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Articles

LAW, NARRATIVE, AND THE CONTINUING COLONIALIST OPPRESSION OF NATIVE HAWAIIANS

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Abstract

The article does three things. First, and for the first time, it brings to bear the perspectives of critical race theory, postcolonial theory, and narrative theory on the U.S. Supreme Court's 2000 decision in Rice v. Cayetano, which dealt a severe blow to Native Hawaiians' struggles for redress and reparations for a century of dispossession and impoverishment at the hands of the United States. Second, it demonstrates in the concrete case of Hawaii the power of a particular historical narrative--when it is accepted uncritically by the Supreme Court--to render the law itself into an instrument of colonial domination. Third, it links important postcolonial writers--Edward Said, Albert Memmi, and Ngugi wa Thiong'o--to contemporary discourse in critical race theory and the narrative aspects of law.

The history of the Hawaiian Islands is a far cry from the idyllic, palm fringed beaches of the travel posters. It is a story of domination and dispossession of an indigenous society. The article shows how Western historians have tried to erase this story, and put in its place a story of the civilizing influences of Western missionaries and traders, who brought modern technology and democratic government to a primitive people. This story played a pivotal role in the Rice opinion, enabling the Supreme Court to ignore and evade the U.S. government's own apology to the Native Hawaiians for the loss of their sovereignty as a result of colonialist policies of the United States. The article further demonstrates how the Court, in addition to suppressing the historical record, adhered woodenly to the fiction of the colorblindness of American law to find that the requirement of Native Hawaiian ancestry to vote for the trustees of the Office of Hawaiian Affairs violated the Fifteenth Amendment to the U.S. Constitution.

The article concludes with three strategies of resistance to law as an instrument of colonial power that apply in the Hawaiian case. These are: to reclaim the native voice in the law at both the trial and appellate level; to deepen and extend criticism of "the law is colorblind"; and to pursue Native Hawaiian self-determination through mechanisms of international law.

*2 Introduction

> The main battle in imperialism is over land, of course; but when it came to who owned the land, who had the right to settle and work on it, who kept it going, who won it back, and who now plans its future--these issues were reflected, contested, and even for a time decided in narrative . . . . The power to narrate, or to block other narratives from forming and emerging, is very important to culture and imperialism, and constitutes one of the main connections between them.
>
> Edward W. Said[1]
>
> The conquest of the earth is not a pretty thing when you look into it too much.
>
> Robert A. Williams, Jr. (after Joseph Conrad)[2]

Stories shape history; compare two narratives of contemporary Hawaii. The first celebrates Hawaii as a land of multiracial

harmony, as depicted by a white resident of Hawaii--a retired high school mathematics teacher and former university professor from Massachusetts--in his testimony in 2000 before the Hawaii Advisory Committee of the United States Commission on Civil **Rights**:

> [O]ver the last 20 years or so, there has been a powerful resurgence of **Hawaiian** culture and that has taken place under the auspices of the existing governmental system where all people have equal **rights** under the law . . . . There are many, many different cultures in Hawai'i. All of us are in the minority here. The various cultures of immigrants have done quite well in maintaining and preserving their culture, and the **Hawaiian** renaissance of the last 20 years has been extraordinarily powerful.[3]

The second offers a **Native Hawaiian's** view of the "renaissance" of her people:

> In our subjugation to American control, we have suffered what other displaced, dislocated people, such as the Palestinians and the Irish of Northern Ireland, have suffered: We have been occupied by a ***3** colonial power whose every law, policy, cultural institution, and collective behavior entrench foreign ways of life in our land and on our people. From the banning of our language and the theft of our sovereignty to forcible territorial incorporation in 1959 as a state of the United States, we have lived as a subordinated **Native** people in our ancestral home.[4]

The breathtaking contrast between these narratives illustrates a present-day contest in the **Hawaiian** Islands that is not simply over the accurate portrayal of the 'Islands' recent past, but over land, power, and the survival of an indigenous culture. Today's **Native Hawaiians** are descendants of the people who occupied the **Hawaiian** Islands from 500 A.D.[5] They developed a flourishing, self-governing culture and society prior to the main European contacts that began in 1778.[6] This culture came under the total domination of Western economic and political interests after 1778, culminating in the overthrow of the independent Kingdom of Hawaii in 1893 by American business interests acting with the support of United States troops.[7] The United States annexed Hawaii as a Territory of the United States in 1898, and admitted it as the fiftieth State in 1959.[8]

This article will show how the relationship between narrative and power has undermined present-day **Native Hawaiians**' efforts to win legal recognition of their political and economic **rights** as reparation for the American takeover. What Edward Said terms the "power to narrate" has operated at two levels in Hawaii.[9] At one level, **Native Hawaiians**' self-definition and cultural identity have suffered displacement in a historical record that privileges English-language sources, Western canons of historical evidence, and the rhetoric of "white man's burden" and "manifest destiny." This is the level that critical race theorist Richard Delgado calls the "narrative of the ingroup," which consists of the stories told by a dominant group to "remind it of its identity in relation to outgroups, and provide it with a form of shared reality in which its own superior position is seen as natural."[10] At a second level, that of constitutional jurisprudence, the narrative of color-blindness in American law threatens to foreclose **Native Hawaiians**' preferential access to economic resources and self-determination, despite the **Hawaiians**' dispossession during decades of Western control.

The power to narrate operates at both levels in the U.S. Supreme Court's 2000 decision in Rice v. Cayetano, where the Court invalidated the election of trustees of Hawaii's Office of **Hawaiian** Affairs, holding that by limiting the electorate to persons of **Native Hawaiian** descent, the State of Hawaii had violated the Fifteenth ***4** Amendment to the U.S. Constitution.[11] The Rice decision accelerated Constitutional challenges to a number of **Native Hawaiian** programs.[12] Close analysis of the Court's decision will reveal how it puts the **Native Hawaiians** in a double bind. On the one hand, the opinion relies upon, and thus institutionalizes, a racialized history of Hawaii that Western colonizers used to legitimize their takeover.[13] On the other hand, when **Native Hawaiians** resist, and demand reparations and self-determination, they are accused of claiming race-based preferences that are impermissible in "color-blind" America.[14] Rice thus lays bare how law and its narratives can function as instruments of colonial domination.[15]

This article begins with a summary of **Hawaiian** history that will endeavor to respect **Native Hawaiian** sources, traditions, and perspectives, that is positioned, in the sense that it consciously takes the political position of the indigenous peoples, and attempts to recover a history that Westerners have tried to erase. Part II will introduce theoretical perspectives on narrative. Postcolonial theory will establish the basic connections between narrative and power. Theories of narrative in the ***5** law will suggest that the forms of legal discourse that predominate in the American legal system silence the **native** voice and enshrine

white privilege and power. Part III will compare the narrative of Hawaiian history in Part I to the racialized history the Supreme Court accepted in Rice. Part IV will describe how the Court's historical narrative interacts with the narrative of color-blindness to defeat Native Hawaiians' claims to reparations and self-determination. Part V will point to three strategies of resistance to the law as an instrument of colonial power: reclaiming the native voice, critical analysis of "the law is colorblind," and pursuit of Native Hawaiians' self-determination through the mechanisms of international law.

I. Hawaii's History: Domination and Resistance

A. Domination: From Indigenous Society to Statehood

1. When does Hawaii's "history" begin?

To narrate the history of the Hawaiian Islands is immediately to take sides in a political debate. The first point of contention is when the Islands' history begins. Most Western histories skip the more than 1000 years of known human settlement in the Hawaiian Islands and begin their narrative with the "discovery" of Hawaii by Captain James Cook in 1778. Gavan Daws, whose Shoal of Time: A History of the Hawaiian Islands is the most popular and most-often cited modern treatment, reveals its Western bias in the first sentence of the Prologue: "The existence of the Hawaiian Islands became known to Europeans late in the eighteenth century, at the end of the great age of exploration in the Pacific."[16] To Daws, and to almost all his fellow historians, Hawaiian history began--as Daws writes in the first sentence of Chapter 1 of Shoal of Time--when "at dawn on January 18, 1778, a high island, deep blue in the early light, appeared to the northeast, and shortly afterward another to the north."[17] The observers of these deep blue islands were, of course, the crews of Cook's sailing ships Resolution and Discovery.[18]

If in fact it were possible to identify the first pair of eyes to view these islands emerging out of the Pacific mists, they would have belonged to an ocean voyager from the Marquesas Islands or thereabouts, who arrived in Hawaiian waters around 300 or 500 A.D.[19] To accept this moment as the beginning of Hawaiian history, however, as well as the subsequent millennium of cultural and social development of an indigenous people, requires an enlargement of the historical record. It requires recognition of the findings of archaeologists and anthropologists, as well as indigenous oral traditions transmitted in chants and genealogies such as the ***6** Hawaiian story of creation, the Kumalipo.[20] Accepting the relevance and reliability of these sources is as much a political as a historical choice, because only by taking these sources seriously is it possible to construct a counter-narrative to the Western account.

2. Indigenous society

On the basis of the archaeological record and the traditional sources--the latter collated and transmitted in some cases by nineteenth-century Native Hawaiian writers such as David Malo[21] and Samuel Kamakau,[22] who learned English in schools run by American missionaries--we can construct a picture of the indigenous society and culture of the Hawaiian Islands prior to European contact. In brief, society was organized in clans or lineages under the authority of the Ali'i Nui, or "High Chiefs."[23] The Hawaiians regarded the Ali'i as mediators between the gods and ordinary people, responsible for ensuring the people's prosperity by enforcing various taboos and carrying out rituals that demonstrated respect for the gods.[24]

The organizing principle for the society was Malama 'Aina--love, or reverence, for the land. The land itself was divided for purposes of settlement, cultivation, and governance into districts, or ahupua'a. Private ownership was unknown.[25] Rather, the Ali'i, whose power and legitimacy derived primarily from their ability to embody Malama 'Aina in themselves and to inspire it in their people, oversaw the interdependent relationships through which the necessities of life were exchanged among the people.[26] As historian Lilikala Kame'eleihiwa put it:

> The ahupua'a were usually wedge-shaped sections of land that followed natural geographical boundaries, such as ridge lines and rivers, and ran from mountain to sea. A valley bounded by ridges on two or three sides, and by the sea on the fourth, would be a natural ahupua'a. The word ahupua'a means "pig altar" and was named for the stone altars with pig head carvings that marked the

> boundaries of each ahupua'a. Ideally, an ahupua'a would include within its borders all the materials required for sustenance--timber, thatching, and rope from the mountains, various crops from the ***7** uplands, kalo [taro] from the lowlands, and fish from the sea. All members of the society shared access to these life-giving necessities.[27]

The pre-contact population of the **Hawaiian** Islands is also a politically contested historical "fact." Most Western histories place it between 300,000 and 400,000, a relatively conservative figure that minimizes the lethality of Western disease and land acquisition on the **native** population.[28] Other sources place the pre-contact population closer to one million.[29] When Cook arrived in 1778 he encountered a political structure in which the Ali'i owed their allegiance to one or another of several mo'i (kings) who held ultimate authority on the various islands.[30] The strongest of these kings proved to be Kamehameha I, who successfully subdued the islands of Maui, Lana'i, Moloka'i and Oahu, and by 1810 united the **Hawaiian** Islands under his rule by gaining the allegiance of Kaua'i.[31]

3. Destruction of the **native** population

Between Cook's arrival and 1820, the **native** population shrank to half its pre-contact size; by 1866 only 57,000 **Native Hawaiians** were alive.[32] Disease, famine, and war were the chief causes of the decline.[33] An ever-increasing flow of Western missionaries, merchants, and sailors putting in for supplies during whaling voyages aggravated the devastation.[34] Their disregard of indigenous land use, worship, and social organization profoundly disrupted the local culture.[35]

As in so many aspects of **Hawaiian** history, the massive die-off of the **native** population has inspired conflicting interpretations that reflect dominant ideological commitments. For example, David Malo, the missionary-educated **Hawaiian** historian, appears to have internalized the values and perspectives of his teachers when he explains the effects of disease by referring to the **natives**' licentiousness and promiscuity, and the internecine wars of the Ali'i.[36] "God is angry," wrote ***8** Malo in 1839, "and he is diminishing the people."[37] Thirty years later, Samuel Kamakau took a different view, but English-language readers would have missed the following passage from Kamakau's history because the translator omitted it when rendering the **Hawaiian** original into English.[38] Trying to account for the mass death of his people, Kamakau wrote (in **Hawaiian**): "The reason for this misfortune and the decimation of the **Hawaiian** lahui [people, or nation], it is understood, is that the haole [whites] are people who kill other peoples; and their desire for glory and riches, those are the companions of the devastating diseases."[39]

Among the most significant factors speeding the destruction of the population and the transfer of power into Western hands was the program of land tenure instigated under intense Western pressure by King Kamehameha III in 1842.[40] Their lives and livelihoods in the ahupua'a having been disrupted by the waves of white settlers, **Hawaiians** had been migrating into Honolulu where they had little economic opportunity.[41] By this time whites had gained dominant influence in the King's Privy Council, largely because they controlled an increasing share of the economic activity on which the monarchy had come to depend.[42] They convinced the King that private ownership of land would provide a solution to the problem of urban migration.[43] Under the land transfer program (known as the Mahele), land that had hitherto been held in common under the authority of the King and the Ali'i would be divided into categories: one-third would be retained by the King; one-third would be distributed to the Ali'i, and the rest would be available for private purchase.[44]

The King agreed, on the condition that non-**Hawaiians** would not be allowed to own the land.[45] The Privy Council reneged on this agreement in 1850, however, and economically savvy whites soon bought up almost all of the available land from **natives** who had no understanding of western concepts of property **rights**.[46] Forty years later, the 1890 census revealed that the Mahele, which had been pressed on the King as a way to benefit the **native** population, had created a society in which almost all the landowners were the whites, who owned seventy-five percent of the land that was in private hands.[47]

***9** Even the massively destructive effects of the Mahele on **native** health and wealth were subject to interpretations that palliated whatever sting they may have inflicted on a white conscience. Looking out at the rapidly changing economy and power structure in the Islands in 1851, a missionary-turned-businessman wrote:

> It seems as if Providence was fighting against the nation internally. . . . Diseases are fast numbering the

> people with the dead, and many more are slow to take advantage of the times and of the privileges granted to them by the King and Government. . . . While the **natives** stand confounded and amazed at their privileges and doubting the truth of the changes on their behalf, the foreigners are creeping in among them, getting their largest and best lands, water privileges, building lots, etc., etc.
>
> The Lord seems to be allowing such things to take place that the Islands may gradually pass into other hands. This is trying, but we cannot help it. It is what we have been contending against for years, but the Lord is showing us that His thoughts are not our thoughts, neither are his ways our ways. The will of the Lord be done.[48]

For many whites, then, their domination of the **native** was a sign of God's providence.

4. The consolidation of white control

In the half-century following the Mahele, Western merchants and landowners consolidated their control of Hawaii's land and people primarily through their development of the sugar industry.[49] Vast sections of Hawaii were transformed into plantations. By 1900, when the **Native Hawaiian** population had dwindled to approximately 40,000, plantation owners had imported some 400,000 Chinese, Japanese, Portuguese, and Filipino laborers to support their operations.[50] The economics of sugar required favorable trading terms with the United States. To secure them, the landowners and merchants began agitating for closer ties between the then independent Kingdom of Hawaii and the United States, with an increasingly influential faction advocating outright annexation.[51] In 1887, these forces pressed Hawaii's King David Kalakaua to accept a new constitution (the "Bayonet Constitution") that reduced the power of the King, and for the first time in Hawaii's history extended the **right** to vote to non-**Hawaiian** males.[52] Soon the whites dominated the Legislature, and a concerted push for annexation by the ***10** United States was under way, reaching its climax in 1893 during the reign of Queen Lili'uokalani.[53]

The ensuing events are summarized in the 2005 Senate Report to accompany the Akaka Bill:

> On January 14, 1893, the Queen was prepared to promulgate a new constitution, restoring the sovereign's control over the House of Nobles and limiting the franchise to **Hawaiian** subjects. She was, however, forced to withdraw her proposed constitution.
>
> Despite the Queen's apparent acquiescence, the majority of westerners recognized that the **Hawaiian** monarchy posed a continuing threat to the unimpeded pursuit of their interests. They formed a Committee of Public Safety to overthrow the Kingdom. . . . A Honolulu publisher and member of the Committee, Lorrin Thurston, informed the United States of a plan to dethrone the Queen. In response, the Secretary of the Navy informed Thurston that President Harrison authorized him to say that "if conditions in Hawai'i compel you to act as you have indicated, and you come to Washington with an annexation proposition, you will find an exceedingly sympathetic administration here." The American annexation group collaborated closely with the United States' Minister in Hawai'i, John Stevens.
>
> On January 16, 1893, at the order of Minister Stevens, American soldiers marched through Honolulu, to a building . . . located near both the government building and the palace. The next day, local revolutionaries seized the government building and demanded that Queen Lili'uokalani abdicate.[54]

The Queen issued a statement:

> I Lili'uokalani, by the Grace of God and under the Constitution of the **Hawaiian** Kingdom, Queen, do hereby solemnly protest against any and all acts done against myself and the Constitutional Government of the **Hawaiian** Kingdom by certain persons claiming to have established Provisional Government of and for this kingdom.
>
> That I yield to the superior force of the United States of America whose Minister Plenipotentiary, His Excellency John L. Stevens, has caused United States troops to be landed at Honolulu and declared that he would support the Provisional Government.
>
> Now to avoid any collision of armed forces, and perhaps the loss of life, I do under this protest and impelled by said force yield my authority until such time as the Government of the United States shall,

> upon the facts being presented to it, undo the action of its ***11** representatives and reinstate me in the authority which I claim as the Constitutional Sovereign of the **Hawaiian** Islands.[55]

The Queen was never reinstated. On February 1, 1893, the U.S. Minister raised the American flag and proclaimed Hawaii a protectorate of the United States.[56] President Grover Cleveland refused to recognize the actions of the Provisional Government, and even declared that the overthrow would never have happened but for the intervention of American troops.[57] However, William McKinley succeeded Cleveland in office in 1896, and McKinley was an eager annexationist.[58] Events now moved swiftly. By August, 1898, the "Republic of Hawaii" had ceded sovereignty and conveyed title to its public lands to the United States, and by 1900 Congress had established a Territorial Government.[59] Statehood arrived in 1959.[60]

B. Resistance: From the Sovereignty Movement to Rice v. Cayetano

1. Hawaii under the Americans

The remnant **Native** **Hawaiian** population fared very poorly under the United States. Yamamoto, Shirota, and Kim summarize the post-annexation history of Hawaii this way:

> Americans in control banned the **Hawaiian** language and closed **Hawaiian** schools. As with many **Native** American tribes, Western diseases and the separation of **Hawaiians** from their homelands hastened an economic, cultural, and spiritual decline. So devastating was this decline that in 1920 Congress deemed **Native** **Hawaiians** a "dying race" and set aside 200,000 acres of "homelands" to resurrect **Hawaiian** life and culture. But this program was so poorly (and sometimes corruptly) administered by the federal and later state governments that non-**Hawaiians** ended up occupying most of the lands, while 20,000 **Hawaiians** jammed the homelands' waiting list.[61]

The **Hawaiian** Advisory Committee of the U.S. Civil **Rights** Commission, using 1999 data from the Office of **Hawaiian** Affairs, concluded, "[t]he socioeconomic statistics depicting **Native** **Hawaiians** are startling. . . . [I]n ***12** comparison to other residents of Hawai'i, **Native** **Hawaiians** have disproportionately low levels of employment, homeownership, income security, and education. Conversely, they have disproportionately high levels of substance and physical abuse, medical problems, impaired mental health, and homelessness."[62]

2. **Native** resistance movements and their effects

Beginning in the 1960s **Native** **Hawaiians** began to organize protests of their social and economic conditions. Most of the early resistance focused on land.[63] Civil disobedience, forced evictions, and other means of protest called public attention to the impact of tourist development and other land use decisions on **Native** **Hawaiians**' well-being.[64] **Native** **Hawaiian** political organizations pressed for solutions ranging from secession and independence to some form of nation-within-a-nation status analogous to that of **Native** American Indian tribes.[65] The largest of these groups, Ka Lahui Hawaii, promulgated a Master Plan for **Hawaiian** Self-Government in 1994, and sent representatives to United Nations-sponsored proceedings on the **rights** of indigenous peoples.[66]

The first official response to this era of protest took the form of an amendment to the state constitution, establishing an Office of **Hawaiian** Affairs (OHA) to coordinate programs that would benefit **Native** **Hawaiians**.[67] The OHA, with a nine-member board of trustees who could be selected only by voters legally defined as "**Hawaiians**," administered 20 percent of the earnings from the public lands ceded to the State of Hawaii in 1959.[68] In addition, Congress passed a number of laws providing special benefits to **Native** **Hawaiians**, many acknowledging a "unique political relationship between the United States and **Native** **Hawaiians**."[69] Finally, in 1993, Congress passed a Joint Resolution "[t]o acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to **Native** **Hawaiians** . . . for [that] overthrow."[70]

3. Resistance stalls

From the vantage point of 2006, the Apology Resolution appears to be the high water mark of the **Native Hawaiian** sovereignty movement. White resistance to **Native Hawaiian** preferences for benefit programs culminated in 1996 when Harold Rice, a white resident of Hawaii, filed suit in U.S. District Court for the District of Hawaii, alleging that his **right** to vote for OHA trustees had been denied in violation of the Fourteenth and Fifteenth Amendments to the U.S. Constitution, the Voting **Rights** Act, the Civil **Rights** Act, and provisions of the Hawaii State ***13** Constitution.[71] In an opinion issued on February 23, 2000, the United States Supreme Court agreed that the statute permitting only **Hawaiians** to vote for trustees of OHA (legally a state agency) created a race-based classification in violation of the Fifteenth Amendment.[72]

Rice emboldened opponents of **Native Hawaiian** preferences to press the attack against many programs, even as the beneficiaries tried to convince the judiciary that their claims were not race-based but, rather, a recognition of the special political relationship between the United States and the **Hawaiian** people as spelled out in the Apology Resolution. The Rice Court refused to accept this argument. Though the Court acknowledged that, in its 1974 opinion in Morton v. Mancari,[73] it had exempted voting preferences for **Native** Americans from Constitutional challenge, the Rice majority argued:

> If Hawaii's restriction were to be sustained under Mancari we would be required to accept some beginning premises not yet established in our case law. Among other postulates, it would be necessary to conclude that Congress . . . has determined that **native Hawaiians** have a status like that of Indians in organized tribes, and that it may, and has, delegated to the State a broad authority to preserve that status. These propositions would raise questions of considerable moment and difficulty. It is a matter of some dispute, for instance, whether Congress may treat the **native Hawaiians** as it does the Indian tribes. We can stay far off that difficult terrain, however.[74]

The Court then concluded that even if Congress had the authority to treat **Native Hawaiians** as tribes, "[t]he State's argument fails for a more basic reason. . . . Congress may not authorize a State to create a voting scheme of this sort."[75]

The Supreme Court declined to analogize the **Native Hawaiians** to the Indian Tribes for purposes of evaluating the **Hawaiians**-only voting requirement in the OHA elections. Lower courts have continued to follow the reasoning that the Supreme Court articulated in Rice. In a decision from 2005, a three-judge panel of the Court of Appeals for the Ninth Circuit cited Rice in support of its decision to strike down the admission policies of the private Kamehameha School in Honolulu, which favored applicants with pure or part aboriginal blood.[76]

***14** If the tide has indeed turned against the **Native Hawaiians**, it is in part because of the U.S. Supreme Court's views of "race." It is also because the Court has accepted a particular version of **Hawaiian** history, privileging a narrative that, at least since the early nineteenth century, has served to legitimize western colonial domination. To demonstrate these propositions, it will be necessary to examine the Rice decision from two perspectives: post-colonial theories of narrative, and the role of narrative in the law.

II. Theoretical Perspectives

A. Narrative in Post-Colonial Theory

Edward Said observed the intimate connection between power and control over others and the power to control stories about others. "The power to narrate," Said wrote, "or to block other narratives from forming and emerging, is very important to culture and imperialism, and constitutes one of the main connections between them."[77] Albert Memmi's analysis of the psychological and power relations between colonizers and the colonized deepens Said's insight.[78]

1. Albert Memmi: The colonizer

Memmi, a Tunisian Jew, was born in 1920. His writings reflect his experience of French colonial rule. Originally written in 1957, The Colonizer and the Colonized is in part a phenomenological account of the consciousness that accompanies colonial domination. Memmi characterizes the colonizer as essentially a usurper.

> A foreigner, having come to a land by the accidents of history, he has succeeded not merely in creating a place for himself but also in taking away that of the inhabitant, granting himself astounding privileges to the detriment of those rightfully entitled to them. And this is not by virtue of local laws, which in a certain way legitimize this inequality by tradition, but by upsetting the established rules and substituting his own. He thus appears doubly unjust. He is a privileged being and an illegitimately privileged one; that is a usurper.[79] ***15** In this setting, narrative is an essential tool of colonization because through it the colonizer so frames his situation and the situation of the colonized as to transform privilege into entitlement.[80] This requires two basic moves. One is to portray the colonized as so backward and primitive that they deserve their subordinate position.[81] The other is to repress or disguise the colonizer's brutality. Narrative is central to both.[82] Of the first move Memmi writes:
>
> [A]ccepting the reality of being a colonizer means agreeing to be a nonlegitimate privileged person, that is, a usurper. To be sure, a usurper claims his place and, if need be, will defend it by every means at his disposal. This amounts to saying that at the very time of his triumph, he admits that what triumphs in him is an image which he condemns. . . . In other words, to possess victory completely he needs to absolve himself of it and the conditions under which it was attained. This explains his strenuous insistence, strange for a victor, on apparently futile matters. He endeavors to falsify history, he rewrites laws, he would extinguish memories--anything to succeed in transforming his usurpation into legitimacy. . . .
>
> His disquiet and resulting thirst for justification require the usurper to extol himself to the skies and to drive the usurped below ground at the same time. In effect, these two attempts are inseparable.[83]

In a passage that recalls the contrasting visions of contemporary Hawaii with which this article began, Memmi points out that it would actually be psychologically untenable for the colonizer to acknowledge the destruction and devastation that he has worked on the land he has taken over, and so:

> No matter what happens he justifies everything--the system and the officials in it. He obstinately pretends to have seen nothing of the poverty and injustice which are **right** under his nose; he is interested only in creating a position for himself, in obtaining his share. . . . Why should [the immigrants] not congratulate themselves for having come to the colony? Should they not be convinced of the excellence of the system which makes them what they are? Henceforth they will defend it aggressively; they will end up believing it to be **right**. In other words, the immigrant has been transformed into a colonialist.[84]

Reciprocally, the colonizer must portray the colonized as having deserved their fate. A typical argument--one that requires a supporting narrative of pre-colonial history--runs: "[B]efore colonization, weren't the colonized already ***16** backward? If they let themselves be colonized, it is precisely because they did not have the capacity to fight, either militarily or technically."[85]

To Memmi, the arguments that the colonizer marshals in order to legitimize his usurpation are ineluctably racist. "Colonial racism," Memmi argues, "is built from three major ideological components: one, the gulf between the culture of the colonialist and the colonized; two, the exploitation of these differences for the benefit of the colonialist; three, the use of these supposed differences as standards of absolute fact."[86] By essentializing the subordinate position of the colonized--by embedding subordination and degradation into the colonized's very nature--the colonialist both reassures himself of the appropriateness of his position and inoculates his domination against historical challenge.[87]

> Racism appears then, not as an incidental detail, but as a consubstantial part of colonialism. It is the highest expression of the colonial system, and one of the most significant features of the colonialist. Not only does it establish a fundamental discrimination between colonizer and colonized, a sine qua non of colonial life, but it also lays the foundation for the immutability of this life. . . .
>
> The servitude of the colonized seemed scandalous to the colonizer and forced him to explain it away under the pain of ending the scandal and threatening his own existence. Thanks to a double reconstruction of the colonized and himself, he is able both to justify and reassure himself. . . .

> [S]ince servitude is part of the nature of the colonized, and domination part of his own, there will be no dénouement. To the delight of rewarded virtue he adds the necessity of natural laws. Colonization is eternal, and he can look to his future without worries of any kind.[88]

2. Ngugi wa Thiong'o: The cultural bomb

The Kenyan writer Ngugi wa Thiong'o delves as deeply as Memmi into the consciousness and motivations of the colonialist, but his sensitivities as a novelist and playwright draw the power of narrative into high relief. Ngugi began his career, as did most African intellectuals of the twentieth century, writing in the language of the colonial power--in Ngugi's case, English. From 1977, however, in recognition of the paradoxical dilemma of the post-colonial critic of colonialism who must express his resistance in the language of his oppressor, Ngugi abandoned English in his artistic work for his tribal languages of Gikuyu and Kiswahili.[89] He continues to write criticism and political commentary in English. This background supplies an autobiographical flavor to Ngugi's assertion that of all the weapons ***17** imperialism and colonialism have in their arsenal, the biggest is "the cultural bomb:"

> The effect of a cultural bomb is to annihilate a people's belief in their names, in their languages, in their environment, in their heritage of struggle, in their unity, in their capacities, and ultimately in themselves. It makes them see their past as one wasteland of non-achievement and makes them want to distance themselves from that wasteland. It makes them want to identify with that which is furthest removed from themselves; for instance, with other peoples' languages rather than their own. It makes them identify with that which is decadent and reactionary, all those forces which would stop their own springs of life. It even plants serious doubts about the moral **rightness** of struggle. Possibilities of triumph or victory are seen as remote, ridiculous dreams. The intended results are despair, despondency and a collective death-wish. Amidst this wasteland which it has created, imperialism presents itself as the cure and demands that the dependant sing hymns of praise with the constant refrain: 'Theft is holy.'[90]

Ngugi's comments resonate sharply with the banning of the **Hawaiian** language that was an integral part of the United States' post-annexation governance of the Islands.[91] By forcing **Hawaiians** to communicate in the language of their oppressors, Ngugi's perspective suggests, the American authorities struck not only at a means of communication but also at a carrier of culture.[92] Ngugi explains:

> Language carries culture, and culture carries, particularly through orature and literature, the entire body of values by which we come to perceive ourselves and our place in the world. How people perceive themselves affects how they look at their culture, at their politics and at the social production of wealth, at their entire relationship to nature and to other beings. Language is thus inseparable from ourselves as a community of human beings with a specific form and character, a specific history, a specific relationship to the world.[93]

Thus, to Ngugi, "[t]he domination of a people's language by the languages of the colonizing nations was crucial to the domination of the mental universe of the colonized."[94]

Through language and narrative, the "cultural bomb" wreaks its destruction in two ways. As suggested in the preceding paragraphs, losing the ability to express oneself publicly in one's **native** language leads to profound self-alienation and disempowerment.[95] Ngugi calls this "colonial alienation":

> ***18** It starts with a deliberate disassociation of the language of conceptualisation, of thinking, of formal education, of mental development, from the language of daily interaction in the home and in the community. It is like separating the mind from the body so that they are occupying two unrelated linguistic spheres in the same person. On a larger social scale it is like producing a society of bodiless heads and headless bodies.[96]

We might call this effect of the cultural bomb an internal effect; it works from within the colonized person, to confuse, distort, and ultimately to paralyze the colonized's mental processes, undermining the colonized's will to self-assertion. The cultural bomb also works externally, however, through the racist images of the colonized that are propagated through popular

narratives in the colonizer's language. Ngugi illustrates this with "the three Africas" that emerged in nineteenth- and twentieth-century Western European fiction and travel writing.[97] Each of these "Africas" fixed an image of backwardness, primitiveness, and exploitability that, in Memmi's terms, supplied legitimacy and reassurance to the imperialist enterprise.

The first "Africa" is that of the hunter after profit, exemplified for Ngugi in Balzac's Eugénie Grandet.[98] To the hunter for profit,

> [I]t does not matter what, in terms of human beings, the cost is of the profit that enables him to live in palaces and to marry well. . . . When he looks at Africa it is not to see the human faces of the masses whose poverty and degradation and oppression are the real conditions for his rising rate of profit. No, what he is looking for are conditions of stability, and it does not matter if that stability is founded on the blood and flesh of millions. It does not matter, if you like, if that stability is founded on the fact that the tongues of millions have been mutilated to make them unable to shout their discontent.[99]

The second "Africa" is that of the hunter for pleasure--the tourist's Africa portrayed in the travelogues and glossy airline magazines.[100] This Africa is populated mainly by animals in lush landscapes. Between the covers of books with titles such as Vanishing Africa or The Authentic African, the tourist finds that,

> In the pictures that illustrate the books, such Africans are nearly always naked and they are often photographed with animals to show [their] harmony with the animal landscape. The hunter for pleasure ***19** is really the hunter for profit but on holiday. He does not want to see or face up to the reality that is the African worker who creates his profit. Hence the literary deathwish for the African engaged in the active struggle against nature and against human degradation.[101]

The third "Africa" is the creation of European fiction writers.[102] To illustrate the mix of infantilization and dehumanization of Africans with which European novelists paved the colonialist's self-justifying path into the continent, Ngugi turns to Karen Blixen (Isak Dinesen), author of Out of Africa.[103] Ngugi's first example conveys a racism that is "catching, because it is persuasively put forward as love. But it is the love of a man for a horse or for a pet."[104] Ngugi quotes Blixen thus: "When you have caught the rhythm of Africa, you find that it is the same in all her music. What I learned from the game of the country was useful to me in my dealings with the **native** people."[105]

Later in Blixen's career, in her book Shadows in the Grass, she repeated her racist views even more emphatically:

> The dark nations of Africa, strikingly precocious as young children, seemed to come to a standstill in their mental growth at different ages. The Kikuyu, Kawirondo and Wakambo, the people who worked for me on the farm, in early childhood were far ahead of white children of the same age, but they stopped quite suddenly at a stage corresponding to that of a European child of nine. The Somali had got further and had all the mentality of boys of our own race at the age 13 to 17.[106]

B. Narrative in the Law

When law functions as an instrument of colonialism, the role of narrative is one thread in a broader tapestry. P.G. McHugh describes the larger context as the practice of "lawfare against the tribes."[107] It has, in his view, four principal dimensions: law's transformation of space into marketable real estate; the establishment of economic entitlements; the definition of aboriginal being; and the ritualization of encounters between aboriginals and the West, so that even in resistance the aboriginals confronted the colonialists on the latter's terms.[108]

Writing with particular emphasis on the impact of Western legal thought on the American Indian, Robert Williams, Jr., documents how Western colonizers ***20** deployed the "doctrine of discovery"--lands "discovered" by a colonial power became the property of the sovereign of that power--to justify the dispossession of the **native** inhabitants.[109] Williams echoes McHugh's characterization of "lawfare" when he writes:

> Power, in its most brutal mass-mobilized form as will to empire, was of course far more determinate in the establishment of Western hegemony in the New World than were any laws or theoretical formulations on the legal **rights** and status of American Indians. But the exercise of power as efficient

> colonizing force requires effective tools and instruments . . . [and] law and legal discourse were the perfect instruments of empire for Spain, England, and the United States in their colonizing histories, performing legitimating, energizing, and constraining roles in the West's assumption of power over the Indian's America.[110]

1. Paul Gewirtz: Law and storytelling

To appreciate how colonialist narratives perform their work of legitimacy, reassurance (of the colonizer), and repression (of the colonized) within the framework of the legal system, we may refer first to work on law, narrative, and rhetoric by Paul Gewirtz, Peter Brooks, and their colleagues at a symposium at Yale in 1995.[111] They begin by describing trials as "the telling of stories."[112] This immediately suggests normative questions to Gewirtz, for example:

> Are the **right** people getting their stories told, to a sufficient degree and with adequate effectiveness? Do the multiplicities of narratives at trial (and on appeal) undercut the idea of objectivity or the idea that there is such a thing as the truth? Or does this narrative multiplicity suggest only that people are at times fallible or deceptive or at times so indifferent to truth that they may let people literally get away with murder?[113]

Delgado and Stefancic have described how standard courtroom procedures and rules of evidence make it almost impossible to tell one's story in one's own words, with the nuances, emotions, perspectives, and associations that make a story personal.[114] "[C]ourts," they write,

> ***21** carve up your stories into little, unfamiliar pieces, and then quiz you to see if you really believe in each of them. They kill your narrative and transform it into something you do not recognize. They force you to choose and defend a past that is unfamiliar to you--one that is not yours.[115]

As McHugh points out, these "clinical procedures of the adversary system" are especially lethal to aboriginal land claims, because those claims typically rest on oral traditions that wither under the assault of the Western legal system's bias towards written documentation.[116] As one commentator on a 1979 case wrote of the Mashpee Indians' failed attempt to obtain recognition as a tribe for purposes of legitimizing claims to land in Massachusetts: "In the courtroom how could one give value to an undocumented 'tribal' life largely invisible (or unheard) in the surviving record?"[117]

If trials are contests between stories, then judicial opinions at the appellate level not only express the majority's preference for the "winning" narrative, but, in their efforts to persuade, and rebut the preferences of the dissenters, the majority opinion is itself a narrative--plotted, structured, and equipped with rhetorical maneuvers and tropes. This emerges with striking force when an appeals court overturns the court below, as did the U.S. Supreme Court in Rice v. Cayetano. In the terms of Brooks's and Gewirtz's perspective on narrative and the law,

> [The reversal amounts to an appellate court's] retelling the story with a different outcome, using different narrative glue to bind events together. And when the majority opinion is countered by dissent, two retellings are in competition, the one uneasily, though conclusively, victorious because it convinces at least one more of these professional listeners than did the other. The law fascinates the literary critic in part because people go to jail, even to execution, because of the well-formedness and force of the winning story. Conviction in the legal sense results from the conviction created in those who judge the story.[118]

2. Thomas Ross: Stories that subjugate

Just as in the case of post-colonial narratives in the culture at large, such as those identified by Ngugi, legal narratives work both by what they include and in what they suppress. Thomas Ross calls attention to the judicial opinions of nineteenth-century America that upheld American apartheid largely through their incorporation of degrading, dehumanizing language about American blacks.[119] ***22** Ross argues that these opinions served the same colonialist motivations of reassurance and legitimacy of oppression that Memmi describes.[120] Writing of the subjugation of blacks in nineteenth-century America, Ross observes:

> The basic tool for subjugation was law and the law's necessary coherence came from narratives and

> assumptions that were in an inescapable sense chosen and not merely received. They were chosen because they worked for the dominant race, even though they propped up a social structure that humiliated and subjugated innocent human beings. Thus, narratives, like the law they built, were a reflection of the dominant moral values of nineteenth-century America.[121]

3. Robert Ferguson: Law's untold stories

By incorporating stories that justified subjugation, judicial opinions such as those in Dred Scott[122] and Plessy v. Ferguson[123] institutionalized the racism of the day. But it is equally important to recognize how the legal stories that are not told serve--by their very absence from the record--to perpetuate structures of racial or economic domination. In his analysis of "untold stories in the law," Robert Ferguson asks, "in the proliferation and refinement of courtroom stories, what does it mean when an available and viable account is not raised in courtroom debate? What, in effect, happens when a relevant story is actively repressed in a republic of laws?"[124]

Using as his illustrative example the near total obliteration from the public record of slaves' defenses to the charge of insurrection in early nineteenth-century Virginia, Ferguson argues that these defenses have not simply been "lost"--they have been actively suppressed.[125] The dilemma for the white power structure, Ferguson asserts, lay in the contradiction of punishing (sometimes by execution) rebellious slaves who justified their actions in the same terms of freedom and equality that the white slaveholders had relied upon in their revolt against England.[126] Rather than confront the contradiction, the slaveholders wiped the record clean of the slaves' defenses.[127] Thus, writes Ferguson, "[t]he surface narrative of a courtroom transcript is not unlike the consciousness of an individual; both offer the official record of what passes for explanation, and both know themselves to be under distinct pressure from other levels of explanation that need to be contained."[128] Thus do the institutions of the law contribute to a "structural amnesia" on the part of the dominant society, creating what in anthropologist Mary ***23** Douglas's words are "shadowed places in which nothing can be seen and no questions asked."[129]

The problem for the Virginia planters was reconciling slavery with their ideology of equality. Transposing the dynamic of structural amnesia and untold stories to the contemporary situation of the **Native Hawaiians**, we will see that the problem for the white power structure, and for the Rice majority, was reconciling their denial of **Hawaiians**' self-determination with the very explicit language of Congress's Apology Resolution. In both contexts, Ferguson might suggest, the contradiction stimulates the oppressor to deploy rhetorical and narrative strategies that conceal the contradiction's attendant psychological discomfort. In the case of the **Hawaiians**, one additional legal narrative was available for the purpose, a narrative that could sustain a regime of racial oppression without labeling it as such. This is the narrative of America's constitutional color-blindness.

4. Neil Gotanda: Racial subordination under a color-blind constitution

Justice Harlan's declaration in his dissent in Plessy v. Ferguson that "[o]ur constitution is color-blind"[130] is the starting point for Neil Gotanda's extended analysis of the impact of Harlan's formulation on the U.S. Supreme Court's subsequent racial jurisprudence.[131] Gotanda finds that the Court's use of Harlan's legacy in a set of cases from the 1980s[132] actually "maintains the social, economic, and political advantages that whites hold over other Americans."[133] Four different meanings of "race" in the language of the Court are central to Gotanda's analysis. Gotanda argues that in the Court's usage, "race" can connote (a) status-race, (b) formal-race, (c) historical-race, or (d) culture-race.[134] For present purposes, the significant distinction is between formal-race and historical-race.

When the Court uses "race" to connote formal-race, Gotanda finds that black and white are "neutral, apolitical descriptions, reflecting merely 'skin color' or country of ancestral origin. [The terms are] unrelated to ability, disadvantage, or moral culpability, . . . [and] unconnected to social attributes such as culture, education, wealth, or language."[135] By contrast, "[h]istorical-race embodies past and continuing racial subordination, and is the meaning of race that the Court contemplates when it applies 'strict scrutiny' to racially disadvantaging government ***24** conduct."[136] Importantly for Gotanda, formal-race is so thoroughly disconnected from social realities--that is, from the historically and socially conditioned experience of racial oppression in the lives of people of color--that when it dominates the Court's color-blind constitutional analysis, the Court "often fails to recognize connections between the race of an individual and the real social conditions underlying a litigation or

other constitutional dispute."[137] The resulting judicial prescription for racial problems in America is for the government "to adopt a position of 'never' considering race."[138]

To Gotanda, color-blind constitutionalism in the formal-race mode produces results that are as suspicious psychologically as they are legally perverse.[139] For the government (or an employer) to assert that it notices the race of an individual but does not consider it--as demanded by the principle of non-recognition--flies in the face of the lived experience of individuals.[140] It is a pretense, and Gotanda sees in it the urge toward suppression of an uncomfortable reality[141] that we have previously encountered in the analyses of Memmi[142] and Ferguson.[143] "Nonrecognition," Gotanda writes, "fosters the systematic denial of racial subordination and the psychological repression of an individual's recognition of that subordination, thereby allowing such subordination to continue."[144]

Analysis in the formal-race mode enables courts to tell a particular kind of story about racial prejudice in American society. The story is that racial prejudice is a matter of individual attitudes, unrelated to larger social structures or relations. Viewing racism as a trait of individuals, divorced from any societal or institutional dimensions, absolves courts from the responsibility to connect a racial minority's subordination to structural factors such as substandard housing, education, employment, or income.[145] With institutional racism erased, the color-blind constitutionalist is free to interpret evidence of a group's disadvantage as isolated phenomena outside of history, or else as the workings of "market forces."[146] In short, Gotanda concludes:

> [C]olor-blind constitutionalists live in an ideological world where racial subordination is ubiquitous yet disregarded--unless it takes the form of individual, intended, and irrational prejudice. Perhaps formal-race analysis would be a useful tool for fighting racism, if it recognized that racism is complex and systematic. However, as presently used, formal-race unconnectedness helps maintain white ***25** privilege by limiting discussion or consideration of racial subordination.[147]

Gotanda's principle of non-recognition, and his concept of formal-race, are two keys to the effectiveness of the narrative of color-blindness in enabling the Rice Court to maintain **Native Hawaiians** in a condition of subordination and disempowerment, not only in the face of the nation's history of colonial oppression, but contrary to the manifest intent of the Apology Resolution. The third and last key, from Gotanda's perspective, is the interaction of non-recognition and formal-race with the doctrine of strict scrutiny.[148] As illustrated in City of Richmond v. J. A. Croson Co.,[149] formal-race enables the Court to apply the strict scrutiny standard to racial preferences designed to mitigate the social and historical effects of racial discrimination, as effectively as historical-race had supported the Court's holding in Brown v. Board of Education[150] against racial discrimination.[151] Gotanda finds traces of the formal-race analysis employed in Justice William O. Douglas's dissent in a 1974 affirmative action case, DeFunis v. Odegaard[152] in the Court's reasoning in Croson.[153] DeFunis had charged that the University of Washington Law School had accepted less qualified minority applicants and denied admission to him.[154] In dissent, Douglas rejected the consideration of race in the admissions process, arguing,

> A DeFunis who is white is entitled to no advantage by reason of that fact; nor is he subject to any disability, no matter what his race or color. Whatever his race, he had a constitutional **right** to have his application considered on its individual merits in a racially neutral manner.[155]

We will encounter the identical reasoning in Rice v. Cayetano's approach to voting **rights**. There, as here, Gotanda's analysis will suggest the legal perversity of applying, to a policy designed to mitigate the effects of centuries of governmentally sanctioned and racially-inspired dispossession and oppression, the same constitutional analysis that evolved to target government-sanctioned racial oppression itself.

This discussion completes the historical and theoretical foundations for assessing the Supreme Court's Rice decision. Now let us consider the details of the racialized history that legitimized the colonial take-over of Hawaii, and how the Court, by privileging that history in its opinion and adopting a formal-race mode of constitutional analysis, has perpetuated **Native Hawaiians**' colonialist subordination ***26** by the United States. It will remain for the last section of the paper to outline three avenues for **Native Hawaiian** resistance to U.S. law as an instrument of colonial power.

III. Racialized History and the Colonial Take-Over of Hawaii

Western accounts of Hawaii amply illustrate Memmi's insight that colonialist history legitimizes conquest by simultaneously devaluing the colonized and ennobling the colonizer.[156] A review by Jocelyn Linnekin for the Cambridge History of the Pacific Islanders shows how colonialist historians portray Europeans as actors, the Islanders as acted upon--**natives** are "less rational, less industrious, less capable, and less stable" than the Westerners.[157] "Colonial historiography," Linnekin notes, "tends to convey certain key messages about early encounters: that Islanders were naïve and readily responded to crude materialist appeals, that foreign introductions were the primary agents of change, and that first encounters with famous Europeans were the most important events in Island history."[158] We can observe these themes in the Western narrative of Hawaii--and the colonialist agendas underlying them--in five areas: (A) descriptions of the nature of indigenous society; (B) accounts of land reform; (C) characterization of the overthrow in 1893; (D) **Hawaiians**' "consent" to annexation; and (E) the termination of Hawaii's status as a non-self-governing entity as defined by the United Nations.

A. Describing Indigenous Society: From Primitive Savagery to the Happy Hula Land

Captain James Cook's journal entry for January 19, 1778, recording his first face-to-face meeting with **Hawaiian** Islanders, sets the tone of colonialist condescension:

> The next morning we stood in for the land and were met by several Canoes filled with people, some of them took courage and ventured on board. I never saw Indians so much astonished at the [sic] entering a ship before, their eyes were continually flying from object to object, the wildness of thier [sic] looks and actions fully express'd their surprise and astonishment at the several new o [b]jects before them and evinced that they had never been on board of a ship before. However the first man that came on board did not with all his surprise, forget his own intrest [sic], the first moveable thing that came his way was the lead and line, which he without asking questions took to put into his Canoe. . . . At 9 o'clock being pretty near the shore, I sent three armed boats . . . to look for a landing place and fresh water. . . . As the boats put off an Indian stole the ***27** Butcher'['s] cleaver, leaped over board with it, got into his canoe and made for the shore, the boats pursued him but to no effect.[159]

American missionaries carried on in the same vein, emphasizing in their letters back home the laziness, lewdness, and childishness of the **natives** they had come to save. Daws quotes from these letters to portray the missionaries' moralistic disdain for **native** women, for example, who showed little energy for productive labor, yet "when it came to a frivolous diversion such as a hula they would practice energetically in the hot sun for days on end."[160] Far worse than "lewd dancing" and public nakedness in the missionaries' eyes, however, were reports of polygamy, royal incest, abortion, and infanticide.[161] One of the leaders of an early missionary band, the Reverend Hiram Bingham, described his first sight of the **natives** on March 30, 1820:

> The appearance of destitution, degradation, and barbarism, among the chattering, and almost naked savages, whose heads and feet, and much of their sunburnt swarthy skins, were bare, was appalling. Some of our number, with gushing tears, turned away from the spectacle. Others, with firmer nerve, continued their gaze, but were ready to exclaim, "Can these be human beings! . . . Can we throw ourselves upon these rude shores, and take up our abode, for life, among such a people, for the purpose of training them for heaven?"[162]

The answer, of course, was yes. Throw themselves on those shores they did, fortified for the ordeal by the conviction that they were doing God's will and fulfilling the white man's destiny at the same time. Even sixty years later, when white settlers had subdued vast tracts of **Hawaiian** land for sugar plantations, and with the indigenous population declining precipitously from poverty, social dislocation, and disease, one planter explained to the readers of the local monthly newspaper:

> The word in the beginning seems to have been spoken to the white man when he was commanded to "subdue the earth and have dominion over it." . . . He has stepped across the Pacific Ocean, leaving the imprint of his enterprising foot upon the various islands of the sea; he has taken possession of Australia and India, with their ***28** countless thousands; he has gone to Africa. . . . The coming of the white man to Africa means government, enterprise, agriculture, commerce, churches, schools, law and order. It will be better for the colored man to have the white man rule. It is better for the colored man of India and Australia that the white man rules, and it is better here that the white man should rule.[163]

An intermixture of cultural devaluation with colonialist designs on the Islands' wealth emerges with breathtaking clarity in the correspondence of the United States Minister to Hawaii in the months leading up to the overthrow of the Queen. In a letter dated November 19, 1892, Minister Stevens excoriated the **Hawaiian** monarchy as "an absurd anachronism."[164] With its feudal basis eroded by the new economics of the sugar industry, "the monarchy now is only an impediment to good government--an obstruction to the prosperity and progress of the islands."[165] A few months later, on February 1, 1893, the Queen was out of power, the American-led provisional government was consolidating its control, and Stevens exulted in a letter to the State Department, "[t]he **Hawaiian** pear is now fully ripe and this is the golden hour for the United States to pluck it."[166]

The pear was plucked formally at statehood in 1959.[167] Since then, a demeaning cultural narrative has remained in place. As with Ngugi's "three Africas,"[168] the colonialist cultural narrative for Hawaii undermines the legitimacy of serious indigenous resistance to western dominance. A primary weapon of subordination in the contemporary narrative echoes the missionaries' preoccupation with exoticized, eroticized **Hawaiian** women, now epitomized in the tourist industry's construction of the hula girl. "**Hawaiian** women," notes Trask,

> are marketed on posters from Paris to Tokyo promising an unfettered 'primitive' sexuality. Burdened with commodification of our culture and exploitation of our people, **Hawaiians** exist in an occupied country whose hostage people are forced to witness (and for many, participate in) our own collective humiliation as tourist artifacts for the First World.[169]

Another local critic, Lisa Kahaleole Hall, connects the humiliating and primitivizing effects of tourism--which she calls the marketing of "kitsch"-- directly to the colonialist goal of perpetuating subordination.[170]

> ***29** By making **Hawaiian**-ness seem ridiculous [from aloha shirts to tiki bars to pineapple and ham pizza], kitsch functions to undermine sovereignty in a very fundamental way. A culture without dignity cannot be conceived of as having sovereign **rights**, and the repeated marketing of kitsch **Hawaiian**-ness leads to non-**Hawaiians**' misunderstanding and degradation of **Hawaiian** culture and history. Bombarded by kitsch along with images of leisure and paradise, non-**Hawaiians** fail to take **Hawaiian** sovereignty seriously and **Hawaiian** activism remains invisible to the mainstream.[171]

Hall concludes with an observation that summons Memmi's notion that through narrative the colonizer disguises and suppresses the evidence of his brutal rise to power:

> The frivolity and omnipresence of kitsch images of Hawaii cover over a history of massive death, colonial dispossession, and attempted cultural destruction. And yet another factor that enables the kitschy transformations of **Hawaiians** and **Hawaiian** culture is that unlike other stigmatized groups in the United States, **Hawaiians** are not feared. . . . Instead, our friendliness has been a major selling point for the tourist industry for more than a century, possibly because the death toll from colonization was so one-sided.[172]

B. Land Reform

As noted above, the principal motivation for Westerners to agitate for private ownership of land was economic.[173] The benefits of capitalist, industrial exploitation of the Islands--particularly through sugar--depended upon investors' ability to consolidate large land holdings for the plantations.[174] White advisors to the **Hawaiian** King pressed their case most fervently in the 1840s, at a time when land fever was sweeping the American mainland in places such as the northern coast of California and the Oregon Territory.[175] The Ali'i Nui (chiefs), however, had their doubts.[176] The interdependence of the **native** ahupua'a (communal land) system had proved itself capable of providing for people's needs, and the Western concepts of private ownership, sovereignty, and exclusive control over individual plots were strange and forbidding.[177]

As Kame'eleihiwa relates in her **native**-centered history of the Mahele, the white business interests worked to overcome Ali'i opposition along two paths.[178] One strategy was to cut deals with the Ali'i that assured them of large holdings of their own under the new system.[179] This strategy succeeded in part for reasons of ***30** economic self-interest on the part of the

Hawaiians, but also, as Kame'eleihiwa explains, through a fortuitous (for the whites) linguistic ambiguity.[180] The word Mahele as used by the Westerners carried the primary meaning of "divide," and referred to the division of communal land **rights** into privately held individual portions.[181] In **Hawaiian**, however, Mahele has an additional connotation--"to share," as one would do with one's food or wealth. Kame'elehiwa thinks it likely that Westerners took advantage of the Ali'i's expectation that they would continue to be able to provide unrestricted access to food for their people, because of the Ali'i's interpretation of the Mahele as a sharing of sovereignty over land rather than alienating it to foreign interests who would exercise exclusive control.[182]

The second approach to convincing the Ali'i to cooperate in the Mahele depended on the missionaries, and it was frankly racist.[183] Calvinist missionaries who had learned the **Hawaiian** language and whom the Ali'i regarded as the new kahuna (respected leaders), carried great influence with the **native** chiefs.[184] In 1846 the missionaries embarked on an intense campaign to persuade the Ali'i that private ownership of land was in the best interests of the common people.[185] The message they preached, orally and through dissemination of publications throughout the Islands, was that the **native** population was declining substantially and something drastic needed to be done.[186] Disease and economic dislocation following the arrival of whites had, indeed, taken a drastic toll on the population. The missionaries argued, however, that the cause of the decline lay in the characteristics of the **natives** themselves.[187] The common people, they explained, were "licentious, indolent, improvident and ignorant."[188] The oppressive structure of centralized land control aggravated these tendencies, the missionaries argued, and the best way "to render them industrious, moral and happy" would be to allow them to hold their land in fee.[189] Kame'elehiwa concludes:

> Once [the **native** common people] held their taro patches and house lots in fee, the theory ran, [they] would have the incentive to become industrious, hard working, and Christian, because they alone would receive the benefit of their labor. Once [they] became industrious, they would give up their bad habits, save money, and become wealthy--and the alarming decline in **Hawaiian** population would be halted. This latter point was perhaps the one that most influenced the Mo'i [kings] and Ali'i Nui.[190]

*31 C. The Overthrow of 1893

U.S. business interests "plucked the **Hawaiian** pear" in January, 1893 in a coup d'état supported by U.S. armed forces.[191] Prior to the overthrow, the Western planters and businessmen had intimidated Queen Lili'uokalani's predecessor, King Kalakaua, into accepting "the Bayonet Constitution"--a set of governmental "reforms" that effectively placed Hawaii under the Westerners' control.[192] The new constitution also extended voting **rights** for the first time to American and European males, regardless of citizenship, and instituted new property requirements that effectively excluded **Native Hawaiians** from voting for a newly formed House of Nobles.[193] When the Queen attempted to restore the previous constitution of Hawaii, the Americans had the pretext they were looking for to form a Committee of Safety and, with the backing of the U.S. armed forces coming from ships in Honolulu Harbor, forced the Queen's abdication.[194]

Western historians have characterized the overthrow as a triumph of democratic values over **native** despotism. On one hand they have emphasized that the Queen's efforts to revert to the prior constitution would have nullified the vote for American and European males. The Committee of Safety thus appears bent on preserving the franchise for non-**Hawaiians**, in the spirit of democracy.[195] On the other hand, Western historians paint an unflattering portrait of the Queen. As Silva points out, these historians rely on English-language newspapers and the memoirs of the planters in their descriptions of the Queen as lazy, autocratic, and ineffectual.[196] One author, Lawrence Fuchs, characterizes the overthrow as a "revolution,"[197] and the major chronicler of these events, William Adam Russ, begins his account by observing, "Lili'uokalani was not a good Queen. That is certain."[198] Furthermore, "Russ accepts without question [an American diplomat's] report that the Queen, if restored, would have had [sugar baron Sanford] Dole and the others beheaded.[199] "(Queen Lili'uokalani strenuously objected on numerous occasions that she had said no such thing.) He also concludes that the coup of 1893 was justified because "'there can be no doubt that Royal Government under Kalakaua and Lili'uokalani was inefficient corrupt, and undependable."'[200]

*32 D. Hawaiians' "Consent" to Annexation

In 1897, 21,269 **Hawaiians** signed an anti-annexation petition that they presented to the American government in Washington.[201] Even residents of the leper colony on Molokai added their signatures.[202] The petition is one dramatic piece of evidence of steadfast local opposition to the Americans' plan to take formal dominion over the Islands. Similar evidence abounds in the archives of the local press, in broadsides and placards, and even in popular song.[203] And yet, as Noenoe K. Silva argues, **native** resistance to the occupation is practically invisible in the dominant Western histories of this period.[204] The major reasons for this invisibility are related: first, colonialist historians, as suggested by Ngugi and Memmi, are determined to erase **native** resistance so as to reassure the colonizer that he was welcomed as a savior or hero; second, almost all the evidence of resistance is in the **Hawaiian** language, which most Western historians could not (and still cannot) read.[205]

***33** The suppression of the **Hawaiian** language and its replacement with English was the official policy of the Republic of Hawaii beginning in 1896.[206] Whereas there had been seventy-seven **Hawaiian**-language schools in the Islands, only one remained after the 1896 law.[207] It would not be legal to teach **Hawaiian** in the public schools of Hawaii again until 1986.[208]

The dislocation, disempowerment, and humiliation of **native** language suppression--articulated by Ngugi and Memmi--did not appear to trouble the Westerners who maintained the policy for almost a century. This excerpt from the Board of Education's report to the Legislature in 1896 clearly conveys the colonialist attitude:

> Schools taught in the **Hawaiian** language have virtually ceased to exist and will probably never appear again in a Government report. **Hawaiian** parents without exception prefer that their children should be educated in the English language. The gradual extinction of a Polynesian dialect may be regretted for sentimental reasons, but it is certainly for the interest of the **Hawaiians** themselves.[209]

That the Board of Education so readily concluded that the extinction of the **Hawaiian** language was a benefit to **native** students stands as a tribute to the malign efficacy of the colonialist discourses that prevailed at this time.

E. The End of U.N. Status as a Non-Self-Governing Territory

A final example of the colonialist historian's effort to render **native** **Hawaiians** as passive, grateful beneficiaries of Western domination is the United States' assertion that by voting for Statehood in 1959 the **Hawaiians** renounced any claims or desires for independence and sovereignty. From 1946 to 1959 Hawaii had been included on the United Nations list of Non-Self-Governing Territories.[210] Under international law, inhabitants of these territories have a **right** to self-determination, and the indigenous peoples in the territories enjoy internationally recognized **rights** to self-determination that are separate from the **rights** of colonized peoples.[211]

The United Nations Fourth Committee adopted a resolution in 1953 that specified the nature of this **right** to self-determination, and the "factors which should be taken into account in deciding whether a Territory is or is not a Territory whose people have not yet attained a full measure of self-government."[212] ***34** According to Resolution 742, the population of a Non-Self-Governing Territory should be free to choose their status in relation to the governing State, through "informed and democratic processes."[213] Inhabitants should be free to choose from a range of possibilities, "including independence," although "it is recognized that self-government can also be achieved by association with another State or group of States if this is done freely and on the basis of absolute equality."[214]

The United States moved to de-list Hawaii as a Non-Self-Governing Territory after the 1959 Statehood vote, arguing that **Hawaiians** had fulfilled the U.N. mandate by voting yes to Statehood.[215] And, indeed, a free choice to associate with the United States via Statehood is one of the alternatives included in Resolution 742.[216] The **Hawaiian** vote in 1959 was deficient, however, in two significant ways that the United States version of events ignores. First, the plebiscite in 1959 offered voters only two choices: the status quo (remaining as a Territory as had been the case since the Overthrow and Annexation), or Statehood.[217] Under the United Nations system, voters should have had the opportunity to choose other forms of relationship as well, "including independence."[218]

The second deficiency concerns the inclusion in the electorate of 1959 of all U.S. citizens who had resided in Hawaii for one year. Outside of Hawaii, settler populations have been barred from participation in decolonization plebiscites.[219] The result in

Hawaii was, in Anaya's words, that "plebiscite procedures allowed the majority settler population to overpower the voice of the **Native Hawaiian** people who were uniquely interested in a Hawaii reconstituted in accordance with self-determination values."[220]

IV. The Incorporation of the Colonialist Narrative in Rice v. Cayetano

The Supreme Court's core holding in Rice v. Cayetano was that the State of Hawaii had used **Hawaiian** ancestry as "a proxy for race,"[221] and therefore violated the Fifteenth Amendment to the Constitution when it limited the electorate for the OHA board of trustees to people of **Hawaiian** ancestry.[222] The Court declined to hold that **native Hawaiians** have a special political relationship with the United States analogous to **Native** American Indians.[223] Without such a special relationship, the Court subjected the race-based voting requirement to strict ***35** scrutiny,[224] rather than evaluating it, as the Ninth Circuit had previously done, for its rational relationship to the state's effort to redress the **Native Hawaiians**' loss of sovereignty to the United States.[225]

The legal grounds for the Court's substantive holding, its application of strict scrutiny to **Native Hawaiian** preferences in a number of policy areas, as well as the question of **Native Hawaiians**' "special relationship," have all been subject to voluminous commentary.[226] My purpose in this paper is narrower. It is to identify points in the Rice opinion where the Court incorporates the colonialist narrative of **Hawaiian** history, and to suggest how the Court's perspective interacts with the narrative of constitutional colorblindness.

Chris Iijima has carried out the most thorough critique of the historical aspects of the Rice opinion.[227] Building on Iijima's analysis, I will identify several historical assumptions in the Rice majority's opinion. We can then see, in the light of the foregoing theoretical and historical discussions, how incorporation of these assumptions in the Court's narrative enshrined an oppressive colonialist regime in the highest law of our land.

A. The Court's View of Hawaii's History

The Rice majority prefaced its legal analysis with an overview of **Hawaiian** history. In introducing its version of events, the Court took pains to portray itself as steering a neutral ground between other versions that might have political or ideological agendas. "Historians and other scholars who write of Hawaii," the Court observed, "will have a different purpose and more latitude than do we. They ***36** may draw judgments either more laudatory or more harsh than the ones to which we refer."[228] The Court's "limited role," it explained, "is to recount events as understood by the lawmakers, thus ensuring that we accord proper appreciation to their purposes in adopting the policies and laws at issue."[229] Under this bland, non-ideological cloak, the Court smuggled into its opinion a number of assumptions and biases that fit squarely within the colonialist narrative. These include: (1) characterization of the white residents of Hawaii as "settlers" rather than "immigrants"; (2) condescending depictions of indigenous society compared to valorizing depictions of Christian missionaries and white business interests; and (3) minimizing almost to the point of denial the U.S. role in the illegal overthrow of the Queen, thereby evading the central findings of Congress in the Apology Resolution.

1. White "settlers"

At two points in the opinion's opening sections the Court betrays its ideologically tinged view of the status of white residents of Hawaii. At the very beginning the Court describes petitioner Harold Rice as "a citizen of Hawaii and thus himself a **Hawaiian** in a well-accepted sense of the term."[230] Of course, the sense in which Rice's "**Hawaiian**-ness" is "well-accepted" is the very essence of the dispute underlying the case. The Court's use of the phrase "well-accepted" signals its unwillingness to examine critically (or even to notice) how Western pretensions to "**Hawaiian**-ness" invalidate the central claim of the **Native Hawaiians** in the litigation, namely, that they are a separate, indigenous people whose sovereignty white Westerners simply ignored when they took over the **Hawaiians**' land and obliterated their culture.[231]

The Court reinforces this bias at the conclusion of its historical review. The Court notes the succession of immigrant groups

that came to Hawaii to work in the sugar fields: "Chinese, Portuguese, Japanese, and Filipinos. . . . [Each] has had its own history in Hawaii, its own struggles with societal and official discrimination, its own successes, and its own role in creating the present society of the islands."[232] This passage introduces two types of bias into the opinion. First, as Iijima notes, the list of "immigrants" tellingly leaves out the whites![233] In the Court's narrative, the white missionaries and businessmen who took absolute control of the indigenous society appear not as two more outsider groups, but as part of the earlier "settler" population on a par with the **Hawaiians** themselves.[234] Second, by elevating the struggles with discrimination of the Chinese, Portuguese, Japanese, and Filipinos, the Court manages to reduce the **Native Hawaiians** to the level of one ***37** interest group among others, deftly evading the fundamental question of the **Hawaiians**' loss of sovereignty over their one and only homeland.[235]

2. The indigenous society and its white benefactors

The biases in the Court's depiction of pre-contact Hawaii are by turns subtle and glaring. A subtle bias is the Court's preference for the population estimates of pre-contact Hawaii made by "some modern historians" that place it between 200,000 and 300,000.[236] As noted above, not only are these figures at the low end even of most Western historians' estimates, they are drastically below the estimates of 800,000 to one million suggested by archaeological and anthropological evidence.[237] Even though the opinion later acknowledges that the population declined due to disease,[238] the Court has softened the impact of that decline considerably by choosing the lower starting figure.

Nothing is subtle about the Court's condescending statement that "accounts of **Hawaiian** [pre-contact] life often remark upon the people's capacity to find beauty and pleasure in their island existence, but life was not altogether idyllic."[239] Like a theater manager arranging the set for a morality play, the Court here brings on stage the childlike, primitive **natives** on the eve of their discovery by the forces of civilization. Then, as if discovering an aspect of **Hawaiian** history totally unlike anything that could be associated with Europe, the Court continues, "the islands were ruled by four different kings, and intra-**Hawaiian** wars could inflict great loss and suffering."[240] Lest readers miss the inherent barbarism and depravity of indigenous society, the Court adds that these kings or other chieftains "could order death or sacrifice of any subject."[241]

The Christian missionaries, on the other hand, despite their historical role as the vanguard of an intrusive and finally dominant Western invasion force, appear to the Court as seeking "to teach **Hawaiians** to abandon religious beliefs and customs that were contrary to Christian teachings and practices."[242] The white interests who took total control of the land and power structure of the Islands had, in the anodyne words of the Court, "increasing involvement . . . in the economic and political affairs of the Kingdom."[243] The principal arena for white conquest, of course, was land. But the Court adopts a view of the land transfer that sees it, not as **native** dispossession and the disruption of a centuries-old system of interdependence of Ali'i and commoner, but as an extension of "**rights**" and the overthrow of "feudal[ism]."[244] The Court further states, with no supporting evidence and in the face of the strong evidence to the contrary presented by Kame'elehiwa and other ***38** local historians: "Westerners were not the only ones with pressing concerns, however, for the disposition and ownership of land came to be an unsettled matter among the **Hawaiians** themselves."[245]

This is a familiar pattern of colonialist rationalization of conquest, as depicted by Memmi. The colonizers portray the colonized as backward, passive, barbaric, and confused. The colonizer is beneficent, civilized, and eager to extend "**rights**" where heretofore the **natives** have known only subservience to feudal powers exercised by kings and chieftains who (unlike the colonizers) wield arbitrary, death-dealing power.

3. The overthrow

It is also a mainstay of colonialist history to depict the ultimate act of conquest as a liberation. Given the findings of President Cleveland in the aftermath of the overthrow of Queen Lili'uokalani,[246] and the text of the Apology Resolution which acknowledges "the suppression of the inherent sovereignty of the **Native Hawaiian** people" and "the participation of agents and citizens of the United States [in] the deprivation of the **rights** of **Native Hawaiians** to self-determination,"[247] it would seem difficult for the Court to perform such interpretive prestidigitation. Yet, in two key sentences, the opinion attempts precisely that.

First, in an allusion to the events surrounding the Bayonet Constitution that barely acknowledges the intimidation of King Kalakaua, the Court reports that "[w]esterners forced the resignation of the Prime Minister of the Kingdom of Hawaii and the adoption of a new Constitution, which, among other things, reduced the power of the monarchy and extended the **right** to vote to non-**Hawaiians**."[248] When the Court adverts to the overthrow of the Queen, it portrays it as a "response to an attempt by the then-**Hawaiian** monarch, Queen Liliuokalani, to promulgate a new constitution restoring monarchical control over the House of Nobles and limiting the franchise to **Hawaiian** subjects."[249]

In two swift strokes the Court re-writes history. Western business interests were the saviors of democracy, and the Queen--who in fact was acting to reassert the legitimate and established order of **native** society after its usurpation by those Western interests a few years before--was a reactionary agent of tyranny. Of course, neither President Cleveland nor the authors of the Apology Resolution interpreted events this way. The Court, however, gives very short shrift to their perspectives. While acknowledging that Cleveland was "unimpressed and indeed offended by the actions of the American Minister," and that he "called for the restoration of the **Hawaiian** monarchy," the Court weakly and vaguely notes that "[t]he Queen could not resume her former place [and] . . . abdicated her throne a year later."[250] As for the findings of the Apology Resolution, the Court's entire consideration of them appears in the following passage: "In 1993, a century after ***39** the intervention by the Committee of Safety, the Congress of the United States reviewed this history, and in particular the role of Minister Stevens. Congress passed a Joint Resolution recounting the events in some detail and offering an apology to the **native** **Hawaiian** people."[251]

The Rice opinion leaves opaque what the grounds for apology could possibly be. According to the Court's construction of events, the Committee of Safety had preserved democracy and thwarted the tyrannical designs of the Queen.[252] Yet the Court is untroubled by the contradiction, a sign that the colonialist historian's work of effacement and erasure of embarrassing or troubling facts has been very effective.

B. Race

It is ironic that the Court's highly racialized history is a prelude to a ruling that race has no permissible place in the State of Hawaii's efforts to ameliorate the **Native** **Hawaiians**' dispossession. Gotanda's analysis of the multiple meanings of "race" throws light on the apparent contradiction, and on the double bind in which the **Native** **Hawaiians** find themselves when they turn to the legal system for redress.[253] In Gotanda's terms, the Rice opinion inappropriately conflates and confuses formal-race and historical-race. When the Court applies the test of race-consciousness to the OHA voting requirement and finds it in violation of the Fifteenth Amendment, it is construing race as formal-race. This usage divorces the **Hawaiians** from their history of political and cultural dispossession at the hands of whites. To do justice to this history, the Court would have to emphasize and acknowledge historical-race, which "embodies past and continuing racial subordination, and is the meaning of race that the Court contemplates when it applies 'strict scrutiny' to racially disadvantaging government conduct."[254]

The Court's confusion, and its invidious effects on the **Native** **Hawaiians**, appear most clearly in two sentences from the Rice opinion. To the Court, **Hawaiian** ancestry is a "proxy for race" because the drafters of the laws at issue in Rice sought to emphasize "the unique culture of the ancient **Hawaiians**" and "to preserve that commonality of people to the present day."[255] Yet, only a few paragraphs later the Court inveighs against "race" 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."[256] That the Court can move in such a short space from recognizing ancestry as worthy of respect, and as the source of the **Hawaiian** people's identity and dignity, to condemning the identification of a people by their ancestry as demeaning, signals profound conceptual confusion. The **Hawaiians** pay a steep price for the Court's confusion. It is nothing less than that the Court attaches equal opprobrium to race-consciousness that oppresses and degrades a people, and to race-consciousness that attempts to **right** grievous historical wrongs.

***40** Summarizing these effects of Rice, and the racial confusion from which they flow, Mahealani Kamau'u offered this testimony at the 2000 Community Forum held by the Hawaii Advisory Committee to the U.S. Commission on Civil **Rights**:

> In rendering its opinion, the High Court chose to apply the law as though entirely separate from the

> cultural, political, and economic context within which OHA's voting process was created. That context largely is the result of America's misdeeds and the Hawai'i electorate's desire to make amends. The Court appears to have been influenced by the increasingly dominant discourse of neo-conservatism, which has emphasized the need for strictly color-blind policies, calling for repeal of special treatment such as affirmative action and other race-remedial policies. Under this doctrine, implicit assumptions regarding race include beliefs that any race consciousness is discrimination, that race is biological and thus a concept devoid of historical, cultural, or social content, and that a group is either racial or it is not. And if it is racial, it cannot be characterized as political. This approach allows America to ignore its historical oppression of **Native Hawaiians** when meting out justice in its courts of law.[257]

Kamau'u's comment shows how colonialist historical narrative and today's narrative of colorblindness reinforce each other. In the Rice opinion, the narratives work together to erase almost all historical traces of Western race-based usurpation and dispossession of **Native Hawaiians**. The Court's selective and biased historical reporting, despite the initial disavowal of any ideological purpose, perpetuates colonialist condescension toward **native** peoples; avoids the most uncomfortable facts concerning a near-genocidal population decline; glosses over the cunning manipulation of **natives** who were unfamiliar with Western constructs of private property; and depicts the agents of the overthrow of the legitimate government of Hawaii as liberators and defenders of democratic rule. In Ferguson's terms, we cannot but suspect that the history that is absent from the Court's narrative has not merely been omitted; it has been forcibly suppressed.[258]

The formal-race analysis of the OHA's voting requirement reinforces the Court's "structural amnesia."[259] The Court's reliance on formal-race denies history. And, by emptying "race" of any historical content, the Court achieves two ends simultaneously. First, it conflates racial preferences that oppress with racial preferences that attempt to redress oppression. Second, it reads out of its legal analysis the historical record that lies at the heart of the Apology Resolution. The Rice opinion, and the rhetorical and analytical frameworks it embodies, call into question the prospects for **Native Hawaiians** to achieve justice within the U.S. justice system.

*41 V. Conclusion: Resisting Law as an Instrument of Colonial Domination

McHugh's analysis of the various forms of colonialist "lawfare against the tribes"[260] laid a foundation for critical counterattack, and depicted Western legalism as "a site of intercultural struggle and contestation."[261] I have argued that the U.S. justice system is structurally and systematically biased against the claims of **Native Hawaiians**, and perhaps against the claims of other indigenous peoples as well. The workings of narrative in the law render the law itself an instrument of colonial domination. At the same time, however, the analysis suggests three potential avenues of resistance: (1) reclaiming and restoring the suppressed **native** voice, (2) continuing critical appraisal of the justice system's use of "race", and (3) recourse to international law.

A. Reclaiming the Suppressed Native Voice

As we have seen, a colonialist historical narrative has played a major role in stifling the **native** voice at the U.S. Supreme Court. That narrative skews the Court's framing of the issues before it, and forecloses consideration of uncomfortable facts that would call into question not only the Court's conceptual frame, but the justice of its holdings. Accordingly, a remedy at this level will be to insist even more strenuously on the inclusion of the **native** historical voice in the Court's construction of the historical record. In the **Hawaiian** case, this will entail more reconstruction of the historical record of the sort undertaken by writers such as Iijima, Yamamoto, Trask, Kame'elehiwa, and Silva.

This approach should also set the **Hawaiian** example beside the treatment at law, and in American culture generally, of the **Native** American Indian. This is particularly apt in light of the (so far failed) attempt by **Native Hawaiians** to persuade the Supreme Court of the validity of the analogy between their "special relationship" with the government and that of the Indian tribes. Robert Williams' The American Indian in Western Legal Thought is both a resource and model for this approach.[262]

This task will entail the careful examination of a court's historical narrative for traces of what Ngugi calls "the cultural bomb."[263] A court's narrative is never neutral, notwithstanding Justice Kennedy's disclaimer at the beginning of his opinion in Rice v. Cayetano.[264] "The power to narrate," Said wrote, "or to block other narratives from forming and emerging, is very important to culture and imperialism, and constitutes one of the main connections between them."[265] The Rice opinion epitomized this connection.

***42** As Delgado has pointed out, however, the power to block a narrative may be exerted at the initial trial level as well.[266] In the **Hawaiian** case, resistance to this phenomenon might well require that the **Native Hawaiian** experience of cultural devaluation and stereotyping, as captured in Hall's depiction of "kitsch,"[267] and the everyday micro-aggressions that **native Hawaiians** encounter in contemporary Hawaii, be accorded greater weight as part of the presentation of grievances in court. To gain a hearing for this experience at the trial level, the challenge is to make manifest and overt the harms caused by unconscious racism. As Joel Kovel[268] and Charles Lawrence[269] have argued, unconscious racism perpetuates micro-aggression and subordination without the telltale markers of "intent" to discriminate (Lawrence) or the blatant forms of "assaultive" racism (Kovel) that courts are more willing to acknowledge. Trial attorneys litigating indigenous claims must be vigilant to assure that the accounts and stories that find their way into the trial record, and set the stage for appellate review, are those of the clients themselves, and not a distorted Westernized version.[270]

*43 B. Critical Appraisal of "Race" in U.S. Jurisprudence

Neil Gotanda points the way to heightened awareness of how courts' use of formal-race freezes in place opportunities and distributions of resources that favor the white majority.[271] He makes the further point that narrative reinforces the oppressive effects of a court's choice of analytic frameworks.[272] Thus, as a strategy of resistance, the actual flesh-and-blood stories that saturate historical-race are necessary complements to Gotanda's theoretical analysis. Ferguson's use of the story of Gabriel's rebellion,[273] and Ross's delving into the "rhetorical tapestry of race"[274] exemplify a narrative-rich approach to exposing the oppressive effects of courts' use of formal-race when assessing policies designed to counter the effects of historical racism.

C. The International Law Arena

As Haunani-Kay Trask observes:

> [C]onflict over **Native** sovereignty is not unique to **Hawaiians**. It is repeated throughout the Pacific Islands, indeed, anywhere in the world where **Native** peoples suffer the yoke of oppression. Like Tahitians, Kanaks, Maori, Australian Aborigines, Palestinians, the Kurdish peoples, Tibetans, the Maya, Quechua, and many other indigenous peoples, **Native Hawaiians** continue to struggle for self-determination and self-preservation as a people.[275]

More than a simple call for international solidarity, Trask's observation points to the international human **rights** arena as a third avenue of resistance to the recalcitrance of the American legal system when it comes to breaking the bonds of the colonialist narrative. Indeed, given how solidly the colonialist narrative is entrenched in American law, an advocate for **Native Hawaiian** sovereignty is justifiably pessimistic that domestic legal remedies are anywhere near at hand. In this environment, an effort to re-inscribe the **Hawaiian** Islands on the United Nations list of Non-Self-Governing Territories is an appropriate strategy.[276] In Trask's words:

> ***44** Civil **rights** must be subsumed under human **rights**; land claims, language transmission, and monetary compensation must be understood and argued in terms of our human **rights** as indigenous people rather than merely as citizens of the United States or the state of Hawai'i. Given that **Hawaiians** were once self-governing under the Kingdom of Hawai'i and given that the United States, through its diplomatic and military offices, played a central role in the overthrow of that Kingdom, our historical injury involves violations of international law. Thus the context of the U.S. constitution is too small a framework in which to argue for sovereignty. An international frame of reference, one that involves universal human **rights**, must be the context for discussion.[277]

Two further arguments from contemporary history support an internationalist turn to the **Native Hawaiians**' anti-colonialist struggle. First, McHugh has documented a number of successes of similar movements around the globe during what he has termed the "jurisprudence of reconciliation" that marked the 1990s.[278] The Draft United Nations Declaration of Principles on the **Rights** of Indigenous Peoples, agreed upon in July 1993, by the members of the U.N. Working Group on Indigenous Populations[279] is further evidence of a possibly more hospitable international climate for **Native Hawaiian** claims.

A second argument derives from Derrick Bell's thesis of "interest convergence."[280] According to Bell, African American political and legal gains in the United States have occurred not because of whites' recognition of the moral force of African Americans' arguments for justice, but because an appearance of black progress serves the interests of white elites.[281] The prime example of this, Bell argues, is the Supreme Court's decision in Brown v. Board of Education to jettison the separate but equal doctrine in the case of public schools.[282] The Court did not suddenly discover the injustice of segregation, Bell argues; rather, the United States could no longer afford the embarrassment of a flagrantly oppressed minority population in the midst of a world-wide competition with the Soviet Union for the allegiance of Third World countries during the Cold War.[283] Richard Delgado has proposed that blacks and other minorities stand to make similar gains at a time when the United States is engaged in its self-proclaimed "War on Terrorism," and is competing with Islamic fundamentalism for the hearts and minds of moderate forces across the Muslim world.[284] An appeal in the ***45** international arena for justice for the dispossessed **Native Hawaiians** may gain traction as the U.S. strives to appear responsive to the claims of oppressed peoples everywhere, and perhaps even contrite about its colonial past.

The international arena is not a panacea. International law forums are hardly immune to colonialist modes of thought. Furthermore, even if international judgments are favorable to an indigenous people, their effect will depend on state actors' willingness to implement them.[285] Nevertheless, a narrative perspective on the **rights** of indigenous peoples suggests a distinct advantage in placing the cause of the **Native Hawaiians** (or, indeed, of any single people) on the international stage, in solidarity with other peoples. On that stage, amplified by the parallel stories of other peoples who have experienced colonial domination, the **native** voice is louder, its timbre richer, its claim to attention more insistent.

Footnotes

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1 Edward Said, Culture and Imperialism, at xii-xiii (1994).

2 Robert A. Williams, Jr., The American Indian in Western Legal Thought 325 (1990).

3 Hawaii Advisory Committee, Reconciliation at a Crossroads: The Implications of the Apology Resolution and Rice v. Cayetano for Federal and State Programs Benefiting **Native Hawaiians**: Hearing Before the Hawaii Advisory Committee to the U.S. Commission on Civil **Rights** 7 (2001), http:// www.usccr.gov/pubs/sac/hi0601/report.htm (last visited Oct. 24, 2006) (alteration in original) [hereinafter Hawaii Advisory Committee].

4 Haunani-Kay Trask, From a **Native** Daughter: Colonialism and Sovereignty in Hawai'i 18 (University of Hawai'i Press 1999) (1993).

5 Kamehameha Schools, Key Points in **Hawaiian** History, http:// www.ksbe.edu/pdf/historic_timeline.pdf (last visited Oct. 24, 2006).

6 Id.

7 Id.

8 Id.

9 Said, supra note 1, at xiii.

10 Richard Delgado, Storytelling for Oppositionists and Others: A Plea for Narrative, 87 Mich. L. Rev. 2411, 2412 (1989).

11 528 U.S. 495, 523-24 (2000).

12 The decision also gave renewed life to Congressional efforts to formalize the United States' recognition of a "special relationship" with the **Native** **Hawaiians** analogous to that between the government and **Native** American Indian tribes. The most recent vehicle for this effort is Senate Bill 147, "The **Native** **Hawaiian** Government Reorganization Act of 2005," also known as "the Akaka Bill" for its principal Senate sponsor, Daniel K. Akaka (D-Hawaii). **Native** **Hawaiian** Government Reorganization Act of 2005, S. 147, 109th Cong. (2005). The bill, which at this writing is awaiting debate and a vote in the Senate, would establish a process through which the U.S. government would eventually recognize a **Native** **Hawaiian** governing entity and enter into negotiations with that entity for purposes of transferring lands and resources and governmental authority over them, and setting up a division of civil and criminal authority in the **Hawaiian** Islands. Id. The Akaka Bill has provoked fervent debate both in Congress and in Hawaii. Proponents see it as long overdue recognition of **Hawaiian** sovereignty and concrete reparation for the U.S. government's role in the overthrow of the Kingdom of Hawaii. Opponents fall into two camps. One argues that the future status of the **Native** **Hawaiian** governing entity will still be too bound up with the United States Government, and does not go far enough in restoring independence. The opposite camp decries the Akaka Bill as a dangerous racial balkanization of the **Hawaiian** Islands that will lead to the dispossession of all racial and ethnic groups who cannot claim **native** ancestry. For a summary of the various positions, see for example, S. Rep. No. 109-68 (2005) [hereinafter the McCain Senate Report]; Kenneth R. Conklin, Why People Outside Hawai'i Should Oppose the Akaka Bill, http:// www.angelfire.com/hi2/hawaiiansovereignty/AkakaOtherStatesOppose.html (last visited July 20, 2005); Brian Duus, Reconciliation Between the United States and **Native** **Hawaiians**: The Duty of the United States to Recognize a **Native** **Hawaiian** Nation and Settle the Ceded Lands Dispute, 4 Asian-Pac. L. & Pol'y J. 470 (2003); Annmarie M. Liermann, Seeking Sovereignty: The Akaka Bill and the Case for the Inclusion of **Hawaiians** in Federal **Native** American Policy, 41 Santa Clara L. Rev. 509 (2001); J. Kehaulani Kauanui, Precarious Positions: **Native** **Hawaiians** and U.S. Federal Recognition, 17 Contemp. Pac. 1 (2005); Dean E. Murphy, Bill Giving **Native** **Hawaiians** Sovereignty Is Too Much for Some, Too Little for Others, N.Y. Times, July 17, 2005, at A17; Vicki Viotti, The Akaka Bill: What Would It Mean for Hawa'ii?, Honolulu Advertiser, Apr. 10, 2005, at B1-4.

13 Judy Rohrer, "Got Race?" The Production of Haole and the Distortion of Indigeneity in the Rice Decision, 18 Contemp. Pac. 1, 1-2 (2006).

14 Id. at 17-20.

15 Judy Rohrer's analysis of the Rice decision, which appeared too recently for me to benefit fully from it in writing this article, parallels my own in a number of ways. She characterizes the **Native** **Hawaiians**' double bind this way: "Rice can be read as evidence of the white historical amnesia that 'races' a people, forgets it raced them, and then denies the material impact of that racialization when it becomes the ground on which that people begin to make claims." Rohrer, supra note 13, at 14.

16 Gavan Daws, Shoal of Time: A History of the **Hawaiian** Islands, at xi (University of Hawaii Press 1974) (1968).

17 Id. at 1.

18 Id.

19 Maui and **Hawaiian** Chronology, http:// www.mauimapp.com/moolelo/chronology.htm (last visited Oct. 24, 2006).

20 For extensive discussions and bibliographies of the archaeological and anthropological literature, and consideration of the traditional sources for pre-contact **Hawaiian** history, see Patrick V. Kirch, On the Road of the Winds: An Archaeological History of the Pacific Islands Before European Contact (2000); The Cambridge History of the Pacific Islanders (Donald Denoon et al. eds., 1997).

21 David Malo, **Hawaiian** Antiquities (Moolelo Hawaii) (Nathaniel B. Emerson trans., Bishop Museum Press 1951) (1898).

22 Samuel M. Kamakau, Ruling Chiefs of Hawaii (rev. ed. 1992).

23 Lilikala Kame‘eleihiwa, **Native** Land and Foreign Desires 7 (1992).

24 Id. at 26. For further discussion of the Ali‘i Nui, see also Malo, supra note 21, and Kamakau, supra note 22; see generally Kame‘eleihiwa, supra note 23 (a modern synthesis of the traditional sources amplified by extensive original scholarship).

25 Kame‘eleihiwa, supra note 23, at 27.

26 Id. at 26.

27 Id. at 27 (definition added).

28 S. Rep. No. 108-085, at 7 & n.25 (2003). For a review of the evidence for the lower and higher estimates and the ideological motivations behind them, see David E. Stannard, Before the Horror: The Population of Hawai‘i on the Eve of Western Contact (1989); David E. Stannard, Disease and Infertility: A New Look at the Demographic Collapse of **Native** Populations in the Wake of Western Contact, 24 J. Am. Stud. 325 (1990).

29 S. Rep. No. 108-085, supra note 28, at 7 & n.25. See also Noenoe K. Silva, Aloha Betrayed: **Native** **Hawaiian** Resistance to American Colonialism 24 (2004). For a review of the evidence for the lower and higher estimates and the ideological motivations behind them, see David E. Stannard, Before the Horror: The Population of Hawai‘i on the Eve of Western Contact (1989); David E. Stannard, Disease and Infertility: A New Look at the Demographic Collapse of **Native** Populations in the Wake of Western Contact, 24 J. Am. Stud. 325 (1990).

30 Silva, supra note 29, at 39-42.

31 Kamakau, supra note 22, at 117-99. See generally Ralph Kuykendall, The **Hawaiian** Kingdom 1778-854 (2d ed.1854).

32 S. Rep. No. 108-085, supra note 28, at 7.

33 Id.

34 HawaiiHistory.org, Contact to Mahele (1778-1848), http:// www.hawaiihistory.com/index.cfm?fuseaction=ig.page&PageID=358 (last visited Oct. 25, 2006).

35 Silva, supra note 29, at 39-54.

36 Id. at 25-26.

37 Id. at 25.

38 Id. at 26.

39 Id. (quoting a deleted passage from Kamakau, supra note 22) (definitions added).

40 Michael K. Dudley & Keoni K. Agard, A **Hawaiian** Nation II: A Call for **Hawaiian** Sovereignty 4-9 (1990).

41 Id. at 1-7.

42 Daws, supra note 16, at 106-12.

43 Id. at 124-28.

44 Id.

45 Id. at 126.

46 Dudley & Agard, supra note 40, at 12-13. See also Daws, supra note 16, at 126-28.

47 Dudley & Agard, supra note 40, at 15. **Native** **Hawaiians**' unfamiliarity with Western concepts of private property and naiveté in dealing with crafty Western businessmen are probably the best explanations for the ease with which such vast land holdings passed into Western hands. But another factor was undoubtedly the language barrier, as a result of which **Hawaiians** simply had no idea what they were agreeing to when they accepted the terms of real estate documents. This combination of cultural and linguistic disadvantage is quite similar to the history of Mexican-American land transfers after the Treaty of Guadalupe Hidalgo. For a careful analysis of that context, see Guadalupe T. Luna, Chicana/Chicano Land Tenure in the Agrarian Domain: On the Edge of a

"Naked Knife", 4 Mich. J. Race & L. 39 (1998).

48 Dudley & Agard, supra note 40, at 16.

49 Hawaii Advisory Committee, supra note 3, at 4-5. See also Dudley & Agard, supra note 40, at 17.

50 Hawaii Advisory Committee, supra note 3, at 4.

51 Id. at 4-5.

52 Id. at 5. For a detailed account of the "Bayonet Constitution" and its relationship to the preceding century of Western infiltration of the indigenous society, see Jonathan Kay Kamakawiwo'ole Osorio, Dismembering Lahui: A History of the **Hawaiian** Nation to 1887 (2002).

53 Hawaii Advisory Committee, supra note 3, at 5-6.

54 S. Rep. No. 108-085, supra note 28, at 11.

55 Hawaii Advisory Committee, supra note 3, at 5-6.

56 Id.

57 Silva, supra note 29, at 170-72.

58 See Hawaii Advisory Committee, supra note 3, at 6.

59 Trask, supra note 4, at 16.

60 Hawaii Advisory Committee, supra note 3, at 7.

61 Eric K. Yamamoto et al., Indigenous People's Human **Rights** in U.S. Courts, in Moral Imperialism: A Critical Anthology 301 (Berta Esperanza Hernandez-Truyol ed., 2002). See also **Hawaiian** Advisory Committee to the U.S. Commission on Civil **Rights**, A Broken Trust: The **Hawaiian** Homeland Program (1991) (reporting results from fact-finding meetings held to determine the extent to which commitments made to **Native** **Hawaiians** by the Federal Government and the State of Hawaii are being fulfilled).

62 Hawaii Advisory Committee, supra note 3, at 12.

63 Trask, supra note 4, at 66-69.

64 Id.

65 Id.

66 Id. at 74-78.

67 Id. at 69.

68 H.I. Const. art. XII, §§ 5-6.

69 Hawaii Advisory Committee, supra note 3, at 18-20.

70 S. J. Res. 19, Pub. L. No. 103-150, 107 Stat. 1510 (1993) [hereinafter, Apology Resolution].

71 Rice v. Cayetano, Civ. No. 96-00390-DAE (D. Haw. filed Apr. 25, 1996), partial summary judgment granted by, 963 F. Supp. 1547 (D. Haw. 1997), aff'd by, 146 F.3d 1075 (9th Cir. Haw. 1998), cert. granted, 526 U.S. 1016 (1999), rev'd, 528 U.S. 495 (2000), vacated, 208 F.3d 1102 (9th Cir. 2000).

72 Rice, 528 U.S. 495, vacated, 208 F.3d 1102.

73 417 U.S. 535 (1974).

74 528 U.S. at 518-19.

75 Id. at 519.

76 Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate, 416 F.3d. 1025, 1047 (9th Cir. 2005), vacated en banc, Doe v. Kamehameha Sch., 441 F.3d 1029 (9th Cir. 2006). The Kamahameha Schools and Bishop Estate have recently filed a petition with the Ninth Circuit for a rehearing en banc. One of the amicus briefs filed to support their petition sheds at least some light on the current state of race relations in multi-ethnic Hawaii at this time of **Native Hawaiian** assertiveness and white Hawaii's counterattack. Honolulu attorneys Eric Yamamoto and Susan Serrano filed the brief on behalf of the Japanese American Citizens League of Hawaii-Honolulu Chapter, Centro Legal de la Raza, and the Equal Justice Society, "a national organization of scholars, advocates, and individuals advancing innovative legal strategies and public policy for enduring social change." Brief of Amici Curiae Japanese American Citizens League of Hawaii-Honolulu Chapter et al. at 1, Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate, 416 F.3d. 1025 (No. 04-15044). They conclude with the statement, "Hawaii's multiracial populace supports Kamahameha Schools because restorative justice for Hawaii's indigenous peoples benefits all." Id. at 11.

77 Said, supra note 1, at xiii.

78 Albert Memmi, The Colonizer and the Colonized (Howard Greenfeld trans., Beacon Press expanded ed. 1967) (1957).

79 Id. at 9.

80 Id.

81 Id. at 24-25.

82 See Memmi, supra note 78.

83 Id. at 52-53.

84 Id. at 46-47.

85 Id. at 24-25.

86 Id. at 71.

87 Id. at 71-72.

88 Memmi, supra note 78, at 74-75.

89 Ngugi wa Thiong'o, Decolonising the Mind: The Politics of Language in African Literature iv (Heinemann 1986).

90 Id. at 3.

91 Dudley & Agard, supra note 40, at 73.

92 Ngugi, Decolonising the Mind, supra note 89, at 16.

93 Id.

94 Id.

95 Id. at 17.

96 Id. at 28.

97 Ngugi wa Thong'go, Moving the Centre: The Struggle for Cultural Freedoms 132 (Heinemann 1993).

98 Honoré de Balzac, Eugénie Grandet (Sylvia Raphael trans., Penguin Classics 2003) (1833).

99 Ngugi, Moving the Centre, supra note 97, at 132.

100 Id. at 133.

101 Id.

102 Id.

103 Id.

104 Id.

105 Ngugi, Moving the Centre, supra note 97, at 133-34 (quoting Isak Dinesen, Out of Africa (Modern Library reprint ed.1992) (1937)).

106 Id.

107 P.G. McHugh, Aboriginal Societies and the Common Law 5 (Oxford University Press UK 2004).

108 Id. at 6-7.

109 Williams, supra note 2.

110 Id. at 7-8.

111 Law's Stories: Narrative and Rhetoric in the Law (Peter Brooks & Paul Gewirtz eds., 1996).

112 Id. at 7.

113 Id. at 9.

114 Richard Delgado & Jean Stefancic, The Racial Double-Helix: Watson, Crick and Brown v. Board of Education (Our No-Bell Prize Award Speech), 47 How. L.J. 473, 474-75 (2004).

115 Id. at 475.

116 McHugh, supra note 107, at 12-15.

117 James Clifford, Identity in Mashpee, in The Predicament of Culture: Twentieth-Century Ethnography, Literature and Art 277, 339 (1988), quoted by McHugh, supra note 107, at 14. See also Rohrer, supra note 13, at 20-23 (discussing the ways in which modern legal methodology clouds indigenous people's abilities to effectively or thoroughly convey their stories in legal proceedings).

118 Peter Brooks, The Law as Narrative and Rhetoric, in Law's Stories, supra note 111, at 18.

119 Thomas Ross, Just Stories: How the Law Embodies Racism and Bias 24-34 (1996).

120 Cf. id. at 10-11 (describing the use of narrative, in Plessy v. Ferguson, as persuasion for the legitimacy of apartheid laws).

121 Id. at 134.

122 Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

123 163 U.S. 537 (1896).

124 Robert A. Ferguson, Untold Stories in the Law, in Law's Stories, supra note 111, at 87.

125 Id. at 87-89.

126 Id. at 93.

127 1.Id. at 95.

128 Id. at 89.

129 Id.

130 Plessy, 163 U.S. at 559.

131 Neil Gotanda, A Critique of "Our Constitution is Color-Blind," 44 Stan. L. Rev. 1 (1991). See also Cheryl I. Harris, Whiteness as Property, 106 Harv. L. Rev. 1707 (1993) (exploring how whiteness, in terms of race, evolved to be equated with, and treated as, a kind of property, which prevented reformation in the legal world with respect to racial classifications).

132 Fullilove v. Klutznick, 448 U.S. 448 (1980) (holding that waiver program supporting minority businesses was not unconstitutional); Minnick v. California Dep't of Corr., 452 U.S. 105 (1981) (dismissing the writ to further determine the extent to which sex or race influenced promotions); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (holding there was a failure to show sufficient justification for a minority set-aside program). In Fullilove, Justice Stewart, in dissent, invokes Harlan's concept of color-blindness. 448 U.S. at 525, 532.

133 Gotanda, supra note 131, at 3.

134 Id. at 3-5.

135 Id. at 4.

136 Id.

137 Id. at 7.

138 Id.

139 Gotanda, supra note 131, at 23.

140 Id.

141 Id. at 23.

142 See Memmi, supra note 78, at 9.

143 See Ferguson, supra note 124, at 87.

144 Gotanda, supra note 131, at 16.

145 Id. at 45.

146 Id. at 46.

147 Id.

148 Id. at 48.

149 488 U.S. 469 (1989).

150 347 U.S. 483 (1954).

151 Gotanda, supra note 131, at 46-47.

152 416 U.S. 312 (1974).

153 Gotanda, supra note 131, at 41.

154 DeFunis, 416 U.S. at 314.

155 Id. at 337.

156 See Memmi, supra note 78, at 24.

157 Jocelyn Linnekin, Contending Approaches, in The Cambridge History of the Pacific Islanders, supra note 20, at 21.

158 Id.

159 James cook, The Journals of Captain Cook 531-32 (Philip Edwards ed., Penguin Books 1999) (1779) (grammar and spelling in original).

160 Daws, supra note 16, at 65.

161 Id. at 66.

162 Id. at 64. Vulgar images of **Hawaiians** as primitive sexual savages persisted well into the 20th century. At the height of national hysteria over a murder trial in Honolulu in 1931 and 1932, in which a prominent and wealthy white resident of Hawaii was accused of conspiring to kill a **Native Hawaiian** to avenge the alleged rape of the white man's wife, mainland tabloids printed cartoons depicting wild-eyed **Hawaiians** in loin cloths strangling an elegant white woman in an evening gown. See David E. Stannard, Honor Killing: How the Infamous "Massie Affair" Transformed Hawaii (2005), illustration no. 33 after 246.

163 Daws, supra note 16, at 213.

164 Dudley & Agard, supra note 40, at 30.

165 Id.

166 Id. at 32.

167 Id.

168 Supra notes 98-105, and accompanying text.

169 Trask, supra note 4, at 17.

170 Lisa Kahaleole Hall, "**Hawaiian** at Heart" and Other Fictions, 17 Contemp. Pacific 404, 409 (2005).

171 Id.

172 Id.

173 Daws, supra note 16, at 106-12.

174 Dudley & Agard, supra note 40, at 16.

175 Daws, supra note 16, at 125.

176 Id. at 124.

177 Id. at 125.

178 Kame'eleihiwa, supra note 23, at 201-10.

179 Id. at 206.

180 Id. at 201.

181 Id. at 210.

182 Id. at 9.

183 Kame'eleihiwa, supra note 23, at 206.

184 Id. at 135.

185 Id. at 202.

186 Id.

187 Id.

188 Id.

189 Kame'eleihiwa, supra note 23, at 202.

190 Id.

191 Hawaii Advisory Committee, supra note 3, at 5.

192 Id.

193 Id.

194 Id.

195 See, e.g., Ralph Kuykendall, The **Hawaiian** Kingdom 402; cited by Hawaii Advisory Committee, supra note 3, at 5 n. 33.

196 Silva, supra note 29, at 165-66.

197 Lawrence Fuchs, Hawaii Pono: Hawaii the Excellent: An Ethnic and Political History (1961), quoted by Silva, supra note 29, at 165-66.

198 William Adam Russ, Jr., The **Hawaiian** Republic (1894-1898) and its Struggle to Win Annexation (1992), quoted by Silva, supra note 29, at 166-67.

199 Silva, supra note 29, at 167.

200 Id.

201 Id. at 151.

202 Id. at 149.

203 One song that was composed at this time, and which remains popular in Hawaii to the present day, is sometimes referred to as "the stone-eating song," because of one poignant verse in which **Native** **Hawaiians** proclaim their preference to be nourished by eating the stones of their own land rather than by the profits of land sales to Westerners. The song is entitled Kaulana Na Pua ("Famous Are the Flowers") and an English translation reads:

Famous are the children of
Hawaii
Ever loyal to the land
When the evil-hearted messenger
comes
With his greedy document of
extortion.
Hawaii, land of Keawe answers.
Pi'ilani's bays help.
Mano's Kauai lends support
And so do the sands of
Kakuhihewa.
No one will fix a signature
To the paper of the enemy
With its sin of annexation
And sale of **native** civil **rights**.
We do not value
The government's sums of
money.
We are satisfied with the stones,
Astonishing food of the land.
We back Lili'u-lani
Who has won the **rights** of the
Land
(She will be crowned again)
Tell the story
Of the people who love their
land.

In Na Mele o Hawaii Nei, 101 **Hawaiian** Songs 62-64 (Samuel Elbert & Noelani Mahoe eds., 1970).

204 Silva, supra note 29, at 123-63.

205 Id. at 2-3.

206 Id. at 144.

207 Id.

208 U.S. Department of the Interior & U.S. Department of Justice, From Mauka to Makai: The River of Justice Must Flow Freely: Report on the Reconciliation Process Between the Federal Government and **Native** **Hawaiians** 29 (2000).

209 Republic of Hawai'i, Report of the Minister of Public Instruction 6-7 (1898), quoted by Silva, supra note 29, at 144.

210 Trask, supra note 4, at 234-36.

211 Jon M. Van Dyke et al., Self-Determination for Nonself-governing Peoples and for Indigenous Peoples: The Case for Guam and Hawai'i, 18 U. Haw. L. Rev. 623 (1996).

212 U.N. General Assembly Fourth Committee Resolution 742 (VIII) [hereinafter Committee Resolution]. Factors which should be taken into account in deciding whether a Territory is or is not a Territory whose people have not yet attained a full measure of self-government, November 27, 1953, item 33.

213 Id.

214 Id. (emphasis added).

215 Van Dyke et al., supra note 211.

216 Committee Resolution, supra note 212.

217 Van Dyke et al., supra note 211.

218 Committee Resolution, supra note 212. See also S. James Anaya, The **Native** **Hawaiian** People and International Human **Rights** Law: Toward a Remedy for Past and Continuing Wrongs, 28 GA. L. Rev. 309, 334 (1994).

219 Anaya, supra note 218, at 334-35.

220 Id. at 334.

221 528 U.S. at 514.

222 Id. at 523-24.

223 Id. at 518-19.

224 Id. at 517.

225 Rice v. Cayetano, 146 F. 3d 1075, 1082 (9th Cir. 1998).

226 Two leading law review articles on the "special relationship" take opposing viewpoints. Arguing against the **Hawaiians**' qualification for a special status analogous to the Indian tribes is Stuart Minor Benjamin, Equal Protection and the Special Relationship: The Case of **Native** **Hawaiians**, 106 Yale L.J. 537 (1996). Criticizing Benjamin and arguing for the opposite conclusion is Jon M. Van Dyke, The Political Status of the **Native** **Hawaiian** People, 17 Yale L. & Pol'y Rev. 95 (1998). The Rice

opinion cites both. For examples of the legal commentary on the Rice decision itself, see for example, Sharon Hom & Eric Yamamoto, Collective Memory, History, and Social Justice, 47 UCLA L. Rev. 1747 (2000); Mililani B. Trask, Rice v. Cayetano: Reaffirming the Racism of Hawaii's Colonial Past,, 3 Asian-Pac. L. & Pol'y J. 352 (2002); Danielle Conway-Jones, The Perpetuation of Privilege and Anti-Affirmative Action Sentiment in Rice v. Cayetano, 3 Asian-Pac. L. & Pol'y J. 352 (2002); Jeanette Wolfley, Rice v. Cayetano: The Supreme Court Declines to Extend Federal Indian Law Principles to **Native Hawaiians** Sovereign **Rights**, 3 Asian-Pac. L. & Pol'y J. 359 (2002); Patrick W. Hanifin, Rice is **Right**, 3 Asian-Pac. L. & Pol'y J. 283 (2002); Chris K. Iijima: New Rice Recipes: The Legitimization of the Continued Overthrow, 3 Asian-Pac. L. & Pol'y J. 385 (2002); Paul M. Sullivan, "Recognizing" the Fifth Leg: The "Akaka Bill" Proposal to Create a **Native Hawaiian** Government in the Wake of Rice v. Cayetano, 3 Asian-Pac. L. & Pol'y J. 308 (2002); Erik M. Zissu, Note, What Hath Captain Cook Wrought?: Bloodlines, the Fifteenth Amendment, and Racial Democracy in Hawaii, 63 U. Pitt. L. Rev. 677 (2002); Gavin Clarkson, Not Because They Are Brown, But Because of Ea: Why the Good Guys Lost in Rice v. Cayetano, and Why They Didn't Have to Lose, 7 Mich. J. Race & L. 317 (2002).

227 Chris K. Iijima, Race Over Rice: Binary Analytical Boxes and a Twenty-First Century Endorsement of Nineteenth Century Imperialism in Rice v. Cayetano, 53 Rutgers L. Rev. 91 (2000). See also Eric K. Yamamoto & Chris K. Iijima, The Colonizer's Story: The Supreme Court Violates **Native Hawaiian** Sovereignty--Again, 3 ColorLines 4 (2000), available at http://www.colorlines.com/article.php?ID=75.

228 Rice, 528 U.S. at 499-500.

229 Id. at 500.

230 Id. at 499.

231 Judy Rohrer remarks on the arrogance and presumption of Kennedy's term "well-accepted," and quotes from an editorial in the Honolulu Advertiser of March 2, 2000, which retorted, "[w]ell-accepted where? Certainly not in Hawaii." Rohrer, supra note 13, at 18, 28.

232 Rice, 528 U.S. at 506.

233 Iijima, supra note 228, at 103.

234 Id.

235 Rice, 528 U.S. at 506.

236 Id. at 500.

237 See Stannard, supra note 28 and accompanying text.

238 Rice, 528 U.S. at 506.

239 Id. at 500.

240 Id.

241 Id.

242 Id. at 501.

243 Id.

244 Rice, 528 U.S. at 501-02 (quoting Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 232 (1984) (Public Use Clause does not bar Hawaii from taking title in real property)).

245 Id. at 501.

246 Silva, supra note 29, at 170-72.

247 Apology Resolution, supra note 70.

248 Rice, 528 U.S. at 504 (emphasis added).

249 Id. (emphasis added).

250 Id. at 505.

251 Id.

252 Id.

253 Gotanda, supra note 131, at 3-4.

254 Id. at 4.

255 Rice, 528 U.S. at 515.

256 Id. at 517.

257 Hawaii Advisory Committee, supra note 3, at 40-41.

258 Supra notes 124-29 and accompanying text.

259 Supra note 129 and accompanying text (quoting Mary Douglas).

260 McHugh, supra note 107, at 5.

261 Id. at 8.

262 Williams, supra note 2. To broaden the canvas even further, and to situate the **Hawaiians** in the widest and richest context of indigenous peoples' treatment by Western legal systems, see McHugh, supra note 107.

263 Supra note 89 and accompanying text.

264 Supra notes 229-30 and accompanying text.

265 Said, supra note 1, at xiii.

266 Delgado, supra note 114, at 474.

267 Hall, supra notes 170-2 and accompanying text.

268 Joel Kovel, White Racism: A Psychohistory 26 (1970).

269 Charles R. Lawrence, III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan L. Rev. 317 (1987).

270 The silencing of the **Native Hawaiian** voice at the trial level, and the substitution of Western narratives, began very early in the Islands' history of Western domination. We have previously considered the denigration of oral traditions as evidence for aboriginal land claims. See McHugh, supra notes 107-108 and accompanying text. Sally Engle Merry has further argued that nineteenth-century **Hawaiians** were receptive to Western legal institutions in part because they recognized that these institutions were seen (by whites) as hallmarks of "civilized" society, and thus as a potential reinforcement for the Islands' claim to autonomous membership in the world of nations. See Sally Engle Merry, Colonizing Hawaii: The Cultural Power of Law 36-37 (Princeton University Press) (2000). In a bitter irony, however, Western legal culture promptly re-inscribed **native** folkways and cultural practices in a language of deviance and perversion, and criminalized indigenous behaviors that had been part of the indigenous culture for centuries. Id. at 39 (arguing that **Hawaiian** sexual and family relations were censured as primitive and savage, and prosecuted as illegal, because they failed to conform to Christian morality).
Mililani Trask has pointed out that many **Hawaiian** claims are barred at the courtroom door altogether. See Mililani Trask, Historical and Contemporary **Hawaiian** Self-Determination: A **Native Hawaiian** Perspective, 8 Ariz. J. Int'l & Comp L. 77, 83 (1991) (showing that **Native Hawaiians** do not have access to Federal District Court to sue the Federal Government for breach of trust stemming from misallocation and mismanagement of funds from ceded lands).
A vivid example of the power of Western racist narrative to work against **Native Hawaiian** interests in the courtroom is the "Massie Affair," described by David Stannard. See Stannard, supra note 162. After white socialite Thalia Massie accused a group

of Native Hawaiian men of raping her in 1930s Honolulu, the prosecution of the men ended in a mistrial. In the midst of the white community's outrage and racial hysteria that followed, one of the accused was found brutally murdered. At a second trial, Thalia Massie's husband stood accused of masterminding the "honor killing." Lead attorney for the defense was the famous American lawyer--and hero of the Scopes "monkey trial"--Clarence Darrow. To the shame of Darrow's overall reputation as a humanitarian protector of the downtrodden, Darrow mounted a vigorous defense that turned on a venerable trope: a white man's understandable loss of control, to the point of insanity, at the very thought of his wife having been violated by "lust-sodden beasts" of color. Id. at 363-76. Although the evidence of Massie's guilt was overwhelming, Darrow's narrative of white victimization moved the jury sufficiently to reduce his conviction to manslaughter. Even this leniency, however, did not quiet the white public's indignation, and in a final twist the Governor of Hawaii commuted the 10-year prison sentence to one hour. Massie went free. Id. at 388-90.

271 Gotanda, supra note 131, at 6-7.

272 Id. at 20-21.

273 Ferguson, supra note 124, at 87-98.

274 Ross, supra note 119, at 21.

275 Trask, supra note 4, at 38.

276 For further discussion of the international law underpinning this strategy, see Van Dyke et al., supra note 211; Anaya, supra note 218; Lisa Cami Oshiro, Comment, Recognizing Na Kanaka Maoli's Right to Self-Determination, 25 N.M. L. Rev. 65 (1995); U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, Final Report on Human Rights of Indigenous Peoples, PP 163-164, U.N. Doc. E/CN.4/Sub.2/1999/20 (June 22, 1999) (prepared by Miguel Alfonso Martinez).

277 Trask, supra note 4, at 38-39.

278 McHugh, supra note 107, at 539-611 (citing developments in Australia, New Zealand, and Canada).

279 U.N. Econ. & Soc. Council [ECOSOC], U.N. Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, Res. 1994/45, U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub2/1994/56, at 105 (Aug. 26,1994) (prepared by Osman El-Hajje).

280 Derrick A. Bell, Jr., Brown v. Board of Education and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518, 523 (1980).

281 Id. at 524-25.

282 Id. at 523-24.

283 Id. at 524-25.

284 Richard Delgado, Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race, 82 Tex. L. Rev. 121,

137-43 (2003) (book review) [hereinafter Crossroads]. Compare with Thomas L. Friedman, Sinbad vs. the Mermaids, N.Y. Times, Oct. 5, 2005, at A27 and Thomas L. Friedman, Leading by (Bad) Example, N.Y. Times, Oct. 19, 2005, at A21 (arguing that moderate factions in the Muslim world will draw more lessons from the social and cultural models that the U.S. shows the world than from its military might, and that the U.S. cannot afford to alienate these factions through disregard of international norms on the use of force or treatment of prisoners of war). Delgado's emphasis on modern day interest convergence is part of a broader critique of what he calls the "idealist turn" in critical race theory. He faults recent critical race authors for substituting analyses of language, private psychological experience, and narrative for the more concrete and potentially confrontational approaches of Bell's "racial realism." See Richard Delgado, Two Ways to Think About Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection, 89 Geo. L.J. 2279 (2001). In the terms of Delgado's distinction, my focus on the narrative aspects of the law and the Rice opinion's version of **Hawaiian** history is an example of the idealist approach. My suggestions that **Hawaiians** turn toward the international arena would be closer, for Delgado, to the strategies and corresponding modes of historical analysis of the racial realist. Crossroads, supra note 284, at 124 ("Racial realists examine the role of international relations and competition, the interests of elite groups, and the changing demands of the labor market in hopes of understanding the twists and turns of racial fortunes, including the part the legal system plays in that history.").

285 S. James Anaya, Indigenous Peoples in International Law 9 (2d ed. 2004).

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