

## Book Review

# A Very Durable Myth: A Critical Commentary on Jon Van Dyke's *Who Owns the Crown Lands of Hawai'i?*

WHO OWNS THE CROWN LANDS OF HAWAI'I? By Jon M. Van Dyke.  
Honolulu: University of Hawai'i Press. 2008. Pp. vii, 485. \$28.00.

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### I. INTRODUCTION

The title question of Professor Jon Van Dyke's recent book *Who Owns the Crown Lands of Hawai'i*<sup>2</sup> does not require a book to answer. The answer is simple and not seriously contested, even in Professor Van Dyke's book. Some of the Crown Lands with which the book is concerned<sup>3</sup> are owned by the United States Government,<sup>4</sup> and the rest are owned by the State of Hawai'i.<sup>5</sup>

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Portions of this article were originally published in Paul M. Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai'i*, 20 U. HAW. L. REV. 99 (1998) [hereinafter Sullivan, *Customary Revolutions*], and 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), available at [http://www.hawaii.edu/aplpj/articles/APLPJ\\_03.2\\_sullivan.pdf](http://www.hawaii.edu/aplpj/articles/APLPJ_03.2_sullivan.pdf) [hereinafter Sullivan, "Recognizing" the Fifth Leg].

<sup>2</sup> JON VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? (2008).

<sup>3</sup> Some of the original Crown Lands were sold at various times and are now in private hands, but those lands are not the focus of Professor Van Dyke's book.

<sup>4</sup> The title of the United States derives from the cession of the Crown Lands and other government lands of the former Kingdom of Hawai'i by the successor Republic at the time of annexation. Through the Newlands Resolution, Act of July 7, 1898, 30 Stat. 750, Congress accepted the cession by the Republic of Hawai'i to the United States of "the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining." Act of July 7, 1898, 30 Stat. 750; United States v.

They are former lands of the Hawaiian monarchy—about 940,000 acres in extent or about one-quarter of the lands within the state's boundaries<sup>6</sup>—ceded

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Mowat, 582 F.2d 1194, 1206 (9th Cir. 1978), *cert. denied*, 439 U.S. 967 (1978); *see also* Bishop v. Mahiko, 35 Haw. 608 (1940). This grant was subject to the proviso:

That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.

Act of July 7, 1898, 30 Stat. 750; *see also* Arakaki v. Lingle, 477 F.3d 1048, 1057 (9th Cir. 2007).

<sup>5</sup> The State of Hawai'i's title derives from the Hawai'i Admission Act, Hawai'i Admission Act of 1959, Pub. L. No. 86-3, § 1, 73 Stat. 4 (codified as amended at 48 U.S.C. § 491), by which the Territory of Hawai'i was admitted as a State of the United States. Subsection 5(b) of the Act provides:

Except as provided in subsections (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property, and to all lands defined as 'available lands' by section 203 of the Hawaiian Homes Commission Act, 1920, as amended, within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union. The grant hereby made shall be in lieu of any and all grants provided for new States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii.

*Id.* § 5(b), 73 Stat. at 5. Subsections (c) and (d) of the Act provided for the reservation or setting aside of certain portions of the ceded lands for the United States. *Id.* § 5(c), 73 Stat. at 5. Subsection (g) of the Act confirms that the term "lands and other properties" as used in the Act:

[I]ncludes public lands and other public property, and the term public lands and other public property means, and is limited to, the lands and properties that were ceded to the United States by the Republic of Hawaii under the joint resolution of annexation approved July 7, 1898, or that have been acquired in exchange for lands or properties so ceded.

*Id.* § 5(g), 73 Stat. at 6.

The title of the State of Hawai'i is subject to a trust obligation set out in subsection 5(f) of the Admission Act as follows:

The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.

*Id.* § 5(f), 73 Stat. at 6.

<sup>6</sup> VAN DYKE, *supra* note 2, at 216.

to the United States at annexation in 1898 and in part further transferred to the State of Hawai‘i at statehood in 1959.<sup>7</sup>

Instead of answering its title question, Professor Van Dyke’s book offers passionate advocacy for its answer to a different question: Who should own Hawai‘i’s Crown Lands? Even for this question, however, a book is not needed to state or explain Professor Van Dyke’s proposed answer. The book’s concise thesis is that the Crown Lands should not be owned by the federal or state government, but instead should be placed in the hands of a Native Hawaiian nation or government (presumably by the state and federal owners and without compensation to either government) for the use and benefit of “the Native Hawaiian People.”<sup>8</sup> The book presents a wealth of information on

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<sup>7</sup> Strictly speaking, there are no longer any “Crown Lands.” The term is used for convenient reference, but the former Crown Lands of the monarchy were merged with the other public lands of the kingdom and ceded to the United States when Hawai‘i was annexed to the United States in 1898, and they have the same legal status as other ceded lands. For information on the ceded lands in the context of Native Hawaiian claims such as those asserted in Professor Van Dyke’s book, see 1 NATIVE HAWAIIANS STUDY COMMISSION, REPORT ON THE CULTURE, NEEDS AND CONCERNS OF NATIVE HAWAIIANS 333-70 (1983), available at [http://wiki.Grassrootinstitute.org/mediawiki/index.php?title=Native\\_Hawaiians\\_Study\\_Commission\\_Report](http://wiki.Grassrootinstitute.org/mediawiki/index.php?title=Native_Hawaiians_Study_Commission_Report) (report made pursuant to Native Hawaiians Study Commission Act, Pub. L. NO. 96-565, 94 Stat. 3321 (1980) (codified at 42 U.S.C. § 2991a), and concluding that Native Hawaiians had no valid legal claims)). *But see* dissenting view in 2 NATIVE HAWAIIANS STUDY COMMISSION, REPORT ON THE CULTURE, NEEDS AND CONCERNS OF NATIVE HAWAIIANS 7-11, 80-99 (1983) (proposing moral rather than legal bases for reparations).

<sup>8</sup> Strictly speaking, there is no “Native Hawaiian People” except in the sense of a racial group whose members are defined as having at least one pre-contact Hawaiian ancestor; that is, one ancestor approximately nine generations ago who lived in the Hawaiian islands. A person could qualify for this group with as little as 1/512 pre-contact ancestry. *See Rice v. Cayetano*, 528 U.S. 495, 527 (Breyer, J., concurring); *see also infra* note 130 and accompanying text.

The legal classifications “native Hawaiian,” “Hawaiian” and “Native Hawaiian” are creatures of statute. In 1921, Congress passed the Hawaiian Homes Commission Act (HHCA), Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, 42 Stat. 108 (1921), which created a Territorial homesteading program for “native Hawaiians” (note the lower case “n” in “native”), defined in HHCA section 201(7) as “any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.” *Id.* § 201(7), 42 Stat. at 108. The term appears again in the Hawaii Admission Act which lists “the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended” as one among five permissible uses of certain lands transferred from the United States to the newly-formed State of Hawai‘i. Hawaii Admission Act of 1959, § 5(f), 73 Stat. at 6. A similar definition of “native Hawaiian” appears in the Hawaii Revised Statutes as it related to the Office of Hawaiian Affairs which defines “Native Hawaiian” as:

[A]ny descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.

Hawai'i's constitutional and legal history, but nearly all of that is peripheral to its simple and straightforward argument that (1) in the mid-nineteenth century, when Hawai'i's land was being divided among the King, the government, the chiefs and the commoners, the lands allocated to commoners under the law of the kingdom were less than their proper share under the custom of the kingdom; (2) that the lands reserved by the king at that time as his private property, called the Crown Lands under the monarchy and owned now by the United States or the State of Hawai'i, were held by him and by the succeeding Hawaiian monarchs in trust for the kingdom's native commoners; and (3) that these lands should now be made available to the Native Hawaiian People, defined solely by race, perhaps through a newly-formed Native Hawaiian government, to redress this asserted historical error.

Professor Van Dyke's book does not state that all or any individual Native Hawaiians today have straightforward claims to the Crown Lands which could and should be adjudicated in a court. If there had been any valid claims of this sort, it might be supposed that they would have long ago have been presented and adjudicated. No argument is presented that chains of title, or adverse possession, or any other traditional legal grounds for judicial resolution of issues of title to real property prove, or even suggest, that most or all persons of Hawaiian ancestry have current valid claims to these lands.<sup>9</sup>

Instead, while the book speaks much of law and history, it advocates a political change. One might grumble that it lacks the rigorous discipline and balance of a legal treatise or a work of historical scholarship, but that is not the book's purpose, and its real shortcoming is not that it is unscholarly, but that its

HAW. REV. STAT. § 10-2 (1993 & Supp. 2007).

"Hawaiian" is defined as: "[A]ny descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." *Id.*

The term "Native Hawaiian" (upper case "N") is used in federal law and usually defines "Native Hawaiian" as anyone with at least one pre-contact Hawaiian ancestor. *See, e.g.*, Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (2000); Apology Resolution of 1993, Pub. L. No. 103-150, 107 Stat. 1510.

In these definitions, the operative test is purely one of race, or as the Court put it in *Rice v. Cayetano*, ancestry used as a proxy for race. There are no other nonracial or race-neutral criteria such as membership in a tribe, residence within a geographic region or adherence to a particular religion or lifestyle which makes one a "Native Hawaiian."

<sup>9</sup> At pages 292-94 of his book, Professor Van Dyke argues that Native Hawaiians have a "collective property right that is cognizable under U.S. law," VAN DYKE, *supra* note 2, at 292-94, but this concept is not developed and there is no discussion which indicates that a lawsuit seeking recognition of this "collective property right" would have any likelihood of success. Two possible bases of such collectivist claims deriving from federal law concerning American Indians—aboriginal title and recognized title—were examined in detail in the 1983 Native Hawaiians Study Commission report and found to be inapplicable. 1 NATIVE HAWAIIANS STUDY COMMISSION, *supra* note 7, at 333-45.

advocacy does not withstand probing examination. What the book proposes is a giveaway of state and federal public property in a race-conscious manner in order to radically change a 160 year old race-neutral land reform program with which the United States had nothing to do, conducted by a foreign government—the Kingdom of Hawai‘i—pursuant to its own validly-enacted laws, which achieved very legitimate objectives for the kingdom and its populace largely through the benevolent supervision of a visionary monarch. Professor Van Dyke’s book simply does not show that either the federal government or the State of Hawai‘i has any reason or any authority to pursue such an endeavor.

The book does show that there was some unfairness in the kingdom’s original division of its lands, but this unfairness consisted for the most part of individual acts of misfeasance, fraud or favoritism, both by native leaders and some immigrants, contrary to the law of the kingdom, toward individual claimants or groups of claimants and had nothing to do with the racial background or ancestry of any of the participants or any action or inaction by the United States.<sup>10</sup> It also shows that nearly all of the lands distributed in the original partition went into native hands (noble or commoner), and while a significant part eventually found its way thence, over time, into the hands of American and European immigrants, a great part of the most valuable of lands of the kingdom remains under Native Hawaiian control today.<sup>11</sup> Ironically, it even shows that contrary to the book’s own thesis, Native Hawaiians do *not* have and never had any valid claim to the Crown Lands or other ceded lands, before or after the termination of the monarchy in 1893.<sup>12</sup>

## II. A BRIEF HISTORICAL BACKGROUND

Professor Van Dyke’s book provides a fascinating, broad-ranging survey of Hawai‘i’s legal and constitutional history. There is a romantic and sometimes sad character to that history which has influenced the development of both Kingdom law and United States law concerning the islands. Professor Van Dyke’s book captures well these elements of the islands’ history.

Hawai‘i’s first known contact with Western civilization occurred when Captain James Cook, exploring the Pacific for the British government, made landfall in the islands in 1778.<sup>13</sup> The story that followed was not one of

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<sup>10</sup> See, e.g., VAN DYKE, *supra* note 2, at 32-50.

<sup>11</sup> See, e.g., *id.* at 307-15. Of the lands under Native Hawaiian control today, Kamehameha Schools “control[s] the largest collection of lands in Hawai‘i except for those administered by the State Government,” *id.* at 315, and other *ali‘i* trusts. *Id.* at 324-43.

<sup>12</sup> See *infra* notes 54-79 and accompanying text.

<sup>13</sup> 1 RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM 12 (1938). Professor Kuykendall’s three-volume work is the standard historical work on the Hawaiian monarchy. Other important historical works on the subject include JON J. CHINEN, THE GREAT MAHELE, HAWAII’S LAND

invasion and domination by European powers, but a story of immigration and assimilation on the part of both the pre-contact<sup>14</sup> inhabitants and the immigrants and visitors following Captain Cook.<sup>15</sup>

A. *Societal and Governmental Changes After Western Contact*

The first century or more after initial Western contact was deeply disruptive for many of Hawai'i's people.<sup>16</sup> Nevertheless, during the nineteenth century a remarkable transformation took place in which the pre-contact society of the islands undertook to change itself from an essentially stone-age Polynesian culture with an absolute monarchy and a feudal system of land management into a Western-style constitutional monarchy recognized as a political equal by the great powers of Europe and America. Within 75 years, literally everything which normally constitutes "culture" changed. All of the pre-contact concepts of religion, language, governance, education and economic relations were replaced or were modified to such an extent as to be wholly new.<sup>17</sup>

The revolutionary changes were not forced on the monarchs by either foreign invaders or the native populace. Instead, it was the monarchs and their most trusted advisors, both foreign and native, who led the transition. In 1819, it was the then-reigning monarch, Kamehameha II, together with some of the kingdom's highest-ranking women and the high priest, who decreed the abandonment of the religious *kapu* system and ordered the destruction of the temples and statues of the gods.<sup>18</sup> This change predated the arrival of Christian missionaries. However, when the missionaries did arrive a year later, they began their own quiet revolution by introducing Christianity to the islands, by giving Hawaiians a written form of their previously oral language, and by beginning a work of public education of all social classes.<sup>19</sup> The early kings found foreign teachers and advisors for themselves and foreign teachers for their royal children so that they and their successors would not be at a disadvantage in dealing with the naval and commercial visitors from powerful

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DIVISION OF 1848 (1958), and A. GROVE DAY, HAWAII AND ITS PEOPLE (1955).

<sup>14</sup> As used in this review, "pre-contact" refers to the inhabitants of the Hawaiian Islands before the discovery of the islands by English explorer Captain James Cook in 1778.

<sup>15</sup> See generally ELEANOR C. NORDYKE, THE PEOPLING OF HAWAII 18-27 (1989); GAVAN DAWS, SHOAL OF TIME: A HISTORY OF THE HAWAIIAN ISLANDS (1968); I KUYKENDALL, *supra* note 13.

<sup>16</sup> NORDYKE, *supra* note 15, at 18-27.

<sup>17</sup> Sullivan, *Customary Revolutions*, *supra* note 1.

<sup>18</sup> I KUYKENDALL, *supra* note 13, at 65-70. This element of the revolutionary changes of the 19th century was not peaceful. Chief Kekuaokalani, a cousin of Kamehameha II, organized an armed opposition to the abolition of the *kapu*. He was defeated in battle at Kuamo'o by the forces of Kamehameha II. *Id.* at 69.

<sup>19</sup> DAY, *supra* note 13, at 195-98.

European (and later Asian) nations.<sup>20</sup> This program of both royal and public education gave Hawai'i, by the mid-nineteenth century, a populace literate in Hawaiian and, increasingly, in English.<sup>21</sup> Economically, the pre-contact system of barter and subsistence agriculture was quickly supplemented and soon replaced by a money economy.<sup>22</sup>

Along with these societal transformations, the law changed radically, inspired and led once again by the monarchs and the kingdom's high chiefs, under the advice (but not the control) of immigrants who had adopted Hawai'i as their home.<sup>23</sup> In 1839, King Kamehameha III promulgated a written Declaration of Rights, grounded in Western ideals of equality of all under the law and tempering the hitherto unbridled discretion of the upper classes (*ali'i*) to use and abuse the commoners.<sup>24</sup> The kingdom's first constitution, promulgated in 1840 by Kamehameha III, had both Western and Hawaiian elements and was followed by a code of laws grounded in the concept of the rule of law and a transformation of governance from absolute monarchy to a constitutional monarchy, including a system of courts and a bicameral

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<sup>20</sup> *Id.* at 195-98; see also 1 KUYKENDALL, *supra* note 13, at 104-13; JON J. CHINEN, *THEY CRIED FOR HELP* 20 (2002).

<sup>21</sup> DAY, *supra* note 13, at 195-98.

<sup>22</sup> See generally THEODORE MORGAN, *HAWAII: A CENTURY OF ECONOMIC CHANGE: 1778-1876* (1948).

<sup>23</sup> See generally 1 KUYKENDALL, *supra* note 13, at 65-70. The transition was explained thus by the Kingdom's Supreme Court:

In the year 1839 began that peaceful but complete revolution in the entire polity of the Kingdom which was finally consummated by the adoption of the present Constitution in the year 1852. His Majesty Kamehameha III began by declaring protection for the persons and private rights of all his people from the highest to the lowest. In 1840 he granted the first Constitution by which he declared and established the equality before the law of all his subjects, chiefs and people alike. By that Constitution, he voluntarily divested himself of some of his powers and attributes as an absolute Ruler, and conferred certain political rights upon his subjects, admitting them to a share with himself in legislation and government. This was the beginning of a government as contradistinguished from the person of the King, who was thenceforth to be regarded rather as the executive chief and political head of the nation than its absolute governor. Certain kinds of public property began to be recognized as Government property, and not as the King's. Taxes which were previously applied to the King's own use were collected and set apart as a public revenue for Government purposes, and in 1841 his Majesty appointed a Treasury Board to manage and control the property and income of the Government. But the political changes introduced at that period did not affect in the least the King's rights as a great feudal Chief or Suzerain of the Kingdom. He had not as yet yielded any of those rights.

*In re Estate of His Majesty Kamehameha IV*, 2 Haw. 715, 719 (1864); see also Sullivan, *Customary Revolutions*, *supra* note 1.

<sup>24</sup> VAN DYKE, *supra* note 2, at 26-27.

legislature with a lower house in which commoners were represented.<sup>25</sup> These changes involved a dramatic transfer of governmental participation from the king to his subjects, not just to the upper classes (*ali'i*) but also to the commoners (*maka'ainana*).

### III. LAND REFORM IN THE HAWAIIAN KINGDOM

Inevitably, the control of land also changed, and it is with these changes that Professor Van Dyke's book is concerned.

Professor Van Dyke's book envisions the time before, and shortly after, Western contact as one where wise and generous kings and noble chiefs administered the kingdom's land with deference to their spiritual and political advisors, in a relationship of interdependence and cooperation with the commoners, and all in a spirit of righteousness.<sup>26</sup> Native historians of the period describe a far less benign social and political environment, at least as far as the commoners were concerned.<sup>27</sup> Less than a decade before the *Mahele*, the

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<sup>25</sup> See CHINEN, *supra* note 20, at 22; see generally I KUYKENDALL, *supra* note 13, at 167-69.

<sup>26</sup> VAN DYKE, *supra* note 2, at 13-15.

<sup>27</sup> For a record of that time we have the writings of two remarkable men, David Malo and Samuel Kamakau, native-born but educated by the newly-arrived missionaries, who lived during the transition from the old order to the new and chronicled it with candor and ability. Here is how David Malo described the pre-constitutional period:

The king, however, had no laws regulating property, or land, regarding the payment or collection of debts, regulating affairs and transactions among the common people, not to mention a great many other things. Every thing [sic] went according to the will or whim of the king, whether it concerned land, or people, or anything else—not according to law. All the chiefs under the king, including the *konoiki* who managed their lands for them, regulated land matters and everything else according to their own notions. There was no judge, nor any court of justice, to sit in judgment on wrong-doers of any sort. Retaliation with violence or murder was the rule in ancient times. To run away and hide one's self was the only recourse for an offender in those days, not a trial in a court of justice as at the present time. If a man's wife was abducted from him he would go to the king with a dog as a gift, appealing to him to cause the return of the wife—or the woman for the return of the husband—but the return of the wife, or of the husband, if brought about, was caused by the gift of the dog, not in pursuance of any law. If any one had suffered from a great robbery, or had a large debt owing him, it was only by the good will of the debtor, not by the operation of any law regulating such matters that he could recover or obtain justice. Men and chiefs acted strangely in those days.

DAVID MALO, HAWAIIAN ANTIQUITIES 57-58 (Nathaniel Emerson trans., 1951). David Malo lived from 1795 to 1853.

To like effect is Samuel Kamakau (1815-1876):

If a chief became angry with a commoner he would dispossess him and leave him landless, but the commoners submitted to the chiefs and consented afterwards to endure hard labor and work like slaves under the chiefs. It was not for a commoner to do as he liked as if what he had was his own. If a chief saw that a man was becoming affluent, was



absolute power of the monarch to do as he wished with any property within the kingdom was unquestioned,<sup>28</sup> subject only to the sanction of revolution.<sup>29</sup> David Malo recorded that “[o]nly a small portion of the kings ruled with kindness; the large majority simply lorded it over the people.”<sup>30</sup>

Between 1839 and 1850, however, Kamehameha III, the successor to both the absolute governmental power and the ownership of the lands in the islands,<sup>31</sup> voluntarily divested himself of most of that control. The process gave fee simple titles not only to the nobles of the kingdom, but also to commoners and even to foreigners.<sup>32</sup> At the same time, the arbitrary power of the *ali'i* over the commoners was restricted, the commoners were given rights under the new laws, and a broad program of land reform was undertaken.<sup>33</sup>

Throughout these changes, the monarchs and leading chiefs of the islands remained in charge of both the nation and the processes of change. These changes were not like the Magna Carta, imposed on an unwilling monarch

a man of importance in the back country, had built him a good house, and had several men under him, the chief would take everything away from him and seize the land, leaving the man with only the clothes on his back. Men feared in old days being driven away and having to take to the highway, or even to have suspicion fasten upon them and be killed, as often happened in the old days.

SAMUEL KAMAKAU, *RULING CHIEFS OF HAWAII* 229 (rev. ed. 1992).

<sup>28</sup> *In re Estate of His Majesty Kamehameha IV*, 2 Haw. 715. The court noted:

At the death of Kamehameha I, his son, Liholiho, Kamehameha II, was recognized as King in accordance with his father's express will. Along with the Crown, Kamehameha II inherited all his father's rights as an absolute sovereign and as suzerain or lord paramount of all the lands in the Kingdom, which rights, unimpaired, descended with the Crown to Kamehameha III.

*Id.* at 719-20. Ralph Kuykendall made essentially the same point a century later:

Long after the death of Kamehameha I, at a time when the council of chiefs had become very powerful, it was declared in the constitution of 1840 that, though “all the land from one of the Islands to the other” belonged to Kamehameha, “it was not his own private property. It belonged to the chiefs and the people in common, of whom Kamehameha I was the head, and had the management of the landed property.” In practice, however, it made little difference to such a ruler as Kamehameha I whether he owned the land outright or merely in a representative capacity; in either case, he disposed of it as he saw fit, and probably it never occurred to him to theorize about it.

1 KUYKENDALL, *supra* note 13, at 269 (citation omitted).

<sup>29</sup> VAN DYKE, *supra* note 2, at 16; Sullivan, *Customary Revolutions*, *supra* note 1, at 107-08.

<sup>30</sup> MALO, *supra* note 27, at 61.

<sup>31</sup> *In re Estate of His Majesty Kamehameha IV*, 2 Haw. 715.

<sup>32</sup> 1 KUYKENDALL, *supra* note 13, at 269-98. Foreigners were early admitted to share in the governance of the kingdom, first as advisors to the monarch and eventually, as subjects with equal status with the other subjects of the monarchy. See Patrick W. Hanifin, *To Dwell on the Earth in Unity: Rice, Arakaki, and the Growth of Citizenship and Voting Rights in Hawaii*, 5 HAW. B. J. 15, 18 (2001).

<sup>33</sup> See generally 1 KUYKENDALL, *supra* note 13.

under threat of force,<sup>34</sup> but they were indubitably revolutionary. What made them truly remarkable is that the revolution was managed by the government.<sup>35</sup>

As often happens with revolutionary change, some things nobly conceived failed to work out as planned. Professor Van Dyke's book focuses on two of these—the distribution of land to commoners, and the King's reservation of a portion of the kingdom's land as his own individual property. He concludes that there was unfairness to the commoners, and he proposes a vast redistribution of the former lands of the monarch, now owned by the state and federal governments, to reverse these alleged errors in the kingdom's judgment.

#### IV. ISSUES OF FAIRNESS IN THE ALLOCATION OF LAND TO COMMONERS

The kingdom's land revolution was in part an exercise of the King's pre-constitutional absolute authority to redistribute lands of the kingdom and in part one of the earliest creations of the post-constitutional system of written laws in a participatory legislative environment. It was under and through that new system of laws that Kamehameha III crafted the division of the kingdom's land among himself, the kingdom's chiefs, its commoners, and its government.

The approach of the King and the kingdom to this redistribution of land was not by arbitrary fiat, but by legislation, in 1845, which established a commission to "settle land titles."<sup>36</sup> The responsibility of the commission was broad, however, and as much creative as adjudicatory.

Claims of one character and another to the possession of land had grown up, but there was no certainty about them, and all was confusion; and finally, after years of discussion had between the King, the chiefs and their foreign councillors[sic], the plan of a Board of Commissioners to Quiet Land Titles was evolved, and finally established by law, for the purpose of settling these claims and affording an opportunity to all persons to procure valid paper titles emanating from the government representing the sovereignty, the source of all title to land in this Kingdom, to the land which they claimed.<sup>37</sup>

In 1846, a Declaration of Principles adopted by the Board of Commissioners recognized three classes of people having customary rights<sup>38</sup> in the land or its

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<sup>34</sup> 59 CONG. REC. 7451 (1920) (statement of Del. Kalaniana'ole); see VAN DYKE, *supra* note 2, at 26.

<sup>35</sup> Sullivan, *Customary Revolutions*, *supra* note 1, at 112-22.

<sup>36</sup> VAN DYKE, *supra* note 2, at 32-36.

<sup>37</sup> Thurston v. Bishop, 7 Haw. 421, 428 (1888).

<sup>38</sup> As noted previously, the existence and protection of "rights" depended much on the temperament of landlords. See *supra* notes 27-30 and accompanying text. Such rights as tenants possessed were also offset by obligations to furnish labor and other taxes to landlords and the king. PRINCIPLES ADOPTED BY THE BOARD OF COMMISSIONERS TO QUIET LAND TITLES IN THEIR ADJUDICATION OF CLAIMS PRESENTED TO THEM (1846), *reprinted in* WHO OWNS THE

products: the King or government (these terms are used interchangeably), the landlords, and the tenants. The commission proposed to the King that each group should be granted one-third of the kingdom's lands.<sup>39</sup>

Not unexpectedly, the aspirations of the Land Commission were not all achieved. There was an understandable reluctance on the part of the *ali'i* to surrender their land and their prerogatives.<sup>40</sup> Much debate took place in the development of laws during, and shortly, after, the *Mahele*.<sup>41</sup> The 1850 Kuleana Act,<sup>42</sup> specifically designed to put land into the hands of the *maka'ainana*, limited awards to commoners to the lands the claimants did actually "occupy and improve."<sup>43</sup> The *maka'ainana* received less than one percent by acreage, and while these lands (nearly all in active cultivation because that was what entitled a claimant to a *kuleana* award) were among the most valuable in the kingdom,<sup>44</sup> the division certainly seems not to have conformed to the division by thirds originally proposed.<sup>45</sup> Even the king received less than a third.<sup>46</sup>

CROWN LANDS OF HAWAII?, *supra* note 2, app. 1, at 385.

<sup>39</sup> *Id.* at 385-96.

Ancient practice, according to testimony, seems to have awarded to the tenant less than justice and equity would demand, and to have given to the King more than the permanent good of his subjects would allow. If the King be disposed voluntarily to yield to the tenant a portion of what practice has given to himself, he most assuredly has a right to do it; and should the King allow to the landlord one third, to the tenant one third, and retain one third himself, he, according to the uniform opinion of the witnesses, would injure no one unless himself; and in giving this opinion, the witnesses uniformly gave it against their own interests.

*Id.* at 387.

<sup>40</sup> 1 KUYKENDALL, *supra* note 13, at 274.

<sup>41</sup> VAN DYKE, *supra* note 2, at 32-51; 1 KUYKENDALL, *supra* note 13, at 278-98.

<sup>42</sup> Kuleana Act (Enactment of Further Principles) (1850), *reprinted in* WHO OWNS THE CROWN LANDS OF HAWAII?, *supra* note 2, app. 3, at 422-23.

<sup>43</sup> Even the original concept of the *Mahele* seemed to restrict awards to the *maka'ainana* to lands they actually cultivated and occupied. See LILIKALA KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES 295 (1992).

<sup>44</sup> Kuykendall observed that:

[N]early all of the kuleanas were lands very valuable for native agriculture as long as the appurtenant water rights were assured to them, while extensive areas of crown, government and chiefs' lands were useless mountain wastes or lava strewn deserts or were covered with forests which benefited all by conserving the water supply.

1 KUYKENDALL, *supra* note 13, at 294.

<sup>45</sup> The precise amounts of land distributed to each of the classes of recipients are not clear. Kuykendall and Chinen report the following estimates:

Crown lands:	Somewhat less than 1,000,000 acres
Government lands:	Nearly 1,500,000 acres
Chiefs' lands:	A little more than 1,500,000
Kuleana awards:	A little less than 30,000 acres.

1 KUYKENDALL, *supra* note 13, at 294; CHINEN, *supra* note 20, at 72. In general, *Mahele* awards

Even under the 1850 law, specifically intended to protect native tenants, tenant claims were not always made, and those made did not always succeed.<sup>47</sup> In some cases, through ignorance on the part of potential claimants or through selfish decisions on the part of both native and immigrant governmental officials, nobles, and others, claimants failed to receive even the land actually cultivated.<sup>48</sup>

Professor Van Dyke's book argues that the *maka'ainana* as a class were unfairly treated in the allocation of land by not receiving the one-third of the kingdom's land recommended by the Land Commission.<sup>49</sup> The authorities cited, however, indicate that under either the old or the new order, the Land Commission's recommendation was just that—a recommendation—and that the decisions of the King and the legislature to adopt a different standard of division was legitimate whether viewed from the old or the new perspective. The division by thirds raised expectations on the part of the commoners that were not fulfilled, and their discontent persists in some of their descendants to this day. Nevertheless, as Professor Van Dyke's book itself points out, Kamehameha III, like his predecessors, had the right and power under ancient tradition to redistribute the kingdom's land at will, a right called *kalai'aina*.<sup>50</sup> To the extent that he departed from the recommendations of the Land Commission, he was entirely justified by custom and tradition in so doing, and his subjects had no basis under customary traditional law to complain. A departure from the recommendation was also justifiable under the new administration of the King, the Privy Council and the new legislature under the new western-style constitution and a code of generally-applicable written laws. The commoners had access to the King and in fact petitioned both King and legislature for relief from what they saw as unfair treatment.<sup>51</sup> Professor Van Dyke does not suggest that the constitutional government lacked the constitutional power to enact new laws that departed from the Land Commission recommendation. Indeed, such a constitutional defect could have been corrected simply by the King's will; even under the kingdom's constitution, the constitution was the King's to give, take away, or modify.<sup>52</sup>

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and *kuleana* awards were to native Hawaiians. See generally KAME'ELEIHIWA, *supra* note 43.

<sup>46</sup> 1 KUYKENDALL, *supra* note 13, at 294.

<sup>47</sup> See generally CHINEN, *supra* note 20; see also KAME'ELEIHIWA, *supra* note 43, at 295-98.

<sup>48</sup> 1 KUYKENDALL, *supra* note 13, at 274 ("One great obstacle which stood in the way of a change in the land system was the reluctance of the chiefs to surrender the hold on the common people secured to them by the feudal tenures and the related labor system.").

<sup>49</sup> See VAN DYKE, *supra* note 2, at 50.

<sup>50</sup> See *id.* at 17; see also CHINEN, *supra* note 20, at 17-18.

<sup>51</sup> CHINEN, *supra* note 20, at 24; KAME'ELEIHIWA, *supra* note 43, at 193-98.

<sup>52</sup> Sovereignty, in the kingdom, resided in the monarch, not the "people," and that sovereignty included the right to establish, amend, and repeal the constitution and laws of the Kingdom. This point was clearly articulated by the Hawaiian Kingdom's Supreme Court in the

To treat the Land Commission recommendation for division by thirds as having greater weight or dignity than the King's exercise of traditional authority or the constitutional government's enactment of new laws elevates a simple report of customary practice and a recommendation for a change to the status of super-constitutional mandate. The Land Commission recommendation may have raised the expectations of the commoners that they would be treated better than they were, but Professor Van Dyke's book provides no basis to conclude that

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case of *Rex v. Booth*, 2 Haw. 616 (1863). A law of the kingdom prohibited sales of liquor to "native subjects" of the Kingdom, but not to other inhabitants or visitors. Booth was charged with violating this law, and in his defense, he argued that the law was unconstitutional under the Kingdom's 1852 Constitution because it was discriminatory or that it was "class legislation." *Id.* at 618-19. Booth asserted that in constitutional governments, legislative authority emanates from the people, and that the legislature acts as agent of the people, and that "it is against all reason and justice to suppose . . . that the native subjects of this Kingdom ever entrusted the Legislature with the power to enact such a law as that under discussion." *Id.* at 629-30. The court responded:

Here is a grave mistake—a fundamental error—which is no doubt the source of such misconception . . . . The Hawaiian Government was not established by the people; the Constitution did not emanate from them; they were not consulted in their aggregate capacity or in convention, and they had no direct voice in founding either the Government or the Constitution. King Kamehameha III originally possessed, in his own person, all the attributes of absolute sovereignty.

*Id.* at 630. The court reviewed Kamehameha III's promulgation of the 1840 Constitution and its 1852 successor and explained that by these documents the King had voluntarily shared with the chiefs and people of the Kingdom, to a limited degree, his previously absolute authority. The court explained:

Not a particle of power was derived from the people. Originally the attribute of the King alone, it is now the attribute of the King and of those whom, in granting the Constitution, he has voluntarily associated with himself in its exercise. No law can be enacted in the name, or by the authority of the people. The only share in the sovereignty possessed by the people, is the power to elect the members of the House of Representatives; and the members of that House are not mere delegates.

*Id.* at 630-31. It was understood that this sharing of sovereignty could be revoked or modified by the ruling monarch. In 1864, Kamehameha V promulgated a new Constitution on his own authority when the Kingdom's legislature was unable to agree on one. See 2 KUYKENDALL, *THE HAWAIIAN KINGDOM 1854-1874: TWENTY CRITICAL YEARS* 132 (1953). Kamehameha announced:

As we do not agree, it is useless to prolong the session, and as at the time His Majesty Kamehameha III gave the Constitution of the year 1852, He reserved to himself the power of taking it away if it was not for the interest of his Government and people, and as it is clear that that King left the revision of the Constitution to my predecessor and myself therefore as I sit in His seat, on the part of the Sovereignty of the Hawaiian Islands I make known today that the Constitution of 1852 is abrogated. I will give you a Constitution.

*Id.* Queen Lili'uokalani likewise stated in her memoir: "Let it be repeated: the promulgation of a new constitution, adapted to the needs of the times and the demands of the people, has been an indisputable prerogative of the Hawaiian monarchy." LILI'UOKALANI, *HAWAII'S STORY BY HAWAII'S QUEEN* 21 (1898).

the kingdom's differing implementation of those recommendations deprived the commoners of anything to which they were entitled under either the old or new order of the kingdom.

There were certainly shortcomings, errors and even some wrongdoing involved in the land reform process, but there was nonetheless a major shift of landownership in favor of the commoners; over 28,658 acres of arable land of the kingdom was awarded to 8,421 *kuleana* claimants.<sup>53</sup> The commoners' awards were in addition to awards of roughly 1,500,000 acres to native chiefs (*ali'i* and *konoiki*) and just under 1,000,000 acres to Kamehameha III, the native monarch.<sup>54</sup> The process was solely the creation of the Hawaiian Kingdom's government. Foreign-born advisors played an important role, but they did not control the process.

It is easy to fault the *Mahele* and its working out from today's perspective. Nevertheless, viewed as the earliest efforts of a nation seeking to pass from absolutism to constitutionalism, it deserves respect. More to the point, Professor Van Dyke's book provides no basis to reopen it now to make a race-conscious change or any change at all; it does not show that the process was unfair to all or most persons of Hawaiian ancestry at the time, or that there was any race-based injustice or other enduring societal wrong that deserves a race-linked remedy, or any remedy, now.

#### V. THE CROWN LANDS

It is not obvious why the property of the United States and the State of Hawai'i should be offered up today to change the outcome of this land reform program of a foreign government. Professor Van Dyke's book finds a basis in another element of the land reform program that also did not work out as originally intended: The apportionment of land to the King.

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<sup>53</sup> VAN DYKE, *supra* note 2, at 48. Lilikala Kame'eiehiwa points out that:

With only 8,421 *kuleana* awards given to a population of 88,000, it may have been that only heads of households were granted awards. And, if there were ten or eleven people in each family residence (extended families lived together), the number of awards might have been a fair representation of the populace . . . .

KAME'EIEHIWA, *supra* note 43, at 296. She adds that "the idea seems far-fetched," but the logic makes sense. *Id.* It should also be noted that not all natives would be farmers. Some natives were fishermen; others worked at various jobs in the developing urban areas, or joined the crews of passing ships. See DAY, *supra* note 13, at 294-304; see also 1 KUYKENDALL, *supra* note 13, at 95-97.

<sup>54</sup> See *supra* note 52 and accompanying text.

A. *The Apportionment of Lands to the Crown*

The second essential point of Professor Van Dyke's thesis is that, assuming there was unfairness, the Crown Lands should be drawn upon to correct it.<sup>55</sup> His argument is not new; it is the same argument, with a few adjustments and additional candor, made by Prince Jonah Kuhio Kalaniana'ole. Prince Kuhio was Hawai'i's Territorial delegate to Congress and in 1920 and 1921 he argued to obtain passage of the Hawaiian Homes Commission Act (HHCA).<sup>56</sup> Prince Kuhio argued that the commoners should have been granted the one-third of the kingdom's land recommended in the Principles of the Land Commission, and since they did not, HHCA's homesteading program would help to make things right. Prince Kuhio asserted that the Crown Lands were a sort of residue of the *Mahele* which "reverted to the Crown, presumably in trust for the people," and should be used to correct the unfairness of the *Mahele* division.<sup>57</sup> The Act as passed created a homesteading program, not for all persons of Hawaiian ancestry, but only for those of 50% or greater Hawaiian "blood."<sup>58</sup>

The Prince's description of the origin of the Crown Lands was wholly inaccurate. As Professor Van Dyke's book makes clear, the Crown Lands originally were set aside purposefully for the King and expressly *not* for any other person or group in the islands.<sup>59</sup> After the 1865 legislation making the Crown Lands inalienable, the proceeds were dedicated to the King and (except for the payment of certain debts) *not* to any other person or group in the islands. Nevertheless, the common view in Congress became that the *maka'ainana* of Hawai'i were badly treated by their own government and that it had somehow become the obligation of the United States, by a rough (and inappropriate)<sup>60</sup> analogy to the Government's treatment of Indian tribes, to take steps, using the Crown Lands and perhaps other ceded lands, to correct that mistreatment.<sup>61</sup>

Along the way, class became confused with race. At the time of the *Mahele*, over 1,500,000 acres of land were distributed to the Native Hawaiian *ali'i* and *konohiki* in addition to the 30,000 or so acres allotted to the *maka'ainana*.<sup>62</sup> Some natives did well in the division, many did not, but there was no racial

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<sup>55</sup> VAN DYKE, *supra* note 2, at 10. Hawaiian Homes Commission Act of 1920, Pub. L. No. 67-34 § 201(a)(7) 42 Stat. 108 (1921).

<sup>56</sup> See generally VAN DYKE, *supra* note 2, at 237-53.

<sup>57</sup> *Id.* at 241.

<sup>58</sup> Hawaiian Homes Commission Act of 1920, § 201(a)(7).

<sup>59</sup> VAN DYKE, *supra* note 2, at 52, 71-88.

<sup>60</sup> For a discussion of a similar and unsuccessful Indian analogy see *Rice v. Cayetano*, 528 U.S. 495, 518-22 (2000).

<sup>61</sup> See *id.* at 245.

<sup>62</sup> See *supra* note 52 and accompanying text.

component to the *Mahele*.<sup>63</sup> The debate on the HHCA, however, focused only on the *maka'ainana*, and yet referred throughout to "native Hawaiians" as victims of the *Mahele* and as proper beneficiaries of the HHCA. This was all done without any acknowledgment that many of the *ali'i* and *konohiki* had received extensive awards of land, sometimes at the expense of the tenants on those lands.

Prince Kuhio and the supporters in Congress of the HHCA focused on the Indian analogy as a justification for giving preferential homesteading opportunities to a racially defined subset of a larger racial class.<sup>64</sup> Professor Van Dyke's book takes a somewhat different approach and argues instead that the Crown Lands were actually held by the monarchs for the benefit of the native subjects of the kingdom. He describes a concept of *noblesse oblige* assertedly held by the kingdom's rulers and nobles toward the commoners and grounded in respect for the gods and for righteous behavior. Thus, he argues, the Crown Lands were held by the monarch under a sense of trust, if not a declaration of trust, that they be used for the benefit of the common people.

The difficulty with this theory is that Professor Van Dyke's book shows no support for that position from the time of which he speaks. It identifies nothing in the document separating out the Crown Lands from the other lands of the kingdom as the King's own,<sup>65</sup> or in the kingdom's subsequent legislation or judicial decisions concerning the Crown Lands,<sup>66</sup> or in the actions of the monarch or anyone else, that showed the slightest intention that the Crown Lands were in some way intended to benefit anyone besides the King. Neither Native Hawaiians nor members of any other group within or outside the kingdom were entitled to the Crown Lands. Only the ruling monarch had such an entitlement, either at the time of the *Mahele* when the Crown Lands were intended to benefit the monarch as a private owner or after the 1865 legislation when the Crown Lands were placed under a commission with the proceeds dedicated to the monarch and his successors. In particular, nothing in the key decision of the Kingdom's Supreme Court concerning the Crown Lands<sup>67</sup> mentions anything about any right or acknowledged claim of the *maka'ainana* to those lands.

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<sup>63</sup> There was considerable transfer of land from natives to foreign-born inhabitants after the *Mahele*. See generally KAME'ELEIHIWA, *supra* note 43, at ch. 10 (offering a variety of explanations for these transfers and the likelihood that many did not reflect sound business judgment on the part of the sellers or mortgagors).

<sup>64</sup> VAN DYKE, *supra* note 2, at 244-46.

<sup>65</sup> An Act Relating to the Crown, Government and Fort Lands (1848), reprinted in WHO OWNS THE CROWN LANDS OF HAWAII'I?, *supra* note 2, app. 2, at 397-421.

<sup>66</sup> See, e.g., *In re Estate of His Majesty Kamehameha IV*, 2 Haw. 715 (1864); Act Rendering the Crown Lands Inalienable (1865), reprinted in WHO OWNS THE CROWN LANDS OF HAWAII'I?, *supra* note 2, app. 5, at 433-34.

<sup>67</sup> *In re Estate of His Majesty Kamehameha IV*, 2 Haw. 715.



It must therefore be concluded that to the extent that any of the monarchs used a part of the proceeds of these lands for the benefit of subjects of the kingdom,<sup>68</sup> they did so as a matter of grace, not because of any legal, moral, or cultural obligation of any sort. Indeed, when Queen Lili'uokalani, years after the revolution, sued in the U.S. Court of Claims for compensation for the loss of her entitlement to the income from the Crown Lands, her claim was for deprivation of a private-property "vested equitable life estate" in the use of, and income from, these lands for her life.<sup>69</sup> Her claim was not as a trustee on behalf of others, but for herself.

Professor Van Dyke's book provides no convincing historical analysis to support the notion that there was a general culturally-binding obligation on the part of the King and *ali'i* toward the commoners. It does, however, provide substantial evidence to the contrary. For example, Jon Chinen's book *They Cried for Help*,<sup>70</sup> cited frequently in Professor Van Dyke's book,<sup>71</sup> documents in detail how many of the *ali'i*, for a variety of reasons, took terrible advantage of the trust or helplessness of the commoners to deprive them of their rights.<sup>72</sup> Unquestionably the monarchs were generous with themselves and others. It was precisely the extravagant sale and encumbrance of the Crown Lands by Kamehameha III and Kamehameha IV, confirmed as the King's prerogative by the kingdom's court,<sup>73</sup> that led the legislature of the kingdom, with the King's approbation, to place these lands under the control of a board of commissioners and to make them inalienable.<sup>74</sup> It was not done for the use by the *maka'ainana*, but to prevent the monarch himself from becoming a public charge.<sup>75</sup>

Finally, Professor Van Dyke's book makes clear that when the monarchs and *ali'i* wanted to place their lands under genuine trust obligations enforceable under the kingdom's law, they knew exactly how to go about it. King Lunalilo

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<sup>68</sup> Professor Van Dyke quotes Lili'uokalani to the effect that the Crown Lands were used to generate revenues so that "the reigning sovereign . . . might care for his poorer people," although she asserted at the same time that the Crown Lands were "my own property at this day." VAN DYKE, *supra* note 2, at 227-28 (quoting LILIUOKALANI, HAWAII'S STORY BY HAWAII'S QUEEN 260 (photo. reprint 1997) (1898)).

<sup>69</sup> *Id.* at 230; *Liliuokalani v. United States*, 45 Ct. Cl. 418 (1910).

<sup>70</sup> *Id.*

<sup>71</sup> See, e.g., VAN DYKE, *supra* note 2, at 34-51.

<sup>72</sup> *Id.* at 85-97.

<sup>73</sup> *In re Estate of His Majesty Kamehameha IV*, 2 Haw. 715 (1864).

<sup>74</sup> Act Rendering the Crown Lands Inalienable, *supra* note 66, app. 5, at 433-34.

<sup>75</sup> *Id.*; see also VAN DYKE, *supra* note 2, at 89-92. Professor Van Dyke offers some speculation that the king's assent to the statute reflected the traditional pre-contact system and the traditional *Malama Aina* system, *id.* at 92, but the dramatic difference between the king's absolute control over all real property in the pre-contact period and his powerlessness following the enactment of the 1865 law suggest that the speculation is not well founded.

in 1874, Queen Emma in 1884, and Queen Lili'uokalani in 1909 all established formal charitable land trusts which persist to this day; the first two under the law of the kingdom and the last under Territorial law.<sup>76</sup> The Kamehameha Schools, one of the wealthiest trusts in the nation with assets estimated at more than \$9 billion,<sup>77</sup> was established by Princess Bernice Pauahi Bishop in 1884 and still continues its work exclusively for the benefit of Native Hawaiians.<sup>78</sup> It is unquestionable that these *ali'i* sought to provide for others in need, but they took the formal, public measures best calculated to define their objectives and ensure the wise application of their bounty long into the future.

This same care to define both the objectives and the administrative provisions of a trust is reflected in the statute of 1865 which rendered the Crown Lands inalienable and devoted their proceeds in part to the liquidation of the King's debts and in part to the "use and benefit of the Reigning Sovereign" and the "heirs and successors of the Hawaiian Crown forever." The end of such legislation was that the original purpose of those lands—i.e., maintaining the "Royal State and Dignity"—not be defeated.<sup>79</sup>

It must therefore be concluded on the basis of Professor Van Dyke's book's own evidence that when the Crown Lands were ceded to the United States in 1898, they came as they were held under the monarchy, as public lands, free of any encumbrance by any interest or legitimate claim of either the kingdom's commoners or its subjects of pre-contact ancestry.<sup>80</sup>

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<sup>76</sup> *Id.* at 324-43.

<sup>77</sup> Press Release, Kamehameha Schs., Kamehameha Schs. Releases Fiscal Year 2007 Report (Feb. 9, 2008), <http://www.ksbe.edu/article.php?story=20080209123413641> (last visited Oct. 13, 2008).

<sup>78</sup> VAN DYKE, *supra* note 2, at 307-23.

<sup>79</sup> Act Rendering the Crown Lands Inalienable, *supra* note 66, app. 5, at 433-34.

<sup>80</sup> Professor Van Dyke's book relies heavily on the so-called Apology Resolution of 1993, Pub. L. No. 103-150, 107 Stat. 1510, and various conclusory statements in the preambles to that and other legislation, to show that Native Hawaiians have continuing valid claims to the Crown Lands. See, e.g., VAN DYKE, *supra* note 2, at 17 n.49 and accompanying text; *id.* at ch. 24, n. 109-10 and accompanying text. The fact that Congress has made factual findings concerning the basis for a statute, however, does not establish either the truth of those findings or their legal sufficiency to support the legislative enactment to which they relate. See *United States v. Morrison*, 529 U.S. 598 (2000).

Congress may make laws, but they cannot make or unmake historical facts. With specific reference to the Apology Resolution, there is substantial evidence that the recitations therein are largely inaccurate. See THURSTON TWIGG-SMITH, HAWAIIAN SOVEREIGNTY: DO THE FACTS MATTER? ch. 10 (1996); BRUCE FEIN, HAWAII DIVIDED AGAINST ITSELF CANNOT STAND (2005), available at <http://www.angelfire.com/hi5/bigfiles3/AkakaHawaiiDividedFeinJune2005.pdf>.

It would have been helpful for Professor Van Dyke to have at least noted these dissenting viewpoints. The Supreme Court in *Rice v. Cayetano* set perhaps the best example of dealing with the Apology Resolution; it noted the existence of the Apology Resolution but made no

## VI. THE PAINFUL REALITY OF RACE

Even if the thesis of Professor Van Dyke's book were not flawed as a matter of historic interpretation, the remedy proposed would almost certainly be unachievable as a matter of constitutional law. Its premise is that land owned by the United States and the State of Hawai'i—both entities subject to constitutional mandates that race-conscious decisions meet standards of strict scrutiny<sup>81</sup>—should be devoted exclusively for the benefit of a group defined exclusively by race. No serious argument can be made that the classification "Native Hawaiian" is not racial. The Supreme Court made the racial character of that classification unmistakably clear in *Rice v. Cayetano*<sup>82</sup> and held that a Hawai'i state law excluding non-Hawaiians from the right to vote for officials of the state's Office of Hawaiian Affairs (OHA) violated the Fifteenth Amendment.<sup>83</sup> Before the Court, the State of Hawai'i sought to justify its discriminatory treatment by analogy to federal policy fostering self-government and self-determination of Indian tribes.<sup>84</sup> The Court rejected the argument, pointing out that OHA is not a tribe but a creature of state law, subject to constitutional constraints on state action.<sup>85</sup> The remedy suggested in Professor Van Dyke's book would likewise involve discretionary action by state and federal governments in disposing of public property for the sole use and benefit of a racial group.

*Rice* is an immense obstacle for any governmental action for or against Native Hawaiians as a group. An entire chapter of Professor Van Dyke's book—Chapter 24—is devoted to the *Rice* case. That chapter deserves special review because it goes to extreme lengths to argue away the plain holding of *Rice* and even to find within that decision, by novel twists of logic, some support for the book's thesis.

Strangely (because the book's general tone is respectful of individuals with differing views) the chapter twice suggests that the *Rice* Court's majority was motivated by personal political considerations not related to the merits of the case.<sup>86</sup> Even more strangely, the chapter contents itself with simply making the

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further reference to it as legal or historical authority, preferring other sources which it apparently found more credible. 528 U.S. 495, 505 (2000).

<sup>81</sup> *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995).

<sup>82</sup> 528 U.S. 495 (2000).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 518-22.

<sup>85</sup> *Id.*

<sup>86</sup> See VAN DYKE, *supra* note 2, at 275, 281. Early in his discussion of the majority opinion in *Rice*, Professor Van Dyke states:

Perhaps because it was blinded by a lack of enthusiasm about affirmative action programs, the Supreme Court's majority failed to appreciate that when the people of Hawai'i established OHA as a vehicle to facilitate Native Hawaiian self-determination

accusations; it offers no discussion as to how and whether these political considerations, if they existed, were identified and how they affected the legitimacy of the court's decision.

In the substantive analysis of *Rice*, Professor Van Dyke engages in a striking level of "positive thinking" to argue not just that *Rice* was wrongly decided, but that it actually supports the book's thesis. To do this, however, the analysis reads far more into that decision than Justice Kennedy's straightforward language can support. It states, for example, that the majority decision "provided a road map for Native Hawaiians to follow"<sup>87</sup> in advancing their claims, and that it "acknowledged that the outcome of the *Rice* case would have been different if the native Hawaiians had formed a 'quasi-sovereign' political entity and had conducted elections of their leaders themselves, because it was on this basis that Justice Kennedy distinguished the OHA election from the many elections across the country in which natives select their leaders."<sup>88</sup> These statements mischaracterize the court's decision.

In the section of the *Rice* decision referred to, the court rejected the State of Hawai'i's argument that the OHA election was like elections within Indian tribes. Further, it never "acknowledged" or even hinted that the outcome would have been different if Native Hawaiians had formed some separate entity outside the State government. In its discussion of *Morton v. Mancari*,<sup>89</sup> the court expresses grave doubts whether Native Hawaiians could ever qualify as a tribal entity<sup>90</sup> and said that such an argument would raise questions of "considerable moment and difficulty"<sup>91</sup> and involve "some beginning premises not yet established in our case law."<sup>92</sup> If there is any "road map" in *Rice* for

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they were acting consistently with steps the United States has taken for many of its native people and consistently with its obligation under international law.

*Id.* at 275. At the end of his discussion of the majority opinion in *Rice*, Professor Van Dyke notes the Court's criticism of the Office of Hawaiian Affairs racial qualifications for voting as "demeaning" and "would give rise to the same indignities, and the same resulting tensions and animosities [that] the [Fifteenth] Amendment was designed to eliminate." VAN DYKE, *supra* note 2, at 281. He then continues:

This characterization appears to have been based either on an ideological perspective that rejects the value of diversity in our pluralistic country and the obligation to rectify the injustices or on a complete misunderstanding of the careful balance that has been achieved in Hawai'i—based on the respect and honor that all races have toward the Native Hawaiians—and the widespread support that exists in Hawai'i for a just resolution of the claims of the Native Hawaiian people.

*Id.*

<sup>87</sup> *Id.* at 278.

<sup>88</sup> *Id.*

<sup>89</sup> 417 U.S. 535 (1974).

<sup>90</sup> See *infra* notes 111-114 and accompanying text.

<sup>91</sup> *Rice v. Cayetano*, 528 U.S. 495, 518 (2000).

<sup>92</sup> *Id.*

Native Hawaiian claims, it arguably shows a dead end street rather than a highway.

In another twist of legal analysis, Professor Van Dyke dismisses the central point of *Rice*—that the classifications “Hawaiian” and “native Hawaiian” are racial—as dicta;<sup>93</sup> as if the point were collateral to the court’s holding and therefore not binding precedent for future decisions. In fact, *Rice* addressed and decided two central issues; first, that the classifications in question were racial, and second, that because they were racial, they were impermissible grounds for denial of the right to vote in the Hawai‘i statewide elections. The holding that the classifications were racial was entirely separate, as a matter of law and as a matter of logic, from the consequent holding that the denial of the franchise based on those classifications was unconstitutional. It stands alone, independent of its application to the question of the franchise, as compelling precedent in future challenges under the Fourteenth Amendment or the Due Process clause of the Fifth Amendment to governmental decisions based on Hawaiian ancestry.<sup>94</sup>

Professor Van Dyke’s book further stretches the language of *Rice* at page 277 where it states that “Justice Kennedy explained that the people of the State of Hawai‘i established the Office of Hawaiian Affairs in 1978 pursuant to their fiduciary duties—duties that had been transferred in part from the United States to the State in the 1959 Admission Act.” This sentence implies that Justice Kennedy had affirmed that the people of the State of Hawai‘i did in fact have fiduciary duties to Native Hawaiians under the Admission Act. Even a casual

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<sup>93</sup> VAN DYKE, *supra* note 2, at 279.

<sup>94</sup> Professor Van Dyke also argues that *Rice* is somehow limited to its Fifteenth Amendment context. He quotes Judge David Ezra (whose decision in the district court was resoundingly overruled by the Supreme Court) for the proposition (following remand) that the Supreme Court’s decision “was a narrow one, restricted to the single issue of state-sponsored Hawaiian-only elections.” VAN DYKE, *supra* note 2, at 279 (quoting “Transcript of Proceedings before Chief United States District Judge David Alan Ezra at 7-8,” *Rice v. Cayetano* (D. Haw. Apr. 7, 2000)). He further cites *AFL-CIO v. United States* to the effect that “*Rice* only dealt with the right to vote.” 195 F. Supp. 2d 4, 19 (D.D.C. 2002). For the reasons noted above, the Court’s decision that the classifications “Hawaiian” and “native Hawaiian” were racial were not only central to the *Rice* decision, but it set the standard for future decisions concerning these classifications and others like them that distinguish among people based on ancestry. The point has not been lost on other courts which have cited *Rice* in Fourteenth Amendment contexts. See *Artichoke Joe’s Cal. Grand Casino v. Norton*, 353 F.3d 712, 731 (9th Cir. 2003) (“A racial preference violates equal protection guarantees unless it is ‘narrowly tailored’ to ‘further compelling governmental interests.’ [Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995)]; see also *Rice v. Cayetano*, 528 U.S. 495 (2000) (striking down a race-based voting limitation.”); see also *Malabed v. N. Slope Borough*, 335 F.3d 864 (9th Cir. 2003) (holding Borough’s employment preference for Native Americans unconstitutional under Alaska constitution’s equal protection clause and citing *Rice* in limiting scope of *Morton v. Mancari*, 417 U.S. 535 (1974)).

reading of *Rice* shows that all Justice Kennedy did was to describe what some official documents had recited as the purpose of the creation of OHA;<sup>95</sup> he did not at any point declare these recitations to be accurate statements of fact or law. It should be noted that the claim of a federal trust relationship deriving from the Hawaiian Homes Commission Act of 1920,<sup>96</sup> which provides homesteading opportunities to those of 50% Hawaiian "blood," was rejected in *Han v. Department of Justice*.<sup>97</sup> In his concurring opinion in *Rice*, Justice Breyer bluntly stated that "there is no 'trust' for Native Hawaiians here"<sup>98</sup> and that the ceded lands trust is for "all of Hawai'i's citizens."<sup>99</sup>

Professor Van Dyke's book further overextends the *Rice* majority opinion when it asserts that the majority opinion "provides the essential underpinning for the conclusion that Native Hawaiians are entitled to the same legal status as other native people within the United States, and that rational-basis (rather than strict scrutiny) judicial review should apply to programs for Native Hawaiians."<sup>100</sup> He bases this conclusion on his observation that the *Rice* majority:

[R]epeatedly acknowledges that Native Hawaiians are indigenous, aboriginal, and native by referring regularly and without qualification or limitation to "the native Hawaiian people," "the native Hawaiian population," and "the native population." Justice Kennedy also acknowledged that these "people" share a common "culture and way of life," that they have experienced a common "loss" that has had effects that have "extend[ed] down through generations," and that it has been appropriate for the State of Hawai'i "to address these realities."<sup>101</sup>

The conclusion that the quoted elements of *Rice* support any special status or privileges for Native Hawaiians is simply insupportable. The cited references in Justice Kennedy's opinion to "the native Hawaiian people" and "the native population"<sup>102</sup> all refer to native inhabitants of the islands in the nineteenth century or earlier. The reference to "the native Hawaiian population"<sup>103</sup> was to Congress' consideration of the Hawaiian Homes Commission Act in 1920 and 1921 for the benefit, not of everyone of Hawaiian ancestry, but only those of 50% Hawaiian "blood"<sup>104</sup>—a criteria which that same *Rice* majority found to

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<sup>95</sup> *Rice*, 528 U.S. at 507-08.

<sup>96</sup> Hawaiian Homes Commission Act of 1920, Pub. L. No. 67-34, 42 Stat. 108 (1921).

<sup>97</sup> 824 F. Supp. 1480 (D. Haw. 1993), *aff'd on other grounds*, 45 F.3d 333 (9th Cir. 1995).

<sup>98</sup> *Rice*, 528 U.S. at 525 (Breyer, J., concurring).

<sup>99</sup> *Id.*

<sup>100</sup> VAN DYKE, *supra* note 2, at 279.

<sup>101</sup> *Id.* (citations omitted).

<sup>102</sup> *Id.* (citing *Rice*, 528 U.S. at 506, 524).

<sup>103</sup> *Id.* (citing *Rice*, 528 U.S. at 507).

<sup>104</sup> *Rice*, 528 U.S. at 507-08.

be a racial classification.<sup>105</sup> There is no hint that the majority believes there is a “Native Hawaiian People” today defined in any way other than by race, or entitled to any governmental treatment as a group except as strict scrutiny might permit in the context of a racial preference. The reference to a “culture and way of life”<sup>106</sup> was likewise to the culture and way of life of pre-contact inhabitants of the islands with no implication that there is a common culture and way of life today that differentiates Native Hawaiians from other island inhabitants or entitles them to the constitutional status of tribal Indians. The only “effect” that the opinion refers to as having “[extended] down through generations”<sup>107</sup> is a “sense of loss,”<sup>108</sup> with no necessary implication that remedying such a “sense of loss” is a “compelling government interest.”

What the *Rice* decision *does* say is that in addressing that “sense of loss” the government must act within constitutional bounds.<sup>109</sup> What it *does* say about whether Native Hawaiians are entitled to be treated like tribal Indians is:

If Hawaii’s [racial voting] restriction were to be sustained under [*Morton v. Mancari*]<sup>110</sup> 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, in reciting [in the Hawai’i Admission Act] the purposes for the transfer of lands to the State—and in other enactments such as the Hawaiian Homes Commission Act and the Joint Resolution of 1993—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.<sup>111</sup>

As noted earlier, when this paragraph is read together with the Court’s denunciation of racial discrimination by government,<sup>112</sup> its narrow construction of *Morton v. Mancari* (and its emphasis on that decision’s focus on tribal status

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<sup>105</sup> *Id.* at 517.

<sup>106</sup> This reference was to *Rice v. Cayetano*.

<sup>107</sup> VAN DYKE, *supra* note 2, at 279 (citing *Rice*, 528 U.S. at 524).

<sup>108</sup> *Id.*

<sup>109</sup> *Rice*, 528 U.S. at 524. In an almost certainly unintended sense, Professor Van Dyke’s book is correct in its point (incorrectly linked to the majority opinion in *Rice*) that “Native Hawaiians are entitled to the same legal status as other native people within the United States,” VAN DYKE, *supra* note 2, at 279, because even persons of American Indian ancestry are not entitled to special treatment or consideration solely because of that ancestry; only tribal status provides an exemption from the strict scrutiny standard. *Morton v. Mancari*, 417 U.S. 535 (1974).

<sup>110</sup> 417 U.S. 535.

<sup>111</sup> *Rice*, 528 U.S. at 518-19.

<sup>112</sup> *Id.* at 517.

rather than ancestry as the basis for the special relationship),<sup>113</sup> and the concurring views of Justices Breyer and Souter that "OHA's electorate, as defined in the statute, does not sufficiently resemble an Indian tribe,"<sup>114</sup> it cannot logically be said that *Rice* offers any support of any sort for race-conscious special treatment for persons of pre-contact Hawaiian ancestry.

Taken as a whole, Chapter Twenty-four's optimistic view that *Rice* supports preferential governmental treatment for Native Hawaiians stretches logic past the breaking point. It seems to reflect not a healthy confidence, but a desperate denial of the obvious. "It is like the thirteenth stroke of a crazy clock, which not only is itself discredited but casts a shade of doubt over all previous assertions."<sup>115</sup>

Professor Van Dyke's book continues on in Chapter Twenty-four to argue that even if its proposal for a race-based disposition of the Crown Lands were tested under the strict scrutiny standard applicable under both state and federal law,<sup>116</sup> it would pass because the state and federal governments both have a compelling interest<sup>117</sup> in protecting Native American lands and fostering tribal self-governance and self-determination.<sup>118</sup>

On this argument, Professor Van Dyke's book forfeits an essential point by failing to address the fundamental weakness of the Indian analogy, which is that there is no Indian tribe in Hawai'i, and there never has been one. From Kamehameha I's unification of the islands in 1810 until the present, there has been only one government (or governmental system)<sup>119</sup> at any one time for all the people of Hawai'i. Additionally, from the time of Kamehameha I, the people of Hawai'i have included increasing numbers of persons not descended from pre-contact inhabitants of the islands and the government has been a government of all the people, not one of, by, or for those of pre-contact ancestry alone.<sup>120</sup> Native Hawaiians, defined (as they are in Professor Van Dyke's book) by race alone, do not share the characteristics of a tribe, whether we apply the

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<sup>113</sup> *Id.* at 519-22.

<sup>114</sup> *Id.* at 525.

<sup>115</sup> Eugene R. Fidell, *Maritime Transportation of Plutonium and Spent Nuclear Fuel*, 31 INT'L LAW. 757, 769 (1997) (quoting A.P. HERBERT, UNCOMMON LAW 28 (3d ed. 1937)).

<sup>116</sup> See *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995).

<sup>117</sup> It is of interest that the "compelling interests" proposed by Professor Van Dyke's book do not appear to be tied to the alleged unfairness of the *Mahele*. He refers (without citation to authority) to the "loss of land and resources" as a compelling interest. VAN DYKE, *supra* note 2, at 291. However, it would appear from subsequent pages that he is referring to the cession of the Crown and government lands at annexation, not to the individual instances during the *Mahele* when claimants were allegedly not treated fairly.

<sup>118</sup> VAN DYKE, *supra* note 2, at 290-97.

<sup>119</sup> The United States and the State of Hawai'i are legitimately treated as one governmental system for purposes of this analysis.

<sup>120</sup> Hanifin, *supra* note 32, at 15.



standards used by the Department of the Interior in evaluating applications of mainland Indian tribes<sup>121</sup> or the standards applied by the Supreme Court under what might be called the common-law definition of “tribe.”<sup>122</sup>

Without a link to a true tribe, Native Hawaiians would not have the “special relationship” with the United States which insulates preferences for tribal members from equal protection or due process challenge.<sup>123</sup>

The Supreme Court’s decision in *Morton v. Mancari*<sup>124</sup> explains the significance of this distinction. In *Morton*, the Court upheld an employment preference for Indians in the Bureau of Indian Affairs. In upholding the preference against a challenge that it constituted racial discrimination, the Court noted that preferences for Indians are “political” in nature and would be upheld if they were “tied rationally to the fulfillment of Congress’ unique obligation toward the Indians.” The court made clear, however, that Congress’ “unique obligation” is not to individuals defined by ancestry, but to tribes or “tribal Indians.”<sup>125</sup>

Professor Van Dyke’s book presupposes that there is, or imminently will be, a Native Hawaiian governing entity with at least the powers which a federally-recognized Indian tribe would have, and it proposes that the Crown Lands be entrusted to this entity for the benefit of the racially defined Native Hawaiians.<sup>126</sup> There are, however, grave problems with this proposal which Professor Van Dyke’s book does not address. Most importantly, the book provides no evidence that any Native Hawaiian “tribe” exists. It does not identify or even suggest any unifying group character to “Native Hawaiians” (as defined in Professor Van Dyke’s book) other than race, no “Hawaiian” government, and as the late George Kanahale pointed out, no “distinctly Hawaiian community” (geographical or social) maintaining an existence

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<sup>121</sup> See 25 C.F.R. § 83 (2008); *Price v. Hawaii*, 764 F.2d 623, 626-27 (9th Cir. 1985).

<sup>122</sup> See, e.g., *Montoya v. United States*, 180 U.S. 261, 266 (1901) (“By a ‘tribe’ we understand a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory.”).

<sup>123</sup> See Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537 (1996).

<sup>124</sup> 417 U.S. 535 (1974).

<sup>125</sup> *Id.* The Court explained that “[t]he preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.” *Id.* at 554. Later the opinion stated:

The preference is not directed towards a “racial” group consisting of “Indians”; instead, it applies only to members of “federally recognized” tribes. This operates to exclude many individuals who are racially to be classified as “Indians.” In this sense, the preference is political rather than racial in nature.

*Id.* at 554 n.24.

<sup>126</sup> See, e.g., VAN DYKE, *supra* note 2, at 10, 53, 253, 273, 383.

separate from other elements of Hawai'i's population.<sup>127</sup> Nor does the book establish that there is today a "Native Hawaiian People"<sup>128</sup> or Native Hawaiian nation, or that the legislation which has been pending in Congress since 2000 to establish one has a credible chance of being passed and surviving judicial scrutiny.<sup>129</sup> One case which considered a claim by a purported Hawaiian tribe indicates that Hawaiians would be unlikely to establish such tribal status under the standards applied by the Bureau of Indian Affairs to mainland groups, even if those standards could legally be applied to groups in Hawai'i.<sup>130</sup>

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<sup>127</sup> George S. Kanahale, *The New Hawaiians*, 29 SOC. PROCESS HAW. 21 (1982).

<sup>128</sup> Professor Van Dyke's book does not define this term, but context suggests that it is used in the sense defined in Webster's Third New International Dictionary (Unabridged) as "a body of persons that are united by a common culture, tradition, or sense of kinship though not necessarily by consanguinity or by racial or political ties and that typically have a common language, institutions, and beliefs." MERRIAM-WEBSTER, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1673 (1993). Used in this sense, the term does not describe a group in Hawai'i today. The term "Native Hawaiian" is a purely racial classification and except insofar as "Native Hawaiian people" refers only to that racial grouping, the term does not relate to an existing "people" in the dictionary sense. As one prominent Hawaiian scholar recently put it:

These are the modern Hawaiians, a vastly different people from their ancient progenitors. Two centuries of enormous, almost cataclysmic change imposed from within and without have altered their conditions, outlooks, attitudes, and values. Although some traditional practices and beliefs have been retained, even these have been modified. In general, today's Hawaiians have little familiarity with the ancient culture.

Not only are present-day Hawaiians a different people, they are also a very heterogeneous and amorphous group. While their ancestors once may have been unified politically, religiously, socially, and culturally, contemporary Hawaiians are highly differentiated in religion, education, occupation, politics, and even their claims to Hawaiian identity. Few commonalities bind them, although there is a continuous quest to find and develop stronger ties.

Kanahale, *supra* note 127, at 21.

<sup>129</sup> With respect to the likelihood of the so-called Akaka Bill (Native Hawaiian Government Reorganization Act, S. 310/H.R. 505, 110th Congress (2007)) becoming law or surviving constitutional challenge, see Patrick W. Hanifin, *Rice is Right*, 3 ASIAN-PAC. L. & POL'Y J. 283 (2002); Sullivan, "Recognizing" the Fifth Leg, *supra* note 1.

<sup>130</sup> *Price v. Hawaii*, 764 F.2d 623 (9th Cir. 1985). The Department of the Interior has promulgated regulations which establish how a group claiming to be an Indian tribe can seek Federal recognition, and what standards will be applied by the Bureau of Indian Affairs in evaluating any such application. See 25 C.F.R. § 83 (2008). These regulations, however, by their own terms, apply only to tribes "indigenous to the continental United States," *id.* § 83.3(a), and the regulations define the "continental United States" as the "contiguous 48 states and Alaska." *Id.* § 83.1. In *Kahawaiolaa v. Norton*, 386 F.3d 1271 (9th Cir. 2004), this exclusion of Hawaiian groups from seeking recognition under the Bureau of Indian Affairs regulations was justified by the Ninth Circuit as being based on statutes meeting the "rational basis" test generally applied to Congress' decisions under the Indian Commerce clause.

Nor does Professor Van Dyke's book address the question whether, if there is no Native Hawaiian tribe, a group of Native Hawaiians could form an organization and obtain constitutionally-valid congressional or state recognition as a "tribe" under the "special relationship." Case law indicates that it could not. However broad Congress' power with respect to Indian tribes might be, it falls short of entitling Congress to create a tribe where none previously existed.

In *U.S. v. Sandoval*,<sup>131</sup> the Supreme Court considered whether the Pueblo Indians could be brought by Congress within the "special relationship." It found sufficient facts to answer the question in the affirmative and it noted that "in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts."<sup>132</sup> It added, however, that "it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe."<sup>133</sup> An effort by a newly-formed race-based organization of Native Hawaiians seeking recognition from Congress as a "tribal government" is likely to be seen only as another attempt by a racial group to obtain disproportionate political control, and would likely meet the same fate as the effort of the city of Tuskegee, Alabama when it sought (unsuccessfully) to secure racial control within its borders by readjusting those borders into a "strangely irregular twenty-eight sided figure" to exclude black voters.<sup>134</sup>

In short, Professor Van Dyke's book proposes a race-conscious remedy using public land for a supposed wrong that had nothing to do with race, which took place under a foreign government that seems to have done the best it could for its people under extraordinarily difficult circumstances, over 150 years ago. This is the core of the book, and given the potentially dramatic impact on the State of Hawai'i if this proposal is adopted, the difficulties with it—historical, logical, and moral—and the competing points of view deserved broader development.

There is, of course, much more material in the book. A large part of it is not strictly relevant to the book's focus on Native Hawaiian claims to the Crown Lands<sup>135</sup> and provides little or no support for the book's conclusions and proposals. Much is said of the growing influence of foreigners over the Hawaiian monarchy during the nineteenth century and the eventual revolution

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<sup>131</sup> 231 U.S. 28 (1913).

<sup>132</sup> *Id.* at 46.

<sup>133</sup> *Id.*

<sup>134</sup> *Gomillion v. Lightfoot*, 346 U.S. 339 (1960).

<sup>135</sup> The chapter on the British crown lands, for example, offers little information of value on how the former Hawaiian Crown Lands, now merged with the other public lands of the United States or the State of Hawai'i, should be administered under our democratic state and federal constitutions.

in 1893 that in turn led to annexation in 1898; but those events, too, are not relevant to Native Hawaiian claims to the Crown Lands in the absence of some showing that Native Hawaiians, as a racial class, had claims to those lands, a point on which Professor Van Dyke's book is unconvincing. Some parts of the book, including portions of the chapter "Before the Mahele," actually support contrary conclusions and inferences from those offered by the author. It is all interesting and of value. The book casts its net widely and will be a valuable resource for those exploring Hawaiian history.

## VII. CONCLUSION

Professor Van Dyke's book fails to convince that today's descendants of the pre-contact inhabitants of the Hawaiian Islands have any claim—moral, legal, historical or otherwise—to the former Crown Lands of the kingdom. It does, however, reflect the views of many people in the islands and elsewhere. Many legislative and judicial decisions concerning Native Hawaiians as a class have accepted the appropriateness of special treatment, the applicability of the Indian analogy, and the legitimacy of race-conscious decision-making.<sup>136</sup> Most recently, the Hawai'i Supreme Court, relying uncritically on the Apology Resolution, enjoined the state from disposing of any of the ceded lands until the claims of Native Hawaiians to those lands have been resolved.<sup>137</sup> Contrary views have had their successes, including the watershed decision in *Rice v. Cayetano*<sup>138</sup> and the failure of the Native Hawaiian Government Reorganization bill of 2005 to survive a cloture motion after full and open debate in the Senate.<sup>139</sup> The debate continues, and Professor Van Dyke's book provides much information for that discussion.

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<sup>136</sup> See, e.g., *Doe v. Kamehameha Schs.*, 470 F.3d 827 (9th Cir. 2006); *Pub. Access Shoreline Haw. v. Haw. County Planning Comm'n*, 79 Hawai'i 425, 903 P.2d 1246 (1995) *cert. denied sub nom.* *Nansay Haw., Inc. v. Pub. Access Shoreline Haw.*, 517 U.S. 1163 (1996); *Native American Graves Protection and Repatriation Act*, 25 U.S.C. §§ 3001-3013 (2000); *The Native American Programs Act of 1974*, 42 U.S.C. § 2991 (2000); *Native Hawaiian Education Act*, 20 U.S.C. §§ 7511-7517 (Supp. 2005); *The Native Hawaiian Health Care Improvement Act of 1992*, 42 U.S.C. §§ 11701-11714 (2000).

<sup>137</sup> *Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Haw.*, 117 Hawai'i 174, 177 P.3d 884 (2008), *cert. granted sub nom.* *Hawaii v. Office of Hawaiian Affairs*, 2008 WL 1943423 (U.S. Oct. 1, 2008) (No. 07-1372).

<sup>138</sup> 528 U.S. 495 (2000).

<sup>139</sup> See 152 CONG. REC. S5510, S5554 (2006).