Statement of Shannen W. Coffin on the Constitutionality of Native Hawaiian Government Defined by Race (H.R. 309)

Before the House Judiciary Subcommittee on the Constitution

Tuesday, July 19, 2005

Dear Mr. Chairman and Members of the Subcommittee:

I would like to thank the Committee for the opportunity to discuss the constitutionality of H.R. 309, the Native Hawaiian Government Reorganization Act of 2005. While I welcome the opportunity to address this Subcommittee, I am disheartened that today's hearing is necessary. However noble its purpose, Congress's consideration of a bill to establish a race-based government entity under the guise of federal law is an unfortunate step backwards to a time in our history where race-conscious legislation was the norm.[1] In an age when our governmental institutions should be oblivious to considerations of race, H.R. 309 eschews principles of color-blindness in favor of a legislative scheme that elevates one racial component of our society to the exclusion of all others. Such legislation not only has the potential to be extraordinarily divisive, it also raises serious constitutional questions. The purpose of my testimony today is to explain the constitutional objections to the bill.

Although there is no express provision of the Constitution requiring the federal government to afford equal protection of the laws to its citizens, the Fifth Amendment's due process clause has been interpreted by the Supreme Court to incorporate principles of equal

[1] *See Plessy v. Ferguson*, 163 U.S. 537, 550 (1896) (reasoning that legislature is permitted "to act with reference to the established usages, customs, and traditions of the people"); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (prohibition of interracial marriage justified by state policy of "maintain[ing] White Supremacy").

protection found in the Fourteenth Amendment.[2] Consequently, "[t]he Court's observations that '[d]istinctions between citizens solely because of their ancestry are by their very nature odious,' . . . and that 'all legal restrictions which curtail the civil rights of a single racial group are immediately suspect,' . . . carry no less force in the context of federal action than in the context of action by the States . . . ."[3] Under the Supreme Court's equal protection jurisprudence, legislation that classifies citizens on the basis of race is subject to the "most rigid judicial scrutiny,"[4] and will be invalidated unless the racial classification is necessary and narrowly tailored to achieve a compelling state interest.[5] This exacting standard applies whether the racial classification favors or disadvantages a particular racial minority.[6] In short, racial classifications are never considered benign: "[A]ny individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be."[7] Congress should act with the same exacting scrutiny when considering legislation that classifies on the basis of race.

There can be little doubt that H.R. 309 uses suspect racial classification. It establishes, under the guise of federal law, a racially-separate government that will exercise broad sovereign

[2] *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

[3] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 215-16 (1995) (citations omitted).

[4] *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

[5] *See, e.g., Shaw v. Reno*, 509 U.S. 630, 643 (1993); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989).

[6] *Adarand*, 515 U.S. at 224 ("'The standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.'") (citation omitted).

[7] *Id.* at 230.

powers.[8] Initial eligibility for participation in that government is limited to "Native Hawaiians," which is defined as "an individual who is one of the indigenous, native people of Hawaii and who is a direct lineal descendant of the aboriginal, indigenous native people who . . . resided in the islands that now comprise the State of Hawaii on or before January 1, 1893 . . . and occupied and exercised sovereignty in the Hawaiian archipelago. . . ." H.R. 309, § 3(8)(A).

Sadly, we have been down this road before. In *Rice v. Cayetano*,[9] the Supreme Court considered similar state legislation that limited eligibility to vote in elections for the State's Office of Hawaiian Affairs to lineal descendants of those inhabitants of the islands that pre-dated the "discovery" of the islands by Captain James Cook, an English explorer, in 1778.[10] The Hawaiian defendants argued that such a definition was not, in fact, race-based. The Supreme Court flatly rejected that argument, reasoning:

> Ancestry can be a proxy for race. It is that proxy here. Even if the residents of Hawaii in 1778 had been of more diverse ethnic backgrounds and cultures, it is far from clear that a voting test favoring their descendants would not be a race-based qualification. . . . In the interpretation of the Reconstruction era civil rights laws we have observed that "racial discrimination" is that which singles out "identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics." The very object of the statutory definition in question . . . is to treat the early Hawaiians as a distinct people, commanding their own recognition and respect. The State, in enacting the legislation before us, has used ancestry as a racial definition and for a racial purpose.[11]

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[8] The new "governing entity" will have the power to negotiate with the United States and the State of Hawaii for control of land, exercise of both civil and criminal jurisdiction in native courts, and the delegation of other governmental powers to the new entity. Its "organic governing documents" will address issues such as the power of the entity, the protection of Native Hawaiian civil rights, and criteria for membership in the "Native Hawaiian community."

[9] 528 U.S. 495 (2000).

[10] *Rice*, 528 U.S. at 500.

[11] *Id.* at 514-15 (citations omitted).

So, too, here. Although the cut-off date of Section 3(8)(A) is later in time, and thus may broaden somewhat the racial definition of the favored class, the line drawn by the legislation is still drawn in terms of an individual's ancestry and thus evokes a clear racial purpose and effect of this legislation.[12] As the *Rice* Court concluded, this "ancestral inquiry . . . implicates the same grave concerns as a classification specifying a particular race by name. One of the principal reasons it is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. An inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens."[13]

The race-based classification drawn by H.R. 309 is thus, without question, subject to the rigid demands of strict scrutiny. It is, as the Supreme Court has repeatedly held, presumptively invalid.[14] The bill cannot withstand that scrutiny on the basis of the artifice created therein, treating the Native Hawaiian people, as defined by the bill, as akin to an Indian tribe. While it is correct that the Supreme Court has upheld against equal protection challenges congressional legislation creating preferences for Indians, the Court has done so only where such preferences are directed toward "members of 'federally recognized' tribes," deeming such preferences as

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[12] The alternative definition of "Native Hawaiian" contained in Section 8(B) – an "individual who is one of the indigenous, native people of Hawaii and who was eligible for the programs authorized by the Hawaiian Homes Commission Act . . . or a direct lineal descendant of that individual" – is actually identical to a provision held to constitute a race-based classification in Rice. See Rice, 528 U.S. at 541 (Stevens, J., dissenting) (discussing Haw. Rev. Stat § 10-2, which incorporated the Hawaiian Homes Commission Act definition of Native Hawaiian).

[13] *Rice*, 528 U.S. at 517.

[14] *Shaw*, 509 U.S. at 643-44; *see also Adarand*, 515 U.S. at 227.

"political rather than racial in nature."[15] As the Supreme Court subsequently held in *Rice v. Cayetano*, even that holding in *Morton* was limited: "It does not follow from *Mancari* . . . that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens."[16]

H.R. 309's preamble finds that "the Constitution vests Congress with the authority to address the conditions of the indigenous, native people of the United States."[17] But the Constitution says nothing about the conditions of "indigenous, native people." Instead, Indian tribes are implicated in only two express powers in the Constitution: 1) Congress's authority to "regulate Commerce…with the Indian tribes" (Art. I, § 8, cl. 3); and 2) the President's authority to make treaties (Art. II, § 2, cl. 2). While Congress has authority to recognize tribes for purposes of these provisions – and the federal government does so pursuant to 25 C.F.R. Part 83 – neither clause grants the expansive authority assumed by H.R. 309. Indeed, the Clauses assume the pre-existence of sovereign, independent Indian tribes.

But even assuming Congress's power to recognize pre-existing tribes, "Native Hawaiians" as defined in H.R. 309 would not meet the constitutional threshold for recognition. In *Rice*, the Supreme Court noted, in dicta, that "[i]t is a matter of some dispute. . . whether Congress may treat the native Hawaiians as it does the Indian tribes."[18] In truth, there was no

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[15] *Morton v. Mancari*, 417 U.S. 535, 553 n.23 (1974).

[16] *Rice*, 528 U.S. at 520.

[17] H.R. 309, § 2(1).

[18] *Rice*, 528 U.S. at 518. In his concurring opinion joined by Justice Souter, Justice Breyer noted that there is "some limit on what is reasonable, at least when a State (which is not itself a tribe) creates the definition" of tribal membership. *Id.* at 527 (Breyer, J., concurring). Justice Breyer concluded that the definition at issue in *Rice*, which in part is replicated in H.R.

dispute between the parties in that case, as even the Hawaiian government admitted in its brief in opposition to the petition for writ of certiorari in *Rice* that "*[t]he tribal concept simply has no place in the context of Hawaiian history.*" [19]

Congress cannot change this conclusion by arbitrarily recognizing Native Hawaiians as an Indian tribe. Although courts often defer to congressional judgment with respect to "distinctly Indian communities,"[20] it "is not meant by this that Congress may bring a community or body of people within the range of [its] power by arbitrarily calling them an Indian tribe . . . ."[21] Instead, an "Indian tribe" has been defined by the Supreme Court as "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."[22] This definition ensures that Congress is in fact merely recognizing a pre-existing sovereign rather than creating a new one.

As set forth more fully in the attached analysis of the Senate Republican Policy Committee, entitled "Why Congress Must Reject Race-Based Government for Native Hawaiians," H.R. 309 (and its Senate counterpart S. 147) falls well short of this exacting

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309, "goes well beyond any reasonable limit" and "is not like any actual membership classification created by any actual tribe." *Id.* at 527.

[19] *Rice v. Cayetano*, No. 98-818, Respondent Benjamin Cayetano's Brief in Opposition to Petition for Writ of Certiorari at 18 (emphasis added) (relevant portions attached). As the Hawaiian government explained in its brief "for the Indians the formerly independent sovereign entity that governed them was the tribe, but for native Hawaiians, their formerly independent sovereign entity was the Kingdom of Hawaii, not any particular 'tribe' or equivalent political entity." *Id.*at 18.

[20] *United States v. Sandoval*, 231 U.S. 28, 46 (1913).

[21] *Id.* at 46.

[22] *Montoya v. United States*, 180 U.S. 261, 266 (1900).

standard.[23] The bill's definition of "Native Hawaiian" is entirely race-based and wholly lacks a unity of leadership and geographic continuity.[24] To summarize:

- Native Hawaiians are not geographically or culturally separated in Hawaii; indeed, there is a long and diverse history of intermarriage among ethnicities in Hawaii. At the time of Hawaiian statehood, the territory touted its racial and ethnic diversity, calling itself a "melting pot."

- "No political entity – whether active or dormant – exists in Hawaii that claims to exercise any kind of organizational or political power. There are no tribes, no chieftains, no agreed upon leaders, no political organizations, and no 'monarchs in waiting.'" RPC Paper at 7.[25] As the Hawaiian government has admitted, there is no tribal concept in the history of Hawaiian government.

- At the time referenced in the bill, 1893, there was no similar race-based Hawaiian government. Queen Liliuokalani's subjects were often naturalized citizens coming from all over the globe.[26]

My colleague Mr. Fein's testimony today will explain in detail many of the flaws of Congressional findings in the bill, but suffice it for me to say that, although Congress's fact-finding power is great, it cannot find facts in the absence of substantial evidence to support them. It can no more find that a group that has no similarities to an Indian tribe other than similar racial characteristics to one another than it can find that night is actually day.

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[23] Senate Republican Policy Committee (Jon Kyl, Chairman), *Why Congress Must Reject Race-Based Government for Native Hawaiians* at 5-8 (June 22, 2005) ("RPC Paper") (attached).

[24] In addition, even if an entity can come forward and show all of the necessary elements of an Indian tribe, that entity must also show that it has continuously existed since before the United States annexed its territory; modern associations cannot make a plausible claim to sovereignty merely because they share culture or ethnicity. *Price v. Hawaii*, 764 F.2d 623, 627 (9th Cir. 1985).

[25] *See also* Stuart M. Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L.J. 537, 576 (1996) ("Native Hawaiians are not organized into any entity that can reasonably be called a tribe" and "there is little reason to suppose that Native Hawaiians would satisfy any definition of 'Indian tribe').

[26] Eleanor C. Nordyke, *The Peopling of Hawai'i* (2d ed. 1989) at 42-98; *see generally* RPC Paper at 7-8.

A couple of final points about Congress's effort to "tribalize" the Native Hawaiians as a group. First, although an Indian tribe may define its membership on the basis of race as a part of its political organization, it is a different case when *Congress* seeks to do so. As Justice Breyer noted in his concurring opinion in *Rice*, "[t]here must . . . be some limit on what is reasonable, at least when a State (which is not itself a tribe) creates the definition" of tribal membership.[27] H.R. 309 does not leave up to a pre-existing sovereign the right to define its own membership, but rather, specifically defines, as a matter of federal law, the racial group eligible to determine the governmental organization and membership of the Native Hawaiian government. Thus, racial discrimination by Congress is the first step in the formation of the Native Hawaiian government.

Second, and perhaps most troubling, Congress's finding that a race-based group lacking political structure may be treated as an Indian tribe and effectively exempted from principles of equal protection sets a dangerous precedent. As explained in the brief of *amici curiae* Campaign for a Color-Blind America, Americans Against Discrimination and Preferences, and the United States Justice Foundation filed in *Rice v. Cayetano* ("CCBA Brief") (a copy of which is attached), such a race-conscious justification for a governmental organization would permit boundless deprivations of constitutionally protected rights by any number of states.[28] It could be used by groups such as the native Tejano community in Texas, the native Californio community of California, or the Acadians of Louisiana – all racially distinct groups that have a special relationship and unique history in their communities – to demand special governmental

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[27] *Rice*, 528 U.S. at 527 (Breyer, J., concurring).

[28] *See Rice v. Cayetano*, No. 98-818, CCBA Brief at 19-25 (available at 1999 WL 374577).

privileges.[29] While none of these groups may currently possess the political clout to accomplish this objective, who is to say that political persistence over time would not result in similar separatist government proposals? As Justice Jackson observed in his dissenting opinion in *Korematsu v. United States*, "once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that it sanctions such an order, the Court for all time has validated the principle of racial discrimination . . . . The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[30]

Viewed properly under the rubric of strict scrutiny, H.R. 309 would fall short of serving a compelling governmental interest, let alone being narrowly tailored to that interest. Congress has not found any evidence of present discrimination or the present effects of past discrimination against the Native Hawaiians as a group.[31] Nor is there any such evidence. And while it is difficult to see how the core components of the bill could be achieved in a race-neutral manner – indeed, a race-neutral State government already exists for the citizens of Hawaii – it is clear that there are narrower means of accomplishing at least some of the objectives of the bill. For instance, while the current bill limits membership of the commission that certifies membership in the Native Hawaiian governmental entity to Native Hawaiians, the Department of Justice has recommended that it could be composed of a racially diverse group of individuals sensitive to Native Hawaiian needs.[32]

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[29] CCBA Brief at 20-24.

[30] 323 U.S. 214, 246 (1944) (Jackson, J., dissenting)

[31] *See Adarand*, 515 U.S. at 222.

[32] *See* July 13, 2005 Letter from Will Moschella, Assistant Attorney General for Legislative Affairs to Senator John McCain, Chairman, Committee on Indian Affairs. Mr.

In closing, this Subcommittee should not look only to the letter of the Constitution, which condemns the bill as unconstitutional, but to its spirit, in recommending that H.R. 309 not be adopted as federal law. The bill sets a terrible precedent of racial separateness and, if followed in other instances, would balkanize the American people. Rather than dividing the people of Hawaii along racial lines, Congress and the State of Hawaii should look to unite them – and unite all of us – as Americans. Thank you for your time.

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July 19, 2005

Moschella's letter notes that there are "questions concerning the constitutionality of" a similar Senate bill.

No. 98-818

IN THE
Supreme Court of the United States

HAROLD F. RICE,
Petitioner,
v.

BENJAMIN J. CAYETANO,
GOVERNOR OF THE STATE OF HAWAII,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE CAMPAIGN FOR A COLOR-BLIND AMERICA, AMERICANS AGAINST DISCRIMINATION AND PREFERENCES, AND THE UNITED STATES JUSTICE FOUNDATION IN SUPPORT OF PETITIONER

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BRIEF OF AMICI CURIAE CAMPAIGN FOR A COLOR-BLIND AMERICA, AMERICANS AGAINST DISCRIMINATION AND PREFERENCES, AND THE UNITED STATES JUSTICE FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF THE AMICI

The Campaign for a Color-Blind America ("CCBA") is a nationwide legal and educational organization, headquartered in Houston, Texas and dedicated to the cause of educating the public about the injustice of racial preferences in public policy.[1] Since its inception in 1993,

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party to this dispute authored this brief in

CCBA has actively facilitated and participated in legal challenges to race-conscious public policies, including challenges to race-based admissions policies of educational institutions, racial set-asides in public contracting, and race-conscious voting schemes. CCBA assists potential plaintiffs in these cases by, among other things, finding legal representation and locating expert witnesses. When an important issue affecting its charter comes before this Court, CCBA also appears as *amicus curiae* to assist the Court in deciding the case before it. *See Piscataway Township Board of Educ. v. Taxman,* No. 96-670, Brief *Amici Curiae* of the Institute for Justice and Campaign for a Color-Blind America (filed Oct. 8, 1997), *writ dismissed,* 118 S. Ct. 595 (1997).

Amici Americans Against Discrimination and Preferences ("AADAP") and the United States Justice Foundation ("USJF") are both California-based non-profit organizations dedicated to the preservation and promotion of equal protection of the laws. AADAP is a non-profit public benefit corporation dedicated to disseminating to the public information regarding civil rights guaranteed by the United States Constitution and otherwise to educate the public about the effects of discrimination and preferential treatment on American society. Similarly, USJF is a non-profit foundation dedicated to the promotion and preservation of constitutional rights. Since its inception in 1979, USJF has regularly assisted individuals and classes, not only to redress individual acts of injustice, but also to analyze important public policy matters affecting constitutional rights. Further, USJF routinely

whole or in part and no person or entity, other than *amici curiae* and their members, made a monetary contribution to the preparation or submission of this brief. All parties have consented to *amici*'s filing in letters of consent on file with the Office of the Clerk of this Court.

files, or joins, friend of the court briefs to promote and protect the civil rights of all U.S. citizens.

Amici respectfully submit this brief to share with the Court their views on the proper application of the Fifteenth Amendment to the challenged Hawaiian voting scheme and to demonstrate the potential dangers of affirming the Ninth Circuit's decision in this case. Despite respondent State of Hawaii's ("Hawaii") characterization of this dispute as "unique to Hawaii," Respondent's Brief in Opposition at 12 ("Resp. Opp."), *amici* and their members believe that this Court's adoption of the Ninth Circuit's rationale would have potentially widespread ramifications beyond the Hawaiian Islands and could, in fact, be used by other States to deprive the elective franchise to large segments of society and otherwise to justify the very invidious racially-discriminatory state action that the Civil War Amendments were adopted to eliminate. *See, e.g., McLaughlin v. Florida,* 379 U.S. 184, 191-92 (1964) ("central purpose" of Civil War Amendments "was to eliminate racial discrimination emanating from official sources in the States").

SUMMARY OF ARGUMENT

" 'The right to vote freely for the candidate of one's choice is of the essence of a democratic society . . . .' " *Shaw v. Reno,* 509 U.S. 533, 555 (1964) (citation omitted). In order to guarantee that right to all races, the States ratified in 1870 the Fifteenth Amendment to the Constitution, which provides that no State may "den[y] or abridge[]" the right of citizens of the United States to vote "on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. That Amendment, "by its limitation on the power of the States in the exercise of their right to prescribe the qualifications of voters in their own elections . . . , clearly shows that the

right of suffrage was considered to be of supreme importance to the national government, and was not intended to be left within the exclusive control of the States." *Ex Parte Yarborough*, 110 U.S. 651, 664 (1884). As a result, this Court has interpreted the Fifteenth Amendment as a *per se* rule against racial discrimination in voting.

The Hawaiian voting scheme challenged in this case is facially inconsistent with the clear prohibition contained in the Fifteenth Amendment. The Hawaiian statute that defines eligible voters for the Office of Hawaiian Affairs ("OHA") contains on its face a racial restriction, limiting qualified electors to "Hawaiians," as defined by race. "[A] more direct and obvious" violation of the plain language of the Fifteenth Amendment can hardly be imagined. *Cf. Nixon v. Herndon*, 273 U.S. 536, 540-41 (1927) (invalidating under Fourteenth Amendment race-based voting restriction contained in state statute). Moreover, none of the State's justifications for the racial classification contained in the statute overcome the Fifteenth Amendment's prohibition against race-based voting systems—a prohibition that is both absolute and self-executing. *See, e.g., Neal v. Delaware*, 103 U.S. (13 Otto.) 370, 389 (1880) (invalidating race-based voting restriction contained in state constitution).

The Ninth Circuit's recognition of Hawaii's race-based justification for the discriminatory voting scheme turns the Fifteenth Amendment on its head and would permit broad-based racial discrimination by any number of other States. Simply by declaring an "historical trust relationship" with a native population, as defined by race, States could justify the very invidious voting schemes that the Fifteenth Amendment was designed to condemn. If the Ninth Circuit's rationale is affirmed by this Court, States such as Texas, California and Louisiana—States that could equally

demonstrate an historical trust relationship with a native racial group—could deprive the franchise to the vast majority of their citizens, all in the name of promoting that unique relationship. The Fifteenth Amendment does not permit the exclusive grant of the franchise to a favored race. Consequently, under this Court's jurisprudence, the racial limitation on eligible voters for the OHA is invalid.

ARGUMENT

I. THE CHALLENGED HAWAIIAN VOTING SCHEME VIOLATES THE FIFTEENTH AMENDMENT

A. The OHA Election Scheme Is *Per Se* Invalid Under the Fifteenth Amendment.

The Fifteenth Amendment's proscription against racial discrimination in state voting laws is as clear as it is absolute: "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 condition of servitude." U.S. Const. amend XV, § 1. "[T]he command of the Amendment [is] self-executing and reache[s] without legislative action the conditions of discrimination against which it was aimed. . . ." *Guinn v. United States*, 238 U.S. 347, 363 (1915); *see also South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966). Consequently, any state statutory or constitutional provision that denies to any citizen of the United States the right to vote on account of race or color is "destroyed by the self-operative force of the Amendment." *Guinn*, 238 U.S. at 364. Under this Amendment, the challenged Hawaiian voting scheme, which on its face denies the elective franchise in elections for board members of the OHA to *all* but a narrow, racially defined class of "Hawaiians," *see* Haw. Const. Art. XII, § 5; Haw. Rev. Stat. §§ 10-2, 13D-3, is *per se* invalid.

Although the Fourteenth and Fifteenth Amendments are often treated by litigants as co-extensive when applied to racially discriminatory voting schemes, a close examination of this Court's jurisprudence demonstrates that the Fifteenth Amendment even more stringently protects the franchise from race-based classifications. The Equal Protection Clause of the Fourteenth Amendment demands strict scrutiny of a facially racial statutory classification. *See, e.g., Shaw v. Reno*, 509 U.S. at 642 ("Express racial classifications are immediately suspect. . . ."); *Hunt v. Cromartie*, No. 98-85, slip op. at 4 (U.S. May 17, 1999) ("[A]ll laws that classify citizens on the basis of race . . . are constitutionally suspect and must be strictly scrutinized."). "[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (opinion of O'Connor, J.). Under that rigid equal protection standard, a racial classification "must serve a *compelling* governmental interest, and must be *narrowly tailored* to further that interest." *Adarand Constructors*, 515 U.S. at 235 (emphasis added).

While this standard admittedly presents a significant hurdle to upholding a facially racial statutory classification,[2] the Fifteenth Amendment is even more demanding.

[2] This Court has only identified one "compelling governmental interest" that satisfies the strict scrutiny standard: the remedying of "'pervasive, systematic, and obstinate discriminatory conduct.'" *Adarand*, 515 U.S. at 237 (citation omitted). Even there, the Court has demanded that a State do more than rely on "an amorphous claim that there has been past discrimination in a particular" field of conduct. *J.A. Croson Co.*, 488 U.S. at 469.

Where state voting legislation runs afoul of the plain terms of the Fifteenth Amendment, it is *per se* invalid, *regardless of the interest served by the racial classification or the scope of application of the classification*: "When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment." *Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960); *see also Katzenbach*, 383 U.S. at 325 (Fifteenth Amendment "has repeatedly been construed, without further legislative speculation, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice."). The difference in scrutiny lies in the fundamental nature of the right protected by the Fifteenth Amendment, a right that this Court has described as the very "essence of a democratic society." *Shaw v. Reno*, 509 U.S. at 639 (internal quotations omitted; citation omitted).

Thus, the analysis under the Fifteenth Amendment is simple. The Court asks a single question: "Does the challenged statute, on its face or in its effect, deny any U.S. citizen the right to vote 'on account of race, color, or previous condition of servitude'?" If the answer is "yes," the inquiry is complete, and the discriminatory terms of the statute are struck as invalid. *See Ex parte Yarborough*, 110 U.S. at 665.

Applying this simple but stringent standard here, the challenged Hawaiian voting scheme cannot withstand constitutional scrutiny. The Hawaii statute that sets the qualifications for voting for the OHA trustees contains on its face a racial limitation on electors: "No person shall be eligible to register as a voter for the election of board members unless the voter meets the following qualifications: (1) The person is Hawaiian." Haw. Rev. Stat. § 13D-3(b). That is, in order to qualify as a voter for

the OHA elections, a person must be a "descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples hereafter have continued to reside in Hawaii." *Id.* § 10-2. In effect, the statute limits the right to vote to all but a limited class of native Hawaiians of Polynesian origin, who can trace their bloodline to the race of people that inhabited the island before Captain James Cook's "discovery" of the islands in 1778. *See* Ralph S. Kuykendall, *A History of Hawaii* 54 (1927). The statute's definition thus forbids *all other races*—black, white, Hispanic, or any other race that did not inhabit the Hawaiian Islands prior to 1778—from voting for OHA board members.[3] Because the statute differentiates among qualified and non-qualified voters "on account of race," U.S. Const. amend XV, § 1, it is invalid.

This *per se* rule of invalidity is demonstrated by a long line of cases beginning with *United States v. Reese*, 92

[3] The fact that non-Hawaiian Polynesians are excluded from the statute's preferred classification—and thus that all Polynesians are not benefited by the statute—does nothing to detract from the conclusion that the statute's scope is defined principally by race. While "Polynesians" may be regarded as a racial classification for purposes of the Fifteenth Amendment, the same is equally true of the narrower class of Polynesian Hawaiians that inhabitated the islands prior to arrival of "outsiders" from Europe, Asia and America beginning in 1778: "The Hawaiians as found by Captain Cook (1778) were already a people of mixed racial origin but they had been isolated for so long a time that they may be regarded as a people or stabilized race mixture and they had a stable social organization." Romanzo Adams, *Interracial Marriage in Hawaii* 69 (1937). "What we sometimes refer to as historic races, that is to say, races that have actually existed and had a history, are merely peoples who have acquired distinctive and distinguishing racial traits through long periods of isolation and continued inbreeding." *Id.* at vii. Thus, while its ultimate conclusion was erroneous, the Ninth Circuit's characterization of the Hawaiian statute as containing a racial classification on its face was correct.

U.S. 214 (1875). There, the Court explained the Fifteenth Amendment's absolute prohibition against race discrimination in voting, reasoning that the Amendment "prevents the States . . . from giving preference . . . to one citizen of the United States over another on account of race, color, or previous condition of servitude." *Id.* at 217. Prior to adoption of the Amendment, this form of discrimination was permissible under the Constitution: "It was as much within the power of a State to exclude citizens of the United States from voting on account of race, &c., as it was on account of age, property, or education." *Id.* at 217-18. As a result of adoption of the Amendment, however, "[i]f citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be." *Id.* at 218. "It follows," reasoned the Court, "that the amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination . . . on account of race, color, or previous condition of servitude." *Id.; see also United States v. Cruikshank*, 92 U.S. 542, 555 (1875).

Shortly thereafter, the Court held that any racially discriminatory state statute or constitutional provision that pre-dated the adoption of the Fifteenth Amendment was automatically invalidated by the plain language of the Amendment, without regard to the purpose or interests served by the classification. *See Neal v. Delaware*, 103 U.S. (13 Otto.) 370. In *Neal*, the Court held that a provision of the Delaware state constitution that limited eligible state voters to "white males" was rendered invalid by the Fifteenth Amendment to the extent it contained the racial limitation: "Beyond question the adoption of the Fifteenth Amendment had the effect, in law, to remove from the State Constitution or render inoperative, the pro-

vision which restricts the right of suffrage to the white race." *Id.* at 389. The remedial effect of the statute, therefore, was to strike the word "white" from the state constitutional provision, permitting all races to enjoy equally the right to vote in Delaware elections. *Id.; see also Myers v. Anderson*, 238 U.S. 368, 376 (1915). The Court later noted that a facially discriminatory state election provision that post-dated the enactment of the Fifteenth Amendment would be equally invalid. *Ex parte Yarborough*, 110 U.S. at 665.[4]

It is difficult to understand, under these plain rules, how the challenged Hawaiian voting scheme, which contains no less invidious a racial classification than the Delaware constitutional provision struck down in *Neal*, could survive the pellucid prohibition of the Fifteenth Amendment. The Hawaiian law "singles out a readily isolated segment of a racial minority"—Hawaiians—"for special discriminatory treatment," *Gomillion*, 364 U.S. at 346—to the exclusion of all other eligible voters. Under the rule of *Neal* and *Yarborough*, the racial limitation contained in the Hawaiian voting statute must be struck as invalid under the Fifteenth Amendment.

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[4] In *Yarborough*, the Court explained that, while the Fifteenth Amendment's protections were "mainly designed for citizens of African descent," 110 U.S. at 665, the protections of the Amendment extend to all races. "The principle . . . that the protection of the exercise of this right is within the power of Congress, is as necessary to the right of other citizens to vote as to the colored citizen, and to the right to vote in general as to the right to be protected against discrimination." *Id.* Thus, in this case, because the Hawaiian voting scheme benefits one race to the exclusion of all others, the race of the plaintiff challenging the scheme is irrelevant.

B. The Ninth Circuit's Rationale for Upholding the Hawaiian Voting Scheme Is Inconsistent with This Court's Fifteenth Amendment Jurisprudence.

Despite its recognition that both the Hawaii constitutional and statutory provisions challenged here "contain a racial classification on their face," *Rice v. Cayetano*, 146 F.3d 1075, 1079 (9th Cir. 1998)—an admission that effectively dooms the voting scheme at issue in this case—the Ninth Circuit held that the voting classification did not violate the Fifteenth Amendment. Held up to the light of this Court's Fifteenth Amendment jurisprudence, however, the Ninth Circuit's tortured rationale for upholding the voting scheme cannot survive.

1. The Fifteenth Amendment Applies to Elections for the Office of Hawaiian Affairs.

The Ninth Circuit's principal reason for holding that the Fifteenth Amendment was inapplicable in this case is that the OHA elections are not "a general election for government officials performing governmental functions of the sort that has previously triggered Fifteenth Amendment analysis." 146 F.3d at 1081. Because "[t]he special election for trustees is not equivalent to a general election, and the vote is not for officials who will perform general governmental functions in either a representative or executive capacity," *id.*, the court reasoned, the Fifteenth Amendment is not even implicated by the OHA voting scheme. The lower court's circumvention of the Fifteenth Amendment in this manner completely distorts this Court's jurisprudence.

This Court has *never* held that the Fifteenth Amendment applies only to "general" elections for state officials who perform "general governmental functions." "Clearly the Amendment includes *any election in which public issues are decided or public officials selected.*" *Terry v.*

Adams, 345 U.S. 461, 468 (1953) (opinion of Black, J.) (emphasis added) (footnote omitted); *see also Gray v. Sanders*, 372 U.S. 368, 380 (1963) ("The concept of political equality in the voting booth contained in the Fifteenth Amendment extends to *all phases of state elections*. . . .") (emphasis added); *Smith v. Allwright*, 321 U.S. 649, 657 (1944) (Fifteenth Amendment "specifically interdicts *any denial or abridgement* by a State of the right of citizens to vote on account of color") (emphasis added); *United States v. Mississippi*, 380 U.S. 128, 138 (1965) ("The Fifteenth Amendment protects the right to vote regardless of race against *any denial or abridgement* by the United States or by any State.") (emphasis added).

Indeed, a comparison of the plain language of the Fifteenth Amendment to that of Section Two of the Fourteenth Amendment, adopted just two years prior, confirms the expansive scope of the Fifteenth Amendment's prohibition. Section Two of the Fourteenth Amendment was a stopgap measure directed at voting discrimination, designed to penalize discriminating States by requiring the reduction in a State's proportionate congressional representation whenever the State "denie[s] to any of the male inhabitants of such State" the right to vote. U.S. Const. amend. XIV, § 2. However, Section Two specifically defines the scope of elections to which it applies, expressly limiting its application to "any election for the choice of electors for the President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or members of the Legislature thereof." *Id.* In stark contrast, the Fifteenth Amendment does not specifically limit its application to elections for any particular office, instead securing generally "[t]he right of citizens of the United States to vote." U.S. Const. amend. XV, § 1. In light of the Fourteenth Amendment

model, "the failure of the framers of the Fifteenth Amendment to insert any words limiting the number and kind of elections referred to indicated that they intended it to apply to all elections held under the authority of the constitution and laws of the United States or of the States." John M. Mathews, *Legislative and Judicial History of the Fifteenth Amendment* 38 (1909). "It was, in fact, well understood in Congress at the time the Amendment was under consideration that it applied to any election, from that for presidential elector down to the most petty election for a justice of the peace or a fence-viewer." *Id.* at 38 (footnote omitted). As one of the opponents of the Fifteenth Amendment complained during the debates leading up to its adoption:

> This amendment applies to the election of members of the Legislature and judges, comptrollers, justices of the peace, and constables; *it applies to all elections* . . . . If it were designed only to apply this provision to that which relates to the General Government, then it should be restricted and framed to refer only to elections for electors of President and Vice President and Representatives in Congress. It provides that the States shall *in no elections* disqualify any one on the ground of race, color, or former condition.

Cong. Globe, 40th Cong., 3d Sess., at 905 (1869) (remarks of Sen. Vickers) (emphasis added).

Further evidence of the Fifteenth Amendment's universal applicability to all elections is found in this Court's interpretation of the Amendment. In a pair of cases challenging Texas political party primaries in which eligible voters were limited to qualified white citizens, the Court held that a State may not circumvent the proscription of the Fifteenth Amendment by permitting a private

organization to discriminate in its selection of candidates. *Terry*, 345 U.S. at 466 (opinion of Black, J.); *Smith*, 321 U.S. at 664. In striking down the primary voting schemes, the Court did not attempt to confine the reach of the Amendment's prohibition to any particular state office, instead expressing its scope in broad language: "Under our Constitution the great privilege of the ballot may not be denied a man by the State because of his color." *Smith*, 321 U.S. at 662. The State could no more accomplish this result indirectly—by permitting a political party that effectively decided the general election result to engage in discriminatory practices—than it could directly:

> The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any State because of race. This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied.

Id. at 664 (citation omitted).

Later, in *Gomillion*, the Court held that the Fifteenth Amendment prevented the State of Alabama from redrawing the boundaries of the City of Tuskegee so as to remove all but "four or five of its 400 Negro voters." 364 U.S. at 341. Thus, the Court applied the Fifteenth Amendment to prohibit racial discrimination by the State in municipal elections. Taken together, *Smith*, *Terry*, and *Gomillion* confirm that the Fifteenth Amendment prohibition against race discrimination in voting applies to *any* election for public office over which the State exercises control, whether it be a national, state or local office.

The electoral scheme challenged in this case clearly falls within the broad scope of the Fifteenth Amendment. As the Ninth Circuit explained, the OHA "is a state agency," *Rice*, 146 F.3d at 1078, established by the Hawaiian legislature and given broad authority over state funds. By statute, the Hawaiian legislature has delegated to the OHA several traditional governmental functions. *See* Haw. Rev. Stat. §§ 10-5, 10-6. OHA trustees "have [the] power to manage proceeds and income from whatever source for Native Hawaiians and Hawaiians . . . ; to handle money and property on behalf of OHA; to formulate policy relating to the affairs of native Hawaiians and Hawaiians; to provide grants for pilot projects; and to make available technical and financial assistance and advisory services for native Hawaiian and Hawaiian programs." *Rice*, 146 F.3d at 1080 n.14 (citing Haw. Rev. Stat. § 10-5). Similarly, the OHA board itself has several broad agency and intragovernmental functions: (1) "to develop a master plan for native Hawaiians and Hawaiians;" (2) "to assist in development of other agencies' plans for native Hawaiian and Hawaiian programs and services;" (3) "to maintain an inventory of, and act as clearinghouse for, programs for Native Hawaiians and Hawaiians;" (4) to keep other agencies informed about native Hawaiian and Hawaiian programs;" (5) "and to conduct research, develop models for programs, apply for and administer federal funds and promote the establishment of agencies to serve native Hawaiians and Hawaiians." *Id.*

Hawaii cannot overcome the Fifteenth Amendment's prohibition simply by arguing that the broad governmental functions of an elected state agency official are exercised

for the benefit of a small racial class of "Hawaiians and Native Hawaiians." Nevertheless, the Ninth Circuit's rationale suggests that such a violation of the Fourteenth Amendment Equal Protection Clause, in turn, justifies a violation of the Fifteenth Amendment. But the right to be free from racial discrimination in voting secured by the Fifteenth Amendment would be meaningless if it could be vitiated by the simple device of limiting the scope of an elected public official's functions to serving a particular racial group. As the Court noted in *Lane v. Wilson*, the Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination." 307 U.S. 268, 275 (1939).

Consequently, the lower court's attempt to liken the OHA elections to "special purpose elections," upheld against Fourteenth Amendment equal protection challenges in *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973), and *Ball v. James*, 451 U.S. 355 (1981), must fail. Neither case can possibly be read for the extraordinary notion that the Fifteenth Amendment excepts from its scope an election targeted solely for the benefit of a particular racial class. Neither case even raised the issue of race discrimination, and thus neither implicated the Fifteenth Amendment. Instead, those cases stand for nothing more than the unexceptional principle that the "one person, one vote" concept embodied in the Fourteenth Amendment is not offended where a state limits eligibility to vote in a special purpose election to those landowners who are disproportionately affected by the election, *irrespective of their race*. *See Salyer*, 410 U.S. at 727. To extend the race-neutral principles of *Salyer* into a broad Fifteenth Amendment exception for "preferred race" elections is to destroy the very right guaranteed by the Amendment.

2. The Fifteenth Amendment Does Not Tolerate "Political" Justifications for Race-Based Voting Discrimination.

The Ninth Circuit also relied heavily on this Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974), to support its conclusion that the Fifteenth Amendment was inapplicable to the challenged Hawaiian voting scheme. The lower court cited *Mancari* for the proposition that a State may justify a race-based voting preference by a "unique trust relationship" with a racial class. 146 F.3d at 1080-81. In short, the Ninth Circuit reasoned that such a trust relationship transforms a racial preference contained on the face of a voting statute into a permissible "political" classification. *Id.* at 1081. Because the Ninth Circuit's rationale so obviously distorts the holding of *Mancari*, which was grounded in the federal government's unique relationship with Indian tribes *qua quasi-sovereign governmental organizations*,[5] and because petitioner himself has so clearly demonstrated the limitations of the

[5] This Court has frequently recognized the unique *governmental* relationship between the United States and its Indian *tribes*, which are dependent *quasi*-sovereign governments in the federal system. "We have repeatedly recognized the Federal Government's long-standing policy of encouraging tribal self-government." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987); *see Mancari*, 417 U.S. at 552 (relying on Indian Commerce Clause and Treaty Clause of Constitution as "the source of the Government's power to deal with the Indian *tribes*") (emphasis added). "This policy reflects the fact that Indian tribes retain 'attributes of sovereignty over both their members and their territory.'" *Iowa Mut.*, 480 U.S. at 14 (citation omitted). This *quasi*-sovereignty extends to the "right of reservation Indians to make their own laws and be ruled by them." *Id. Mancari* simply recognized this special governmental relationship and the unique *quasi*-sovereignty enjoyed by the tribes *qua tribes* and thus approved federal preferences directed at "members of 'federally recognized' tribes." *Mancari*, 417 U.S. at 553 n.24 ("The preference is not directed toward a 'racial' group consisting of 'Indians' . . . .").

scope of *Mancari, see* Pet. at 17-20, *amici* will not belabor its analysis of the lower court's reasoning here. Nevertheless, the Ninth Circuit's reliance on the "political" justification for a racial classification bears special attention here. That "political" rationale is thoroughly inconsistent with this Court's prior holdings, which have refused to examine the justifications for facially discriminatory statutory provisions. *See* Lawrence H. Tribe, *American Constitutional Law* 335 n.2 (2d ed. 1988) ("The Supreme Court has held that the fifteenth amendment prohibits state action which on its face discriminates against black voters.").

"No inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute." *Shaw v. Reno*, 509 U.S. at 642. Once it is established, as in this case, that a voting scheme contains a racial limitation, no further inquiry into the asserted "political" rationale for that limitation is permitted under the Fifteenth Amendment. *Gomillion* demonstrates this principle. There, the Court held that a racial gerrymandering scheme could not be justified by a "political" desire to realign the boundaries of a municipality. In this regard, the State's political power over its subdivisions, "extensive though it is, is met and overcome by the Fifteenth Amendment . . . , which forbids a State from passing any law which deprives a citizen of his vote because of his race." 364 U.S. at 345. Otherwise legitimate political objectives, the Court reasoned, were irrelevant when carried out by race-conscious methods:

> The opposite conclusion . . . would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of realignment of political subdivisions. "It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

Id. (citation omitted). Similarly, here, the State of Hawaii's political justification embraced by the Ninth Circuit—furthering a putative "trust relationship" with a native population—cannot justify the exclusion of *every other racial class in the State* from voting in a statewide election.

In sum, the Hawaiian voting scheme challenged in this case cannot withstand the scrutiny demanded by the Fifteenth Amendment. The governing statute contains on its face a *per se* unlawful racial classification. Under this Court's jurisprudence, that race preference alone dooms the voting scheme. None of the justifications relied upon by the Ninth Circuit or advanced by the respondent in this Court [6]—no matter how benignly characterized by the lower court—can save the OHA scheme from *per se* constitutional invalidity.

II. HAWAII'S RACE-CONSCIOUS JUSTIFICATION FOR ITS VOTING SCHEME WOULD PERMIT BOUNDLESS DEPRIVATIONS OF CONSTITUTIONALLY PROTECTED RIGHTS BY NUMEROUS STATES.

Although respondent characterizes this dispute as "unique to Hawaii," Resp. Opp. at 12, the race-conscious "trust relationship" rationale relied upon by the Ninth Cir-

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[6] Respondent asserts in the margin that the Fifteenth Amendment does not apply here because petitioner Rice did not "show the required discriminatory intent." Resp. Opp. at 29 n.12. However, the very authority relied upon by respondent for that proposition, *City of Mobile v. Bolden*, 446 U.S. 55 (1980), rebuts that proposition where, as here, the racial discrimination is evident on the face of the statute. *City of Mobile*'s requirement of discriminatory purpose arises only where "action by a State . . . is racially neutral on its face. . . ." *Id.* at 62 (opinion of Stewart, J.).

cuit to evade the command of the Fifteenth Amendment has potentially broad ramifications in other States. Any number of States could claim an equally "unique" historical relationship of trust with a core, native population and seek to justify race-conscious preferences and voting schemes on the basis of that trust relationship.[7] By divorcing the holding of *Mancari* from the special *governmental* relationship between the United States and Indian tribes and extracting instead a race-conscious principle permitting state-sponsored discrimination on the mere showing of a "unique history" of trust between a State and a particular racial group, the Ninth Circuit's reasoning would permit numerous other States to engage in equally invidious behavior under the guise of an historically rooted obligation. While no other State currently limits its franchise in such a manner, affirmance of the Ninth Circuit's rationale could potentially open a Pandora's box of race-based state voter preferences.

Several States besides Hawaii can boast a "unique" historical relationship with some insular racial group. Three obvious, though not exclusive, parallels arise in Texas, California and Louisiana.

Prior to its admission to the Union, Texas, like Hawaii, enjoyed a history as an independent sovereign. *See generally* T.R. Fehrenbach, *Lone Star: A History of Texas and Texans* (1968). After the Mexican Revolution of 1821, Texas became a province of the New Mexican republic. *Id.* at 154. That marriage proved doomed, and in 1836, Texas declared its independence from Mexico

[7] The Ninth Circuit also relied upon Hawaii's trust relationship with Hawaiians to conclude that the OHA voting scheme would constitute a compelling governmental interest under the Fourteenth Amendment. *See Rice*, 146 F.3d at 1082. Thus, adoption of Hawaii's "trust relationship" argument would have equally broad ramifications in the equal protection context.

and won that independence at the Battle of San Jacinto. *Id.* at 219-46. For a short time ending with its admission to the Union in 1845, the Republic of Texas ruled as a sovereign nation. *Id.* at 247-67.

Although at the time of its admission to the Union, a majority of its citizens were of Anglo-Saxon descent, *id.* at 154-73, early Texas history shows a unique relationship between the governments in Texas and a people known as the "Tejanos." *See* Arnoldo De León, *The Tejano Community, 1836-1900* (1982); Fehrenbach, *supra*, at 56. These people were "the product of generations of *mestizaje*, that is, the interracial mixture of European Spaniards" and both Mexican and Texas Indians. *See* De León, *supra*, at 2. The *Tejanos* were recognized as citizens of both Spanish Texas and Mexico, respectively. *See* Fehrenbach, *supra*, at 53, 65. Indeed, upon Mexican secession from Spain, the very "idea of a Mexican nation was centered in the *mestizo* group." *Id.* at 156. But just as the native Hawaiians were "displace[d]" upon their incorporation into the United States, the Tejano people often "lost their lands through a number of subterfuges" when Texas subsequently declared its independence from Mexican rule. De León, *supra*, at 14, 17.

The relationship between early Texas and this racial and cultural group thus bears many of the earmarks relied upon by Hawaii to justify the discrimination in this case. First, the Tejanos have a "unique history" as a native people who preceded "American" migration into the territory. *See* Resp. Opp. at 16.[8] They were the

[8] The fact that the Tejano people were the result of interracial socialization between the Spanish settlers of the territory and the local Indian population does nothing to distinguish them from Native Hawaiians. *See* Adams, *supra*, at vii ("It is no longer a secret, even to the laymen, that there are not now and probably never have been . . . any pure races."). Although Hawaii deems

"former subjects of an independent sovereign nation"—Mexico—that was devoted to their prosperity. *Compare id. with* Fehrenbach, *supra,* at 156. When Texas declared its independence from Mexico, these native *Tejanos* were "displace[d]" and often "disadvantage[d]" by the citizens of the new republic. *See* Resp. Opp. at 16. Thus, all that is left in order to satisfy respondent's lax standard is the declaration of a "special trust relationship" by the State of Texas with this racial group. The Texas state government would not have to "concoct at will," *id.* at 17, this historical antecedent in order to pass muster under the Ninth Circuit's permissive standard.

The State of California could similarly declare a "trust" relationship to justify race-based state voting measures favoring the native Hispanic population. California, like Texas, was permanently settled as a Spanish mission in the 1760s. *See* Walton Bean & James Rawls, *California, An Interpretive History* 17 (1988); Andrew F. Rolle, *California, A History* 48 (4th ed. 1987). An early pre-American population followed—"descendants of the free settlers from Mexico and the soldiers of the garrisons and Missions," and the local Indian populations. Robert F. Heizer & Alan F. Almquist, *The Other Californians* 139-40 (1971). These native hispanicized Californians have been called by some historians "Californios." *Id.* at 139; *see also* Leonard Pitt, *The Decline of the Californios*

a special relationship with the Polynesian Hawaiians that inhabited the island prior to Captain Cook's arrival, the "Polynesians are not a pure race—all descended from the same ancestors. Like the English, the French, and the Americans, they are a mixed up race made up of men and women of different races who came from different places at different times." Kuykendall, *supra,* at 31 (1927). *See also* Adams, *supra,* at 69. Like the Polynesian Hawaiians, the Tejanos are an identifiable race derived from different origins. Indeed, their descendants are still found today in various regions of Texas, such as Nacogdoches. Fehrenbach, *supra,* at 69.

(1970). Upon Mexico's declaration of independence from Spain, "the Spanish nationals who remained in California automatically became Mexican citizens." Heizer & Almquist, *supra,* at 138. Thus, as in Texas, the native Californios were citizens of a sovereign nation prior to California's incorporation into the United States. *See* Bean & Rawls, *supra,* at 98, 126. However, following California's admission to the Union in 1850, the claims of American squatters and subsequent legal battles often resulted in the displacement of these native Californio landowners from their land. Rolle, *supra,* at 236-37. Again, under the Ninth Circuit's expansive rationale, this history might be sufficient to justify modern voting schemes that limit the vote to a racially-defined group of hispanic Californians.[9]

Louisiana's "special relationship" with the Acadians, or "Cajuns," who migrated to South Louisiana from Nova Scotia during Spanish rule of the Louisiana territory, similarly bears resemblance to the Hawaii-Hawaiians relationship. *See generally,* James Harvey Domengeaux, *Comment: Native-Born Acadians and the Equality Ideal,* 46 La. L. Rev. 1151 (1986); Carl A. Brasseaux, *Acadian to Cajun* (1992). Indeed, motivated by this special relationship, in 1968, Louisiana established a state agency, the Council for the Development of French in Louisiana, dedicated to the "preservation of the French language and Acadian culture." Domengeaux, *supra,* at 1155; *see* La. Rev. Stat. § 25:651-653. While the members of this

[9] Hawaii's reliance on the vague notion of "displacement and resulting disadvantage" of the native Hawaiian population as a result of their loss of sovereignty, *see* Resp. Opp. at 16, is squarely at odds with this Court's Fourteenth Amendment requirement that "'specific instances of discrimination'" or "identified discrimination" are necessary to justify even assertedly "benign" racial classifications. *See J.A. Croson Co.,* 488 U.S. at 495, 497, 505.

organization are appointed by the governor, the Ninth Circuit's rationale could support their race-based election because of the relationship enjoyed between the State of Louisiana and its Cajun citizens.

These examples demonstrate the inherent unreliability of a "special trust relationship" exception to the Fifteenth Amendment's absolute prohibition of racial discrimination in voting. Of course, respondent may argue that dissimilarities in the history or culture of Hawaiians as compared to these other racial groups distinguish the rationale for the OHA voting scheme from these other States. But such an argument misses the point. When the rationale of *Mancari* is divorced from the distinctive governmental status of Indian tribes within our federal system and their equally distinctive relationship with the federal government, and instead used to justify a "special relationship" between a government and a particular race of people, there is, as Justice Powell noted in *Wygant v. Jackson Bd. of Educ.*, "no logical stopping point." 476 U.S. 267, 275-76 (1986). Loosed from the narrowly confined moorings of *Mancari*, the Ninth Circuit's theory, like the race-conscious rationale invalidated in *J.A. Croson Co.*, "could be used to 'justify' race-based decisionmaking essentially limitless in its scope and duration." 488 U.S. at 498 (opinion of O Connor, J.); *see also Wygant*, 476 U.S. at 276 (warning that, under city's theory, "a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future").

Once race itself is used as a justification for race-based discrimination in voting, the very protections afforded by the Fifteenth Amendment are rendered meaningless. The result, illustrated by the OHA voting scheme in this case, is the wholesale deprivation by the State of the rights of its citizens to have a voice in conduct of their government. The Fifteenth Amendment, however, was adopted to secure this voice to all races. *See* Mathews, *supra*, at 21-22 (noting "widely held belief" leading to adoption of Fifteenth Amendment "that universal suffrage is the perfect antidote against all the moral and political ills to which society is subject") (footnote omitted). Because it denies the right to participate in the conduct of elected government to all but a small class of individuals, defined by their race, the OHA voting scheme cannot stand.

CONCLUSION

For the reasons stated herein, this Court should reverse the decision of the Ninth Circuit.

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No. 98-818

In The

Supreme Court of the United States

October Term, 1998

HAROLD F. RICE,

Petitioner,

v.

BENJAMIN J. CAYETANO, GOVERNOR OF THE STATE OF HAWAII,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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1. Imposing a Tribal Requirement for *Morton* is Unjustified.

Petitioner wrongly narrows the scope of *Morton* to formally recognized tribes, Pet. at 17-20, by ignoring the critical portion of *Morton* that held that the primary reason the classification in *Morton* was political and not racial was not because of any tribal requirement, but rather, as stated by this Court:

> Contrary to the characterization made by appellees, this preference does not constitute "racial discrimination." Indeed, it is not even a "racial" preference. Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It is directed to participation by the governed in the governing agency.

Morton, 417 U.S. at 554. Thus, the key reason the classification was not racial was not because of the formal tribal aspect but because the restriction was designed to further self-governance. While this Court did mention, in a footnote, 417 U.S. at 553 n.24, that the preference was given to only tribal Indians, and not all racial Indians, that actually supports the notion that the reason the restriction was political and not racial was because of the *self-governance* aspect. Why? Because the BIA positions for which the preference applied were those that "admin-ist[ered] functions or services affecting any Indian *tribe*." *See* 417 U.S. at 537-38 (emphasis added). Thus, to give the preference to all racial Indians, even if they were not tribal Indians, would have actually undercut the self-

governance aspect that motivated *Morton*. That explains why this Court went on to say that the preference is "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities *whose lives and activities are governed by the BIA* in a unique fashion." 417 U.S. at 554. In short, the tribal limitation was necessary because the BIA positions for which the preference applied governed *tribal* Indians. In this case, on the contrary, because OHA beneficiaries are *all* Hawaiians and native Hawaiians, without regard to any tribal classification, self-governance is promoted by allowing the voters to be all Hawaiians and native Hawaiians, regardless of any tribal status.

Another way to understand why there should be no artificial tribal requirement for Hawaiians is that for the Indians the formerly independent sovereign entity that governed them was the tribe, but for native Hawaiians, their formerly independent sovereign nation was the Kingdom of Hawaii, not any particular "tribe" or equivalent political entity. Thus, because *Morton* turned upon the desire to promote Indian self-governance, it made sense to give the preference to only those Indians who were members of the formerly sovereign entity (i.e. the tribe), which meant only tribal Indians. Similarly, promoting Hawaiian self-governance is accomplished by giving the preference (here, the exclusive franchise in electing OHA trustees) to all those who were members of (or their descendants) the former sovereign nation. Because that former sovereign is the Kingdom of Hawaii, not any particular tribe or equivalent "political entity," all Hawaiians should qualify. The tribal concept simply has no place in the context of Hawaiian history.

And petitioner is simply wrong to suggest that *Morton* turned on the unique Indian Commerce and Treaty

Clauses of the Constitution. Pet. at 19. Any careful reading of *Morton* makes clear that the key to *Morton* was the historical special relationship and the self-governance factors, which apply equally well to Hawaiian history and the voter restriction. The Indian clauses simply *reflect* and *arise out of* the historical relationship; namely, the conquering of an aboriginal people who were the subjects of a formerly independent nation. The analogous historical relationship in the case of Hawaiians and native Hawaiians is reflected by the Annexation Act of 1898, the Organic Act of 1900, the Hawaiian Homes Commission Act of 1920, and the Admission Act of 1959. These Acts for Hawaiians and native Hawaiians are the equivalents of the Indian Commerce and Treaty Clauses for Indians discussed in *Morton*.

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S. 147 Offends Basic American Values

Why Congress Must Reject Race-Based Government for Native Hawaiians

Executive Summary

- Pending before the Senate is S. 147, a bill to authorize the creation of a race-based government for Native Hawaiians living throughout the United States.
- The bill does this by shoehorning the Native Hawaiian population, wherever located, into the federal Indian law system and calling the resulting government a "tribe."
- S. 147 advocates argue that the bill simply grants Native Hawaiians the same status as *some* American Indians and Alaska Natives, but this claim represents a serious distortion of the constitutional and historical standards for recognizing Indian tribes.
- The Supreme Court has held that Congress cannot simply create an Indian tribe. Only those groups of people who have long operated as an Indian tribe, live as a separate and distinct community (geographically and culturally), and have a preexisting political structure can be recognized as a tribe. Native Hawaiians do not satisfy any of these criteria.
- When Hawaii became a state in 1959, there was a broad consensus in Congress and in the nation that Native Hawaiians would not be treated as a separate racial group, and that they would not be transformed into an "Indian tribe."
- To create a race-based government would be offensive to our nation's commitment to equal justice and the elimination of racial distinctions in the law. The inevitable constitutional challenge to this bill almost certainly would reach the U.S. Supreme Court.
- S. 147 would lead the nation down a path to racial balkanization, with different legal codes being applied to persons of different races who live in the same communities.
- The bill also encourages increased litigation, including claims against private landowners and state and federal entities, which would heavily impact private and public resources.
- S. 147 represents a step backwards in American history and would create far more problems — cultural, practical, and constitutional — than it purports to solve. It must be rejected.

"To pursue the concept of racial entitlement — even for the most admirable and benign of purposes — is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of the government, we are just one race here. We are American." — Adarand Constuctors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

Introduction

Pending before the Senate is S. 147, a bill to authorize the creation of a race-based government for those with Native Hawaiian blood. The bill does this by shoehorning Native Hawaiians (who live in all 50 states) into the federal Indian law system, creating a new race-based entity, and calling it a "tribe." Advocates claim that this result will be fair and equitable because Native Hawaiians would have the same status as some American Indians and Alaska Natives. This deceptive argument ignores the radical transformation to American law that S. 147 threatens. That is because, unlike Indian tribes, this proposed Native Hawaiian government would be defined ***not*** by community, geography, and cultural cohesiveness, as every other Indian tribe is. Instead, the Native Hawaiian entity would be defined by the one distinction abhorrent to American law and civic culture — that of race.

Congress should not be in the business of granting special governmental powers to racial subsets of the American family. We are a nation grounded in equality under the law regardless of skin color or ancestry. Our most violent internal conflicts, whether in the 1860s or the 1960s, have revolved around efforts to eliminate the law's racial distinctions and to encourage a culture where all citizens become comfortable as part of the *American* race. That journey is by no means complete, but this bill halts progress and sends an entirely contrary message — a message of racial division and ethnic separatism, and of rejection of the American melting pot ideal. The bill is, therefore, profoundly counterproductive to the nation's efforts to develop a just, equitable, and color-blind society, and it must not become law.

A Brief Look at the Key Flaws in S. 147

S. 147 authorizes a racially-separate government of Native Hawaiians that will operate as an Indian tribe throughout the United States. The new "tribe" will have as many as 400,000 members nationwide,[1] including more than 20 percent of Hawaii's residents.[2] The new Native Hawaiian entity will have broad-ranging governmental powers and is likely to have jurisdiction over residents of all 50 states.[3] Moreover, if every eligible Native Hawaiian signs up, the new race-based government will be the nation's largest Indian tribe. The multi-step process to create the new government is described in sections 7 and 8 of the legislation, but the essential fact is this: the bill uses a race-based test to govern the organization of the Native Hawaiian entity.

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[1] U.S. Census Bureau, *The Native Hawaiian and Other Pacific Islander Population: 2000* (Dec. 2001), at 8 (hereinafter "Census Report"), available at www.census.gov/prod/2001pubs/c2kbr01-14.pdf (noting 141,000 respondents reporting only Native Hawaiian ancestry and an additional 260,000 who reported Native Hawaiian and at least one other race).

[2] Census Report, Table 2.

[3] Census Report, Table 2.

How S. 147 Authorizes a Race-Based Government

The definition of "Native Hawaiian" is extremely broad, perhaps unconstitutionally so.[4] According to the bill, a "Native Hawaiian" is anyone who is one of the "indigenous, native people of Hawaii" *and* who is a "direct lineal descendant of the aboriginal, indigenous, native people who" resided in the Hawaiian Islands on or before January 1, 1893 *and* "exercised sovereignty" in the same region.[5] As will be discussed below, only one person, Queen Liliuokalani, actually exercised any "sovereignty" in 1893, as Hawaii was then a monarchy. Presumably, S. 147 assumes an ahistorical definition of "sovereignty," referring instead to all persons with "aboriginal, indigenous, native" blood in 1893.

This definition of "Native Hawaiian" focuses on race to the exclusion of all other potentially relevant factors. Nowhere in the definition of "Native Hawaiian" is there any requirement of residency in Hawaii (either presently or at any point in the person's life), any quantum for indigenous blood, any past participation or adoption of Native Hawaiian culture or language, or any documented involvement or interest in Hawaiian (much less Native Hawaiian) political affairs. All of these characteristics — so essential to the recognition of a traditional Indian tribe (as discussed below) — are absent from S. 147. Instead, this legislation relies solely and crudely on race itself, in what amounts to a one-drop racial definition.[6]

It is important to distinguish S. 147's racial test from those that Indian tribes often use to determine their membership. Indian tribes have the authority to determine the rules governing their membership *because they are sovereign entities*.[7] As such, the Equal Protection Clause does not apply to tribes' race-based decisions. In contrast, S. 147 would force the federal government itself to impose and enforce a racial test before any sovereign Native Hawaiian entity even exists (assuming, only for the sake of argument, that Congress has the power to "make" Indian tribal sovereigns through legislation). S. 147's racial test is, therefore, offensive to the Constitution.

Additional Problems in S. 147

Although S. 147's racial test for the new government is its most offensive feature, a few additional aspects of the bill deserve scrutiny.

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[4] In *Rice v. Cayetano*, 528 U.S. 495, 525, 524-527 (2000), Justices Breyer and Souter argued (while concurring in the result) that there is a constitutional limit to how extenuated the definition of a tribal member can be, and strongly suggested that a definition such as this one — membership based on one drop of Native American blood in 1893 — would not pass muster. The majority Justices did not address this argument.

[5] The bill provides an alternate definition as well. Any individual who is one of the "indigenous, native people of Hawaii and who was eligible in 1921 for the programs authorized by the Hawaiian Homes Commission Act or a direct lineal descendant of that individual" is also included. That Act defined "Native Hawaiian" as anybody with 1/2 Native Hawaiian blood.

[6] The steps to create the ultimate Native Hawaiian government are spelled out in sections 7 and 8. The procedures are clear that nobody except one with racial bona fides as defined in section 3(10) can participate in the creation of the new government. After the new government is created, it could theoretically restrict the membership to those with more Native Hawaiian blood, but it is difficult to imagine how it could do so from a political standpoint given that the initial definition in this bill is so broad.

[7] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978) (emphasizing that an Indian tribe is an "independent political community").

First, nothing in the bill guarantees that the ultimate race-based entity will be democratic in nature; in fact, advocates of S. 147 have publicly insisted that the government could take any form.[8] For example, the initial political actors who shape the entity could create a theocratic monarchy.

Second, the bill fails to guarantee that the Bill of Rights applies to the Native Hawaiian entity. Under federal law, the 1st, 5th, and 14th Amendments do not apply to Indian tribes. Those tribes are nonetheless bound by the Indian Civil Rights Act of 1968 ("ICRA"), which provides some, *but not all*, of the Bill of Rights protections (conspicuously excluding, for example, the Establishment Clause and the right to trial by jury in civil cases). In contrast, S. 147 does not apply ICRA to the new entity. Native Hawaiian members of the new entity are, therefore, unlikely to have the protections of key parts of the Bill of Rights when dealing with the new entity.[9]

Third, S. 147 provides no mechanism to enable Hawaiians — all Hawaiians, not just those with one drop of Native Hawaiian blood — to determine whether they want to authorize this race-based government in their midst. This omission is notable given the new entity's inevitable clashes with state law, as discussed below at pages 11-12.

Fourth, the bill empowers the new entity to "negotiate" with the state and federal government over lands and natural resources, the division and exercise of "civil and criminal jurisdiction," and the "delegation of governmental powers" from the United States and Hawaii to the governing entity. Any such negotiations will inevitably come at some price for federal and state taxpayers — not to mention personal liberty in the case of criminal jurisdiction.

S. 147's Core Rationale is Fundamentally Flawed

The major argument in favor of S. 147 is the notion that Congress should just create a Native Hawaiian "Indian tribe" in order to treat them "the same" as American Indians and Alaska Natives. But Congress cannot simply "create" an aboriginal Indian government. The tribal governments that exist on Indian reservations today were not created by the federal government; rather, they were preexisting when those areas were incorporated into the United States. The only exceptions are rare cases where the federal government has recognized an Indian tribe *after* statehood because the tribe could demonstrate that it operated as a sovereign for the past century, was a separate and distinct community, and had a preexisting political organization.[10] If the Native Hawaiians seeking their own government could meet these standards, then Indian law would provide a better fit.

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[8] See Internet website maintained by the State of Hawaii's Office of Hawaiian Affairs, *Questions and Answers*, available at http://www.nativehawaiians.com/questions/SlideQuestions.html (emphasis added), which explains that S. 147 does not restrict what kind of government the Native Hawaiian entity will be, and emphasizes that "total independence" is an option.

[9] The bill does include a provision in section 7(c)(4) requiring the Secretary of the Interior to certify that the civil rights of entity members are "protected," but provides no guidelines to shape the Secretary's discretion. Given that the Indian Civil Rights Act does not precisely mirror the Constitution's Bill of Rights, one cannot assume that the Secretary is bound to guarantee complete constitutional protections.

[10] For a summary of the settled standards for what constitutes an Indian tribe under federal law, see Congressional Research Service, *The Bureau of Indian Affairs' Process for Recognizing Groups as Indian Tribes* (March 25, 2005). The standards are derived from longstanding Supreme Court case law. See, e.g., *United States v. Felipe Sandoval*, 231 U.S. 28, 39-46 (1913) (holding that an Indian community must be "separate and isolated," and that Congress cannot arbitrarily designate a group of people as an Indian tribe even if the people are racially similar to Indians).

But advocates for S. 147 cannot demonstrate any of these characteristics. Instead, they focus on only one similarity between those groups and Native Hawaiians — the fact that their ancestors lived on lands now part of the United States. This is little more than a racial test, grounded purely in ancestry and wholly divorced from the standards that determine whether a group of indigenous peoples (or, more typically, their descendants) should be treated as a separate political community. Nor is the test "tailored" to address any purported "wrongs" committed against the Hawaiian people by the United States or other Westerners (or Asians, for that matter). This focus on race and bloodlines is contrary to the settled, court-approved rules for determining what an Indian tribe is, as discussed below. Moreover, it violates the implicit understanding of Congress when Hawaii was admitted to the Union — that Native Hawaiians would not be treated as Indians. As will become apparent, Native Hawaiians simply cannot be treated as an Indian tribe.

Native Hawaiians Cannot Meet Settled Rules for "Tribal" Recognition

The Department of the Interior has a settled process governing the recognition of Indian tribes. The Secretary has promulgated federal regulations, 25 C.F.R. §§ 83.6-83.7, which outline the factors the Secretary must consider before recognizing a tribe. The Congressional Research Service summarizes the main factors as follows:

- "Existence *as an Indian tribe* on a continuous basis since 1900. Evidence may include documents showing that governmental authorities — federal, state, or local — have identified it as an Indian group; identification by anthropologists and scholars; and evidence from newspapers and books.

- "*Existence predominantly as a community*. This may be established by *geographical residence* of 50% of the group; *marriage patterns*; kinship and language patterns; cultural patterns; and social or religious patterns.

- "*Political influence or authority over members as an autonomous entity from historical times until the present.* This may be established by showing evidence of leaders' ability to mobilize the group or settle disputes, inter-group communication links, and *active political processes*.

- "Evidence that the *membership descends from an historical tribe or tribes that combined and functioned together as a political entity*. This may be established by tribal rolls, federal or state records, church or school records, affidavits of leaders and members, and other records."[11]

Only after weighing factors such as these can the Secretary recognize a tribe.

Thus, there are two common threads in these requirements: (1) the group must be a separate and distinct community of Indians, and (2) a preexisting political entity must be present. S. 147 eschews these settled criteria in favor of race and ancestry alone. Indeed, it would be absolutely impossible for persons with Native Hawaiian blood to satisfy these settled criteria.

[11] Congressional Research Service, *The Bureau of Indian Affairs' Process for Recognizing Groups as Indian Tribes*, at 2 (emphasis added).

No Separate and Distinct Community

S. 147 repeatedly refers to a Native Hawaiian "people" or "community," but never establishes that such a people or community exists. Certainly there are many Americans who descend from indigenous Hawaiians, but blood alone does not make a "tribe." S. 147 seeks to include virtually every single person who has one drop of indigenous Hawaiian blood in its definition of "Native Hawaiian."[12] It is clear that Native Hawaiian "race" cannot be a proxy for "community," as the following facts demonstrate:

- Native Hawaiians are not geographically or culturally segregated in Hawaii. They live in the same neighborhoods, attend the same schools, worship at the same churches, and participate in the same civic activities as do all Hawaiians.

- Persons with Native Hawaiian blood live throughout the United States. There are more than 400,000 Americans who today claim at least some "Native Hawaiian" blood.[13] Moreover, Native Hawaiians live in all 50 states.[14]

- Native Hawaiians have intermarried with other ethnicities since as early as the 1820s,[15] and "high rates of intermarriage are a unique demographic characteristic of the people of Hawaii."[16]

- Intermarriages in the Native Hawaiian population today are not only common, but predominant. Data show that three-fourths of "only" Native Hawaiians marry outside the race, and more than one-half of "part" Native Hawaiians do the same.[17]

- It is also worth noting that nearly half of *all* marriages in Hawaii are interracial, showing that the culture there continues to be a "melting pot."[18] (Hawaii's racial intermarriage rate is therefore more than *ten times higher* than the 4.5 percent nationwide figure.[19])

- As a result of this intermarriage, some scholars estimate that there are no more than 7,000 "pure-blooded" Native Hawaiians today.[20]

The reality of modern Hawaii — and indeed, of all the United States — is that racial boundaries continue to break down.

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[12] See definition at section 3(10) of S. 147, as well as discussion above at pages 2-3.

[13] Census Report, at 8.

[14] Census Report, Table 2. Technically, the report refers to Native Hawaiians and "other Pacific Islanders," but the only others who fall into "Other Pacific Islander" are the relatively small populations of Fijian and Tongan background. Other major "Pacific Islander" groups such as Filipinos, Samoans, and Guamanians all have their own categories.

[15] Robert C. Schmitt, Foreword to Eleanor C. Nordyke, *The Peopling of Hawai'i*, 2nd ed. (1989), at xvi ("Interracial marriage and a growing population of mixed bloods had been characteristic of Hawai'i since at least the 1820s"). Schmitt is identified as the State Statistician for the Hawaii Dep't of Business and Economic Development.

[16] Xuanning Fu & Tim B. Heaton, *Status Exchange in Intermarriage*, Journal of Comparative Family Studies (Jan. 2000), at 1.

[17] See Hawaii Marriage Certificate Data for 1994 cited in Fu & Heaton, Table 2.

[18] Fu & Heaton, Table 2.

[19] U.S. Census Bureau, *America's Families and Living Arrangements: 2003* (Nov. 2004), Table 9.

[20] Bradley E. Hope and Janette Harbottle Hope, *Native Hawaiian Health in Hawaii: Historical Highlights*, California Journal of Health Promotion (2003), at 1. However, fully 141,000 Americans self-reported as only "Native Hawaiian" on the 2000 Census. See Census Report, at 8.

It is apparent that there is no "separate and distinct community" of Native Hawaiians that the law can recognize, but only American citizens, scattered across the nation, who have some ancestry in Hawaii. Such a dispersed people are not what the law contemplates as an "Indian tribe."

No Political Entity

There is another reason why persons with Native Hawaiian blood alone cannot be considered a tribe: they fail the settled "political test" that determines whether a tribe should be recognized.

It is important to understand why there *is* a "political test" for granting tribal recognition. The Constitution does not speak to Native "peoples," but only to "Indian tribes."[21] As the Supreme Court has stated, "Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government. * * * [They are] separate sovereigns pre-existing the Constitution."[22] Thus, Indian tribes are respected as legal entities with quasi-sovereign powers because they existed *prior* to the creation of state governments. Their lands and sovereignty were respected either through treaties entered into with the United States, or due to special reservations in statehood enabling acts. Where Indian communities — communities, not mere racial groups — have been recognized by government post-statehood, it has been due to the recognition that a community continued to exist, and that the community had a semblance of ongoing political cohesion.[23]

No political entity — whether active or dormant — exists in Hawaii that claims to exercise any kind of organizational or political power. There are no tribes, no chieftains, no agreed-upon leaders, no political organizations, and no "monarchs-in-waiting." Advocates of S. 147 freely admit this fact.[24] If normal procedures were followed and settled law respected, this failure would preclude the bill's consideration.

Instead, faced with these realities, S. 147's advocates rely upon a confused history of Hawaii to persuade Congress to ignore the normal procedures and settled law. The bill's findings (section 2) proclaim that "Native Hawaiians" exercised "sovereignty" over Hawaii prior to the fall of the monarchy of Queen Liliuokalani in 1893,[25] and that it is therefore appropriate for Native Hawaiians to exercise their "inherent sovereignty" again. This is simply not the case, for two simple reasons.

First, there *was no* race-based Hawaiian government in 1893, so there is no "Native Hawaiian government" to be restored. Since the early 19th century, the Hawaiian "people" included many native-born and naturalized subjects who were not "Native Hawaiians" in the sense of S. 147 — including Americans, Chinese, Japanese, Koreans, Samoans, Portuguese, Scandinavians,

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[21] See Art. I, § 8, cl. 3 (granting Congress power to regulate commerce with "Indian tribes").

[22] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) (quoting *Worcester v. Georgia*, 6 Pet. 515, 558, 8 L. Ed. 483 (1832)); see also *Morton v. Mancari*, 417 U.S. 535, 554 & 554 n.24 (1974) (emphasizing that government benefits given to Indian tribes do not constitute racial discrimination because the circumstances are "political rather than racial in nature").

[23] See 25 C.F.R. § 83.7 for political requirements.

[24] See legal argument of the State of Hawaii's Office of Hawaiian Affairs, *Treating Similarly Situated Peoples the Same*, available at http://www.nativehawaiians.com/legalbrief.html (explaining that "no vestiges of an official 'tribe' which purports to represent Native Hawaiians remains").

[25] The Queen yielded to a provisional government in 1893, leading to the creation of a Republic of Hawaii (1894-1898), followed by annexation to the United States in 1898. See discussion of Hawaiian history in *Rice v. Cayetano*, 528 U.S. 495 (2000); Merze Tate, *The United States and the Hawaiian Kingdom* (1965), at 155-193.

Scots, Germans, Russians, Puerto Ricans, and Greeks.[26] All were subjects of the monarch, not just those with aboriginal blood. Moreover, the Queen and her predecessor monarchs regularly employed non-Natives at high levels in their governments from as early as 1844, when an American was appointed by King Kamehameha III to be the kingdom's attorney general.[27] Whites regularly served in the legislature throughout the second half of the 19th Century, and the franchise was even expanded to non-citizen residents in 1887.[28] When the Queen's monarchy fell in 1893, the legislature was multi-racial and many of her Cabinet ministers were white.[29] To speak of "restoring" the "Native Hawaiian" government as of 1893 is to ignore the fact that no such racially-exclusive government — or nation — existed.

Second, Hawaii in 1893 was a monarchy, with "sovereignty" residing *only* in the Queen's person, *not* in the people — Native Hawaiian or otherwise. In no way did the "people" of Hawaii exercise sovereignty over those lands; only the Queen had sovereignty.[30] Thus, S. 147's findings are fundamentally flawed in their references to restoring "inherent sovereignty" because such sovereignty simply never existed. The only way that sovereignty could be restored to its 1893 status would be to reinstate a monarchy.

Given the above, it is apparent that those whom S. 147 calls "Native Hawaiians" (1) have no existing government or organization that could be called a "tribe," and (2) have never exercised "inherent sovereignty" as a "native, indigenous people." No "reorganization" is possible or appropriate because no earlier government existed. In the simplest terms, there is nothing to reorganize or restore.

S. 147 Contravenes the Political Understanding Reached at the Time of Statehood

As explained above, Indian tribes' sovereignty is a function of their existence as tribal organizations prior to their having been absorbed into the American system. Indian tribes that exist and are recognized have their sovereignty as a function of (a) statehood enabling laws, (b) treaties between tribal leadership and the U.S. government, and/or (c) later administrative or Congressional recognition that they are separate and distinct communities with some form of political structure. It is highly relevant for present purposes, then, to review what the understanding was at the time that Hawaii became a state in 1959.

It is not in dispute that, at the time Hawaii was admitted as a State, there was an implicit understanding that Hawaii's "native peoples" would ***not*** be treated as an Indian tribe with sovereign powers. There was no political effort in 1898 (at the time of annexation) — or in 1959 — to treat Native Hawaiians like Alaska Natives or as Indian tribes. To the contrary, during the extensive statehood debates of the 1950s, advocates repeatedly emphasized that the Hawaiian Territory was a post-racial "melting pot" without racial divisiveness. There was virtually no discussion of carving out separate sovereignty for "Native Hawaiians."

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[26] Eleanor C. Nordyke, *The Peopling of Hawai'i*, 2nd ed. (1989), at 42-98.

[27] Nordyke, *The Peopling of Hawai'i*, at 42; see also Tate, *The United States and the Hawaiian Kingdom*, at 13-22 & 49.

[28] Tate, *The United States and the Hawaiian Kingdom*, at 52 & 53-111.

[29] See, generally, Tate, *The United States and the Hawaiian Kingdom*, at 155-193.

[30] See, generally, Tate, *The United States and the Hawaiian Kingdom*, at 155-193 (discussing the Queen's efforts to maintain sovereignty solely in her own person).

Consider, for example, the representative words of some of the key advocates for Hawaii statehood in the years leading up to statehood:

> "Hawaii is America in a microcosm — a melting pot of many racial and national origins, from which has been produced a common nationality, a common patriotism, a common faith in freedom and in the institutions of America." *— Senator Herbert Lehman (D-NY), April 1, 1954, Congressional Record, at 4325.*
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> "Hawaii is the furnace that is melting that melting pot. We are the light. We are showing a way to the American people that true brotherhood of man can be accomplished. We have the light, and we have the goal. And we can show that to the peoples of the world." *— Testimony of Frank Fasi, Democratic National Committeeman for Hawaii, before the Senate Committee on Interior and Insular Affairs, June 30, 1953.*
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> "While it was originally inhabited by Polynesians, and its present population contains substantial numbers of citizens of oriental ancestry, the economy of the islands began 100 years ago to develop in the American pattern, and the government of the islands took on an actual American form 50 years ago. Therefore, today Hawaii is literally an American outpost in the Pacific, completely reflecting the American scene, with its religious variations, its cultural, business, and agricultural customs, and its politics." *— Senator Wallace Bennett (R-UT), Congressional Record, March 10, 1954, at 2983.*
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> "Hawaii is living proof that people of all races, cultures and creeds can live together in harmony and well-being, and that democracy as advocated by the United States has in fact afforded a solution to some of the problems constantly plaguing the world." *— Testimony of John A. Burns, Delegate to Congress from the Territory of Hawaii, before the Senate Committee on the Interior and Insular Affairs, Apr. 1, 1957.*

These statements represent the repeated testimony and arguments that Congress considered prior to granting statehood. Hawaii's admission was granted with the straightforward understanding that the diverse and multiracial Hawaiian community would ***not*** be the fount of the racial separatism that S. 147 presents.[31] As such, this legislation is a significant step backwards. And from a legal

[31] The historical record leaves no room for doubt regarding the post-racial position of statehood advocates. See, for example, Testimony of Edward N. Sylva, Attorney General of Hawaii Territory, before the Senate Committee on the Interior and Insular Affairs, June 30, 1953 ("we are not race conscious in Hawaii at all"); Testimony of Dr. Gregg Sinclair, President of the University of Hawaii, before the before the Senate Committee on the Interior and Insular Affairs, June 30, 1953 ("there can be no doubt at all about [Native Hawaiians' and other Hawaiian ethnic groups'] true Americanism"); Testimony of Fred Seaton, Secretary of Interior, before the Subcommittee on Territories and Insular Affairs of the Senate Committee on the Interior and Insular Affairs, Feb. 25, 1959 ("The overwhelming majority of Hawaiians are native-born Americans; they know no other loyalty and acclaim their citizenship as proudly as you and I"); Statement of Senator Clair Engle (D-CA), Subcommittee on Territories and Insular Affairs of the Senate Committee on the Interior and Insular Affairs, Feb. 25, 1959 ("There is no mistaking the Americans culture and philosophy that dominates the lives of Hawaii's polyglot mixture"); Statement of Senator Frank Church (D-ID), Subcommittee on Territories and Insular Affairs of the Senate Committee on Interior and Insular Affairs, Feb. 25, 1959 (Hawaiian culture bears the "unmistakable stamp of the United States"); Letter from Interior Secretary Fred Seaton to Chairman James Murray, dated Feb. 4, 1959, collected in record to Statehood for Hawaii Hearing before the Senate Committee on the Interior and Insular Affairs, Mar. 5, 1959 ("Hawaii is truly American in every aspect of its life");

perspective, this history shows that there has been no question of the inapplicability of federal Indian law to Native Hawaiians.[32]

S. 147 Violates Core Constitutional Values

It is astonishing that Congress is considering creating a race-based government in Hawaii (or anywhere else) given the tremendous progress that the nation has made towards eliminating racial distinctions among its citizens. Presumptive color-blindness and race-neutrality is now at the core of our legal system and cultural environment, and represents one of the most important American achievements of the 20th Century. S. 147 is, therefore, profoundly retrograde — a challenge to settled constitutional understandings and a disturbing threat to growing cultural cohesion on matters of race.

As recently as 2000, the Supreme Court warned that any effort to treat Native Hawaiians as an Indian tribe would be constitutionally suspect, calling the subject "difficult terrain" and "a matter of some dispute."[33] The court made this statement when considering an earlier effort by Hawaii's politicians to create a race-based government made up of only of Native Hawaiians — an effort that forms both a legal and precipitating backdrop to the current efforts.

In *Rice v. Cayetano*, the Supreme Court addressed an effort by Hawaii to create a state-sanctioned, race-based entity composed solely of Native Hawaiians (defined solely based on race, similar to in S. 147) and limited the franchise to the Native Hawaiian "race." The Supreme Court found that this effort to create a race-based government in Hawaii violated the Constitution's Fifteenth Amendment, which forbids discrimination in voting based on race. In so doing, the Supreme Court stated:

> One of the reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. An inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens.[34]

Thus, the Supreme Court concluded that the law could not be used as the "instrument for generating the prejudice and hostility all too often directed against persons whose particular ancestry is

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Statement of Senator James Murray (D-MT), *Congressional Record*, Mar. 11, 1959, at 3854 (Hawaiians "no other loyalty than that to America"); Statement of Senator Alan Bible (D-NV), *Congressional Record*, Mar. 11, 1959, at 3857 ("American ideas, American liberty, American civilization prevail there"); Statement of Senator Gordon Allott (R-CO), Mar. 11, 1959, at 3858 (arguing that statehood shows to the world that Americans believe in "self-government and the equal treatment of all citizens, irrespective or race, color or creed"). The Senate floor debate of March 11, 1959 provides further evidence of Congress's disavowal of racial separatism for Hawaii's people.

[32] A small amount of acreage is set aside for some Native Hawaiian peoples through the Hawaiian Homes Commission Act (1920), ratified later in the Hawaiian Admission Act. Federal courts have repeatedly made clear that these laws did not create any "trust relationship" (akin to that which exists with Indian tribes) between the federal government and Native Hawaiians. *E.g.*, *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n*, 588 F.2d 1216, 1224 (9th Cir. 1978); *Han v. Dep't of Justice*, 824 F. Supp. 1480 (D. Haw. 1993) (finding no trust responsibility), *aff'd* 45 F.3d 333 (1995); *Na Iwi O Na Kupuna O Makupu v. Dalton*, 894 F. Supp. 1397, 1410 (D. Haw. 1995) (holding that "the federal government has no trust responsibility to Native Hawaiians").

[33] *Rice v. Cayetano*, 528 U.S. 495, 518-519 (2000).

[34] *Rice*, 528 U.S. at 517.

disclosed by their ethnic characteristics and cultural traditions."[35] To do so would be "odious to a free people whose institutions are founded upon the doctrine of equality."[36]

The Supreme Court's holding in *Rice*, although formally limited to the Fifteenth Amendment challenge, is likely to reach the race-based plans of S. 147. The bill's advocates believe that by cloaking their efforts in federal Indian law, they will be able to relax the standard of review in federal courts from "strict scrutiny," which applies to race-based governmental decisions,[37] to the more deferential "rational basis review," which applies to the sovereign-to-sovereign governmental interactions found in federal Indian law.[38] This argument will likely fail because the Supreme Court — in an earlier and unrelated case — has already held that Congress may not do what S. 147's advocates intend: to insulate a program from strict scrutiny by "bring[ing] a community or body of people within the range of this [Congressional] power by arbitrarily calling them an Indian tribe."[39] And as noted above, the Supreme Court has already registered its skepticism about the ability of Congress to recognize Native Hawaiians as a "tribe."[40]

Despite these signals from the Supreme Court, Congress should not be too sanguine about the Supreme Court doing its proverbial dirty work by striking down this bill if it were to become law. Challenges to S. 147 are likely to arise in the same courts — the District of Hawaii and the Ninth Circuit — that upheld the unconstitutional race-based voting system struck down in *Rice v. Cayetano*. Supreme Court jurisdiction would be discretionary, and the Court's composition is likely to be different at the time of the decision. Congress should not "punt;" it should instead exercise its independent obligation to "support and defend the Constitution" by refusing to pass this bill.

S. 147 Will Be Racially Divisive In Hawaii and Throughout the Nation

S. 147 advocates repeatedly claim that creating a racially-exclusive government will be a "unifying force,"[41] but the practical effects of the legislation do not square with these claims. This is because, by creating an "Indian tribe" out of some Native Hawaiians, Congress will be creating a path by which the new government gains the same privileges and immunities that other Indian tribes have — in particular, freedom from state taxation and regulation. But the new government will be operating in an environment that is completely different from that which other Indian tribes have dealt, because there will be no segregated space (reservations) or physical communities. As noted above, Native Hawaiians live in the same neighborhoods, attend the same schools, work for the same employers, and worship at the same churches as others in Hawaii and across the nation.

This assimilation will not prevent Native Hawaiians from insulating themselves from the state laws that their neighbors must obey. Because Native Hawaiians do not have segregated "reservation" lands, the natural way for the new entity to gain the privileges and immunities is to ask the Secretary of Interior to take land "into trust." Once land is taken "into trust," it cannot be taxed or regulated. The federal government has repeatedly taken very small amounts of land "into trust" upon petition by members of Indian tribes. One such case is a recent decision by the

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[35] *Rice*, 528 U.S. at 517.
[36] *Rice*, 528 U.S. at 517 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).
[37] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).
[38] *Morton v. Mancari*, 417 U.S. 535, 554 (1974).
[39] *United States v. Felipe Sandoval*, 251 U.S. 28, 46 (1913).
[40] *Rice*, 528 U.S. at 518-519.
[41] See, e.g., Testimony of Linda Lingle, Governor of Hawaii, before the Senate Indian Affairs Committee, March 1, 2004, at 3.

Secretary to take into trust a three-acre parcel of land in Nebraska — a parcel which used to house a bar called "Dan's Lounge," but which soon will feature a casino. A federal district court allowed the Secretary to take the land into trust (and thereby insulate it from many state laws) despite its small size.[42] In Hawaii, it is likely that Native Hawaiians will attempt to use the same process to persuade the Secretary of the Interior to take some of their homes and businesses "into trust" on a wholesale or even piecemeal basis. The result will be different legal codes applying to different people living in the same communities depending on their race.

Finally, it is important to understand how this bill is being promoted in Hawaii. While some advocates are telling Senators that the legislation is a ticket to racial harmony, the State of Hawaii itself is telling Native Hawaiians that it is the path to greater independence. Consider this paragraph from an Internet website operated by the Office of Hawaiian Affairs, in a section titled, *How Will Federal Recognition Affect Me*:

> While the federal recognition bill authorizes the formation of a Native Hawaiian governing entity, the bill itself does not prescribe the form of government this entity will become. S. 344 [the bill number in the 108th Congress] creates the process for the establishment of the Native Hawaiian governing entity and a process for federal recognition. The Native Hawaiian people *may exercise their right to self-determination by selecting another form of government including free association or total independence*.[43]

It is difficult to see how a bill touted in Hawaii as a potential path to "total independence" is going to help reconcile whatever racial divisions exist there. It goes without saying that Congress does not serve the nation's long-term interests by providing vehicles for its citizens to secede from the Union.

Additional Long-Term Issues Created by S. 147

Before concluding, it is important to highlight additional provisions of S. 147 that create challenges Congress will be forced to confront if this bill becomes law. For example:

- ***Future Taxpayer Liabilities.*** Section 8(c) of the bill provides a 20-year statute of limitations for new legal claims against the federal government by Native Hawaiians. Prominent among the potential claims are "*Cobell*-style litigation" — claims that the federal government has abused its "trust relationship" with Indians.[44] Other claims could include disputes over land title to Hawaiian lands owned by state and federal governments, *as well as* private citizens. For example, private landowners in the Northeast United States have been fighting claims of prior aboriginal title on their lands for the past 30 years. Moreover, the bill expressly states that no pending claims against the federal government shall be settled. Given the extent of the pending lawsuits filed

[42] See Memorandum and Order entered July 29, 2004, in *Santee Sioux Nation v. Norton*, No. 8:03CV133 (D. Nebraska), on file with the Senate Republican Policy Committee.

[43] Internet website maintained by the State of Hawaii's Office of Hawaiian Affairs, *Questions and Answers*, available at http://www.nativehawaiians.com/questions/SlideQuestions.html (emphasis added).

[44] For more information on *Cobell* litigation, see Congressional Research Service, *The Indian Trust Fund Litigation: An Overview of Cobell v. Norton* (February 25, 2005).

by Native American individuals and tribes, this lengthy statute of limitations period virtually guarantees additional federal financial burdens.

- ***Gambling.*** The question of gambling in Hawaii on Indian lands is not answered by S. 147. On the one hand, section 9 provides that the bill does not authorize gambling under the Indian Gaming Regulatory Act. On the other hand, section 8(b) ensures that the new Native Hawaiian entity would be free to negotiate gaming rights with the State of Hawaii and with the federal government.

- ***Effect on other Indian Funding.*** Under the bill, the current programs for the benefit of Native Hawaiians are presumed to continue, and Bureau of Indian Affairs, Indian Health Service, and other Indian-related monies are segregated for existing tribes. *However*, given that the primary rationale for S. 147 is that Native Hawaiians should be "just like Indians," it is highly likely that future Congresses will rationalize the programs and lump Indian and Hawaiian funding together. When current political compromises become little more than faint memories, there will be natural pressure to funnel monies to Native Hawaiians through the Indian law system. When that happens, Native Americans will be competing with 400,000 Native Hawaiians for federal resources. And, of course, that 400,000 figure will only grow over time.

- ***Authorization for Additional Appropriations.*** Section 11 contains an open-ended authorization for additional funds necessary to carry out the Act. In 2004, the Congressional Budge Office estimated that an earlier version of this bill would cost "nearly $1 million annually in fiscal years 2005-2007 and less than $500,000 in each subsequent year, assuming the availability of appropriated funds."[45]

Conclusion

Congress should not be in the business of creating governments for racial groups that are living in an integrated, largely assimilated society. If the Native Hawaiians lived as Indian tribes, with separate and distinct communities and with their own political entities, then the injury to the nation in recognizing them would be much less dramatic. But this is not the case. Federal Indian law should not be manipulated into a racial spoils system. If Congress can create a government based on blood alone, then the Constitution's commitment to equality under the law means very little. Rather than putting that constitutional question to the Supreme Court, Congress should answer the question itself and defeat this legislation.

[45] CBO Estimate for H.R. 4282, Sept. 22, 2004.