



7-1-2002

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### Recommended Citation

Danielle M. Conway, *The Perpetuation of Privilege and Anti-Affirmative Action Sentiment in Rice v. Cayetano*, 3 *APLJ* 371 (2002).

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## The Perpetuation of Privilege and Anti-Affirmative Action Sentiment in *Rice v. Cayetano*

Danielle Conway-Jones\*

What does affirmative action<sup>1</sup> have in common with Native Hawaiian<sup>2</sup> Sovereignty? Absolutely nothing, except in the manner that America responds to Peoples of Color. America seeks to know no color when it discusses affirmative action, Native Hawaiian self-determination

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<sup>1</sup> Danielle Conway-Jones & Christopher Leon Jones, Jr., *Department of Defense Procurement Practices After Adarand: What Lies Ahead for the Largest Purchaser of Goods and Services and Its Base of Small Disadvantaged Business Contractors*, 39 *HOW. L.J.* 391, 391-92 (1995) (explaining that affirmative action is the set of public policies and initiatives designed to help eliminate past and present discrimination based on race, color, religion, sex, or national origin).

<sup>2</sup> Throughout this piece, "Native Hawaiian" is used to refer to the indigenous peoples of Hawai'i without regard to blood quantum. Defining who is "Native Hawaiian" can be a difficult task for those individuals soaked in the ethereal waters of Western colonizers. But to those who understand indigenosity, the following definition is not hard to grasp. R. Hōkūlei Lindsey writes, "The only Hawaiians—whether a Hawai'i resident or not—are those who have a genealogical link to the land of Hawai'i." See R. Hōkūlei Lindsey, *Reclaiming Hawai'i: Toward the Protection of Native Hawaiian Cultural and Intellectual Property* (April 22, 2002) (unpublished manuscript, on file with the author).

When the myriad definitions imposed on the Native Hawaiian peoples by non-Hawaiian institutions are considered, the source of the difficulty is evident. See Hawaiian Homes Commission Act, Pub. L. No. 67-34, ch. 42, § 201(a)(7), 42 Stat. 108 (1920) (defining "native Hawaiian" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778"). In addition to the federal government, the State of Hawai'i has provided two definitions: one for "Native Hawaiian" and the other for "Hawaiian." See HAW. REV. STAT. ANN. § 10-2 (Michie 2000) (adopting, in essence, the definition articulated in the Hawaiian Homes Commission Act for "Native Hawaiian" under state law; defining further "Hawaiian" as "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii").

and governance, or Native American and Alaskan tribal rights, but America has its eye keenly fixed on color when it reveals its position about privilege, national security, and economic development and opportunity. Color-blindness<sup>3</sup> is a convenient tool of the privileged. It lies dormant for some issues and alive for others. Of course, there is no logical nexus between affirmative action policies and Native Hawaiian sovereignty issues, save the inconsistently applied color-blind standard touted by the privileged when most convenient. I propose that this America can never be color-blind so long as privilege retains color while disadvantage is forced to know no color.

The United States Constitution, as originally penned by its Framers, is a flawed document only corrected after decades of human suffering, humiliation, and annihilation. Supreme Court Justice Thurgood

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<sup>3</sup> The historical roots of the color-blind principle derive from Justice Harlan's famous dissent in *Plessy v. Ferguson*. Justice Harlan wrote:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.

*Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

Professor Cedric Merlin Powell eloquently interpreted Justice Harlan's dissent to be a sword against the perpetuation of a caste system in America where one's position in the system is pre-determined by skin color. See Cedric Merlin Powell, *Blinded by Color: The New Equal Protection, the Second Deconstruction, and Affirmative Inaction*, 51 U. MIAMI L. REV. 191, 202 (1997) (stating that "Justice Harlan's conception of colorblindness did not mean that the Constitution turns a blind eye on race; but rather, that the Constitution embraces the notion that there can never be caste based on one's status as nonwhite. Race is, indeed, a factor in this analysis. Significantly, *Plessy* embraces two theories—racial subjugation in the majority opinion and the elimination of caste based on Black skin in Justice Harlan's dissent. Both theories are color conscious, not colorblind. The striking difference between the two theories is how color is used to fashion a theory of equality." (citations omitted)).

Unlike Justice Harlan, the Supreme Court today, under its modern color-blind jurisprudence, casually ignores the "realities of time, place, and history" in its pronouncements that "race is treated as a forbidden classification." *Rice v. Cayetano*, 528 U.S. 495, 540, 544 (2000). Color-blind jurisprudence relies on the position that race is an irrelevant characteristic that is never a justified basis for treating people differently. Thus, Jim Crow laws had no basis, but they still existed and were premised on the fiction of racial differences. Unlike Jim Crow laws, race as a remedial force in affirmative action is real and a legitimate solution to the harm that Blacks suffered at the hands of White racism and discrimination.

Marshall publicly stated at the celebration of the bicentennial of the U.S. Constitution that “he refused to ‘find the wisdom, foresight, and sense of justice exhibited by the Framers particularly profound,’ because ‘the government they devised was defective from the start.’”<sup>4</sup> Mark Tushnet wrote that “[t]he difficulty for Marshall was that the framers intentionally perpetuated the system of African-American slavery, ‘to trade moral principles for self-interest.’”<sup>5</sup> Only with the passage of the Thirteenth,<sup>6</sup> Fourteenth,<sup>7</sup> and Fifteenth<sup>8</sup> Amendments has this country been able to envision the promise of justice and equality for all persons, especially for

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<sup>4</sup> MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961*, at 5 (1994). The author, a Professor of Law at the Georgetown University Law Center in Washington, D.C., was a law clerk for the late Supreme Court Justice Thurgood Marshall during the 1972 Term of the Court. In his book, Tushnet explains the kaleidoscopic civil rights movement, with particular attention to Justice Thurgood Marshall’s role as a lawyer for the National Association for the Advancement of Colored People (NAACP) Legal Defense and Education Fund.

<sup>5</sup> *Id.*

<sup>6</sup> U.S. CONST. amend. XIII. The Thirteenth Amendment made slavery illegal. Ratified on December 6, 1865, it states:

“Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.” *Id.*

<sup>7</sup> U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment guarantees equal protection under the laws. Ratified on July 9, 1868, it states in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*Id.*

<sup>8</sup> U.S. CONST. amend. XV. The Fifteenth Amendment forbids racial discrimination in access to voting. Ratified on February 3, 1870, it states:

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous conditions of servitude—

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

*Id.*

African-Americans.<sup>9</sup> Historical context is the only mechanism to teach and to understand the objectives of these amendments, all crucial to the amelioration of poor race relations resulting from the slavery and oppression of the Negro,<sup>10</sup> the Jim Crow laws enacted in response to post-Civil War Reconstruction,<sup>11</sup> and *de facto* and *de jure* segregation,<sup>12</sup> all of

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<sup>9</sup> See TUSHNET, *supra* note 5, at 5.

<sup>10</sup> Although antagonism to slavery existed in the thirteen colonies, “[a]ll of the colonies had slave populations. . . . [B]y the time of the Revolution, slavery was an integral component of American society. The economy, especially the burgeoning Southern agricultural economy and the thriving commerce of the North, benefited from this repressive source of labor.” JOHN P. KAMINSKI, *A NECESSARY EVIL?: SLAVERY AND THE DEBATE OVER THE CONSTITUTION* 1 (1995).

George Washington, Thomas Jefferson, and James Madison . . . . acknowledged the injustice of slavery; all advocated its abolition; and all personally held slaves. Yet none in his lifetime did anything of substance to free his own slaves or support the cause of emancipation. . . .

. . . . Each man had a plantation that supported him and his family financially . . . . Southern society valued economic independence. To reject financial security and turn one’s back on an established social system would take a great deal of dedication to the cause, not to mention personal sacrifice . . . . Support of emancipation might be detrimental politically . . . . Each man worried that the slavery issue, if pushed too hard, could lead to a backlash [that would] threaten the Union itself. Each man, born and reared in a slave society, was uncertain that emancipation would benefit the white population, the South, the country, or even the slaves.

*Id.* at 243-44.

<sup>11</sup> “Jim Crow describes a practice or policy of segregation or discrimination against Negroes in public places, public vehicles, employment, schools, etc. The term derives from a song sung by Thomas Rice in a mid-1800s Negro minstrel show.” CARL T. ROWAN, *DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL* 7 (1993).

Jim Crow laws, named for the minstrel show character borne in the ante-bellum South, were late nineteenth century statutes passed by legislatures of the Southern states that sought to and succeeded in creating a racial caste system in the American South. This system spread from the West to the East. White leaders designed Jim Crow laws to create a rigidly institutionalized system of control over Blacks that, during Reconstruction, moved from rural life, a life of humiliation and dependency, to urban life, a life of community and power. Examples of Jim Crow laws include, but are not limited to, the following, which are found on the website *Race, Racism and the Law* by Professor Vernellia R. Randall, who is a full professor at the University of Dayton School of Law.

Nurses: No person or corporation shall require any white female nurse to nurse in wards or rooms in hospitals, either public or private, in which negro men are placed. *Alabama*

Buses: All passenger stations in this state operated by any motor transportation company shall have separate waiting rooms or space and separate ticket windows for the white and colored races. *Alabama*

Railroads: The conductor of each passenger train is authorized and required to assign each passenger to the car or the division of the car, when it is divided by a partition, designated for the race to which such passenger belongs. *Alabama*

Restaurants: It shall be unlawful to conduct a restaurant or other place for the serving of food in the city, at which white and colored people are served in the same room, unless such white and colored persons are effectually separated by a solid partition extending from the floor upward to a distance of seven feet or higher, and unless a separate entrance from the street is provided for each compartment. *Alabama*

Pool and Billiard Rooms: It shall be unlawful for a negro and white person to play together or in company with each other at any game of pool or billiards. *Alabama*

Toilet Facilities, Male: Every employer of white or negro males shall provide for such white or negro males reasonably accessible and separate toilet facilities. *Alabama*

Intermarriage: The marriage of a person of Caucasian blood with a Negro, Mongolian, Malay, or Hindu shall be null and void. *Arizona*

Intermarriage: All marriages between a white person and a negro, or between a white person and a person of negro descent to the fourth generation inclusive, are hereby forever prohibited. *Florida*

Cohabitation: Any negro man and white woman, or any white man and negro woman, who are not married to each other, who shall habitually live in and occupy in the nighttime the same room shall each be punished by imprisonment not exceeding twelve (12) months, or by fine not exceeding five hundred (\$500.00) dollars. *Florida*

Education: The schools for white children and the schools for negro children shall be conducted separately. *Florida*

Juvenile Delinquents: There shall be separate buildings, not nearer than one fourth mile to each other, one for white boys and one for negro boys. White boys and negro boys shall not, in any manner, be associated together or worked together. *Florida*

Mental Hospitals: The Board of Control shall see that proper and distinct apartments are arranged for said patients, so that in no case shall Negroes and white persons be together. *Georgia*

Intermarriage: It shall be unlawful for a white person to marry anyone except a white person. Any marriage in violation of this section shall be void. *Georgia*

Barbers: No colored barber shall serve as a barber [to] white women or girls. *Georgia*

Burial: The officer in charge shall not bury, or allow to be buried, any colored persons upon ground set apart or used for the burial of white persons. *Georgia*

Restaurants: All persons licensed to conduct a restaurant, shall serve either white people exclusively or colored people exclusively and shall not sell to the two races within the same room or serve the two races anywhere under the same license. *Georgia*

Amateur Baseball: It shall be unlawful for any amateur white baseball team to play baseball on any vacant lot or baseball diamond within two blocks of a playground devoted to the Negro race, and it shall be unlawful for any amateur colored baseball team to play baseball in any vacant lot or baseball diamond within two blocks of any playground devoted to the white race. *Georgia*

Parks: It shall be unlawful for colored people to frequent any park owned or maintained by the city for the benefit, use and enjoyment of white persons . . . and unlawful for any white person to frequent any park owned or maintained by the city for the use and benefit of colored persons. *Georgia*

Wine and Beer: All persons licensed to conduct the business of selling beer or wine . . . shall serve either white people exclusively or colored people exclusively and shall not sell to the two races within the same room at any time. *Georgia*

Reform Schools: The children of white and colored races committed to the houses of reform shall be kept entirely separate from each other. *Kentucky*

Circus Tickets: All circuses, shows, and tent exhibitions, to which the attendance of . . . more than one race is invited or expected to attend shall provide for the convenience of its patrons not less than two ticket offices with individual ticket sellers, and not less than two entrances to the said performance, with individual ticket takers and receivers, and in the case of outside or tent performances, the said ticket offices shall not be less than twenty-five (25) feet apart. *Louisiana*

Housing: Any person . . . who shall rent any part of any such building to a negro person or a negro family when such building is already in whole or in part in occupancy by a white person or white family, or vice versa when the building is in occupancy by a negro person or negro family, shall be guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than twenty-five (\$25.00)

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nor more than one hundred (\$100.00) dollars or be imprisoned not less than 10, or more than 60 days, or both such fine and imprisonment in the discretion of the court. *Louisiana*

The Blind: The board of trustees shall...maintain a separate building . . . on separate ground for the admission, care, instruction, and support of all blind persons of the colored or black race. *Louisiana*

Intermarriage: All marriages between a white person and a negro, or between a white person and a person of negro descent, to the third generation, inclusive, or between a white person and a member of the Malay race; or between the negro and a member of the Malay race; or between a person of Negro descent, to the third generation, inclusive, and a member of the Malay race, are forever prohibited, and shall be void. *Maryland*

Railroads: All railroad companies and corporations, and all persons running or operating cars or coaches by steam on any railroad line or track in the State of Maryland, for the transportation of passengers, are hereby required to provide separate cars or coaches for the travel and transportation of the white and colored passengers. *Maryland*

Education: Separate schools shall be maintained for the children of the white and colored races. *Mississippi*

Promotion of Equality: Any person . . . who shall be guilty of printing, publishing or circulating printed, typewritten or written matter urging or presenting for public acceptance or general information, arguments or suggestions in favor of social equality or of intermarriage between whites and negroes, shall be guilty of a misdemeanor and subject to fine or not exceeding five hundred (500.00) dollars or imprisonment not exceeding six (6) months or both. *Mississippi*

Intermarriage: The marriage of a white person with a negro or mulatto or person who shall have one-eighth or more of negro blood, shall be unlawful and void. *Mississippi*

Hospital Entrances: There shall be maintained by the governing authorities of every hospital maintained by the state for treatment of white and colored patients separate entrances for white and colored patients and visitors, and such entrances shall be used by the race only for which they are prepared. *Mississippi*

Prisons: The warden shall see that the white convicts shall have separate apartments for both eating and sleeping from the negro convicts. *Mississippi*

Education: Separate free schools shall be established for the education of children of African descent; and it shall be unlawful for any colored child to attend any white school, or any white child to attend a colored school. *Missouri*

**Intermarriage:** All marriages between . . . white persons and negroes or white persons and Mongolians . . . are prohibited and declared absolutely void...No person having one-eighth part or more of negro blood shall be permitted to marry any white person, nor shall any white person be permitted to marry any negro or person having one-eighth part or more of negro blood. *Missouri*

**Education:** Separate rooms [shall] be provided for the teaching of pupils of African descent, and [when] said rooms are so provided, such pupils may not be admitted to the school rooms occupied and used by pupils of Caucasian or other descent. *New Mexico*

**Textbooks:** Books shall not be interchangeable between the white and colored schools, but shall continue to be used by the race first using them. *North Carolina*

**Libraries:** The state librarian is directed to fit up and maintain a separate place for the use of the colored people who may come to the library for the purpose of reading books or periodicals. *North Carolina*

**Militia:** The white and colored militia shall be separately enrolled, and shall never be compelled to serve in the same organization. No organization of colored troops shall be permitted where white troops are available, and while white permitted to be organized, colored troops shall be under the command of white officers. *North Carolina*

**Transportation:** The . . . Utilities Commission...is empowered and directed to require the establishment of separate waiting rooms at all stations for the white and colored races. *North Carolina*

**Teaching:** Any instructor who shall teach in any school, college or institution where members of the white and colored race are received and enrolled as pupils for instruction shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not less than ten dollars (\$10.00) nor more than fifty dollars (\$50.00) for each offense. *Oklahoma*

**Fishing, Boating, and Bathing:** The [Conservation] Commission shall have the right to make segregation of the white and colored races as to the exercise of rights of fishing, boating and bathing. *Oklahoma*

**Mining:** The baths and lockers for the negroes shall be separate from the white race, but may be in the same building. *Oklahoma*

**Telephone Booths:** The Corporation Commission is hereby vested with power and authority to require telephone companies . . . to maintain separate booths for white and colored patrons when there is a demand for such separate booths. That the Corporation Commission shall determine the necessity for said separate booths only upon complaint of the people in the town and vicinity to be served after due hearing as now provided by law in other complaints filed with the Corporation Commission. *Oklahoma*

Lunch Counters: No persons, firms, or corporations, who or which furnish meals to passengers at station restaurants or station eating houses, in times limited by common carriers of said passengers, shall furnish said meals to white and colored passengers in the same room, or at the same table, or at the same counter. *South Carolina*

Child Custody: It shall be unlawful for any parent, relative, or other white person in this State, having the control or custody of any white child, by right of guardianship, natural or acquired, or otherwise, to dispose of, give or surrender such white child permanently into the custody, control, maintenance, or support, of a negro. *South Carolina*

Libraries: Any white person of such county may use the county free library under the rules and regulations prescribed by the commissioners court and may be entitled to all the privileges thereof. Said court shall make proper provision for the negroes of said county to be served through a separate branch or branches of the county free library, which shall be administered by [a] custodian of the negro race under the supervision of the county librarian. *Texas*

Education: [The County Board of Education] shall provide schools of two kinds; those for white children and those for colored children. *Texas*

Theaters: Every person . . . operating . . . any public hall, theatre, opera house, motion picture show or any place of public entertainment or public assemblage which is attended by both white and colored persons, shall separate the white race and the colored race and shall set apart and designate . . . certain seats therein to be occupied by white persons and a portion thereof , or certain seats therein, to be occupied by colored persons. *Virginia*

Railroads: The conductors or managers on all such railroads shall have power, and are hereby required, to assign to each white or colored passenger his or her respective car, coach or compartment. If the passenger fails to disclose his race, the conductor and managers, acting in good faith, shall be the sole judges of his race. *Virginia*

Intermarriage: All marriages of white persons with Negroes, Mulattos, Mongolians, or Malaya hereafter contracted in the State of Wyoming are and shall be illegal and void. *Wyoming*

Vernellia R. Randall, Race, *Racism and the Law: Speaking Truth to Power!*, <http://www.udayton.edu/~race/02rights/jcrow02.htm> (last visited May 25, 2002).

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Dr. Martin Luther King, Jr., Address Before the First Annual Institute on Non-Violence and Social Change in Montgomery, Alabama (1956) in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR.* 136-37 (James Melvin Washington, ed., 1986). Dr. Martin Luther King, Jr. spoke of segregation:

which combined to institutionalize racism<sup>13</sup> as a foundation of modern American society. White racism in America continues to persist today and remains a template for the subjugation of other non-White races as depicted by the American conquest of the Philippines, the overthrow of the Hawaiian Nation, and the myriad assaults on Cuba.

The formerly mentioned Justice Marshall quote “to trade moral principles for self-interest” is particularly apt in any discussion about the assault on affirmative action and, of particular interest to Native Hawaiians, the assault on principles of self-determination, sovereignty, and federal recognition. In any anti-affirmative action discourse, self-interest is reflected by the privileged class’s use of the Fourteenth Amendment to challenge the very moral principle it sought to protect: the

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We have also seen the old order in our own nation, in the form of segregation and discrimination. We know something of the long history of this old order in America. It had its beginning in the year 1619 when the first Negro slaves landed on the shores of this nation. They were brought here from the soils of Africa. And unlike the Pilgrim Fathers who landed at Plymouth a year later, they were brought here against their wills. Throughout slavery the Negro was treated in a very inhuman fashion. He was a thing to be used, not a person to be respected. He was merely a depersonalized cog in a vast plantation machine. The famous *Dred Scott* Decision of 1857 well illustrates the status of the Negro during slavery. In this decision the Supreme Court of the United States said, in substance, that the Negro is not a citizen of the United States; he is merely property subject to the dictates of his owner. Then came 1896. It was in this year that the Supreme Court of this nation, through the *Plessy v. Ferguson* decision, established the doctrine of separate-but-equal as the law of the land. Through this decision segregation gained legal and moral sanction. The end result of the *Plessy* doctrine was that it led to a strict enforcement of the ‘separate,’ with hardly the slightest attempt to abide by the ‘equal.’ So the *Plessy* doctrine ended up making for tragic inequalities and ungodly exploitation.

*Id.*

Thus, under Jim Crow, both *de jure* and *de facto* segregation were the laws of the land.

<sup>13</sup> Professor Elizabeth S. Anderson identifies three types of racism for purposes of defining the term. First, she identifies unconscious or covert racism, which is the difference in treatment according to “unconsciously held racial stereotypes or cognitive schemas that structure . . . perceptions and habits.” Elizabeth R. Anderson, *Race, Gender, and Affirmative Action: What Are Racism and Sexism?*, <http://www-personal.umich.edu/~eandersn/biblio.htm> (last modified Sept. 10, 2001). Second, she identifies secondary racism or racism by proxy, which occurs when a “facially race-neutral basis for discrimination is accepted at least in part because it tracks race.” *Id.* And third, she identifies institutional racism, “which is neither overt, covert, nor secondary[,] [but] includes policies that perpetuate the legacy of racial discrimination by means of classifications that disproportionately impact disadvantaged racial groups.” *Id.*

life, liberty, and property of all persons. This same self-interest, masked as an attempt to ensure a color-blind America, is directed against the goals of affirmative action. As well, in any Hawaiian anti-sovereignty discourse, self-interest is reflected by the privileged class's use of constitutional and federal laws, particularly the Fourteenth and Fifteenth Amendments, to challenge the moral principles of self-determination for Native Hawaiians and Peoples of Hawaiian ancestry. But this color-blind America asks far too much of its members of color. Peoples of color are bullied into believing or accepting that both invidious and benign racism no longer exist merely because the privileged class says so. Well, racism does persist, and now it is dressed up as convenient color-blindness that will never account for the continued gains reaped by those who insist on perpetuating privilege.

At issue in *Rice v. Cayetano*<sup>14</sup> was the voting scheme for election of trustees of the Office of Hawaiian Affairs (OHA).<sup>15</sup> A non-Hawaiian, White rancher, Harold "Freddy" Rice challenged the constitutionality of the voting scheme on the basis that the scheme was racially discriminatory. The U.S. Supreme Court chose to frame the issue to favor Rice by narrowly viewing the voting scheme as solely a question of racial classification. Upon reflection, the Supreme Court's decision is not a surprise. In fact, the Court's action only perpetuates the majoritarian<sup>16</sup> perspective that Whites do not view minority races differently as between each other and, therefore, because there are no differences, Whites assume that all members of minority groups are the same.

This is the basis of color-blind jurisprudence, and it is flawed. By holding steadfastly to White privilege, the White majority distinguishes between the White race and the non-White race. This cannot be considered color-blind jurisprudence. In addition, Whites envision their Whiteness as the norm and, thus, any racial deviation results in racial awareness of non-Whiteness. The Supreme Court seems to congratulate itself for ignoring race between people of color without ignoring race in relation to Whiteness.

The *Rice* Court explicitly criticized the Native Hawaiian voting scheme for allegedly using ancestry as a proxy for race. By conflating the

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<sup>14</sup> 528 U.S. 495 (2000).

<sup>15</sup> *Id.* at 498-99.

<sup>16</sup> See MERRIAM-WEBSTER ONLINE, at <http://www.Merriam-Webster.com> (last visited June 8, 2002) (defining "majoritarianism" as "the philosophy or practice according to which decisions of [a] group [are] made by a numerical majority of its members").

distinct issues encountered by Blacks in America with the issues facing Native Hawaiians in their quest for self-determination and sovereignty, the Court exposed its superficial understanding of ancestry in one context and race in another context. But more distressing is the Court's silence about the past, present, and future impact of White privilege in relation to racial equality and self-determination. Just as easily as the Supreme Court transformed an issue of ancestry into one of invidious racism by raising the proxy spectre, one can reasonably assert that White privilege is a proxy for invidious, institutional racism and discrimination. By sustaining White privilege, the Court cements institutional advantages for Whites—a race-conscious result, while simultaneously ensuring that specific remedies for particular harms resulting from racism and discrimination will not be redressed—a distinctly color-blind result. And, in this result, the Court is most proud.

To be most clear that differences exist in harms and appropriate remedies, it is useful to distinguish between the experience of Blacks in America and the experience of Native Hawaiians subjugated by Western colonization in their own homeland. Affirmative action policy grew out of the Civil Rights Movement between the 1930s and the 1960s. In 1961, President John F. Kennedy embarked on a journey to discover how, in the midst of the Civil Rights Movement, the executive branch of the federal government could address racial inequality.<sup>17</sup> Following passage of the Civil Rights Act of 1964<sup>18</sup> and the Voting Rights Act of 1965,<sup>19</sup> President Lyndon B. Johnson significantly expanded affirmative action programs to include an array of initiatives, like special recruiting and hiring goals, designed to help racial minorities and women become full participants in America's economic structure.<sup>20</sup> Affirmative action policy is one

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<sup>17</sup> Among other great triumphs, President John F. Kennedy was responsible for issuing Exec. Order No. 10,925, 3 C.F.R. 448 (1959-63), amended by Exec. Order No. 11,114, 3 C.F.R. 774 (1959-63), which created the Committee on Equal Employment Opportunity. The Executive Order mandated that projects financed with federal funds "take affirmative action" to ensure that hiring and employment practices remain free of racial bias. See *id.* § 301(1)

<sup>18</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 243 (codified as amended at 42 U.S.C.A. §§ 2000a to h-6 (West 2002)).

<sup>19</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C.A. §§ 1973 to 1973bb-1 (West 2002)).

<sup>20</sup> In a now famous speech to the Class of 1965 at Howard University, President Lyndon B. Johnson framed the concept underlying affirmative action as follows:

mechanism that responds to the fallacy of “a place of perfect knowledge, perfect competition, and perfect access to information and opportunity.”<sup>21</sup> As demonstrated by the African American experience in America, perfect and level playing fields in education, voting, employment, housing, jury service, and transportation are fantasies. To turn these fantasies into workable solutions to combat racial inequality and discrimination, the federal government crafted affirmative action programs. By all accounts, these programs are not perfect and are not intended to be permanent, but their very existence was and still is necessitated by insidious race politics in America. Lest we forget, the need for civil rights legislation and affirmative action programs emanated from White supremacy and notions of White superiority, which rose like a phoenix from Jim Crow laws and still persist today, now emblazoned under the moniker of color-blindness.

But affirmative action and racial preferences were developed to address a uniquely Black experience in America. Affirmative action’s use in other contexts has the effect of diluting its meaning and its purpose, not to mention that its use in other contexts provides lawmakers and jurists with avenues of egress to safe havens of convenient jurisprudential color-blindness. The argument of racial preferences and the implicit, yet perceived, connection to affirmative action through analogies to race

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You do not wipe away the scars of centuries by saying: “now, you are free to go where you want, do as you desire, and choose the leaders you please.” You do not take a man who for years has been hobbled by chains, liberate him, bring him to the starting line of a race, saying, “you are free to compete with all the others,” and still justly believe you have been completely fair . . . . This is the next and more profound stage of the battle for civil rights. We seek not just freedom but opportunity—not just legal equity but human ability—not just equality as a right and a theory, but equality as a fact and as a result.

Borgna Brunner, *Timeline of Affirmative Action Milestones*, at <http://www.infoplease.com/spot/affirmativetimeline1.html> (last visited May 25, 2002).

President Johnson was a profoundly aware leader, because he realized that civil rights legislation in the abstract could not alone ameliorate the conditions of the Black race in America; he realized that racial equality would realistically take form only after the federal government supported civil rights policies by consciously acting in the interest of Black American victims of public and private institutional racism and discrimination. On September 25, 1965, President Johnson issued Exec. Order No. 11,246, 3 C.F.R. 339 (1964-65), *reprinted as amended in* 42 U.S.C.A. § 2000e (West 2002), enforcing affirmative action and, for the first time, requiring “government contractors to ‘take affirmative action’ toward prospective minority employees in all aspects of hiring and employment.” Brunner, *supra*; *see also* Exec. Order No. 11,246, *supra*.

<sup>21</sup>

ELLIS COSE, *COLOR-BLIND: SEEING BEYOND RACE IN A RACE-OBSSESSED WORLD* 99 (1997).

classifications and remedies presented in *Rice v. Cayetano* distorts both the issue of being Native Hawaiian and the issue of Native Hawaiians' special relationship to the United States based upon indigenoussness and political status.<sup>22</sup>

Professor Chris Iijima said it best when he wrote about the binary box the Supreme Court constructed in *Rice v. Cayetano*.<sup>23</sup> In his passionate, yet logical, discussion of the uniqueness of voting schema for electing trustees to OHA, Professor Iijima rightly concluded that Native Hawaiians hold a special political status that the federal government has recognized in over 150 pieces of federal legislation, and that their special status "stems from the racial and cultural subordination inherent in their colonization and the longstanding assault on their sovereignty."<sup>24</sup> The carnage of the Native Hawaiian peoples during the illegal overthrow of the Hawaiian government and the subsequent annexation of the Hawaiian Islands by the United States represent a unique history that is separate and distinct from the history of racism against Blacks in America, the very impetus for equal protection legislation and executive mandates for affirmative action. This does not mean that the plight of Blacks is worse than that of Native Hawaiians; it means that each group's victimization at the hands of Whites is unique, and this very uniqueness calls for properly tailored remedies. If one looks at the victimization of Blacks and Hawaiians from the Western colonial perspective, then it is obvious that the harm visited on both groups is rooted in racial subordination. In spite of this racial reality, Native Hawaiians, indigenous to the land of Hawai'i, also retain their status as a people to whom a special relationship is owed. This special relationship is the basis upon which the voting schema for electing OHA trustees was set, and it is the rational basis standard that should test its legitimacy in the courts of a government that has explicitly accepted responsibility<sup>25</sup> for the egregious actions taken against the Native Hawaiian people.

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<sup>22</sup> See 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, 97 (2000).

<sup>23</sup> See *id.* at 96.

<sup>24</sup> *Id.* at 97.

<sup>25</sup> See Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893, Overthrow of the Kingdom of Hawai'i, Pub. L. No. 103-150, 107 Stat. 1510 (1993) (apologizing "to Native Hawaiians . . . for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination").