

**"Recognizing" the Fifth Leg:<sup>1</sup> The "Akaka Bill" Proposal to Create a  
Native Hawaiian Government in the Wake of *Rice v. Cayetano***

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I. INTRODUCTION

On February 23, 2000, the United States Supreme Court handed down its decision in *Rice v. Cayetano*.<sup>3</sup> 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."<sup>4</sup>

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<sup>1</sup> A riddle attributed to Abraham Lincoln goes as follows: "If you call a tail a leg, how many legs has a dog? Five? No; calling a tail a leg don't make it a leg." The message has been echoed in some U. S. courts. See, e.g., *U.S. v. Virginia, Dept. of Highways and Transp.*, 554 F.Supp. 268, 269 (E.D. Va. 1983).

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<sup>3</sup> 528 U.S. 495 (2000).

<sup>4</sup> HAW. REV. STAT. § 10-2 (2001) defines "native Hawaiian" as:

any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically

These groups are defined respectively in state law as persons with at least one pre-1778 Hawaiian ancestor and persons with at least fifty percent Hawaiian "blood."<sup>5</sup> Only "Hawaiians" could vote in these OHA elections.

In *Rice*, the Court held that the definition of "Hawaiian" established a racial classification<sup>6</sup> and that by using that term to define the eligible voters for OHA elections, the state law unconstitutionally deprived Hawai'i's other citizens of the right to vote on grounds of race. Recently, the U.S. district court in Hawai'i, relying on the *Rice* decision, held unconstitutional a state law that permitted only "Hawaiians" to seek office as OHA trustees.<sup>7</sup> Other suits based on *Rice* have since been filed to overturn other statutory entitlement programs for persons of Hawaiian ancestry.<sup>8</sup>

Much is at stake. An entire title of Hawai'i's constitution,<sup>9</sup> an

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refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.

HAW. REV. STAT. § 10-2 (2001).

The term "Hawaiian" is defined in the same statute as: "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." *Id.*

These definitions must not be confused with the term "Native Hawaiian," with an upper case "N" in the first word, which is generally used in federal statutes providing benefits to persons with any pre-contact Hawaiian ancestor and is usually defined much the same as "Hawaiian" in HAW. REV. STAT. § 10-2. See *infra*, note 12.

<sup>5</sup> HAW. REV. STAT. § 10-2 (2001).

<sup>6</sup> The court held that the state's definition of "Hawaiian" used ancestry "as a proxy for race", and that the definition of "native Hawaiian" shared this "explicit tie to race." See *supra* notes 3-5 and accompanying text.

<sup>7</sup> *Arakaki v. State*, D. Haw. No. 00-00514 HG-BMK, 9th Cir. Civ. No. 00-17213 (9<sup>th</sup> Cir. argued May 6, 2002).

<sup>8</sup> *Carroll v. Nakatani*, D. Haw. Civ. No. 00-0061 DAE KSC, (D. HI), and *Barrett v. State of Hawai'i*, D. Haw. Civ. No. 00-00645 DAE KSC (D. HI), were dismissed on grounds of standing. *Arakaki v. Cayetano*, D. Haw. Civ. No. 02-00139 SOM/KSC, filed on March 4, 2002, was pending as of the date of this article. All three cases broadly challenged all the state's constitutional provisions permitting or requiring special treatment under state law for native Hawaiians and Hawaiians.

<sup>9</sup> HAW. CONST., art. XII, "Hawaiian Affairs."

important part of Hawai'i's jurisprudence,<sup>10</sup> and more than 160 U.S. statutes<sup>11</sup> provide special benefits or protections for persons defined in terms that are identical, or nearly identical, to the definitions which *Rice* held to be "racial."<sup>12</sup> 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.<sup>13</sup> The only "compelling interest" for race-conscious legislation that has been recognized by a majority of the U.S. Supreme Court is the remediation of prior racial discrimination,<sup>14</sup> and this remains the only ground for which

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<sup>10</sup> See, e.g., *Public Access Shoreline Hawai'i v. County of Hawai'i*, 79 Haw. 425, 903 P.2d 1246 (1995), *cert. denied sub. nom. Nansay Hawai'i, Inc. v. Public Access Shoreline Hawai'i*, 116 S.Ct. 1559 (1996); *Pele Defense Fund v. Paty*, 73 Haw. 578, 837 P.2d 1247 (1992), *cert. denied*, 507 U.S. 918 (1993); *Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327 (Haw. 1982).

<sup>11</sup> S. REP. NO. 107-66, at 4; see, e.g., *Native Hawaiian Education Act*, 20 U.S.C. 7901 *et seq.*; *Native Hawaiian Health Care Improvement Act*, 42 U.S.C. 11,714 *et seq.*

<sup>12</sup> See Brief for the United States as Amicus Curiae Supporting Respondent, *Rice v. Cayetano* at 6.

Early federal statutes, such as the HHCA [Hawaiian Homes Commission Act], defined 'Native Hawaiian' as 'any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.' HHCA § 201(a)(7), 42 Stat. 108. All federal statutes enacted since 1974, however, have defined 'Native Hawaiian' as any descendant of the aboriginal people of the Hawaiian Islands. See, e.g., *Native American Programs Act of 1974*, 42 U.S.C. 2992c; 107 Stat. 1513; *Native Hawaiian Education Act*, 20 U.S.C. 7912(1). The *Native Hawaiian Education Act* has been re-codified at 20 U.S.C. 7511 *et seq.*; the definition of "Native Hawaiian" appears at 20 U.S.C. 7517(1): The term 'Native Hawaiian' means any individual who is (A) a citizen of the United States; and (B) a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now comprises the State of Hawaii, as evidenced by (i) genealogical records; (ii) Kupuna (elders) or Kamaaina (long-term community residents) verification; or (iii) certified birth records.

*Id.*

<sup>13</sup> See *Adarand Constructors v. Federico Pena*, 515 U.S. 200 (1995).

<sup>14</sup> *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996), *cert. denied* 518 U.S. 1033 (1996). Cf. *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1201 (9th Cir. 2000), *cert. denied* 532 U.S. 1051 (2001) (holding that the encouragement of diversity in a university environment can be a compelling interest for purposes of strict scrutiny).

there is a consensus of judicial support.<sup>15</sup> The major federal statutes establishing preferences for Native Hawaiians set out their justification in extensive preambles,<sup>16</sup> but none of these refers to past discrimination or the remediation of such. Each defines "Native Hawaiian" solely by ancestry and usually in terms indistinguishable from those held in *Rice* to constitute a racial classification.<sup>17</sup> Moreover, these statutory programs are not targeted to matters of native religion, culture, or self-government but seek to provide all Native Hawaiians with preferential access to social services for social needs which non-Native Hawaiians also share, and they are thus vulnerable to the charge that they are not "narrowly tailored."<sup>18</sup>

In light of these vulnerabilities, an alternative approach to preserving Hawaiian preference legislation has been to ask Congress<sup>19</sup> to authorize the federal "recognition" of a "governing entity" of, by, and for persons of Hawaiian ancestry with the expectation that upon federal recognition, this entity would qualify for the "government-to-government" status which federally recognized Indian tribes enjoy – a status which for Indian tribes has been construed as based on a political rather than a racial

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analysis); *Wittmer v. Peters*, 87 F.3d 916, 919-20 (7th Cir. 1996) (sustaining under strict scrutiny a preferential promotion of a black prison guard to lieutenant for a prison "boot camp").

<sup>15</sup> *Boston's Children First v. Boston School Committee*, 183 F.Supp.2d 382, 397 (2002) (stating, "As Judge Selya has observed [in *Wessmann v. Gittens*, 160 F.3d 790, 795 (1st Cir. 1998)], the only racially-oriented interest that has achieved decisional consensus as genuinely compelling is one of remedying the legacy of past discrimination").

<sup>16</sup> *See, e.g.*, 20 U.S.C. 7512 (Native Hawaiian Education Act); 42 U.S.C. 11701 (Native Hawaiian Health Care Improvement Act).

<sup>17</sup> *See supra* note 12.

<sup>18</sup> *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997). For a concise overview of the constitutional vulnerabilities of these statutes, see Kimberly A. Costello, *Rice v. Cayetano: Trouble in Paradise for Native Hawaiians Claiming Special Relationship Status*, 79 N.C. L. REV. 812, 828-832 (2001).

<sup>19</sup> The bills currently pending in the Senate are S. 81, 107th Cong., 1st Sess., S. 746, 107th Cong., 1st Sess., S. 1783, 107th Cong., 1st Sess.; the House bill is H.R. 617, 107th Cong., 1st Sess., which is essentially identical to S. 746. Two of the bills, S. 746 in the Senate and H.R. 617 in the House, have been reported out of committee. *See* S. REP. NO. 107-66, at 1-3 (S. 746); H.R. REP. NO. 107-140, at 6-8 (H.R. 617). The differences between the three Senate bills are minor. In this paper, the term "Akaka Bill" is used to refer to the two essentially identical bills, S. 746 and H.R. 617, which are presently awaiting a floor vote in their respective houses.

classification, and therefore not subject to the "strict scrutiny" standard applicable to race-conscious decisions by state or federal government entities.<sup>20</sup>

The difficulty, of course, is that no such government entity exists today, and the constitutional question is whether Congress's sponsorship of the creation of such an entity – the membership of which is limited solely by a classification that *Rice v. Cayetano* has already held to be "racial" – and Congress's subsequent "recognition" of such a racially-exclusive entity as a "government" with the prerogatives of an Indian tribe, can be constitutionally justified.

This article examines these constitutional questions and concludes that the Akaka Bill is unlikely to survive a constitutional challenge. As with the dog's tail in Lincoln's riddle, calling a racial group a tribe does not make it one, and the powers of Congress under the Constitution do not permit it to achieve such a result. This article continues on to review a number of the bill's provisions, which, if the bill is passed, will present extraordinary problems in interpretation and application, and explains why even if the bill should survive a constitutional challenge, the flaws that remain will impede or prevent the accomplishment of its goals and threaten enduring harm to the State of Hawai'i and its citizens.

## II. *RICE V. CAYETANO*

The central issue in *Rice v. Cayetano* was whether the State of Hawai'i's denial of the vote in OHA elections to all except those with some degree of Hawaiian ancestry involved a denial on grounds of "race" and was thus in violation of the Fifteenth Amendment.

The Court found no difficulty in holding that the OHA classifications were "racial" and therefore within the Fifteenth Amendment's prohibition. It observed, "the voting structure now before us is neither subtle nor indirect. It is specific in granting the vote to persons of defined ancestry and to no others."<sup>21</sup> Rejecting the State's claim that the classification "Hawaiian" "is not a racial category at all but instead a classification limited to those whose ancestors were in Hawai'i at a particular time, regardless of their race,"<sup>22</sup> the court said:

Ancestry can be a proxy for race. It is that proxy here. . . .  
In the interpretation of the Reconstruction era civil rights

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<sup>20</sup> Morton v. Mancari, 417 U.S. 535 (1974).

<sup>21</sup> *Rice*, 528 U.S. at 514.

<sup>22</sup> *Id.*

laws we have observed that "racial discrimination" is that which singles out "identifiable classes of persons ... solely because of their ancestry or ethnic characteristics." . . . The State, in enacting the legislation before us, has used ancestry as a racial definition and for a racial purpose.<sup>23</sup>

The Court then turned its attention to the State's definition of "native Hawaiian,"<sup>24</sup> and concluded that this classification "preserves the explicit tie to race"<sup>25</sup> of the definition of "Hawaiian." It continued:

The ancestral inquiry mandated by the State implicates the same grave concerns as a classification specifying a particular race by name . . . . 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.<sup>26</sup>

The Court declined to accept the State's argument<sup>27</sup> that the OHA classifications are not "racial" but "political" and thus permissible under the constitutional principles summarized in *Morton v. Mancari*, which permit differential treatment of members of Indian tribes. The court reserved this question, calling it "difficult terrain."<sup>28</sup> It held more narrowly that even if Congress might constitutionally treat Hawaiians or native

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<sup>23</sup> *Id.* at 514-515 (citations omitted).

<sup>24</sup> HAW. REV. STAT. § 10-2 (1993) provides:

[n]ative Hawaiian' means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.

HAW. REV. STAT. § 10-2 (1993).

<sup>25</sup> *Rice*, 528 U.S. at 516.

<sup>26</sup> *Id.* at 517.

<sup>27</sup> See *Rice v. Cayetano*, Respondent's Brief in Opposition to Petition for Writ of Certiorari (Dec. 29, 1998).

<sup>28</sup> *Rice*, 528 U.S. at 519-522.

Hawaiians like Indian tribes, the State of Hawai`i could not use those classifications to deny non-Hawaiians the right to vote in state elections, and Congress could not authorize it to do so.<sup>29</sup>

But the Court made it plain that an effort to bring Hawaiians or native Hawaiians within the rule of *Morton v. Mancari* would face serious obstacles. It said:

If Hawai`i's [voting] restriction were to be sustained under *Mancari* 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 (1998).<sup>30</sup>

A close examination of the issue, and of the two law review articles cited by the Court, suggests that if the U.S. Supreme Court were to enter upon that "difficult terrain," it would likely hold that Congress cannot constitutionally treat "Hawaiians," "native Hawaiians" or "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." In *Morton v. Mancari*,<sup>31</sup> the U.S. Supreme Court considered an employment

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<sup>29</sup> The Court said: "[T]he elections for OHA trustee are elections of the State, not of a separate quasi sovereign, and they are elections to which the Fifteenth Amendment applies. To extend *Mancari* to this context would be to permit a State, by racial classification, to fence out whole classes of its citizens from decision-making in critical state affairs. The Fifteenth Amendment forbids this result." *Id.* at 520-522.

<sup>30</sup> *Id.* at 518.

<sup>31</sup> *Morton v. Mancari*, 417 U.S. 535 (1974).

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's 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, but to members of federally-recognized Indian tribes.<sup>32</sup>

The Court in *Rice* re-emphasized *Morton's* distinction between tribal affiliation and race as the foundation for Congress's constitutional power to treat certain Indians differently from other citizens. In addressing the State of Hawai'i's argument based on *Morton*, it pointed out, citing *Morton* itself: "As we have observed, 'every piece of legislation dealing with Indian tribes and reservations . . . single[s] out for special treatment a constituency of tribal Indians.'"<sup>33</sup> It said of the preference upheld in *Mancari*:

Although the classification had a racial component, the Court found it important that the preference was "not directed towards a 'racial' group consisting of 'Indians,' " but rather "only to members of 'federally recognized' tribes." 417 U.S., at 553, n. 24, 94 S.Ct. 2474 (quoting 44 BIAM 335, 3.1 (1972)). "In this sense," the Court held, "the preference [was] political rather than racial in nature." *Ibid.*; see also *id.*, at 554, 94 S.Ct. 2474 ("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"). Because the BIA preference could be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians," and was "reasonable and rationally designed to further Indian self-government," the Court held that it did not offend the Constitution. *Id.*, at

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<sup>32</sup> The Court said: "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." *Id.* at 554. In a subsequent footnote it reiterated, "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.* at 554 n.24.

<sup>33</sup> *Rice*, 527 U.S. at 518.

555, 94 S.Ct. 2474. The opinion was careful to note, however, that the case was confined to the authority of the BIA, an agency described as "*sui generis*." *Id.*, at 554, 94 S.Ct. 2474.<sup>34</sup>

### III. THE AKAKA BILL

#### A. *Legislative History*

In immediate response to the *Rice* decision, Hawai'i Senator Daniel Akaka, for himself and for Hawai'i Senator Daniel Inouye, introduced S. 2899 in the 106th Congress.<sup>35</sup> That bill "addressed a specific and detailed process for the reorganization of a Native Hawaiian government, in a manner similar to that addressed in the Indian Reorganization Act of 1934."<sup>36</sup> Hawai'i Congressman Neil Abercrombie introduced an identical bill, H.R. 4904, in the House of Representatives.<sup>37</sup> H.R. 4904 passed the House, but S. 2899 failed to pass the Senate before the end of the session.<sup>38</sup> Senator Akaka introduced S. 81, a bill very similar to S. 2899, at the beginning of the first session of the 107th Congress, and Congressman Abercrombie introduced a companion measure, H.R. 617, in the House.<sup>39</sup> These bills omitted the provisions concerning the formation of a new governing entity and focused on the process of recognition of such an entity, once formed, by the Secretary of the Interior.

On April 6, 2001, Senator Akaka introduced S. 746, a revised version of S. 81, and this bill was favorably reported by the Senate Indian Affairs Committee on July 24, 2001.<sup>40</sup> H.R. 617, amended to incorporate the provisions of S. 746, was reported favorably by the House Committee

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<sup>34</sup> *Id.* at 520.

<sup>35</sup> S. REP. NO. 107-66, at 40.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 48.

<sup>40</sup> *Id.*

on Resources on May 16, 2001.<sup>41</sup> Senator Akaka introduced a third bill, S. 1783, on December 7, 2001, which made some revisions to S. 746.

*B. Core Elements of the Bill*

The common and central feature of all versions of this bill is that they seek to foreclose a Supreme Court decision on the constitutional status of Native Hawaiians and to protect the state and federal programs favoring Native Hawaiians through a Congressional declaration that "Native Hawaiians," defined in the bill solely by ancestry, 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.

The bill takes a remarkable approach to the *Rice* decision: It challenges it directly on its constitutional premises. In a series of "Findings," in a set of definitions and in six statements of "Policy and Purpose," the bill directly contradicts the fundamental constitutional principles of *Rice*. Where the *Rice* decision, citing and reaffirming *Mancari*, stressed that the special relationship between Indian tribes and the United States is not with individual Indians based on their ancestry but with Indian tribes as enduring political entities, the Akaka Bill states instead that this special relationship is with all Indian individuals solely because they are lineal descendants of "aboriginal, indigenous, native people of the United States."<sup>42</sup> Native Hawaiians are expressly brought within this policy.<sup>43</sup> Reinforcing this commitment to ancestry as the basis for special treatment, Native Hawaiians are defined, at least for the

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<sup>41</sup> *Id.*

<sup>42</sup> Akaka Bill, *supra* note 19, at § 1(1) (stating "The Constitution vests Congress with the authority to address the conditions of the indigenous, native people of the United States"); *Id.* at § 1(3) (arguing "The United States has a special trust relationship to promote the welfare of the native people of the United States, including Native Hawaiians"); *Id.* at § 2(4) (stating "The term "indigenous, native people" means the lineal descendants of the aboriginal, indigenous, native people of the United States"); *Id.* at § 2(1) (explaining that 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.").

<sup>43</sup> *Id.* at § 2(3); *id.* at § 3(a)(1) (stating, "The United States reaffirms that Native Hawaiians are a unique and distinct aboriginal, indigenous, native people, with whom the United states has a political and legal relationship").

purpose of determining who may participate in the creation of the Native Hawaiian "governing entity," solely by ancestry.<sup>44</sup>

The bill makes no concession to the distinction between obligations to tribes and obligations to individuals, which was drawn in *Mancari* to protect Indian preferences from Fourteenth Amendment challenges as racial classifications. Indeed, Sections 6 ("Process for the Recognition of the Native Hawaiian Governing Entity") and 2(6)(A) (definition of "Native Hawaiian") of the bill, read together, expressly authorize the formation a "governing entity," with the attributes of sovereignty possessed by federally recognized Indian tribes, by a group defined by a test of ancestry which the U.S. Supreme Court has already held to be racial.

The bill also seems to declare that Native Hawaiians are not a racial but a political group,<sup>45</sup> even though there is no existing "polity" to which this political character could attach or even a group of any sort defined by race-neutral criteria or by a combination of race-conscious and race-neutral criteria.

### C. *Critique of the Akaka Bill*

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<sup>44</sup> *Id.* at § 2(6);

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.

*Id.*

<sup>45</sup> *Id.* at § 1(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.

*Id.*

### 1. Mancari, Sandoval and the Lack of a True Tribe

The early decisions of the U.S. Supreme Court that developed the concept of the "special relationship"<sup>46</sup> with Indian tribes emphasized that the government-to-government character of that relationship derived from the fact that the tribes were entities with attributes of sovereignty and governmental character before the coming of European settlers<sup>47</sup> and that this sovereign character continued until such time as Congress might terminate it.<sup>48</sup> The Department of Interior regulations for recognition of Indian tribes reflect this requirement for essentially continuous historical existence of the applicant for recognition;<sup>49</sup> indeed, the effort of one Native Hawaiian group to obtain judicial recognition of its "tribal" character failed, in part, because it could not show such continued existence.<sup>50</sup> This regulatory requirement is consistent with *Morton* and *Rice* but would be irrelevant if entitlement to special status were "inherent" is all persons of any Indian ancestry, however remote or attenuated.

Because the Akaka Bill sets aside the requirement for persistent tribal character that so consistently informed constitutional analysis in past cases, it is likely to be viewed, if enacted, as an attempt on the part of Congress, by legislation, to change a basic principle of constitutional law. It may happen, of course, that in ruling upon a challenge to this bill, the

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<sup>46</sup> For a discussion of this "special relationship," see Stuart Minor Benjamin, *Equal Protection and the Special Relationship*, 106 YALE L.J. 537 (1996).

<sup>47</sup> See, e.g., *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

<sup>48</sup> *U.S. v. Wheeler*, 435 U.S. 313, 323 (1978).

The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

*Id.*

<sup>49</sup> See, e.g., 25 C.F.R. § 83.3(a) (specifying that "[t]his part . . . is intended to apply to groups that can establish a substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present"); 25 CFR § 83.3(c) (stating, "Associations, organizations, corporations or groups of any character that have been formed in recent times may not be acknowledged under these regulations").

<sup>50</sup> *Price v. Hawai'i*, 764 F.2d 623 (9th Cir. 1985).

U.S. Supreme Court would defer to Congress, or at least take Congress's position into account and change its own position as expressed in *Mancari* and *Rice*. If it does not, however, and if it applies its holding in *Rice* to conclude that the classification "Native Hawaiian" in the Akaka Bill is racial, like the classification of "Hawaiian" in Hawai'i law which also focuses exclusively on ancestry to apportion political power, then it may simply ignore all the findings, definitions, policy and purpose sections of the bill on the same grounds on which it ignored the Religious Freedom Restoration Act in *City of Boerne v. Flores*; i.e., that Congress lacks the responsibility and the authority to alter constitutional decisions of the Court.<sup>51</sup>

The risk of such a decision in this case is significant. The major premise of the Akaka Bill's findings, definitions and statements of policy and purpose is that Congress's constitutional authority with respect to Indians permits it to support the formation of an Indian governing entity where no such entity has existed,<sup>52</sup> simply because the organizing group

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<sup>51</sup> *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997).

When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.

*Id.* (citations omitted).

<sup>52</sup> The Akaka Bill, *supra* note 19, at Findings 1(12)-(15), repeatedly cites the so-called Apology Resolution, Pub. L. No. 103-150, which extended an apology to the "Hawaiian people" for the 1893 overthrow of the Hawaiian monarchy. Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993). The bill's apparent implication is that this former government was a "Native Hawaiian" government based on the "inherent sovereignty" of the "Native Hawaiian people," and that this "inherent sovereignty" is to be restored by Congressional recognition of the "reorganized" governing entity.

The historical and legal validity of many of the crucial statements in the Apology Resolution, however, have been challenged in detail. *See, e.g.*, THURSTON TWIGG-SMITH, HAWAIIAN SOVEREIGNTY: DO THE FACTS MATTER? (1966). There is no serious question that the monarchy itself was a multiracial, multicultural governmental entity, which, to a remarkable degree for the times, treated its subjects equally without regard to race or national origin. Patrick W. Hanifin, *To Dwell on the Earth in Unity: Rice, Arakaki and the Growth of Citizenship and Voting Rights in Hawai'i*, 5 HAW. BAR J. 15 (2001).

The reference to "inherent sovereignty" of the "Hawaiian people" is particularly puzzling because the Supreme Court of the Hawaiian Kingdom, in a

consists of persons of Indian ancestry (however attenuated) and to extend to such entity the same recognition, rights and government-to-government relationship as exists with traditional tribes. The Supreme Court in *Rice* took pains to state its reservations about such a claim<sup>53</sup> and there are sound reasons for its cautionary language.

The constitutional power of Congress in the area of Indian affairs often has been described as "plenary,"<sup>54</sup> but however broad this power may be, it does not extend to the creation of a "tribe" where none exists in reality. In *U.S. v. Sandoval*,<sup>55</sup> the U.S. Supreme Court considered whether the Pueblo Indians could be brought by Congress within the "special relationship" existing between that body and the Indian tribes. The Court 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,"<sup>56</sup> that they lived "in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetishism [sic], and [are] chiefly governed according to the crude customs inherited from their ancestors."<sup>57</sup> It balanced these

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thoughtful and carefully drafted 1863 opinion, held that the sovereignty of the kingdom resided in the monarch, and *not* the "people." *Rex v. Booth*, 2 Haw. 616 (1863).

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.

*Id.*

It would also appear that under recent U. S. Supreme Court precedent, such "sovereignty" as Indian tribes possess over nonmembers is not "inherent", but delegated from Congress and thus subject to Congress' own constitutional limitations. L. Scott Gould, *Mixing Bodies And Beliefs: The Predicament Of Tribes*, 101 COLUM. L. REV. 702, 706-707 (2001).

<sup>53</sup> See *supra* note 34.

<sup>54</sup> *Id.* at 551; see also *Alaska v. Native Village Of Venetie Tribal Government*, 522 U.S. 520, 531 n.6 (1998); *South Dakota V. Yankton Sioux Tribe*, 522 U.S. 329, 342 (1998).

<sup>55</sup> 231 U.S. 28 (1913).

<sup>56</sup> *Id.* at 39.

<sup>57</sup> *Id.*

considerations against arguments that the Pueblos were, at least arguably, citizens of the United States<sup>58</sup> (unlike most Indians at the time) and that their lands were held by them in fee simple<sup>59</sup> (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.<sup>60</sup> 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."<sup>61</sup>

A number of the Findings of the Akaka Bill are intended to show that Native Hawaiians are a "community,"<sup>62</sup> a "distinct indigenous group"<sup>63</sup> or a "people,"<sup>64</sup> but in general these assertions are factually in error or based on misunderstanding or misinterpretations of law. Findings 1(5)-(9), for example, refer to the 1921 Hawaiian Homes Commission Act<sup>65</sup> and

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 38-39, 48.

<sup>60</sup> *Id.* at 48-49.

<sup>61</sup> *Id.* at 46.

<sup>62</sup> *See, e.g.,* Akaka Bill, *supra* note 19, at § 1(6) (stating, "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"); *Id.* at § 1(9) (explaining, "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").

<sup>63</sup> *Id.* at § 1(20)(B) (stating, "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 responsibility").

<sup>64</sup> *Id.* at § 1(20)(A) (stating that "the United States has a special responsibility for the welfare of the native peoples of the United States, including Native Hawaiians").

<sup>65</sup> Hawaiian Homes Commission Act, Pub. L. No. 67-34, 42 Stat. 108 (1921). The Hawaiian Homes Commission Act set aside over 200,000 acres of Federal land in Hawai'i for homesteading by "native Hawaiians," defined as persons of "not less than

Section 5(f) of the Hawai'i Admission Act,<sup>66</sup> as evidence of Congress's special solicitude for "Native Hawaiians" as defined in the Akaka Bill. Yet these statutes by their terms provide benefits only for persons of fifty percent or greater Hawaiian ancestry. Persons with lesser degrees of Hawaiian ancestry receive no more nor less under the statute than any other member of the general public. More importantly, Section 5(f) of the Admission Act imposes no requirement that any specific part of the ceded lands trust, or any part at all, be applied to the "betterment" of this fifty-percent group, so long as the trust proceeds are applied to "one or more" of the permitted uses. The state could legitimately spend none of these resources on "the betterment of native Hawaiians" and in fact, from 1959 until 1978, the proceeds of the ceded lands trust were directed to the state's Department of Education for a different authorized use, the "support of the public schools and other public educational institutions."<sup>67</sup> Whatever the Hawaiian Homes Commission Act ("HHCA") and the Admission Act imply about federal responsibility for persons of fifty percent or greater Hawaiian ancestry – a classification already found to be "racial" in *Rice v. Cayetano*,<sup>68</sup> they imply nothing about the far larger group with lesser degrees of Hawaiian "blood."

The Akaka Bill's Finding 15 says that "[d]espite the overthrow of the Hawaiian Government, Native Hawaiians have continued . . . 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." This is simply not true. As the court pointed out in *Rice v. Cayetano*, 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.<sup>69</sup> OHA is managed by trustees who are state officials elected (after *Rice*) by all the

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one-half part of the races inhabiting the Hawaiian Islands previous to 1778." That definition was found by the U.S. Supreme Court to be "racial." *Rice*, 528 U.S. at 516.

<sup>66</sup> Hawai'i Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959). The Admission Act included "the betterment of native Hawaiians, as defined in the Hawaiian Homes Commission Act" as one of five permissible uses of the ceded lands trust. It would seem logical that this classification would, if challenged, be found equally as "racial" as the classification in the Hawaiian Homes Commission to which it refers.

<sup>67</sup> See *Hoohuli v. Ariyoshi*, 631 F.Supp. 1153 (D. Haw. 1990).

<sup>68</sup> See *supra* note 25 and accompanying text.

<sup>69</sup> *Rice*, 528 U. S. at 514-15.

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.<sup>70</sup> 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.<sup>71</sup>

The asserted separateness and distinctness of Hawaiians from other groups living in the islands are not supported by factual evidence set out in the Akaka Bill itself or in the Senate Report<sup>72</sup> that supports it. An opposite view was taken by a prominent scholar, himself of Hawaiian ancestry, who wrote:

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.

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

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<sup>70</sup> *Id.* at 520-22.

<sup>71</sup> It might be noted that the "self" involved in the asserted "self-determination" and "self-governance" is a group defined in the Akaka Bill by race, or as the U. S. Supreme Court described it in *Rice*, 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" that involve the exclusion of their neighbors of different races from equal access to government.

<sup>72</sup> S. REP. NO. 107-66 (2001).

them, although there is a continuous quest to find and develop stronger ties.<sup>73</sup>

Robert C. Schmitt, Hawai'i's former State Statistician, offered a similar view in his introduction to another scholar's comprehensive study of Hawai'i's many ethnic groups. He observed:

Interracial marriage and a growing population of mixed bloods had been characteristic of Hawai'i since at least the 1820's, but prior to 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 . . . . 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."<sup>74</sup>

The principal works of social and demographic study of Hawai'i take detailed note of the past and continuing (but diminishing) significance of ethnic groups throughout Hawai'i's history and particularly during territorial and statehood periods, but they make no mention of any sort of Native Hawaiian "government."<sup>75</sup> Even the most outspoken advocates of "Hawaiian sovereignty" have not suggested that "Native Hawaiians" preserve today, any "governmental" forms.<sup>76</sup>

What most weakens the bill's assertions that Native Hawaiians constitute a "community" or a "people," is the absence of any reference to affiliation with any such definable group in the definition of "Native Hawaiian" or in the provisions for formation of a governing entity. In the final analysis, the only criterion for participation in formation of the

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<sup>73</sup> George S. Kanahale, *The New Hawaiians*, in 29 SOCIAL PROCESS IN HAWAII 21 (1982).

<sup>74</sup> Robert C. Schmitt, *Introduction*, in ELEANOR NORDYKE, THE PEOPLING OF HAWAII xvi-xvii (1989).

<sup>75</sup> See, e.g., LAWRENCE H. FUCHS, HAWAII PONO (1961); JOHN F. McDERMOTT, JR. ET AL., PEOPLE AND CULTURES OF HAWAII, A PSYCHOCULTURAL PROFILE (1980); ELEANOR NORDYKE, THE PEOPLING OF HAWAII (1989); ANDREW W. LIND, HAWAII'S PEOPLE (4th ed. 1980).

<sup>76</sup> MICHAEL KIONI DUDLEY & KEONI KEALOHA AGARD, A CALL FOR HAWAIIAN SOVEREIGNTY (1990); HAUNANI KAY TRASK, FROM A NATIVE DAUGHTER (1993).

"governing entity" is being "Native Hawaiian," and being "Native Hawaiian" is exclusively a matter of having the right ancestry.

### 2. *Adarand and the Constitutional Test of Strict Scrutiny*

The Akaka Bill is not structured to meet the standard of strict scrutiny applicable to race-conscious governmental decision-making.<sup>77</sup> The extensive Senate Report on S. 746<sup>78</sup> makes no attempt to show that Native Hawaiians have suffered invidious racial discrimination or that any remedy for current or past racial discrimination is needed. That report describes a variety of social and economic disadvantages that statistically disfavor Native Hawaiians, but these disadvantages are not unique to persons of Hawaiian ancestry, and the report does not identify or even suggest a race-based cause for these disadvantages, a need for a race-limited solution, or any credible link between these disadvantages and the 1893 change of Hawai'i's government from a monarchy to a republic that is the only "wrong" alleged against the U.S. state government.<sup>79</sup> Neither the bill nor the report offer any explanation why the absolute, permanent race-based classification of Hawai'i's population into two sovereign governments can be said to be "tailored" in any way to correct the claimed wrong or to alleviate the social and economic needs. Thus, if the Akaka Bill fails to survive a constitutional challenge on grounds that Native Hawaiians are not within the "special relationship" that the United States has with Indian tribes, it is not likely to withstand a challenge based on strict scrutiny either.

### 3. *Omissions and Ambiguities in the Bill*

Apart from the Akaka Bill's susceptibility to constitutional challenges, its prospects for successful implementation are diminished by a number of questions that it leaves unanswered. For instance, Section 3(6)(B) of the bill provides that "[f]ollowing 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." Nowhere in the bill, however, 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

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<sup>77</sup> See *Adarand*, 515 U.S. at 200.

<sup>78</sup> S. REP. NO. 107-66 (2001).

<sup>79</sup> *Id.* at 1, 11-12; see also Akaka Bill, *supra* note 19, at §§ 1(12)-(14).

"Native Hawaiians" because the governing entity adopts a more limiting definition than that in Section 3(6)(A). That could occur, for example, if the governing entity were to adopt a blood quantum requirement like that of the existing Hawaiian Homes Commission Act and the Hawai'i Admission Act. The bill does not explain 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,<sup>80</sup> or whether they retain any rights or claims either against their former Native Hawaiian government or the United States. Logically, 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 that do survive are in any sense political rather than racial.

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 that make special provision for persons of Hawaiian ancestry. Among these are statutes providing favored treatment with respect to health care, education, 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.

Furthermore, Section 3(7) of the Akaka Bill<sup>81</sup> implies that there shall be only one Native Hawaiian governing entity. Such a limitation appears to be inconsistent with other statements of policy in the bill,<sup>82</sup>

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<sup>80</sup> Such a new definition might, for example, impose a blood quantum requirement.

<sup>81</sup> Akaka Bill, *supra* note 19, at § 3(7) states: "The term 'Native Hawaiian governing entity' means the governing entity organized by the Native Hawaiian people." See also *id.* at § 3(b), which explains that "[i]t 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."

<sup>82</sup> See *e.g.*, *id.* at § 3(4) (stating that "Native Hawaiians have . . . (B) an inherent right of self-determination and self-governance [and] (C) the right to reorganize a Native Hawaiian governing entity") *Id.* at § 6(a) states, "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."

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. If the rights of autonomy and self-determination<sup>83</sup> 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 that 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.

#### 4. *The Lack of Resources for the "Governing Entity"*

The only section of the Akaka Bill that addresses the question of resources for the newly formed "governing entity" is Section 8, which states:

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.<sup>84</sup>

This section grants neither Federal funds nor other Federal property to the new "entity."

For the following reasons, the implementation of this section will present difficult challenges. If the term "land, resources, and assets dedicated to Native Hawaiian use" refers to property of the State of Hawai'i,<sup>85</sup> then the bill's provisions concerning "transfer" of such lands "to

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<sup>83</sup> See *id.* at § 3(a)(4).

<sup>84</sup> *Id.* at § 8.

<sup>85</sup> 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. Senate Report 107-66 states, however, that "[i]t is the Committee's intent that the reference to 'lands, resources and assets

the Native Hawaiian governing entity" appear to conflict with terms of the trust that originated in the Newlands Resolution<sup>86</sup> by which Hawai'i was annexed to the United States, which was acknowledged in section 73 of the Hawai'i Organic Act<sup>87</sup> and which, in somewhat different form, was confirmed in section 5 of the Hawai'i Admission Act.<sup>88</sup> Another difficulty in applying this section to the Hawaiian home lands or to the ceded lands in general is that the provision, as written, does not encompass either of these categories of state land.

Senate Bill 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 fifty percent 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 fifty percent blood quantum to qualify. If the Hawaiian Home Lands program should terminate or be found unconstitutional, the lands, which are presently 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 expressly within any of the permissible uses of trust resources, and may be difficult to imply.

The remainder of the ceded lands is definitely not "dedicated to Native Hawaiian use."<sup>89</sup> Neither the Newlands Resolution, the Organic

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dedicated to Native Hawaiian use' include, but not be limited to lands set aside under the Hawaiian Homes Commission Act and ceded lands as defined in section 2." At page 44, that report notes, "[t]he term 'ceded lands' is intended to include submerged lands and natural resources." S. REP. NO. 107-66, at 47.

<sup>86</sup> Newlands Resolution, 30 Stat. 750 (1898).

<sup>87</sup> Hawaiian Organic Act, 31 Stat. 141 (1900).

<sup>88</sup> Hawai'i Admission Act, 73 Stat. at 4.

<sup>89</sup> 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

Act, nor the Admission Act makes any reference to "Native Hawaiians" as defined in this bill. Under state law,<sup>90</sup> OHA receives twenty percent 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.<sup>91</sup> 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."

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*, be open to challenge as an unconstitutional race-conscious measure. Thus even if there were currently state land which is apparently "dedicated to Native Hawaiian use," it should not be assumed that such a dedication would be legally valid.

It would appear that the only directly available source of revenue

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Native Hawaiian use." The State of Hawai'i in HAW. REV. STAT. § 6K-9 (2001), 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. HAW. REV. STAT. § 6K-3 (2001) 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 fifty percent 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 HAW. REV. STAT. § 6K (2001) to administer the island is a state agency established by state statute, *Rice* 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.

<sup>90</sup> HAW. REV. STAT. § 10-13.5 (2001).

<sup>91</sup> 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 that represent a possible source of revenue.

for this new entity (other than the United States Treasury) would be through taxation of its own citizens. Such a course, however, 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.<sup>92</sup>

#### IV. CONCLUSION

The Akaka Bill offers little to the State of Hawai'i and the nation but the promise of disputes and disappointments. The issue of constitutionality is 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's implied assurance that this time, segregation will work. 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; the advantages to the dominant race or class, if any, are transitory, and such segregation plants seeds of hatred that flourish generations after the inevitable abolition of the formal structures of separateness.

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 Hawaii.<sup>93</sup>

The Akaka Bill unfortunately ignores this advice; it turns away from the Constitution, back to the discredited politics of race and ancestry.

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<sup>92</sup> See *Oklahoma Tax Comm. v. Chickasaw Nation*, 515 U.S. 450 (1995).

<sup>93</sup> *Rice*, 528 U.S. at 524.