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FARRINGTON V. TOKUSHIGE: LANGUAGE AND POWER IN HAWAI'I

“These Islands must be 100 percent American.
The first and most obvious step is the elimination of the foreign
language school.”¹

Introduction

In *Farrington v. Tokushige* (1927), the U.S. Supreme Court struck down on Fifth Amendment grounds a series of laws enacted by the Territory of Hawai'i to control and ultimately eradicate private Japanese language schools.² Legal commentary on *Tokushige* is sparse. *Tokushige* is often characterized as a straightforward application of *Pierce v. Society of Sisters* (1925) and *Meyer v. Nebraska* (1923)³—which, on its face, it is. In *Pierce*, the court invalidated an Oregon law requiring that children be sent to public schools on Fourteenth Amendment grounds.⁴ In *Meyer*, the Court ruled that a Nebraska law prohibiting teaching any language other than English to students who had not

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1. NORIKO ASATO, *TEACHING MIKADOISM, THE ATTACK ON JAPANESE LANGUAGE SCHOOLS IN HAWAII, CALIFORNIA, AND WASHINGTON, 1919–1927*, at 30 (2006) (quoting a speech given by Reverend Albert W. Palmer, an influential Honolulu Central Union Church pastor, on Japanese language schools in November 1919).

2. 273 U.S. 284, 299 (1927).

3. Kenneth O'Brien, *Education, Americanization and the Supreme Court*, *AM. QUARTERLY*, VOL 13, 161–71 (1961); WILLIAM G. ROSS, *FORGING NEW FREEDOMS: NATIVISM, EDUCATION, AND THE CONSTITUTION, 1917–1927* 174–84 (1994).

4. 268 U.S. 510 (1925).

yet passed the eighth grade was similarly unconstitutional.⁵ In *Tokushige*, the Court applied *Pierce* and *Meyer* in the Fifth Amendment context, declaring that Japanese parents have the “right to direct the education” of their children “without unreasonable restrictions; the Constitution protects [them] as well as those who speak another tongue.”⁶ *Tokushige* is cited, along with *Pierce* and *Meyer*, in *United States v. Carolene Products*’s famous Footnote Four as an instance of prejudice against a “discrete and insular” minority tending to inhibit “political processes ordinarily to be relied upon to protect minorities.”⁷

These cases and the laws they dealt with were rooted in the Americanization period that gained momentum in the early 1900s, crystalized during World War I, and continued through the 1920s. This era was fueled by nativism, which targets the ethnicity of people deemed enemies to a nation’s dominant culture.⁸ The Americanization period can be characterized as a “defensive type of nationalism” that promoted “pro-Anglo Saxon, pro-‘native’ American, and pro-Protestant” ethnocentric homogeneity.⁹ Americanization proponents were politically adept, drawing on “moral energy and popular anxieties” to mount inflated political and social “crusade[s] against the foreign elements in American culture.”¹⁰ During this period, nativist sentiments catalyzed a movement for mandatory English-only teaching in public schools in an attempt to assimilate those perceived as immigrants¹¹—whether they were actually born outside of the United States or just perceived as such, as was the case for Nisei (U.S.-born children of first-generation Japanese immigrants) in the Territory of Hawai’i.¹² *Tokushige*, *Pierce*, and

5. 262 U.S. 390 (1923).

6. *Tokushige*, 273 U.S. at 298.

7. 304 U.S. 144, 152 n.4 (1938).

8. Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 329 (1992).

9. Ann Leilani Halsted, *Sharpened Tongues: The Controversy Over the “Americanization” of Japanese Language Schools in Hawaii, 1919–1927*, at 1 (Dissertation Stanford University 1989).

10. *Id.*

11. Not all immigrants were subjected to nativist attacks with the same vehemence and national fervor. As Robert S. Chang and Keith Aoki explain, “[f]ear of immigration, often discussed in generalized terms, is colored so that only certain immigrant bodies excite fear.” Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 CALIF. L. REV. 1395, 1400 (1997). In the United States, “fear over immigration is not articulated solely around foreignness per se; it includes a strong racial dimension.” *Id.* at 1400–01. For clarity, I refer to “foreignness” throughout, but I mean this racialized foreignness.

12. ASATO, *supra* note 1, at 104–05; *see also* Eileen H. Tamura, *The Americanization Campaign and the Assimilation of the Nisei in Hawaii, 1920 to 1940*, at xv–xvi (Dissertation University of Hawai’i 1990).

Meyer are often characterized as the Court's public education chapter of the Americanization period.¹³

However, as social science scholar Noriko Asato explains, viewing *Tokushige* as a simple extension of *Meyer* and *Pierce* ignores "critical differences" between the cases—namely, the unique forces behind the school control laws at issue in *Tokushige*.¹⁴ The attacks on Japanese language schools in Hawai'i must be situated within the larger context of white elites' attempts to maintain political and economic control in the Territory in the face of the growing Nisei population, who, unlike their parents, were U.S. citizens with the right to vote. In this way, the Territory's anti-Japanese movement was distinct from concurrent Japanese exclusion initiatives in California and Washington, which revolved around attempts to prevent Japanese land ownership and economic ascension, though the fear of the "yellow peril" was the fulcrum through which these movements metastasized.

As a legal matter, *Tokushige* is what it appears to be: an uncomplicated application of *Pierce*'s and *Meyer*'s Fourteenth Amendment pronouncements in the Fifth Amendment context. What sets *Tokushige* apart is the unique history leading up to the decision—history that is inextricably intertwined with the establishment and maintenance of U.S. hegemony in the Pacific. Examining the social and legal history behind *Tokushige* reinserts the significant racial dynamics that undergirded the events, the cultural depictions, and the legal justifications for the Japanese school control legislation that was lost in the U.S. Supreme Court's sterilized decision.¹⁵ It also resituates *Tokushige* within the context of U.S. colonization and the forces that justified control over Hawai'i's politics, land, and culture. Recontextualized, *Tokushige* implicates core questions of power that are increasingly relevant today, including who has access to political and economic power and who creates the conditions for access to that power.

Part I provides a brief history of land tenure and political power in Hawai'i throughout the nineteenth century, which is necessary to understand the attacks on the Japanese language schools. With that foundation, Part II then turns to the establishment of the language schools at the behest

13. ASATO, *supra* note 1, at 104–05.

14. ASATO, *supra* note 1, at 105–06.

15. Given space constraints, this Essay focuses on *Tokushige*'s social and legal history. In later work, I intend to examine how the attacks on Japanese language schools and efforts to eradicate the Hawaiian language were manifestations of the racialization process that was essential to the United States' colonization of Hawai'i. For more on the links between racialization and colonization, see Susan K. Serrano, *A Reparative Justice Approach to Assessing Ancestral Classifications Aimed at Colonization's Harms*, 27 WM. & MARY BILL RTS J. 501, 518–21 (2018); ALBERT MEMMI, *THE COLONIZER AND THE COLONIZED* 7–9 (Howard Greenfeld trans., Beacon Press expanded ed. 1967).

of politically powerful interests, including sugar planters and Christian and Buddhist missionaries. The plantations—operated by the “Big Five” corporations, which had a gridlock on economic and political power in the islands—established language schools to incentivize Japanese laborers to put down roots in Hawai‘i, rather than return home at the conclusion of their contracts. Christian and Buddhist missionaries also created language schools as recruitment mechanisms for their congregations. As tools of these politically powerful interests, the language schools became pawns in larger games of power between and among not only the Big Five and missionary groups, but also Territorial and U.S. politicians, who were vying to maintain electoral control in the islands that had so recently been illegally overthrown by the same business elite and missionaries, with the backing of U.S. armed forces.

Part III delves into the rising tensions surrounding these power struggles, which operationalized growing nativist animosity as the U.S.-born Nisei population grew to become the majority ethnic group in the Territory. Part IV then turns to the immediate catalysts of the school control legislation at issue in *Tokushige*: a report written by a Christian missionary and a Federal Education Survey conducted by the U.S. Bureau of Education, both of which were borne out of the strong nativist resentment stoked in the power struggles amongst the Big Five, politicians, and missionaries. Finally, Part V covers the offending legislation, the legal battle mounted by the language schools, and the aftermath of the U.S. Supreme Court’s decision in *Tokushige*.

I. A Brief History of Land, Power, and Labor in Nineteenth Century Hawai‘i

Prior to western contact, Native Hawaiian communities thrived in a complex society rooted in reciprocal relationships between themselves and the biocultural resources in the most isolated archipelago in the world, which at the same time supported a population close to present-day size.¹⁶ The arrival of missionaries in Hawai‘i in 1820 profoundly altered every facet of Native Hawaiian society, ultimately ending in mass death,¹⁷ widespread land dispossession, cultural devastation, environmental destruction, and the

16. Melody Kapilialoha MacKenzie, *Historical Background*, in *NATIVE HAWAIIAN LAW: A TREATISE*, 2, 8 (Melody Kapilialoha MacKenzie et al. eds., 2015); Kamanamaikalani Beamer, *An Aloha ‘Āina Economy—Give, Take, Regenerate*, in *THE VALUE OF HAWAII 3: HULIHIA, THE TURNING* 83–84 (Noelani Goodyear-Ka‘ōpua et al. eds., 2020).

17. The Native population declined from about 1,000,000 people in 1778 to only 40,000 by the end of the nineteenth century. D. Kapua‘ala Sproat, *Wai Through Kānāwai: Water for Hawai‘i’s Streams and Justice for Hawaiian Communities*, 95 MARO. L. REV. 127, 174 (2011) (citations omitted); see also LILIKALĀ KAME‘ELEIHIWA, *NATIVE LAND AND FOREIGN DESIRES: PEHEA LĀ E PONO AI?* 81 (1992) (explaining that

illegal overthrow of the Kingdom of Hawai'i. In less than one hundred years of the missionaries' arrival, five companies, known as the "Big Five," took control of Hawai'i's economy and politics, remaking the islands into a plantation society.¹⁸ Four of these companies were founded by missionary families.¹⁹

Over time, the missionaries-turned-planters, along with western military interests, sought to exploit Hawai'i's resources and strategic geopolitical location. To safeguard the sovereignty of the Kingdom of Hawai'i and traditional lifeways, Native Hawaiian leaders formally created a constitutional monarchy to stave off colonization.²⁰ While the island nation had always been sovereign, the Constitution of 1840 formally codified its government structure and enshrined public trust concepts embedded in the Native Hawaiian communal land tenure system.²¹

Western interests, however, grew increasingly hostile to the communal land tenure system, vying for a private property regime instead.²² Faced with interrelated pressures from the missionaries and the Big Five, western imperialism in the Pacific,²³ and the rapid decline of the Native population,²⁴ Kamehameha III (Kamehameha III), the sovereign of the Kingdom, transitioned the nation to a private property regime through a process known as the *Māhele* (division or share) to protect a land base for Native Hawaiians and ensure that they retained property rights in the face of western encroachment.²⁵

Through the *Māhele* process, however, the western business elite amassed large amounts of land for plantations, holding title to three of every

there was an eighty percent decline in the Native Hawaiian population in the first forty-five years after western contact).

18. See generally CAROL A. MACLENNAN, *SOVEREIGN SUGAR* 52–102 (2014).

19. *Id.*

20. KAMANAMAIKALANI BEAMER, *NO MĀKOU KOU KA MANA: LIBERATING THE NATION* 104–05 (2014).

21. HAW. CONST. OF 1840, *translated in* TRANSLATION OF THE CONSTITUTION AND LAWS OF THE HAWAIIAN ISLANDS, ESTABLISHED IN THE REIGN OF KAMEHAMEHA III, 11–12 (photo. reprt. 1934) (1842); D. Kapua'ala Sproat & MJ Palau-McDonald, *The Duty to Aloha 'Āina: Indigenous Values as a Legal Foundation for Hawai'i's Public Trust*, 57 HARV. C.R.-C.L. L. REV. 525, 534–44 (2022).

22. MacKenzie, *supra* note 16, at 11.

23. Melody Kapilialoha MacKenzie & D. Kapua'ala Sproat, *A Collective Memory of Injustice: Reclaiming Hawai'i's Crown Lands Trust in Response to Judge James S. Burns*, 39 U. HAW. L. REV. 481, 503 (2017).

24. JON M. VAN DYKE, *WHO OWNS THE CROWN LANDS OF HAWAII?* 30–31 (2008) (explaining the correlation between population decline and privatization of property).

25. MacKenzie & Sproat, *supra* note 23, at 510; see also BEAMER, *supra* note 20, at 142–43 (demonstrating that the *Māhele* was a tool of Native agency meant to secure Native Hawaiian land rights).

four privately owned acres by the end of the nineteenth century.²⁶ Though Kauikeaouli's explicit goal was to protect Native lifeways, the Māhele ultimately resulted in land dispossession and the consolidation of political and economic power in the hands of western businessmen and U.S. armed forces.

As the western elite amassed more power and land, they increasingly opposed the sovereignty of the Kingdom of Hawai'i.²⁷ In 1893, a small group of Americans and Europeans, aided by U.S. Marines, overthrew the Kingdom.²⁸ They then declared the creation of a "Provisional Government" that would rule until the United States annexed Hawai'i.²⁹ Alarmed by the illegal overthrow and the push for annexation, President Grover Cleveland sent a commissioner to investigate the situation. The commissioner's report found that "Americans, with the support of the U.S. minister to Hawai'i and U.S. military troops, were responsible for overthrowing the monarchy."³⁰ In turn, President Cleveland urged the U.S. Congress "to make all possible reparation" and restore the monarchy that had been "robbed of its independence and its sovereignty by a misuse of the name and power of the United States."³¹ Despite President Cleveland's directive and Native Hawaiians' vigorous advocacy, sovereignty was not restored. When the U.S. Senate did not pursue annexation in 1894, the insurrectionists declared the creation of the Republic of Hawai'i and seized the land belonging to Hawai'i's sovereign, Queen Lili'uokalani.³² Soon thereafter, the Republic merged the sovereign's lands with the land held by the Kingdom in trust for the people and made them alienable.³³ The Big Five snatched up acreage for sugar plantations. By 1898, about 1,400,000 of the 1,800,000 acres of these lands were leased to 65 corporations and individuals.³⁴

26. MacKenzie, *supra* note 16, at 16, 18–19.

27. Portions of this paragraph have previously appeared in MJ Palau-McDonald, *Blockchains and Environmental Self-Determination for the Native Hawaiian People: Toward Restorative Stewardship of Indigenous Lands*, 57 HARV. C.R.-C.L. L. REV. 393, 405–06 (2022).

28. MacKenzie, *supra* note 16, at 19–23.

29. *Id.* at 24.

30. MacKenzie & Sproat, *supra* note 23, at 515.

31. See H.R. Exec. Doc. No. 47, 53d Cong., Relation to the Hawaiian Islands (Grover Cleveland, Dec. 18, 1893) (2d sess. 1893), *reprinted in* H.R. Exec. Doc. No. 1, 53d Cong., App'x II, Foreign Relations of the United States, 1894, Affairs in Hawaii 457 (3d Sess. 1895).

32. See MacKenzie, *supra* note 16, at 24–25.

33. For a full accounting of the complicated legal history surrounding the seizure, merger, and alienation of the Crown and Government Lands, see Palau-McDonald, *supra* note 27, at 406 n.121.

34. VAN DYKE, *supra* note 24, at 216.

The initial waves of Japanese emigration to Hawai'i are tied to this massive land grab.³⁵ As the Big Five cemented their lock on economic, political, and social power in the islands after the illegal overthrow, they recruited indentured Chinese workers to fill plantation labor shortages that white workers would not fill.³⁶ Due to the abhorrent conditions on plantations and other factors, most Chinese laborers sought to return home after fulfilling their contracts. But the contract labor system was abolished when the United States annexed Hawai'i via congressional joint resolution in 1898,³⁷ further constricting the labor force.³⁸ To make matters worse for the planters, the Territory of Hawai'i began to enforce the United States' Chinese Exclusion Act a few years after U.S. annexation.³⁹

Given these constraints on Chinese labor, planters came to view Japanese workers as an "ideal solution" to the deficit.⁴⁰ From 1885 to 1894, the Japanese government sent *kanyaku imin* (government-sponsored contract laborers) to work on Hawai'i's plantations.⁴¹ Like the Chinese contract laborers before them, the Japanese laborers who emigrated during this period viewed themselves as sojourners, who would return to their homeland at the conclusion of their contracts, as opposed to immigrants who would put down roots in the islands.⁴² Despite the poor conditions,⁴³ Issei (first-generation Japanese immigrants) quickly became the dominant ethnic group in Hawai'i's workforce, making up 42.2 percent in 1890 and 73.5 percent by 1902.⁴⁴ Because they did not qualify for U.S. citizenship, Issei had no right to vote, even though they comprised a substantial portion of the Territory's population. As a result, they "lived and worked at the discretion" of the Big Five, which dominated social, political, and economic life in the islands throughout the twentieth century.⁴⁵

35. See ASATO, *supra* note 1, at 22.

36. MACLENNAN, *supra* note 18, at 190; ASATO, *supra* note 1, at 1.

37. Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, July 7, 1898, 30 Stat. 750.

38. MACLENNAN, *supra* note 18, at 172.

39. *Id.* at 190–91, 240–41.

40. ASATO, *supra* note 1, at 2; see also PETER IRONS, JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES 74 (1989).

41. ASATO, *supra* note 1, at 1. One-hundred and forty-eight Japanese had previously emigrated to the fledgling United States as contract-laborers in 1868. *Id.* The immigration of these *gannenmono* (people of the first year) was not successful, and Japan halted further immigration to the United States until the beginning of the *kanyaku imin* period in 1885. *Id.*

42. Tamura, *supra* note 12, at 5.

43. *Id.* at 7–11.

44. ASATO, *supra* note 1, at 2.

45. MACLENNAN, *supra* note 18, at 171.

II. Establishment of the Japanese Language Schools

Initially, children's education was not a central concern for Issei because they viewed themselves as sojourners (as opposed to immigrants), who would raise families once they returned home at the end of their contract.⁴⁶ Given the challenges of retaining labor forces, the Big Five sought to incentivize Issei to stay beyond their contractual period. To that end, the plantations encouraged Issei to bring their wives to Hawai'i and funded the creation of Japanese language schools on plantation property that would serve as education and childcare centers for the laborers' children.⁴⁷ Outside of the plantations, Christian and Buddhist missionaries also opened Japanese language schools to help grow their congregations.⁴⁸ In total, there were 147 Japanese language schools (along with an additional nine that taught Korean and seven that taught Chinese) in the Territory by 1920.⁴⁹

The curriculum at these early language schools was still based on the assumption that the laborers' families would ultimately return to Japan. As such, the curriculum focused on Japanese national education.⁵⁰ Because their primary purpose was to serve as childcare centers, the schools did not supplant public education; the schools supervised children after the public-school day ended while their parents worked in the cane fields and sugar mills.⁵¹ In this way, the language schools were a vital component of the plantation economy.⁵² Over time, these schools became meeting places for labor organizing and also helped support Japanese-language newspapers and bookstores.⁵³

Contrary to later nativist attacks that asserted direct involvement on the part of the Japanese government in the language schools, the Japanese government was not significantly involved with the language schools in Hawai'i and on the North American continent.⁵⁴ In 1906, the Japanese government established guiding principles and recommendations for educating Japanese citizens residing overseas,⁵⁵ but the Japanese Consuls General in Hawai'i "often deliberately ignored" the order because they were forced to tow a line between protecting Japanese communities and rising nativist animosity from

46. ASATO, *supra* note 1, at 2.

47. *Id.* at 2–3.

48. JOHN E. REINECKE, LANGUAGE AND DIALECT IN HAWAII: A SOCIOLINGUISTIC HISTORY TO 1935, 125–26 (1969).

49. *Farrington v. Tokushige*, 273 U.S. 284, 291–92 (1927).

50. ASATO, *supra* note 1, at 4, 15.

51. *Id.* at 4.

52. Halsted, *supra* note 9, at 48–49, 110.

53. REINECKE, *supra* note 48, at 124–25.

54. ASATO, *supra* note 1, at 15.

55. *Id.*

American politicians and Christian religious leaders in Hawai'i.⁵⁶ By 1909, the Japanese government considered the schools "beyond their active control."⁵⁷

III. Changing Priorities and Rising Nativist Animosity

The assumption that the laborers' families would return home shifted as Issei families grew. By 1904, Nisei, the U.S.-born children of Issei, made up nearly half of the Territory's population, and by 1920, Japanese made up the largest ethnic group in Hawai'i by a large margin.⁵⁸ As families set down roots, they began to shift their priorities away from returning to Japan toward settling in Hawai'i long term—just as the Big Five had intended.

This shift was in part driven by the fact that Nisei, having been born in the Territory, were U.S. citizens,⁵⁹ unlike their Issei parents, who were initially presumed ineligible for citizenship and then were later barred under *Ozawa v. United States* (1922).⁶⁰ Complicating their situation, Nisei also held citizenship under Japan's *jus sanguinis* system.⁶¹ Their dual nationality spurred nativist charges of "divided loyalty."⁶²

Against the backdrop of nativist animosity, the language schools became pawns in power conflicts between plantations, Christian and Buddhist missions, the Territorial government, and U.S. officials.⁶³

Unlike Christian leaders and western officials who attacked the Buddhist missions as un-American, the Big Five had historically supported the Buddhist missions because they helped to enforce divisions along ethnic and

56. *Id.* at 16.

57. *Id.* at 15–16.

58. According to Tamura's calculations, 42.7% of the 1920 population was Japanese, 16.3% Native Hawaiian (which includes those marked as "Hawaiian" and "Part-Hawaiian"), 10.6% Portuguese, 9.2% Chinese, 8.2% Filipino, 7.7% Caucasian, and 1.9% Korean. Tamura, *supra* note 12, at 431.

59. ASATO, *supra* note 1, at 7–8.

60. 260 U.S. 178 (1922). Japanese immigrants were presumed ineligible for citizenship because they were not white nor of African descent. JUAN F. PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* 411 (3rd ed. 2015). Despite this presumption, 420 Japanese had naturalized by 1910. *Id.* at 416. In *Ozawa*, however, the Court concluded that only "free white persons" and "aliens of African nativity" and "persons of African descent" were eligible for citizenship under the naturalization statute. 260 U.S. at 196–98. For more on Japanese immigrants' fight for citizenship, see Yuji Ichioka, *The Early Japanese Immigrant Quest for Citizenship: The Background of the 1922 Ozawa Case*, AMERASIA J., 1977, at 17–18.

61. ASATO, *supra* note 1, at 7–8.

62. *Id.* at 8.

63. See REINECKE, *supra* note 48, at 127.

cultural lines, which the Big Five fomented to prevent widespread solidarity among plantation laborers.⁶⁴ Then, in 1904 and 1909, Buddhist leaders from the Hongwanji-sect suppressed plantation labor strikes. Plantation owners were impressed with the Hongwanji leaders' intercession and their ability to "enhance the docility of their labor force."⁶⁵ In turn, plantations supported Buddhist-operated language schools, which thrived with the plantations' economic and political support.⁶⁶

But the plantations' support for the Buddhist schools inflamed Christian and nativist leaders.⁶⁷ The Americanization movement "often blurred the line between 'Americanizing' and Christian proselytizing."⁶⁸ During this period, Buddhism "was regarded as an antithesis to Christianity, which was frequently used as a measurement of assimilation in America."⁶⁹ Unsurprisingly then, the initial attacks on the language schools were mostly directed at the Buddhist schools, especially those run by the Hongwanji sect.⁷⁰ Christians also charged the Buddhist schools with stymying Japanese assimilation and criticized Buddhist teachers as having little or no ability to speak English and minimal American civics knowledge.⁷¹ The language school's focus on Japanese national education as well as Nisei's dual citizenship further inflamed nativist sentiments, and the schools were increasingly charged with creating imperial subjects loyal to the Japanese empire.⁷²

To combat these attacks, Issei leaders looked to modify school policies to raise Nisei as "American citizens of Japanese ancestry."⁷³ To that end, Japanese language teachers formed the Hawai'i Education Association (HEA) in 1915.⁷⁴ Through HEA, they moved to standardize the curriculum across all of the language schools, offering only standard Japanese language instruction, instead of other previously taught subjects that were included in the Japanese national curriculum.⁷⁵ HEA also sought to create its own textbook to replace

64. ASATO, *supra* note 1, at 22.

65. *Id.* at 8.

66. *Id.* However, the rivalry between Christian and Buddhist organizations intensified, and the plantations eventually stopped supporting individual schools directly, instead donating to the Consuls General, which in turn apportioned financial support among the schools. *Id.* at 10.

67. *Id.* at 11.

68. *Id.* at 23.

69. *Id.* at 11.

70. *Id.*

71. *Id.*

72. *Id.* at 11–12.

73. *Id.* at 8.

74. *Id.* at 11.

75. *Id.*

ones used by the Monbushō, Japan's Ministry of Education.⁷⁶ The organization also changed the name of the schools from Nihonjin shōgakkō (Japanese elementary schools) to Nihongo gakkō (Japanese language schools).⁷⁷ All of these endeavors were meant to assure the nativist critics that they were raising American citizens of Japanese ancestry, rather than Japanese subjects.⁷⁸

IV. Catalysts for the Acts: The Gulick Report and the Federal Education Survey

Despite the language schools' policy shift and new public image, politicians, nativists, and Christian groups continued to attack the schools. One major critic was Reverend Sidney L. Gulick, a prominent Christian missionary. Gulick visited Hawai'i for two weeks in 1915 to produce a report titled "Hawaii's American-Japanese Problem."⁷⁹ The school control bills that were eventually passed by Territorial officials and struck down in *Tokushige* have origins in Gulick's recommendations.

Gulick's report begins by speaking to the anxieties of white politicians and missionaries over maintaining dominance in and control over the islands that had so recently been overthrown in the face of an influx of "Oriental blood."⁸⁰ He identifies the "Problem of the Citizen" as a central issue, querying whether it will be possible "to maintain a democratic form of Government" when within "a score of years the majority of the voters in the Territory of Hawaii will be of Japanese and Chinese ancestry."⁸¹ He continues, asking how is the "loyalty" of "citizens of Oriental blood" to "be won and permanently maintained? Is Hawaii to be a seed-plot of sedition and maintained as an outpost of American territory and civilization only by the strong arm of the American Army and Navy?"⁸² For Gulick, the "speedy promotion of complete social and political assimilation, that is to say, Americanization of the various races in the Islands" was the resolution.⁸³

76. *Id.* at 11–12.

77. *Id.* at 12. This change shifts the name of the schools from an "elementary school for a *Japanese person*" to a "*Japanese language* school." In this way, it literally erases the ethnic, national, and personal identity dimensions of the schools to focus solely on teaching the Japanese language. Interview with Arisa Herman (Feb. 7, 2025).

78. ASATO, *supra* note 1, at 8, 12.

79. SIDNEY L. GULICK, HAWAII'S AMERICAN-JAPANESE PROBLEM (Honolulu Star-Bulletin 1915).

80. *Id.* at 15.

81. *Id.*

82. *Id.*

83. *Id.*

In his report and later work, he provided recommendations for this Americanization process. First, he called for legislation requiring all teachers to pass qualifications in “English, American history, methods of government, and ideals of democracy” and obtain a certification from the Territorial Board of Education.⁸⁴ He also suggested that officials question “whether the plantations should be allowed to subsidize Japanese schools whose teachers and policies tend to obstruct the Americanization of their pupils” and warned that “[s]erious problems are ahead unless Hawaiian-born Japanese are pretty thoroughly Americanized.”⁸⁵

A few years later, Territorial Senator Albert F. Judd published a letter to the editor in the *Pacific Commercial Advertiser*, an influential English language newspaper, calling for a bill identical to Gulick’s recommendations to “safeguard for the nation a Christian American citizenship” in Hawai‘i.⁸⁶ Japanese communities strongly opposed Judd’s proposed legislation as it would effectively close all of the language schools because few teachers were fluent in English.⁸⁷ Japanese newspapers published opposition letters from community leaders, leading to a back and forth in the English and Japanese papers’ letters to the editor. In one of the final missives, the editor of the *Pacific Commercial Advertiser* admonished the Japanese community for suggesting that the language school attacks amounted to racial discrimination and “making a considerable to-do over a conspiracy some Japanese think they have discovered to abolish the Japanese schools of the Territory.”⁸⁸

Ultimately, Judd’s proposal was shelved, but a series of bills were thereafter introduced calling for various measures to control and restrict the language schools.⁸⁹ Although these initial bills ultimately failed due to strong opposition from the Japanese community and other factors,⁹⁰ the Territorial Legislature was successful in authorizing officials to request that the U.S. Commissioner of Education conduct an education survey in Hawai‘i.⁹¹

84. SIDNEY L. GULICK, AMERICAN DEMOCRACY AND ASIATIC CITIZENSHIP 241 (1918).

85. *Id.*

86. A. F. Judd, *Qualifications for Teaching*, PAC. COMM. ADVERTISER, Jan. 4, 1919, at 4.

87. ASATO, *supra* note 1, at 24.

88. Halsted, *supra* note 9, at 94 (quoting a January 9, 1919, article by Pacific Commercial Advertiser Edward P. Irwin).

89. *Id.* at 94–95.

90. *Id.* at 81; ASATO, *supra* note 1, at 27.

91. Authorizing and Directing the Governor and the Superintendent of Public Instruction to Request the Commissioner of Education of the United States of America to Undertake a Federal Survey of the Schools of the Territory of Hawaii, Joint Resolution No. 1 (1917). Later, the Territorial Legislature also authorized a commission to conduct a “thorough investigation” of the curriculum and teacher qualifications and recommended further legislation

The resulting Federal Education Survey was the idiomatic straw that broke the camel's back, leading to the passage of the legislation challenged in *Tokushige*. The Survey Commission devoted an entire section of the survey to the language schools. To gather data for this section, the Survey Commission solicited commentary from western stakeholders, including members of the Territory's public school corps and three white civic organizations: the Daughters of the American Revolution, the Honolulu Chamber of Commerce, and the Ad Club of Honolulu.⁹² The Survey Commission also asked the civic organizations to provide recommendations for legislation.⁹³ Among other Americanization proponents, Gulick sent the Survey Commission a copy of his work opposing the schools.⁹⁴ Though not disclosed in the report, it was later revealed that the U.S. Office of Naval Intelligence also sent a confidential memorandum to the U.S. Bureau of Education on the Japanese language schools during the survey process.⁹⁵ No one from the Japanese community was interviewed.⁹⁶

Given space constraints, the breadth of the anonymous commentary documented in the Survey cannot be adequately summarized here, but suffice to say that it was xenophobic, racist, and inflammatory, ultimately characterizing the schools as hindering the development of "real Americans"⁹⁷ and fostering loyalty to Japan.⁹⁸ The proposed legislation put forth by the civic organizations was reprinted in entirety in the final report. In its recommendation, the Daughters of the American Revolution declared that "foreign-language schools are not only unnecessary, but a menace to the unity and safety of our Nation."⁹⁹ The other civic organizations—the Honolulu Chamber of Commerce and the Ad Club of Honolulu—called for the schools to be placed under government control to begin assimilating "Hawaii's children of

to ensure that all students are "loyal and intelligent citizens of the territory of Hawaii and the United States of America." *Appointment of Commission to Devise Ways to Inculcate Ideals of Citizenship Urged by Senate*, HONOLULU STAR-BULLETIN (SEMI-WEEKLY STAR), May 2, 1919, at 13.

92. U.S. DEP'T OF INTERIOR, A SURVEY OF EDUCATION IN HAWAII 134 (1920) [hereinafter *FEDERAL SURVEY*].

93. *Id.* As Asato points out, the "report offers no explanation as to why these white civic organizations were labeled important or representative of public sentiment. Each of the three organizations had passed resolutions opposing the Japanese language schools." ASATO, *supra* note 1, at 39.

94. ASATO, *supra* note 1, at 33.

95. *Id.* at 32.

96. *Id.* at 30.

97. *FEDERAL SURVEY*, *supra* note 92, at 129.

98. *Id.* at 131–32.

99. *Id.* at 135.

many races.”¹⁰⁰ The Ad Club called for “the gradual elimination of the language schools as rapidly as may be wise and expedient” and claimed that a failure to properly Americanize children of non-citizen parents would “block the attainment of statehood and will probably result in a loss of self-government in the Territory.”¹⁰¹

The Survey Commission, however, ultimately concluded that bringing the schools under government control would be impractical given staffing shortages and would “tacitly sanction[] an institution which the commission is convinced is incompatible with American traditions and ideals.”¹⁰² In lieu of government supervision, the Survey Commission called for legislators to simply abolish all of the language schools.¹⁰³ The Survey Commission set forth this harsh proposal, cloaked in the perceived objective neutrality of a federal study, but did not identify any specific aspects of the schools that were “un-American” or warranted abolition.¹⁰⁴

V. The Acts and Legal Challenges

The impact of the Federal Survey was immense and led to the passage of the laws at issue in *Tokushige*.¹⁰⁵ In the wake of its release, numerous white entities and organizations called for measures to control the language schools. To avoid further hostilities, Japanese community leaders, in consultation with Lorrin Thurston—a vehement critic of the schools and an Americanization proponent who had assisted in the illegal overthrow of the Hawaiian Kingdom¹⁰⁶—drafted a compromise bill, which was signed into law in November 1920.¹⁰⁷

Known as Act 30, the law required that any “foreign language school”¹⁰⁸ obtain a permit from the Territory’s Department of Public Instruction (DPI).¹⁰⁹ Language school teachers were also required to get permits, which—echoing Gulick’s original recommendation—would be granted only if DPI was

100. *Id.* at 136–37.

101. *Id.* at 137.

102. *Id.* at 139.

103. *Id.* at 140–42.

104. ASATO, *supra* note 1, at 40.

105. *Id.* at 41.

106. Halsted, *supra* note 9, at 87, 97; VAN DYKE, *supra* note 24, at 121.

107. ASATO, *supra* note 1, at 41.

108. The Act defined “foreign language school” to mean a school conducted in any language other than English or Hawaiian, except for Sabbath schools. The carve out for Hawaiian was superfluous because that language was nearly wiped out at this time due to U.S. colonization.

109. An Act Relating to Foreign Language Schools and Teachers Thereof, No. 30, § 2 (1920) [hereinafter Act 30].

“satisfied” that the applicant “possessed the ideals of democracy, knowledge of American history and institutions and knows how to read, write and speak the English language.”¹¹⁰

A companion bill, Act 36, titled “An Act to Prescribe Certain Qualifications for School Teachers for the Purpose of Safeguarding American Citizenship in the Territory of Hawaii,” required that teachers obtain a certificate from DPI signifying that they satisfactorily proved these same qualifications.¹¹¹ On the ground, the certification and permitting process was a considerable financial burden for the Japanese community, which ultimately raised thousands of dollars to put their teachers through the requisite Americanization classes.¹¹²

Act 30 also required applicants seeking to open or teach at a foreign language school to pledge to “direct the minds and studies of pupils . . . as will tend to make them good and loyal American citizens,” and to not permit instruction inconsistent with American citizenship.¹¹³ It also limited attendance at language schools to one hour per day, not to exceed six hours per week, nor for more than thirty-eight weeks per school year,¹¹⁴ and banned the schools from operating in the morning before the public-school day started or anytime during which public school was in session.¹¹⁵ It gave DPI “full power” to control language school curriculum and textbooks¹¹⁶ and made any violation of the Act punishable as a misdemeanor.¹¹⁷

Following Act 30’s passage, California and Washington, which were in the grips of similar yet distinct anti-Japanese movements, attempted to pass school control legislation modeled after Act 30.¹¹⁸ Only California was successful. Where the language school controversy in Hawai‘i was a manifestation of power conflicts playing out against the backdrop of white elites’ attempts to sustain an electoral majority in a nation that the United States had illegally overthrown not twenty years prior, the language school controversies on the

110. *Id.* §§ 3, 4. *See also* An Act to Prescribe Certain Qualifications for School Teachers for the Purpose of Safeguarding American Citizenship in the Territory of Hawaii, No. 36, § 1 (1920) [hereinafter Act 36].

111. Act 36, § 1.

112. ASATO, *supra* note 1, at 101.

113. Act 30, § 5.

114. *Id.* § 6.

115. *Id.*

116. *Id.* § 7. Of course, Act 30 also made clear that DPI would not furnish any of its prescribed textbooks to the language schools.

117. *Id.* § 9.

118. *School Case Watched by California*, HONOLULU STAR-ADVERTISER, Jan. 3, 1923, at 8; Matsubayashi Yoshide, *The Japanese Language Schools in Hawaii and California from 1892 to 1941*, at 155–59 (Dissertation University of San Francisco 1984).

North American continent were rooted in the Japanese exclusion movement, which centered on attempts to prevent Japanese land ownership and economic advancement.¹¹⁹ Linking the Hawai'i experience with the co-occurring experiences on the North American continent was the underlying fear that the "yellow peril" posed a threat to the unity and safety of the white populace.¹²⁰

Back in Hawai'i, a joint committee was formed to enact regulations to administer the various provisions of Act 30 that gave the DPI authority to oversee the teaching and curriculum.¹²¹ Initially, fifteen Japanese community leaders were appointed to the committee.¹²² However, early in their work it was "suggested" that white members also be appointed to the committee.¹²³ Soon thereafter, six white members were appointed, all of whom had backgrounds in missionary work and the Americanization movement, including Walter Francis Frear, who would go on to defend the Territory before the U.S. Supreme Court in *Tokushige*.¹²⁴ The white members frequently met without their Japanese counterparts and drafted regulations without their participation.¹²⁵ Proposed regulations drafted by the white members were ultimately passed out from the committee under pressure from the white members.¹²⁶

The proposed regulations went further than Act 30 provided for in controlling the schools.¹²⁷ They required that students complete at least two grades of an English-only school before attending a foreign language school and that foreign language school textbooks be written from the perspective that the students' first language was English.¹²⁸ The rationale for all of these policies was that English would be students' first language.¹²⁹ But, ironically, the "fact that most of the children involved came from Japanese speaking homes"—and thus would be speaking Japanese long before they attended a language school—seemed to "escape" the white committee members.¹³⁰

At a meeting where the Japanese members were not present, the white members and Territorial officials discussed revising the proposed regulations to "eliminate[]" kindergarten, first, and second grade at the language

119. ASATO, *supra* note 1, at 42, 83, 96; PEREA ET AL., *supra* note 60, at 410 (discussing the origins of California's Alien Land Law).

120. ERIC YAMAMOTO ET AL., RACE, RIGHTS, AND NATIONAL SECURITY: LAW AND THE JAPANESE AMERICAN INCARCERATION 33–34 (3rd ed. 2021).

121. Halsted, *supra* note 9, at 104–05.

122. *Id.*

123. *Id.* at 105.

124. *Id.* at 106, 177.

125. *Id.*

126. *Id.* at 107.

127. *Id.*

128. *Id.*

129. *Id.* at 109.

130. *Id.* at 108.

schools.¹³¹ This new proposal troubled various stakeholders. First and most obviously, the Japanese members disagreed with the revised proposal because it would financially ruin the schools.¹³² The proposed regulations also presented issues for the plantations, which depended on the language schools to provide childcare for laborers' children after the public-school day ended.¹³³ Moreover, the conflict surrounding the proposed regulations worried Territorial Governor Wallace Rider Farrington, who feared that news of friction between the government and the Japanese community may stymie his efforts to court U.S. Congressional leaders, who harbored concerns over the "yellow peril," in favor of statehood for Hawai'i.¹³⁴ When the commission adopted the regulations in August 1922, Governor Farrington refused to sign them.¹³⁵

A month later, attorneys for the Japanese Society of Hawai'i petitioned Governor Farrington to stop the regulation that would eliminate the lower grades and argued for the first time that Act 30 might be unconstitutional.¹³⁶

In November 1922, the commission adopted a revised set of regulations, which Governor Farrington signed the same day.¹³⁷ These revised regulations specified that students must "reach a certain age and level of academic achievement" and "pass the public school first and second grade" before attending a foreign language school.¹³⁸ The requirement that textbooks be written from the point of view that English was students' first language was kept in.¹³⁹ In effect, these "revised" regulations still closed the first three years of the language schools.¹⁴⁰

While the Japanese leaders who had originally drafted Act 30 felt betrayed by these hostile regulations, the broader Japanese community was divided as to how to react to the new regulations, with some advocating for resistance and others arguing for compliance.¹⁴¹ In late December 1922, four language

131. *Id.* at 110.

132. *Id.* at 111.

133. *Id.* at 110–11.

134. *Id.* at 112. Concern over the "yellow peril" and barbaric, uncivilized Native Hawaiians undergirded discussions about Hawai'i statehood. For brevity, I do not delve into these racialized fears in this Essay, but it is worth noting that they were brutally epitomized in the execution of Myles Fukunaga and lynching of Joseph Kahahawai. For more information on both instances of vigilantism, see JONATHAN Y. OKAMURA, *RACED TO DEATH IN 1920s HAWAII: INJUSTICE AND REVENGE IN THE FUKUNAGA CASE* 166–86 (2019).

135. Halsted, *supra* note 9, at 113.

136. *Id.* at 113–14.

137. *Id.* at 114.

138. *Id.*

139. *Id.*

140. ASATO, *supra* note 1, at 101.

141. *Id.* at 101–02; REINECKE, *supra* note 48, at 128.

schools filed a lawsuit in the Territorial trial court that challenged the constitutionality of Act 30.¹⁴² Early the next year, the court ruled that Act 30 was constitutional, but that DPI's regulations regarding the curriculum were invalid.¹⁴³ Both parties appealed to the Territorial Supreme Court.¹⁴⁴

While the case was pending in the Territorial Supreme Court, the Territorial Legislature enshrined DPI's regulations in law.¹⁴⁵ Known as Act 171, the law also imposed fines for enforcement violations and created inspector positions to assess school compliance.¹⁴⁶

The schools then petitioned to enjoin Act 171, which the Territorial Circuit Court granted a few months later.¹⁴⁷ In turn, the Territorial Legislature passed Act 152, which amended Acts 30 and 171 to add a provision allowing for civil suits against any school that failed to pay the fee and any person involved with a rogue school and the imposition of criminal penalties.¹⁴⁸ Act 152 also prohibited seeking an injunction to restrain the fee collection and criminal prosecution provisions.¹⁴⁹

By June 1925, the Territorial Supreme Court still had not ruled on the language schools' original suit, so the Territory and the schools mutually dismissed the case.¹⁵⁰ With the dismissal, the Territory could not enforce DPI's regulations, but Act 30 remained constitutional.¹⁵¹

The schools then sued in the U.S. District Court for the Territory of Hawai'i, seeking to enjoin the Territory from enforcing Act 152's collection provisions against the litigating schools.¹⁵² In a sweeping order, Judge J.T. Debolt granted a temporary injunction restraining territorial officials from requiring the schools to obtain permits, pay fees, make reports, give pledges, use DPI-prescribed textbooks, and conform to any DPI regulation regarding subjects, courses of study, and teaching qualifications.¹⁵³ He further restrained

142. ASATO, *supra* note 1, at 102.

143. Halsted, *supra* note 9, at 189.

144. *Id.* at 190.

145. *Id.*

146. An Act to Amend Sections 1, 2, 4, 7 and 8 of Act 30 of the Special Session Laws of 1920, and Adding Thereto a New Section to be Known as Section 9A, Relating to Foreign Language School, No. 171 (1923).

147. ASATO, *supra* note 1, at 103.

148. An Act to Amend Sections 391 and 398 of the Revised Laws of Hawaii 1925, Relating to Foreign Language Schools, No. 152 (1925).

149. *Id.* § 1.

150. Halsted, *supra* note 9, at 191; ASATO, *supra* note 1, at 103.

151. ASATO, *supra* note 1, at 130. DPI eventually agreed to rescind the regulation that prohibited language schools from teaching students before they had finished the second grade. Halsted, *supra* note 9, at 191.

152. Halsted, *supra* note 9, at 191.

153. *Farrington v. Tokushige*, 11 F.2d 710, 713 (9th Cir. 1926).

territorial officials from enforcing any penalties against the schools and teachers, arresting them, or bringing civil or criminal proceedings against them for failing to comply with the terms of the challenged laws.¹⁵⁴ Territorial officials were also prohibited from interfering in any way with the schools' properties or business.¹⁵⁵

On appeal, the Ninth Circuit affirmed Judge DeBolt's order in a divided opinion that ultimately rejected Acts 30, 171, and 152 on due process and privileges and immunities grounds.¹⁵⁶ The majority began by acknowledging that the "right of the pupils, against whom the legislation is directed, to acquire a knowledge of the Japanese language, and the right of others to teach them that language" was "beyond question."¹⁵⁷ The majority continued that the only remaining consideration was whether the Acts could be upheld as a proper exercise of the Territory's police power over a non-compulsory private school system that provided instruction in addition to, not in lieu of, public school.¹⁵⁸ On this point, the majority concluded that a parent's right to educate their child in their own way, "at least beyond the requirements of local law," was beyond the scope of the police power.¹⁵⁹ The majority reasoned that the Acts essentially amounted to forcing the students to take a course on Americanism—"a course not required for any other class of citizens or students."¹⁶⁰ The majority remarked that "if such a system of regulations were enforced by one of our American commonwealths against an American college in which foreign languages are taught, it would shock the conscience of mankind."¹⁶¹

The majority also rejected the Territory's argument that such regulations were justified because of the "peculiar conditions prevalent on the Islands"—i.e. the large Nisei population that would soon make up a majority of the electorate and was allegedly unwilling to assimilate and harboring secret loyalty to the Japanese emperor.¹⁶²

Although the majority foreclosed these arguments, it did so on constitutional grounds, while still validating the Territory's tropes rooted in nativistic racism. The majority opined that it was "a matter of common knowledge that the Japanese do not readily assimilate with other races, and especially

154. *Id.*

155. *Id.*

156. *Id.* at 714.

157. *Id.* at 713 (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Bartels v. Iowa*, 262 U.S. 404 (1923)).

158. *Id.*

159. *Id.* at 714.

160. *Id.*

161. *Id.*

162. *Id.*

with the white race.”¹⁶³ The majority reasoned that this was “in part a matter of choice and in part a matter of necessity, because one cannot assimilate alone” and noted that it had “[n]o doubt [that] the Japanese tongue will be spoken on the Islands for generations yet to come, and no doubt the Japanese will be slow to give up their customs and their ideals.”¹⁶⁴ Nevertheless, the majority conceded that the United States “took the Islands cum onere and extended the Constitution of the United States there, and every American citizen has a right to invoke its protection. You cannot make good citizens by oppression, or by a denial of constitutional rights, and we find no such conditions there as will justify a departure from the fundamental principles of constitutional law.”¹⁶⁵ Thus, the majority ultimately concluded that the Acts “abridge[d] the privileges and immunities of citizens of the United States, and deprive[d] them of liberty and property without due process of law.”¹⁶⁶

The U.S. Supreme Court granted certiorari.¹⁶⁷ Though the Court would not allow the Federal Survey as evidence, the Territory’s brief significantly relied on the Survey and reiterated its main points, justifying the abolition of the language schools by characterizing them as “un-American.” The Territory argued that it would be “a sad commentary on our system of government to hold that the Territory must stand by, impotent,” and “watch its foreign-born guests conduct a vast system of schools of American pupils, teaching them loyalty to a foreign country and disloyalty to their own country,” and “hampering them during their tender years in the learning of the home language in the public schools,—to hold that the Territory could not by mere regulatory measures even alleviate these evils.”¹⁶⁸ This argument—and particularly the reference to *foreign-born guests* and *loyalty to a foreign country*—is ironically meta given that the author of the Territory’s brief, Judge Walter Francis Frear,¹⁶⁹ along

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* Judge McCamant wrote separately noting that, in his opinion, the statute was not “wholly void,” and the injunction should only prevent the Territory from interfering with student attendance at the schools and requiring the schools to use DPI-prescribed textbooks. *Id.*

167. *Farrington v. Tokushige*, 273 U.S. 677 (1926).

168. Halsted, *supra* note 9, at 180 (quoting the Territory’s brief).

169. Walter Francis Frear was born in California but later moved to the Kingdom of Hawai’i with his missionary father. He graduated from Oahu College (now known as Punahou School), one of the English-only schools in the Kingdom, and then later was appointed as a circuit judge by Queen Lili’uokalani. After the illegal overthrow, he was elevated to the Supreme Court of the Republic of Hawai’i and later the Chief Justice of the Territory’s Supreme Court. He was later appointed Territorial Governor by the U.S. President.

with most other Territorial officials, had come to the Kingdom of Hawai'i as foreign-born guests and personally and professionally benefitted from a foreign power's illegal overthrow of the Kingdom's sovereignty about thirty years prior.

The Territory also attempted to distinguish the Acts from the Oregon, Nebraska, and Iowa laws that the Court had previously struck down in *Meyer v. Nebraska* (1923), *Bartels v. Iowa* (1923), and *Pierce v. Society of Sisters* (1925).¹⁷⁰ The Territory argued that the laws at issue in *Meyer*, *Bartels*, and *Pierce* dealt with "prohibitory" measures, whereas the Territory's Acts were "regulatory" in nature and only meant "to supervise and control" rather than to "abolish" foreign language schools.¹⁷¹

In response, the Japanese language schools pointed out that the Acts actually went *further* than the Nebraska, Iowa, and Oregon statutes because those laws did not attempt to control school curriculum, textbooks, teaching qualifications, and entrance requirements, nor did those laws interfere with the conduct of private schools beyond the mandates that schools be English-medium and that foreign languages not be taught below certain grade levels.¹⁷² The Japanese language schools argued that the Acts gave DPI complete control and effectively converted private schools into public schools, even though the public made no contribution, financial or otherwise, to them.¹⁷³

The Court ultimately agreed with the Japanese language schools, concluding in a brief, four-paragraph analysis that the Acts went "far beyond mere regulation of privately supported schools," such that enforcement of the regulations "probably would destroy most, if not all, of [the schools]" and "would deprive parents of fair opportunity to procure for their children instruction which they think important" and which the Court could not say was "harmful."¹⁷⁴ The Court declared that the "Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue."¹⁷⁵

The Court then applied *Meyer*, *Bartels*, and *Pierce*, holding that the "fundamental rights of the individual," which *Meyer*, *Bartels*, and *Pierce* recognized were protected by the Fourteenth Amendment, were "guaranteed by the Fifth

Chief Justice Frear Accepts Governorship, Hawaiian Gazette, June 28, 1907, at 3. In his role as Governor, Frear helped facilitate the alienation of the Crown Lands to sugar plantations. See VAN DYKE, *supra* note 24, at 222.

170. Halsted, *supra* note 9, at 184 (summarizing the Territory's argument).

171. *Id.*

172. *Id.* at 186.

173. *Id.* at 186–87.

174. *Farrington v. Tokushige*, 273 U.S. 284, 298 (1927).

175. *Id.*

Amendment against action by the territorial Legislature or officers.”¹⁷⁶ At the end of its analysis, however, the Court also seemed to validate the Territory’s nativistic arguments, conceding that the “grave problems incident to the large alien population” in Hawai’i “should be given due weight whenever the validity of any governmental regulation of private schools is under consideration; but the limitations of the Constitution must not be transcended.”¹⁷⁷

In the wake of *Tokushige*, Hawai’i-based Japanese-language newspapers reported that Japanese communities celebrated the success of the lawsuit.¹⁷⁸ The Territorial Legislature eventually passed a bill to repay the language schools the fees collected under Act 152.¹⁷⁹ California, which was in the grips of its own Japanese exclusion movement, repealed its school control law, which was identical to Act 30.¹⁸⁰

The language schools thrived throughout the 1930s.¹⁸¹ However, immediately after the attack on Pearl Harbor in December 1941, all language schools in Hawai’i were forced to close by military order.¹⁸² The use of the Japanese language in public was banned, as were gatherings of more than ten Japanese people.¹⁸³ The FBI arrested and interned school principals and other community leaders.¹⁸⁴ The remaining school trustees dissolved the schools and liquidated their assets under pressure from the FBI and other intelligence agencies.¹⁸⁵ School officials and community members destroyed school documents and other historical sources to avoid suspicion.¹⁸⁶ At bottom, the Japanese community “lost its centers of religious life, social life, and information exchange” due to these restrictions and the internment of their community leaders.¹⁸⁷ After World War II, many language schools did not resume operations.¹⁸⁸

176. *Id.* at 299.

177. *Id.*

178. Halsted, *supra* note 9, at 197–98.

179. An Act Appropriating the Sum of Nineteen Thousand Four Hundred Forty-One and no/100 Dollars (\$19,441.00) for the Reimbursement of Certain Foreign Language Schools, No. 53 (1927).

180. Yoshida, *supra* note 118, at 159.

181. ASATO, *supra* note 1, at 150 n.28.

182. Noriko Shimada, *Wartime Dissolution and Revival of the Japanese Language Schools in Hawai’i: Persistence of Ethnic Culture*, 1 J. ASIAN AM. STUDS. 121, 121 (1998); see also Yoshida, *supra* note 118, at 38.

183. *Id.* at 122–23.

184. Yoshida, *supra* note 118, at 38.

185. Shimada, *supra* note 182, at 125–26.

186. Yoshida, *supra* note 118, at 38.

187. Shimada, *supra* note 182, at 122.

188. Yoshida, *supra* note 118, at 38.

Conclusion

This Essay has situated *Tokushige* in its historical context, filling a gap in the legal commentary that has characterized the case as non-distinct from *Pierce* and *Meyer*. While *Tokushige* is facially a straightforward application of these precedents, its unique backstory roots the case in fundamental questions of power and hegemony. At first glance, it seems ironic that the U.S. Supreme Court cited *Tokushige* in *Carolene Products* Footnote Four as an example of a case where prejudice against a “discrete and insular” minority inhibited the “political processes ordinarily to be relied upon to protect minorities,”¹⁸⁹ given that Japanese could not be considered a minority in the Territory by any means and the electoral significance of this growing community of U.S. citizens was a driving force behind the school control legislation at issue in *Tokushige*. Was the Court simply mistaken about the relative size of ethnic groups in the islands, or holding fast to the Territory’s racialized characterization of Japanese as inherently foreign and un-American?

Regardless of what the Court meant, the citation implicates the heart of questions of power that are relevant today. In an ostensible democracy racked by inherent inequity, no matter the relative size of a voting population, *who has access* to political and economic power? And, *who creates the conditions* for access to that power? During the Territorial period (and arguably continuing to today), the Big Five and their subsidiaries and predecessor corporations—nearly all descendants of the missionary families that overthrew the Kingdom of Hawai‘i with the help of U.S. armed forces—controlled the islands’ economy and politics. Though these white elites were an ethnic minority, their ill-gotten gains from the illegal overthrow enabled them to have an unshakeable grip on power in the islands—power they used not only to control immigrant populations, but also to supplant Native Hawaiian communities as well. Indeed, the attempt to eradicate the Japanese language schools was not the first attempt by white elites in Hawai‘i to stamp out a “foreign” language. About twenty years prior, many of the same players involved with the attacks on the Japanese language schools banned the Hawaiian language as part of a larger campaign to establish and maintain hegemony in the islands. In future work, I intend to connect the histories of these two language eradication initiatives to demonstrate how they were two parts of the same decades-long project to establish and consolidate American political and economic hegemony in the Pacific.

189. 304 U.S. 144, 152 n.4 (1938).
