Killing Aloha

The "Akaka Bill" is wrong for Native Hawaiians, wrong for the State of Hawai‘i and wrong for the United States.

Here's why.

A section-by-section analysis of the bill

by

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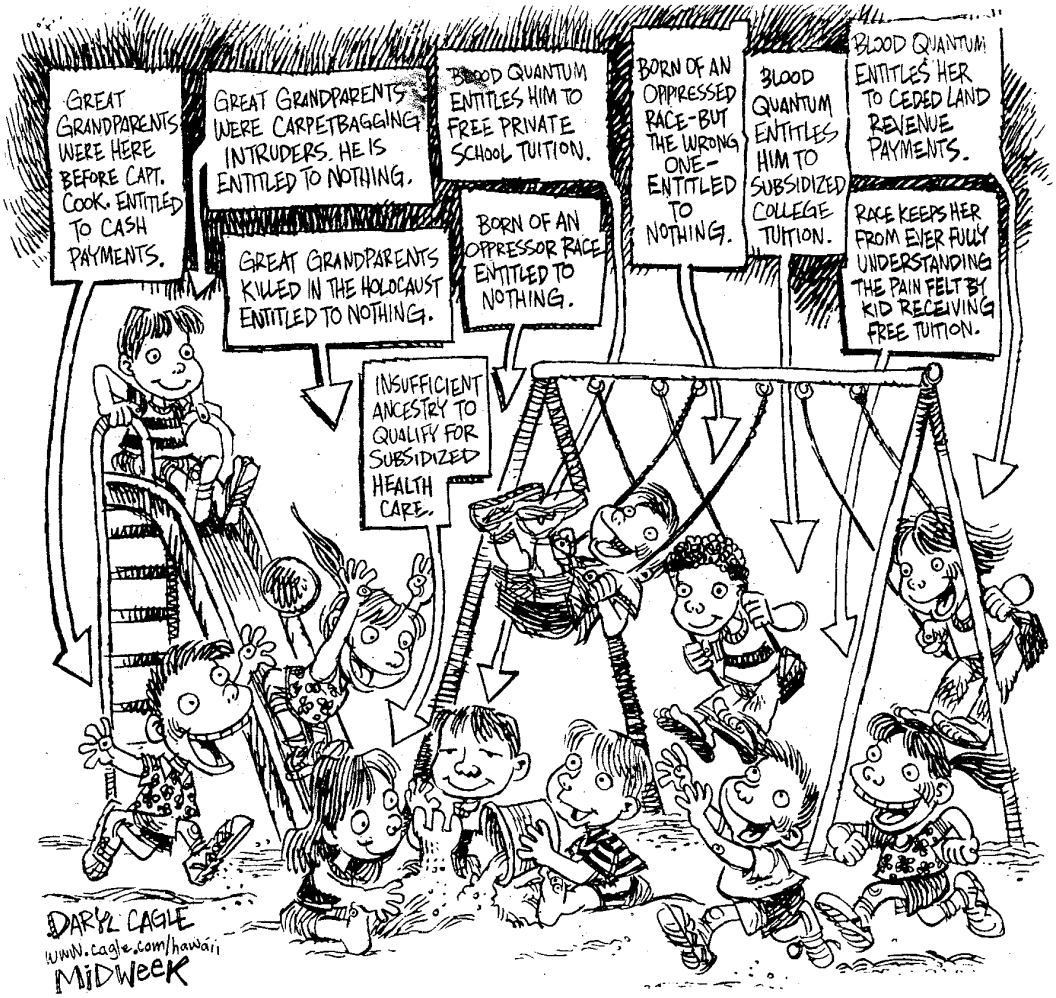

This paper incorporates several political cartoons by Daryl Cagle from one of Hawai'i's weekly newspapers, *Midweek*. Mr. Cagle's art uniquely illustrates the arrogance and naiveté of those who propose racial segregation for Hawai'i. Mr. Cagle, however, was not involved in the preparation of this paper and his views may differ from those of the author.

Introduction[1]

Hawai'i is justly admired as an integrated, racially blended, multi-cultural society. Some would call it a model for the rest of the country, and perhaps for the world. The qualities of respect for others and openhearted kindness, without regard to race or origin or station in life, are common traits among all of Hawai'i's people and are part of that many-dimensioned concept, "aloha."

But some people in Hawai'i find no comfort in integration and equality. For several years, a countercurrent promoting special privileges for persons of Hawaiian ancestry (one-fifth or more of the state's population) has achieved considerable success. Recently it has expanded into a movement for "Hawaiian sovereignty," a confused concept which can mean anything from the defense of current race-based Hawaiian entitlement programs to outright secession of all or part of the State of Hawai'i as an independent Hawaiian nation.

S. 746 and its companion bill H.R. 617 are part of this countercurrent. These bills propose the creation of a "Native Hawaiian governing entity" centered in the State of Hawai'i, along the lines of an Indian tribe, for a racially defined class of American citizens.

This paper provides a section-by-section review of S. 746 and explains why it is constitutionally infirm, why its factual and legal foundations are invalid, why it would fail to achieve its intended purposes even if those purposes were legitimate, why it would set a dangerous precedent with respect to American Indians and Alaska Natives, and why it would cause grave political, legal and social harm to Hawai'i and the United States.

Background of S. 746

S. 746 is derived from S. 2899 and H.R. 4904, introduced in the 106th Congress in the wake of the U.S. Supreme Court's February 2000 decision in *Rice v. Cayetano*[2]. That decision struck down a racial restriction on voting in Hawai'i's statewide elections for trustees of the state's Office of Hawaiian Affairs (OHA), a state agency charged with administering several hundred million dollars in state funds for the betterment of the conditions of "Hawaiians" and "native Hawaiians." These groups are defined respectively in state law as persons with at least one pre-1778 Hawaiian ancestor and persons with at least 50% Hawaiian "blood." Only "Hawaiians" could vote in these OHA elections.

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[1] The author is an attorney who has lived and practiced in Hawai'i for more than eighteen years. His article *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai'i* appeared in the Fall 1998 edition of the University of Hawai'i Law Review. The views in this paper are those of the author, and are not necessarily those of the author's employer or of any organization or other entity with which he may be associated.

[2] 528 U.S. 495, 120 S.Ct. 1044 (2000).

In *Rice,* the Court held that the definition of "Hawaiian" established a racial classification[3] and that the state law unconstitutionally deprived Hawai'i's other citizens of the right to vote on grounds of race. Recently, the Federal district court in Hawai'i, relying on the *Rice* decision, held unconstitutional a state law which permitted only "Hawaiians" to seek office as OHA trustees. Other suits based on *Rice* have since been filed to overturn other statutory entitlement programs for persons of Hawaiian ancestry.

Much is at stake. If the state and Federal statutes which give favored treatment to persons of Hawaiian ancestry must meet the constitutional standards for racial classifications, they are all at risk.

The Supreme Court has not wholly prohibited race-conscious legislation, but it has accepted it only reluctantly, and only in circumstances of grave necessity. Such legislation is subject to "strict scrutiny;" that is, it must be justified by a "compelling interest" and be "narrowly tailored" in duration and effect to achieve its purpose.[4]

To justify special treatment, advocates for Hawaiian causes point to the overthrow of Hawai'i's monarchical government in 1893 and complain of "lost sovereignty" and "theft of lands" related to that event, and they recite a litany of social and economic disadvantages suffered today by many persons of Hawaiian ancestry. But the claims of lost sovereignty and stolen lands cannot withstand careful legal and historical analysis. As to the social and economic disadvantages which many Hawaiians unquestionably experience (but which are not unique to persons of Hawaiian ancestry), these advocates have established neither a race-based cause, nor a need for a race-limited solution, nor any credible link between these disadvantages and the 1893 change of government. Of course, the absolute, permanent race-based classifications in these statutes are not "tailored" in any way to correct the claimed wrongs or to alleviate the social and economic needs.

Thus few if any of the current Hawaiian-preference laws are likely to survive strict scrutiny. Perhaps anticipating this, the proponents of these laws have always asserted that the preferences are like those for Indian tribes and their members, which the U. S. Supreme Court has upheld as "political" rather than racial because they are grounded in the government-to-government "special relationship" between the United States and the Indian tribes. Indeed, the State of Hawai'i relied heavily on this argument before the U. S. Supreme Court in *Rice*.

But the Supreme Court found the argument unpersuasive. It did not reject it outright, but it called it "difficult terrain" and expressed serious reservations about its merits. There is good reason to believe that if the Court were squarely presented with the issue, it would hold that Native Hawaiians do not share the unique constitutional status of American tribal Indians.

S. 746, like its earlier versions (S. 81 in this session and S. 2899/H.R. 4904 in the last), seeks to foreclose a Supreme Court decision on the constitutional status of Native Hawaiians

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[3] The court held that the state's definition of "Hawaiian" used ancestry "as a proxy for race", and that the definition of "native Hawaiian", drawn from a Federal statute from Hawai'i's territorial period, shared this "explicit tie to race".

[4] *See* Adarand Constructors v. Federico Pena, 515 U.S. 200, 115 S.Ct. 2097 (1995)

and to protect the state and Federal programs favoring Native Hawaiians through a Congressional declaration that "Native Hawaiians," ultimately defined as everyone having at least one ancestor who lived in the Hawaiian Islands before 1778, have a "political relationship" with the United States and that governmental discrimination in their favor is thus not "racial." The bill thereby seeks to extend to "Native Hawaiians" the special quasi-governmental status of Federally-recognized Indian tribes.

Objections to S. 746

Anyone who has lived in Hawai'i knows that there is no "Native Hawaiian tribe" here, or anything resembling a tribe. There are no enclaves where one racial or ethnic element of our community lives "separate and apart" from the rest of us. Interracial and interethnic marriage was accepted in Hawai'i from the earliest period of Western contact, and over the years, the tradition has extended to immigrants from other nations and has happily blurred our separateness. At a neighborhood luau, we may eat poi and sushi and baklava, dance hula and rock & roll, wear flower leis from Honolulu and shell leis from the Philippines and sing songs learned in childhood from around the world.

Persons of Hawaiian ancestry are part of this intermingled society. They may be found throughout the state's social, economic and political fabric in positions of power and influence. Neither language nor religion nor a territorial boundary separates them from their neighbors of different backgrounds. They are not segregated by prejudice or by tradition or by a voluntary decision to live apart. There is no Hawaiian government other than our state and municipal governments. In fact, "Native Hawaiians" as defined in this bill are not a distinguishable "they" or "them" at all, except by the test of race. In every way that matters to the Constitution, "they" are "us."

By giving this racial grouping its own "government," S. 746 would impose a racial segregation upon the people of the State of Hawai'i and the many other states where Native Hawaiians reside. This would be politically, socially and economically devastating to the State and its people, and there is no constitutional, legal, historical or moral basis for it.

The U. S. Supreme Court has held that while Congress has broad power to deal with Indian tribes and to determine what entities are in fact tribes, "it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe[.]"[5] Yet S. 746 proposes to do exactly that: To *create* a "tribe" and a "governing entity" where none exists now, and to do so using a test for membership virtually identical to that which the *Rice* decision held to be racial.

Apart from its constitutional infirmity and its pernicious racial character, this bill redefines the relationship of the United States not only with "Native Hawaiians" but with American Indians and Alaska Natives, so as to make all persons of American Indian or Alaska Native ancestry eligible for special treatment under Federal law without considering tribal

[5] *U.S. v. Sandoval*, 231 U.S. 28 (1913).

affiliation or tribal relationship. This is a dramatic change in current law which may have unintended and undesirable consequences for the tribes and their members.

Finally, the bill is awkwardly drafted, particularly with respect to the rights and obligations of the new "governing entity," the status of persons of Hawaiian ancestry inside and outside that "entity," and the means by which the "entity" will support itself.

In short, the constitutional failings, divisive effects and unsatisfactory draftsmanship of S. 746 would each counsel strongly against passing this bill. Together, they compel its defeat.

Section-by-section comments on S. 746[6]

SECTION 1. FINDINGS.[7]
Congress makes the following findings:
(1) The Constitution vests Congress with the authority to address the conditions of the indigenous, native people of the United States.

Comment: The U.S. Supreme Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974) suggests otherwise.

In *Morton*, the U. S. Supreme Court considered an employment preference for Indians in the Bureau of Indian Affairs. In upholding the preference against a challenge that it constituted racial discrimination, the court noted that preferences for Indians are "political" in nature and would be upheld if they were "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." The court made clear, however, that Congress' "unique obligation" is not to individuals or groups of individuals descended from the inhabitants of the United States before Western contact, or to any other group defined solely by race or ancestry. It pointed out:

> The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.

The court subsequently noted:

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

S. 746, however, ignores the requirement for tribal status by declaring that Congress has special responsibilities for, and special authority to "address the conditions of," the "indigenous" and "native" people of the United States, who are defined in Section 2(4) of the bill as the "lineal descendants of the aboriginal, indigenous, native people of the United States." Thus the bill speaks in terms of individuals and ancestry. There is no mention of tribes or tribal membership. The bill implies that this special responsibility permits Congress to authorize some or all of these individuals to create an entity to which Congress will then extend governmental authority. Neither the Constitution nor the logic of Congress' authority over

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[7] Throughout this paper, the provisions of S. 746 are set out in ***bolded italics*** and are followed by comments in Roman type. Comments are provided on selected paragraphs only. The omission of comments on other parts of the bill does not necessarily indicate the author's agreement with those other sections or subsections.

Indian tribal relations provides support for such a broad and unqualified contention, particularly in the case of persons of Hawaiian ancestry.

There is no constitutional or other authority for Congress' creation of a "tribe" or similar entity as proposed in this bill. The broad power of the Federal executive and Congress notwithstanding, no "tribe" eligible to claim the "special relationship" with the U.S. can be created where none exists in reality. In *U.S. v. Sandoval*, 231 U.S. 28 (1913), the U.S. Supreme Court considered whether the Pueblo Indians could be brought by Congress within the "special relationship." It examined a variety of factors indicating that Congress could do so, including the facts that the Pueblos are "Indians in race, custom, and domestic government," that they lived "in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetichism [sic], and [are] chiefly governed according to the crude customs inherited from their ancestors." It balanced these considerations against arguments that the Pueblos were citizens of the United States (unlike most Indians at the time) and that their lands were held by them in fee simple (rather than being held in trust by the Federal Government) and concluded that it was within the power of Congress to treat the Pueblos as an Indian tribe. The court cautioned, however, that **"it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe,** but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts." *Id*. at 46. (Bolding added.)

There is no Hawaiian "tribe" or anything like it, and one case which considered a claim by a purported Hawaiian tribe indicates that Hawaiians are unlikely be able to establish such a status under BIA policy. *Price v. Hawai'i*, 764 F.2d 623 (9th Cir. 1985). Unlike the Pueblo communities, there is no unifying group character to "Native Hawaiians" (as defined in this bill) other than race, no existing government, and as the late George Kanahele pointed out in the work quoted below, no distinct "Native Hawaiian" community (geographical or social) maintaining an existence separate from other elements of Hawai'i's population.

(2) Native Hawaiians, the native people of the Hawaiian archipelago which is now part of the United States, are indigenous, native people of the United States.

Comment: Native Hawaiians, as defined in S. 746, cannot properly be characterized either as "a people" or as "indigenous."

a. **"People."** The bill's reference to "Native Hawaiians" as "the native people" of these islands appears to use the term "people" in the sense defined in Webster's Third New International Dictionary (Unabridged) (1993), p. 1673 as "a body of persons that are united by a common culture, tradition, or sense of kinship though not necessarily by consanguinity or by racial or political ties and that typically have a common language, institutions, and beliefs." Native Hawaiians as defined in S. 746, cannot claim such a status. As one prominent Hawaiian scholar has put it:

> These are the modern Hawaiians, a vastly different people from their ancient progenitors. Two centuries of enormous, almost cataclysmic change imposed from within and without have altered their conditions, outlooks, attitudes, and values.

> Although some traditional practices and beliefs have been retained, even these have been modified. In general, today's Hawaiians have little familiarity with the ancient culture.
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> Not only are present-day Hawaiians a different people, they are also a very heterogeneous and amorphous group. While their ancestors once may have been unified politically, religiously, socially, and culturally, contemporary Hawaiians are highly differentiated in religion, education, occupation, politics, and even their claims to Hawaiian identity. Few commonalities bind them, although there is a continuous quest to find and develop stronger ties.

George S. Kanahele, *The New Hawaiians*, 29 Social Process in Hawai'i 21 (1982).

Mr. Kanahele's observations explain why the "society" of today's Native Hawaiians as defined in this bill, is fundamentally the "society" of the State of Hawai'i and the United States. "They" do not, as a group or as several groups, exist apart from the larger community of the state and nation. Today's citizens of Hawaiian extraction do not share the religion, language, forms of government, economics or any other of the defining social or cultural structures of precontact Hawaiian civilization. *See* Paul M. Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai'i*, 20 U.Haw. Law Rev. 99 (1998). As Mr. Kanahele correctly observes, people of Hawaiian ancestry are fully and completely integrated into the larger social and economic life of the state of Hawai'i and the nation. Hawaiians hold positions of power and respect at all levels of society including business, government and the arts; for example, in the past several years, Hawai'i has seen persons of Hawaiian ancestry serve as its Governor (John Waihee), as the state supreme court's chief justice (William S. Richardson), as a Federal District Court judge (Samuel King), as a U.S. Senator (Daniel Akaka) and in other state executive, judicial and legislative offices.

Indeed, the use of the terms "they" and "them" with respect to "Native Hawaiians" is of questionable validity, except in the context of the racial definitions of this bill, and of earlier Federal and state legislation using the same racial definition. Except for race, "they" are "us."[8]

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[8] In his introduction to Eleanor Nordyke's comprehensive study of Hawai'i's various ethnic groups, Robert C. Schmitt, Hawai'i's former State Statistician, noted an "erosion in the availability, quality, and meaningfulness of some of our most important [data] series." He observed:

> Budget cuts have forced drastic reductions in sample sizes used in the decennial censuses, the HHSP [Hawai'i Health Surveillance Program], and HVB [Hawai'i Visitors Bureau] Basic Data Survey. The 1950 census was the only such effort in the twentieth century to collect comprehensive data on race mixture, and in 1970 the Bureau of the Census deleted the category of "Part Hawaiian," which had appeared in all seventeen official enumerations from 1849 through 1960. As a result, the 1970 census was comparable neither to its predecessors nor to the birth, death, marriage, divorce, and related statistics regularly compiled by various state agencies. Further definitional changes occurred in 1980, with still others in prospect for 1990.
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> These cutbacks in statistical programs occurred at the very time that Hawai'i's population dynamics were becoming ever more complex, further complicating a situation that was already badly tangled twenty years earlier. **Interracial marriage and a growing population of mixed bloods had been characteristic of Hawai'i since at least the 1820's, but prior to**

b. **"Indigenous."** Webster at p. 1151 offers two definitions of "indigenous" which deserve consideration. The first is "a(1): not introduced directly or indirectly according to historical record or scientific analysis into a particular land or region or environment from the outside <Indians were the ~ inhabitants of America><species of plants that are ~ to that country>," and the second is "(2) originating or developing or produced naturally in a particular land or region or environment <an interesting example of ~ architecture><a people with a rich ~ culture>." The term "indigenous" does not appear in the Constitution, although that document does refer to the power of Congress to regulate commerce with the "Indian tribes." But Hawaiians have a strong oral tradition, supported by recent scholarly research, which places their arrival in the Hawaiian Islands somewhere between the time that the Romans were colonizing England and the time that the Crusaders were invading the Holy Land. *See* ELEANOR NORDYKE, THE PEOPLING OF HAWAI'I (2nd ed., 1989) 7-11 (1989). This hardly

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> **World War II most of these unions and their issue could be conveniently classified as "Part Hawaiian." For the past half century, however, all groups have participated in such heterogeneous mating.** As a consequence, according the State Department of Health, 46.5 percent of the resident marriages occurring in Hawai'i in 1986 were interracial, and 60.6 percent of the babies born to civilian couples of known race that year were of mixed race. Based on tabulations from the HHSP, fully 31.2 percent of all persons living in households were of mixed parentage--19.9 percent Part Hawaiian and 11.3 percent of other origins. Yet neither the 1970 nor 1980 censuses provided any indication of such developments.
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> These statistical gaps, in combination with the growing complexity of demographic events, have seriously handicapped Hawai'i's demographers. **Even such a fundamental (and ostensibly simple) question as "Which groups are growing, which are declining, and by how much?" can no longer be answered, even in the most approximate terms: shifting and often arbitrary racial definitions have rendered decennial census tabulations almost useless, and annual data from the HHSP, now our sole source of population estimates by detailed race, have been marred by high sampling variation and unexplainable (and sometimes unreasonable) fluctuations in group totals.** Calculation of accurate birth, death, and other rates has consequently become exceedingly problematic. These difficulties are especially daunting in a work like the present one, which relies to an uncommon degree on accurate, consistent, and meaningful ethnic statistics. It is a tribute to Eleanor Nordyke's skill and perseverance that, in the face of such intractable underlying data, she has been able to fashion any kind of reasonable and defensible conclusions.
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> The importance of this analysis is underscored by the irresistible impact of the changes now sweeping Hawai'i. **Not only are the state's once-distinctive ethnic groups--under the influence of pervasive intermarriage--turning into a racial chop suey, but even those maintaining a fair degree of endogamy are becoming indistinguishable from their neighbors, as their third, fourth, and fifth generations succumb to cultural "haolefication."** These trends, plus the growing irrelevance of ethnic statistics, suggests that this may be our last chance to capture the significant differences among Hawai'i's people. When these differences can no longer be charted, either because the population has become biologically and culturally homogenized or because government no longer collects meaningful data, Hawai'i's value as a social laboratory will vanish.

Robert C. Schmitt, *Introduction to* ELEANOR NORDYKE, THE PEOPLING OF HAWAI'I xvi-xvii (1989). (Bolding added.)

supports a claim of being "indigenous." In the context of this bill, the term "indigenous" has more the character of a shorthand term for the one racial group, out of the many in Hawai'i, whose arrival antedated that of Westerners by a few hundred years and for which the bill's supporters seek special political privilege and status.

(3) The United States has a special trust relationship to promote the welfare of the native people of the United States, including Native Hawaiians.

Comment: This is not precisely the law. In a recent survey of American Indian law, Judge William Canby states:

> From time to time Indian litigants have urged the enforcement of a broader trust responsibility, going beyond the protection of tribal lands and resources and encompassing a duty to preserve tribal autonomy or to contribute to the welfare of the tribes and their members. As yet these attempts have not met with success in the courts, which tend to insist upon a statute or regulation establishing trust responsibilities, or upon the existence of federal supervision over tribal funds or other property. See United States v. Wilson, 881 F.2d 596, 600 (9th Cir. 1989).

WILLIAM C. CANBY, JR. AMERICAN INDIAN LAW 44 (1998).

Indeed, were the descendants of precontact Indians to have such a claim on the rest of the citizens of the United States as is stated in this Finding, unrelated to pre-existing tribal status, we would have precisely the notion of a "creditor race" and a "debtor race" which Justice Scalia rejected in his concurring opinion in *Adarand Constructors v. Pena*, 515 U.S. 200, 240 (1995).[9]

Stuart Minor Benjamin's comprehensive analysis in *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L.J. 537 (1996), shows why Native Hawaiians do not and almost certainly cannot share the "special relationship" which Indian tribes have with the Federal Government.

The principal statute creating benefits for persons of Hawaiian ancestry has been held *not* to establish a Federal trust relationship. A claim of a trust relationship deriving from the Hawaiian Homes Commission Act, 1920, Act of July 9, 1921, c. 42, 42 Stat. 108, which provides homesteading opportunities to those of 50% Hawaiian "blood" was rejected twice, first in *Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission*, 588 F.2d 1216, 1224 (9th Cir. 1978) and again in *Han v. Department of Justice*, 824 F.Supp. 1480 (D. Hawai'i 1993), *aff'd* 45 F.3d 333 (9th Cir. 1995), where the U.S. District Court explained in detail why no such trust relationship existed.

The U.S. Supreme Court has expressed grave reservations about the claim that Native Hawaiians share the "special relationship" which Native American tribes have with the United States. In *Rice v. Cayetano*, 528 U.S. 495, 518, 120 S.Ct. 1044, 1057-58, (2000) the court stated:

> If Hawai'i's [racial voting] restriction were to be sustained under [*Morton v.*] *Mancari* [417 U.S. 535, (1974)] we would be required to accept some beginning premises not yet established in our case law. Among other postulates, it would be necessary to conclude that Congress, in reciting [in the Hawai'i Admission Act] the purposes for the transfer of lands to the State--and in other enactments such as the Hawaiian Homes Commission Act and the Joint Resolution of 1993--has determined that native Hawaiians have a status like that of Indians in organized tribes, and that it may, and has, delegated to the state a broad

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[9] Adarand Constructors v. Pena, 515 U.S. 200, 239, 115 S.Ct. 2097, 2118-19 (SCALIA, J., concurring). Justice Scalia stated:

> That concept [of a creditor or debtor race] is alien to the Constitution's focus upon the individual, see Amdt. 14, sec. 1 ("[N]or shall any state . . . deny to any person" the equal protection of the laws) (emphasis added), and its rejection of dispositions based on race, see Amdt. 15, sec. 1 (prohibiting abridgment of the right to vote "on account of race") or based on blood, see Art. III, sec. 3 ("[N]o Attainder of Treason shall work Corruption of Blood"); Art 1, sec. 9 ("No Title of Nobility shall be granted by the United States"). 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 government, we are just one race here. It is American.

authority to preserve that status. These propositions would raise questions of considerable moment and difficulty. It is a matter of some dispute, for instance, whether Congress may treat the native Hawaiians as it does the Indian tribes. Compare Van Dyke, The Political Status of the Hawaiian People, 17 Yale L. & Pol'y Rev. 95 (1998) with Benjamin, Equal Protection and the Special Relationship: The Case of Native Hawaiians, 106 Yale L.J. 537 (1996). We can stay far off that difficult terrain, however.

A close examination of the issue suggests that if the U.S. Supreme Court were to enter upon that "difficult terrain," it would likely hold that Congress cannot constitutionally treat "Native Hawaiians" like tribal Indians. The Constitution at Article I, Section 8 extends to Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." As noted in the Comment to Finding (1) above, the U. S. Supreme Court has upheld an Indian employment preference as not "invidious racial discrimination," basing that conclusion on the fact that such special treatment derives from Congress' recognition of the special status of Indian tribes as separate "quasi-sovereign" groups, *not* groups defined only by race. *Morton v. Mancari* found the employment preference for Indians in that case to be based on a "political" status rather than on "race" because Congress was legislating with respect to "members of quasi sovereign tribal entities," and that the preference "is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes." It pointed out that "[t]his operates to exclude many individuals who are racially to be classified as 'Indians'."

Beyond the issue of race, the establishment of an entity within a state of the United States with special privileges based solely on the duration of residence or the accident of birth raises constitutional issues of due process, the privileges and immunities clause (*see Saenz v. Roe*, 526 U.S. 489, 119 S.Ct. 1518 (1999); *Zobel v. Williams*, 457 U.S. 55, 102 S.Ct. 2309 (1982)), and the anti-nobility clauses (see, e.g., Jol A. Silversmith, *The "Missing Thirteenth Amendment": Constitutional Nonsense And Titles Of Nobility*, 8 S. Cal. Interdisciplinary L.J. 577, 609 (1999) ("We should remember that the nobility clauses were adopted because the founders were concerned not only about the bestowal of titles but also about an entire social system of superiority and inferiority, of habits of deference and condescension, of social rank, and political, cultural and economic privilege.")).

(4) Under the treaty making power of the United States, Congress exercised its constitutional authority to confirm a treaty between the United States and the government that represented the Hawaiian people, and from 1826 until 1893, the United States recognized the independence of the Kingdom of Hawaii, extended full diplomatic recognition to the Hawaiian Government, and entered into treaties and conventions with the Hawaiian monarchs to govern commerce and navigation in 1826, 1842, 1849, 1875, and 1887.

Comment: It should first be noted that, as explained more fully in the Comment to Finding 13 below, the "Hawaiian people" during the period from 1826 to 1893 included many naturalized and native-born subjects who were not "Native Hawaiians" in the sense of S. 746, and the Hawaiian government during this time included many senior officials of foreign birth. This

was particularly the case in the kingdom's foreign relations; the kingdom's Foreign Minister from 1845 to 1865, for example, was a Scot, Robert C. Wyllie, and his successors in that post included Charles de Varigny and Charles R. Bishop, both foreign-born.

In the interest of completeness, it should also be noted that U.S. acknowledgment of Hawai'i's national independence did not end in 1893. The Hawaiian revolutionary government was diplomatically recognized not only by the U.S. but by many other powerful nations as well. MERZE TATE, THE UNITED STATES AND THE HAWAIIAN KINGDOM 191-92 (1965).

(5) Pursuant to the provisions of the Hawaiian Homes Commission Act, 1920 (42 Stat. 108, chapter 42), the United States set aside 203,500 acres of land in the Federal territory that later became the State of Hawaii to address the conditions of Native Hawaiians.
(6) By setting aside 203,500 acres of land for Native Hawaiian homesteads and farms, the Act assists the Native Hawaiian community in maintaining distinct native settlements throughout the State of Hawaii.
(7) Approximately 6,800 Native Hawaiian lessees and their family members reside on Hawaiian Home Lands and approximately 18,000 Native Hawaiians who are eligible to reside on the Home Lands are on a waiting list to receive assignments of land.

Comment: The Hawaiian Homes Commission Act established a homesteading program for a small segment of a racially-defined class of Hawai'i's citizens. That is all it did. *See* H. Rep. 839, 66th Cong., 2nd sess. (1920).

Its intended beneficiaries were not and are not now "Native Hawaiians" as defined in S. 746 (i.e., those with any degree of Hawaiian ancestry, no matter how attenuated), but exclusively those with 50% or more Hawaiian "blood"–a limitation which still applies, with some exceptions for children of homesteaders who may inherit a homestead lease if the child has at least 25% Hawaiian "blood."

The HHCA was enacted in the heyday of *Plessy v. Ferguson*, 163 U.S. 537 (1896), which upheld the racial segregation of railway carriages and the concept that "separate but equal" facilities met the requirements of the Fourteenth Amendment. The conventional attitudes of those times are reflected in the testimony of Franklin K. Lane, then Secretary of the Interior, in support of the bill which became the HHCA. Lane said of the "natives of the islands":

> There is a thriftlessness among those people that is characteristic among peoples that are raised under a communist or feudal system. They do not know what the competitive system is and they will get rid of property that is given them. They do not look forward. They can not see to-morrow. Therefore, they should be given as close identification with their country as is possible and yet be protected against their own thriftlessness and against the predatory nature of those who wish to take the land from them, and who have in the past.

H.R. Rep. No. 839, 66th Cong., 2nd sess. at 4.

Astonishingly, this was said more than three generations after the Hawaiian monarchy had put an end to the "communist or feudal" system in the islands, at a time when full or part Hawaiians were a major power bloc in the Territorial legislature and constituted much of the civil service (*see* LAWRENCE H. FUCHS, HAWAII PONO: A SOCIAL HISTORY (1960), pp. 161-62).

Plessy was effectively overruled by *Brown v. Board of Education*, 347 U.S. 483 (1954), beginning a line of jurisprudence, culminating in *Adarand v. Federico Pena*, 515 U.S. 200 (1995), which shaped our present constitutional law on race-based decision-making by the government. If Secretary Lane's condescending stereotyping were ever a legitimate basis for Federal legislation, *Adarand* and a simple regard for the truth deprive it of any validity today.

For additional comments on the HHCA see the Comment to Finding 21(A)(ii) below.

(8) In 1959, as part of the compact admitting Hawaii into the United States, Congress established the Ceded Lands Trust for 5 purposes, 1 of which is the betterment of the conditions of Native Hawaiians. Such trust consists of approximately 1,800,000 acres of land, submerged lands, and the revenues derived from such lands, the assets of which have never been completely inventoried or segregated.

Comment: First and most obviously, the Hawaii Admission Act here referred to (P. L. No. 86-3, 73 Stat. 4, section 5(f) (1959)), like the HHCA, in providing benefits to descendants of precontact Hawaiians, restricts those benefits to persons of 50% Hawaiian "blood," referred to in the Act and in the HHCA as "native Hawaiians." Under the Admission Act, persons of Hawaiian ancestry lacking the 50% blood "quantum" are not "native Hawaiians."

Bettering the conditions of "native Hawaiians" (50% blood quantum) is, as noted, merely one of five *permissible* purposes for which the ceded lands trust may be used, and there is no mandate to use *any* part of these proceeds for "native Hawaiians." The statute expressly states that the trust may be used for "one or more" of the five enumerated purposes. It permits the state to determine, within this limitation, how the trust property is used. *Price v. State of Hawaii*, 764 F.2d 623 (9th Cir. 1985). Indeed, from 1959 to 1978, ceded lands revenues were principally dedicated to education. *See Hoohuli v. Ariyoshi*, 631 F.Supp. 1153 (1990). State decisions concerning the use of these public funds, of course, are subject to the constraints of the Fourteenth Amendment and the *Adarand* decision with respect to any racial test for allocation or receipt of benefits.

For additional comments on the ceded lands and on Hawaiian claims concerning them, see the Comment following Finding 18 below.

(9) Throughout the years, Native Hawaiians have repeatedly sought access to the Ceded Lands Trust and its resources and revenues in order to establish and maintain native settlements and distinct native communities throughout the State.

Comment: Activists for Hawaiian causes have indeed made many demands for special control of, or access to, the ceded lands and their proceeds for a wide variety of purposes. Establishing and maintaining "native settlements" and "distinct native communities," however, have not been the foremost purposes as this proposed finding implies and would not appear to be lawful uses of that fund.

Under the Admission Act, the ceded lands and their revenues may be used *only* for *one or more* of the following purposes*:*

a. For support of the public schools and other public educational institutions,

b. For the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended,

c. For the development of farm and home ownership on as widespread a basis as possible,

d. For the making of public improvements, and

e. For the provision of lands for public use.

P. L. No. 86-3, 73 Stat. 4, section 5(f) (1959). The only one of these purposes which might arguably include the purposes listed in Finding 9 is "the betterment of the conditions of native Hawaiians." But the Admission Act defines "native Hawaiians" by reference to the HHCA, which in turn defines "native Hawaiians" as those of 50% or greater Hawaiian "blood." Many of the "Native Hawaiians" as defined in S. 746 (i.e., those with "one drop" of Hawaiian "blood"), would be excluded from benefits under the HHCA and the Admission Act.

The Admission Act makes no specific provision for "Native Hawaiians" as defined in S. 746. Thus any use of the ceded lands or their revenues to benefit "Native Hawaiians" would have to fall within one of the five permissible uses of these resources, and would of course have to meet constitutional requirements. Any use of the ceded lands and their resources "to establish and maintain native settlements and distinct native communities throughout the State" for the benefit of "Native Hawaiians" as defined in this bill, would not only involve grave constitutional issues, but would appear to fall outside all of the limited purposes of the trust and would be illegal on that ground alone.

(10) The Hawaiian Home Lands and the Ceded Lands provide an important foundation for the ability of the Native Hawaiian community to maintain the practice of Native Hawaiian culture, language, and traditions, and for the survival of the Native Hawaiian people.

Comment: Since the HHCA is limited in its purpose and its scope to providing leasehold homesteads to persons of at least 50% Hawaiian ancestry, and since (as Finding (7) above acknowledges) only 6,800--less than 4%--of the approximately 200,000 Native Hawaiians (as defined in S. 746) hold leases under the HHCA and only 18,000 others--about 9%--are on the

waiting list, it cannot fairly be said that the Hawaiian home lands could effectively help the entire "Native Hawaiian community" (most of whom are not eligible for a Hawaiian home lands lease because they lack the requisite blood quantum) to maintain any specific culture, language and traditions. Similarly, the Admission Act's ceded lands trust, to the extent that it may provide any resources expressly for persons of Hawaiian ancestry, can provide them only for the 'betterment" of those meeting the 50% blood quantum requirement ("native Hawaiians" rather than "Native Hawaiians). *See* section 5(f), Hawai'i Admission Act, P. L. 86-3, 73 Stat. 4, (1959).

The decision as to what constitutes the "betterment" of "native Hawaiians," of course, as well as the decision whether to apportion some, all or none of the ceded lands trust resources to that purpose, is committed to the citizens of the State of Hawai'i, *see Price v. State of Hawai'i*, 764 F.2d 623 (9th Cir. 1985) and not solely to persons of Hawaiian ancestry. As governmental decisions, they are subject to the constraints of the U. S. Constitution.

(11) Native Hawaiians have maintained other distinctly native areas in Hawaii.

Comment: There are several areas of the state where persons of Hawaiian ancestry tend to predominate, just as there are areas where persons of Filipino or Caucasian or Japanese ancestry tend to predominate. They are "distinctly native" only in the sense that these other areas are "distinctly Filipino" or "distinctly Caucasian" or "distinctly Japanese." None of these areas could legitimately be considered a "tribal enclave" or anything like it. None of these areas is subject to any "government" other than those of the United States, the State of Hawai'i and the county where it is located.

(12) On November 23, 1993, Public Law 103-150 (107 Stat. 1510) (commonly known as the Apology Resolution) was enacted into law, extending an apology on behalf of the United States to the Native people of Hawaii for the United States role in the overthrow of the Kingdom of Hawaii.

Comment: The so-called Apology Resolution appears to have been adopted without careful examination of the purported "history" which it recites (see S. Rep. 103-126 (1993) and S. Rep. 102-456 (1992)), and the statements in the resolution's preamble provide no reliable support for the positions taken in S. 746. Chapter 10 of THURSTON TWIGG-SMITH, HAWAIIAN SOVEREIGNTY: DO THE FACTS MATTER? (1996) addresses each of the major historical assertions of the Apology Resolution and explains how each is in error, or misleading.

The U.S. Supreme Court in *Rice v. Cayetano,* 528 U.S. 495, 505, 120 S.Ct. 1044, 1051 (2000) acknowledged the existence of the Apology Resolution and then made no further reference to it as historical authority, preferring instead its own inquiry, based on original sources and scholarly works.

The Apology Resolution contains the following disclaimer: "Nothing in this Joint Resolution is intended to serve as a settlement of any claims against the United States."

When the Apology Bill was debated on the Senate floor, Senator Slade Gorton asked Senator Inouye:

> Is this purely a self-executing resolution which has no meaning other than its own passage, or is this, in [the proponent Senators'] minds, some form of claim, some form of different or distinct treatment for those who can trace a single ancestor back to 1778 in Hawai'i which is now to be provided for this group of citizens, separating them from other citizens of the State of Hawai'i or the United States?
> * * *
> What are the appropriate consequences of passing this resolution? Are they any form of special status under which persons of Native Hawaiian descent will be given rights or privileges or reparations or land or money communally that are unavailable to other citizens of Hawai'i?

Senator Inouye replied:

> As I tried to convince my colleagues, this is a simple resolution of apology, to recognize the facts as they were 100 years ago. As to the matter of the status of Native Hawaiians, as my colleague from Washington knows, from the time of statehood we have been in this debate. Are Native Hawaiians Native Americans? This resolution has nothing to do with that. . . . I can assure my colleagues of that. It is a simple apology.

139 Cong. Rec. S14477, 14480, Oct. 27, 1993.

It would appear that S. 746 now takes a different view of the Apology Resolution, since the resolution is now offered in support of precisely the demands for "special status" which were of concern to Senator Gorton.

> It is a good rule in life never to apologize. The right sort of people do not want apologies, and the wrong sort take a mean advantage of them.
>
> -- P. G. Wodehouse, *The Man Upstairs*

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(13) The Apology Resolution acknowledges that the overthrow of the Kingdom of Hawaii occurred with the active participation of agents and citizens of the United States and further acknowledges that the Native Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people over their national lands to the United States, either through their monarchy or through a plebiscite or referendum.

Comment: "Inherent Sovereignty." The Apology Resolution and S. 746 refer to the "sovereignty" or the "inherent sovereignty" of the "Native Hawaiian people" which was somehow taken from them at or about the time of the overthrow of the monarchy in 1893 and which has somehow persisted to the present day.

There is no historical or legal basis for these assertions. "Native Hawaiians," under the kingdom, never had "inherent sovereignty" to lose.[10]

Sovereignty, in the Hawaiian kingdom, resided inherently in the monarch, *not* the "people." In this respect, the monarchy was very different from a republic like the United States, where sovereignty--the supreme political authority within an independent nation--is with the people.

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

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

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

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

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[10] The following discussion on sovereignty under the Kingdom of Hawai'i is taken in substantial part from Paul M. Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai'i*, 20 U. Haw. Law Rev. 99, 152-53 (1998).

It would appear that both Kamehameha V and Queen Lili'uokalani believed that this sharing of sovereignty could be revoked or modified by the monarch who granted it, or by his or her successor. In 1864, when Kamehameha V became frustrated with the inability of the legislature to agree on amendments to the 1852 Constitution, he simply dissolved the legislature and promulgated a new Constitution on his own authority with the statement (quoted here from 2 KUYKENDALL, THE HAWAIIAN KINGDOM 132 (1953)):

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

Of like mind was Queen Lili'uokalani, who stated:

> Let it be repeated: the promulgation of a new constitution, adapted to the needs of the times and the demands of the people, has been an indisputable prerogative of the Hawaiian monarchy.

LILI'UOKALANI, HAWAI'I'S STORY BY HAWAI'I'S QUEEN 21 (1898).

To these Hawaiian leaders of the past, a claim that the "Hawaiian people" had "inherent sovereignty" would likely have been viewed as revolutionary.

Nor was the government of the Hawaiian Islands, in the decades immediately before the ending of the monarchy, "Hawaiian" or "Native Hawaiian." As early as 1851, foreign-born subjects of the kingdom sat in the legislature (3 KUYKENDALL, THE HAWAIIAN KINGDOM 191 (1967)) and held various degrees of control during the monarchy period (*See, e.g., id.* at 401-402, 406-410, 448-455). Westerners as well as natives sat as judges in the courts of the kingdom (*see*, e.g., 2 KUYKENDALL, THE HAWAIIAN KINGDOM 241(1938)) and as members of the cabinet along with natives and part-Hawaiians. Westerners had been trusted advisors of the monarchs from the time of Kamehameha I. During the reign of King David Kalakaua (1874-1891), many who lacked Hawaiian ancestry were appointed to the King's cabinet; at one point in his reign, he had made a total of thirty-seven ministerial appointments of which only eleven had gone to men of Hawaiian "blood." GAVAN DAWS, SHOAL OF TIME 214 (1968).

By 1893, when the monarchy was replaced by a provisional government, natives and foreigners alike had long participated extensively in the political, social and economic life of the nation, and continued to do so. Racial tension was often high, but the government was not a government of, by or for a particular race. See generally 3 KUYKENDALL, THE HAWAIIAN KINGDOM (1967) ch. 19 - 20; Patrick W. Hanifin, *A Tradition Of Inclusion:* Rice, Arakaki*, And The Development Of Citizenship And Voting Rights In Hawai'i*, http://www.angelfire.com/hi2/hawaiiansovereignty/HanifinCitizen.html.

Thus under the Hawaiian kingdom, it could not be said from either a legal or a political standpoint that the native people of the kingdom had any exclusive claim to "sovereignty," inherent or otherwise. Legally, sovereignty resided in the monarch; there was no popular sovereignty in any sense whatsoever. Politically, Westerners as well as natives participated fully in the legislative as well as the executive and judicial functions of government, and could thus fairly claim to be counted among "those whom, in granting the Constitution, [the King] has voluntarily associated with himself" through the limited and revocable sharing of the King's sovereign power.

The sovereignty of the kingdom, once resident solely in the monarch, passed upon the revolution of 1893 to the provisional government which succeeded it, then to the Republic, and then, upon annexation, to the United States. It was as U.S. citizens that "Native Hawaiians" truly came to share in the "sovereignty" of their nation as a matter of right.

The bill should omit any reference to "sovereignty" of the "Native Hawaiian people." It never existed.

"Plebiscite or referendum": Whatever might have been the feelings in 1893 or 1898 of the "native people of Hawaii" (who formed less than 40% of the population at that time), those same "native people" or their descendants were full participants and a major political force within the Territorial government (s*ee* LAWRENCE H. FUCHS, HAWAII PONO: A SOCIAL HISTORY (1960), pp. 79-85, 161-62). In 1959, at the time of the statehood plebiscite, they were about one-sixth of the populace, and the overwhelming 17 to 1 majority vote for statehood shows support by Hawaiians as well as other groups for that measure. *Id*. at 414.

(14) The Apology Resolution expresses the commitment of Congress and the President to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii and to support reconciliation efforts between the United States and Native Hawaiians; and to have Congress and the President, through the President's designated officials, consult with Native Hawaiians on the reconciliation process as called for under the Apology Resolution.

Comment: It is difficult to see how "reconciliation" can be advanced by separation; that is, by the establishment of a permanent, separate race-based "governmental" entity for Native Hawaiians within the State of Hawai'i. The U.S. Supreme Court has termed racial classifications "odious to a free people" (*Hirabayashi v. U.S.*, 320 U. S. 81 (1943)) and "presumptively invalid" (*Personnel Administrator v. Feeney*, 442 U.S. 256, 272 (1979)); *see generally Adarand Constructors v. Pena,* 515 U.S. 200, 224 (1995), in which the Court

declared that "any 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." S. 746 would segregate Hawai'i's population into two racially-defined groups, one with special status and privileges under Federal (and perhaps state) law and one without.

The pronouncements of the U.S. Supreme Court indicate that S. 746, if challenged, would be unlikely to pass constitutional muster. For Hawaiians to have their expectations raised by this bill, only to have those hopes dashed when the bill is found unconstitutional, can hardly advance "reconciliation;" in fact, such a course of events would be seen by many Hawaiians as one more in a long chain of "broken promises."

(15) Despite the overthrow of the Hawaiian Government, Native Hawaiians have continued to maintain their separate identity as a distinct native community through the formation of cultural, social, and political institutions, and to give expression to their rights as native people to self-determination and self-governance as evidenced through their participation in the Office of Hawaiian Affairs.

Comment: This statement is false.

a. Native Hawaiians, as defined in S. 746, are thoroughly integrated into Hawai'i's social, economic and political life. (See the comments to Finding (2) above.) The formation of cultural, social and political institutions is no more unique to Native Hawaiians than it is to any of the other ethnic groups which came to the islands and stayed to build communities. More importantly, as Robert C. Schmitt, Hawai'i's former State Statistician makes clear in the quoted material in the Comment to Finding (2) above, underlying the separating influences of ethnic traditions in the islands is an integration, fostered and perpetuated by extensive interracial and intercultural marriage, which is rapidly eroding even the remnants of ethnic boundaries which exist today.

b. Native Hawaiians do not give expression to "rights as native people to self-determination and self-governance" through OHA. OHA is a state agency. It carries out a discretionary decision of the state to apply certain state funds to "the betterment of native Hawaiians and Hawaiians," two groups identified solely by what the U.S. Supreme Court has held to be racial definitions. *Rice v. Cayetano,* 528 U. S. 495, 514-15, 120 S.Ct. 1044, 1055-56

(2000). OHA is managed by trustees who are state officials elected (after *Rice*) by all the citizens of the state. OHA's status as a state agency was precisely the reason why the U.S. Supreme Court in *Rice* determined that it was unnecessary to decide whether Native Hawaiians are, legally speaking, analogous to American Indians; the court stated that whatever might be the rule in tribal elections, the election for OHA trustees was a state election for state officials, so the Fifteenth Amendment applied and invalidated the limitation of the franchise to one racial group. *Rice v. Cayetano,* 528 U. S. at 520-22, 120 S.Ct. at 1058-59. So OHA is not a vehicle for "self-determination and self-governance," except perhaps in the limited sense that all citizens engage in self-determination and self-governance on an individual basis by participating in the government of the state and the nation.

It might be noted that the "self" involved in the asserted "self-determination" and "self-governance" is a group defined in this bill by race, or as the U. S. Supreme Court described it in *Rice v. Cayetano, supra*, by ancestry used as a proxy for race. The basic premise of the Fifteenth Amendment and of cases such as *Gomillion v. Lightfoot,* 364 U.S. 339 (1960) is that in the United States, racial groups have no rights to "self-determination" or "self-governance" which involve the exclusion of their neighbors of different races from equal access to government.

(16) Native Hawaiians also maintain a distinct Native Hawaiian community through the provision of governmental services to Native Hawaiians, including the provision of health care services, educational programs, employment and training programs, children's services, conservation programs, fish and wildlife protection, agricultural programs, native language immersion programs and native language immersion schools from kindergarten through high school, as well as college and master's degree programs in native language immersion instruction, and traditional justice programs, and by continuing their efforts to enhance Native Hawaiian self-determination and local control.

Comment: This statement is false.

Native Hawaiians as a racial group (as defined by S. 746) or as any other sort of group do not provide "governmental services" to anyone except insofar as individuals or groups might (1) assist state or local governmental agencies in providing governmental services or (2) offer, in a private capacity, services such as education which state or local government agencies also offer.

The services listed are provided, to Native Hawaiians and the rest of the state's citizens, both by true governmental agencies and by private schools, service clubs, labor unions and other community service organizations which may or may not have roots in, or a focus on, one or more of the islands' ethnic elements.

There is no existing Native Hawaiian government or anything resembling such an entity.

(17) Native Hawaiians are actively engaged in Native Hawaiian cultural practices, traditional agricultural methods, fishing and subsistence practices, maintenance of cultural use areas and sacred sites, protection of burial sites, and the exercise of their traditional rights to gather medicinal plants and herbs, and food sources.

Comment: It is no doubt true that some Native Hawaiians, as racially defined in S. 746, engage in some or all of these activities, although as noted in the Comments to Findings (1) and (2) above, since "Native Hawaiians" are found throughout the society of the state and nation at all economic, social, educational and occupational levels, their "cultural practices" vary widely. Certainly, the "cultural practices" even of those seeking to recapture the remote past do not include such "practices" of ancient Hawaiian society as the draconian *kapu* system or human sacrifice; these were abandoned at the insistence of the Hawaiian rulers shortly *before* the arrival of Christian missionaries in 1820.

Of course, persons who are not Native Hawaiians also engage in these activities and on the other hand, many Native Hawaiians do not engage in them. The issue is immaterial to the decision whether to enact S. 746.

The nature and extent of "traditional rights to gather medicinal plants and herbs, and food sources" is a matter of considerable debate. *See generally* Paul M. Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai'i*, 20 U. Haw. Law Rev. 99 (1998).

(18) The Native Hawaiian people wish to preserve, develop, and transmit to future Native Hawaiian generations their ancestral lands and Native Hawaiian political and cultural identity in accordance with their traditions, beliefs, customs and practices, language, and social and political institutions, and to achieve greater self-determination over their own affairs.

Comment: Undoubtedly some people of Hawaiian ancestry desire some or all of these things. They are pretty much universal human aspirations. However, (1) if "ancestral lands" means "ceded lands," then Native Hawaiians as defined in the bill have no special claim to those lands, and (2) if "Native Hawaiian political . . . identity" means "political power allocated by statute on the basis of race," then governmental action to preserve, develop or transmit such power would likely be unconstitutional, and (3) if "self-determination" involves special political power over state or Federal governmental decisions for a group defined by race or ancestry, then such self-determination would run afoul of the decision in *Rice v. Cayetano,* 528 U.S. 495, 120 S.Ct. 1044 (2000).

Ceded lands. Native Hawaiian advocates have long asserted that Native Hawaiians have some special claim to the former Crown and government lands of the kingdom, sometimes referred to as the "ceded lands" because they were granted or "ceded" to the United States upon Hawai'i's annexation in 1898. These claims were examined in detail by the Congressionally-chartered Native Hawaiians Study Commission in 1983 and were found to have no legal basis. *See* "Existing Law, Native Hawaiians and Compensation," 1 FINAL

REPORT OF THE NATIVE HAWAIIANS STUDY COMMISSION (1983), pp. 333-370; *but see* dissenting view in 2 FINAL REPORT OF THE NATIVE HAWAIIANS STUDY COMMISSION (1983) 7-11, 80-99 (proposing moral rather than legal bases for reparations). They were examined again in 1995 in an environmental impact statement for land use changes at the Bellows Air Force Station in Waimanalo, Oahu. U.S. PACIFIC COMMAND, FINAL EIS FOR LAND USE DEVELOPMENT AT BELLOWS AIR FORCE STATION, WAIMANALO, HI (1995), section 6.6. The Record of Decision therein concluded that these claims had no legal or historical validity. 61 Fed. Reg. 28568, June 5, 1996. These findings were not novel; they were fully consistent with the 1910 decision of the U.S. Court of Claims denying ex-Queen Lili'uokalani's claim for compensation for the loss of her interest in the Crown lands and holding that both the Crown and the government lands of the kingdom were, in essence, "public lands" (*Lili'uokalani v. U.S.*, 48 Ct. Cl. 418 (1910)).

There is absolutely no legal support whatsoever for the notion that at the time of the overthrow of the monarchy or at any time after the land revolution which began in 1848, Native Hawaiians held any interest, directly or as beneficiaries of some sort of implied trust, in the ceded lands. Every credible legal authority is to the contrary. *See, e.g.,* JON J. CHINEN, THE GREAT MAHELE, HAWAII'S LAND DIVISION OF 1848 15-20 (1958); LOUIS CANNELORA, THE ORIGIN OF HAWAII LAND TITLES AND OF THE RIGHTS OF NATIVE TENANTS (1974); and the authorities cited in the paragraph immediately above. *See generally* Paul M. Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai'i*, 20 U. Haw. Law Rev. 99 (1998).

There is, of course, no barrier to persons of Hawaiian ancestry carrying out the very legitimate desires set out in this Finding, so long as they do not seek race-conscious support of Federal, state or local government to do so.

It should also be borne in mind, as more fully explained in the Comments to Findings (1) and (2) above, that the "traditions, beliefs, customs and practices, language, and social and political institutions" of today's "Native Hawaiians" as defined in S. 746 are not those of precontact Hawai'i and are, in most respects, those shared by all the intermixed, intermarried inhabitants of the State of Hawai'i

(19) This Act provides for a process within the framework of Federal law for the Native Hawaiian people to exercise their inherent rights as a distinct aboriginal, indigenous, native community to reorganize a Native Hawaiian governing entity for the purpose of giving expression to their rights as native people to self-determination and self-governance.

Comment: For reasons explained earlier in this paper, Native Hawaiians as defined in the bill do *not* have inherent rights other than those shared by all citizens of the state and the nation, are *not* aboriginal or indigenous, are *not* a "native community," and have *no rights to self-determination or self-governance* other than the political rights held by all citizens of the state of Hawai'i and the United States. In addition, at the end of the monarchy in 1893 and for many years before, there was no "Native Hawaiian governing body" in the sense of a

government exclusively of, by or for Native Hawaiians, and there is no legal, historical or moral basis for the "reorganization" or creation of such a racially-defined body now.

The broad power of the Federal executive and Congress notwithstanding, no "tribe" can be created where none exists in reality. As explained in more detail in the Comment to Finding (1) above, the U.S. Supreme Court in *U.S. v. Sandoval*, 231 U.S. 28 (1913) held that while the Pueblo Indians could be brought by Congress within the "special relationship" with Indian tribes even though the Pueblos did not share all the characteristics of other tribes, "it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts." *Id*. at 46.

This warning deserves careful consideration before Congress attempts to bring "Native Hawaiians," who share none of the group or individual characteristics deemed pertinent in *Sandoval*, within the ambit of the "special relationship" which Congress has with true Indian tribes. Unlike the Pueblo communities, there is no unifying group character to the class called "Native Hawaiians" other than race.

There is no Hawaiian "tribe," and one case which considered a claim by a purported Hawaiian tribe indicates that Hawaiians are unlikely to be able to establish such a status. *Price v. Hawai'i*, 764 F.2d 623 (9th Cir. 1985).

Thus the bill would, if enacted, extend privileged political status to a group defined solely by race or ancestry. Considering the pernicious effects of racial discrimination and the U.S. Supreme Court's cautionary language in *Rice*, such an outcome appears neither socially wise nor constitutionally permissible.

(20) The United States has declared that--
(A) the United States has a special responsibility for the welfare of the native peoples of the United States, including Native Hawaiians;

Comment: See the Comments to Findings (1) and (3) above. With all due respect for Congress' authority, it must be noted that Congress' constitutional power relates to Indian tribes, not to "native peoples of the United States." In *Rice v. Cayetano*, 528 U.S. 495, 120 S.Ct. 1044 (2000), the Court, in passing on the State of Hawai'i's argument that special statutory treatment for Native Hawaiians is justified on the same basis as Congress' power with respect to Indians, said "[a]s we have observed, 'every piece of legislation dealing with Indian tribes and reservations . . . single[s] out for special treatment a constituency of tribal Indians." *Id*. at 1058. In discussing *Morton v. Mancari*, 417 U.S. 535 (1974), the *Rice* Court took pains to note that in *Morton*, "the Court found it important that the preference [there in question] was 'not directed toward a "racial" group consisting of "Indians"', but rather 'only to members of "Federally recognized" tribes.'" *Id.* As noted earlier in these comments, extending Congress' "special responsibility" to "native peoples" goes beyond present law.

(B) Congress has identified Native Hawaiians as a distinct indigenous group within the scope of its Indian affairs power, and has enacted dozens of statutes on their behalf pursuant to its recognized trust responsibility; and
(C) Congress has also delegated broad authority to administer a portion of the Federal trust responsibility to the State of Hawaii.

Comment: Although there is ample room for debate about whether Congress has in fact delegated "broad authority" to the state and whether Congress has any "trust responsibility" for Native Hawaiians, the fundamental issue is not whether Congress has done what the proposed Finding says, but whether in so doing Congress acted within its constitutional authority. The U.S. Supreme Court's decision in *Rice v. Cayetano* raises significant doubt on this point (S*ee* Comment to Policies 3(a)(1)(A), (B) and (C) *infra*.)

(21) The United States has recognized and reaffirmed the special trust relationship with the Native Hawaiian people through--
(A) the enactment of the Act entitled `An Act to provide for the admission of the State of Hawaii into the Union', approved March 18, 1959 (Public Law 86-3; 73 Stat. 4) by--
(i) ceding to the State of Hawaii title to the public lands formerly held by the United States, and mandating that those lands be held in public trust for 5 purposes, one of which is for the betterment of the conditions of Native Hawaiians; and

Comment: This finding is inaccurate.

There is no general mandate in the cited statute (the Hawaii Admission Act) that any of the ceded lands be held or applied in whole or part for the betterment of the conditions of "Native Hawaiians" as defined in this bill.

a. First and most obviously, while the Hawai'i Admission Act *permits* the use of public trust resources for "the betterment of the conditions of native Hawaiians," that class consists only of persons of 50% or more Hawaiian "blood," not "Native Hawaiians" defined in the bill as persons with any degree of Hawaiian ancestry. *See* section 5(f), Hawai'i Admission Act, P. L. 86-3, 73 Stat. 4, (1959).

b. Second, the Admission Act did not require that all or any part of the ceded land trust be actually used for the betterment of the conditions of native Hawaiians; it merely listed "the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act" as *one of five* purposes for which the ceded lands trust proceeds *might* be used. The statute expressly states that the proceeds of the ceded lands trust may be used for "one or more" of the five enumerated purposes. The statute permits the state to determine how the trust proceeds are distributed. *Price v. State of Hawai'i*, 764 F.2d 623 (9th Cir. 1985). Such state decisions, of course, are subject to the constraints of the Fourteenth Amendment and the *Adarand* decision with respect to any racial test for allocation or receipt of benefits. Indeed, because the U.S. Supreme Court has held that the definition of "native Hawaiian" in Hawai'i's statutes shares with the definition of "Hawaiian" an "explicit tie to race" (*see Rice v. Cayetano*,

528 U.S. 495, 514-517, 120 S.Ct. 1044, 1055-57 (2000)), the Admission Act provision concerning "native Hawaiians" is itself of questionable constitutionality.

(ii) transferring the United States responsibility for the administration of the Hawaiian Home Lands to the State of Hawaii, but retaining the authority to enforce the trust, including the exclusive right of the United States to consent to any actions affecting the lands which comprise the corpus of the trust and any amendments to the Hawaiian Homes Commission Act, 1920 (42 Stat. 108, chapter 42) that are enacted by the legislature of the State of Hawaii affecting the beneficiaries under the Act.

Comment: Claims of a Federal trust relationship founded upon the Hawaiian Homes Commission Act (HHCA) and the Hawai'i Admission Act which transferred HHCA responsibilities to the State of Hawai'i have been rejected by the Federal courts.

In 1978 the U.S. Court of Appeals for the Ninth Circuit dismissed claims for breach of a claimed trust brought by beneficiaries of the HHCA against that agency and its chairman. It held that plaintiffs had no Federal cause of action under the Admission Act because "[w]ith Hawai'i's admission into the Union, the national government virtually relinquished its control over and interest in the Hawaiian home lands. The problem described in plaintiffs' complaint is essentially a matter of state concern." *Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission*, 588 F.2d 1216, 1224 (9th Cir. 1978). It held further that the Federal court lacked jurisdiction over plaintiffs' claims under the HHCA itself because that act, after statehood, was a matter of state rather than Federal law.

A claim of a trust relationship was raised again and rejected again in *Han v. Department of Justice, et al*., 824 F.Supp. 1480 (D. Hawai'i 1993), aff'd 45 F.3d 333 (9th Cir. 1995). The District Court stated bluntly:

> First, as a matter of law, the federal defendants have no trust responsibility to plaintiff or other native Hawaiians under statutory or case law. The Ninth Circuit Court of Appeals has expressly held that "the state is the trustee. . . . The United States has only a somewhat tangential supervisory role under the Admission [Statehood] Act, rather than the role of trustee." The Ninth Circuit reaffirmed that holding in Price v. Hawaii (the United states "is not a formal trustee" of the Hawaiian home lands)[.] . . . Furthermore, nothing in the statutes at issue here indicates the federal defendants have a trust duty. The Admission Act specifically requires the State of Hawai'i to hold the home lands "as a public trust for the . . . betterment of the conditions of native Hawaiians." Admission Act section 5(f). There is no such corresponding duty on the part of the United States.

Id. at 1486. (Internal citations omitted.)

Indeed, the District Court expressly rejected the argument set out in this bill's Finding that the Federal government's reserved power to enforce the state's obligation, and the

restrictions imposed on the state's power to amend the HHCA, implied a Federal trust obligation. The court stated:

> Section 4 merely establishes a compact between the State of Hawai'i and the United States, whereby the state has agreed not to amend any of the Commission Act's substantive provisions without the consent of the United States. Admission Act section 4. This creates an obligation of the state, not the federal government. And while the federal government may bring an enforcement action, it is not by law required to.

Id. at 1486.[11]

More fundamentally, the HHCA provides no support for the arguments that Congress has constitutional authority to legislate concerning the "conditions of Native Hawaiians," that HHCA benefits are not "racially" allocated or that the racial distinction at HHCA's core is constitutional. As noted above, the HHCA benefits only those of 50% Hawaiian blood under a definition of "native Hawaiian" which the U. S. Supreme Court in *Rice v. Cayetano*, 528 U.S. 495, 516, 120 S.Ct. 1044, 1056 (2000) found to have an "explicit tie to race." Beyond this, the HHCA itself is constitutionally infirm; as noted in the Comment to Finding 5 above, the blatant racial basis for the HHCA would be unlikely to survive a strict scrutiny review today.

It is worth noting with respect to the "exclusive right of the United States to consent to any . . . amendments to the Hawaiian Homes Commission Act . . . that are enacted by the legislature of the State of Hawaii" that in signing statements to two recent Federal statutes granting such consent, Presidents Ronald Reagan and George Bush each expressed concern with the racial character of the HHCA. In signing P. L. 99-577, President Reagan stated:

> Because the Act employs an express racial classification in providing that certain public lands may be leased only to persons having "not less than one-half of the blood of the races inhabiting the Hawaiian Islands previous to 1778," the continued application of the [HHCA] raises serious equal protection questions. These difficulties are exacerbated by the amendment that reduces the native-blood requirement to one-quarter, thereby casting additional doubt on the original justification for the classification.

22 *Weekly Compilation of Presidential Documents* 1462, Nov. 3, 1986.

In that same statement he urged Congress to "give further consideration to the justification for the troubling racial classification." *Id.*

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[11] On appeal, the Ninth Circuit avoided the "general trust obligation" issue by "assuming without deciding" that a general trust or "guardianship" relationship exists between the United States and native Hawaiians similar to that between the United States and recognized Indian tribes. It held, however, that the Admission Act did not impose a "general fiduciary duty" upon the Federal Government to enforce the HHCA against the State of Hawai'i. Han v. Dep't of Justice, 45 F.3d 333 (9th cir. 1995).

Six years later, his successor, President George Bush, in signing P. L. 102-398, raised an identical equal protection concern. See 28 *Weekly Compilation of Presidential Documents* 1876, Oct. 12, 1992. He concluded by noting that "the racial classifications contained in the Act have not been given the type of careful consideration by the Federal Government that would shield them from ordinary equal protection scrutiny." *Id.*

(22) The United States continually has recognized and reaffirmed that--
(A) Native Hawaiians have a cultural, historic, and land-based link to the aboriginal, native people who exercised sovereignty over the Hawaiian Islands;

Comment: If this finding is intended to imply that modern-day Hawaiians maintain the societal and cultural forms of the precontact inhabitants of the islands, then this "finding" is incomplete and inaccurate. Native Hawaiians, defined as they are in S. 746 as descendants of the precontact inhabitants of the islands, necessarily have a "historic" link to their ancestors, but any modern-day link to precontact Hawaiian culture is more doubtful, and in fact is nonexistent for many contemporary Hawaiians.

Precontact Hawaiians had no written history, and there is debate as to who the "aboriginal, native people" were, where they came from and when they arrived. *See generally* ELEANOR C. NORDYKE, THE PEOPLING OF HAWAII (2nd ed., 1989) 7-12. There is a considerable body of opinion that there were various waves of migration, with the first perhaps from the Marquesas Islands between 200 and 700 A.D. and another from Tahiti between 900 and 1300 A.D. Captain James Cook's arrival in the islands in 1778 initiated another period of migration which still continues.

Culturally, the society of the Hawaiian Islands underwent significant change both before and after Western contact. There was at least one radical discontinuity reflected in the legends and oral traditions which occurred long before Western contact, when immigrants from the South Pacific introduced the "kapu" system which ensured the absolute power of the chiefs over the commoners. *See* MARTHA BECKWITH, HAWAIIAN MYTHOLOGY (1970), pp. 369-375. Thus the precontact culture of 1778 was apparently quite different from the precontact culture of the earlier immigrants.

After Western contact, radical change and cultural discontinuity were the order of the day, but the Hawaiian people were as much agents as victims of these changes. Hawaii's early kings and chiefs accomplished a near miracle in maintaining their nation's independence while guiding and shaping the chaotic forces which focused on the islands. It was Hawaii's own native leaders who dispensed with the "old religion" of polytheism and human sacrifice even before the arrival of Christian missionaries in 1820. 1 KUYKENDALL, THE HAWAIIAN KINGDOM (1938) pp. 65-70. A generation later, it was Hawaii's own native leaders, drawing upon but not surrendering to their Western advisors, who replaced ancient forms of governance, land management, land ownership and many aspects of economic life with Western models. *See generally* 1 KUYKENDALL, THE HAWAIIAN KINGDOM (1938), pp. 227-334; Paul M. Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawaii*, 20 U. Haw. Law Rev. 99 (1998) 112-117. By the time it passed into history, the Hawaiian kingdom

was a constitutional monarchy in the Western style, with a racially mixed legislature, judiciary and Cabinet governing a multi-racial nation which was fully accepted as an equal in Western diplomatic circles and boasted a literate citizenry well-educated in Western as well as Hawaiian ways. See generally 3 KUYKENDALL, THE HAWAIIAN KINGDOM (1967).

One other vital influence on Hawaiian history since Western contact was an early and continued practice of intermarriage by Hawaiians with all the ethnic and racial groups which have made Hawaii their home over the last two hundred years and more. Intermarriage brought a multitude of cultural influences into the cultures of Hawaiians and new arrivals alike.

From the perspective of history we see that as the continuity of Hawaiians to the old precontact culture waned, their continuity to the varied cultures of the Pacific and the world expanded and intensified. Indeed, the asserted "links" of all modern-day Native Hawaiians to their precontact ancestors are perhaps most accurately viewed as the justifiable pride of ancestry and historical connection we all feel for the best traditions and accomplishments of our ancestors. For today's 8,000 or so "pure" Hawaiians, that pride may be more focused than in the thousands of Hawaiians whose forebears came not only from Hawai'i, but from varied regions of Europe, Asia and America and whose ancestors thus represent most of the great civilizations of the earth. But pride of ancestry is a universal characteristic of humanity. As it exists in Hawai'i, it implies no political consequence and justifies no special treatment.

Whatever form or forms the precontact Hawaiian "society" took before Captain James Cook arrived in 1778, it cannot be said that it persists today as it existed either at Western contact or at any time before that. To the extent that there is a "Hawaiian culture" today, it is not the culture of precontact Hawai'i, but a radically evolved blend of old and new, with the new predominating, and it is a "culture" embraced by many who have no Hawaiian ancestry at all.

It would be inaccurate to say that today's "Native Hawaiians" as defined by this bill have, as a group, a distinct society or lifestyle. As the passage from George Kanahele quoted in the Comment to Finding 2 above makes clear, the society and culture of today's "Native Hawaiians", as they are defined in this bill, is the society and culture of the State of Hawaii and the United States. They do not, as a group or as several groups, live apart from the larger community of the state and nation. They do not practice the religion of ancient Hawai'i, or use Hawaiian as a first language, or follow the forms of government, economics or other defining social or cultural structures of precontact Hawaiian civilization. *See* Paul M. Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawaii*, 20 U. Haw. Law Rev. 99 (1998).

Indeed, "Native Hawaiians," as a group defined by race or ancestry, cannot fairly be said to share today *any* common language, religion, economic regime, form of self-government or other unique group-identifying features except those of the United States and the State of Hawai'i as a whole; "they" are fully and completely integrated into the larger social and economic life of the state of Hawaii and the nation. They hold positions of power and respect at all levels of society including business, government and the arts; for example, in the past several years, Hawaii has had a Native Hawaiian Governor (John Waihee), a Native Hawaiian

state supreme court chief justice (William S. Richardson), a U.S. Senator (Daniel Akaka) and numerous state officials and members of the state legislature.

If the Congress undertakes a full and open exploration of this issue, it is most likely to conclude that as to "Native Hawaiians," "they" are "us"--Americans, like all the other varied Americans in the state and the nation, mostly with mixed racial or ethnic backgrounds and sharing in the freedom and diversity of lifestyles guaranteed under the U.S. Constitution. The Congress would therefore find, consistent with *Adarand Constructors v. Federico Pena,* 515 U.S. 200 (1995), that each "Native Hawaiian" deserves the same access to political power, and the same governmental assistance when necessary, as any American of any race--without regard to race except as the U. S. Constitution might permit it--but nothing more.

(B) Native Hawaiians have never relinquished their claims to sovereignty or their sovereign lands;

Comment: "Sovereignty." "Native Hawaiians" as defined by this bill never had any "sovereignty" to relinquish, either at the time of the termination of the monarchy or before. *See* the Comment to Finding (13) above.

"Sovereign lands." This term appears to refer to the Crown lands and government lands of the kingdom, ceded to the United States at annexation in 1898. Native Hawaiian advocates have long asserted that Native Hawaiians have some special claim to these lands. These assertions and claims are baseless. Since 1848 as to government lands, and since 1865 as to Crown lands, these were public resources of the kingdom, and Native Hawaiians as a racial or ancestrally-defined group had no legal interest in or right to these lands except as subjects of the kingdom–rights shared by the non-"Native Hawaiian" subjects and denizens of the kingdom. Patrick W. Hanifin, *Hawaiian Reparations: Nothing Lost, Nothing Owed*, 17 Hawai'i B.J. 107 (1982); "Existing Law, Native Hawaiians and Compensation," 1 FINAL REPORT OF THE NATIVE HAWAIIANS STUDY COMMISSION (1983), pp. 333-370; U.S. PACIFIC COMMAND, FINAL EIS FOR LAND USE DEVELOPMENT AT BELLOWS AIR FORCE STATION, WAIMANALO, HI (1995), section 6.6.

> To the Constitution of the United States the term *sovereign*, is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those, who ordained and established that Constitution. They might have announced themselves "*sovereign*" people of the United States: But serenely conscious of the fact, they avoided the ostentatious declaration.
>
> -- *Chisholm v. Georgia*, 2 U.S. (Dall.) 419, 454 (1793)

(C) the United States extends services to Native Hawaiians because of their unique status as the aboriginal, native people of a once sovereign nation with whom the United States has a political and legal relationship; and
(D) the special trust relationship of American Indians, Alaska Natives, and Native Hawaiians to the United States arises out of their status as aboriginal, indigenous, native people of the United States.

Comment on Findings 22(C) and (D): These statements are inaccurate. See comments to Findings (1) and (3) above. *Rice v. Cayetano*, 528 U.S. 495, 120 S.Ct. 1044 (2000) implies that when the United States "extends services to Native Hawaiians" as such, it makes those services available on the basis of race and its actions must meet the constitutional standard of strict scrutiny.

If Congress adopts subsection (D) above as congressional policy, it will be redefining its relationship with American Indians and Alaska Natives as well as Native Hawaiians, and may be assuming responsibilities which are beyond those existing under current law. But such a change in relationship would imperil the continuing validity of the U. S. Supreme Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974), wherein the court held that an Indian preference under challenge as racial discrimination was not in fact "racial" because it was derived from the government-to-government relationship between the United States and Indian *tribes.* The court stated:

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

Id.

Subsection 22(D) of this bill, however, would redefine the constitutional relationship underlying current Federal laws benefiting American Indians and Alaska Natives. It would permit such programs and preferences to be extended to all Native Americans and Alaska Natives by virtue of their race or ancestry alone, and would thus nullify the distinction between racial and political classifications so carefully drawn in *Morton*. By removing that distinction, this bill may have an effect absolutely opposite to the intent of its supporters. It will almost certainly fail to bring Native Hawaiian preferences and programs under *Morton v. Mancari*'s protection from equal protection challenges, and it may have the unintended consequence of destroying the constitutional basis of that protection as it applies to the tribes and tribal members who currently benefit from it.

SEC. 2. DEFINITIONS.
In this Act:
(1) ABORIGINAL, INDIGENOUS, NATIVE PEOPLE- The term `aboriginal, indigenous, native people' means those people whom Congress has recognized as the original inhabitants of the lands and who exercised sovereignty prior to European contact in the areas that later became part of the United States.

Comment: This term is unhelpful as applied to Native Hawaiians, since with the exception of the ruling chiefs of the islands, neither the original inhabitants of Hawai'i nor "Native Hawaiians" as defined in the bill exercised sovereignty prior to European contact. *See Rex v. Booth*, 2 Haw. 616 (1863) and the comment to Finding (13) above.

This finding suggests that congressional recognition of the "original inhabitants" is of considerable importance to the rights of present-day individuals. If that is true, then in light of *Rice v. Cayetano*, that recognition must pass the test of strict scrutiny. It would be appropriate for Congress to review any past "recognition" of this sort and reopen the matter so that all affected persons may be heard on the issue.

Sections 2(2) and 2(3).

No comments are offered on sections 2(2) and 2(3) of the bill.

(4) INDIGENOUS, NATIVE PEOPLE. – The term ``indigenous, native people'' means the lineal descendants of the aboriginal, indigenous, native people of the United States.

Comment: This definition, with its exclusive focus on ancestry, carries the same constitutional implications as the definitions of "Hawaiian" and "native Hawaiian" addressed in *Rice v. Cayetano*. This definition, like those, uses ancestry as a proxy for race, and any statute relying upon it must be drafted to meet the constitutional test of strict scrutiny as described in *Adarand Constructors v. Federico Pena*, 515 U.S. 200 (1995).

(5) Interagency Coordinating Group

No comments are offered on subsection 2(5).

(6) NATIVE HAWAIIAN-
(A) Prior to the recognition by the United States of the Native Hawaiian governing entity, the term `Native Hawaiian' means the indigenous, native people of Hawaii who are the direct lineal descendants 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 who occupied and exercised sovereignty in the Hawaiian archipelago, including the area that now constitutes the State of Hawaii, and includes all Native Hawaiians who were eligible in 1921 for the programs authorized by the Hawaiian Homes Commission Act (42 Stat. 108, chapter 42) and their lineal descendants.

Comment: This definition is indistinguishable, in its essentials, from the definition of "Hawaiian" which the U.S. Supreme Court in *Rice v. Cayetano* found to be "racial." As with

the definition of "Hawaiian," this definition identifies a class within today's population of Hawai'i solely by ancestry. As with the definition of "Hawaiian," the ancestral link must be to the inhabitants of the Hawaiian Islands before Western contact; the definition of "Hawaiian" describes these precontact inhabitants as those in the islands before 1778, while this bill refers to them as the "aboriginal, indigenous, native people," but the group is manifestly the same. Lest there be any doubt, subsection 2(1) of the bill defines "aboriginal, indigenous, native people" as the "original inhabitants . . . prior to European contact."

In *Rice v. Cayetano*, 528 U.S. 495, 120 S.Ct. 1044, (2000) the U. S. Supreme Court, in declaring unconstitutional a State of Hawai'i law restricting the franchise for certain statewide elections to "Hawaiians" defined by ancestry in a manner essentially identical to the definition of "Native Hawaiian" in S. 746, condemned discrimination on grounds of ancestry as follows:

> The ancestral inquiry mandated by the State [of Hawai'i] implicates the same grave concerns as a classification specifying a particular race by name. One of the principal 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.
>
> The ancestral inquiry mandated by the State is forbidden by the Fifteenth Amendment for the further reason that the use of racial classifications is corruptive of the whole legal order democratic elections seek to preserve. The law itself may not become the instrument for generating the prejudice and hostility all too often directed against persons whose particular ancestry is disclosed by their ethnic characteristics and cultural traditions. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Hirabayashi v. United States, 320 U. S. 81, 100 (1943). Ancestral tracing of this sort achieves its purpose by creating a legal category which employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name. The state's electoral restriction enacts a race-based voting qualification.

Id. at 517, 120 S.Ct. at 1057.

It would be difficult to imagine a more thoroughgoing "ancestral inquiry" than that proposed in the foregoing section of this bill, or one more likely to produce the very social ills described in the quoted section from *Rice*. Through this process, Hawai'i's citizens will be formally and officially segregated by race, with the favored race to be accorded special political privileges and all others to be denied them.

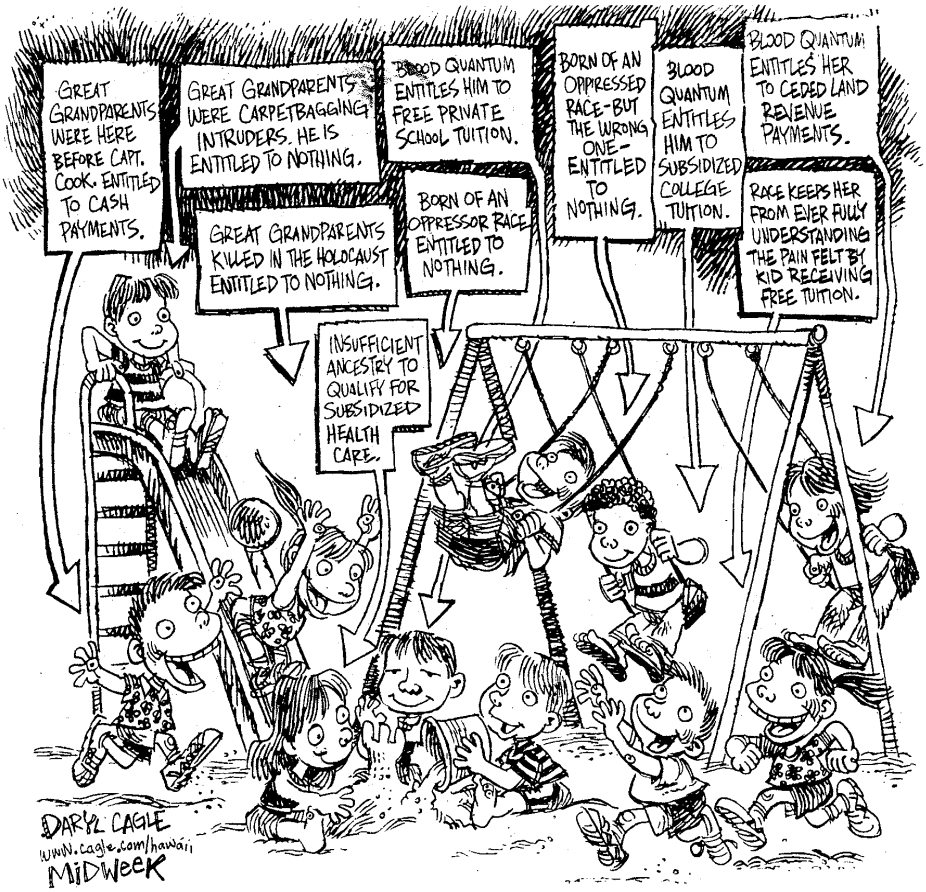
Given the racial character of the bill's definition of "Native Hawaiian" and the absence of justification for classifying Hawai'i's citizens on that ground, it must be concluded that S. 746 would not survive constitutional challenge.

(B) Following the recognition by the United States of the Native Hawaiian governing entity, the term 'Native Hawaiian' shall have the meaning given to such term in the organic governing documents of the Native Hawaiian governing entity.

Comment: There will be serious difficulties in implementing this provision.

a. The "governing entity" may not have a free hand in incorporating a race-conscious definition of "Native Hawaiian" in its organic governing documents. Section 6(b)(2)(A) of this bill provides in pertinent part that "[t]he Secretary shall certify that the organic governing documents . . . (ii) are consistent with applicable Federal law and the special trust relationship between the United States and the indigenous native people of the United States[.]" The constitutional principles enunciated in *Adarand Constructors v. Pena*, 515 U.S. 200 (1995) and *Rice v. Cayetano*, 528 U.S. 495 (2000) are part of "applicable Federal law," and for the reasons set out throughout these comments, they interpose a most daunting constitutional barrier to the Secretary's making the specified findings, at least so long as the governing documents preserve the "explicit tie to race" found objectionable in *Rice*.

b. Nowhere in the bill is there a consideration of the status of those who are now "Native Hawaiians" as defined in Section 2(6)(A) if they cease to become "Native Hawaiians" because the organic governing documents of the governing entity, as approved by the Secretary, so stipulate. That could occur, for example, if the governing entity adopts a blood quantum requirement like that of the existing Hawaiian Homes Commission Act and the Hawai'i Admission Act. Such a redefinition of "Native Hawaiian" would call into question the broad statements of congressional policy with respect to "Native Hawaiians" elsewhere in this bill. See the Comment to Section 3(a)(4) below for a fuller discussion of this point.



(7) NATIVE HAWAIIAN GOVERNING ENTITY- The term `Native Hawaiian governing entity' means the governing entity organized by the Native Hawaiian people.

Comment: This Section and others in the bill imply that there shall be only one Native Hawaiian governing entity. For the reasons set out in the Comment to Section 3(a)(4) below, such a limitation appears to be inconsistent with other statements of policy in the bill which suggest that the rights to self-determination, to self-government and to "reorganize" a Native Hawaiian governing entity inhere in all "Native Hawaiians" as defined in subsection 2(6)(A) of the bill.

Section 2(8).

No comments are offered on Section 2(8).

SEC. 3. UNITED STATES POLICY AND PURPOSE.
(a) POLICY- The United States reaffirms that--
(1) Native Hawaiians are a unique and distinct aboriginal, indigenous, native people, with whom the United States has a political and legal relationship;

Comment: The statement "reaffirmed" is inaccurate.

a. **"A unique and distinct . . . people."** As explained in the Comments to Findings (2) and (15) above, the comprehensive integration of Native Hawaiians at all levels of state and national life precludes the claim that Native Hawaiians today are either "unique" or "distinct" in any other sense than the racial one, except insofar as every group within this country can claim "uniqueness" and "distinctness." Of course, nothing in this statement of policy and purpose explains how the claimed "distinctness" or "uniqueness" of this group, identified (in this bill and in other laws) solely by race or ancestry, would entitle it to preferential treatment under law, or exempt such treatment from the constraints of the Fourteenth Amendment.

b. **"Political and legal relationship."** The United States has no "political" relationship with the group identified as "Native Hawaiians" in this bill. The claim of a political relationship is intended to bring Native Hawaiians within the constitutional rule of *Morton v. Mancari*, 417 U.S. 535 (1974), discussed in the Comment to Finding (1) above. In *Morton*, the U. S. Supreme Court held that Congress had a "unique obligation toward the Indians" which was "political." It said:

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

The "political" relationship, however, could exist in *Morton* because there was a "polity"–a pre-existing political unit with a political organization–which could be "federally recognized." There is no such existing entity consisting of Native Hawaiians; the only group identified in this bill as "Native Hawaiians" is one defined by race or ancestry.

For the same reason, the United States has no "legal" relationship with "Native Hawaiians" as defined in this bill, except perhaps the same legal relationship it has with all other U. S. citizens.

(2) the United States has a special trust relationship to promote the welfare of Native Hawaiians;

Comment: This is incorrect. See the Comments to Findings (3) and (20)(A) above.

(3) Congress possesses the authority under the Constitution to enact legislation to address the conditions of Native Hawaiians and has exercised this authority through the enactment of--
(A) the Hawaiian Homes Commission Act, 1920 (42 Stat. 108, chapter 42);
(B) the Act entitled 'An Act to provide for the admission of the State of Hawaii into the Union', approved March 18, 1959 (Public Law 86-3; 73 Stat. 4); and
(C) more than 150 other Federal laws addressing the conditions of Native Hawaiians;

Comment: The authority of Congress in these respects is precisely the issue the U. S. Supreme Court carefully declined to address in *Rice v. Cayetano*, 528 U.S. 495, 120 S.Ct. 1044 (2000), calling it "difficult terrain." It said:

> If Hawai'i's [racial voting] restriction were to be sustained under [*Morton v.*] *Mancari* [417 U.S. 535, (1974)] we would be required to accept some beginning premises not yet established in our case law. Among other postulates, it would be necessary to conclude that Congress, in reciting [in the Hawai'i Admission Act] the purposes for the transfer of lands to the State--and in other enactments such as the Hawaiian Homes Commission Act and the Joint [Apology] Resolution of 1993--has determined that native Hawaiians have a status like that of Indians in organized tribes, and that it may, and has, delegated to the state a broad authority to preserve that status. These propositions would raise questions of considerable moment and difficulty. It is a matter of some dispute, for instance, whether Congress may treat the native Hawaiians as it does the Indian tribes. Compare Van Dyke, The Political Status of the Hawaiian People, 17 Yale L. & Pol'y Rev. 95 (1998) with Benjamin, Equal Protection and the Special Relationship: The Case of Native Hawaiians, 106 Yale L.J. 537 (1996).

Id. at 518, 120 S.Ct. at 1057-58.

These comments by the U. S. Supreme Court hardly justify the sweeping statement of this subsection concerning Congressional authority to "address the conditions of Native Hawaiians," except insofar as Congress might "address the conditions of Native Hawaiians" in a context of addressing the conditions of all the citizens of Hawai'i, without regard to race.

It should also be noted that the statutes referred to in this subsection–the Hawaiian Homes Commission Act (HHCA) and the Hawai'i Admission Act–both speak only of "native Hawaiians," defined as persons with at least 50% Hawaiian ancestry, not "Native Hawaiians" as defined in this bill. In *Rice v. Cayetano*, the U. S. Supreme Court held that the definition of "native Hawaiian" in the governing statutes of the state's Office of Hawaiian Affairs, which is essentially identical to the definitions of "native Hawaiian" in the HHCA and the Admission Act, was racial. *Id.* at 1056.

(4) Native Hawaiians have--
(A) an inherent right to autonomy in their internal affairs;
(B) an inherent right of self-determination and self-governance;
(C) the right to reorganize a Native Hawaiian governing entity; and

Comment: The statements in subsections 3(a)(4)(A) and (B) are true only to the extent that they are true of all of the citizens of the state of Hawai'i. On the matter of self-determination and self-governance, s*ee* the Comment to Finding (15) above. The statement in 3(a)(4)(C) is accurate only in the sense that any group of individuals may organize itself for lawful purposes and establish a body to govern itself. The evident purpose of 3(a)(4)(C), however is to validate the creation of an organization of Native Hawaiians which Congress can and will recognize as having a "government-to-government" relationship with the United States. For the reasons set out earlier in this document (*see, e.g.,* the Comments to Findings (1) and (19)), that is not constitutionally permissible.

This portion of S. 746 raises several troubling questions.

a. If Native Hawaiians as defined in this bill have true "autonomy in their internal affairs" and rights of "self-determination," how may they fairly be limited to a single governmental entity? The bill clearly contemplates that only "Native Hawaiians" may create the new entity, and that only one governing entity may be formed. But if the rights of autonomy and self-determination reside in "Native Hawaiians" defined by race or ancestry, then logically they should reside in any subset of that group, or even in each individual, because the only criterion for being "Native Hawaiian" is fully and completely met by each individual member of the group and by all the members of any subgroup. Thus each group and subgroup, or perhaps even each individual, should have the same right to the special solicitude of the U.S. Government as any other. Otherwise, the group which first obtains control of the "Native Hawaiian governing entity" would have the power to exclude the minority not only from "the government" but, under section 2(6)(B) of the bill, from the very definition of "Native Hawaiian" itself. If, on the other hand, the bill contemplates that more than one Native Hawaiian governing entity could be formed, then it should provide some guidance as to the mechanism for creating such additional governments and for resolving disputes between or among these governments which may affect Federal interests.

b. What will become of those who, either by exclusionary action of the majority or by their own decisions not to participate,[12] cease to be citizens of the Native Hawaiian government after it is formed? Do the "inherent" rights and entitlements referred to in the Findings, Definitions and Policy sections of the bill, and the special trust relationship and other obligations of the Federal government announced in this bill, cease to exist with respect to these individuals? It might be inferred that those who elect not to join the new government still remain "Native Hawaiians" with the special claims upon the Federal government referred to in Sections 3(a)(1) and (2) of the bill, but it is equally reasonable to say that those who do

[12] The bill nowhere expressly gives Native Hawaiians as defined in Section 2(6) the right to "opt out" of the "governing entity." While such a right might be presumed to exist, it should be clearly set out if this bill becomes law.

not join the new government lose all claims to Federal "recognition" or benefits since the "political" relationship which (according to the bill's advocates) keeps Native Hawaiian preferences from being "racial" would be subsumed in the newly created and recognized entity.

c. What would become of those of Hawaiian ancestry who might fail to meet a new definition of "Native Hawaiian" enacted under subsection 2(6)(B) of the bill?[13] What would those then-former Native Hawaiians become? Would they retain any rights or claims either against their former Native Hawaiian government or the United States? As noted above, once the Native Hawaiian government is formed and recognized, the rights of autonomy and self-determination would appear to be subsumed in the new entity and would thus pertain only to those who are citizens of the new entity. If this is not to be the case (which is what subsections 3(a)(4)(A) and (B) of this bill seem to imply), then the bill should make clear how persons of Hawaiian ancestry who are excluded from the definition of "Native Hawaiian" adopted by the governing entity will be treated under the new order. Of course, for the State or Federal government to extend any rights to such persons by virtue of ancestry alone would trigger grave constitutional concerns because as noted above, the creation and recognition of a single "political" entity for Native Hawaiians would make it difficult for those who are "defined out" of the new governing entity to argue that any rights or claims which do survive are in any sense political rather than racial.

d. A related question is whether, if the definition of "Native Hawaiian" is changed by the new Native Hawaiian government, that new definition will carry over to other Federal and state laws which make special provision for persons of Hawaiian ancestry. Among these are statutes providing favored treatment with respect to health care (42 U. S. Code 11701 et seq.), education (25 U. S. Code 3001 et seq.) and repatriation of cultural items including human remains. If existing or future State and Federal benefits for "Native Hawaiians" are to be considered truly "political," then the governing political entity's definition should control. Otherwise, State and Federal statutes extending benefits to persons differently defined as "native Hawaiian" or "Native Hawaiian" could hardly be justified as creating a "political" rather than "racial" classification.

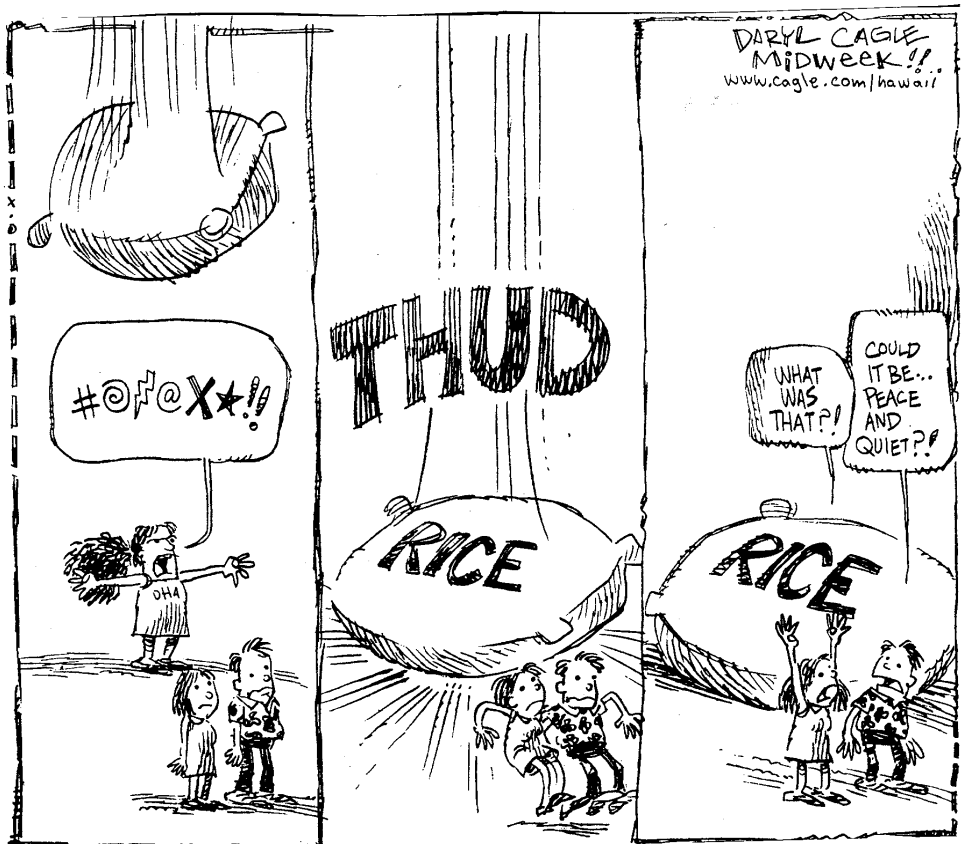
The United States could perhaps exercise its "plenary" authority over Indian tribes or the Secretary's certification authority under subsection 6(b)(2) to limit the power of a majority to "define out" dissident or undesired citizens of the Native Hawaiian government, but any such action would very possibly be condemned as interference with the "inherent" rights of autonomy and self-determination.

(5) the United States shall continue to engage in a process of reconciliation and political relations with the Native Hawaiian people.

Comment: See Comments to Finding (14) and Policy 3(a)(1) above. The implication that the United States once had or has "political relations" with "the Native Hawaiian people" is invalid. During the monarchy, any "political relationship" between the two nations formally existed between the United States and the monarch in whom, individually, reposed the sovereignty of

[13] Such a new definition might, for example, impose a blood quantum requirement.

the kingdom. For nearly the entire duration of the monarchy, the kingdom's government included those who were not "Native Hawaiians" as defined in this bill, so if the "political relations" of the U. S. are construed as those with the kingdom's government, they were conducted with many subjects of the kingdom who were not "Native Hawaiian." Following the conclusion of the monarchy in 1893, the Hawaiian government included many citizens who were not Native Hawaiians. See the Comment to Finding (13) for a fuller discussion on this point. Thus there were and are no separate "political relations" with "the Native Hawaiian people" to be "continued."



(b) PURPOSE- It is the intent of Congress that the purpose of this Act is to provide a process for the recognition by the United States of the Native Hawaiian governing entity for purposes of continuing a government-to-government relationship.

Comment: As noted in the Comment to Finding 13 above, there was no purely "Native Hawaiian governing entity" during either the time of the Hawaiian monarchy, the time of the Provisional Government and the Republic after the 1893 revolution, or the time following annexation in 1898. The government of the Hawaiian Islands during the time of the Kingdom was not restricted to persons of Hawaiian ancestry, and it included many officials of American and European extraction. There is currently no "Native Hawaiian governing entity" to recognize. What this bill would do is to *create* a wholly new entity so as to invest a single one

of Hawai'i's many racial groups with special governmental power. As noted elsewhere in these comments, such a course is almost certainly unconstitutional.

SEC. 4. ESTABLISHMENT OF THE UNITED STATES OFFICE FOR NATIVE HAWAIIAN RELATIONS.
(a) IN GENERAL- There is established within the Office of the Secretary the United States Office for Native Hawaiian Relations.
(b) DUTIES OF THE OFFICE- The United States Office for Native Hawaiian Relations shall--
(1) effectuate and coordinate the trust relationship between the Native Hawaiian people and the United States, and upon the recognition of the Native Hawaiian governing entity by the United States, between the Native Hawaiian governing entity and the United States through the Secretary, and with all other Federal agencies;
(2) continue the process of reconciliation with the Native Hawaiian people, and upon the recognition of the Native Hawaiian governing entity by the United States, continue the process of reconciliation with the Native Hawaiian governing entity;
(3) fully integrate the principle and practice of meaningful, regular, and appropriate consultation with the Native Hawaiian governing entity by providing timely notice to, and consulting with the Native Hawaiian people and the Native Hawaiian governing entity prior to taking any actions that may have the potential to significantly affect Native Hawaiian resources, rights, or lands;
(4) consult with the Interagency Coordinating Group, other Federal agencies, and with relevant agencies of the State of Hawaii on policies, practices, and proposed actions affecting Native Hawaiian resources, rights, or lands; and
(5) prepare and submit to the Committee on Indian Affairs and the Committee on Energy and Natural Resources of the Senate, and the Committee on Resources of the House of Representatives an annual report detailing the activities of the Interagency Coordinating Group that are undertaken with respect to the continuing process of reconciliation and to effect meaningful consultation with the Native Hawaiian governing entity and providing recommendations for any necessary changes to existing Federal statutes or regulations promulgated under the authority of Federal law.

Comment: Establishing a Federal office which provides or administers any preferential treatment for Native Hawaiians as defined in this bill raises the same constitutional issues of racial segregation and discrimination discussed elsewhere in this paper. Such an office would be presumptively unconstitutional.

The reference in subsection 4(b)(3) to "consulting with the Native Hawaiian people and the Native Hawaiian governing entity," and references in subsection 4(b)(2) and (3) to taking certain actions with "the Native Hawaiian people" and then with the Native Hawaiian governing entity upon its recognition, enhances the ambiguity of the status of persons of Hawaiian ancestry who are not citizens of the new government, and perhaps not even "Native Hawaiians" under a definition adopted in the organic governing document of the new entity. Is it the intent of the bill that the rights of the "Native Hawaiian people" cease to exist when the new governing entity is recognized, or will such persons retain some special status even though

they are not citizens of the new "government"? If persons outside the "recognized" "government" are given rights by this bill, it will be difficult to argue that such rights are not based on race rather than a "political" relationship, since the "political" relationship would arguably have been defined through the recognition of, and subsumed in, the "Native Hawaiian governing entity."

The section further requires consultation on matters that may "significantly or uniquely affect Native Hawaiian resources, rights or lands." The bill should define this term, since its meaning is not obvious.

a. There are currently no lands or other property which could be characterized as "Native Hawaiian," except perhaps lands or property owned individually by persons of Hawaiian ancestry. The assets and resources of the State of Hawaii Department of Hawaiian Home Lands and of the state Office of Hawaiian Affairs are the property of the State of Hawai'i. They are being applied at the moment for the betterment of native Hawaiians or Hawaiians, but they are not in any sense the property of all or any Native Hawaiian individuals, or of native Hawaiians or Native Hawaiians as a group. *Cf. Rice v. Cayetano*, 528 U.S. 495, 120 S.Ct. 1044 (2000); *see also* the Comment "Ceded Lands" to Finding 18 above and authorities cited therein. Although some Hawaiians claim that the ceded lands are the property or patrimony of "Native Hawaiians," careful legal and historical research shows that these claims are baseless. *Id*.

b. The term "Native Hawaiian resources, rights or lands" may be intended to mean "resources, rights or lands of the Native Hawaiian governing entity," but it could fairly be construed instead to mean "resources, rights or lands" of any person with a precontact Hawaiian ancestor. Under the latter interpretation, any action with a significant effect on any property or right of any "Native Hawaiian"--such as placing a tax lien on a Native Hawaiian's bank account, condemning a utility right-of-way over a parcel in which a Native Hawaiian has an interest, or even placing a Native Hawaiian under arrest--would require prior consultation not only with the individual affected, but with "the Native Hawaiian people and the Native Hawaiian governing entity." This would place an extraordinarily heavy burden on the affected agencies of the municipal, State and Federal governments.

Given these ambiguities, the bill, if enacted at all, should be amended to clearly define the term "Native Hawaiian resources, rights or lands" and the scope of the consultation requirement.

SEC. 5. NATIVE HAWAIIAN INTERAGENCY COORDINATING GROUP.
(a) ESTABLISHMENT- In recognition of the fact that Federal programs authorized to address the conditions of Native Hawaiians are largely administered by Federal agencies other than the Department of the Interior, there is established an interagency coordinating group to be known as the 'Native Hawaiian Interagency Coordinating Group'.
(b) COMPOSITION- The Interagency Coordinating Group shall be composed of officials, to be designated by the President, from--

(1) each Federal agency that administers Native Hawaiian programs, establishes or implements policies that affect Native Hawaiians, or whose actions may significantly or uniquely impact on Native Hawaiian resources, rights, or lands; and
(2) the United States Office for Native Hawaiian Relations established under section 4.
(c) LEAD AGENCY- The Department of the Interior shall serve as the lead agency of the Interagency Coordinating Group, and meetings of the Interagency Coordinating Group shall be convened by the lead agency.

Comment: If in fact the Federal programs concerned with Native Hawaiians are administered "largely" by agencies other than the Department of the Interior, then it would probably be more efficient to have the agency with the greatest impact on Native Hawaiians take the lead role in this "group." Consideration should also be given to the agency whose activities most broadly affect Native Hawaiians, even if that agency does not administer any programs addressing the conditions of Native Hawaiians.

Of course, this section of the bill, like the rest, is founded on the "explicit tie to race" which the U.S. Supreme Court found sufficient, in *Rice v. Cayetano*, to render the OHA voting restriction unconstitutional. That same "tie to race" would infect the Interagency Coordinating Group established by this section of the bill, and would trigger the strict scrutiny standard for evaluating the constitutionality of the entity itself and any actions it might take. As noted elsewhere in this paper, strict scrutiny is likely to prove fatal both in fact and in theory to the racial segregation and racial preferences established by this bill.

(d) DUTIES- The responsibilities of the Interagency Coordinating Group shall be--
(1) the coordination of Federal programs and policies that affect Native Hawaiians or actions by any agency or agencies of the Federal Government which may significantly or uniquely impact on Native Hawaiian resources, rights, or lands;
(2) to assure that each Federal agency develops a policy on consultation with the Native Hawaiian people, and upon recognition of the Native Hawaiian governing entity by the United States, consultation with the Native Hawaiian governing entity; and
(3) to assure the participation of each Federal agency in the development of the report to Congress authorized in section 4(b)(5).

Comment: This section of the bill perpetuates the same ambiguity discussed in the Comment to Section 4 above; i.e., the ambiguity concerning the definition, rights and prerogatives of "Native Hawaiians" as distinguished from "the Native Hawaiian people" following the recognition of the new "governing entity." This will surely make the "coordination" and "consultation" referred to in this

section impossibly complex, because there is at least one interpretation of this section which would require consultation and coordination not only with the new entity, but with all those, within or outside the new entity, who meet the bill's definition of "Native Hawaiian." This would be an extreme burden on the governmental agencies involved, and the ambiguity should be resolved so as to avoid that.

SEC. 6. PROCESS FOR THE RECOGNITION OF THE NATIVE HAWAIIAN GOVERNING ENTITY.
(a) RECOGNITION OF THE NATIVE HAWAIIAN GOVERNING ENTITY- The right of the Native Hawaiian people to organize for their common welfare and to adopt appropriate organic governing documents is hereby recognized by the United States.

Comment: On its face, this statement is unobjectionable, since it would apply to any lawful group which desired to organize for its common welfare and develop its individual charter and organizational structure. However, to the extent that this statement might imply that Native Hawaiians, as a racial group, have any "right" to special privileges because of race other than those which would pass the test of strict scrutiny, Congress' "recognition" of that "right" is, for the reasons stated throughout this document, inappropriate.

(b) PROCESS FOR RECOGNITION-
(1) SUBMITTAL OF ORGANIC GOVERNING DOCUMENTS- Following the organization of the Native Hawaiian governing entity, the adoption of organic governing documents, and the election of officers of the Native Hawaiian governing entity, the duly elected officers of the Native Hawaiian governing entity shall submit the organic governing documents of the Native Hawaiian governing entity to the Secretary.
(2) CERTIFICATIONS-
(A) IN GENERAL- Within 90 days of the date that the duly elected officers of the Native Hawaiian governing entity submit the organic governing documents to the Secretary, the Secretary shall certify that the organic governing documents--
(i) establish the criteria for citizenship in the Native Hawaiian governing entity;
(ii) were adopted by a majority vote of the citizens of the Native Hawaiian governing entity;
(iii) provide for the exercise of governmental authorities by the Native Hawaiian governing entity;
(iv) provide for the Native Hawaiian governing entity to negotiate with Federal, State, and local governments, and other entities;
(v) prevent the sale, disposition, lease, or encumbrance of lands, interests in lands, or other assets of the Native Hawaiian governing entity without the consent of the Native Hawaiian governing entity;
(vi) provide for the protection of the civil rights of the citizens of the Native Hawaiian governing entity and all persons subject to the authority of the Native Hawaiian governing entity, and ensure that the Native Hawaiian governing entity exercises its authority consistent with the requirements of section 202 of the Act of April 11, 1968 (25 U.S.C. 1302); and

(vii) are consistent with applicable Federal law and the special trust relationship between the United States and the indigenous native people of the United States.
(B) BY THE SECRETARY- Within 90 days of the date that the duly elected officers of the Native Hawaiian governing entity submit the organic governing documents to the Secretary, the Secretary shall certify that the State of Hawaii supports the recognition of the Native Hawaiian governing entity by the United States as evidenced by a resolution or act of the Hawaii State legislature.
(C) RESUBMISSION IN CASE OF NONCOMPLIANCE WITH FEDERAL LAW-
(i) RESUBMISSION BY THE SECRETARY- If the Secretary determines that the organic governing documents, or any part thereof, are not consistent with applicable Federal law, the Secretary shall resubmit the organic governing documents to the duly elected officers of the Native Hawaiian governing entity along with a justification for each of the Secretary's findings as to why the provisions are not consistent with such law.
(ii) AMENDMENT AND RESUBMISSION BY THE NATIVE HAWAIIAN GOVERNING ENTITY- If the organic governing documents are resubmitted to the duly elected officers of the Native Hawaiian governing entity by the Secretary under clause (i), the duly elected officers of the Native Hawaiian governing entity shall--
(I) amend the organic governing documents to ensure that the documents comply with applicable Federal law; and
(II) resubmit the amended organic governing documents to the Secretary for certification in accordance with the requirements of this paragraph.
(D) CERTIFICATIONS DEEMED MADE- The certifications authorized in subparagraph (B) shall be deemed to have been made if the Secretary has not acted within 90 days of the date that the duly elected officers of the Native Hawaiian governing entity have submitted the organic governing documents of the Native Hawaiian governing entity to the Secretary.
(3) FEDERAL RECOGNITION- Notwithstanding any other provision of law, upon the election of the officers of the Native Hawaiian governing entity and the certifications by the Secretary required under paragraph (1), the United States hereby extends Federal recognition to the Native Hawaiian governing entity as the representative governing body of the Native Hawaiian people.

Comment. There is an ambiguity with respect to Section 6(b)(2)(D)'s provision for "deemed made" DoI certifications. It would appear that the certifications referred to are those described in Section 6(b)(2)(A) rather than that of Section 6(b)(2)(B). The corresponding section of H.R. 617 refers to "subparagraph (A)" rather than "subparagraph (B)." In any case, such a "deemed certification" in default of an affirmative DoI approval of the Native Hawaiian governing entity's organic documents (which, among other things, will define the governmental powers of the entity; the protection of the civil rights of its members, and the criteria for citizenship in the entity) could result in much mischief if these documents purport to commit the United States to a relationship which is unreasonably burdensome or which is not in fact consistent with law. If the bill appears likely to pass, it should be amended to remove this "default" approval. It would also be wise, in view of the bill's requirements for Federal agency consultation with the new entity, for all Federal agencies to be afforded an opportunity to comment on the organic documents so that potential conflicts and difficulties could be ascertained and resolved before the documents are approved.

This section, of course, shares the same constitutional infirmity as the rest of the bill, and it ignores the interest of the rest of the citizens of Hawai'i in the creation of this new "governing entity" within the state's sovereign borders.

SEC. 7. AUTHORIZATION OF APPROPRIATIONS.

Comment: No comment is provided on Section 7 of the bill.

SEC. 8. REAFFIRMATION OF DELEGATION OF FEDERAL AUTHORITY; NEGOTIATIONS.
(a) REAFFIRMATION- The delegation by the United States of authority to the State of Hawaii to address the conditions of the indigenous, native people of Hawaii contained in the Act entitled `An Act to provide for the admission of the State of Hawaii into the Union' approved March 18, 1959 (Public Law 86-3; 73 Stat. 5) is hereby reaffirmed.

Comment: As noted in the Comments to Findings 8 through 10 and 21, if there were any delegation of authority to the State of Hawai'i in the cited statute, it concerned only "native Hawaiians" of 50% or greater Hawaiian "blood," not "Native Hawaiians" as defined in this bill. Under *Rice v. Cayetano*, 528 U.S. 495, 120 S.Ct. 1044 (2000), the constitutionality of any such delegation, like the constitutionality of all Congressional acts singling out either the racial group of "Native Hawaiians" or the racial group of "native Hawaiians" for special treatment, would appear to be subject to the standards of strict scrutiny, which this statute almost certainly cannot meet.

(b) NEGOTIATIONS- Upon the Federal recognition of the Native Hawaiian governing entity by the United States, the United States is authorized to negotiate and enter into an agreement with the State of Hawaii and the Native Hawaiian governing entity regarding the transfer of lands, resources, and assets dedicated to Native Hawaiian use to the Native Hawaiian governing entity. Nothing in this Act is intended to serve as a settlement of any claims against the United States.

Comment: If the term "land, resources, and assets dedicated to Native Hawaiian use" refers to property of the State of Hawai'i[14], then the bill should expressly recognize that such property belongs to *all* the citizens of Hawai'i, and that the ceded lands are subject to a special trust obligation for all the state's citizens which originated in the Newlands Resolution (30 Stat. 750, July 7, 1898) by which Hawai'i was annexed to the United States, which was acknowledged in section 73 of the Hawai'i Organic Act (31 Stat. 141, April 30, 1900) and which, in somewhat different form, was confirmed in section 5 of the Hawai'i Admission Act (Public Law 86-3, March 18, 1959). Any diversion of such land from the trust to the "Native Hawaiian governing

[14] This term could be read as applying to such private trusts as the $2 billion Estate of Bernice Pauahi Bishop which supports the Kamehameha Schools for the education of children of Hawaiian ancestry. It could also be read to apply to land currently owned by individual Native Hawaiians. The statute, if enacted, should be modified to remove this ambiguity.

entity," or indeed any transfer of State resources, would require the consent of the State (which should not be assumed) and in all probability the payment of just compensation to the State for the property involved.

It might logically be assumed that this provision is intended to refer to the Hawaiian home lands or to the ceded lands in general. As written, however, this provision does not encompass either of these categories of state land.

a. S. 746 does not repeal or preempt the HHCA or those portions of the Admission Act which pertain to the HHCA, so the HHCA (including its restrictions on eligibility for a Hawaiian homestead) would presumably remain in effect for such current and possible future beneficiaries as may wish to remain with the program. The Hawaiian home lands are available under the HHCA only to those with 50% or greater blood quantum, so they are not, and cannot be, "dedicated to Native Hawaiian use" because most "Native Hawaiians" as defined in this bill do not have the requisite blood quantum to qualify. If the Hawaiian home lands program should terminate or be found unconstitutional, the lands, which are all impressed with an express trust under the Newlands Resolution and the Admission Act for all the state's citizens, would remain in the ownership of the State of Hawai'i and would be available for one of the other enumerated trust applications, so any divestiture would have to be consistent with the trust limitations. Supporting a "Native Hawaiian governing entity" independent of the State of Hawai'i is not within any of the permissible uses of trust resources.

b. The remainder of the ceded lands are definitely not "dedicated to Native Hawaiian use."[15] Neither the Newlands Resolution nor the Organic Act nor the Admission Act

[15] The Island of Kaho'olawe is not an exception to this. There is a popular belief that this former military bombing range is now "for Native Hawaiians," but this is not what the law provides. This island was returned from the Federal government to the state by deed dated May 7, 1994 pursuant to Title X of Public Law 103-139. Neither the statute nor the deed imposed a requirement that the island be in any way "dedicated to Native Hawaiian use." The State of Hawai'i in HRS section 6K-9, in anticipation of the Federal transfer, stipulated that "[u]pon its return to the State, the resources and waters of Kaho'olawe shall be held in trust as part of the public land trust; provided that the State shall transfer management and control of the island and its waters to the sovereign native Hawaiian entity upon its recognition by the United States and the State of Hawaii." At that time there was no "sovereign native Hawaiian entity" and there has been none since that time. HRS section 6K-3 provides that the island shall be used "solely and exclusively" for (1) preservation and practice of all rights customarily and traditionally exercised by native Hawaiians for cultural, spiritual, and subsistence purposes; (2) preservation and protection of its archaeological, historical, and environmental resources; (3) rehabilitation, revegetation, habitat restoration, and preservation; and (4) education. Only one of these uses even mentions persons of Hawaiian extraction, and the use of an initial lower-case "n" in the term "native Hawaiian" implies (perhaps inadvertently) that only those with 50% Hawaiian "blood" are referred to. In any case, the statute does not limit the "practice" of these "rights" to "Native Hawaiians" or even to "native Hawaiians." There is no requirement that the educational use of the island be limited to "Native Hawaiians" as defined in S. 746. Indeed, since the Commission designated by HRS chapter 6K to administer the island is a state agency established by state statute, Rice v. Cayetano, 528 U.S. 495 (2000) would indicate that any preference or special treatment for "native Hawaiians" (or for "Native Hawaiians" as defined in S. 746) would be vulnerable to constitutional challenge. Thus Kaho'olawe would not fall within the provisions of this subsection.

makes any reference to "Native Hawaiians" as defined in this bill. Under State law (HRS section 10-13.5), OHA receives 20% of the revenues from certain of the ceded lands, but this is a self-inflicted and revocable undertaking on the State's part and extends only to funds, not to land as such.[16] For the reasons set out in the preceding paragraph, the statutory ceded lands trust presents a formidable obstacle to any uncompensated "transfer" of any of those lands to any party including a "Native Hawaiian governing entity."

c. Any action by the state to "dedicate" state property "to Native Hawaiian use," either in the past or before passage of this act would, in light of *Rice v. Cayetano,* 528 U.S. 495 (2000) be open to challenge as an unconstitutional race-conscious measure. Thus even if there is currently state land which is apparently "dedicated to Native Hawaiian use," it should not be assumed that such a dedication would be legally valid.

Resourcing the new "government." The question of resources for the new "government" holds great promise of destroying that "governing entity" even if this bill survives constitutional challenge. If the "governing entity" is ever to be anything more than a welfare client of the United States–a true "domestic dependent nation" in the fullest and most demeaning sense–it will need resources. Before Congress passes this measure, both the Congress and the people of the State of Hawai'i must have a clear picture of the sources and uses of funds for this "nation," and an assurance that the "governing entity" will not simply become a public charge. Without an independent and honorable income–not "welfare" from either the Federal or the State government–the "governing entity" will be nothing more than a public cancer.

Yet there is no easy source of revenue for this new entity other than the United States Treasury. The new government could tax its own citizens, but such a course may be controversial if the property and income of those citizens is also taxable by the State of Hawai'i, which could well be the case if the citizens of the "Native Hawaiian governing entity" are also citizens and residents of the State of Hawai'i. *See Oklahoma Tax Comm. v. Chickasaw Nation*, 515 U.S. 450 (1995). As last August's joint Senate Committee on Indian Affairs/House Committee on Resources hearings in Honolulu made clear, Hawaiians are already deeply divided over the bill and many are passionately opposed to it. That opposition can only become more widespread as it becomes clear that "sovereignty" is not free.

Indeed, when it is known that the new "government" will have to look to its own citizens for resources, those citizens may ask what equivalent benefits will accrue from their new sovereign status. Some may feel that a privileged political relationship with the United States should bring some immediate and tangible reward. Yet this bill offers no Federal resources either to the new "governing entity" or to its citizens, and Section 9(b) of the bill expressly denies to Native Hawaiians any benefits available through the Bureau of Indian Affairs.

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[16] OHA, of course, is not terminated by this legislation and may, in the unlikely event that constitutional objections can be overcome, have a continuing role to promote the "betterment" of at least those persons of Hawaiian ancestry who choose not to join the Native Hawaiian government. OHA may well decide that its fiduciary responsibilities require it to oppose the uncompensated transfer of any ceded lands which represent a possible source of revenue.

It is hardly fair to ask Congress, or the citizens of the State of Hawai'i who must live with this new entity, to support this bill until these fundamental questions are addressed: What exactly will the "governing entity" be? Which governmental functions will it carry out for its citizens, and which will be left for the State of Hawai'i and the United States? Since it has no valid claim to the ceded lands or other property of the State of Hawai'i or the Federal government, what will be its territory (if any) and how will that territory be acquired? What will be its resource base? Will it look to the Federal government for support in the future, and if so, for how long and to what extent will that support be granted?

Other questions come to mind. Throughout the state, persons of Hawaiian ancestry live and work side by side with the rest of the state's citizens. Will Hawaiian businesses have tax exemptions or other immunities not shared by the non-Hawaiian businesses next door or across the street? If so, how likely is that to promote "reconciliation" and harmony? And what will be the status of the "governing entity" and of persons of Hawaiian ancestry (whether or not citizens of the "governing entity") in other states? Will the entity or its citizens be able to claim the immunities of the "governing entity" outside Hawai'i? What authority, if any, will this new entity have in foreign relations?

Leaving these questions to be resolved between the new entity and the Department of the Interior ignores the reality that all the citizens of the State of Hawai'i and the nation will be profoundly affected by the answers. These citizens have had little opportunity either to be informed or to be heard, and the voices of opposition at last August's hearing were somehow lost in transmission to Washington. That should not happen again in this session.

Ultimately, the bill will fail to achieve the "reconciliation" which Senator Akaka seeks. This bill offers nothing to people of Hawaiian ancestry but disharmony, discontent and disappointment. If Hawai'i's political history is any guide, we can expect disputes among ethnic Hawaiians as factions form and fight among themselves for control of, or recognition as, the single "governing entity." There will be disputes between Hawaiian groups and the Federal government as those who see no future in the first-recognized "governing entity" demand separate recognition for an entity of their own. There will be disputes between one or more of these entities and the State of Hawai'i over the questions of resources, jurisdiction, taxation and all the other issues presented when two sovereignties must occupy the same physical space. There will be

disputes between the entity and its "citizens" as these citizens discover few benefits and many disappointments in "sovereignty."

Underlying all these disputes will be the issue of constitutionality, an issue almost certain to be resolved in a way that dashes the hopes of the Native Hawaiians who placed their faith in this bill and in Congress' implied assurance that this time, segregation will work.

After all these disputes have run their course, what will persons of Hawaiian ancestry have achieved? Even if the bill survives constitutional challenges, our national experience with racial and political segregation, like that of the rest of the world, demonstrates that no good comes from such things; that the advantages to the dominant race or class, if any, are transitory, and that such segregation plants seeds of hatred that flourish generations after the inevitable abolition of the formal structures of separateness. If the bill is declared unconstitutional, Hawaiians will have one more "broken promise" to add to the litany of irremediable grievances. Whatever the outcome, those who put their hopes on this bill, along with the other citizens of the State of Hawai'i and perhaps of other states where Hawaiians reside, will have enduring scars.

At the conclusion of its opinion in *Rice v. Cayetano,* the Court stated:

> When the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations, and their dismay may be shared by many members of the larger community. As the State of Hawai'i attempts to address these realities, it must, as always, seek the political consensus that begins with a sense of shared purpose. One of the necessary beginning points is this principle: The Constitution of the United States, too, has become the heritage of all the citizens of Hawai'i.

S. 746 turns away from the Constitution, back to the discredited politics of race and ancestry. Congress should not take this path.

SEC. 9. APPLICABILITY OF CERTAIN FEDERAL LAWS.
SEC. 10. SEVERABILITY.

Comment: No comments are provided on these sections of the bill.

Conclusion

S. 746 should not become law. It won't work. There is no need for it. It is almost certainly unconstitutional. It is replete with ambiguity and uncertainty. It perpetuates inaccurate and divisive views of history and law. Vital questions about its effects remain unanswered. It sets a dangerous precedent for other non-tribal entities elsewhere in the country.

And it is morally, politically and socially wrong. Its basic premise is that race and ancestry are valid grounds for the permanent political and social segregation of American citizens. By law, it divides forever not only the people of Hawai'i, but the people of the United States, on grounds which the U. S. Supreme Court has termed "odious to a free people."

We have known such divisions before, in this country and elsewhere, and we have seen their brutal and corrosive effects. Have we not learned from that?

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37210