Blood Quantum Land Laws and the Race Versus Political Identity Dilemma

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Modern equal protection doctrine treats laws that make distinctions on the basis of indigeneity defined on blood quantum terms along a racial versus political paradigm. This dichotomy may be traced to Morton v. Mancari and, more recently, to Rice v. Cayetano. In Mancari, the Supreme Court held that laws that privilege members of American Indian tribes do not constitute racial discrimination because the preferences have a political purpose—to further the right of self-government of federally recognized American Indian tribes. Rice crystallized the juxtaposition of the racial from the political nature of indigeneity by invalidating a law that privileged Native Hawaiians. That law, according to the Court, used an ancestral blood requirement to construct a racial category and a racial purpose as opposed to the legally permissible political purpose of promoting the right of self-government of American Indian tribes.

Close analysis of the dichotomy between the constitutive notion of indigenous blood as either racial or political has largely escaped scholarship. An analysis deconstructing their juxtaposition is sorely needed. As recent

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challenges to blood quantum laws show, there remain unanswered questions about the extent to which the racialized (and thus invalid) Native Hawaiian-only voting law impact other blood quantum laws. Among the laws implicated by the dichotomy between the racial and political meaning of indigeneity are land ownership laws that privilege indigenous peoples who are not federally recognized tribes. Specifically, in some jurisdictions in the United States, including Hawaii, Alaska, and the U.S. territories, only indigenous peoples may purchase or possess property. Perhaps more problematically, these property laws define indigeneity on the basis of blood quantum. Under the contemporary race versus political meaning of blood quantum, these laws arguably violate equal protection principles because they do not fit the current framing of what constitutes political indigeneity.

Using these laws—what I collectively refer to as blood quantum land laws—as frames of reference, this Essay interrogates and criticizes the juxtaposition of the racial and political meaning of indigeneity. Specifically, the Essay examines the legal construction of political indigeneity and demonstrates how its narrowed construction would undermine these blood quantum land laws that were enacted to reverse the effects of colonialism. Consequently, this Essay calls for the liberalization of the binary racial and political paradigm by expanding equal protection law’s interpretation of the meaning of political indigeneity. Toward this end, this Essay provides an initial analysis of how to broaden the political notion of indigeneity, focusing in particular on the relationships among property, indigeneity, and the right to self-determination.

INTRODUCTION

What is the relationship between “blood” and identity? As several scholars have explained, the metaphor of blood played a critical role in the legal and social construction of race.1 The deployment of blood distinctions through hypodescent rules2 including the “one-drop of blood” rule racialized


2. See Harris, supra note 1, at 1738 n.137 (“‘Hypodescent’ is the term used by anthropologist Marvin Harris to describe the American system of racial classification in which the subordinate classification is assigned to the offspring if there is one ‘superordinate’ and one
African Americans, perpetuated their slave status, and, after the passage of the Fourteenth Amendment, facilitated their second-class citizenship status through segregation. These same pernicious rules also racialized Asian Americans and other non-whites, and led to their inability to acquire U.S. citizenship.

This history of the insidious relationship between race and blood distinctions informs the current normative equal protection laws, which highly scrutinize categorical differences on the basis of blood. Yet, current equal protection also recognizes that blood might be constitutive of a non-racial identity. In particular, in Morton v. Mancari, the Supreme Court held that laws that privileged individuals with one-fourth American Indian blood did not constitute racial discrimination because the preference had the political purpose of furthering the right of self-government of federally recognized tribes. Almost twenty-five years later, Rice v. Cayetano relied on Mancari's construction of the valid use of "indigenous blood" by invalidating a law that limited the right to vote for trustees of a state agency to Native Hawaiians. The state contended that the Native Hawaiian blood quantum requirement was similar to the policy upheld in Mancari in that the requirement gave the indigenous peoples a "measure of self-governance." However, the Supreme Court disagreed and struck down the law, refusing to extend the "limited exception of Mancari." In so doing, the Supreme Court crystallized the

'subordinate' parent. Under this system, the child of a Black parent and a white parent is Black.) (citing MARVIN HARRIS, PATTERNS OF RACE IN THE AMERICAS 37, 56 (1964)); Christine B. Hickman, The Devil and the One Drop Rule, 95 MICH. L. REV. 1161, 1167 (1997).

3. See, e.g., Plessy v. Ferguson, 163 U.S. 537 (1896) (noting that Homer Plessy, who was phenotypically white, was deemed a Black person under Louisiana's segregation laws because he was genotypically seven-eighths white and one-eighth Black).

4. In re Alverto, 198 F. 688, 690 (E.D. Pa. 1912) (stating that petitioner was "ethnologically speaking, one-fourth of the white or Caucasian race and three-fourths of the brown or Malay race" and consequently, ineligible for naturalization); In re Knight, 171 F. 299, 300 (E.D.N.Y. 1909) (holding that petitioner's "Mongolian blood" excluded him from classification as a white person and thus eligible for U.S. citizenship); In re Camille, 6 F. 256 (D. Or. 1880) (holding that a person of half white and half Indian blood is not a "white person" for purposes of immigration naturalization). See also HANEY LÓPEZ, supra note 1, at 203-08 (providing a chart that includes cases in which a person's blood functioned to ascribe non-whiteness to a person).

5. See Rice v. Cayetano, 528 U.S. 495 (2000); In re Santos, 110 Cal. Rptr. 2d 1, 40 (Cal. Ct. App. 2001) (stating that "[w]hether we characterize this genetic association as racial, ethnic, or ancestry, a determination based on 'blood,' on its face invokes strict scrutiny").


8. Mancari, 417 U.S. at 553.
9. 528 U.S. 495.
10. Id. at 517.
11. Id. at 520.
12. Id.
dichotomy between the racial and the political meaning of blood quantum laws.  

Closer examination of the legal construction of political indigeneity in the context of the racial versus political framework of equal protection analysis has largely escaped scholarship. A number of commentators have criticized Rice for its doctrinal misapplication of equal protection principles informed by racial equality to claims by Native Hawaiians that were grounded mainly on colonialism and the loss of sovereignty. An analysis deconstructing the process by which the law has produced and perpetuated the political meaning of “indigenous blood,” itself, and its impact on other indigenous groups,

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13. Chris K. Iijima, Race Over Rice: Binary Analytical Boxes and a Twenty-First Century Endorsement of Nineteenth Century Imperialism in Rice v. Cayetano, 53 Rutgers L. Rev. 91, 92 (2000) (explaining that Rice used a binary framework that examined whether Native Hawaiians were a political or racial group).

14. In this Essay, I use indigeneity and indigenous interchangeably to generally refer to indigenous, aboriginal, First Peoples and/or native groups. I do not adopt a particular definition, however, and I recognize that many indigenous groups have opposed the prescription of an exact definition. See Ronald Niezen, The Origins of Indigenism 18 (2003) (explaining that indigenous-rights groups believe that the enactment of a legal definition of the word “indigenous” “would impose standards or conditions for participation in human rights processes that would be prejudicial to their interests”). James Anaya, a prominent scholar on indigenous rights, has described indigenous peoples as those “living descendants of preinvasion inhabitants of lands now dominated by others.” S. James Anaya, Indigenous Peoples in International Law 3 (1996). The World Council of Indigenous Peoples (WCIP) has advocated that “[t]he question of who is indigenous?” is best answered by indigenous communities themselves.” Jeff J. Comtassel, Who Is Indigenous? ‘Peoplehood’ and Ethnonationalist Approaches to Rerarticulating Indigenous Identity, 9 Nationalism & Ethnic Pol. 75 (2003) (explaining that the WCIP passed a resolution stating that indigenous peoples should have the right to self-identification). The concept of self-identification, however, has been critiqued as too broad and as having the potential to “lead other ethnic groups to position themselves as ‘indigenous’ solely to obtain expanded international legal status.” Id. at 76. States in which indigenous peoples reside have sought for a clear definition of indigeneity. See id. The problem associated with this proposition is that it runs the risk of being so restrictive as to exclude legitimate indigenous groups from gaining recognition. See id.

15. A notable exception is the scholarly work of the late Professor Chris Iijima that critiqued Rice v. Cayetano and the Supreme Court’s binary analysis. See Iijima, supra note 13, at 96. I build on Professor Iijima’s work in this Essay by examining broader implications of the binary framework on other indigenous peoples such as those in the U.S. territories.

16. Jon M. Van Dyke, Who Owns the Crown Lands of Hawai‘i? 274 (2007) [hereinafter Van Dyke, Crown Lands] (stating that the Supreme Court frustrated the “efforts of Native Hawaiians to recover their lost lands, resources and governmental authority”); Gavin Clarkson, Not Because They Are Brown but Because of Ea: Why the Good Guys Lost in Rice v. Cayetano and Why They Didn’t Have to Lose, 7 Mich. J. Race & L. 317, 318 (2002) (stating that “Native Hawaiians were instead victims of a constitutionally faulty remedial infrastructure that was based on their race rather than their inherent sovereignty”); Sharon K. Horn & Eric K. Yamamoto, Collective Memory, History, and Social Justice, 47 UCLA L. Rev. 1747, 1776 (2000) (critiquing the appropriation of civil rights rhetoric in modern “reverse discrimination” cases); Iijima, supra note 13, at 111-23, 123 (contending that the Supreme Court’s use of racial equality norms invalidated the Native Hawaiian-only law and that the “question should be whether they have been specifically harmed as a people by the loss of their nationhood”); Leti Volpp, Rethinking Asian American Jurisprudence, 10 Asian L.J. 51, 54 (2003) (commenting that there was no space within the Supreme Court’s notion of civil rights for the question of Native Hawaiian sovereignty to be addressed).
however, has been sorely lacking. Yet, recent challenges to blood quantum laws in Hawaii\textsuperscript{17} show that there remain unanswered questions about the appropriate boundaries of the valid uses of indigenous “blood” on other blood quantum laws that privilege indigenous peoples, including American Indian tribes\textsuperscript{18} and non-federally recognized indigenous groups.

Among the laws implicated by the juxtaposition of the racial and political framing of indigeneity are land laws in Hawaii and the U.S. territories which limit ownership or possession of lands to indigenous peoples. Problematic for equal protection doctrine purposes, these indigenous populations are not American Indian tribes and the property laws that make preferences on their behalf define indigeneity on the basis of blood quantum.\textsuperscript{19} For example, in Hawaii, a federal law provides Native Hawaiians the opportunity to lease properties for ninety-nine years at the rate of $1.00 per year.\textsuperscript{20} The law defines Native Hawaiians as those who are “descendants of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778,” which is the definition of Native Hawaiian struck down in \textit{Rice}.\textsuperscript{21}

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\textit{Rice v. Cayetano}, several lawsuits have been filed to challenge the legitimacy of other blood quantum policies in Hawaii. See Arakaki v. Lingle, 477 F.3d 1048 (9th Cir. 2007) (arguing against state programs that limit participation to Native Hawaiians); Doe v. Kamehameha Sch., 470 F.3d 827 (9th Cir. 2006), \textit{cert. dismissed}, 127 S. Ct. 2160 (2007) (challenging a private school’s preferential policy towards students of Native Hawaiian ancestry); Kahawaiolaa v. Norton, 386 F.3d 1271 (9th Cir. 2004) (seeking to invalidate the exclusion of Native Hawaiians from the federal acknowledgment process for acquiring American Indian tribal status); Carroll v. Nakatani, 342 F.3d 934 (9th Cir. 2003) (challenging constitutionality of state programs restricted for Native Hawaiians); Arakaki v. Hawaii, 314 F.3d 1091, 1097 (9th Cir. 2002) (arguing against a constitutional requirement that limited the ability to serve on the board of the Office of Hawaiian Affairs to those of Native Hawaiian ancestry).

Yet, because Native Alaskans are considered American Indian tribes, the holding in \textit{Rice} is not generally thought to implicate its validity. It should be noted, however, that there are some blood quantum laws that privilege American Indian tribes that could be vulnerable under \textit{Rice}. See Spruhan, \textit{Indian as Race, supra} note 18, at 27 (examining the Indian Reorganization Act’s “half-blood” requirement).

\textbf{20.} \textit{See} \textit{Hawaiian Homes Commission Act,} Act of July 9, 1921, Pub. L. No. 67-34, ch. 42, § 208, 42 Stat. 108, 111 (1921); \textit{see also} Part III.A infra (discussing the historical background on the enactment of the HHCA).

\textbf{21.} HHCA, § 201(a)(7).

\textbf{22.} \textit{Rice v. Cayetano,} 528 U.S. 495, 516 (2000) (stating that the definition of Native
Samoa, only those who are one-half Samoan blood may own property, and in the Commonwealth of the Northern Mariana Islands (CNMI), only those who are of one-fourth Northern Marianas descent may purchase property.

Utilizing these laws—what I collectively refer to in this Essay as blood quantum land laws—as frames of references, this Essay interrogates and criticizes the juxtaposition of the racial and political meaning of indigeneity. Specifically, the Essay examines the legal production of political indigeneity and demonstrates how its narrowed construction reifies its racial counterpart. The rigid way in which the political notion of indigeneity is interpreted would frame blood quantum land laws as racialized laws and undermine their purpose in reversing the effects of colonialism. What this analysis elucidates, I argue, is a retheorization of equal protection law that would make it more accommodating of measures designed to facilitate the self-determination rights of all indigenous peoples in the United States. Consequently, this Essay calls for the liberalization of the binary racial and political equal protection paradigm by expanding the law’s interpretation of the meaning of political indigeneity.

Toward this end, this Essay provides an initial analysis of how to broaden the political understanding of indigeneity, focusing in particular on the relationships among property, indigeneity and the right to self-determination. In developing this theory, I make two interrelated points. First, an analysis of the administrative regulatory process by which indigenous groups acquire political status reveals that there are structural inequalities that preclude many indigenous groups, such as Native Hawaiians and indigenous groups from the U.S. territories, from even applying for tribal status. The result is that those indigenous groups who fail to acquire political status are subsequently categorized as racial groups. Thus, at minimum, the federal regulatory framework needs to be amended to ensure that all indigenous groups have meaningful opportunity to gain political status.

Hawaiian made clear that “descendants . . . of [the] aboriginal peoples” means “the descendants . . . of the races”).


24. See CNMI CONST. art. XII, § 4, available at http://cnmilaw.org/constitution_article12.htm (limiting ownership of land to persons with “one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood,” the indigenous peoples of the CNMI); see also id. at § 1 (“[T]he acquisition of permanent and long-term interests in real property within the Commonwealth shall be restricted to persons of Northern Marianas descent.”).

Second, and more generally, I argue for transcending the boundaries of equal protection doctrine beyond the prescribed racial versus political paradigm by recognizing broader conceptions of what constitutes political indigeneity. I draw attention to blood quantum land laws in the U.S. territories and the two cases that upheld them. Importantly, both cases—Craddick v. Territorial Registrar of American Samoa and Wabol v. Villacrusis—upheld the government's reliance on blood quantum laws, recognizing the importance of the indigenous peoples' right to have control over their own lands. When placed within the context of colonialism from which these land laws developed, the laws' facilitation of indigenous peoples' control over their properties constitutes a form of political power that should have space within the equal protection doctrine.

The Essay proceeds as follows. In Part I, I analyze critically the modern doctrinal approach governing the constitutional analysis of blood quantum laws. I frame this discussion by examining the ways in which blood quantum laws led to the loss of indigenous peoples' sovereignty and property. In Part II, I show the structural flaws in the administrative process of acquiring federal tribal recognition, which are elided by the race versus political paradigm. In particular, I demonstrate how the inherent design of the process unfairly excludes many indigenous groups, including Native Hawaiians, from ever obtaining federal tribal status. In so doing, I reveal the rigidity with which political status is formally acquired and show how the process reifies the racialized construction of indigenous groups who are unable to obtain federal tribal recognition. Part III examines the impact of the current racial versus political framework on Hawaii's Home Land Programs, which uses a blood quantum requirement. This part briefly provides the historical context from which the law arose and the ways in which the law helps to address the ongoing legacies of colonialism. However, by privileging Native Hawaiians who have not been recognized as federal tribes, these laws could potentially be subject to strict scrutiny and undermine the laws' anti-colonialism remedies. Finally, in Part IV, I lay the foundation for a normative theory of expanding blood quantum's political meaning. Specifically, I initiate the argument that blood quantum laws that seek to protect indigenous peoples' ownership and control of their lands are justified because such laws provide them with a measure of autonomy over their social, cultural, economic, and political development. Viewed through an anti-colonialism lens, the facilitation of indigenous peoples' control over their property constitutes the quintessential form of political power.
THE RACE VERSUS POLITICAL DICHOTOMY OF INDIGENEOITY

A. Blood Rules, Racism, and Colonialism

I want to make clear at the outset that given the relationship between racial subordination and laws that utilized blood distinctions in the United States, any legal requirement of blood lineage today appropriately raises concerns about whether the law's intent is to ensure racial purity. Yet, it is important to emphasize that the implementation of blood rules impacted various groups in different ways. Recent scholarship has detailed the complex relationship between blood rules—particularly blood quantum rules—and American Indian political and racial identity. As this scholarship has commented, blood quantum rules had the double effect of not only racializing American Indians but also undercutting their right of sovereignty, including their property rights.

In the early 20th century, for example, the U.S. government decreed that only those persons with no more than one-half American Indian blood were qualified to own property after the federal government broke up all American Indian lands under the Dawes Severalty Act. Those American Indians in the reservations who lacked the requisite blood quantum were not given property and such lands that would have been allotted to them were made available to


27. The loss of American Indian tribal sovereignty and their property rights resulted from Johnson v. M'Intosh, 21 U.S. 543 (1823), wherein the Supreme Court held that American Indian tribes did not have the authority to sell their own lands because they lost their right to sovereignty and, relatedly, property rights when what is now the United States was "discovered" by Europeans. See Gould, supra note 18, at 720 n.124 (citing a source that estimated that "between 1887 and 1934, Indian lands declined from 138 million acres to 52 million acres").

28. In 1887, Congress enacted the Dawes Severalty Act, also known as the Great Allotment Act, which was designed to break up Indian reservations into plots of land and allot them to individual American Indians. See Dawes Act, ch. 119, 24 Stat. 388 (1887) (encouraging Indians to forego hunting and use the lands for agricultural and grazing purposes); Margo S. Brownell, Who Is An Indian? Searching for an Answer to the Question at the Core of Federal Indian Law, 34 U. MICH. J.L. REFORM 275, 279 (2001) (explaining that the Dawes Severalty Act led to the first use of blood quantum as a "determinant of when an Indian would be allowed to alienate an allotment of land"); Gould, supra note 18, at 719 (noting that the federal government introduced the concept of race vis-a-vis blood quantum as a membership criterion through the Dawes Severalty Act, which divided up American Indian lands and allotted these lands to individual American Indians who met the appropriate blood quantum); Spruhan, Legal History, supra note 26, at 34-36 (discussing various statutes that relied on blood quantum to determine allotment eligibility).

29. Note that some American Indians with only one-fourth American Indian blood or who were full-blooded American Indians but did not belong to particular tribe were denied property as well. See Gould, supra note 18, at 720.
whites. Additionally, blood quantum rules operated to diminish the ability of American Indians to sell their lands. "Mixed-blood" American Indians were able to sell their lands while "full-blood" American Indians needed the permission of the U.S. government to sell their properties. As these blood quantum rules demonstrated, racism facilitated the related consequences of racially subordinating American Indians, loss of significant American Indians' property and, not unrelated to property rights, diminishing their sovereignty rights.

With the enactment of normative civil rights legislation, overt discrimination, including the insidious legal use of blood distinctions, ultimately diminished. Following landmark civil rights cases, Congress enacted the Civil Rights Act of 1964, which sought to establish equality in both private and public contexts. Then, in 1975, Congress passed the Indian Self-Determination Act and Education Assistance Act, expressly stating that the United States had the obligation to respond to the "expression of the [American] Indian people for self-determination." In order to meet this obligation, the federal government recognized that it must take steps necessary to ensure "the development of strong and stable tribal governments." Importantly, the federal government adopted blood quantum rules to delineate the individuals and groups who would benefit from programs implementing this federal policy. Thus, unlike the earlier uses of blood quantum rules as technology of colonialism, the deployment of these rules in this context constituted a method for promoting American Indian political self-determination. Moreover, the basis of the use of these blood quantum rules formed part of the underlying support for the growing divide between the racial and political meaning of indigeneity under modern equal protection law.

30. See id. The result of the Dawes Severalty Act was the tremendous loss of American Indian lands, an estimated 86 million acres. These restrictions were part of a larger federal policy at the time of assimilating American Indians into "American" society. See David H. Getches et al., Cases and Materials on Federal Indian Law 111 (5th ed. 2005) (discussing the Era of Allotments and Assimilation).

31. See Treaty with the Chippewa of the Mississippi, 16 Stat. 719, art. 7 (1867) (providing that American Indian tribal lands "shall not be alienated except with the approval of the Secretary of the Interior").

32. See Act of March 1, 1907, ch. 2285, 34 Stat. 1015, 1034.


37. 25 U.S.C. § 450a(b).
B. Constructing Blood Quantum’s Political Dimension

Understanding the political construction of indigeneity under modern equal protection analysis must first begin by analyzing two cases: Morton v. Mancari, upholding a blood quantum rule giving preference to American Indians in the employment context, and Rice v. Cayetano, striking a blood quantum rule limiting certain voting rights to Native Hawaiians. The opinions of these cases demonstrate the conflict between the right of the individual to equal treatment under the law and the right of the group to have a measure of self-government. 38

Morton v. Mancari involved a constitutional challenge to a federal agency’s preferential employment hiring policy. 39 The Bureau of Indian Affairs (BIA) established a policy that gave hiring preferences to American Indians with “one-fourth or more degree Indian blood.” 40 Two non-American Indian BIA employees challenged the preference policy on the grounds that it constituted reverse racial discrimination. 41 This challenge signaled the beginning of what has been described as the use of “equality rhetoric” to argue against laws that conferred distinct rights to American Indians. 42 Before Mancari was decided in 1974, Congress had passed two significant civil rights laws. The Civil Rights Act of 1964 43 and the Equal Employment Opportunity Act of 1972 (“EEOC Act”) 44 proscribed discrimination in hiring on the basis of race, color, national origin, or sex. The plaintiffs alleged that the American Indian preference policy violated these two statutes as well as the Fifth

40. Id. at 553 n.24. The policy was promulgated as part of an overall shift in federal American Indian policy that occurred in the 1930s. Congress enacted the Indian Reorganization Act of 1934, 25 U.S.C. § 461 (2000), which had as its purpose the need to craft measures “whereby Indian tribes would be able to assume a greater degree of self-government.” Mancari, 417 U.S. at 542. One such measure included increasing “the participation of tribal Indians in the BIA operations.” Id. at 543. The Court noted that according to the BIA, preferences in hiring and promotions of Indians were necessary in order to make the agency “more responsive to the interests of the people it was created to serve.” Id. “If the Indians are exposed to any danger, there is none greater than the residence among them of unprincipled white men.” Id. at 542 n.11.
41. Id. at 537.
42. Goldberg, supra note 38, at 948 (explaining that the discursive use of equality principles has always been used to invalidate laws privileging American Indians, but that the earlier cases focused on “emancipating” American Indians from federal domination). As Professor Carole Goldberg aptly notes, “[t]his rhetoric of emancipation conveniently ignored the possibility that Indians might be able to rid themselves of the worst forms of federal domination without losing their special rights, status, and benefits.” Id. at 947.
Amendment by providing for hiring preferences on the basis of race. The three-judge district court agreed with the plaintiffs and held that the policy violated both the Civil Rights Act and the EEOC Act. Relying on principles of equality and individual rights, the court explained that civil rights laws required that in the employment context, one's employment within the company needed to be made based on merit and not on his or her race. Importantly, the court noted that Title VII of the Civil Rights Act also "forbids reverse discrimination."

By contrast, whereas the notion of individual rights predominated the lower court’s decision, the Supreme Court’s opinion focused on a group rights rationale to reverse the lower court and uphold the policy. The Court reframed the issue to emphasize that the question was not about race discrimination but about the right of American Indian tribes to political sovereignty. Justice Harry Blackmun, writing for the majority, explained that the preference as used in this instance functioned to assist American Indians who are members of a quasi-sovereign tribal group. Accordingly, the policy did not discriminate on the basis of race, but rather, on the basis of membership in federally recognized tribes.

Transforming the issue away from race had an important consequence. The blood quantum policy only triggered rational basis review, a less exacting standard than the strict scrutiny review normally applied in questions of equal protection. Under this standard, the Court concluded that the special treatment based on blood quantum was rationally tied to the fulfillment of Congress’ unique obligation to ensure that American Indian tribes attain “greater control

46. Id. at 591. The court opted not to rule on the constitutionality of the policy but stated that “we could well hold that the statute must fail on constitutional grounds.” Id.
47. Central to the district court’s decision was the “reality” of the policy, which had already gone “far beyond the formative stage.” Id. at 588 (explaining that the violation of the individual rights of the plaintiffs, who were teachers and programmers and had received advanced training, was deeply problematic).
48. Id. at 589-90 (quoting Senator Byrd’s remarks in favor of the Equal Employment Opportunities Act of 1972).
49. Id.
50. The Supreme Court noted probable jurisdiction, which enabled the case to go directly to the Court from the three-judge district court. Morton v. Mancari, 417 U.S. 535, 537 (1974).
51. Id. at 554.
52. Id. ("[P]reference is reasonably and directly related to a legitimate, nonracially based goal [which is] the principal characteristic that generally is absent from proscribed forms of racial discrimination.").
53. See id. at 554 n.24. Federal recognition refers to what Professor Matthew Fletcher expressed as “that magical status that most Indian tribes try to achieve.” Fletcher, supra note 25, at 489, 489-90 (“[F]ederally recognized Indian tribes benefit from the trust relationship between the federal government and Indian tribes.” (citing Cramer, supra note 25, at 5-6)).
of their own destinies.” Emphasizing the federal government’s obligation to American Indian tribal self-determination was a critical component of the Mancari opinion. Thus, by recognizing the American Indian tribes’ right to self-government, Mancari is consistent with the federal policy of promoting their right to self-determination. However, the opinion also served to limit the validity of blood quantum policies to when they employ a political purpose tied to federally-recognized American Indian tribes, which are accorded the right to self-government.

That the political framing of blood quantum law was limited to American Indian tribes became even clearer in 2000 in Rice v. Cayetano. As in Mancari, Rice involved a claim of reverse racial discrimination by a non-indigenous person. A white Hawaiian challenged the constitutionality of a provision in the Hawaii Constitution that limited the right to vote for the trustees of the Office of Hawaiian Affairs (OHA) to Native Hawaiians. The provision defined Native Hawaiians as persons who can trace their ancestry to “not less than one-half part of the races inhabiting the Hawaiian Islands prior to 1778” and to people inhabiting the islands in 1778. Additionally, as in Mancari, the plaintiff in Rice grounded his discrimination claim on racial inequality though it differed in that his claim was grounded on the Fifteenth Amendment’s proscription of the abridgement of voting rights on the basis of race.

Rice once again illuminated the tension between the individual right to equal protection and the group right to self-determination. The plaintiff’s race discrimination claim did not prevail in the lower courts. Employing language akin to the Mancari opinion, the Ninth Circuit explained that “the voting

55. Mancari, 417 U.S. at 553.
56. See Getches et al., supra note 30, at 41-216 (providing a history of federal Indian law and policy). The policy of self-determination began in the early 1960s as an official abandonment of the previous policy of terminating Indian tribes. See id. at 218.
57. See Part II infra (discussing the significance of attaining the status of a federally recognized tribe).
58. See id. Cf. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (holding that an American Indian woman whose children were excluded from tribal membership because she married outside of the tribe may not sue the tribe in court because of tribal sovereignty, even though children of American Indian men who engaged in exogenous marriages acquire tribal membership).
59. Rice v. Cayetano, 528 U.S. 495, 499 (2000). Both the district court and the U.S. Court of Appeals for the Ninth Circuit upheld the statute on the basis that, similar to American Indians, Native Hawaiians have a guardianship relationship with Congress, and in this case, with the State of Hawaii. Rice v. Cayetano, 146 F.3d 1075 (9th Cir. 1998); Rice v. Cayetano, 963 F. Supp. 1547 (D. Haw. 1997).
60. 528 U.S. at 499; see also U.S. CONST. amend. XV, § 1.
61. See 528 U.S. at 511. Both the district court and the U.S. Court of Appeals for the Ninth Circuit held for the State of Hawaii. The opinions emphasized the law’s collective benefits on Native Hawaiians. See Rice, 146 F.3d at 1076 (explaining that because Native Hawaiians are the only group benefiting from the trust administered by the OHA, restricting the vote to Native Hawaiians should be reviewed on a rational basis).
restriction is not primarily racial, but legal or political.62 Taking a historical approach, the court outlined the history of Hawaii, from the overthrow of the state’s monarchy to the right of self-determination of the Native Hawaiians, and concluded that “special treatment” of Hawaiians is analogous to that of American Indians.63 The Supreme Court, however, reversed under the Fifteenth Amendment.64 While noting that the purpose of the Fifteenth Amendment “was to guarantee to the emancipated slaves the right to vote,”65 the Court explained that it applies to all persons regardless of race.66 The Court further explained that enforcement of the Amendment developed to address the different barriers to African American voting rights that emerged over time,67 including the use of ancestry, poll taxes, and literacy tests as proxies for race.68

Despite the unmistakable difference between the objectives of such historical devices to institutionalize the second-class citizenship of African Americans69 and the Native Hawaiian-only law in question in Rice,70 the Supreme Court similarly subjected the Hawaiian Constitution’s provision to a strict scrutiny analysis.71 In fact, the Court chided the state for its lack of subtlety in what it saw as the obvious restriction of the right to vote on ancestry lines.72 Writing for the majority of the Court, Justice Anthony Kennedy stated that the law demeaned the dignity and worth of a person by passing a judgment based on ancestral ties instead of the individual’s own merits and qualities.73 In striking down the law, the Court explained that “distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.”74 As such, the Court concluded that ancestry was being used as a proxy for race and held that Hawaii’s Constitution included an impermissible race-based voting

62. Rice, 146 F.3d at 1079.
63. Id. at 1080-81.
64. Rice, 528 U.S. at 512. By contrast, the Ninth Circuit employed language akin to Mancari in its opinion, explaining that “the voting restriction is not primarily racial, but legal or political.” Rice, 146 F.3d at 1079. Taking a historical approach, the court outlined the history of Hawaii, from the overthrow of the state’s monarchy to the right of self-determination of the Native Hawaiians, and concluded that “special treatment” of Hawaiians is analogous to that of Native Americans. See id. at 1080-81.
65. Rice, 528 U.S. at 512.
66. Id.
67. Id.
68. Id. at 513.
70. See Yamamoto, supra note 16, at 1776 (discussing how the Supreme Court’s formalistic approach to race obscured the purpose of the Native Hawaiian-only law in promoting the right to self-government of Native Hawaiians).
71. See Rice, 528 U.S. at 522.
72. Id. at 514.
73. Id. at 517.
74. Id. (quoting Hirabayashi v. United States, 320 U.S. 81 (1943)).
The Rice Court dismissed the State of Hawaii's analogy to American Indians' recognized political rights as the "most far reaching of the State's arguments." Refusing to draw the analogy, the Court countered that it remains disputable whether Congress may treat Native Hawaiians as having the same status as American Indian tribes. The Court emphasized that the blood quantum preference in Mancari dealt only with members of federally recognized tribes and thus the preference was political rather than racial. By contrast, the blood quantum rule in Rice, which did not deal with a federally recognized tribe, lacked a political purpose and thus, constituted an impermissible racial classification.

That the ancestry-based voting restriction could not be analogized to American Indian tribes' use of blood to determine tribal membership and privileges was highlighted further in Justice David Souter's concurrence. Expressly rejecting that an analogy could be made between OHA and American Indian tribes, Justice Souter contended that the law defined the Native Hawaiian electorate too broadly and in ways completely distinct from membership in an American Indian tribe. Importantly, he explained that it was not a tribe but the state that established the ancestral criterion.

Thus, the Rice Court crystallized in theory the impermissible racial classification of an ancestry-based blood distinction for voting rights because the classification was employed by a state and not a tribe. This stands in contrast to the blood quantum rule upheld in Mancari, which as previously explained, constituted a permissible political tool that American Indians have the right to employ. The significance of these two decisions is that the implication that only federally-recognized American Indian tribes may ever constitutionally rely on blood quantum rules to promote the right of self-government.

II
DECONSTRUCTING THE RACIAL AND POLITICAL INDIGENITY DICHOTOMY

The doctrinal split between the racial and political meaning of blood

75. Id. The Ninth Circuit also applied strict scrutiny but reached the opposite conclusion. See 146 F.3d at 1081. While the court distinguished Native Hawaiians from American Indians in that Native Hawaiians are not organized in tribes, the opinion nevertheless stressed that merely categorizing the voting restriction as a race-based classification does not necessarily mean that it is unconstitutional. See id.
76. 528 U.S. at 518.
77. Id. at 519.
78. Id. at 520.
79. Id. at 526-27 (Breyer, J., concurring) (providing examples of American Indian tribal membership qualifications that relied in part on blood quantum restrictions but other criteria as well including the ability to trace an ancestor's name on a tribal roll).
80. Id. at 527.
quantum laws that developed from *Mancari* and *Rice* emphasizes the importance of acquiring American Indian tribal status in order to confer a political dimension to the employment of a blood quantum rule. Upon closer scrutiny of the political construction of blood quantum policies, an overlooked yet significant part of the development of political indigeneity emerges. Specifically, the juxtaposition of the political and the racial meaning of blood quantum ignores the narrowed way in which an indigenous group acquires federal tribal recognition. Critically, under the administrative regulatory process by which indigenous peoples obtain federal tribal status, many indigenous groups, such as Native Hawaiians and indigenous peoples from the U.S. territories, can never require federal recognition.

For a tribe to obtain federal recognition, it must file an application with the Department of Interior (DOI)\(^8\) and prove that it satisfies seven mandatory criteria established through administrative regulations.\(^8\) In particular, the group must show that: (1) it has been continuously known as an American Indian entity since 1900;\(^8\) (2) the group is composed predominantly of a distinct community that has existed as such from historical times until the present;\(^8\) (3) it has functioned as an autonomous entity that has exerted political authority over its members;\(^8\) (4) the group has a governing document, including its membership criteria;\(^8\) (5) the group’s membership is comprised of persons who are descendants of members of historical Indian tribes;\(^8\) (6) most of the group’s members are not members of any other recognized American Indian tribe;\(^8\) and (7) the group has not been previously terminated by congressional legislation.\(^8\) Obtaining federal acknowledgment, however, is not an easy task. As one commentator pointed out, federal recognition is “often the result of good fortune or the accidents of history.”\(^9\)

Because both the substantive and procedural requirements of the process expressly exclude them from ever obtaining acknowledgment as a federally recognized tribe, Native Hawaiians and indigenous peoples in the U.S. territories have at least two distinct reasons for criticizing the federal acknowledgment process. First, the substantive criteria establish historical, cultural and political structures that essentialize what constitutes a legitimate American Indian group. While this is a complaint that has been made with

\(^8\) 25 C.F.R. § 83.4 (2007).
\(^8\) 25 C.F.R. § 83.6(c) (2007) (explaining that all seven criteria must be met in order to acquire federal acknowledgment).
\(^8\) 25 C.F.R. § 83.7(a) (2007).
\(^8\) Id. at § 83.7(b).
\(^8\) Id. at § 83.7(c).
\(^8\) Id. § 83.7(d).
\(^8\) Id. § 83.7(e).
\(^8\) Id. § 83.7(f).
\(^8\) Id. § 83.7(g).
\(^9\) Mark Edwin Miller, Forgotten Tribes 17 (2004).
respect to other American Indian tribes that have been denied federal acknowledgment, it is one that has particular resonance for Native Hawaiians because of their distinct social, cultural and political experience with colonization.

Second, the procedure for applying for federal tribal recognition is explicitly limited to “only to those American Indian groups indigenous to the continental United States which are not currently acknowledged as Indian Tribes.” Under the regulations, continental United States means “the contiguous 48 states and Alaska.” Thus, by its own terms, the tribal recognition process excludes Native Hawaiians from even having the opportunity to seek tribal recognition. This exclusion is critical when placed in the context of equal protection jurisprudence’s racial and political construction of indigeneity. Under the current regulations, there is no meaningful way for Native Hawaiians to acquire political status. Thus, the regulations themselves reinforce the non-political and racialized status of Native Hawaiians.

Third, and perhaps most important, federal tribal recognition has come to be considered a significant part of acquiring the ability to exercise the right of self-determination. Once a tribe is acknowledged as a federally recognized tribe, it formally acquires status that enables it to have a government-to-government relationship with the federal government. Consequently, it gains a host of privileges attendant to this status, including the right of self-government; the receipt of financial support for governance, health and welfare services; and the acquisition of immunity from state and local

94. Id. at § 83.1.
95. Id. at § 83.2. What makes this process particularly curious is that the inherent sovereignty of American Indian tribes has long been recognized in constitutional jurisprudence. See U.S. CONST. art. 1, § 8, cl. 3 (noting that Congress has the power to regulate commerce with the Indian tribes); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832) (stating that the Cherokee Nation was a “distinct community occupying its own territory, with boundaries accurately described”); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (recognizing that American Indian tribes are domestic dependent nations). Despite the recognition of this inherent sovereignty, an American Indian tribe is not considered to have a legitimate political status unless so granted the status by the federal government. See Kahawaiolaa v. Norton, 386 F.3d 1271, 1273 (9th Cir. 2004), cert. denied, 545 U.S. 1114 (2005) (“[A]s far as the federal government is concerned, an American Indian tribe does not exist as a legal entity unless the federal government decides that it exists.”).
96. 25 C.F.R. § 83.2 (stating that federal acknowledgment of tribal status confers responsibilities, powers, limitations and obligations of such tribes).
97. Fletcher, supra note 25, at 489-90 (describing federal recognition as that “magical status that most Indian tribes try to achieve because . . . federally recognized Indian tribes benefit
governmental control.\textsuperscript{98} Importantly, as made clear in \textit{Mancari}, the tribe obtains special privileges for its members including employment preferences, so long as it can be tied to the right of self-government.\textsuperscript{99}

A failed equal protection challenge to these regulations demonstrates the circular way Native Hawaiians are constructed as a racialized group precisely because they cannot obtain a political status for which they are precluded from applying for in the first instance. In \textit{Kahawaiolaa v. Norton}, a group of Native Hawaiians sought to apply for federal tribal recognition and consequently sued the Department of Interior to invalidate regulations excluding them from the application process.\textsuperscript{100} Although the U.S. Court of Appeals for the Ninth Circuit aptly noted that the exclusionary process meant that "'[n]o Hawaiians need apply,'"\textsuperscript{101} it nevertheless rejected their claim that the regulations violated the Equal Protection Clause of the Fifth Amendment.\textsuperscript{102} Ironically, the plaintiffs who brought the constitutional challenge to the lawsuit used Rice's categorization of Native Hawaiians as a racial group to contend that the appropriate constitutional level of analysis should be strict scrutiny. The court disagreed with their argument, however, noting the inapplicability of Rice because the lawsuit challenged the regulations themselves (i.e. not a racial classification) that accord quasi-sovereign to American Indian tribes. The court applied the rational basis test and upheld the laws' constitutionality.\textsuperscript{103}

Thus, the political constitutive notion of indigenous blood is ultimately dependent on the U.S. Department of Interior's arbitrary exclusionary process of recognizing federal tribes. The dichotomous framing of preferences for Hawaiians as racial preferences, while special treatment of American Indians is framed as political preferences, elide this inherently unfair federal acknowledgment process. As long as the current regulations form the basis for the acquisition of political status for American Indians and remain the formative grounds upon which the exercise of self-determination is recognized, Native Hawaiians will continue to be considered a racialized group. Equal protection law's modern understanding of what constitutes a racial and a political group will therefore continue to remain stagnantly diametrically opposed. Critically, the doctrinal framework applicable to blood quantum laws and to the regulatory process for recognizing American Indian tribes mutually serve to undermine the political claims of indigenous peoples such as Native Hawaiians and other indigenous groups who are explicitly excluded from the trust relationship between the federal government and Indian tribes" which subsequently confers several benefits to its members).

\textsuperscript{98} See id.
\textsuperscript{100} 386 F.3d 1271 (9th Cir. 2004) (challenging the regulations under the Fifth Amendment).
\textsuperscript{101} Id. at 1274.
\textsuperscript{102} Id. at 1282-83.
\textsuperscript{103} Id. at 1279.
federal acknowledgment process.

Recognizing this anomaly in the process by which indigenous groups acquire political status thus calls for amending the administrative process for acknowledging what constitutes political indigeneity. Doing so would not only minimize the divide between the racial and political meaning of blood quantum policies; it would, more importantly, correct current equal protection law’s narrow vision of what it considers valid political purpose.

III

BLOOD QUANTUM LAND LAWS

At a minimum, until the definition of “American Indian tribe” is broadened to also include indigenous groups who reside in Hawaii and the U.S. territories, the dichotomy between the racial and the political meanings of indigeneity produced by the Mancari and Rice cases will continue to generate complex issues. Importantly, the inherent tension within equal protection law between the right against racial discrimination and the privilege of self-determination within equal protection doctrine will remain unresolved. On the one hand, modern equal protection law recognizes the importance of promoting the self-governing rights of indigenous groups. Thus, with respect to matters that are linked to the furtherance of the right to self-determination of American Indian tribes, equal protection law’s normative goal is to not stifle and instead accommodate methods that would otherwise seem racially impermissible. From this perspective, indigenous peoples’ adoption of blood quantum policies may be linked to their right to self-governance because questions about rights, privileges and membership of indigenous communities are best answered by indigenous peoples themselves.

On the other hand, Mancari and Rice show us that this exception is limited to only federally recognized tribes. This narrow exception reflects the

104. It should be noted that another way an indigenous group may acquire political status is through congressional statute. Since Rice was decided, for example, there has been a bill in Congress that seeks to recognize the political status of Native Hawaiians. See S. 310, 110th Cong. (2007) (proposing the Native Hawaiian Reorganization Act of 2007, which is also known as the “Akaka Bill”). For analysis of the Akaka Bill, see R. H K Lei Lindsey, Comment, Akaka Bill: Native Hawaiians, Legal Realities, and Politics as Usual, 24 HAW. L. REV. 693 (2002).

105. Indeed, American Indian tribes have long utilized blood distinctions as one way of defining membership and attendant rights and privileges. See Spruhan, Legal History, supra note 26, at 24-44 (explaining the historical use of blood quantum among American Indian tribes). Yet, as recent events in the Cherokee Nation show, the right of sovereignty can lead to troubling results. See Evelyn Nieves, Putting to a Vote the Question ‘Who is Cherokee?’, N.Y. TIMES, Mar. 3, 2007, at A9; Slave Descendants Lose Tribal Status, N.Y. TIMES, Mar. 4, 2007, at A24. For additional discussion about the issue of membership rights of American Indians with African ancestry, see Ray, supra note 1, at 388 and Carla D. Pratt, Tribes and Tribulations: Beyond Sovereign Immunity and Toward Reparation and Reconciliation for the Estelusti, 11 WASH. & LEE RACE & ETHNIC ANC. L.J. 61, 75-93 (2005) (examining several American Indian tribes, including the Cherokee Nation, that engaged in slavery).

106. See note 13 supra.
idea that embedded within the individualistic-centered doctrine of equal protection jurisprudence is the recognition of the significance of correcting a group-based harm. Limiting this remedy to only those American Indian groups recognized as federal tribes, however, is questionable in light of many indigenous groups’ similar negative experience with colonization. Consequently, under the current framing of what constitutes political indigeneity, certain laws that were enacted to address the legacies of colonialism, including loss of property and of the ability to make decisions about important internal matters, are vulnerable.

Among the laws implicated by the juxtaposition of the racial and the political meaning of indigeneity are land alienation laws in Hawaii, American Samoa and the CNMI that utilize blood quantum distinctions. In the following discussion, I briefly examine the Hawaiian Home Lands Program and analyze how Rice questions its validity. I emphasize that it is critical to analyze these land laws from the lens of colonization’s effect on the property rights of indigenous peoples. My goal is not to provide a complete and exhaustive discussion of this law. Instead, I merely seek to highlight some important events that further illuminate equal protection law’s narrowed vision of political indigeneity and underscore the important connection between indigenous peoples’ property rights and a semblance of sovereignty.

A. The Hawaiian Home Lands Program

In 1921, Congress enacted the Hawaiian Homestead Commission Act (“HHCA”) to create a “permanent land base for the beneficial use of Native Hawaiians.” In particular, it set aside 203,500 acres of lands to be used for homestead leases for the residences and the farm lots of Native Hawaiians. This law was significant because it represented a step towards providing Native Hawaiians lands they were entitled but denied as a result of colonialism.

Historically, Native Hawaiians had a social hierarchical structure wherein commoners and chiefs shared a complex relationship of interdependence and cooperation that revolved around the use of their lands. Although Hawaii

107. I note, however, that while I believe in the importance of placing these laws in the colonial context from which they arose, my discussion reflects my perspective as an observer. There were many historical events, factors and considerations that led to these laws that this Essay is unable to discuss fully.
111. Id. at 13-15 (explaining that commoners sought permission from the chiefs to occupy and use the lands and the chiefs in turn relied upon the commoners to provide them with basic needs, including food and clothing).
was still ruled by various chiefs prior to western contact in 1778, the Hawaiian Islands were united under one ruler in 1810. Westerners caused significant social, cultural and political changes to the islands, including the establishment of a constitutional monarch in which power was shared between the monarchy and a legislature elected by the people. Two events particularly affected property rights in Hawaii.

The first was the Mahele, or division of lands, in which all Hawaiian lands—which by this time were all owned by the king—were divided among the monarchy, the chiefs, the government of Hawaii and the remaining indigenous Hawaiians (commoners). Although the king originally retained 2.5 million acres of lands, he gave up 1.5 million acres to the government. What was left of his lands was supposed to be deemed his private property, although an 1864 Hawaii Supreme Court later ruled that the lands belonged to the monarch or the Crown. The Mahele in principle was supposed to enable commoners to acquire lands. Several factors, however, including administrative barriers and lack of knowledge about private property rights, led to less than 30% of Native Hawaiian males acquiring property. Lands that were not claimed subsequently became part of Government Lands.

The second important change was the passage of legislation that allowed foreigners to purchase property. This facilitated chiefs and commoners to sell properties to foreigners. Perhaps the most monumental change came in 1893 when several people, including U.S. government officials, participated in an illegal overthrow of the monarch at the time, Queen Lili'uokalani, from her throne. This led to the establishment of the Republic of Hawaii in 1894.

112. See id. at 11-29 (providing a brief overview of Native Hawaiian history prior to the arrival of westerners in 1778).
113. See id. at 17 (stating that the Hawaiian Islands were unified under the rule of King Kamehameha I); see also Rice v. Cayetano, 528 U.S. 495, 501 (2000) (stating that Hawaii was unified under King Kamehameha I in 1810).
114. See VAN DYKE, CROWN LANDS, supra note 16, at 27 (discussing the enactment of the 1840 Constitution, which created the constitutional monarchy, legislature and Supreme Court).
115. See id. at 42. The king believed that dividing the lands would protect Hawaiian lands from hostile foreign encroachments. See id. at 30. The process of dividing the lands was complex and a full analysis is beyond the scope of this Essay. The main thrust of the proposal for dividing the lands was that after the king had decided which lands he wanted to retain, one-third of the remaining lands would be allocated to the government, one-third to the chiefs and the remaining one-third to the commoners. See id. at 41.
116. Id. at 54.
117. See id. at 52.
118. See id. (explaining that lands that were forfeited or not claimed by commoners became part of Government Lands).
119. See id. at 38 (discussing how changes in land ownership in Hawaii were proposed by an American lawyer William Little Lee, who himself later acquired a large parcel of Hawaiian lands).
120. See id. (stating that "much of [the] lands moved quickly into foreign lands").
121. Id. at 151-53.
122. See id. at 172-87 (discussing the formation of the Republic of Hawaii).
Shortly after, despite the protest of Native Hawaiians, the United States annexed Hawaii in 1898 through a joint resolution by Congress.123

In 1920, Congress conducted a series of hearings about the conditions of Native Hawaiians. The hearings discussed, in part, the need to rehabilitate the Native Hawaiians because of their alarmingly declining numbers.124 Testimony provided at the hearings emphasized Hawaiians as a "dying race," stating, for example, how the "number of full-blooded Hawaiians" dropped tremendously from 142,500 in 1826 to 22,500 in 1919.125

The hearings also underscored the fact that Native Hawaiians possessed a very small portion of the lands in Hawaii.126 By 1919, only 6.23% of the lands in Hawaii were held by Native Hawaiians.127 Congress found that the alienation of Native Hawaiians from their lands caused them economic, social, and psychological damage as well as cultural loss,128 and it determined that the establishment of a land base was necessary to rehabilitate Native Hawaiians.129 Consequently, Congress enacted the HHCA and set aside lands for Native Hawaiians to be used as their homestead and to improve their deteriorating condition.130

In order to determine which Native Hawaiians would benefit from the HHCA, Congress implemented for the first time a blood quantum rule in Hawaii. The original proposal employed a 1/32 blood requirement, which would have been a broader and more inclusive bloodline distinction than the current fifty-percent requirement that was adopted in large part because of the protests of the sugar industry.131 In adopting the higher requirement, the law consequently fixed Native Hawaiian identity along a fifty-percent blood quantum criterion.

In 1959, Hawaii became the fiftieth state to join the United States.132 The federal government transferred administration of the HHCA to the newly

124. VAN DYKE, CROWN LANDS, supra note 16, at 237 (explaining that federal officials wanted to reverse the “native population’s progressively declining numbers” and thus “rehabilitate” them).
127. See id.
128. See lijima, supra note 13, at 118-20 (discussing Congress’ findings on how the loss of lands affected Native Hawaiians).
129. See H.R. Rep. No. 839, at 4. Native Hawaiians need lands and homes because “when they were frozen out of their lands and driven into the cities they had to live in the cheapest places, tenements [and] [t]hat is one of the reasons why the Hawaiian people are dying”.
130. Arakaki v. Lingle, 477 F.3d 1048, 1054 (9th Cir. 2007).
131. VAN DYKE, CROWN LANDS, supra note 16, at 247.
formed state. The state incorporated the HHCA in its constitution and established the Hawaiian Home Lands Program. Notably, the transferred lands are to be held as a “public trust” for the “betterment of the conditions of Native Hawaiians, as defined in the Hawaiian Homes Commission Act.” Importantly, the Hawaiian Home Lands Program relies on the definition of Native Hawaiian as “any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778,” that was invalidated by Rice.

B. Right to Property and Equality

Race discrimination in property ownership, like voting, constituted a sad part of U.S. history. Although property law has long been suspicious of laws that impose absolute restrictions on the right to sell and acquire land, it was not until the early to mid-1900s that equal access to the selling and purchasing of real property regardless of race became a prescribed normative principle of constitutional and property law. In particular, in Buchanan v. Warley, the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment gave African Americans the right to “acquire property without state legislation discriminating against him solely because of color.” Later, in Oyama v. California, the Court extended this nondiscrimination principle to ancestry-based property ownership requirements. Finally, in Shelley v.
Kraemer, the Court held that equal protection laws prohibit states from enforcing private agreements restricting the sale of property on the basis of race. Thus, under these cases, no state may proscribe the use, enjoyment or ownership of land on the basis of race, color or ancestry.

These cases, along with Rice, present important barriers to the continued validity of blood quantum land laws. Despite the goals of the Hawaiian Home Land Program to protect Native Hawaiian rights and interests to their lands, Rice v. Cayetano suggests that it would be analyzed under strict scrutiny analysis because of its use of a blood quantum requirement. In particular, the deployment of blood quantum requirements by non-American Indian groups could invoke precisely what troubled the Supreme Court in Rice.

Indeed, a challenge to the constitutionality of the Hawaiian Home Lands Program—the question left unanswered in Rice—was brought up in Arakaki v. Lingle. As in Rice, non-Native Hawaiians argued against the constitutionality of this law under equal protection principles. The case went back and forth between the district court and the Ninth Circuit, focusing primarily on questions of standing. Ultimately, the Ninth Circuit held that the plaintiffs did not have standing to challenge the programs. The court, however, reversed the district court’s ruling that the plaintiffs’ cause of action constituted a nonjusticiable political question. Importantly, the Ninth Circuit recognized the application of the race versus political analytical framework in this case if the case were litigated again with appropriate plaintiffs.

Law applied only to Japanese. In fact, as scholars have commented, the Alien Land Laws were directed primarily at Japanese Americans. See, e.g., Keith Aoki, No Right to Own?: The Early Twentieth Century "Alien Land Laws" as a Prelude to Internment, 40 B.C. L. REV. 37, 38-39 (1998) (stating that "[t]he salient point of these laws was their strongly racialist basis - 'aliens ineligible to citizenship' was a disingenuous euphemism designed to disguise the fact that the targets of such laws were first-generation Japanese immigrants, or 'Issei'.")

143. Shelley v. Kraemer, 334 U.S. 1, 14 (1948) (holding that judicial enforcement of private covenants constitutes state action for purposes of the Fourteenth Amendment).

144. See Buchanan, 245 U.S. at 82; Oyama, 332 U.S. at 647. I emphasize here that Buchanan and progeny compelled only states to cease from formally discriminating against African Americans – through the use of public law - in the sale and occupation of property. Discrimination in the sale and lease of property against African Americans and other people of color continued for decades after Buchanan through restrictive covenants and discriminatory personal choices. Discrimination in the sale and lease of private property continued until the passage of the Fair Housing Act of 1968. See 42 U.S.C. § 3604 (prohibiting discrimination in the sale, rental and financing of dwelling based on race, color, national origin, sex, familial status and disability).


146. 477 F.3d 1048 (9th Cir. 2007).

147. Id. at 1053 (explaining that the plaintiffs challenged the programs under the Fifth and Fourteenth Amendments of the Constitution).

148. Id. (noting the procedural history of the case that focused in large part on the ability of the plaintiffs to successfully argue that they had standing to sue the State of Hawaii and the U.S. government for creating and managing the state programs).

149. Id.

150. Id. at 1066.
Assuming that Native Hawaiians continue to be treated as a racialized group, the question therefore becomes whether the Hawaiian Home Lands Program would survive strict scrutiny. Scholars have argued that the program would indeed be upheld even under this standard, contending that there is a compelling government interest in promoting the self-determination rights of Native Hawaiians. Yet, as pointed out in Part II, this argument faces the difficulty of a limited conception of self-determination and political indigeneity. Significantly, the failure of modern equal protection analysis to see the political purpose of the Hawaiian Home Lands Program illustrates the need to expand the law’s understanding of political indigeneity. As the final Part elucidates, laws in the U.S. territories might offer an entryway into this broader view of the valid deployment of blood quantum distinctions.

IV
EXPANDING THE POLITICAL MEANING OF INDIGENEITY

By describing how equal protection law and the administrative federal acknowledgment process have mutually constructed a narrowed meaning of political indigeneity and the impact of that limited construction on Native Hawaiians and other non-American Indian indigenous peoples, this Essay ultimately calls for expanding the law’s conception of valid connections between indigenous blood and political empowerment. Significant to reorienting equal protection analysis in ways that would make it more accommodating to the political needs of all indigenous peoples within its jurisdiction requires examining laws that privilege indigenous peoples not from racial lens informed only by the history of racial discrimination in the United States, but through a perspective that appreciates the connections among indigeneity, property and sovereignty. I suggest that one way toward that goal is a closer analysis of blood quantum land laws in the U.S. territories, considering in particular their colonial origins and how the property laws promote the indigenous peoples’ right of self-determination. I argue that when placed within the context of past and arguably ongoing colonialism in the territories, these land laws facilitate a measure of political control over the indigenous peoples’ social, economic and cultural developments and should consequently be held to promote a political and not racial purpose. Consequently, it is necessary to discuss the historical antecedents of the blood quantum land laws in American Samoa and the CNMI and their relationship to

151. VAN DYKE, CROWN LANDS, supra note 16, at 247. Professor Van Dyke argues that: These interests are certainly 'compelling' under our legal system, because they involve providing redress for the loss of the most essential rights recognized under U.S. and international law. And limiting these programs to persons of Hawaiian ancestry will frequently be the 'least drastic alternative,' because it is these people of and their ancestors who have suffered the losses and who uniquely have the right to self-determination and self-government.

Id.
the exercise of self-determination. Indeed, an analysis of the cases that upheld them provides support for this broader normative political indigeneity argument.

A. Territorial Blood Quantum Land Laws, Property and Sovereignty

1. American Samoan Blood Quantum Land Law

The American Samoan Constitution states that it is the "policy of the Government of American Samoa to protect persons of Samoan ancestry against alienation of their lands and the destruction of the Samoan way of life and language, contrary to their best interests." The American Samoan Code implemented this policy by restricting the alienation of any lands to "any person who has less than one-half Native blood." Thus, only those with "fifty percent" American Samoan blood may own property or lease it for more than fifty-five years. This privileging of Samoans with "one half Native blood" or more in property ownership is further bolstered by another provision of the code, which requires the children of persons "who [have] any nonnative [sic] blood" to have a total of "one-half Native blood" in order to be able to own property.

American Samoa's blood quantum land law originated from a land alienation policy that was implemented by the United States in the early 1900 immediately after it acquired possession of the islands. Prior to the U.S. colonization of American Samoa, the islands were ruled by matai or chief of the family and each family or clan resided in villages. Traditionally, as is


154. Id. § 37.0204(c) (emphasis added), available at http://www.asbar.org/Newcode/Title%2037.htm.


156. STANLEY K. LAUGHLIN, JR., THE LAW OF THE UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS 318 (1995) (discussing the forms of ownership and acquisition of land in American Samoa). Families generally live in villages, which are comprised of several households. See LEIBOWITZ, supra note 152, at 404. The matai system is another component of the American Samoan social and cultural life that is inconsistent with the Constitution. See U.S. CONST. art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States.").

still today, lands in American Samoa are communally owned but under the control and administration of the matai. 158 The matai system works in conjunction with communal ownership of property, giving the matai the authority to make decisions about land use, possession and other rights associated with the land. 159 The matai makes determinations about how the property should be used and allocates the lands among extended family and other village members. 160

In April 1900, as a result of years of turmoil brought on in the Samoan islands by westerners, 161 several Samoan chiefs or mata'i—leaders of various villages and islands in Samoa—formally ceded the islands of Tutuila and Aunu'u to the United States. 162 Four years later, the king and chiefs of Manu'a islands ceded their islands to the United States as well. 163 The documents that the various American Samoa chiefs signed when they ceded sovereignty to the United States demonstrated that their “consent” to become subject to U.S. colonial rule was conditioned on the preservation of their property rights. 164 Specifically, the documents illustrated the chiefs’ desire to have a recognized unitary Samoa formed under the sovereignty of the United States in exchange for the right to maintain ownership of their property. 165 The 1904 cession provided that that “the rights of the Chiefs in each village and of all people concerning their property according to their customs shall be recognized.” 166

To be blunt, the U.S. had its own reasons for securing the indigenous people's property rights. 167 Through the land alienation restriction, the U.S.

158. Keesing, supra note 155, at 270 (examining the Samoan communal land tenure system).
159. See Leibowitz, supra note 152, at 425.
160. See id.
161. See Leibowitz, supra note 152, at 414-15 (explaining the social, cultural and political upheaval that emerged after the U.S. and other foreign countries began to take interest in the Samoan islands).
162. See id.
163. Id.
164. A critical response to this argument may be grounded on Antonio Gramsci’s theory of hegemony where it could be contended that the Samoans may have perceived the United States to be more superior and thus better able to lead them economically, militarily and socially. See Ediberto Román, The Other American Colonies: An International and Constitutional Law Examination of the United States' Nineteenth and Twentieth Century Island Conquests 10-11 (2006) (discussing Antonio Gramsci’s theory of hegemony and application in the colonial context).
165. See Joseph William Singer, Sovereignty and Property, 86 Nw. U. L. Rev. 1, 6-7 (1991) [hereinafter Singer, Sovereignty and Property] (explaining that when some American Indian tribes reserved hunting and fishing rights near lands they ceded to the government by treaty and thus, when such rights are described as discrimination against non-Indians, they ignore that the reserved rights constitute property rights).
166. Leibowitz, supra note 152, at 424 (discussing the 1904 Cession of Manu'a Islands).
167. Derrick A. Bell, Jr., Comment, Brown v. Board of Education and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518 (1980). Relying on Professor Derrick Bell’s interest convergence theory, it could be argued that the United States adopted the land
was able to bolster its military interests in American Samoa. In particular, it sought protection of rights to a harbor on one of the Samoan islands that it obtained in 1878 that soon faced possible encroachment by Germany. At first, it secured its interest by entering into an agreement with Germany and Great Britain (which also had a presence in Samoa) that enabled the three countries to have a tripartite shared foreign authority over a Samoan government ruled by a king. Importantly, this agreement prohibited the sale of Samoan lands to any citizen or subject of a foreign country in order that "Native Samoans may keep their lands for cultivation by themselves and by their children after them." Eventually, the three countries determined that splitting up Samoa better facilitated their interests and thus, in 1900, they signed the Treaty of Berlin, which led to Germany's acquisition of western Samoa and the U.S. acquiring eastern Samoa, which later became American Samoa. Under U.S. administration of what became American Samoa, the prohibition on alienation of land continued, which functioned to prevent foreigners from buying lands on the new U.S. territory. The three nations entered this treaty as a result of tensions over their commercial and military interests on the islands and the United States in particular was "determined to prevent German domination of Samoa." Under the treaty, the parties agreed to impose a "tripartite foreign authority over any Samoan government to be established under a new and freely chosen king." While the treaty prohibited the sale of Samoan lands to any citizen or subject of a foreign country in order that "Native Samoans may keep their lands for cultivation by themselves and by their children after them," it also functioned to protect the United States' new territorial possession from foreign encroachment.

alienation law in American Samoa not necessarily because it was concerned about the indigenous peoples but more so because of the country's interest in securing military interests.

168. Leibowitz, supra note 152, at 413 (discussing the military interest in Pago Pago harbor in American Samoa).
170. Leibowitz, supra note 152, at 414 (discussing the Berlin Conference of April 1889 which resulted in the creation of a "tripartite foreign authority over any Samoan government").
171. Craddick v. Territorial Registrar of Am. Sam., 1 Am. Samoa 2d 11, 13 n.3 (1980), available at http://www.asbar.org/Cases/Second-Series/1ASR2d/1ASRsd10.htm#N_3. The court makes the mistake of referring to the agreement that emerged from the Berlin Conference of April 1889 as the "Treaty of Berlin" and stating that it was signed in 1890. In fact, the Treaty of Berlin was entered into in 1889 and eventually ratified in 1900. See Treaty of Berlin, 1889, 31 Stat. 1878.
172. See Treaty of Berlin, 1889, 31 Stat. 1878; see also Leibowitz, supra note 152, at 414 (explaining that Great Britain gave up its claims to Samoa in exchange for other lands in the Pacific and Africa).
173. Keesing, supra note 155, at 266.
175. Leibowitz, supra note 152, at 413-14.
176. Id. at 414.
Regardless of this apparent interest convergence, the privileging of land ownership in American Samoa today thus emanated from the disaggregation of land ownership from sovereignty\(^{178}\) and played an important role during this colonial history. Despite the loss of sovereignty over the islands, the policy ensured that indigenous peoples maintained ownership and control over their lands. The decoupling of sovereignty and property was significant because the protection of property rights functioned as a form of political autonomy within the context of colonialism. It protected the indigenous peoples', particularly the chiefs', critical leadership roles in the social landscape of American Samoa. The land law replaced the former customary rule of indigenous collective ownership of lands with a federal policy of protecting indigenous lands and consequently enabled American Samoan chiefs and their family members to continue to have control and ownership over their lands.\(^{179}\) Today, more than 90 percent of lands in American Samoa continue to be owned by the indigenous peoples.\(^ {180}\)

2. CNMI Blood Quantum Land Ownership Law

The CNMI's blood quantum land law also illustrates the unique relationship between property rights and promotion of a political purpose. In 1976, the CNMI entered into a permanent political union with the United States through the implementation of a negotiated political agreement known as the Covenant to Establish the Commonwealth of the Northern Mariana Islands (Covenant).\(^{181}\) Section 805 of the Covenant provides that, "the alienation of

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178. Eventually, American Samoans were allowed to establish their own local legislature. See LEIBOWITZ, supra note 152, at 452-54 (explaining the historical events that subsequently led to the creation of a locally elected legislature). Today, they have a bicameral legislature and a governor who, although previously appointed by the Department of Interior, is now elected. See id. at 453-55. The matai system, however, continues to play an important part in the legislative system in that all senators have to be a matai. See id. at 452-53. The establishment of the local legislature, however, did not change the manner with which decisions about use of lands and land ownerships are made. As previously noted, land ownership remains communal and the matai continues to be the head of the family who makes overall administrative decisions about use and ownership of the lands. See id. at 430.

179. The American Samoans' determination to protect their property rights even influenced their decision to reject U.S. citizenship because they feared that doing so would implicate the validity of their land tenure regime. LEIBOWITZ, supra note 152, at 426 (explaining that in 1948, 90 Samoan chiefs requested Congress to delay legislation that would have provided them with U.S. citizenship). To this day, American Samoans are U.S. nationals. See id. at 449.

180. See id. at 430.

181. See Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (CNMI Covenant), Act of Mar. 24, 1976, Pub. L. No. 94-241, 90 Stat. 263 (codified at 48 U.S.C. § 1801 (2000)). As a result of the Covenant, the people of the Northern Marianas re-obtained the authority to govern themselves. The Covenant provided for the election of a governor and establishment of a bicameral legislature in which the three main islands in the Northern Marianas have equal representation in the Senate and representation in the House of Representatives by population. It also created a local two-tiered judicial system and establishment of a federal district court. Finally, the Covenant conferred U.S. citizenship on the Mariana people.
permanent and long-term interests in real property" may be restricted to "persons of Northern Marianas descent." 182 It further explains that the reason for the land alienation restriction is "the importance of the ownership of land for the culture and traditions of the people of the Northern Mariana Islands, and in order to protect them against exploitation and to promote their economic advancement and self-sufficiency." 183

The CNMI later enacted its Constitution, which implemented Section 805 of the Covenant. Article XII of the Constitution provides that, "the acquisition of permanent and long-term interests in real property within the Commonwealth shall be restricted to persons of Northern Marianas descent." 184 Article XII defined a person of Northern Marianas descent as "a citizen or national of the United States and who is of at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof." 185 It also stated that, "the term permanent and long-term interests in real property . . . includes freehold interests and leasehold interests of more than fifty-five years including renewal rights." 186 As in American Samoa, the lease term may not exceed fifty-five years. 187

Yet, unlike American Samoans, the peoples of the Mariana Islands lost their sovereignty rights much earlier, specifically in 1565 when Spain claimed the Marianas as its colony and subsequently ruled it for 330 years. 188 At the end of World War II, the U.N. placed the Marianas and other former Japanese-held Micronesian islands in a trusteeship called the Trust Territory of the Pacific Islands (TTPI). 189 The colonies were temporarily placed under the trust and administration of independent countries, which were tasked with assisting the

182. CNMI Covenant, art. VIII, § 805(a).
183. Id. at art. VIII, § 805.
185. Id. at § 4. The section also states that a child adopted before the age of eighteen years by a person of Northern Marianas descent is also considered a person of Northern Marianas descent.
186. Id. at § 3.
187. See Wabol v. Villacrusis, 958 F.2d 1450, 1452 n.2 (noting the amendment to the Covenant).
188. See Laughlin, supra note 156, at 425-26; Leibowitz, supra note 152, at 522-23 (discussing the history of the Northern Mariana Islands). See generally Don A. Farrell, History of the Northern Marianas Islands (Phyllis Koontz ed., 1991) (discussing the history of the Northern Mariana Islands). At the end of the Spanish-American War, Spain sold the Northern Marianas to Germany and ceded Guam (then part of the Marianas) to the United States. See Laughlin, supra note 156, at 428; Leibowitz, supra note 152, at 523-25. Germany's colonial hold on the Marianas did not last very long. By 1914, when World War I began, Japan took possession of the Northern Marianas and controlled the islands until the end of World War II. See Laughlin, supra note 156, at 428; Leibowitz, supra note 152, at 525-26.
189. See Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189. The TTPI was part of the International Trusteeship System, which was established for the purpose of overseeing the achievement of self-government or independence of former colonized territories.
colonies attain self-government or independence based on the "freely expressed wishes of the peoples concerned." The United States became the administering body of the TTPI and was obligated to promote self-governance.

By the time the U.S. government took over the Mariana Islands, the majority of lands owned by the indigenous peoples of the Northern Mariana Islands had been lost to the foreign colonial governments. The United States subsequently implemented a policy of non-alienation of interests in lands, either in freehold interests or long-term leasehold interests, to persons who were not of Micronesian descent. In the mid-1960s, the TTPI islands began negotiating for their political status. The Mariana Islands, which sought a closer relationship with the United States, broke from the TTPI and requested separate negotiations.

During the negotiations of the Covenant, both representatives of the United States and Northern Mariana Islands agreed to establish a land alienation restriction. The Northern Mariana Islands' delegates viewed the imposition of a restriction as "one involving the principle of self-government" and one to be decided by the indigenous peoples. Interestingly, the U.S. government insisted on including it within the Covenant as a requirement. It recognized the constitutional implications of the policy but stated that:

The need to protect the land holdings of the original population of an area thus is sufficiently strong to override the generally applicable constitutional requirements of equal protection and due process. . . . There is also a strong federal interest in legislation which will prevent the same thing that happened in Hawaii from taking place in the Northern Marianas.

The United States viewed the restriction on land alienation as an essential component of the economic development of the islands, noting that the "failure to enact or to enforce such limitation on land alienation" could result in "a large portion of the population of the Northern Marianas [losing] its land." It further stated that a consequence might be that "the average citizen of the

190. Id.
191. See Farrell, supra note 188, at 120.
192. Howard P. Willens & Deanne C. Siemer, The Constitution of the Northern Mariana Islands: Constitutional Principles and Innovation in the Pacific Setting, 65 GEO. L.J. 1373, 1407 (1977) (discussing the implementation of land alienation restriction policy under Trust Territory period, which was ultimately under the governance of the United States).
193. See Leibowitz, supra note 152, at 501.
194. The rest of the TTPI islands preferred a status of free association. See Leibowitz, supra note 152, at 528-29.
195. See id. at 527-29.
196. Id. at 591.
197. Id. at 592.
198. See id. at 591.
199. Id. at 591 (citing U.S. Delegation, Talking Points on Land Alienation 3, May 25, 1974).
200. Id. at 592.
Commonwealth [could fail] to benefit from the U.S. assistance while those aliens who acquired the land absorbed the benefits of U.S. assistance.\textsuperscript{201}

\textbf{B. Equal Protection Challenges}

The fact that both American Samoa and the CNMI are U.S. territories that are subject to the U.S. Constitution and other federal laws meant that ultimately the deployment of blood quantum distinctions in their property laws would raise equal protection concerns. Two cases, decided before \textit{Rice v. Cayetano}, analyzed and upheld these territorial blood quantum land laws. Though they have been ignored in mainstream civil rights jurisprudence, they illustrate the marginalization of territorial cases within normative equal protection doctrine\textsuperscript{202} and could thus be subjected to new constitutional challenges. Importantly, both cases illustrate how the analyses of these blood quantum laws operated outside of the binary analytical framework, facilitating a potential reorientation of equal protection law's understanding of racial and political identity.

In \textit{Craddick v. Territorial Registrar of American Samoa},\textsuperscript{203} the High Court of American Samoa held that maintaining ownership of lands by American Samoans was necessary for the preservation of the "Fa'a Samoa, or Samoan culture."\textsuperscript{204} The court first acknowledged that the land alienation restriction constituted a classification based on race\textsuperscript{205} but concluded that the preservation of culture demonstrated a compelling state interest sufficient to override the equal protection claim brought by a non-indigenous resident of American Samoa.\textsuperscript{206}

The court's analysis of the compelling justification for the law focused on the relationship between property rights and culture among the American Samoan people. The court emphasized that land is so important to the indigenous peoples that they specifically included a provision in their constitution that would perpetuate their property ownership. Under this

\begin{itemize}
\item \textsuperscript{201} Id.
\item \textsuperscript{203} 1 Am. Samoa 2d 11 (1980), available at http://www.asbar.org/Cases/Second-Series/1ASR2d/1ASR2d10.htm#N_3_.
\item \textsuperscript{204} Id. at 12.
\item \textsuperscript{205} Id.
\item \textsuperscript{206} Id. at 11 (explaining that the challenge to the land alienation restriction was brought by an American citizen and his wife, who is a Native American Samoan). The Craddicks sought to register a warranty deed, which was denied by the Territorial Registrar because Douglas Craddick was not an American Samoan.
\end{itemize}
provision, the government of American Samoa must “protect the lands, customs, culture, and traditional Samoan family organization of persons of Samoan ancestry.” As noted above, land tenure in American Samoa is communal and inextricably tied to the territory’s social, cultural and political structures. Underlining the policy’s existence since the American occupation on April 17, 1900, the court explained:

The whole fiber of the social, economic, traditional, and political pattern in American Samoa is woven fully by the strong thread which American Samoans place in the ownership of land. Once this protection for the benefit of American Samoa is broken, once this thread signifying the ownership of land is pulled, the whole fiber, the whole pattern of the Samoan way of life will be forever destroyed.

Critically, the court concentrated not on the racial implication of the blood quantum requirement but rather on the underlying historical, social and cultural reasons for the promulgation of the policy. Holding that the American Samoan Code had a legitimate purpose rather than a “discriminatory one,” the court determined that the racial classification was necessary to safeguard the territory’s compelling interest in protecting the people’s culture.

In Wabol v. Villacrusis, the Ninth Circuit described the land alienation restriction law as “race-based” but concluded that the law was not “subject to equal protection attack.” Unlike the Craddick court’s reliance on an equal protection analysis to determine the constitutionality of the American Samoan land alienation restriction law, the Ninth Circuit used the territorial incorporation doctrine, which developed out of the Insular Cases, to uphold
the Northern Mariana Islands’ land alienation restriction. Under the territorial incorporation doctrine, only rights deemed fundamental are guaranteed in the territories. The Ninth Circuit opined that equal access to land ownership on the basis of ethnicity is not a fundamental right because its application in the Northern Marianas Islands would be “impractical and anomalous.”

Through the “impractical and anomalous” test, the Ninth Circuit’s opinion emphasized the intersection between property and culture as well as its relationship to the exercise of self-determination in the Mariana Islands. First, the court held that exercising the right would have impeded both the political union between the Northern Mariana Islands and the United States and the United States’ ability to acquire military posts. Framing this part of the analysis within the context of the indigenous peoples’ desire to attain self-government, the court emphasized that the current political status of commonwealth might not have been achieved but for the agreement to implement a land alienation law. Second, the application of nondiscrimination in the acquisition of property would have forced the United States to fail in its “international obligations” and break “its pledge to preserve and protect [Northern Marianas peoples’] culture and property.” The recognition of indigenous peoples’ property rights related to the court’s third and final holding—that the role of the Bill of Rights is to “protect minority rights, not to enforce homogeneity.” The court warned that the Bill of Rights was not “intended to operate as a genocide pact for diverse native cultures.” Accordingly, the court reasoned that imposition of the principle of equal access to property ownership would be anomalous if it lead to “the loss of their land [and] their cultural and social identity” and was therefore constitutional.

C. Expanding Political Identity

The indigenous only land laws in the territories coupled with Wabol and Craddick raise possibilities that could lead to broader conceptions of the

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"the incorporated/unincorporated territory distinction of the Insular Cases.”
217. Wabol, 958 F.2d at 1459-63.
218. See id. at 1459.
219. Id. at 1461.
220. Id. at 1462 (stating that the “application of the constitutional right could ultimately frustrate the mutual interests that led to the Covenant”).
221. Id. at 1461.
222. Id. at 1462.
223. Id.
224. Id. (“Where land is so scarce, so precious, and so vulnerable to economic predation, it is understandable that the islanders’ vision does not precisely coincide with mainland attitudes toward property and our commitment to the ideal of equal opportunity in its acquisition.”).
225. Id.
226. Id.
relationships among property, indigeneity and the right to self-determination. At least two lines of inquiry may be explored more fully in future scholarship. At the core of these different analyses is an emphasis on destabilizing equal protection law's fixed dichotomy between the racial and political meaning of laws that privilege indigenous groups. The first could examine the intersection between race and culture and its potential to reimagine what the protection against racial discrimination would look like. Scholars have understandably criticized the deviation from equal protection principles in the territories and the recognition of cultural differences in the territories. Yet these arguments are grounded on current normative equal protection law and the narrowed construction of race and political indigeneity explained in previous sections. Examining the treatment of culture and land rights in the territories and their attendant relationship to race engender potentially broader understanding of what the protection against racial discrimination would look like. The second area of theoretical analysis that could be further pursued would consider how property rights may facilitate a possible basis for expanding law's

227. Claims that are grounded on rights to cultural differences are among those arguments that have been rejected in equal protection law. See Richard T. Ford, Race as Culture? Why Not?, 47 UCLA L. REV. 1803, 1803 (2000) ("For the most part, [proposals that advance cultural preservation rights] have not yet been embraced by the courts."). The Supreme Court in Rice expressly articulated this bias when it explained that the U.S. Constitution should be the starting point from which Native Hawaiians ought to address the realities of the loss of their culture wrought by colonization. See Part I, infra and accompanying notes. Yet, as explained previously, current equal protection elides the colonial legacy of measures designed to address the effects of colonization and by design is ill-equipped to adequately address those concerns unless we begin to see how racial and political identities intersect.

Given the marginalization of cultural claims within equal protection jurisprudence, what import might Craddock and Wabol have for normative equal protection law? The privileging of indigenous peoples' ownership of lands and their culture illustrates the potential of equal protection's framework's to expand beyond its prescribed borders. Unlike the equal protection racial versus political paradigm, which invalidated the Native Hawaiian law for using "ethnic characteristics and cultural traditions," Rice v. Cayetano, 528 U.S. 495, 496 (2000), the more expansive interpretation of equal protection norms employed in the territories context accommodates a separate and distinct cultural identity.

228. See James A. Branch, Jr., The Constitution of the Northern Mariana Islands: Does a Different Cultural Setting Justify Different Constitutional Standards?, 9 DENV. J. INT'L L. & POL'Y 35, 59-62 (1980) (stating that the land alienation restrictions in the CNMI present several constitutional conflicts, including the Equal Protection Clause of the Fourteenth Amendment); Marybeth Herald, Does the Constitution Follow the Flag into United States Territories or Can it be Separately Purchased and Sold?, 22 HASTINGS CONST. L.Q. 707, 742 (1995) (critiquing the Ninth Circuit's use of "cultural genocide" to uphold the constitutionality of the CNMI land alienation restriction law because of the court's failure to analyze how the law protects culture and family identity); Gerald L. Neuman, Constitutionalism and Individual Rights in the Territories, in FOREIGN IN A DOMESTIC SENSE 182, 200 (Christina Duffy Burnett & Burke Marshall eds., 2001) ("Accepting linguistic and cultural differences as the basis for recognizing separate peoples within a permanent political union [challenges the character of U.S. citizenship."]); James R. Thornbury, A Time for Change in the South Pacific?, 67 REV. JUR. U.P.R. 1099, 1108-1110 (1998) (criticizing Presiding Bishop v. Hodel, 830 F.2d 374 (D.C. Cir. 1987), which noted with approval the legitimate interest in preserving and respecting American Samoa's traditions regarding land ownership).
understanding of political indigeneity. The remainder of this Essay provides some initial inroads towards that line of inquiry.

As legal philosopher Morris Cohen argued, the right of property grants the holder the right to exclude others, compels service and obedience and essentially, power over another. The relationship between property and sovereignty is a theory that scholars have examined or intimated in contexts outside Cohen's original context, including federal Indian law, segregated Jewish communities and land takings. Critically, I rely on this theory to explore how to expand the political meaning of indigeneity. Demonstrating the extent to which a blood quantum property law confers an indigenous group increased control and autonomy over their lands provides an example of how equal protection law might more broadly construct permissible political uses of blood quantum rules.

This theory has normative support in international law. The Declaration of the Rights of Indigenous Peoples (Declaration), adopted by the United Nations in September 2007, recognizes the necessity of facilitating indigenous peoples' right to own and possess their lands. Although the United States and three others states rejected the Declaration, 143 other countries overwhelmingly approved it, indicating the growing norm of recognition and protection of indigenous peoples' collective and individual rights. The rights established under the Declaration include the right to self-determination, the right to autonomy with respect to internal matters, and the right to maintain and strengthen indigenous peoples' political, legal, economic, social and cultural institutions. Moreover, several provisions of the Declaration

229. Morris R. Cohen, Property as Sovereignty, 13 CORNELL L.Q. 8, 12. (1927). I recognize that the subject of Cohen's article is different from the context I am addressing in this Essay. Nevertheless, the general point of Cohen's article that property rights confer some element of power forms an important part of my thesis.

230. Cohen's article addressed laissez faire and the unrecognized relationship between economic wealth and sovereignty. See id. at 14.

231. Singer, Sovereignty and Property, supra note 165, at 7 ("Federal Indian law therefore raises serious questions about the meaning of democracy, property, equality and the rule of law in the United States.").


236. G.A. Res. 61/295, supra note 234, at art. 3.

237. Id. at art. 4.

238. Id. at art. 5.
specifically address indigenous peoples' property rights. Article 26, for example, provides that indigenous peoples should have the right to the lands and territories they traditionally owned and that they have the right to use, develop and control these lands based on traditional ownership. Similarly, Article 32 states that indigenous peoples have the right to determine and develop their priorities for the development or use of their lands. These various provisions show that an important component of protecting indigenous peoples' property rights is conferring autonomy and control over their property.

An application of this property as self-determination theory may be explored in both the American Samoa and CNMI contexts. As discussed previously, the history of the enactment of American Samoa's blood quantum land law points to the federal government and indigenous peoples' intent to protect the peoples' right to control their lands despite being subjected to foreign rule. The policy enabled American Samoans to retain a form of political power through the ability to control their property, which was connected to their culture and social governance. Similarly, the implementation of the land alienation law in the CNMI related to the exercise of self-determination and the indigenous peoples' ability to negotiate their unique political status. Indeed, it may be argued that the recognized political status of the CNMI as a commonwealth demonstrates that the promotion of self-determination need not be limited to federally recognized tribes.

CONCLUSION

The current equal protection paradigm that examines blood quantum laws along a dichotomous racial versus political construction of blood constitutes an example of equal protection law's inability to appropriately address historical injustice and domination. What is needed is an escape from the narrow constructions of both racial and political identity. In this Essay, I argued for the liberalization of the current racial versus political dichotomy by revealing how the two legally produced and mutually exclusive categories are in fact related. Indeed, by showing the ways in which the federal regulatory process ascribes political status on some indigenous groups and reifies the racial status of other indigenous communities, the Essay demonstrated how law can expand what it means by political indigeneity.

More broadly, I showed how property rights could be used as a basis for expanding equality principles' understanding of valid political purposes. Reconfiguring the political paradigm, as I have urged, by examining the connections among property, culture and autonomy in the territories enables the law to drum up questions that seek to analyze how blood quantum laws may

239. See id. at arts. 26-28.
240. Id. at art. 26.
241. Id. at art. 32.
promote indigenous peoples' right to self-determination. Ultimately, the recognition of racial and political identity within equal protection doctrine illustrates the inherent and unresolved struggle between protecting individuals against race discrimination and promoting the collective right of indigenous peoples' to self-government. While finding solution to this tension is difficult, we could and should explore how the two legally produced mutually exclusive categories of race and political identities intersect and could promote the self-determination of indigenous peoples.