of European ancestry, descended from subjects of the Kingdom of Hawai`i, whose family has lived in Hawai`i for five generations. He tried to register to vote in the OHA election (held as part of the general election) but was denied because he was not of Hawaiian ancestry. Rice sued and lost in the District Court.[22] The Ninth Circuit affirmed.[23] The Supreme Court reversed, holding that OHA's restriction of voting to cognate Hawaiians violated the Fifteenth Amendment.[24]

The U.S. Supreme Court held that the "State's electoral restriction enacts a race-based voting qualification"[25] that violates the Fifteenth Amendment to the United States Constitution.[26] Noting that 1778, the date

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[21] *See Rice*, 528 U.S. at 499 (referring to "Petitioner Rice, a citizen of Hawaii and thus himself a Hawaiian in a well-accepted sense of the term").

[22] 963 F.Supp. 1547 (D. Haw. 1997).

[23] 146 F.3d 1075 (9th Cir. 1998).

[24] For a more detailed analysis of *Rice*, see Patrick W. Hanifin, *To Dwell on the Earth in Unity: Rice, Arakaki and the Growth of Citizenship and Voting Rights in Hawai`i*, 5 HAW. BAR J. 15-44 (2001), *available at* http://www.angelfire.com/hi2/hawaiiansovereignty/HanifinCitizen.html. For a wide-ranging discussion of the issues concerning *Rice* and Hawaiian sovereignty claims, see the materials at www.angelfire.com/hi2/hawaiiansovereignty.

[25] *Rice*, 528 U.S. at 517.

[26] U.S. CONST. amend. XV, § 1 (providing 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").

in the statutory definition of "Hawaiian," was the date that Hawai`i's long isolation ended,[27] the Court drew the conclusion that "[t]he State, in enacting the legislation before us, has used ancestry as a racial definition and for a racial purpose."[28] 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."[29] 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,"[30] the Court concluded that denying persons who are not cognate Hawaiians the right to vote in OHA elections violates the Fifteenth Amendment. Justices Breyer and Souter concurred on the ground that there is no federal trust relationship with cognate Hawaiians and that that class is not analogous to an Indian tribe.[31] Justices Stevens and Ginsberg dissented, accepting the State's analogy between cognate Hawaiians and members of recognized Indian tribes.[32]

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.[33]
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> The moral evil of racial discrimination is that it divides people into

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[27] *Rice,* 528 U.S. at 500, 514-15.

[28] *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.* 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.

[29] *Id.* at 514.

[30] *Id.* at 511-12.

[31] *Id*. at 525-27.

[32] *Id*. at 528-48.

[33] *Id.* at 517.

superior and inferior groups based on ancestry. The evil is the same regardless of the size of the hereditary group: a royal family, an aristocracy, a tribe, a nationality, or a race. This principle is rooted in the original Constitution: the clauses forbidding titles of nobility,[34] guaranteeing each state a republican form of government,[35] and prohibiting hereditary criminal status.[36] The Thirteenth, Fourteenth and Fifteenth Amendments extended the principle of equality up the scale of group size from aristocracy to race. These amendments could have been phrased narrowly to address black slavery and emancipation, the immediate cause and consequence of the Civil War. However, just as the principle of equality extends beyond its historical application against slavery, so, too, the language added to the Constitution extends beyond any particular historical variety of discrimination. In *Rice,* the Supreme Court reminded us that when the Constitution says "the right of citizens . . . to vote shall not be denied or abridged . . . on account of race," it means precisely that.

B. Arakaki v. State of Hawai`i ("Arakaki I")

The State of Hawai`i did not get it. Because state law provided that anyone who could vote for OHA trustee could serve as OHA trustee,[37] the Supreme Court's decision that struck down the racial restriction on voting also struck down the restriction that only cognate Hawaiians could run for and serve as OHA trustees. The state legislature promptly restored the racial restriction on candidacy by amending the statute to limit candidacy and service on the OHA board by the same definition that the Supreme Court had just decided is a racial classification.[38]

A multi-racial group of citizens of Hawai`i, including some of Hawaiian ancestry, challenged this resistance to their constitutional rights.

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[34] U.S. CONST. art. I, § 9, cl. 8, § 10, cl. 1.

[35] *Id.* at art. IV, § 4.

[36] *Id.* at art. III, § 3, cl. 2 (stating, "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 Mr. Rice should not be allowed to vote in OHA elections because his grandfather had opposed King Kalakaua and Queen Liliuokalani. *See* Haunani-Kay Trask & Mililani Trask, *Rice's Discrimination Claim Reveals Legacy of Overthrow*, HONOLULU ADVERTISER (Oct. 3, 1999).

[37] HAW. REV. STAT. § 13D-2 (1998).

[38] 2000 Haw. Sess. Laws, ch. 59, § 1 (amending HAW. REV. STAT. § 13D-2).

One of them, Kenneth R. Conklin, sought nomination papers for OHA trustee and was refused, preventing him from running for that office.

In *Arakaki v. State of Hawai`i*, Judge Helen Gillmor of the U.S. District Court for the District of Hawai`i extended the principle of *Rice* to hold that state laws that restricted the right to run for the office of OHA trustee based on ancestry violated the Fourteenth as well as the Fifteenth Amendment. The court pointed out:

> [O]urs is a political system that strives to govern its citizens as individuals rather than as groups.
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> The Fourteenth and Fifteenth Amendments to the U.S. Constitution were enacted as part of the effort to exorcise race as a factor upon which the government may base its treatment of its people. . . . Racial classifications are particularly harmful when used with respect to voting as they threaten to "balkanize us into competing racial factions."[39]

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."[40] 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" [41] *as* trustees. The court also held that the state's discrimination against candidates violated the Fifteenth Amendment and the Voting Rights Act by abridging the right to vote on account of the race of the candidates.[42]

C. Barrett and Carroll

Rice and *Arakaki I* established that the State could not create a government exclusively *by* cognate Hawaiians and *of* cognate Hawaiians. But the State still operates governmental agencies exclusively *for* cognate Hawaiians. People who lack Hawaiian "blood" can vote for OHA trustees

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[39] Arakaki v. State of Hawai`i, slip op. at 4-5 (quoting Shaw v. Reno, 509 U.S. 630, 657 (1993)).

[40] *Id.* at 16.

[41] *Rice,* 528 U.S. at 523.

[42] *Arakaki*, slip op. at 20-25, Voting Rights Act of 1965, 42 U.S.C. § 1973.

(thanks to *Rice*) and can run for and serve as trustees (thanks to *Arakaki I*) but they are still denied any benefits from these agencies.

Patrick Barrett is a citizen of the United States and of the State of Hawai`i who is of Caucasian ancestry. He has challenged the racial restrictions on applying for a homestead from DHHL and applying for a small business loan from OHA. Another citizen, John Carroll, also challenged these laws.[43] The two cases were consolidated and dismissed on technical standing grounds. Both Barrett and Carroll have appealed.

D. Arakaki v. Cayetano ("Arakaki II")

Earl Arakaki and some of the other *Arakaki I* plaintiffs, joined by other citizens, have returned to the battle, asserting their rights as taxpayers to challenge the expenditure of state tax revenues on OHA and DHHL programs as a violation of the Equal Protection Clause. The plaintiffs rely on the principle enunciated in *Rice*, that a state cannot discriminate based on racial ancestry, and on *Rice*'s conclusion that "Hawaiian" and "native Hawaiian" as defined in Hawai`i law are racial classifications. OHA and DHHL do not pass strict scrutiny because their asserted purpose, self-government for a racial class, is illegitimate and they are not narrowly tailored to any compelling governmental purpose. For instance, unlike a narrowly tailored program,[44] the legal divisions between "native Hawaiians," "Hawaiians" and non-Hawaiians are intended to last forever.

Plaintiffs also assert rights as beneficiaries of the public land trust and challenge diversion of trust revenues to DHHL and OHA. The United States accepted cession of Hawai`i's public land from the Republic of Hawai`i in trust for the benefit of all of the inhabitants of Hawai`i.[45] The United States subsequently transferred that land, still impressed with that public trust, to the State when Hawai`i was admitted to the Union.[46]

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[43] Carroll v. Nakatani, D. Haw. Civ. No. 00-00641 DAE/KSC.

[44] Adarand Constructors v. Pena, 515 U.S. 200, 238 (1995) (explaining that a narrowly tailored program must "not last longer than the discriminatory effects it is designed to eliminate").

[45] Annexation Resolution, (also known as the Newlands Resolution) Resolution No. 55 of July 7, 1898, 30 Stat. 750, accepting and ratifying the Republic of Hawai`i's offer to cede the lands to the United States on conditions as set forth in the Treaty of Annexation (1897), *reprinted in* L. THURSTON, FUNDAMENTAL LAWS OF HAWAI`I 243 (1904).

[46] Hawai`i Admission Act, An Act to Provide for the Admission of the State of Hawai`i into the Union, Act of March 18, 1959, Pub. L. 86-2, 73 Stat. 4, § 5.

Neither trustee, the United States or the State, could change the terms of the trust to impose an unconstitutional racial qualification on any benefits or restrict some of the trust corpus to the exclusive benefit of racial classes.[47]

IV. THE DISCRIMINATION IS PURELY RACIAL

Discrimination based on race and ancestry is generally conceded to be undemocratic and unfair. The advocates of the OHA and DHHL programs are not racists and do not contend that these programs are justified racial discrimination. They sincerely believe that cognate Hawaiians are privileged over all others for some reason other than race. Several rationalizations have been advanced. All fail.

A. Not Based on Being an "Indian Tribe"

The first rationalization draws an analogy to American Indian tribes. It contends that (1) all Indian tribes are "indigenous" groups; (2) all "indigenous" groups, or at least those that have a "special relationship" with the government, have rights to special treatment, including having governments exclusively for themselves; (3) cognate Hawaiians are an "indigenous" group with a "special relationship"; so (4) they have a right to an exclusive government and other special benefits.

The constitutional basis for this argument is the Commerce Clause, which gives Congress the power "to regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes."[48] Whatever an "Indian Tribe" may be, its presence is essential for invoking Congress' congressional power to regulate commerce with "Indian Tribes." The argument relies on *Morton v. Mancari*,[49] which upheld a hiring preference for employees of the Bureau of Indian Affairs ("BIA") who are enrolled members of federally recognized Indian tribes. OHA and DHHL are allegedly analogous to Indian tribal governments, which are allowed to restrict voting to tribal members, and also analogous to the BIA. The conclusion is that the standard of constitutional review is not strict scrutiny, as applies to racial classifications, but rather a rational basis

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[47] *See* H. William Burgess & Sandra Puanani Burgess, *The Ceded Lands Case*, 5 HAW. BAR J. 9 (July 2001); Aloha for All, www.aloha4all.org.

[48] U.S. CONST. art. I, § 8, cl. 3.

[49] 417 U.S. 535 (1917).

test for political classifications.[50]

The first flaw in this argument is that Hawaiians are not a federally recognized Indian tribe. No Hawaiian organization or group is on the Secretary of the Interior's official list of all "Indian tribes," which the Secretary recognizes to be eligible for the federal programs and services.[51] This list includes both tribes that Congress itself has recognized and tribes that have been acknowledged under the Interior Department's administrative procedures promulgated under congressional authority.[52] The regulations limit recognition to groups in the continental United States,[53] disqualifying cognate Hawaiians.[54] Because the class of cognate Hawaiians does not qualify for administrative recognition as a tribe, it is also outside the statutory definition of an "Indian tribe," *i.e.*, an "Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe."[55] No congressional act expressly recognizes the class of cognate Hawaiians as an Indian tribe. Indeed one strong advocate for special rights has acknowledged that it is "impossible" for cognate Hawaiians to qualify for recognition as an Indian tribe because they are neither Indians nor tribal.[56]

As we heard in law school, if you can think of one thing that is inextricably linked with another thing, without thinking of that other thing, then you can think like a lawyer. A lawyer can think of cognate Hawaiians

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[50] *Id.* at 554 n.24: "The preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of "federally recognized" tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature."

[51] 25 U.S.C. § 479a-1. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 65 Fed. Reg. 13,298 (Mar. 13, 2000).

[52] For the respective roles of Congress and the BIA, see Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of Interior, 255 F.3d 342, 346 (7th Cir. 2001).

[53] 25 C.F.R. § 83.1 (defining "Indian group," "Indian tribe," and "indigenous").

[54] *See* Price v. State of Hawai`i, 764 F.2d at 626-28 (finding that a Hawaiian group does not qualify under regulations).

[55] 25 U.S.C. § 479a.

[56] Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95, 137 (1998). *See* Rice v. Cayetano, Respondent's Brief in Opposition to Petition for Writ of Certiorari 18 (Dec. 29, 1998) (arguing that the tribal concept has no place in Hawaiian history).

as an "Indian tribe" without thinking of them as either Indians or a tribe. The first step is to reinterpret "Indian tribe" to mean any ethnic group which can trace part of its ancestry back to America before white men arrived; such groups are "indigenous." The second step is to say that the requirement for federal recognition is satisfied by any federal legislation or appropriation that refers to the group. Such special legislation creates a "special relationship" (sometimes called a "political relationship" or a "trust relationship") between the group and the United States. The conclusion is that such special laws use a political classification, not a racial classification, so that the rational basis test is proper.[57]

Even the most creative lawyers do not always win. In *Rice*, the Court rejected the argument that cognate Hawaiians are analogous to an Indian tribe so that restricting voting in OHA elections to cognate Hawaiians is analogous to restricting voting in tribal elections to tribal members.[58] The Court restricted *Mancari*'s rational basis test to legislation involving federally recognized tribes, enrolled members of such tribes, and the Bureau of Indian Affairs' hiring preference (which it deemed "*sui generis*").[59]

In *Rice*, the Supreme Court explained how Indian tribes differ from state agencies such as OHA and DHHL: They are separate quasi-sovereigns, not federal or state instrumentalities.[60] Indian tribes pre-existed the United States and "retained some elements of quasi-sovereign authority even after cession of their lands to the United States."[61] Their lingering remnants of original sovereignty – "quasi-sovereignty" as the Supreme Court described it – are not created by or derived from the United States or any State.[62]

This has two constitutional consequences. First, Indian tribes, unlike state and federal agencies, are not subject to the Fourteenth or Fifteenth Amendments.[63] Second, because Indian tribes have lingering

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[57] For a detailed presentation of this argument, *see id.*

[58] 528 U.S. at 518-22.

[59] *Id.*

[60] *Id.* at 520-22.

[61] *Id.*

[62] *Id.*; *see also* United States v. Wheeler, 435 U.S. 313, 322-323 (1978).

[63] *See* Talton v. Mayes, 163 U.S. 376 (1896) (finding that a tribe is not limited by the Fifth Amendment to the U.S. Constitution when dealing with its members).

remnants of sovereignty not derived from the United States or any State, the United States enters into political relations with them, government to government. Such a government-to-government relationship is impossible for a group that has no separate group government.

Expanding the definition of an "Indian tribe" to a group of individuals having a certain racial ancestry would destroy the crucial constitutional distinction between an Indian tribe and a racial group. That would undercut Congress' power under the Commerce Clause to enact special legislation governing tribes. All of Congress's powers under the original Constitution, including the Commerce Clause, are limited by the Fifteenth Amendment and the Bill of Rights, including the equal protection principle implicit in the Due Process Clause of the Fifth Amendment.[64] If an "Indian Tribe" is nothing more than an ethnic group for which special legislation has been enacted, then that special legislation is as constitutionally suspect as special legislation for "all Irish-Americans in Boston" or "all Mexican-Americans in Texas." By rejecting the State of Hawai`i's analogy between cognate Hawaiians and an Indian tribe, the Supreme Court preserved the constitutionality of the Indian title of the U.S. Code.[65] Reading the constitutional term "Indian Tribe" to mean any "indigenous" group that has a "special relationship," as evidenced by special legislation for that group, collapses "Indian tribe" into a racial classification after all.

Cognate Hawaiians, like the rest of us, are descendants of immigrants, and as a group are not "indigenous" in the standard English meaning of the term.[66] When "indigenous" is used as a term of art to refer

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[64] Bolling v. Sharpe, 347 U.S. 497 (1954) (circumscribing Congress's power to legislate for the District of Columbia by the equal protection principle implicit in the Due Process Clause of the Fifth Amendment, and not extending that power to legislation requiring segregated schools). Congress's exercise of its Indian Commerce Clause power is limited by the Fifth Amendment. Hodel v. Irving, 481 U.S. 704 (1987) (holding that a statute barring inheritance of fractionated Indian land allotments unconstitutionally effected taking of Indians' property); Babbitt v. Youpee, 519 U.S. 234 (1997) (finding that an amended version of same statute also unconstitutional).

[65] *See* Morton v. Mancari, 417 U.S. at 552 (stating that if legislation governing Indian tribes were "deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased").

[66] "Indigenous" can mean either "not introduced directly or indirectly according to historical record or scientific analysis into a particular land or region or environment from the outside" or "originating or developing or produced naturally in a particular land or region or environment." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1673 (1993). Any individual who was born in Hawai`i is indigenous to Hawai`i in the sense of

to any ethnic group descended from people that lived in America before the white men arrived, then it becomes a racial classification.[67] It singles out groups based on racial ancestry as clearly as a law that denies the vote to "descendants of the inhabitants of sub-Saharan Africa in 1492" singles out African-Americans. Ancestry is not enough to make an "Indian Tribe" for constitutional purposes. "[R]acial or ancestral commonality isn't enough without a continuously existing political entity to constitute a tribe."[68]

The alleged "special relationship" between cognate Hawaiians and the federal government is nothing more than a string-cite to statutes that mention "Hawaiians" or "native Hawaiians."[69] If a stack of laws that treat a group differently immunizes those laws and others from strict scrutiny, then Jim Crow laws were constitutional. The "special relationship" argument is circular: it relies upon legislation that defines "Hawaiian" and "non-Hawaiian" in terms of racial ancestry to argue that if those classifications are used in legislation, then they must be "political" rather than racial.[70] However, when the people who have a so-called "political

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having personally originated in Hawai`i, but the statutes at issue describe classes, not individuals.

[67] For instance, the so-called "Akaka Bill," S. 746 of the current 107th Congress, defines "indigenous native people" as "the lineal descendants of the aboriginal indigenous native people of the United States." S. 746 at § 2(4). The latter term in turn is defined as "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." *Id*. at § 2(2). The bill would require the Secretary of the Interior to manage the creation of a government for cognate Hawaiians.

[68] Miami Nation of Indians of Indiana, Inc. v. Babbitt, 112 F. Supp. 2d 742, 746 (N.D. Ind. 2000), *affirmed sub nom*. Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of Interior, 255 F.3d 342, 350 (7th Cir. 2001) (explaining that when political organization ceased to effectively govern, Indian group "united only by common descent" ceased to be tribe); Price v. State of Hawai`i, 764 F.2d 623, 627 (9th Cir. 1985) (saying that a group of Hawaiians is not a tribe); United Houma Nation v. Babbitt, 1997 U.S. Dist. Lexis 10095 (D.D.C. 1997) (stating, "Miscellaneous Indians do not make a tribe").

[69] For a list of such statutes, *see* Appendix A to the *amicus curiae* brief of the Hawai`i congressional delegation in *Rice*, 1999 WL 557289.

[70] The inapplicability of the "special political relationship" argument to laws discriminating between racial Hawaiians and others is discussed at length in Stuart Minor Benjamin, *Equal Protection and the Special Relationship* 106 YALE L.J. 537 (1996) and in 1 NATIVE HAWAIIANS STUDY COMMISSION, REPORT ON THE CULTURE NEEDS AND CONCERNS OF NATIVE HAWAIIANS 347-49 (1983).

relationship" are precisely defined by a racial classification, then the "political relationship" is a disguised racial classification. In the *Japanese Internment Cases*, the government claimed that it had interned people of Japanese ancestry because their political relationship to the Japanese Empire supposedly made their loyalty to the United States suspect.[71] Nonetheless, as Justice Murphy said in dissent, the government was engaging in "obvious racial discrimination."[72]

Finally, if the "Indian tribe" argument were to succeed in court, Congress and state governments could treat people differently based on "indigenous" ancestry. Rather than creating special rights for cognate Hawaiians, this would impose plenary powers of Congress over Hawaiians. Equal protection would no longer equally protect anyone who Congress deems to be of "indigenous" ancestry. Congress could do as it sees fit. The courts have a long history of deferring to congressional judgments about what is best for Indians: push them west into the badlands (it will keep them safe from settlers); force them onto reservations (it will civilize them); suppress their religions (it will civilize them); break up the reservations into allotments (it will make them yeoman farmers); terminate the tribes (it will teach them self-reliance); tell them to run casinos (gambling will make them all rich); and, in sum, make them wards of the government (Great White Father knows best). How much would you sell your civil rights for?

B. Not Based on Descent from Subjects of the Kingdom of Hawai`i

The second rationalization is that cognate Hawaiians are distinguishable from their fellow citizens as being the descendants of the subjects of the Kingdom of Hawai`i. The class of cognate Hawaiians has different members than the class of descendants of the Kingdom's subjects, however. Harold F. Rice is descended from subjects of the Kingdom, but he was denied the right to vote because he lacked the required cognate Hawaiian descent.[73] On the other hand, consider a person who can prove that he is a member of a family descended from a Hawaiian sailor who left Kaua`i in 1790, moved to Massachusetts, had children and died in 1800 (before Kaua`i was added to the Kingdom of Hawai`i). Since 1800, he and all his ancestors have been born and raised in Massachusetts. Even

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[71] Korematsu v. United States, 323 U.S. 214, 218-19 (1944).

[72] *Id.* at 234.

[73] *Rice*, 528 U.S. at 510; Brief for Petitioner in *Rice*, 1999 WL 374574 at 2, 8.

though he is not descended from any subject of the Kingdom of Hawai`i, he would qualify for OHA benefits if he moved to Hawai`i.

The Kingdom of Hawai`i was a multiracial state that never limited citizenship or political participation to cognate Hawaiians. The Kingdom followed the Anglo-American common law rule of "*jus soli*": everyone born in the country and subject to its jurisdiction is a citizen regardless of where their ancestors came from.[74] The government of the Kingdom actively sought immigrants from around the world. 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 their countries of origin.[75] During the closing decades of the Kingdom, most cognate Hawaiians could not vote, but some persons who were not cognate Hawaiians were voters, legislators, cabinet members, and judges.[76] The government was not a government of, by or for a particular race. Singling out a particular racial group for disparate treatment is not justified by the history of the Kingdom.

C. Not Based on a Hereditary Claim for Stolen Sovereignty or Land

The third rationalization is that cognate Hawaiians are victims of a theft of sovereignty and land when the Kingdom of Hawai`i was overthrown in 1893. OHA, DHHL and other programs are a down payment on the vast compensation that they are due for this wrong.

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

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[74] CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE, § 92.04[3] (1999). For a detailed discussion of the historical evidence concerning citizenship, voting rights and office holding under the laws of the Kingdom of Hawai`i, see Hanifin, *To Dwell on the Earth in Unity, supra* note 24.

[75] *See* MAUD JONES, NATURALIZATION IN HAWAI`I (1934) (summarizing the naturalization statutes of the Kingdom).

[76] *See* RALPH S. KUYKENDALL, 3 HAWAIIAN KINGDOM 191 (1967) (writing that foreign-born subjects of the kingdom sat in the legislature as early as 1851); GAVAN DAWS, SHOAL OF TIME 214 (1968) (only eleven of thirty-seven cabinet ministers appointed by Kalakaua were of Hawaiian ancestry); *see generally* KUYKENDALL, 3 HAWAIIAN KINGDOM, at ch. 19–20; for the judges, see the lists of judges at the beginnings of the first eleven volumes of the Hawaii Reports.

definition, everyone else would abandon "sovereignty" for something more vague.

Although irremediably vague, "sovereignty" is not utterly meaningless. Its varying uses in the current debate are contradictory precisely because they point to contradictory proposals regarding the same subjects. A rough checklist of the word's uses suggests 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.[77]

The second theme, political power, includes the right to vote, to run for office, and to try to persuade others about political issues. Every adult citizen of the United States and of Hawai`i has these rights. In a democracy, sovereignty in this political sense is shared. No one can be all-powerful unless everyone else is powerless. Each of us is sometimes in the minority, unable to imagine how the majority elected such an idiot or enacted such a foolish law. But with raucous debate, together we exercise the political power of sovereign national and state governments. Thus, in our individual and collective exercise of self-government, we are all sovereign now. The claim at issue is not for sovereignty or self-determination – we all have that. The claim is for exclusive rights denied to most citizens of Hawai`i.

Everyone who was alive in Hawai`i in 1893 is now dead. The exclusive powers demanded in the name of "Hawaiian Sovereignty" would go to people who were not even born then. This is not a matter of inheriting private property. It is a claim for hereditary political power. However, we who are alive now have the right to decide by majority vote how the government should be run. Historical claims that one's ancestors enjoyed positions of privilege and power, even if true, do not justify hereditary political power for a minority. No one is entitled to extra power because some of his ancestors once belonged to a ruling class. For instance, the heirs of French King Louis XVI are not entitled to the land and power he lost when he lost his crown and head. No one deserves more than equality. Moreover, because citizenship and political participation in the Kingdom was never limited to cognate Hawaiians, no claim arising from the overthrow of the Kingdom could be limited to that class.

Similarly, cognate Hawaiians as a class do not have a claim for the

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[77] U.S. CONST. amend. I; *see* Meyer v. Nebraska, 262 U.S. 390 (1923) (defining the right to learn and learn in foreign language); HAW. CONST. art. I, § 4.

alleged "theft" of the public lands of the Kingdom.[78] There were three types of land under the Kingdom: private land, Crown Land and Government Land. No private land was seized. By 1893, the Crown Lands were a kind of public lands used to generate income that compensated the chief executive for services rendered to the public; they did not belong to any individual, including the monarch.[79] Similarly, cognate Hawaiians, individually or a group, did not own the Government Lands; the government did. Nor did cognate Hawaiians, individually or as a group, have any special legal privileges to use Government Lands or Crown Lands. After the overthrow of the monarchy, the Government Lands remained Government Lands. The Republic ceded those lands, together with the former Crown Lands, to the United States, which accepted them in trust for the benefit of all inhabitants of Hawai`i.[80] Those lands are still public lands held by the State for the benefit of its citizens or held by the United States for federal purposes such as the common defense. Cognate Hawaiians do not have a unique hereditary claim to Hawai`i's public lands that would justify disparate treatment as non-racial.

D. Not Based on Language or Culture

The fourth rationalization is that cognate Hawaiians can be separated out from their fellow citizens based on a distinct culture. The statutory terms "Hawaiian" and "native Hawaiian" are defined without regard to language or culture, however. A person can be fluent in the

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[78] *See* Hanifin, *Hawaiian Reparations: Nothing Lost, Nothing Owed,* 17 HAW. BAR J. 107 (1982), *available at* www.angelfire.com/hi2/hawaiiansovereignty/hanifinreparations.html. The development of land law in Hawai`i is analyzed in Paul Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai`i*, 20 U. HAW. L. REV. 99 (1998), *available at* www.angelfire.com/hi2/hawaiiansovereignty/sullivanpash.html.

See 1 NATIVE HAWAIIANS STUDY COMMISSION, REPORT ON THE CULTURE NEEDS AND CONCERNS OF NATIVE HAWAIIANS 333-370 (1983) (refuting the claim that Hawaiians as an ethnic group held title to Hawai`i land) (attached as Exhibit 3). Notice of Record of Decision for Land Use and Development Plan Final Environmental Impact Study, Bellows Air Force Station, Waimanalo, Hawai`i, 61 Fed. Reg. 28,568 (June 5, 1996).

[79] Liliuokalani v. United States, 45 Ct. Cl. 418,427-428 (1910) (stating that Crown Lands "belonged to the office and not to the individual" and when the office of monarch ceased to exist, the lands "became as other lands of the Sovereignty"), *available at* www.angelfire.com/hi2/hawaiiansovereignty/liliucrownlands.html.

[80] Annexation Resolution, Resolution No. 55 of July 7, 1898, 30 Stat. 750; U.S. v. Mowat, 582 F.2d 1194, 1206-07 (9th Cir. 1978).

Hawaiian language from infancy, be raised on a taro farm as a *hanai* child of a family of Hawaiian ancestry, earn a doctorate in Hawaiian studies; but if he lacks "blood" in the requisite minimum amounts, he can never qualify for benefits from DHHL or OHA. On the other hand, a person who is born and raised outside Hawai`i, speaks no Hawaiian, knows nothing of any culture that anyone would call "Hawaiian" and does not care to learn can qualify if he shows even "1 possible ancestor out of 500."[81]

Caution is appropriate when using terms as vague as "culture." The temptation when using a term like "Hawaiian culture," "American culture," or "European culture" is to assume that we are talking about some definite thing that excludes other things of the same class. That is a mistake. Cultures can have neither precise definitions nor precise boundaries. If a physical metaphor is needed, cultures resemble clouds: interpenetrating, constantly changing, dividing, and merging.

One can think of a culture as made up of an almost infinite number of interrelated "memes" – units of information that can each be replicated by imitation and so can evolve.[82] Examples include words, songs, advertising slogans, clothing fashions, recipes, ceremonies, scientific ideas, and technological ideas such as how to build an arch. Memes often travel in packs, fitting together more or less tightly. Examples of such "memeplexes" include languages, religions and political doctrines. Successful memes are replicated more often. They can be contagious, spreading like biological or computer viruses from person to person and memeplex to memeplex. You got your genes from your parents, but you get your memes from all over the world. Memelines don't necessarily follow bloodlines.

Like viruses and genes, a meme may have evolved into its present form because that form improves its chances for replication, not necessarily because it is beneficial to people who replicate it.[83] To illustrate this with an extreme case: the meme for suicide bombing is spreading among Palestinians because, although it is fatal to any individual who practices it, it is part of a memeplex that glorifies terrorists as heroes of the Palestinian nation and so induces imitation.

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[81] *Rice*, 528 U.S. at 527 (Breyer J., concurring).

[82] The meme for memes was invented by the biologist Richard Dawkins in THE SELFISH GENE 203-215 (1976). For a general survey of its evolution, see SUSAN BLACKMORE, THE MEME MACHINE (1999), especially the discussion of what a meme is at 4-8, 19-22, 42-56, 63-66.

[83] See DAWKINS, THE SELFISH GENE, *supra* note 82, at 214-15.

At any given time, each individual has his own unique set of memes, which more or less overlap the set of memes of each of his neighbors. Every day, we learn new memes, vary what we learn, and pass the latest variants on to others. For instance, musicians in Hawai`i have borrowed a Portuguese instrument, given it the Hawaiian name "ukulele," and adapted rhythms from Jamaican reggae, country music, and Tin Pan Alley popular songs. Hawai`i musicians rework these memes and many other memes in a constantly changing tradition to invent uniquely Hawaiian variations, which they send out into the world to be listened to and imitated wherever music is heard. Like words, in Justice Holmes' famous phrase, a meme is "not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[84] Everyone in Hawai`i swims in the worldwide meme pool of evolving ideas, skills, beliefs, and practices. We each more or less share our personal collections of memes with everyone else in Hawai`i, in America, and in the world.

Hawai`i law does not try to base exclusive legal rights on the exclusive possession of any clearly bounded set of memes. That would be impossible. Culturally, we are all *hapa* now.

E. Not Based on Being a Separate Nation

The final rationalization is that cognate Hawaiians are not a hereditary privileged class under Hawai`i law but rather a separate "nation" entitled to its own separate government. Did *Rice* mistake a nation for a racial class? Is there any morally significant difference if a class defined by ancestry is called a "nation" rather than a "race"?

Nationalism was invented in Europe in the eighteenth and nineteenth centuries as a response to modernity: the industrial revolution and the connected development of mass literacy, mass communications and rapid transportation.[85] Technology and early industrial development disrupted traditional societies. Using the new technology, memes could spread rapidly across Europe, competing with each other to replicate in minds opened to new ways. Nationalist memes offered new ways to

[84] Town v. Eisner, 245 U.S. 418, 425 (1918).

[85] The scholarly literature on nationalism is vast. For a penetrating yet succinct analysis of the origin and development of nationalism, see ERNEST GELLNER, NATIONS AND NATIONALISM (1983), ERNEST GELLNER, NATIONALISM (1997).

organize modern societies.[86] Nationalism comes in at least two distinct varieties: civic nationalism and ethnic or blood nationalism.[87]

The first to develop, often called "civic nationalism," emphasizes allegiance to the polity – the state, government and citizen body. The criterion for membership in the civic nation is citizenship in the country. For this reason, it is better called "patriotism" because the focus of loyalty is the "patria," the country and homeland, rather than a group defined by a common "natio," (*i.e.*, birth and ancestry).[88] This kind of patriotism first in arose England, the home of the industrial revolution, where everyone born subject to the laws was a subject of the kingdom.[89] The patriotism memes spread to the United States of America and then to France during the French Revolution. In each of these countries, the loyalties encouraged by patriotism memes focused on an organized polity as the object of allegiance.

There was no nationalism and no nation in pre-contact, pre-industrial Hawai`i. Rather, there were several warring, feudal kingdoms.[90] Despite the wars, people could freely move among the kingdoms to take the best economic deal.[91] Like England, Kamehameha I's unified Kingdom was a polity formed by conquest and only later attracted broad-

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[86] "Nationalism is not the awakening of nations to self-consciousness; it invents nations where they do not exist." ERNEST GELLNER, THOUGHT AND CHANGE 169 (1964).

[87] Like other intellectual taxonomists, scholars of nationalism can be taxonomized into "splitters" and "lumpers" – those who create many categories and those who prefer to use only a few. In an article this short, two categories will have to suffice. For a survey of the literature, see ANTHONY SMITH, THE NATION IN HISTORY: HISTORIOGRAPHICAL DEBATES ABOUT ETHNICITY AND NATIONALISM (2000); JOHN HUTCHINSON & ANTHONY D. SMITH, NATIONALISM (1994). For a criticism of the civic vs. ethnic nationalism dichotomy, see Rogers Brubaker, *Myths and Misconceptions in the Study of Nationalism* in JOHN A. HALL ET AL., THE STATE OF THE NATION, 272, 298-301 (1998).

[88] This distinction is made in WALKER CONNER, ENTHNONATIONALISM 196-209 (1994); ERIC HOHSBAWM NATIONS AND NATIONALISM SINCE 1780, 86-88 (1990). For a history of the term "nation," see LIAH GREENFELD, NATIONALISM: FIVE ROADS TO MODERNITY, 4-12 (1992).

[89] BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Bk. I, Ch. 10 *366-*374 (1765).

[90] For the early history of Hawai`i, see RALPH S. KUYKENDALL, 1 THE HAWAIIAN KINGDOM 1-60 (1938); DAVID MALO, HAWAIIAN ANTIQUITIES (1898).

[91] *See* MELODY K. MACKKENZIE, NATIVE HAWAIIAN RIGHTS HANDBOOK 4 (1991).

based loyalty. The leaders of the Kingdom borrowed and adapted Anglo-American memes like *jus soli* and easy naturalization.[92] To the extent that nationalist memes spread to Hawai`i, they were the civic nationalist memes from England and America, directing allegiance to the polity. Citizenship, voting rights and office-holding in the Kingdom were never restricted to cognate Hawaiians.[93] The heirs of the multiracial Kingdom are the multiracial State of Hawai`i, the United States, and all of their citizens.

However, those who try to justify OHA and DHHL as the first steps towards Hawaiian nationalism are not satisfied with equal citizenship in a multiracial polity. The test of membership in an alleged "Hawaiian nation" of cognate Hawaiians is ancestry.[94]

Far from being a revival of the ancient Hawaiian nation, "Hawaiian nationalism" is an imitation of the eastern European model of ethnic or blood nationalism.[95] The crucial memes of blood nationalism in its most virulent form are the beliefs that:

1) the nation is defined by putative common ancestry;
2) allegiance to the nation must take precedence over all other loyalties;
3) the nation must have a state with a territory, allegedly the nation's ancestral lands, in which it has exclusive political power ("sovereignty"); and
4) all and only individual members of the nation must be subject to that state and all should be taught the set of memes that the state decrees is the national culture.

Blood nationalism excludes everyone who lacks the blood of the national group: for instance, a Jew in 1940 or a Turkish immigrant in 2002

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[92] *See* Hanifin, *To Dwell on the Earth in Unity*, *supra* note 24, at 17-27.

[93] *See supra* Part IV(B).

[94] Some cognate Hawaiian "sovereignty" advocates would add a criterion of political correctness: only those with the blood plus the proper political beliefs can be first class members of the nation while those who lack the blood can be second-class citizens if they are willing to accept that status; everyone else in Hawai`i would become an alien. However, racial discrimination is not improved by being combined with political discrimination.

[95] For the development of ethnic nationalism in multiple variations, see GELLNER, NATIONALISM, *supra* note 85, at 31-58. For its roots in romanticism and its intellectual (or anti-intellectual) history, see ISAIAH BERLIN, THE SENSE OF REALITY, 168-193, 232-248 (1996); BERLIN, THE CROOKED TIMBER OF HUMANITY, 175-206, 238-61 (1990); BERLIN, AGAINST THE CURRENT, 333-55 (1980).

could never be a "true German."

The earliest memes for blood nationalism were invented in Germany during the late eighteenth and early nineteenth centuries at a time when the French dominated continental Europe politically, culturally, and militarily.[96] Germans who resented and envied the French responded by "contrast[ing] their own deep inner life of the spirit, their own profound humility, their selfless pursuit of true values – simple noble, sublime – with the rich, worldly, successful, superficial, smooth, heartless morally empty French."[97] As Isaiah Berlin explained, this strategy became,

> the original exemplar of the reaction of many a backward, exploited or at any rate patronized society, which, resentful of the apparent inferiority of its status, reacted by turning to real or imaginary triumphs and glories of its past, or enviable attributes of its own national or cultural character.[98]

Despite (or because of) despising the French, Germans tried to imitate the apparently successful nationalist memes. However, because there was no unified German polity to direct their allegiance to, they focused it on a "German nation" defined by the blood that supposedly embodied all the virtues they claimed for Germans over French.

The great competitive advantage of these memes for blood nationalism was the ease with which they could be imitated by other groups that envied their neighbors. Blood nationalism became a sort of meme template into which any traditional local set of memes could be inserted, like the names and addresses inserted into a form-letter in a mail-merge program. There was a big market for this. Societies that modernize become rich and powerful. They confront traditional societies with disturbing new memes that are backed by economic temptation and military might. It is the mark of a civilized person to have doubted one's first principles, but most people find such doubt extremely uncomfortable. People exposed to disturbing new memes sought to combine them with older, familiar, comforting memes so that they could convince themselves that they had combined the best of the old and the modern. Blood nationalism offered a way to combine worship of old, local memes with radical modernization. Often the transformation was forced by militaristic

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[96] BERLIN, AGAINST THE CURRENT, *supra* note 95, at 348-50; BERLIN, THE CROOKED TIMBER OF HUMANITY, *supra* note 95, at 244-247.

[97] BERLIN, THE CROOKED TIMBER OF HUMANITY, *supra* note 95, at 246.

[98] *Id.* For an analysis of the power of resentment and envy in nationalism, see GREENFELD, NATIONALISM, *supra* note 88, at 14-17.

and fascistic rulers who rose to power by calling for revenge against foreigners or domestic scapegoats. The new nationalist governments established schools and cultural institutions that mass-produced copies of the official memes in young minds. These monopolistic organizations excluded competing ideas and drove out independent thinkers, while giving jobs and status to third-rate intellectuals with the approved national "roots" who preached the approved nationalist memes.

Infectious blood nationalism spread eastward across Europe and later to the European colonies that became independent countries.[99] The people of Eastern Europe, Africa, and Asia did not live in discrete ethnic territories. When the old empires broke down, missionaries of the new nationalist memes claimed that the only legitimate governments were nationalist governments of national states. People excluded from one of the new self-proclaimed nations because they had the "wrong blood" could try to form their own new nation and carve out their own state.

In a multi-ethnic area, the only way to separate the "people of the nation" from their "alien" neighbors is to kill the neighbors or expel them from the "nation's sacred land." In revolution, war, and "ethnic cleansing," law breaks down and the most ruthless killers have a competitive advantage. In turn, memes that encourage ruthless aggression have a competitive advantage. As massacres in places like Rwanda show, even people who initially want to mind their own business may resort to genocidal violence when they fear that that their neighbors are about to kill them if they do not strike first. Thus, memes for blood nationalism tend to evolve ever, bloodier forms.

This is a case where dead men do tell tales. To see where blood nationalism leads a multi-ethnic society, look at the bloody ruins of what used to be Yugoslavia. The history of Europe, Africa and Asia since about 1848 demonstrates how disastrous these memes are when they infect people in ethnically diverse areas.

Certainly, no one in Hawai`i wants violence. The advocates for a Hawaiian nation are peaceful and sincere. That was also true of the first advocates for a German nation. Yet resentment feeds on resentment. Claims for special treatment multiply while distinctions of blood divide a community into ever-smaller factions. Because there is no rational rule for defining a "nation," there is no faction too small to claim to be a nation.

Dividing the community by blood quantum into privileged and unprivileged groups is already well established in Hawai`i. Whether the requisite blood quantum is 100 percent, fifty percent or one percent is mathematical trivia. Whatever the cutoff, when the government offers

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[99] *See* HANS KOHN, THE IDEA OF NATIONALISM, 329-334 (1944).

money, land or power to a group defined by blood, it must define and test the purity of bloodlines – as South Africa did and DHHL and OHA do. Money being the mother's milk of politics, such programs encourage political battles over racial definitions. Race-based political programs breed racial resentment among both the favored and disfavored groups. When the State draws racial lines, "communities seek not the best representative but the best racial . . . partisan."[100] Political careers are made by replicating the meme that "my people demand special treatment because we've been mistreated" – something anyone will be able to claim. If the government pays extra for cheese, the warehouses will soon be overflowing with cheese. If the government pays for feelings of racial resentment, the community will soon be overflowing with racial resentment.

That is a bad investment. Hawai`i should reject it. Whether the divisions based on ancestry are labeled "national" or "racial," discrimination is wrong. The greatest service that the Supreme Court has done for Hawai`i in *Rice* is to create a constitutional quarantine against the infectious memes of blood nationalism.

V. CONCLUSION

The OHA and DHHL programs cannot be justified as drawing distinctions based on tribal status, or descent from the subjects of the Kingdom, or culture, or nationhood. Their classifications are racial, just as the Court found in *Rice*. OHA and DHHL are grounded on a claim for hereditary political privileges for racial groups. *Rice* tore the mask off that claim and marks the beginning of the end of these programs. In a democracy, government of the race, by the race and for the race has no place.

[100] Wright v. Rockefeller, 376 U.S. 52, 67 (1964) (Douglas, J. dissenting).