

Killing Aloha

**S. 1011/H.R. 2314
111th Congress**

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

Here's why.

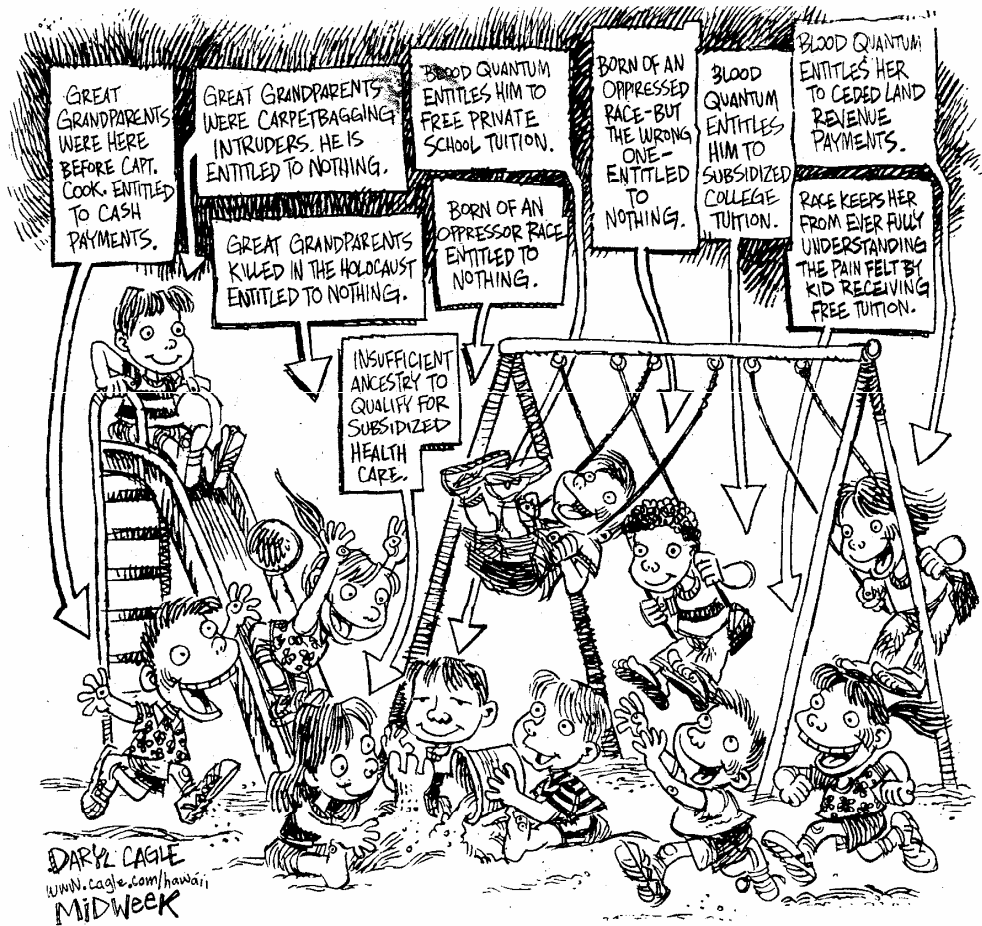
A section-by-section analysis of the bill

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.

Introduction¹

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-dimensional 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.

The Akaka Bill is part of this countercurrent. It proposes 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 the currently favored version of the Akaka Bill 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 the Akaka Bill

In March of 1996, Mr. Harold F. Rice, a rancher on the Big Island of Hawai'i, tried to register to vote in a State of Hawai'i election 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."

¹ The author is an attorney who has lived and practiced in Hawai'i for more than twenty years. He has written both scholarly and popular articles on Hawaiian issues including *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai'i* which 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 employers or of any organization or other entity with which he may be associated.

Under state law, only "Hawaiians" could vote in these OHA elections. Mr. Rice was not Hawaiian and was rejected. He sued, asserting that he had been denied the right to vote on grounds of race in violation of the Fifteenth Amendment to the U. S. Constitution. Almost four years later, the U. S. Supreme Court agreed.² It held that the definition of "Hawaiian" established a racial classification³ and that the state law unconstitutionally deprived Hawai'i's other citizens of the right to vote on grounds of race. Subsequently, another Federal court, relying on the *Rice* decision, struck down a state law which permitted only "Hawaiians" to seek office as OHA trustees.⁴

The OHA election law is not the only law favoring "Hawaiians" and "native Hawaiians." Over 160 state and Federal statutes, using definitions essentially identical to those which the court in *Rice* found to be racial, give special privileges and favored treatment to persons of Hawaiian ancestry in such areas as education, health care, housing and awards of Federal contracts. As race-conscious measures, these laws are vulnerable to challenge under the U. S. Constitution's Fifth and Fourteenth Amendments which, as consistently interpreted by the U. S. Supreme Court, forbid racial discrimination by governmental entities except in the most strictly limited circumstances.

The Supreme Court has given constitutional sanction to race-conscious legislation 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.⁵

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 as this booklet explains, the claims of lost sovereignty and stolen lands cannot withstand careful legal and historical analysis.⁶ 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 only the claimed wrongs or to

² *Rice v. Cayetano*, 528 U.S. 495 (2000).

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 *Arakaki v. Cayetano*, 324 F.3d 1078 (9th Cir., 2003)

⁵ *See Adarand Constructors v. Federico Pena*, 515 U.S. 200, 115 S.Ct. 2097 (1995). Racial discrimination in voting is a special case; it is absolutely prohibited by the Fifteenth Amendment, without regard to any asserted need or narrow tailoring.

⁶ *See Comments to Findings 13, 18 and 22B* at pages 16, 23 and 31 below.

alleviate the social and economic needs with the least impact on citizens who do not meet the racial qualification.

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.⁷

Thus the Akaka Bill. The current versions of the Akaka Bill, like their predecessors, seek to foreclose a Supreme Court decision on these constitutional issues 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 the Akaka Bill

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.

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. They have no government other than our Federal, state and municipal governments. In fact, "Native Hawaiians" as defined in

⁷ See Comments to Findings 1 and 3 at pages 1 and 7 below.

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," the Akaka Bill would impose a racial segregation upon the people of the State of Hawai'i and the many other states where Native Hawaiians reside. *Killing Aloha* explains why this would be devastating to the State and its people, and why 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[.]"⁸ Yet the Akaka Bill 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.

The bill ignores the interests of the 80% of Hawai'i's citizens who are not in the favored racial class of Native Hawaiians. There are two crucial stages in the establishment of the new entity, and the bill makes no provision for a statewide referendum on either. The first is the "recognition" of the entity following the preparation of its organizational documents. There is no provision for Hawai'i's citizens to be heard on this decision. The second is the transfer of governmental power and resources from the state government to the new entity following post-recognition negotiations between the entity and state and Federal officials. The bill makes no provision for a plebiscite on this decision; it only requires implementing state and Federal legislation, and then only piecemeal, when and if individual elements of the negotiated settlement require specific amendments to existing state or Federal law. Neither the state's citizens nor the state and Federal legislatures are guaranteed a chance to evaluate and accept or reject the overall structure and powers of the new entity before it becomes settled in state and Federal law.

The interests of other states are also ignored, even though their citizens of Hawaiian ancestry are eligible to become members of the new entity and to acquire the privileges and immunities available only to such members.

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 affiliation or tribal relationship. This is a dramatic change in current

⁸ *U.S. v. Sandoval*, 231 U.S. 28 (1913).

law which may have unintended and undesirable consequences for the tribes and their members.⁹

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.

The constitutional failings, divisive effects and unsatisfactory draftsmanship of the bill would each counsel strongly against its passage. Together, they compel its defeat.

Legislative History of the Akaka Bill

The first versions of the Akaka Bill, S. 2899 and H.R. 4904, were introduced in the 106th Congress in the wake of the February 2000 decision in *Rice v. Cayetano*. Neither bill became law and they were reintroduced in the 107th Congress as S. 81 and H.R. 617. Two other versions of the bill, S. 746 and S. 1783, were later introduced in the Senate. S. 746 emerged as the favored version and H.R. 617 was amended to conform to it. Again, neither bill became law.

In the 108th Congress, the Akaka Bill was introduced yet again, this time as S. 344 and H.R. 665. They were essentially identical to each other and to the final versions of S. 746 and H.R. 617 from the 107th Congress.

H.R. 665 was superseded in the House by H.R. 4282, introduced on May 5, 2004 and reported favorably by the House Committee on Resources on October 6, 2004. S. 344 was revised in several respects when it was reported favorably by the Senate Indian Affairs Committee on May 14, 2003.¹⁰ Senator Akaka proposed a second amended version of the bill on April 7, 2004 which was approved by the Senate Indian Affairs Committee on April 21, 2004. Another amendment was offered by Senator Akaka on July 7, 2004 as part of an unsuccessful effort to pass the Akaka Bill as a rider to S. 2062, an unrelated bill dealing with interstate class action litigation. This amendment was not adopted. Senator Inouye offered a final amendment to S. 344 on September 7, 2004 to make it identical to H.R. 4282, but there was no vote on that proposed amendment. Neither bill became law.

The Akaka Bill was reintroduced in the 109th Congress on January 25, 2005 as S. 147 and H.R. 309, both essentially identical to H.R. 4282 in the 108th Congress. The House bill was referred to committee and no further action was taken on it. The Senate bill was favorably reported out of the Senate Indian Affairs Committee in March, 2005

⁹ This point is discussed in greater detail in the Comment to Findings 22C and D at page 32 below.

¹⁰ See Senate Report 108-85.

with minor amendments.¹¹ As noted below, a cloture motion failed to obtain the necessary 60 votes following debate on 6–8 June 2006 and the bill died. Another bill, S. 3064, was introduced by Senator Akaka to accommodate administration objections but was never referred to committee or voted upon.

The Akaka Bill was introduced again in the 110th Congress as S. 310/H.R. 505. H.R. 505 was passed by the House and S. 310 was favorably reported by the Senate Indian Affairs Committee, but neither bill was passed by the Senate.

In the 111th Congress, the Akaka Bill was initially introduced as S. 381/H.R. 862 in the form in which it was originally introduced in 2000. Slightly revised bills (S. 708/H.R. 1711) were introduced shortly thereafter. Finally, S. 1011 was introduced in the Senate and H.R. 2314 in the House. These bills, which appear to be the favored versions as of the date of this pamphlet, are essentially identical to S. 310/H.R. 505 in the 110th Congress.

Debate on the Akaka Bill in the 109th Congress

In the Senate of the 109th Congress, the Akaka Bill received much greater attention than even before and for the first time there was open debate on the measure. In July, 2005, the Department of Justice wrote to the Senate Indian Affairs Committee chairman raising technical objections to several elements of the bill. Negotiations with Senator Akaka resulted in the introduction of a new bill, S. 3064, to preclude litigation of claims by the new entity against the United States or the State of Hawai'i, to mitigate possible impacts on the Department of Defense, to resolve doubts about civil and criminal jurisdiction of the proposed governing entity and to deny gaming rights to the new entity.

In December 2005, Senate opponents of the bill confirmed an agreement with the bill's proponents to allow the bill to come before the full Senate.¹² The bill had attracted national attention and individuals, interest groups and think-tanks lined up for and against it.¹³ Perhaps more importantly, the Senate Republican Policy Committee issued a 13-page paper opposing the bill,¹⁴ and the U.S. Commission on Civil Rights, after hearing presentations for and against the bill, recommended against passage of that bill "or any other legislation that would discriminate on the basis of race or national origin and further subdivide the American people into discrete subgroups accorded varying degrees of

¹¹ Senate Report 109-68, May 16, 2005.

¹² Congressional Record, Dec. 21, 2005, 151 Cong.Rec. S14313

¹³ Articles and op-ed pieces opposing the Akaka Bill are gathered at <http://www.angelfire.com/hi2/hawaiiansovereignty/AkakaPublishedOpposition.html>.

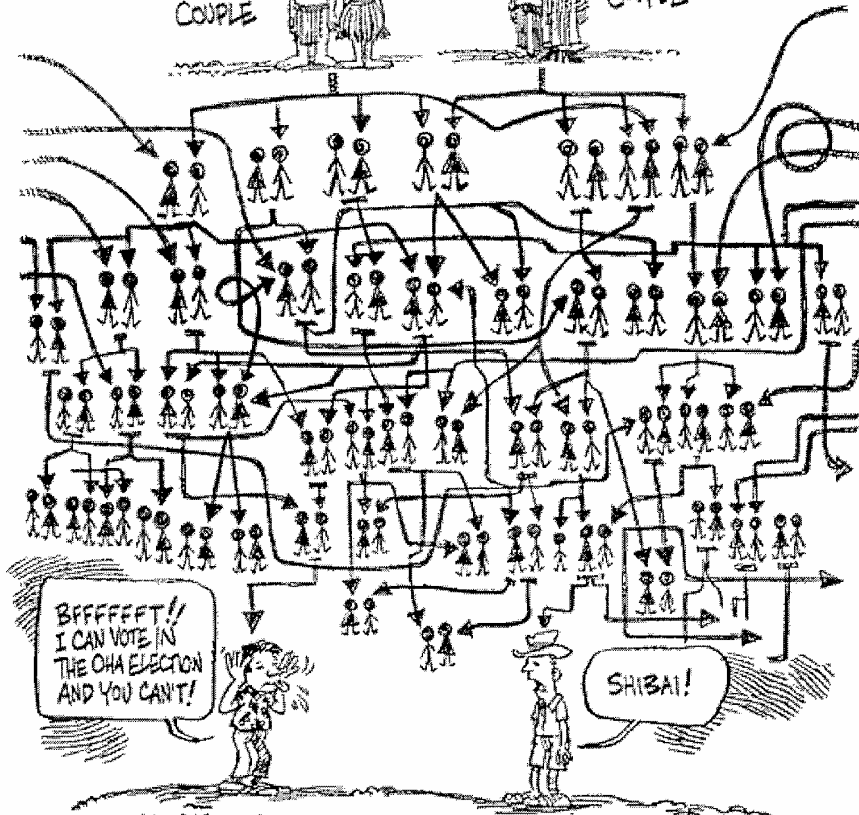
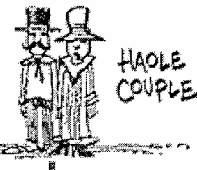
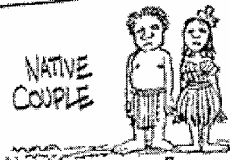
¹⁴ Senate Republican Policy Committee, *Why Congress Must Reject Race-Based Government for Native Hawaiians* (2005) available at http://rpc.senate.gov/_files/Jun2205NatHawSD.pdf.

privilege."¹⁵ Finally, in the midst of the floor debate on June 7, 2006, Senator Jeff Sessions announced that the U.S. Department of Justice had that day submitted a letter to Majority Leader Bill Frist declaring the administration's opposition to the bill, not on the grounds addressed in S. 3064, but because of the bill's racial character and doubtful constitutionality.¹⁶ On the following day, the cloture motion failed to obtain the required sixty votes and the bill died.

¹⁵ U.S. Commission on Civil Rights Briefing Report "The Native Hawaiian Government Reorganization Act of 2005," available at <http://www.usccr.gov/pubs/060531NatHawBriefReport.pdf>.

¹⁶ Congressional Record, June 7, 2006, 152 Cong.Rec. S5587.

FREDDY RICE VS. NATIVE HAWAIIAN FAMILY TREE



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Section-by-section comments on the Akaka Bill

S. 1011/H.R. 2314, 111th Congress

SECTION 1. SHORT TITLE.¹

This Act may be cited as the `Native Hawaiian Government Reorganization Act of 2009'.

Comment: The title of this bill now makes it plain that its objective is the creation of a new Native Hawaiian governing entity rather than the recognition of some entity which presently exists. Section 7 describes the process in detail.

SEC. 2. FINDINGS.

Congress finds that--

(1) the Constitution vests Congress with the authority to address the conditions of the indigenous, native people of the United States;

Comment: This Finding is incorrect except in the sense that the U. S. Constitution vests Congress with specific and limited authority to address the conditions of all the people of the United States. The Constitution makes no reference to "the indigenous, native people of the United States," although it mentions "Indian tribes." The U.S. Supreme Court's decision in *Morton v. Mancari*² explains the significance of this distinction.

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.

¹ Throughout this paper, the provisions of the Akaka Bill 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.

² 417 U.S. 535 (1974).

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.³

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.⁴

The Akaka Bill, however, ignores the requirement for historical, "recognizable" tribal status. It declares that Congress has special responsibilities for, and special authority to "address the conditions of," the "indigenous, native people" of the United States, who are defined in Section 3(6) 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 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*,⁵ 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**

³ *Id.* at 554

⁴ *Id.* at 46. (Bolding added.)

⁵ 231 U.S. 28 (1913).

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."⁶

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 to be able to establish such a status under the standards applied by the Bureau of Indian Affairs to mainland groups.⁷ Unlike the Pueblo communities, there is no unifying group character to "Native Hawaiians" (as defined in this bill) other than race, no "Hawaiian" government, and as the late George Kanahale pointed out in the work quoted below, no "distinctly 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 that is now part of the United States, are indigenous, native people of the United States;

Comment: Native Hawaiians, as defined in the Akaka Bill, cannot properly be characterized either as "a people" or as "indigenous," and they are "native" only in the sense that all people born in the United States and the State of Hawai'i are native to those places.

a. **"People."** The bill's reference to "Native Hawaiians" as "the native people" of the Hawaiian archipelago 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 the bill, 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

⁶ *Id.* at 46.

⁷ *Price v. Hawai'i*, 764 F.2d 623 (9th Cir. 1985). The Department of the Interior has promulgated regulations which establish how a group claiming to be an Indian tribe can seek Federal recognition, and what standards will be applied by the Bureau of Indian Affairs in evaluating any such application. See 25 C.F.R. § 83.1 et seq. These regulations, however, by their own terms apply only to tribes "indigenous to the continental United States," 25 C.F.R. 83.3(a), and the regulations define the "continental United States" as the "contiguous 48 states and Alaska." 25 C.F.R. 83.1. In *Kahawaiola'a v. Norton*, 386 F.3d 1271 (9th Cir., 2004), this exclusion of Hawaiian groups from seeking recognition under the BIA regulations was justified by the Ninth Circuit as being based on statutes meeting the "rational basis" test generally applied to Congress' decisions under the Indian Commerce clause.

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 them, although there is a continuous quest to find and develop stronger ties.⁸

Mr. Kanahale'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.⁹ As Mr. Kanahale 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. Since the earliest days of the Territory of Hawai'i, persons of Hawaiian ancestry have held positions of power and respect at all levels of society including business, government and the arts. In the past several years, persons of Hawaiian ancestry have served as the state's 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 and Federal 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."¹⁰

⁸ George S. Kanahale, *The New Hawaiians*, 29 *Social Process in Hawai'i* 21 (1982).

⁹ 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).

¹⁰ 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

b. **"Indigenous."** Webster at p. 1151 offers two definitions of "indigenous" which deserve consideration. They are "(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 "(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

related statistics regularly compiled by various state agencies. Further definitional changes occurred in 1980, with still others in prospect for 1990.

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 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.

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.

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 HAWAII* xvi-xvii (1989). (Bolding added.)

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 HAWAII* (2nd ed., 1989) 7-11 (1989). This historically recent arrival hardly supports a claim of being "indigenous" by Webster's definition. 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 ancestors arrived in Hawai'i a few hundred years before Westerners and for which the bill's supporters seek special political privilege and status.¹¹

(3) the United States has a special political and legal relationship to promote the welfare of the native people of the United States, including Native Hawaiians;

Comment: This finding is not true with respect to Native Hawaiians as defined in this bill and it overstates the responsibilities of the United States to American Indians and Alaska Natives.

It should be noted that the corresponding paragraphs of earlier versions of the bill (S. 746 and H.R. 617¹²) referred to a "trust relationship" between Native Hawaiians and the United States. S. 344 as originally introduced also referred here and elsewhere to a "trust relationship" but this was changed to "special legal and political responsibility."¹³

¹¹ The recent British case of *The Queen (ex parte Bancoult) v. Foreign and Commonwealth Office*, [2001] Q.B. 1067, 2000 WestLaw 1629583 (High Court of England and Wales, Queen's Bench Division, Administrative-Divisional Court, London, Nov. 3, 2000) sheds some interesting light on the meaning of "indigenous" in the context of modern international and humanitarian law. *Bancoult* was a suit against the British government over its forcible removal of several hundred contract laborers and their families from the Chagos Archipelago in the Indian Ocean in preparation for the British lease to the American government of the island of Diego Garcia for a military base. The court held that plaintiffs' removal was unlawful under British law, in spite of their lack of any property rights in the territory where they lived, because "[a] British citizen . . . enjoys a constitutional or fundamental right to reside in or return to that part of the Queen's dominions of which he is a citizen." The court observed of those who had been removed:

They were an indigenous people: they were born there, as were one or both of their parents, in many cases one or more of their grandparents, in some cases (it is said) one or more of their great-grandparents. (Bolding added.)

This humanitarian interpretation of the term "indigenous" illuminates by contrast the separatist and segregationist viewpoint of the Akaka Bill, which would deny forever to those lacking the "correct" ancestry an equal right to claim Hawaii as their true home.

¹² Paragraph 1(3) in each bill.

¹³ S. 1783, introduced in the 107th Congress on December 7, 2001, substituted the term "special responsibility" in paragraphs 1(3) and "special political and legal relationship" elsewhere in the bill (*see, e.g.*, paragraphs 1(21), 1(22(D)) reportedly to satisfy concerns of the Department of the Interior (DoI) over the term "trust relationship" (*see* <http://stopakaka.com/2002/edit2.html>). DoI's concerns may have been driven by litigation in which Indian plaintiffs sought compensation for



Both terms are evidently intended to refer to the "special relationship" which exists between the United States on the one hand and American Indians and Alaska Natives on the other based on the unique and often tragic history of American expansion into the territories of tribal governments. The U. S. Supreme Court provided a brief explanation of the origin and some of the consequences of this "special relationship" in its decision in *Morton v. Mancari*.¹⁴

years of alleged Federal government mismanagement of Indian trust funds. An article in the April 22, 2002, issue of the Washington Post, *Lost Trust: Billions Go Uncounted, Indians in Century-Old Fight to Tally Money Owed for Land Use* provides a summary of the claims.

¹⁴ 417 U.S. 535, 551-555 (1974). "Resolution of the instant issue turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes. The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Article I, s 8, cl. 3, provides Congress with the power to 'regulate Commerce . . . with the Indian Tribes,' and thus, to this extent, singles Indians out as a proper subject for separate legislation. Article II, s 2, cl. 2, gives the President the power, by and with the advice and consent of the Senate, to make treaties. This has often been the source of the Government's power to deal with the Indian tribes. The

This Finding overstates the scope of the special relationship as it applies to American Indians and Alaska Natives. There is no such comprehensive obligation to "promote the welfare of the native people of the United States." 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).¹⁵

In addition, the U. S. Supreme Court made clear in *Morton v. Mancari*¹⁶ and confirmed in *Rice v. Cayetano*¹⁷ that the "special relationship" is not with individuals of Indian ancestry, but with tribes and their members or close associates. 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. Peña*.¹⁸

Court has described the origin and nature of the special relationship:

'In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic. . . .' Board of County Comm'rs v. Seber, 318 U.S. 705, 715, 63 S.Ct. 920, 926, 87 L.Ed. 1094 (1943).

¹⁵ WILLIAM C. CANBY, JR. AMERICAN INDIAN LAW 44 (1998).

¹⁶ See Comment to Section 2(1), *supra*.

¹⁷ 528 U.S. 495, 520-21 (2000)

¹⁸ 515 U.S. 200, 239 (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.

Whether this "special relationship" with American Indians and Alaska Natives be termed a "trust relationship" or a "special political and legal relationship," there is no legal or historical justification for applying it to Native Hawaiians, and certainly not so as to justify the enactment of the Akaka Bill; Stuart Minor Benjamin's comprehensive analysis in *Equal Protection and the Special Relationship: The Case of Native Hawaiians*¹⁹ shows why Native Hawaiians do not and almost certainly cannot ever 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, 1920,²⁰ which provides homesteading opportunities to those of 50% Hawaiian "blood" was rejected twice, first in *Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission*,²¹ and again in *Han v. Department of Justice*,²² 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*²³ 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 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

¹⁹ 106 Yale L.J. 537 (1996).

²⁰ Act of July 9, 1921, c. 42, 42 Stat. 108.

²¹ 588 F.2d 1216, 1224 (9th Cir. 1978).

²² 824 F.Supp. 1480 (D. Hawai'i 1993), *aff'd* 45 F.3d 333 (9th Cir. 1995).

²³ 528 U.S. 495, 518 (2000).

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 clause²⁴ and the anti-nobility clauses.²⁵

(4) under the treaty making power of the United States, Congress exercised its constitutional authority to confirm treaties between the United States and the Kingdom of Hawaii, and from 1826 until 1893, the United States--
(A) recognized the sovereignty of the Kingdom of Hawaii;
(B) accorded full diplomatic recognition to the Kingdom of Hawaii; and
(C) entered into treaties and conventions with the Kingdom of Hawaii 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 the Akaka Bill, 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

²⁴ See *Saenz v. Roe*, 526 U.S. 489 (1999), *Zobel v. Williams*, 457 U.S. 55 (1982).

²⁵ 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.").

government which replaced the monarchy was diplomatically recognized not only by the U.S. but by many other powerful nations as well.²⁶

(5) pursuant to the Hawaiian Homes Commission Act, 1920 (42 Stat. 108, chapter 42), the United States set aside approximately 203,500 acres of land to address the conditions of Native Hawaiians in the Federal territory that later became the State of Hawaii;

(6) by setting aside 203,500 acres of land for Native Hawaiian homesteads and farms, the Hawaiian Homes Commission Act assists the members of the Native Hawaiian community in maintaining distinct native settlements throughout the State of Hawaii;

(7) approximately 6,800 Native Hawaiian families reside on the Hawaiian Home Lands and approximately 18,000 Native Hawaiians who are eligible to reside on the Hawaiian Home Lands are on a waiting list to receive assignments of Hawaiian Home Lands;

Comment: The Hawaiian Homes Commission Act (HHCA) established a homesteading program for a small segment of a racially-defined class of Hawai'i's citizens. That is all it did.²⁷

Its intended beneficiaries were not and are not now "Native Hawaiians" as defined in the Akaka Bill (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*,²⁸ which upheld the racial segregation of railway carriages and the concept that "separate but equal" facilities met the antidiscrimination requirements of the U. S. Constitution's 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.²⁹

²⁶ MERZE TATE, THE UNITED STATES AND THE HAWAIIAN KINGDOM 191-92 (1965).

²⁷ For details see H. Rep. 839, 66th Cong., 2nd sess. (1920).

²⁸ 163 U.S. 537 (1896).

²⁹ 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 .³⁰

Plessy was effectively overruled by *Brown v. Board of Education*,³¹ beginning a line of jurisprudence, culminating in *Adarand Constructors v. Federico Pena*,³² 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(B) below.

(8)(A) in 1959, as part of the compact with the United States admitting Hawaii into the Union, Congress established a public trust (commonly known as the "ceded lands trust"), for 5 purposes, 1 of which is the betterment of the conditions of Native Hawaiians;

(B) the public trust consists of lands, including submerged lands, natural resources, and the revenues derived from the lands; and

(C) the assets of this public trust have never been completely inventoried or segregated;

Comment: First and most obviously, the Hawai'i Admission Act here referred to,³³ like the HHCA, in permitting the new state to provide 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" and have no special status.

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. 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.³⁴ Indeed, from 1959 to 1978, ceded lands revenues were principally dedicated to education.³⁵ 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.

³⁰ *see* LAWRENCE H. FUCHS, HAWAII PONO: A SOCIAL HISTORY 161-62 (1960).

³¹ 347 U.S. 483 (1954).

³² 515 U.S. 200 (1995).

³³ Public Law No. 86-3, 73 Stat. 4, section 5(f) (1959).

³⁴ *Price v. State of Hawaii*, 764 F.2d 623 (9th Cir. 1985).

³⁵ *See Hoohuli v. Ariyoshi*, 631 F.Supp. 1153 (1990).

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

(9) Native Hawaiians have continuously sought access to the ceded lands 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 (contrary to the implication of this proposed finding) 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.³⁶

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 the Akaka Bill (i.e., those with "one drop" of Hawaiian "blood"), are excluded from benefits under the HHCA and the Admission Act.

The Admission Act makes no specific provision for "Native Hawaiians" as defined in the Akaka Bill and 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 one-drop "Native Hawaiians" 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.

³⁶ P. L. No. 86-3, 73 Stat. 4, section 5(f) (1959).

(10) the Hawaiian Home Lands and other 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 and economic self-sufficiency of the Native Hawaiian people;

Comment: This Finding is untrue. The Hawaiian home lands simply provide homes and small farms for a few of Hawai'i's citizens. As noted above, the racially-defined beneficiaries of these lands and the ceded lands are only those of half or more Hawaiian "blood." All the rest of Hawai'i's citizens of Hawaiian ancestry are, under these laws, merely citizens. They, together with those with no Hawaiian ancestry, are free to maintain whatever "culture, language and traditions," Hawaiian or otherwise, they may deem suitable. Finding 17 notes that many Native Hawaiians as defined in this bill engaged in various of cultural and traditional practices, apparently without hindrance.

With respect to the ceded lands, decisions as to whether to apportion some, all or none of the ceded lands trust resources to persons of 50% or greater Hawaiian ancestry are committed to all the citizens of the State of Hawai'i,³⁷ and not solely to persons of Hawaiian ancestry. As governmental decisions, they are subject to the constraints of the U. S. Constitution, and as decisions necessarily favoring a group defined solely by race, they must meet the test of strict scrutiny.

(11) Native Hawaiians continue to maintain other distinctly native areas in Hawaii;

Comment: There are some locations in 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 might be called "distinctly Hawaiian" in the sense that these other areas are "distinctly Filipino" or "distinctly Caucasian" or "distinctly Japanese." They cannot be considered "native" except in the artificial sense of the Akaka Bill in which "native" connotes something other than being born in a given jurisdiction or locality. None of these areas could legitimately be considered a "tribal enclave" or anything like it.

According to Census 2000, about 240,000 or about 60%, of persons reporting some degree of Native Hawaiian ancestry live in Hawaii, the most integrated, intermarried, racially blended state in the Nation. They, intermingled with the rest of Hawaii's multi-ethnic population, reside throughout all the 49 census districts of the State of Hawaii.

Except for the Hawaiian home lands, there is no racial segregation in Hawai'i's communities, de facto or de jure. This broad-based racial integration is a precious and fragile fact, and one to be nurtured, not undermined.

³⁷ Price v. State of Hawai'i, 764 F.2d 623 (9th Cir. 1985)

(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 recites³⁸ and the statements in the resolution's preamble provide no reliable support for the positions taken in the Akaka Bill. 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 evidently reached the same conclusion. In *Rice v. Cayetano*³⁹ the court 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 Daniel 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

³⁸ See S. Rep. 103-126 (1993) and S. Rep. 102-456 (1992).

³⁹ 528 U.S. 495, 505 (2000).

Americans? This resolution has nothing to do with that. . . . I can assure my colleagues of that. It is a simple apology.⁴⁰

It would appear that the Akaka Bill 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 (1914)

(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 to the United States their claims to their inherent sovereignty as a people over their national lands, either through the Kingdom of Hawaii or through a plebiscite or referendum;

Comment:

"Inherent Sovereignty." The Apology Resolution and the Akaka Bill 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.⁴¹

Sovereignty, in the 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.

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

⁴¹ 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).

This difference was clearly set out by the Hawaiian kingdom's supreme court in the case of *Rex v. Booth*.⁴² 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.

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:

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

⁴² 2 Haw. 616 (1863).

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.⁴³

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

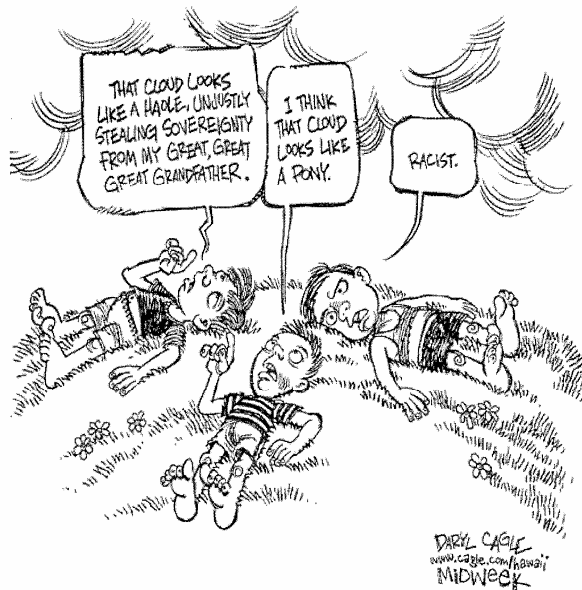
Let it be repeated: the promulgation of a new constitution, adapted to the needs of the times and the demands of the people, has been an indisputable prerogative of the Hawaiian monarchy.⁴⁴

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

Nor was the government of the Hawaiian Islands, in the decades immediately before the ending of the monarchy, racially limited to persons of Hawaiian ancestry.

Westerners had been trusted advisors of the monarchs from the time of Kamehameha I. As early as 1851, foreign-born subjects of the kingdom sat in the legislature⁴⁵ and held

various degrees of control during the monarchy period.⁴⁶ Westerners as well as natives sat as judges in the courts of the kingdom.⁴⁷ Westerners also served as members of the cabinet along with natives and part-Hawaiians; 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."⁴⁸



By 1893, when the monarchy was replaced by a provisional government, natives and foreigners alike had long participated extensively in the political,

⁴³ Quoted here from 2 KUYKENDALL, THE HAWAIIAN KINGDOM 132 (1953)

⁴⁴ LILI'UOKALANI, HAWAII'S STORY BY HAWAII'S QUEEN 21 (1898).

⁴⁵ 3 KUYKENDALL, THE HAWAIIAN KINGDOM 191 (1967).

⁴⁶ See, e.g., *id.* at 401-402, 406-410, 448-455.

⁴⁷ See, e.g., 2 KUYKENDALL, THE HAWAIIAN KINGDOM 241(1938).

⁴⁸ GAVAN DAWS, SHOAL OF TIME 214 (1968).

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.⁴⁹

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" (full and part Hawaiians formed less than 40% of the population at that time), those same people or their descendants were full participants and a major political force within the succeeding Territorial government.⁵⁰ 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. Indeed, if we assume that persons of Hawaiian ancestry voted in proportion to their census numbers and that every vote against statehood was cast by a person of Hawaiian ancestry, the measure would still have passed among that group by a margin of two to one.

It should be noted that in *Hawaii v. OHA*⁵¹, the U.S. Supreme Court held that the Apology Resolution did not create or recognize rights or claims.

***(14) the Apology Resolution expresses the commitment of Congress and the President--
(A) to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii;***

⁴⁹ See generally 3 KUYKENDALL, THE HAWAIIAN KINGDOM (1967) ch. 19 - 20; 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. (No. 13) 15 (2001).

⁵⁰ See LAWRENCE H. FUCHS, HAWAII PONO: A SOCIAL HISTORY 79-85, 161-62 (1960).

⁵¹ *Hawai'i et al. v. Office of Hawaiian Affairs, et al.*, No. 07-1372, Mar. 31, 2009.

*(B) to support reconciliation efforts between the United States and Native Hawaiians; and
(C) to consult with Native Hawaiians on the reconciliation process as called for in 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"⁵² and "presumptively invalid."⁵³ The Akaka Bill 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 the Akaka Bill, 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 surely be seen by many Hawaiians as one more in a long chain of "broken promises."

(15) despite the overthrow of the government of the Kingdom of Hawaii, Native Hawaiians have continued to maintain their separate identity as a distinct native community through cultural, social, and political institutions, and to give expression to their rights as native people to self-determination, self-governance, and economic self-sufficiency;

Comment: This statement is false.



⁵² Hirabayashi v. U.S., 320 U. S. 81 (1943).

⁵³ Personnel Administrator v. Feeney, 442 U.S. 256, 272 (1979)); *see generally* Adarand Constructors v. Peña, 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."

a. Native Hawaiians, as defined in the Akaka Bill, 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.

It might be noted that the "self" involved in the asserted "self-determination" and "self-governance" is a group defined by race, or as the U. S. Supreme Court described it in *Rice v. Cayetano*, by ancestry used as a proxy for race. The basic premise of the Fifteenth Amendment and of U. S. Supreme Court cases such as *Gomillion v. Lightfoot*,⁵⁴ is that in the United States, racial groups have no rights which involve the exclusion of their neighbors of different races from equal access to government.

(16) Native Hawaiians have also given expression to their rights as native people to self-determination, self-governance, and economic self-sufficiency--
(A) through the provision of governmental services to Native Hawaiians, including the provision of--
(i) health care services;
(ii) educational programs;
(iii) employment and training programs;
(iv) economic development assistance programs;
(v) children's services;
(vi) conservation programs;
(vii) fish and wildlife protection;
(viii) agricultural programs;
(ix) native language immersion programs;
(x) native language immersion schools from kindergarten through high school;
(xi) college and master's degree programs in native language immersion instruction;
and
(xii) traditional justice programs;
(B) 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 the Akaka Bill) 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

⁵⁴ 364 U.S. 339 (1960)

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.

The reference to Hawaiian language immersion programs, however, deserves special mention. These programs give their students no practical language skill, since Hawaiian is not spoken except by a handful of people and is not used as the language of daily life except on the remote island of Ni'ihau. The principal effect of Hawaiian immersion programs, and perhaps their principal intended effect, is to foster a facility in the Hawaiian language as a divisive and distinguishing characteristic of the students, emphasizing their separateness from the rest of the state's population. It is a device for self-segregation, and it serves a political rather than an educational end.

(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 the Akaka Bill, 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 listed cultural activities and on the other hand, many Native Hawaiians do not engage in them. The important point is that engaging in these practices does not identify one as "Native Hawaiian" or as a member of any Native Hawaiian group. The issue is immaterial to the decision whether to enact the Akaka Bill.

The nature and extent of "traditional rights to gather medicinal plants and herbs, and food sources" is a matter of considerable debate. The question has nothing to do with the Akaka Bill, but it presents grave constitutional issues of its own.⁵⁵

⁵⁵ 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 generations of Native Hawaiians their lands and Native Hawaiian political and cultural identity in accordance with their traditions, beliefs, customs and practices, language, and social and political institutions, to control and manage their own lands, including ceded lands, 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, for the reasons set out in the Comment to Finding (2) above, this statement is inaccurate in its implication that there is a "Native Hawaiian people" with a unity of attitudes and desires. It is also inaccurate, for the reasons set out below, in its implication that Native Hawaiians have rights or valid claims to the ceded lands. If its reference to a "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. Finally, if "self-determination" refers to special political power for a group defined by race or ancestry to affect (or ignore) state or Federal governmental decisions, then such self-determination would run afoul not only of the decision in *Rice v. Cayetano*, but of America's long opposition to race-based exclusion of any group from participation in government.

It should 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 the Akaka Bill are not those of precontact Hawai'i and are, in fact, those shared throughout the intermixed, intermarried society of the State of Hawai'i. There is no legal, social or other barrier to persons of Hawaiian ancestry carrying out the legitimate desires set out in this Finding with respect to perpetuating the traditions of their ancestors or any other group, so long as they do not seek race-conscious support of Federal, state or local government to do so.

Ceded lands. Native Hawaiian advocates have long asserted that Native Hawaiians have some claim based on race or ancestry 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.⁵⁶ They were examined again in 1995 in an environmental impact statement for land use changes at the Bellows Air Force Station in Waimanalo, Oahu.⁵⁷ The Record of Decision therein, based on detailed

⁵⁶ See "Existing Law, Native Hawaiians and Compensation," 1 FINAL REPORT OF THE NATIVE HAWAIIANS STUDY COMMISSION 333-370 (1983); *but see* dissenting view in 2 FINAL REPORT OF THE NATIVE HAWAIIANS STUDY COMMISSION 7-11, 80-99 (1983) (proposing "moral" rather than legal bases for reparations).

⁵⁷ U.S. PACIFIC COMMAND, FINAL EIS FOR LAND USE DEVELOPMENT AT BELLOWS AIR FORCE STATION, WAIMANALO, HI (1995), section 6.6.

legal analyses published in the Draft and Final EIS documents, concluded that these claims had no legal or historical validity.⁵⁸ 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."⁵⁹

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.⁶⁰

(19) this Act provides a process within the framework of Federal law for the Native Hawaiian people to exercise their inherent rights as a distinct, 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: As noted earlier, 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 entity" in the sense of a government exclusively of, by or for Native Hawaiians. Instead, there was a racially integrated constitutional monarchy which was in time replaced by a racially integrated independent republic which sought and eventually obtained annexation to the United States. There is no legal, historical or moral basis for Congress to create a racially-defined body to govern some or all "Native Hawaiians" now.

Of course, 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*⁶¹ 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

⁵⁸ 61 Fed. Reg. 28568, June 5, 1996.

⁵⁹ *Lili'uokalani v. U.S.*, 48 Ct. Cl. 418 (1910).

⁶⁰ 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).

⁶¹ 231 U.S. 28 (1913).

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."⁶²

This warning explains why Congress cannot 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 "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 could not meet the criteria which are applied to American Indian groups seeking Federal recognition.⁶³

Considering the pernicious effects of racial discrimination and the U. S. Supreme Court's cautionary language in *Rice*, extending privileged political status to a group defined purely by race appears neither socially wise nor constitutionally permissible.

(20) Congress--

(A) has declared that the United States has a special political and legal relationship 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*, 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.'"⁶⁴ In discussing *Morton v. Mancari*,⁶⁵ 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.'"⁶⁶ As noted earlier in these comments, extending Congress' "special responsibility" to "native peoples" (or in the case of Hawai'i, to the remote descendants of native peoples) is not justified by the Constitution or other law.

⁶² *Id.* at 46.

⁶³ *Price v. Hawai'i*, 764 F.2d 623 (9th Cir. 1985).

⁶⁴ 528 U.S. 495, 519 (2000).

⁶⁵ 417 U.S. 535 (1974).

⁶⁶ 528 U.S. 495, 519 (2000).

(B) has identified Native Hawaiians as a distinct group of indigenous, native people of the United States within the scope of its authority under the Constitution, and has enacted scores of statutes on their behalf; and

(C) has delegated broad authority to the State of Hawaii to administer some of the United States' responsibilities as they relate to the Native Hawaiian people and their lands;

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* suggests that it did not (*see* Comments to Sections 4(a)(1), (2) and (3) *infra.*).

(21) the United States has recognized and reaffirmed the special political and legal relationship with the Native Hawaiian people through 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--

(A) ceding to the State of Hawaii title to the public lands formerly held by the United States, and mandating that those lands be held as a public trust for 5 purposes, 1 of which is for the betterment of the conditions of Native Hawaiians; and

Comment: This Finding is untrue.

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.⁶⁷

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 (within constitutional limitations) how the trust proceeds are to be distributed.⁶⁸ Such state decisions, of course, are subject to the

⁶⁷ See section 5(f), Hawai'i Admission Act, P. L. 86-3, 73 Stat. 4 (1959).

⁶⁸ *Price v. State of Hawai'i*, 764 F.2d 623 (9th Cir. 1985).

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,"⁶⁹ the Admission Act provision concerning "native Hawaiians" is itself of questionable constitutionality.

(B) transferring the United States' responsibility for the administration of the Hawaiian Home Lands to the State of Hawaii, but retaining the exclusive right of the United States to consent to any actions affecting the lands included in 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."⁷⁰ 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.*⁷¹ 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

⁶⁹ *Rice v. Cayetano*, 528 U.S. 495, 514-517 (2000).

⁷⁰ *Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission*, 588 F.2d 1216, 1224 (9th Cir. 1978).

⁷¹ 824 F.Supp. 1480 (D. Hawai'i 1993), *aff'd* 45 F.3d 333 (9th Cir. 1995).

Act section 5(f). There is no such corresponding duty on the part of the United States.⁷²

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.⁷³

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, not the far larger class of "Native Hawaiians" as defined in the Akaka Bill. Its definition of "native Hawaiian" was found, in *Rice v. Cayetano*, to have an "explicit tie to race."⁷⁴ As noted in the Comment to Finding 5 above, the blatant racial basis for the HHCA and the lack of any termination of its remedy would make it 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.

⁷² *Id.* at 1486. (Internal citations omitted.)

⁷³ *Id.* 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).

⁷⁴ 528 U.S. 495, 516 (2000),

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.⁷⁵

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

Six years later, his successor, President George Bush, in signing P. L. 102-398, raised an identical equal protection concern.⁷⁶ 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."⁷⁷

*(22) the United States has continually recognized and reaffirmed that--
(A) Native Hawaiians have a cultural, historic, and land-based link to the aboriginal, indigenous, 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 false. Native Hawaiians, defined as they are in the Akaka Bill as descendants of the precontact inhabitants of the islands, necessarily have a "historic" link to their ancestors, but there is no significant survival of precontact Hawaiian culture.

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.⁷⁸ 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.⁷⁹ Thus the precontact culture of 1778 was apparently quite different from the precontact culture of the earlier immigrants.

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

⁷⁶ 28 Weekly Compilation of Presidential Documents 1876, Oct. 12, 1992.

⁷⁷ *Id.*

⁷⁸ See generally ELEANOR C. NORDYKE, *THE PEOPLES OF HAWAII* (2nd ed., 1989) 7-12.

⁷⁹ See MARTHA BECKWITH, *HAWAIIAN MYTHOLOGY* (1970), pp. 369-375.

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 1820.⁸⁰ 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.⁸¹ 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.⁸²

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 new influences into the lifestyles 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 does not exist 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.

⁸⁰ 1 KUYKENDALL, THE HAWAIIAN KINGDOM (1938) pp. 65-70.

⁸¹ 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.

⁸² See generally 3 KUYKENDALL, THE HAWAIIAN KINGDOM (1967).

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 Kanahale 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.⁸³

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*,⁸⁴ 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

⁸³ See Paul M. Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawaii*, 20 U. Haw. Law Rev. 99 (1998).

⁸⁴ 515 U.S. 200 (1995).

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.⁸⁵

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 indigenous, native people of a once-sovereign nation with whom the United States has a special political and legal relationship; and
(D) the special 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; and

Comment on Findings 22(C) and (D): These statements are inaccurate. See comments to Findings (1) and (3) above. *Rice v. Cayetano*⁸⁶ suggests 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

⁸⁵ 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.

⁸⁶ 528 U.S. 495 (2000).

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*,⁸⁷ 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.⁸⁸

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's* protection from equal protection challenges, and it may have the unintended consequence of undermining the constitutional basis of that protection as it applies to real tribes and tribal members.

(23) the State of Hawaii supports the reaffirmation of the special political and legal relationship between the Native Hawaiian governing entity and the United States as evidenced by 2 unanimous resolutions enacted by the Hawaii State Legislature in the 2000 and 2001 sessions of the Legislature and by the testimony of the Governor of the State of Hawaii before the Committee on Indian Affairs of the Senate on February 25, 2003 and March 1, 2005.

Comment: The State of Hawai'i has enacted a number of racial preferences for persons of Hawaiian ancestry since it became a state. The executive and judicial branches of state government have also supported Hawaiian-preference programs and race-conscious decision-making concerning persons of Hawaiian ancestry. Every one of these decisions, however, is presumptively unconstitutional, and at least two--the OHA voting preference and the restriction on serving as OHA trustee--have been held to violate the Constitution. The state legislature's resolutions supporting the Akaka Bill are part of this shameful tradition. They deserve to be ignored, not followed.

⁸⁷ 417 U.S. 535 (1974).

⁸⁸ *Id.*

SEC. 3. DEFINITIONS.

In this Act:

(1) ABORIGINAL, INDIGENOUS, NATIVE PEOPLE- *The term "aboriginal, indigenous, native people" means people whom Congress has recognized as the original inhabitants of the lands that later became part of the United States and who exercised sovereignty 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 Western contact. See *Rex v. Booth*⁸⁹ 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.

(2) ADULT MEMBER- *The term "adult member" means a Native Hawaiian who has attained the age of 18 and who elects to participate in the reorganization of the Native Hawaiian governing entity.*

Comment: Since this term is used in Section 7 below in affording special political privileges to persons defined by ancestry, it creates a racial classification which must pass the constitutional test of strict scrutiny. Nothing in this bill appears sufficient to satisfy this requirement.

(3) APOLOGY RESOLUTION- *The term "Apology Resolution" means Public Law 103-150, (107 Stat. 1510), a Joint Resolution extending an apology to Native Hawaiians on behalf of the United States for the participation of agents of the United States in the January 17, 1893 overthrow of the Kingdom of Hawaii.*

Comment: See Comment to Finding (13) above.

(4) COMMISSION- *The term "commission" means the Commission established under section 7(b) to provide for the certification that those adult members of the Native Hawaiian community listed on the roll meet the definition of Native Hawaiian set forth in paragraph (10).*

⁸⁹ 2 Haw. 616 (1863).

(5) COUNCIL- *The term "council" means the Native Hawaiian Interim Governing Council established under section 7(c)(2).*

Comment: No comments are offered on Definitions (4) and (5). In general, see Comment to Section 7 of the bill.

(6) INDIAN PROGRAM OR SERVICE-

(A) IN GENERAL-*The term 'Indian program or service' means any federally funded or authorized program or service provided to an Indian tribe (or member of an Indian tribe) because of the status of the members of the Indian tribe as Indians.*

(B) INCLUSIONS-*The term 'Indian program or service' includes a program or service provided by the Bureau of Indian Affairs, the Indian Health Service, or any other Federal agency.*

(7) INDIAN TRIBE-*The term 'Indian tribe' has the meaning given the term in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b).*

Comment: No comments are offered on Definitions (6) and (7).

(8) 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*⁹⁰

(9) Interagency coordinating group- *The term "Interagency Coordinating Group" means the Native Hawaiian Interagency Coordinating Group established under section 6.*

No comments are offered on Definition (9).

(10) Native Hawaiian-

(A) IN GENERAL-*Subject to subparagraph (B), for the purpose of establishing the roll authorized under section 7(c)(1) and before the reaffirmation of the special political and legal relationship between the United States and the Native Hawaiian governing entity, the term "Native Hawaiian" means--*

⁹⁰ 515 U.S. 200 (1995).

(i) an individual who is 1 of the indigenous, native people of Hawaii and who is a direct lineal descendant of the aboriginal, indigenous, native people who—
(I) resided in the islands that now comprise the State of Hawaii on or before January 1, 1893; and
(II) occupied and exercised sovereignty in the Hawaiian archipelago, including the area that now constitutes the State of Hawaii; or
(ii) an individual who is 1 of the indigenous, native people of Hawaii and who was eligible in 1921 for the programs authorized by the Hawaiian Homes Commission Act (42 Stat. 108, chapter 42) or a direct lineal descendant of that individual.
(B) NO EFFECT ON OTHER DEFINITIONS-Nothing in this paragraph affects the definition of the term 'Native Hawaiian' under any other Federal or State law (including a regulation).

Comment: This definition is indistinguishable, in its essentials, from the definition of "Hawaiian" which the U.S. Supreme Court has already found to be "racial." As with the definition of "Hawaiian," this definition identifies a class 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 3(1) of the bill defines "aboriginal, indigenous, native people" as the "original inhabitants" of the islands.

In *Rice v. Cayetano*,⁹¹ 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 the Akaka Bill, 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

⁹¹ 528 U.S. 495 (2000).

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.⁹²

It would be difficult to imagine a more thoroughgoing "ancestral inquiry" than that proposed in the foregoing section of this bill and in Section 7, or one more likely to produce the very social ills described in the quoted section from *Rice*. Through this process, U.S. citizens in Hawai'i and throughout the United States will be formally and officially segregated by race, with members of 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 any justification for classifying Hawai'i's citizens on that ground, it cannot be thought that the Akaka Bill would survive constitutional challenge.

(11) Native Hawaiian Governing Entity- The term "Native Hawaiian Governing Entity" means the governing entity organized by the Native Hawaiian people pursuant to this Act.

Comment: This Section and others in the bill indicate that there shall be only one Native Hawaiian governing entity. For the reasons set out in the Comment to Section 4(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 the bill.

(12) NATIVE HAWAIIAN PROGRAM OR SERVICE- The term 'Native Hawaiian program or service' means any program or service provided to Native Hawaiians because of their status as Native Hawaiians.

(13) OFFICE- The term "Office" means the United States Office for Native Hawaiian Relations established by section 5(a).

(14) SECRETARY- The term "Secretary" means the Secretary of the Interior.

(15) SPECIAL POLITICAL AND LEGAL RELATIONSHIP- The term 'special political and legal relationship' shall refer, except where differences are specifically indicated elsewhere in the Act, to the type of and nature of relationship the United States has with the several federally recognized Indian tribes.

⁹² *Id.* at 517.

No comments are offered on Sections 3(12) through (15).

SEC. 4. UNITED STATES POLICY AND PURPOSE.

(a) Policy- The United States reaffirms that--

(1) Native Hawaiians are a unique and distinct, indigenous, native people with whom the United States has a special political and legal relationship;

Comment: The statement "reaffirmed" is false.

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*⁹³ 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. The only way that a political relationship with this racial group could exist is for Congress to create it, and under the Constitution, that would be beyond the power of Congress.

⁹³ 417 U.S. 535 (1974).

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 political and legal relationship with the Native Hawaiian people which includes promoting the welfare of Native Hawaiians;

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

***(3) Congress possesses the authority under the Constitution, including but not limited to Article I, section 8, clause 3, 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*,⁹⁴ 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).⁹⁵

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

⁹⁴ 528 U.S. 495 (2000).

⁹⁵ *Id.* at 518.

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.

(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***
- (D) the right to become economically self-sufficient; and***

Comment: The statements in subsections 4(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, see the Comment to Finding (15) above. The statement in 4(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 4(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 the Akaka Bill raises several other 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. The apparent objective is the restoration of the government of the Hawaiian Islands before the 1893 replacement of the monarchical government with a provisional government and then a republic. 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 (and the same right to form a governing entity) as any other. Otherwise, the group which

first obtains control of the "Native Hawaiian governing entity" would have the power to exclude the minority from "the government" itself by establishing restrictive criteria for citizenship in the Native Hawaiian governing entity.

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,⁹⁶ fail to become 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 asserted special relationship and other obligations of the Federal government announced in this bill, cease to exist with respect to these individuals? It might be supposed 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 4(a)(1) and (2) of the bill, but it is equally reasonable to say that those who do 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 which is declared by the bill to be "the representative governing body of the Native Hawaiian people."

c. What would become of those of Hawaiian ancestry who might fail to meet a new definition of "Native Hawaiian" enacted by the "governing entity"?⁹⁷ 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 4(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.

⁹⁶ The bill nowhere expressly gives people of Hawaiian ancestry 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.

⁹⁷ Such a new definition might, for example, impose a blood quantum requirement to exclude anyone with less than 50% or 25% Hawaiian ancestry from citizenship in the "governing entity."

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,⁹⁸ education⁹⁹ and repatriation of cultural items including human remains. Section 3(10)(B) says not, but 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 4(a)(1) above. The implication that the United States once had or now 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 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 termination 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- The purpose of this Act is to provide a process for the reorganization of the single Native Hawaiian governing entity and the reaffirmation of the special political and legal relationship between the United States and that Native Hawaiian governing entity for purposes of continuing a government-to-government relationship.

⁹⁸ 42 U. S. Code § 11,701 et seq.

⁹⁹ 25 U. S. Code § 3001 et seq.

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, or 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. That government was succeeded by a Provisional Government in 1893, which was in turn succeeded by the Republic of Hawai'i in 1895. Both these entities were internationally recognized as the lawful governments of the Hawaiian Islands during their tenure. The Republic settled the terms of annexation to the United States in 1898. Following annexation, Hawai'i became a territory of the United States and in 1959, became a state. At no time during this period was there any other entity which claimed, or could claim, to be a "government" of the entire population of the Hawaiian Islands or of that part of the population which descended from the precontact inhabitants of the islands. There is currently no such "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 would be unconstitutional.

SEC. 5. UNITED STATES OFFICE FOR NATIVE HAWAIIAN RELATIONS.

(a) Establishment- There is established within the Office of the Secretary, the United States Office for Native Hawaiian Relations.

(b) Duties- The Office shall--

(1) continue the process of reconciliation with the Native Hawaiian people in furtherance of the Apology Resolution;

(2) upon the reaffirmation of the special political and legal relationship between the single Native Hawaiian governing entity and the United States, effectuate and coordinate the special political and legal relationship between the Native Hawaiian governing entity and

the United States through the Secretary, and with all other Federal agencies;

(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 before 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 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 Federal law or regulations promulgated under the authority of Federal law.

(c) Applicability to Department of Defense-This section shall have no applicability to the Department of Defense or to any agency or component of the Department of Defense, but the Secretary of Defense may designate 1 or more officials as liaison to the Office.

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 5(b)(3) to consulting with "the Native Hawaiian people and the Native Hawaiian governing entity," the reference in subsection 5(b)(1) to continuing the reconciliation process with "the Native Hawaiian people" and the reference in subsection 5(b)(2) to effectuating the special relationship between the United States and the "Native Hawaiian governing entity" enhances the ambiguity of the status of persons of Hawaiian ancestry who are not citizens of the new government. This section appears to acknowledge that the "special political and legal relationship" would exist only between the United States and the "governing entity" and would not extend to the "Native Hawaiian people," yet it obliges Federal agencies to extend special opportunities for consultation to "the Native Hawaiian people." If persons of Hawaiian ancestry but 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 bill does not provide any guidance as to how, as a practical matter, consultation with the "Native Hawaiian people" could be effectively carried out except through the "governing entity."

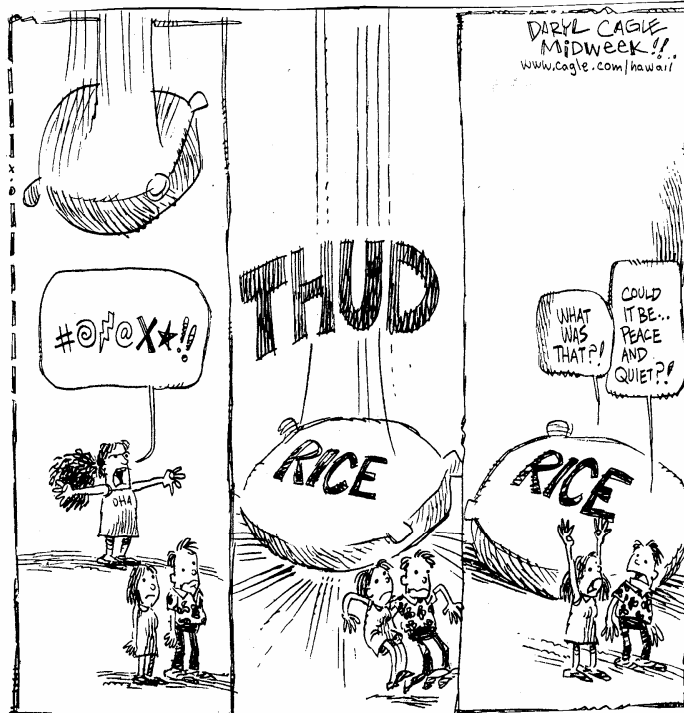
The section further requires consultation on matters that may "significantly or uniquely affect Native Hawaiian resources, rights or lands." This ambiguous phrase requires clarification.

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.¹⁰⁰ 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

¹⁰⁰ Rice v. Cayetano, 528 U.S. 495 (2000).

"Native Hawaiians," careful legal and historical research shows that these claims are baseless.

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 should not be considered unless its proponents provide a clear and narrow definition of the term "Native Hawaiian resources, rights or lands" together with a refinement of the scope of the consultation requirement. Without these changes, those voting on the bill will have no clear picture of its consequences.¹⁰¹

¹⁰¹ Section 148 of Division H of Public Law 108-199 enacted the following somewhat modified version of Section 5 of the Akaka Bill:

UNITED STATES OFFICE FOR NATIVE HAWAIIAN RELATIONS.

(a) ESTABLISHMENT.-The sum of \$100,000 is appropriated, to remain available until expended, for the establishment of the Office of Native Hawaiian Relations within the Office of the Secretary of the Interior.

(b) DUTIES.-The Office shall-

- (1) effectuate and implement the special legal relationship between the Native Hawaiian people and the United States;
- (2) continue the process of reconciliation with the Native Hawaiian people; and
- (3) fully integrate the principle and practice of meaningful, regular, and appropriate consultation with the Native Hawaiian people by assuring timely notification of and

SEC. 6. NATIVE HAWAIIAN INTERAGENCY COORDINATING GROUP.

(a) Establishment- *In recognition 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 Native Hawaiian resources, rights, or lands; and*

(2) *the Office.*

(c) Lead Agency-

(1) *In general-* *The Department of the Interior shall serve as the lead agency of the Interagency Coordinating Group.*

(2) *Meetings-* *The Secretary shall convene meetings of the Interagency Coordinating Group.*

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 Interagency Coordinating Group shall--*

(1) *coordinate Federal programs and policies that affect Native Hawaiians or actions by any agency or agencies of the Federal Government that may significantly or uniquely affect Native Hawaiian resources, rights, or lands;*

prior consultation with the Native Hawaiian people before any Federal agency takes any actions that may have the potential to significantly affect Native Hawaiian resources, rights, or lands.

This section echoes parts of Section 5 but the reference to federal agency consultations is worded differently. The Department of the Interior reportedly has established the office and anticipates staffing it with a GS-13 program analyst.

(2) consult with the Native Hawaiian governing entity, through the coordination referred to in section 6(d)(1), but the consultation obligation established in this provision shall apply only after the satisfaction of all of the conditions referred to in section 7(c)(6); and

(3) ensure the participation of each Federal agency in the development of the report to Congress authorized in section 5(b)(5).

(e) Applicability to Department of Defense-This section shall have no applicability to the Department of Defense or to any agency or component of the Department of Defense, but the Secretary of Defense may designate 1 or more officials as liaison to the Interagency Coordinating Group.

Comment: This section of the bill perpetuates the same ambiguity discussed in the Comment to Section 5 above concerning the definition, rights and prerogatives of "Native Hawaiians" as distinguished from "the Native Hawaiian people" and from the "Native Hawaiian governing entity." This ambiguity will surely make the "coordination" and "consultation" referred to in this section impossibly complex, because the statute appears to require consultation and coordination not only with the new entity on matters of government-to-government significance, but with all those, within or outside the new entity, who meet the bill's definition of "Native Hawaiian" and whose resources, rights or land may be affected by a Federal action. This would be an extreme burden on the governmental agencies involved, as well as an unconstitutional racial preference.

SEC. 7. PROCESS FOR THE REORGANIZATION OF THE NATIVE HAWAIIAN GOVERNING ENTITY AND THE REAFFIRMATION OF THE SPECIAL POLITICAL AND LEGAL RELATIONSHIP BETWEEN THE UNITED STATES AND THE NATIVE HAWAIIAN GOVERNING ENTITY.

(a) Recognition of the Native Hawaiian Governing Entity- The right of the Native Hawaiian people to reorganize the single Native Hawaiian governing entity to provide for their common welfare and to adopt appropriate organic governing documents is recognized by the United States.

Comment: As more fully explained elsewhere in this booklet, this statement incorrectly implies that there was once a "Native Hawaiian governing entity," at least during the period of the monarchy or afterward, and that it could be "reorganized" without violating the U.S. Constitution. It also expressly recognizes that a group defined solely by race has a "right" to form a racially restricted governing entity. From time to time, white voters in the American South sought to organize racially exclusive governmental enclaves. Federal statutes and the U.S. Supreme Court have made it clear that such racial restrictions on participation in government are unacceptable.¹⁰²

¹⁰² See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *State of North Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Shaw v. Reno*, 509 U.S. 630 (1993).

(b) Commission-

(1) IN GENERAL- There is authorized to be established a Commission to be composed of 9 members for the purposes of--

(A) preparing and maintaining a roll of the adult members of the Native Hawaiian community who elect to participate in the reorganization of the single Native Hawaiian governing entity; and

(B) certifying that the adult members of the Native Hawaiian community proposed for inclusion on the roll meet the definition of Native Hawaiian in section 3(10).

(2) MEMBERSHIP-

(A) APPOINTMENT-

(i) IN GENERAL- Not later than 180 days after the date of enactment of this Act, the Secretary shall appoint the members of the Commission in accordance with subparagraph (B).

(ii) CONSIDERATION- In making an appointment under clause (i), the Secretary may take into consideration a recommendation made by any Native Hawaiian organization.

(B) REQUIREMENTS- Each member of the Commission shall demonstrate, as determined by the Secretary--

(i) not less than 10 years of experience in the study and determination of Native Hawaiian genealogy; and

(ii) an ability to read and translate into English documents written in the Hawaiian language.

(C) VACANCIES- A vacancy on the Commission--

(i) shall not affect the powers of the Commission; and

(ii) shall be filled in the same manner as the original appointment.

(3) EXPENSES- Each member of the Commission shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, while away from their homes or regular places of business in the performance of services for the Commission.

(4) DUTIES- The Commission shall--

(A) prepare and maintain a roll of the adult members of the Native Hawaiian community who elect to participate in the reorganization of the Native Hawaiian governing entity; and

(B) certify that each of the adult members of the Native Hawaiian community proposed for inclusion on the roll meets the definition of Native Hawaiian in section 3(10).

(5) STAFF-

(A) IN GENERAL- The Commission may, without regard to the civil service laws (including regulations), appoint and terminate an executive director and such other additional personnel as are necessary to enable the Commission to perform the duties of the Commission.

(B) COMPENSATION-

(i) IN GENERAL- Except as provided in clause (ii), the Commission may fix the compensation of the executive director and other personnel without regard to the

provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, relating to classification of positions and General Schedule pay rates.

(ii) MAXIMUM RATE OF PAY- The rate of pay for the executive director and other personnel shall not exceed the rate payable for level V of the Executive Schedule under section 5316 of title 5, United States Code.

(6) DETAIL OF FEDERAL GOVERNMENT EMPLOYEES-

(A) IN GENERAL- *An employee of the Federal Government may be detailed to the Commission without reimbursement.*

(B) CIVIL SERVICE STATUS- *The detail of the employee shall be without interruption or loss of civil service status or privilege.*

(7) PROCUREMENT OF TEMPORARY AND INTERMITTENT SERVICES- *The Commission may procure temporary and intermittent services in accordance with section 3109(b) of title 5, United States Code, at rates for individuals that do not exceed the daily equivalent of the annual rate of basic pay prescribed for level V of the Executive Schedule under section 5316 of that title.*

(8) EXPIRATION- *The Secretary shall dissolve the Commission upon the reaffirmation of the special political and legal relationship between the Native Hawaiian governing entity and the United States.*

(c) Process for the Reorganization of the Native Hawaiian Governing Entity-

(1) ROLL-

(A) CONTENTS- *The roll shall include the names of the adult members of the Native Hawaiian community who elect to participate in the reorganization of the Native Hawaiian governing entity and are certified to be Native Hawaiian as defined in section 3(10) by the Commission.*

(B) FORMATION OF ROLL- *Each adult member of the Native Hawaiian community who elects to participate in the reorganization of the Native Hawaiian governing entity shall submit to the Commission documentation in the form established by the Commission that is sufficient to enable the Commission to determine whether the individual meets the definition of Native Hawaiian in section 3(10).*

(C) DOCUMENTATION- *The Commission shall--*

(i) identify the types of documentation that may be submitted to the Commission that would enable the Commission to determine whether an individual meets the definition of Native Hawaiian in section 3(10);

(ii) establish a standard format for the submission of documentation; and

(iii) publish information related to clauses (i) and (ii) in the Federal Register.

(D) CONSULTATION- *In making determinations that each of the adult members of the Native Hawaiian community proposed for inclusion on the roll meets the definition of Native Hawaiian in section 3(10), the Commission may consult with Native Hawaiian organizations, agencies of the State of Hawaii including but not limited to the Department of Hawaiian Home Lands, the Office of Hawaiian Affairs, and the State Department of Health, and other entities with expertise and experience in the determination of Native Hawaiian ancestry and lineal descendancy.*

(E) CERTIFICATION AND SUBMITTAL OF ROLL TO SECRETARY- *The Commission shall--*

(i) submit the roll containing the names of the adult members of the Native Hawaiian community who meet the definition of Native Hawaiian in section 3(10) to the Secretary within two years from the date on which the Commission is fully composed; and

(ii) certify to the Secretary that each of the adult members of the Native Hawaiian community proposed for inclusion on the roll meets the definition of Native Hawaiian in section 3(10).

(F) PUBLICATION- Upon certification by the Commission to the Secretary that those listed on the roll meet the definition of Native Hawaiian in section 3(10), the Secretary shall publish the roll in the Federal Register.

(G) APPEAL- The Secretary may establish a mechanism for an appeal for any person whose name is excluded from the roll who claims to meet the definition of Native Hawaiian in section 3(10) and to be 18 years of age or older.

(H) PUBLICATION; UPDATE- The Secretary shall--

(i) publish the roll regardless of whether appeals are pending;

(ii) update the roll and the publication of the roll on the final disposition of any appeal; and

(iii) update the roll to include any Native Hawaiian who has attained the age of 18 and who has been certified by the Commission as meeting the definition of Native Hawaiian in section 3(10) after the initial publication of the roll or after any subsequent publications of the roll.

(I) FAILURE TO ACT- If the Secretary fails to publish the roll, not later than 90 days after the date on which the roll is submitted to the Secretary, the Commission shall publish the roll notwithstanding any order or directive issued by the Secretary or any other official of the Department of the Interior to the contrary.

(J) EFFECT OF PUBLICATION- The publication of the initial and updated roll shall serve as the basis for the eligibility of adult members of the Native Hawaiian community whose names are listed on those rolls to participate in the reorganization of the Native Hawaiian governing entity.

(2) ORGANIZATION OF THE NATIVE HAWAIIAN INTERIM GOVERNING COUNCIL-

(A) ORGANIZATION- The adult members of the Native Hawaiian community listed on the roll published under this section may--

(i) develop criteria for candidates to be elected to serve on the Native Hawaiian Interim Governing Council;

(ii) determine the structure of the Council; and

(iii) elect members from individuals listed on the roll published under this subsection to the Council.

(B) POWERS-

(i) IN GENERAL- The Council--

(I) may represent those listed on the roll published under this section in the implementation of this Act; and

(II) shall have no powers other than powers given to the Council under this Act.

(ii) **FUNDING-** *The Council may enter into a contract with, or obtain a grant from, any Federal or State agency to carry out clause (iii).*

(iii) **ACTIVITIES-**

(I) **IN GENERAL-** *The Council may conduct a referendum among the adult members of the Native Hawaiian community listed on the roll published under this subsection for the purpose of determining the proposed elements of the organic governing documents of the Native Hawaiian governing entity, including but not limited to—*

(aa) *the proposed criteria for citizenship of the Native Hawaiian governing entity;*

(bb) *the proposed powers and authorities to be exercised by the Native Hawaiian governing entity, as well as the proposed privileges and immunities of the Native Hawaiian governing entity;*

(cc) *the proposed civil rights and protection of the rights of the citizens of the Native Hawaiian governing entity and all persons affected by the exercise of governmental powers and authorities of the Native Hawaiian governing entity; and*

(dd) *other issues determined appropriate by the Council.*

(II) **DEVELOPMENT OF ORGANIC GOVERNING DOCUMENTS-** *Based on the referendum, the Council may develop proposed organic governing documents for the Native Hawaiian governing entity.*

(III) **DISTRIBUTION-** *The Council may distribute to all adult members of the Native Hawaiian community listed on the roll published under this subsection—*

(aa) *a copy of the proposed organic governing documents, as drafted by the Council;*

and (bb) *a brief impartial description of the proposed organic governing documents;*

(IV) **ELECTIONS-** *The Council may hold elections for the purpose of ratifying the*

proposed organic governing documents, and on certification of the organic governing

documents by the Secretary in accordance with paragraph (4), hold elections of the officers of the Native Hawaiian governing entity pursuant to paragraph

(5).



Comment. This section of the Akaka Bill proposes several preliminary steps which would lead to the formation of a Native Hawaiian governing entity. In summary, this section requires the establishment of a commission by, and apparently with the financial support of, the Department of the Interior to evaluate the racial qualifications of those who wish to participate in forming the proposed "governing entity." The sole function of the members of the commission is to ensure that only those with demonstrably acceptable racial credentials may share in the formation of the new "governing entity." Once the roll

is complete it will be forwarded to the Secretary of the Interior for publication and for resolution of any appeals by persons excluded from the roll who claim to be "Native Hawaiians." This process places upon the Secretary the pernicious role of adjudicating the "Hawaiianness"--that is, the racial character--of a group of American citizens.

(3) SUBMITTAL OF ORGANIC GOVERNING DOCUMENTS- *Following the reorganization of the Native Hawaiian governing entity and the adoption of organic governing documents, the Council shall submit the organic governing documents of the Native Hawaiian governing entity to the Secretary.*

(4) CERTIFICATIONS-

(A) IN GENERAL- *Within the context of the future negotiations to be conducted under the authority of section 8(b)(1), and the subsequent actions by the Congress and the State of Hawaii to enact legislation to implement the agreements of the 3 governments, not later than 90 days after the date on which the Council submits 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 adult members of the Native Hawaiian community whose names are listed on the roll published by the Secretary;*
- (iii) provide authority for the Native Hawaiian governing entity to negotiate with Federal, State, and local governments, and other entities;*
- (iv) provide for the exercise of governmental authorities by the Native Hawaiian governing entity, including any authorities that may be delegated to the Native Hawaiian governing entity by the United States and the State of Hawaii following negotiations authorized in section 8(b)(1) and the enactment of legislation to implement the agreements of the 3 governments;*
- (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 affected by the exercise of governmental powers and authorities by the Native Hawaiian governing entity; and*
- (vii) are consistent with applicable Federal law and the special political and legal relationship between the United States and the indigenous, native people of the United States; provided that the provisions of Public Law 103-454, 25 U.S.C. 479a, shall not apply.*

(B) RESUBMISSION IN CASE OF NONCOMPLIANCE WITH THE REQUIREMENTS OF SUBPARAGRAPH (A)-

(i) RESUBMISSION BY THE SECRETARY- *If the Secretary determines that the organic governing documents, or any part of the documents, do not meet all of the requirements set forth in subparagraph (A), the Secretary shall resubmit the organic governing documents to the Council, along with a justification for each of the Secretary's findings as to why the provisions are not in full compliance.*

(ii) AMENDMENT AND RESUBMISSION OF ORGANIC GOVERNING DOCUMENTS- *If the organic governing documents are resubmitted to the Council by the Secretary under clause (i), the Council shall--*

(I) *amend the organic governing documents to ensure that the documents meet all the requirements set forth in subparagraph (A); and*

(II) *resubmit the amended organic governing documents to the Secretary for certification in accordance with this paragraph.*

(C) CERTIFICATIONS DEEMED MADE- *The certifications under paragraph (4) shall be deemed to have been made if the Secretary has not acted within 90 days after the date on which the Council has submitted the organic governing documents of the Native Hawaiian governing entity to the Secretary.*

(5) ELECTIONS- *On completion of the certifications by the Secretary under paragraph (4), the Council may hold elections of the officers of the Native Hawaiian governing entity.*

(6) REAFFIRMATION- *Notwithstanding any other provision of law, upon the certifications required under paragraph (4) and the election of the officers of the Native Hawaiian governing entity, the special political and legal relationship between the United States and the Native Hawaiian governing entity is hereby reaffirmed and the United States extends Federal recognition to the Native Hawaiian governing entity as the representative governing body of the Native Hawaiian people.*

Comment. 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.

It is not clear from the legislation what status the "governing entity" will acquire when the "United States extends Federal recognition" to the entity "as the representative governing body of the Native Hawaiian people." Section 7(c)(4)(A) of the bill requires, at subparagraph (iv), that the Secretary of the Department of the Interior ((DoI)) certify that the organic documents prepared by the governing entity "provide for the exercise of governmental authorities by the Native Hawaiian governing entity, including any authorities that may be delegated to the Native Hawaiian governing entity by the United States and the State of Hawaii" and that the organic documents "provide for the protection of the civil rights of the citizens of the Native Hawaiian governing entity and all persons affected by the exercise of governmental powers and authorities by the Native Hawaiian governing entity[.]" These sections, read in isolation, suggest that the entity could achieve some level of governmental power according to the terms of its organic documents simply by the Secretary's certification.

Section 7(c)(4)(A), however, requires that the Secretary's certification be accomplished "[w]ithin the context of the future negotiations to be conducted under the authority of section 8(b)(1), and the subsequent action by the Congress and the State of Hawaii to enact legislation to implement the agreements of the 3 governments[.]" What these provisions mean is unclear. If recognition is to be "within" the context of future

events, then recognition could not be effective until those future events occurred. These negotiations cannot even begin until after the Secretary has made the specified certifications, and so the Secretary's certification could, at most, result in the "recognition" of a governing entity only with authority over its own members.

Bringing nonmembers, whether of Hawaiian ancestry or not, within the power of the governing entity involuntarily would require a cession or transfer of state or federal authority by legislation of one or both governments, assuming it could be done at all under state and Federal constitutions. The Secretarial certification and the resulting automatic "recognition" of the governing entity might give the entity some authority with respect to Federal and state governments, but notwithstanding the language of Section 7(c)(6), neither the Congress nor the Secretary could invest that entity with authority to be "the representative governing body of the Native Hawaiian people." The Declaration of Independence pointed out that ". . . Governments are instituted among Men, deriving their just Powers from the Consent of the Governed." The only consent of any Native Hawaiians to the authority of the newly-created "governing entity" would have been manifested by individuals in submitting their names for the roll. Even that consent would logically be revocable, although the bill says nothing on this point. Native Hawaiians who saw fit not to seek a place on the roll would remain just as they are now, citizens of the state and the nation entitled to petition their government as individuals or as members of groups of their own choosing, and entitled as well to be free from involuntary subjection to a "governing entity" other than a duly constituted state or local government. Indeed, Section 4(a)(4) of the bill strongly implies that rights of autonomy and self-determination reside equally in each Native Hawaiian individual. Such racially-limited rights are wholly incompatible with the Constitution, but assuming they do exist, then if Congress intends to take those rights from all Native Hawaiians who decline to join the new "entity" it should state so clearly, so that legislators and citizens can make appropriate decisions about passing the bill.

It must therefore be concluded that the "recognition" referred to in section 7(c)(6) would not confer true governmental powers on the entity other than those which it would have, without any Secretarial action, as the governing body of a private voluntary organization. Any transfer of power or authority which would have to be worked out in "the context of the future negotiations to be conducted under the authority of section 8(b)(1)" and which would require "subsequent action by the Congress and the State of Hawaii to enact legislation" could not be accomplished by the Secretarial "recognition."

This lack of power, however, does not mean that there is no harm in forming the entity. The entity, once created, will have a privileged status in the competition among Hawai'i's citizens for a share of the state's land and other resources. Its very existence will raise expectations among its members that a special claim on the state lands and funds is their due. There will be immense pressure on state and Federal negotiators to make concessions to the entity's demands, if only to avoid a backlash by the entity's citizens if their expectations are not met.

Worst of all, the disenfranchisement of the rest of Hawai'i's population will be manifest. Nowhere is there any provision for a plebiscite of all the people of Hawai'i, all of whom will be affected by the creation of this "sovereign" entity within its borders. Roughly 80% of the state's population has no Hawaiian ancestry, but they share the responsibilities of paying taxes together with the 20% who are Hawaiians, and they share the accessibility to and use of state lands and other state resources. The new entity will split the state resource pool between Hawaiians and non-Hawaiians and enact a set of privileges and responsibilities for its citizens different from those of the rest of the state's population, without affecting in any way the entitlement of its citizens to all the additional benefits of citizenship in the State of Hawai'i and the nation. History warns that the racial divide involuntarily imposed by this bill on Hawai'i's non-Hawaiian population will be a constant source of rancor.

SEC. 8. REAFFIRMATION OF DELEGATION OF FEDERAL AUTHORITY; NEGOTIATIONS; CLAIMS.

(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 reaffirmed.

Comment: The fundamental premise of this proposed "reaffirmation" is false. 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" (50% or greater Hawaiian "blood"), not "Native Hawaiians" as defined in the Akaka Bill. Under *Rice v. Cayetano*,¹⁰³ 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 be subject to the standards of strict scrutiny. As noted elsewhere in this booklet, this statute cannot meet that standard.

(b) Negotiations-

(1) In general- Upon the reaffirmation of the special political and legal relationship between the United States and the Native Hawaiian governing entity, the United States and the State of Hawaii may enter into negotiations with the Native Hawaiian governing entity designed to lead to an agreement addressing such matters as--

(A) the transfer of lands, natural resources, and other assets, and the protection of existing rights related to such lands or resources;

(B) the exercise of governmental authority over any transferred lands, natural resources, and other assets, including land use;

¹⁰³ 528 U.S. 495 (2000).

(C) the exercise of civil and criminal jurisdiction;
(D) the delegation of governmental powers and authorities to the Native Hawaiian governing entity by the United States and the State of Hawaii;
(E) any residual responsibilities of the United States and the State of Hawaii; and
(F) grievances regarding assertions of historical wrongs committed against Native Hawaiians by the United States or by the State of Hawaii.

(2) Amendments to existing laws- Upon agreement on any matter or matters negotiated with the United States, the State of Hawaii, and the Native Hawaiian governing entity, the parties are authorized to submit--

(A) to the Committee on Indian Affairs of the Senate, the Committee on Energy and Natural Resources of the Senate, and the Committee on Resources of the House of Representatives, recommendations for proposed amendments to Federal law that will enable the implementation of agreements reached between the 3 governments; and
(B) to the Governor and the legislature of the State of Hawaii, recommendations for proposed amendments to State law that will enable the implementation of agreements reached between the 3 governments.

(3) GOVERNMENTAL AUTHORITY AND POWER- Any governmental authority or power to be exercised by the Native Hawaiian governing entity which is currently exercised by the State or Federal Governments shall be exercised by the Native Hawaiian governing entity only as agreed to in negotiations pursuant to section 8(b)(1) of this Act and beginning on the date on which legislation to implement such agreement has been enacted by the United States Congress, when applicable, and by the State of Hawaii, when applicable. This includes any required modifications to the Hawaii State Constitution in accordance with the Hawaii Revised Statutes.

Comment: The bill says nothing about what specific powers, responsibilities, or resources the new entity will have. The bill gives the entity no interim "governmental" authority while the process of negotiation and legislation is going on. It gives it no territorial "reservation" or any legal jurisdiction over any geographic area. It gives it no power over its own members. It does not authorize or require the entity to provide any governmental services to those members. It provides no resources for the entity and it gives the entity no authority to obtain its own resources, whether by taxing its own members or otherwise.

Instead, it authorizes the entity to enter into negotiations with the United States and the State of Hawai'i on the specific subjects listed above. If and when agreements are reached, they will be reported to Congress and the Hawai'i state legislature with recommendations for implementing legislation. The bill, however, does not require that negotiations be concluded within a specific time or even that they be concluded at all.

There is no existing body of law which might fill in the blanks. There are many laws, regulations and judicial decisions which concern the powers and obligations of Indian tribes, but these would not apply to this unique, newly-created, racially-defined entity. They would not apply as a practical matter because they are intended for real

tribes which had real historical existence and real governmental authority long before they were federally recognized. They would not apply as a legal matter because the Akaka Bill expressly declares that the entity's powers are to come into existence only in the future, and only after the negotiation/legislation process has taken place.

Thus for all practical purposes, until the negotiations are concluded and all the necessary implementing state and federal legislation is enacted, the "governing" entity will be nothing but a private, voluntary organization. It will only gain form and substance after negotiations which are almost certain to be lengthy, contentious and fraught with litigation and the uncertainties of legislation in two jurisdictions. Indeed, the negotiations process itself might not even start until the inevitable constitutional challenges to the bill are resolved. The "recognition" of the entity so bravely declared in Section 7(6) will therefore be a cruel joke which neither acknowledges the existence of a true government nor creates one.

The bill also tells us nothing about what Congress or the bill's proponents think the "governing entity" will look like once the process of negotiation and legislation is concluded. There is no guidance for the negotiators as to what powers and responsibilities the entity must have, what powers and responsibilities it may be offered at the discretion of the negotiators, and what powers and responsibilities it must not receive at all. Without guidance in the legislation, the negotiators' positions will principally reflect the current political philosophies of those who will appoint them. There is a vigorous national debate over what governmental authority Indian tribes should and should not have. The Federal government has not been entirely consistent in its positions. If the Federal negotiators insist that governmental authority for the new Hawaiian entity be narrow and limited, those who believe that Congress intended something different will have nothing in the bill to support their point of view. There can be no argument that such Federal negotiators failed to follow the will of Congress, since Congress has not expressed its will. Indeed, nothing in the bill even requires that the negotiations result in agreement. If the negotiators reach impasse, the "governing entity" may never receive any powers, any authority, any lands, or any other indicia of governmental character.

However, while the Akaka Bill guarantees nothing to the new entity, it prohibits nothing, either. Nothing in the bill sets any limits to what negotiations might produce if Congress and the state pass appropriate implementing legislation. Nothing in the bill, for example, would prevent the state and Federal negotiators from giving away public, and even private, property to the new entity and placing some or all of the citizens of the state, involuntarily, under the new entity's governmental authority. Nothing in the bill prevents negotiators from establishing Hawaiian-controlled sectors which include both Hawaiian and non-Hawaiian individuals and within which both Hawaiian-entity law, state and local laws, or all of these apply concurrently. Nothing in the bill prevents negotiators, with legislative approval if necessary, from subjecting non-Hawaiians in these sectors to Hawaiian-entity land use, civil and criminal laws. Nothing in the bill

prevents the Hawaiian entity and state and local governments from double-taxing individuals and imposing independent and duplicative sets of license and regulatory obligations on businesses located or working in Hawaiian-entity-controlled areas.

On the other side of the ledger, nothing in the bill requires the Hawaiian entity to provide schools, roads and other social services to its citizens or relieves the state and federal government from some or all of these obligations.

There is also no provision in the bill for bringing all of Hawai'i's citizens directly into the process of approving the final result. The negotiation process could initiate vast changes in the governance of the state and in the ownership and control of its property. These could well be changes of constitutional magnitude—changes which should be referred to the whole citizenry of the state for acceptance or rejection. Under the Akaka Bill, only the state legislature and Congress need vote on these changes. While it might be argued that Hawai'i state law would require a vote of the populace before some or all necessary changes in state law could take effect, the Akaka Bill should not leave the matter to state law; it should unequivocally mandate a plebiscite.

Of course, there are boundaries outside the Akaka Bill which will limit what the negotiators and legislators can do. Negotiated decisions and new laws which violate state or Federal constitutional restrictions will be subject to legal challenge. The inherent complexity and uncertainty of the legislative process itself will limit what can be accomplished; some negotiated decisions, for example, which require new or amended laws at both state and Federal levels will be approved only by one of those jurisdictions, and those decisions will never become effective. Such frustrating failures of the Akaka Bill's negotiation/legislation process may incidentally prevent bad state and Federal decisions, but they are hardly a high-minded way to run a government.

Section 8(b)(1)(F) of the bill adds "grievances regarding assertions of historical wrongs committed against Native Hawaiians by the United States or by the State of Hawaii" to the list of matters to be negotiated between the new entity, the U.S. and the State of Hawai'i. These "grievances" are not listed, but it may safely be assumed that they include the overthrow of the monarchy in 1893, the annexation of Hawai'i to the U.S. in 1898 and the cession of Hawai'i's government lands to the U.S. at that time. They are likely also to include the lesser litany of alleged "wrongs" which amount essentially to the social and economic changes associated with Hawai'i's rapid transition, under its monarchy, from a stone age culture to a modern nineteenth century monarchy in the Western style. Careful reviews of these claims on several occasions over the past 20 years or so indicate that these claims of wrongdoing by the U.S. and by the State of Hawai'i have no historical, moral or legal validity,¹⁰⁴ and that in any event there are no persistent consequences of those alleged wrongs existing or remediable today. The

¹⁰⁴ See, e.g., Comments to Sections 1(13) and 1(18) above.

inclusion of these "grievances" in the list of items open to negotiation is only likely to extend and perhaps entirely frustrate that negotiation process.

Unfortunately, litigation is the natural result of leaving important decisions to negotiations, particularly when the law gives no hint to the negotiators as to the outcome which Congress desires and the rules or standards to be applied in achieving it. Sadly but inevitably, whatever the other effects of the Akaka Bill might be, many lawyers will grow rich.

(c) Claims-

(1) DISCLAIMERS- Nothing in this Act--

(A) creates a cause of action against the United States or any other entity or person;

(B) alters existing law, including existing case law, regarding obligations on the part of the United States or the State of Hawaii with regard to Native Hawaiians or any Native Hawaiian entity;

(C) creates obligations that did not exist in any source of Federal law prior to the date of enactment of this Act; or

(D) establishes authority for the recognition of Native Hawaiian groups other than the single Native Hawaiian Governing Entity.

(2) FEDERAL SOVEREIGN IMMUNITY-

(A) SPECIFIC PURPOSE- Nothing in this Act is intended to create or allow to be maintained in any court any potential breach-of-trust actions, land claims, resource-protection or resource-management claims, or similar types of claims brought by or on behalf of Native Hawaiians or the Native Hawaiian governing entity for equitable, monetary, or Administrative Procedure Act-based relief against the United States or the State of Hawaii, whether or not such claims specifically assert an alleged breach of trust, call for an accounting, seek declaratory relief, or seek the recovery of or compensation for lands once held by Native Hawaiians.

(B) ESTABLISHMENT AND RETENTION OF SOVEREIGN IMMUNITY- To effectuate the ends expressed in section 8(c)(1) and 8(c)(2)(A), and notwithstanding any other provision of Federal law, the United States retains its sovereign immunity to any claim that existed prior to the enactment of this Act (including, but not limited to, any claim based in whole or in part on past events), and which could be brought by Native Hawaiians or any Native Hawaiian governing entity. Nor shall any preexisting waiver of sovereign immunity (including, but not limited to, waivers set forth in chapter 7 of part I of title 5, United States Code, and sections 1505 and 2409a of title 28, United States Code) be applicable to any such claims. This complete retention or reclaiming of sovereign immunity also applies to every claim that might attempt to rely on this Act for support, without regard to the source of law under which any such claim might be asserted.

(C) EFFECT- It is the general effect of section 8(c)(2)(B) that any claims that may already have accrued and might be brought against the United States, including any claims of the types specifically referred to in section 8(c)(2)(A), along with both claims

of a similar nature and claims arising out of the same nucleus of operative facts as could give rise to claims of the specific types referred to in section 8(c)(2)(A), be rendered nonjusticiable in suits brought by plaintiffs other than the Federal Government.

(3) STATE SOVEREIGNTY IMMUNITY-

(A) Notwithstanding any other provision of Federal law, the State retains its sovereign immunity, unless waived in accord with State law, to any claim, established under any source of law, regarding Native Hawaiians, that existed prior to the enactment of this Act.

(B) Nothing in this Act shall be construed to constitute an override pursuant to section 5 of the Fourteenth Amendment of State sovereign immunity held under the Eleventh Amendment.

Comment: This astonishing set of paragraphs appears not only to preserve the sovereign immunity of the United States from any and all lawsuits by the new entity, based on anything in the past, under this bill or otherwise, but to retract any waivers of sovereign immunity for such claims under existing law. The language of the bill is exceptionally broad. If it survives the legislative process, this subsection would appear to effectively neutralize any attempt by the new entity to use the courts to challenge Federal authority in Hawai'i, or Federal control or ownership of lands in Hawai'i (including submerged lands), on the basis of any claimed past "wrongs" or any claimed historical rights of Native Hawaiians.

SEC. 9. APPLICABILITY OF CERTAIN FEDERAL LAWS.

(a) Indian Gaming Regulatory Act-

(1) The Native Hawaiian governing entity and Native Hawaiians may not conduct gaming activities as a matter of claimed inherent authority or under the authority of any Federal law, including the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.) or under any regulations thereunder promulgated by the Secretary or the National Indian Gaming Commission.

(2) The foregoing prohibition in section 9(a)(1) on the use of Indian Gaming Regulatory Act and inherent authority to game apply regardless of whether gaming by Native Hawaiians or the Native Hawaiian governing entity would be located on land within the State of Hawaii or within any other State or Territory of the United States.

(b) Taking Land Into Trust- Notwithstanding any other provision of law, including but not limited to part 151 of title 25, Code of Federal Regulations, the Secretary shall not take land into trust on behalf of individuals or groups claiming to be Native Hawaiian or on behalf of the native Hawaiian governing entity.

(c) Real Property Transfers- The Indian Trade and Intercourse Act (25 U.S.C. 177), does not, has never, and will not apply after enactment to lands or lands transfers present, past, or future, in the State of Hawaii. If despite the expression of this intent herein, a court were to construe the Trade and Intercourse Act to apply to lands or

land transfers in Hawaii before the date of enactment of this Act, then any transfer of land or natural resources located within the State of Hawaii prior to the date of enactment of this Act, by or on behalf of the Native Hawaiian people, or individual Native Hawaiians, shall be deemed to have been made in accordance with the Indian Trade and Intercourse Act and any other provision of Federal law that specifically applies to transfers of land or natural resources from, by, or on behalf of an Indian tribe, Native Hawaiians, or Native Hawaiian entities.

(d) Single Governing Entity- This Act will result in the recognition of the single Native Hawaiian governing entity. Additional Native Hawaiian groups shall not be eligible for acknowledgment pursuant to the Federal Acknowledgment Process set forth in part 83 of title 25 of the Code of Federal Regulations or any other administrative acknowledgment or recognition process.

(e) Jurisdiction- Nothing in this Act alters the civil or criminal jurisdiction of the United States or the State of Hawaii over lands and persons within the State of Hawaii. The status quo of Federal and State jurisdiction can change only as a result of further legislation, if any, enacted after the conclusion, in relevant part, of the negotiation process established in section 8(b).

(f) Indian Programs and Services- Notwithstanding section 7(c)(6), because of the eligibility of the Native Hawaiian governing entity and its citizens for Native Hawaiian programs and services in accordance with subsection (g), nothing in this Act provides an authorization for eligibility to participate in any Indian program or service to any individual or entity not otherwise eligible for the program or service under applicable Federal law.

(g) Native Hawaiian Programs and Services- The Native Hawaiian governing entity and its citizens shall be eligible for Native Hawaiian programs and services to the extent and in the manner provided by other applicable laws.

Comment: Section 9(c), in the breadth and certainty of its language, parallels the provisions of Section 8 explicitly denying any waiver of sovereign immunity in this bill and withdrawing inconsistent past waivers. The intent of the bill is manifestly to foreclose any claims by or on behalf of Native Hawaiians relating to anything that happened in the past.

Sections 9(a) and 9(f) give illusory assurance that the Akaka Bill will not bring gambling to Hawai'i or threaten the benefits now received by true Indian tribes. Nothing in this act would prevent Congress, at any time, from bringing the new "governing entity" or its constituents within the statute or the programs referred to, or from enacting new Federal statutes or creating new programs of the same or similar character for the new entity or its constituents. Indeed, such changes would surely be among the first to be presented to Congress through the negotiation/legislation process of Section 8 of the bill. The new entity will quickly point out that if it is indeed a sovereign entity like an Indian tribe (as the Akaka Bill itself implies), it would be inequitable and perhaps unconstitutional (notwithstanding Congress' plenary power with respect to tribes) not to give it and its members the same status and privileges that all other tribes enjoy.

SEC. 10. SEVERABILITY.

If any section or provision of this Act is held invalid, it is the intent of Congress that the remaining sections or provisions shall continue in full force and effect.

Comment: No comments are provided on this section of the bill.

SEC. 11. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated such sums as are necessary to carry out this Act.

Comment: It should first be noted that the "sums . . . necessary to carry out this Act" apparently do not include funds for the governmental activities of the "governing" entity. On September 22, 2004, the Congressional Budget Office submitted to the House of Representatives an estimate of the costs of implementing H.R. 4282, then the House version of the Akaka Bill, which for purposes of fiscal analysis is essentially identical to S. 1011 and H.R. 2314. It estimated that the bill would cost \$500,000 per year indefinitely for the U.S. Office for Native Hawaiian Relations and \$1,000,000 per year for three years for the nine-member commission responsible for creating and certifying the roll of Native Hawaiians who would form the new governing entity. It mentioned that "the transfer of any land or other assets to this new government, including land now controlled by the state of Hawaii, would be the subject of future negotiations." It made no estimate of any expenditures that might be necessary or desirable to fund the new entity, which would not even come into existence until the commission had concluded its work. This bill evidently does not authorize the appropriation of funds to support the new governing entity.

Indeed, the question of resources for the new "governing entity" holds great promise of destroying that "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 parasite on the body politic.

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 will surely be controversial because some or all of the property and income of those citizens will also be taxable by the State of Hawai'i.¹⁰⁵

¹⁰⁵ See *Oklahoma Tax Comm. v. Chickasaw Nation*, 515 U.S. 450 (1995).

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. Yet this bill offers no Federal resources either to the new "governing entity" or to its citizens, and Section 9(f) of the bill expressly denies any benefits that might otherwise be available through the Bureau of Indian Affairs.

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? What will be its structure? 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?

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?



Leaving these questions to be resolved between the new entity, the State of Hawai'i's bureaucracy and the Department of the Interior is unacceptable. It 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.

It is also unacceptable to say that these questions cannot be answered because they must await the negotiations mentioned in Section 8. The time for negotiations, and for resolving these issues, is not after recognition, but before it, so that Congress, the state legislature and the citizens of Hawai'i will know what their commitments will be before any approvals are given.

Most importantly, it is unacceptable that any decisions with such sweeping consequences for the citizens of Hawai'i—consequences affecting the most basic structures of state government and the state's land and resource base—be taken without a

statewide plebiscite both at the time of the initial decision to allow the Akaka Bill's process to begin, and again at the time when all the proposed changes have been negotiated and fully disclosed and before any of them have been put into effect.

It is ironic that one of the most frequently heard complaints of the Akaka Bill's supporters, reflected in Section 2(13) of the bill itself, is that the 1893 change of government and the subsequent transfer of the public lands to the United States took place without "a plebiscite or referendum." At that time, as explained elsewhere in this paper,¹⁰⁶ Native Hawaiians suffered no loss of sovereignty and no diminution of the public lands. The Akaka Bill would now visit both of those evils, immediately and forever, on the racially disfavored 80% of the state's population who lack the necessary single Native Hawaiian ancestor from ten generations ago, and would withhold from all those citizens of the state and the United States precisely the voice in those decisions that the bill's supporters complain that their own ancestors were denied. The bill's advocates simply cannot have it both ways.

Final thoughts

Ultimately the Akaka 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 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 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 burdens in "sovereignty."

Underlying all these disputes will be the issue of constitutionality, an issue almost certain to be resolved in a way that leaves nothing for those 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 frustration to add to their litany of irremediable grievances. Whatever the outcome, those who believed in

¹⁰⁶ See Comments to Sections 2(13) and 2(18).

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 U. S. Supreme 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.

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

Conclusion

The Akaka Bill 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 throughout the country.

It is also 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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