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## ***Rice v. Cayetano*: Trouble in Paradise for Native Hawaiians Claiming Special Relationship Status**

The United States government has long claimed a “special relationship” with the once-sovereign peoples whose culture and autonomy were forever altered and in some cases destroyed by Western expansion.<sup>1</sup> As distinguished from other minority groups, indigenous tribal Indians<sup>2</sup> have a unique legal and political relationship with the federal government,<sup>3</sup> based largely upon their

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1. *Rice v. Cayetano*, 528 U.S. 495, 529 (2000) (Stevens, J., dissenting) (observing that the federal government’s relationship with descendants of indigenous people is of a “fiduciary character”); *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (noting that Congress has a “unique obligation towards the Indians”); *United States v. Kagama*, 118 U.S. 375, 383 (1886) (describing Indian tribes as dependent “wards of the nation”); *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (equating the relationship between the federal government and Indians to ward and guardian). The numerous interchangeable terms referring to a singular federal government-native relationship illustrate its various origins and continue to obscure the scope of the relationship. See GILBERT L. HALL, *THE FEDERAL-INDIAN TRUST RELATIONSHIP* 3 (1979).

2. Although “Native Americans” is generally the preferred term for describing the indigenous people of North America, this Note uses the terms “Indians” and “Indian tribes” when describing the special relationship for reasons outlined in *Morton v. Mancari*, which relied on a classification of Indian tribes as political entities. See *Mancari*, 417 U.S. at 553–55. In contrast, “Native American” can connote a racial classification, making use of the term misleading in conjunction with the special relationship because the U.S. Supreme Court has not ruled specifically on whether the relationship includes Native Americans lacking a tribal structure. See FELIX S. COHEN’S *HANDBOOK OF FEDERAL INDIAN LAW* 1–2 (Rennard Strickland et al. eds., 1982) [hereinafter *HANDBOOK OF FEDERAL INDIAN LAW*] (observing that rights and obligations of individual Indians primarily are derived from their tribal ties); Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 *YALE L.J.* 537, 560 (1996) (“[N]either *Mancari* nor any other case directly stated . . . that the special relationship was limited to Indian tribes and their members.”). Otherwise, this Note conforms to prevailing terminology to describe indigenous groups. Federal statutes commonly use the term “Native American” to refer collectively to American Indians, Native Hawaiians and other Pacific Islanders (such as American Samoans), and Alaska Natives. See, e.g., 42 U.S.C. §§ 2991, 2991a (1994) (naming these groups as beneficiaries of legislation to promote self-sufficiency). Modern federal laws, with slight variations, generally use the term “Native Hawaiian” to refer to any individual whose “ancestors were natives of the area which consists of the Hawaiian Islands prior to 1778,” see, e.g., Native American Programs Act of 1974, 42 U.S.C. § 2992c(3) (1994), although a few statutes include only Native Hawaiians with fifty percent native blood. See e.g., 38 U.S.C. § 3764(3)(B) (1994). To avoid confusion with the narrower definitions promulgated by the State of Hawaii for its own programs, see *infra* note 37, this Note subscribes to the more general terminology of “Native Hawaiians” when referring to the native peoples who claim the government-native “special relationship.”

3. HALL, *supra* note 1, at iii; see also *Kagama*, 118 U.S. at 381 (characterizing the

sovereign status that pre-existed the arrival of Europeans<sup>4</sup> and continues to be recognized through treaties,<sup>5</sup> laws,<sup>6</sup> court decisions,<sup>7</sup>

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relationship between tribes and the government as "difficult to define"); DAVID E. WILKINS, *AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE* 21 (1997) (noting the peculiarities that mark the federal-Indian relationship). The extent and nature of the fiduciary obligations inherent in the trust relationship are vague and vary to certain degrees from tribe to tribe. See *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84–85 (1977) (stating that Congress has some discretion to determine how different Indian groups shall participate in tribal income); *W. Shoshone Bus. Council v. Babbitt*, 1 F.3d 1052, 1056 (10th Cir. 1993) (observing that the government may recognize a group of Native Americans for some purposes but not others); Donald Craig Mitchell, *Alaska v. Native Village of Venetie: Statutory Construction or Judicial Usurpation? Why History Counts*, 14 ALASKA L. REV. 353, 397 & n.179 (1997) (noting that some Alaska Native groups are not considered "tribes" for the purposes of the Indian Child Welfare Act, 25 U.S.C. § 1903(8) (1994)); Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1246–48 (1975) (summarizing different conceptions of the trust doctrine). At a minimum, the federal government has a duty to act in good faith in the best interests of Indians. See *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942) (observing that Congress has undertaken a moral obligation to the Indians of the "highest responsibility and trust"). Other organizations have provided their own definitions of the trust obligations arising from the special relationship. See, e.g., AM. INDIAN POLICY REVIEW COMM'N, 95TH CONG., FINAL REPORT 131–36 (Comm. Print May 17, 1977) (Sup. Docs. No. Y4.In2/10.R29/V1) [hereinafter AIPRC FINAL REPORT] (noting that the government has a legal obligation to promote Indian self-governance and economic independence and must provide social and economic services to raise the Indian standard of living); *Bureau of Indian Affairs Organization: Hearings Before the Select Comm. on Indian Affairs*, 95th Cong. 106–25 (1977) (Sup. Docs. No. Y4.In2/11:In2/2) (statement of James A. Joseph, Under Secretary, Dep't of the Interior) (stating that the federal obligation is to protect "valuable Indian lands, water, minerals and other natural resources"). Additionally, the Institute for the Development of Indian Law identifies three broad areas encompassed by the trust obligation: protection of trust property, protection of the right to self-governance, and "provision of . . . social, medical and educational services necessary for survival of the tribe." HALL, *supra* note 1, at 9. Court decisions establish that the United States Congress is the trustee for Indians and has the sole power to decide the scope of its unique obligations. See *Winton v. Amos*, 255 U.S. 373, 391–92 (1921) (observing that Congress has full power to legislate over the Indians); *United States v. Sandoval*, 231 U.S. 28, 46–47 (1913) (stating that Congress, not the courts, determines the extent of the special relationship); *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 417–19 (1865) (holding that the right to exercise power over Indians belongs solely to Congress). Congress, in turn, has delegated much of the management of the trust responsibility to agencies, primarily the Department of the Interior, which houses the Bureau of Indian Affairs. See 25 U.S.C. § 2 (1994) (granting the authority over Indian-related matters to a Commissioner of Indian Affairs under the supervision of the Secretary of the Interior).

4. See VINE DELORIA JR. & DAVID E. WILKINS, *TRIBES, TREATIES AND CONSTITUTIONAL TRIBULATIONS* 7–12 (1999) (asserting that ideas regarding Native American tribal nation status have remained virtually unchanged since the pre-Revolutionary War era); Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1, 16–21 (1942) (noting that Spanish dealings with native peoples heavily influenced subsequent federal government policy); William W. Quinn, Jr., *Federal Acknowledgement of American Indian Tribes*, 34 AM. J. LEGAL HIST. 331, 338 (1990) (observing implicit and explicit recognition of the "sovereignty and autonomy" of Native Americans by colonial powers).

executive orders,<sup>8</sup> and the Constitution.<sup>9</sup> Although its origins are unclear,<sup>10</sup> the relationship stems from the federal government's

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5. See, e.g., Treaty with the Kaskaskias, Aug. 13, 1803, U.S.-Kaskaskias, 7 Stat. 78 (granting "care and patronage" to the Kaskaskias tribe); Treaty with the Creek Nation, Aug. 7, 1790, U.S.-Creek Nation, 7 Stat. 35 (acknowledging the federal government's duty to protect the tribe); Treaty with the Cherokees, Nov. 25, 1785, U.S.-Cherokees, 7 Stat. 18 (guaranteeing peace and protection to the tribe); Treaty with the Six Nations, Oct. 22, 1784, U.S.-Six Nations, 7 Stat. 15 (receiving the tribes into the protection of the United States); see also 2 CHARLES J. KAPLER, INDIAN AFFAIRS, LAWS AND TREATIES (1904) (compiling the texts of government treaties with the Indians from 1778-1868); FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 446-500 (1994) (listing more than 360 ratified Indian treaties between 1778 and 1869).

6. See, e.g., Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-494 (1994 & Supp. IV 1998) (extending trust status to Indian lands indefinitely); Snyder Act of 1921, 25 U.S.C. § 13 (1994 & Supp. IV 1998) (authorizing federal funds for the "benefit, care and assistance of the Indians throughout the United States"); Act of June 30, 1834, ch. 162, 4 Stat. 735 (seeking restoration of tribal rights); Act of March 30, 1802, ch. 13, § 5, 2 Stat. 139, 141-42 (prohibiting unauthorized settlement on Indian land); Act of Aug. 7, 1789, 1 Stat. 50 (protecting property and liberty rights of Indians from invasion).

7. *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 172 (1973) ("Indian tribes[]" ... claim to sovereignty long predates that of our own Government."); see *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) (describing Indian nations as separate communities that retained their natural rights); *Cherokee Nation v. Georgia*, 30 U.S. 1, 11-12 (1831) (characterizing tribes as "domestic dependent nations"). Other cases suggest that Indian sovereignty is limited to internal affairs. See *United States v. Mazurie*, 419 U.S. 544, 557 (1975) ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . ."); *Kagama*, 118 U.S. at 381-82 (noting that Indians are a distinct people who possess "the power of regulating their internal and social relations," but lack "the full attributes of sovereignty").

8. See, e.g., Exec. Order No. 7423, 3 C.F.R. 189 (1935) (amending employment requirements for the Bureau of Indian Affairs); Exec. Order of June 13, 1902 (giving occupancy of land to the San Felipe Pueblos), reprinted in EXECUTIVE ORDERS RELATING TO INDIAN RESERVATIONS 1855-1922, at 126, 126 (Scholarly Resources, Inc. 1975) [hereinafter INDIAN EXECUTIVE ORDERS]; Exec. Order of Oct. 16, 1891 (extending the boundaries of the Hoopa reservation), reprinted in INDIAN EXECUTIVE ORDERS, *supra*, at 39, 39; Exec. Order of Feb. 7, 1879 (creating a reservation for the Southern Utes), reprinted in INDIAN EXECUTIVE ORDERS, *supra*, at 67, 67-68; Exec. Order of May 14, 1855 (establishing the first executive-order reservation), reprinted in INDIAN EXECUTIVE ORDERS, *supra*, at 79, 79.

9. The Constitution grants Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3 (Indian Commerce Clause).

10. See *McClanahan*, 411 U.S. at 172 n.7 ("The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making."). Early cases did not state a specific constitutional basis for the relationship even as they declared its existence. *Worcester v. Georgia* claimed that protection arose as a corollary of the "competency" of Congress to enforce and guarantee treaty conditions. 31 U.S. (6 Pet.) at 594. *United States v. Kagama* initially rejected the idea that the Indian Commerce Clause could extend to the criminal laws at issue in *Kagama* and suggested that the power "must exist in [the federal government] because it has never existed anywhere else, . . . because it has never been denied, and because it

acknowledgement that its actions left tribes at risk of extinction and in need of protection.<sup>11</sup> While initially this paternalistic view of Indians merely served to increase government control over the tribes,<sup>12</sup> as federal policy evolved, the paramount function of this "special relationship" became the nobler goal of promoting self-governance among the tribes.<sup>13</sup>

The special relationship between the federal government and Indian tribes is significant not only due to the government's fiduciary obligations but also due to the differential treatment programs for beneficiary tribes.<sup>14</sup> Because the relationship with the tribes is

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alone can enforce its laws on all the tribes." 118 U.S. at 375, 378-79, 384-85 (1886). The Court apparently derived the protectorate role of the federal government from Congress's power over the Indians, *id.* at 384, but scholars have suggested that the source of this power, termed in many cases as "plenary," has dubious legal foundations. WILKINS, *supra* note 3, at 74; Robert T. Coulter, *The Denial of Legal Remedies to Indian Nations Under United States Law*, 3 AM. INDIAN J. 3, 8 (1977); see also HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 2, at 219 (commenting that *Kagama* "suggested that congressional power over Indians may be implied from necessity"); Benjamin, *supra* note 2, at 543 (1996) (noting *Kagama*'s rejection of the Indian Commerce Clause as the source of congressional power and the resulting reliance on historical authority). For a comprehensive discussion of the "plenary power" concept, see generally David E. Wilkins, *The U.S. Supreme Court's Explication of "Federal Plenary Power": An Analysis of Case Law Affecting Tribal Sovereignty*, 18 AM. IND. Q. 349 (1994). The Court did not specifically denote the Indian Commerce Clause as the source of congressional empowerment for the differential treatment of tribes until its landmark decision in *Morton v. Mancari*, 417 U.S. 535, 552 (1974). See also *Livingston v. Ewing*, 455 F. Supp. 825, 830 (D.N.M. 1978) (commenting on the significance of the *Mancari* decision); Alex Tallchief Skibine, *Duro v. Reina and the Legislation that Overturned It: A Power Play of Constitutional Dimensions*, 66 S. CAL. L. REV. 767, 785-86 (1993) (same).

11. *Kagama*, 118 U.S. at 384.

12. See *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978) (citing Congress's plenary power over Native American affairs as a basis for restrictions on tribal sovereignty); see also WILKINS, *supra* note 3, at 76-81 (arguing that the view of Native Americans as requiring protection led to greater governmental interference in tribal affairs).

13. See Indian Self-Determination Act of 1975, 25 U.S.C. § 450a(a) (1994) (stating that the Act serves to "recogniz[e] the obligation of the United States to respond to the strong expression of the Indian people for self-determination"); Indian Financing Act of 1974, 25 U.S.C. § 1451 (1994) (granting financial aid to tribal governments); see also Haunani-Kay Trask, *Kūpa'a 'Aina: Native Hawaiian Nationalism in Hawai'i*, in HAWAII: RETURN TO NATIONHOOD 15, 25 (Ulla Hasager & Jonathan Friedman eds., 1994) [hereinafter Trask, *Native Hawaiian Nationalism*] (observing that under President Nixon, the policy towards Native Americans became one of self-determination rather than guardianship); see generally AIPRC FINAL REPORT, *supra* note 3, at 125. But see DELORIA & WILKINS, *supra* note 4, at 158-59 (arguing that the federal government's heavy involvement in Native American affairs continues to undermine tribal sovereignty).

14. *Mancari*, 417 U.S. at 555 (upholding a preferential hiring program for Native Americans in the Bureau of Indian Affairs (BIA)). Citing the "unique legal status of Indian tribes under federal law" and the "plenary power of Congress . . . to legislate on behalf of federally recognized Indian tribes" inherent in the Indian Commerce Clause, the

considered both legal and political,<sup>15</sup> the Supreme Court has upheld the constitutionality of disparate treatment programs for tribal members in cases that otherwise would violate the Equal Protection Clause.<sup>16</sup> According to the Court, this differential treatment is

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*Mancari* Court ruled that the BIA's preferential hiring of Indians was not invidious racial discrimination in violation of the Fifth Amendment's Due Process Clause. *Id.* at 553-54. The criteria used to determine Indian status would exclude many individuals considered members of the Native American race. *Id.* at 551, 553-54. Because the BIA had an exceptional role in the oversight and administration of policies specifically directed at members of quasi-sovereign entities, the Court determined that the hiring criterion was reasonably formulated to further the federal government's goals in regard to Indians, including increased self-governance. The Court likened the condition to the requirement that a United States Senator should reside in the state that she represents. *Id.* at 554-55; *see also* *United States v. Antelope*, 430 U.S. 641, 643-45 (1977) (rejecting a challenge by Indians arguing that special treatment constituted racial discrimination); *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 476 (1976) (concluding that as long as Indians had not abandoned their tribe, they were permitted to receive preferential treatment notwithstanding their widespread integration into the surrounding community).

The *Antelope* petitioners had been indicted for a homicide on an Idaho Indian reservation. They sought to be tried under Idaho law which, unlike the federal law applied on the reservation, did not apply the felony murder rule. *See Antelope*, 430 U.S. at 644. Reversing a Ninth Circuit decision that found the convictions in violation of the Fifth Amendment, the *Antelope* court concluded that, based on the principles expressed in *Mancari*, denial of access to the state court was not based on impermissible racial classifications. *See id.* at 645-46; HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 2, at 218-19.

15. *See Antelope*, 430 U.S. at 645 (stating that preferences are given to Indians "not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities" (quoting *Mancari*, 417 U.S. at 554)); *Mancari*, 417 U.S. at 553 n.24 (describing the preferential distinction as "political rather than racial in nature"); HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 2, at 1-2 ("Indian law is founded in the political relationship between the United States and Indian tribes."); GAIL K. SHEFFIELD, THE ARBITRARY INDIAN 4-5 (1997) (observing that "[t]he political nature of tribal status is one step removed from considerations of 'ethnicity' . . ."). The Supreme Court has acknowledged that differential treatment derived from the special relationship might affect some individuals whose tribal affiliations are tenuous or nonexistent, but has not directly confronted this issue. *See Antelope*, 430 U.S. at 646 n.7 (noting that while official enrollment in a tribe was not a requirement for federal jurisdiction, the Court was not called on to address this issue because the petitioners were official members of a tribe); *Moe*, 425 U.S. at 480 n.16 (declining to disturb the lower court's holding that Indians living on the reservation were not subject to the cigarette sales tax regardless of their actual tribal membership, but recognizing that different rules might apply to Indians residing off the reservation).

16. *See, e.g., Antelope*, 430 U.S. at 645-50 (1977) (denying Indians the right to be tried in state court for crimes committed in Indian territory); *Moe*, 425 U.S. at 479-83 (holding that exempting reservation Indians from paying taxes does not violate the Fourteenth Amendment). As *Antelope* suggests, the special relationship does not result in enhanced rights and may, in some cases, serve to restrict rights of Indians because it essentially grants the federal government greater latitude over their affairs. *Antelope*, 430 U.S. at 645-50 (applying federal criminal law to Indians, resulting in harsher punishment than prescribed under state law); *see also* *Duro v. Reina*, 495 U.S. 676, 692 (1990) (acknowledging the federal government's plenary power to "impose burdens or benefits"

permissible as long as it is rationally tied to the fulfillment of obligations—including promoting self-governance and preserving cultural integrity—that arise from the relationship.<sup>17</sup> This “rational basis” standard, applied by the Supreme Court in 1974 in *Morton v. Mancari*,<sup>18</sup> enables Congress to enact federal laws and programs specifically designed to benefit members of Indian tribes.<sup>19</sup> The *Mancari* majority indicated that, whenever special treatment passed the rational basis test, the Court would be unwilling to disturb federal legislative pronouncements.<sup>20</sup> The classification of the special relationship as legal and political is crucial; were the relationship based on a racial distinction, the differential treatment would have to withstand the heightened standard of strict scrutiny to survive a constitutional challenge.<sup>21</sup>

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on Indians “as a class”).

17. *Mancari*, 417 U.S. at 555.

18. 417 U.S. 535 (1974) (holding that congressional acts that permit differential treatment for native peoples will not be disturbed “[a]s long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians”).

19. See, e.g., Snyder Act of 1921, 25 U.S.C. § 13 (1994 & Supp. IV 1998) (welfare benefits); Indian Child Protection and Family Violence Prevention Act, 25 U.S.C. § 3201 (1994) (abuse prevention); Indian Employment, Training and Related Services Demonstration Act of 1992, 25 U.S.C. § 3401 (1994) (joblessness reduction); Tribal Economic Development and Technology Related Education Assistance Act of 1990, 25 U.S.C. § 1851 (1994) (grants to tribally controlled colleges). Courts consistently have upheld legislation providing special benefits to Indians. *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 270 (1992) (excise tax exemption); *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 679 (1979) (granting fishing rights to Indian Tribes); *Bryan v. Itasca County*, 426 U.S. 373, 388–90 (1976) (upholding a law granting reservation Indians immunity from personal property taxes); *Fisher v. Dist. Court of Sixteenth Judicial Dist.*, 424 U.S. 382, 389 (1976) (per curiam) (granting tribal court exclusive jurisdiction over tribal adoptions); *Antoine v. Washington*, 420 U.S. 194, 205–06 (1975) (preventing state from regulating hunting and fishing on Indian territory); *Livingston v. Ewing*, 601 F.2d 1110, 1114 (10th Cir. 1979) (upholding a law granting Indians the exclusive right to handcrafted jewelry sales); *Parravano v. Babbitt*, 861 F. Supp. 914, 922 (N.D. Cal. 1994) (recognizing federally reserved fishing rights for Indians); *Schmasow v. Native Am. Ctr.*, 978 P.2d 304, 307–08 (Mont. 1999) (upholding preferential hiring program for Indians); see also *Hoop Valley Tribe v. Blue Lake Forest Prods.*, 143 B.R. 563, 563 (Bankr. N.D. Cal. 1992) (inapplicability of state commercial laws to alienation of Indian trust property); *In re M.K.*, 964 P.2d 241, 244 (Okla. Ct. App. 1998) (heightened burden of proof in termination of parental rights under the Indian Child Welfare Act).

20. See *Mancari*, 417 U.S. at 555.

21. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226–27 (1995) (holding that strict scrutiny is the sole standard of review for racial classifications); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494–95 (1989) (applying heightened scrutiny in invalidating a race-based preference program designed to remedy effects of past discrimination). Predicting the issues raised in *Rice v. Cayetano*, Professor Benjamin asserted that *Adarand* and *Croson* demonstrated increasing disapproval of even beneficial racial classifications, thereby heightening the importance of the tribal classification. See Benjamin, *supra* note

Among the groups claiming inclusion within the special relationship are natives of the Hawaiian islands. Although this group had a governmental structure that differed from the tribal system typically found in groups indigenous to the North American mainland,<sup>22</sup> Native Hawaiians are named among the beneficiaries of much of the legislation that provides special services to Native Americans.<sup>23</sup> Despite numerous congressional acts implemented to benefit Native Hawaiians, the status of this group of indigenous people remained somewhat ambiguous.<sup>24</sup> In *Rice v. Cayetano*,<sup>25</sup> the

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2, at 538–41.

22. See DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 945 (4th ed. 1998) (describing the Hawaiian land tenure system that prevailed before the arrival of Captain James Cook as similar to medieval feudal systems); Benjamin, *supra* note 2, at 572–81 (noting that native Hawaiians are not organized into any entity that resembles a traditional tribe). But see Jon Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95, 144–45 (1998) (pointing to substantive similarities in the plight of Native Hawaiians and traditional tribal groups).

23. See, e.g., National Historic Preservation Act, 16 U.S.C. § 470 (1994) (protecting properties with cultural and historic significance to native groups); Native Hawaiian Education Act of 1994, 20 U.S.C. §§ 7901–7912 (1994 & Supp. IV 1998) (providing funds to promote educational achievement); Indian Health Care Amendments of 1992, 25 U.S.C. §§ 1601–1683 (1994 & Supp. IV 1998) (providing appropriations to improve quantity and quality of health services and preventative medical care); Native American Languages Act, 25 U.S.C. § 2902 (1994 & Supp. IV 1998) (granting statutory protection to the Native Hawaiian language); Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013 (1994 & Supp. IV 1998) (providing repatriation of funerary objects and human remains); Rehabilitation Act of 1973, 29 U.S.C. §§ 701–7961 (1994 & Supp. IV 1998) (extending preferential status to grant applications to fight drug abuse among Native Americans); American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1994 & Supp. IV 1998) (promising to protect Native American faith practices); Native American Programs Act of 1974, 42 U.S.C. §§ 2991–2992 (1994 & Supp. IV 1998) (enacting various financial and cultural programs); Older Americans Act of 1965, 42 U.S.C. §§ 3001–3058 (providing health, housing, and economic benefits); Native Hawaiian Health Care Improvement Act of 1992, 42 U.S.C. §§ 11701–11714 (1994 & Supp. IV 1998) (providing comprehensive health promotion and disease prevention services).

24. See *Rice v. Cayetano*, 528 U.S. 495, 518 (2000) (noting that whether Congress has bestowed a status on Hawaiian natives akin to that of Indians tribes is “not yet established in case law”). But see *id.* at 533–34 (Stevens, J., dissenting) (asserting that numerous programs Congress has implemented on behalf of Native Hawaiians affirm their status as an Indian tribe). Although Congress has not explicitly spoken on the inclusion of Hawaiian natives into the federal-Indian special relationship, courts and commentators have interpreted some legislation and federal policy as an implicit acknowledgement that such a relationship exists. See Native Hawaiian Education Act, 20 U.S.C. § 7902 (1994) (acknowledging a “special relationship” between the federal government and Hawaiian natives); Native Hawaiian Health Care Improvement Act, 42 U.S.C. § 11701 (1994) (referring to a “trust relationship” and a “historical and unique legal relationship” between Native Hawaiians and the United States); Joint Resolution (Apology Resolution), Act of Nov. 23, 1993, Pub. L. No. 103-150, 107 Stat. 1510 (1993) (apologizing for depriving Native Hawaiians of the right to self-determination and encouraging reconciliation efforts); Act to Provide for the Admission of the State of Hawaii into the



United States Supreme Court overturned an electoral scheme that restricted the right to vote for officers in the state-created Office of Hawaiian Affairs (OHA) to those defined as Native Hawaiians as determined by ancestry.<sup>26</sup> The Court found that this scheme relied on a race-based distinction, rather than a legal or political one, and therefore violated the Fifteenth Amendment.<sup>27</sup> This rejection of the Native Hawaiians' chosen electoral structure had the practical effect of frustrating Native Hawaiians' attempts to attain the sovereignty that has become a central objective of federal Native American policy.<sup>28</sup> The rejection of the voting structure, which the Hawaii legislature implemented to administer a state-run trust endowed to improve conditions for descendants of Hawaiian natives, also raised doubts about the ability of Native Hawaiians to claim the special relationship and possibly signified trouble for other Native American groups with similar governing structures.<sup>29</sup>

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Union (Admission Act), Pub. L. No. 86-3, § 5(f), 73 Stat. 4, 6 (1959) (creating a "public trust" to benefit Native Hawaiians); *Keaukaha-Panaewa Cmty. Ass'n v. Hawaiian Homes Comm'n*, 739 F.2d 1467, 1472 (9th Cir. 1984) (imposing a trust obligation arising from federal laws); *Ahuna v. Dep't of Hawaiian Homes Lands*, 640 P.2d 1161, 1168-70 (D. Haw. 1982) (drawing an analogy between Hawaiian natives and mainland natives and special programs provided to both groups in imposing a trust relationship between Congress and Hawaiians); Exec. Order No. 13125, § 10(b), 3 C.F.R. § 193 (1999) (establishing an advisory commission on Pacific Islanders); HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 2, at 802-04 ("Since 1920 the federal government has acted in apparent recognition of a trust obligation to Native Hawaiians by legislating specifically for their benefit."); Mark A. Inciong, *The Lost Trust: Native Hawaiian Beneficiaries Under the Hawaiian Homes Commission Act*, 8 ARIZ. J. INT'L & COMP. L. 2:171 (1991); Van Dyke, *supra* note 22, at 104-10, (asserting that Congress has recognized the special status of Native Hawaiians by including them in legislation benefiting Native Americans generally). *But see* *Han v. Dep't of Justice*, 824 F. Supp. 1480, 1486 (D. Haw. 1993) (determining the trust obligation to be the responsibility of the state, not federal, government).

25. 528 U.S. 495 (2000).

26. *Id.* at 499.

27. *Id.* at 514-15.

28. See Special Message to the Congress on Indian Affairs, H.R. DOC. NO. 363, 91st Cong., 2d Sess. (1970) (advocating legislation to facilitate tribes in maximizing autonomy), reprinted in PUB. PAPERS 564, 564-66 (1970); Statement on Indian Policy, 1 PUB. PAPERS 96, 96-98 (1983) (affirming a policy of strengthening tribal governments); see also Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 1067-68 (1981) (advocating the adoption of self-determination as the model for the long-term development of Indian tribes).

29. The most obvious parallel is with Alaska Natives, another conglomerate of aboriginals who share cultural traits but are not necessarily associated with tribal bodies. Congressional action on behalf of Native Alaskans signals that their status, however, is more securely established within the special relationship. See *infra* notes 106-08 and accompanying text (comparing and contrasting similarities between Alaska and Hawaii natives). The implications are much stronger in many respects for colonially acquired

This Note briefly recounts the developments and history leading to the creation of the electoral scheme at issue in *Rice* and discusses the reasoning behind the Supreme Court's invalidation under the Fifteenth Amendment of Hawaii's eligibility requirements for voting for OHA trustees.<sup>30</sup> The Note then considers the implications of the *Rice* Court's decision to classify the ancestry requirement as racial.<sup>31</sup> Next, the Note examines whether Native Hawaiians will achieve a more secure standing within the federal government-native special relationship.<sup>32</sup> Finally, the Note examines the current state of affairs for OHA, suggests strategies for achieving greater sovereignty for Native Hawaiians, and analyzes the impact of recent initiatives intended to settle the questions raised by *Rice*.<sup>33</sup>

*Rice* addressed the validity of a voting structure for the administration of a trust benefiting Native Hawaiians. Initially established by the United States Congress as a lands and loan program to provide homesteads and financial assistance to descendants of indigenous inhabitants and rehabilitate the native population from the devastating effects stemming from Western contact,<sup>34</sup> the trust was turned over to the State of Hawaii as a

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territories such as Guam, American Samoa, Micronesia, and possibly Puerto Rico. HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 2, at 798 n.4 (noting that additional conditions specific to territories limit the comparison); *see generally* Ediberto Roman, *Empire Forgotten: The United States's Colonization of Puerto Rico*, 42 VILL. L. REV. 1119, 1122–26 (1997) (charging that U.S. policies toward current and former territories are imperialistic and racist and are calculated to undermine self-determination); Haunani-Kay Trask, *Politics in the Pacific Islands: Imperialism and Native Self-Determination*, 16 AMERASIAN J. 1, 5–10 (1990) (noting the common struggle against colonization faced by many of the Pacific Rim islands); Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445, 510–17 (1992) (offering theories on the means to achieve increased self-governance); Jon M. Van Dyke et al., *Self-Determination for Nonself-governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawai'i*, 18 U. HAW. L. REV. 623, 640–42 (1996) (examining rights to autonomy under international law).

30. *See infra* notes 34–70 and accompanying text.

31. *See infra* notes 71–95 and accompanying text.

32. *See infra* notes 96–133 and accompanying text.

33. *See infra* notes 134–48 and accompanying text.

34. Hawaiian Homes Commission Act of 1920 (HHCA), Pub. L. No. 66-34, ch. 42, 42 Stat. 108 (1921); *see* H.R. REP. NO. 66-839, at 4 (1920) (Sup. Docs. No. Y1.1/2:7653) (testimony of Sen. Wise) (“[T]he Hawaiian people are dying. . . . [T]he only way to save them . . . is to take them back to the lands and give them the mode of living that their ancestors were accustomed to and in that way rehabilitate them.”); MELODY KAPILIALOHA MACKENZIE, NATIVE HAWAIIAN RIGHTS HANDBOOK 43–50 (1991) [hereinafter NATIVE HAWAIIAN RIGHTS HANDBOOK] (describing the native population as a race endangered by “poverty, disease, and political powerlessness” that accompanied the arrival of Westerners). In providing what is perhaps the first federal statutory definition of “Native Hawaiian”—“any descendant of not less than one-half part of the

condition of its admission to the union in 1959.<sup>35</sup> After several years of direct state management of the trust, in 1978 the state sought to give greater control to the trust's intended beneficiaries by amending the state constitution to establish the OHA to administer a portion of the trust and its proceeds.<sup>36</sup>

The OHA's legislative mandate is to seek better conditions, conduct advocacy efforts, seek and disperse donations and grants, and receive reparations on behalf of two designated groups of state citizens: "Hawaiians," generally defined as those with any degree of descent from the original native population present before the arrival of Westerners in 1778, and a smaller subclass of "native Hawaiians," classified as those with at least fifty percent Hawaiian ancestry.<sup>37</sup>

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blood of the races inhabiting the Hawaiian Islands previous to 1778"—the HHCA presumably served as the model for subsequent legislation. HHCA, Pub. L. No. 66-34, ch. 42, § 201(7), 42 Stat. 108, 108 (1921); *see also Native Hawaiians Vote on Sharing a Trust's Riches*, N.Y. TIMES, Dec. 26, 1989, at B11 (noting that the origins of the definition are in the HHCA).

35. *See* Act to Provide for the Admission of the State of Hawaii into the Union (Admission Act), Pub. L. No. 86-3, § 5(f), 73 Stat. 4, 6 (1959). The Admission Act limits use of the proceeds from the trust fund for the following: (1) support of public education, (2) improvement of conditions for native Hawaiians as defined in the HHCA, (3) development of farm and home ownership, (4) making of public improvements, and (5) provision of land for public use. *See id.* These purposes are reiterated in state law governing the OHA's operation. *See* HAW. REV. STAT. § 10-3 (1993). As long as the funds are used for the specified purposes, the state has wide leeway to establish the management structure of the trust. *See* Admission Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 4, 6 (1959).

36. The Hawaii Constitution states in part that "[t]he Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians." HAW. CONST. art. XII, § 5. The amendment to the Hawaiian Constitution establishing the OHA was adopted by a majority vote of all Hawaii's citizens in November 1978. The legality of the state's delegation of the trust to the agency was upheld in *Price v. Hawaii*, 921 F.2d 950, 957 (9th Cir. 1990). *See also* *Price v. Akaka*, 928 F.2d 824, 825-26 (9th Cir. 1990) (discussing the history of the Admissions Act, the OHA, and related laws). The creation of the OHA is examined in Jon M. Van Dyke, *The Constitutionality of the Office of Hawaiian Affairs*, 7 U. HAW. L. REV. 63, 68-69 (1985).

37. HAW. REV. STAT. § 10-2 (1993 & Supp. 1999). Specifically, the statute defines a "Hawaiian" as "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." *Id.* This definition corresponds closely to the definition promulgated in many federal statutes. *See supra* note 2. In contrast, a "native Hawaiian" is:

any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778 . . . provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter continued to reside in Hawaii.

HAW. REV. STAT. § 10-2. The seminal year 1778 marked the arrival of Captain Cook to

Operation of the OHA is overseen by nine trustees, who “shall be Hawaiians” elected by “qualified voters who are Hawaiians, as provided by law.”<sup>38</sup>

At the heart of the controversy in *Rice* was the legislature’s definition of “Hawaiian” for the purposes of the OHA constituency. Harold Rice, a Caucasian cattle rancher who could trace his ancestors’ arrival on the islands to 1831,<sup>39</sup> challenged this definition after the State denied his application to vote in the 1996 OHA elections.<sup>40</sup> Rice claimed that the voting classification was based solely on race, violating his constitutional rights under the Fifteenth Amendment.<sup>41</sup> Hawaii, backed by the federal government, responded that because the OHA electorate consisted of a distinct group of indigenous people subject to the federal government-native special relationship—as acknowledged and validated by federal law and congressional action—the ancestry requirement challenged by Rice was legal and political, not racial, in nature.<sup>42</sup> Thus characterized, the requirement did not run afoul of the Fifteenth Amendment.<sup>43</sup> Alternatively, Hawaii contended that, even if the provisions contained racial distinctions, such distinctions were permissible under previous decisions allowing special treatment of Indians.<sup>44</sup>

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the islands, sparking an influx of Westerners. For purposes of consistency, and to avoid confusion between “Hawaiians” in the general sense—any citizen of the State of Hawaii—and those who claim the federal government-native special relationship based on their descendancy from aboriginal people, this Note subscribes to the federal terminology, *see supra* note 2, when referring to the latter classification.

38. HAW. CONST. art. XII, § 5; HAW. REV. STAT. § 10-2 (limiting the definition of native Hawaiians to ancestors of aboriginals occupying the islands prior to 1778).

39. Christine Donnelly, Rice: *It’s About Protecting the Constitution, Not ‘Racist,’* HONOLULU STAR-BULLETIN, Feb. 23, 2000, <http://starbulletin.com/2000/02/23/news/story3.html>; Bruce Dunford, *Supreme Court to Hear Challenge to Hawaii’s Race-Based Privileges*, PORTLAND OREGONIAN, Oct. 4, 1999, at A2, 1999 WL 28264822. Although Rice’s ancestors arrived in Hawaii as missionaries, the family later amassed considerable wealth and political power. Donnelly, *supra*. Following resolution of the suit, Rice maintained his support for programs that favor Hawaiians as long as they are based on need instead of race. *Id.* Incidentally, two of his grandchildren are considered Hawaiian under the OHA provisions. *Id.*

40. *See Rice*, 528 U.S. at 510. Rice sued Benjamin Cayetano, Governor of Hawaii, in his official capacity; the *Rice* opinion and this Note, however, refer to the respondent as “the State.” *See id.*

41. *See id.* at 498. The Fifteenth Amendment states that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude.” U.S. CONST. amend. XV, § 1.

42. *See Rice*, 528 U.S. at 520.

43. *See id.* at 529 (Stevens, J., dissenting).

44. *See id.* at 518–22. Hawaii also argued that, even if racially based, the provisions were valid because the election fell under the special-purpose-district exception to the one-person, one-vote rule of the Fourteenth Amendment and because the voting scheme

These two fundamental, yet inconsistent, principles of special treatment for Indians and the prohibition of race-based voting conditions met head-on in *Rice*. The case tested the limits of the Supreme Court's willingness to treat Indians as a political and legal entity rather than a racial entity, a predicament complicated by the Native Hawaiians' lack of formal tribal structure.<sup>45</sup> The confrontation also set the stage for the Supreme Court to overturn or restrict the use of the rational basis standard in judging differential treatment for Indians, or, more radically, to rein in congressional power in dealing with indigenous peoples.

The State's view prevailed in the early rounds of the battle. Granting summary judgment for the State,<sup>46</sup> the United States District Court for the District of Hawaii determined that Congress and Hawaii shared a relationship with Native Hawaiians analogous to the relationship between the United States and Indian tribes; thus, the voting requirement fell within the wide latitude that the Supreme Court granted to Congress in matters regarding native groups.<sup>47</sup> Additionally, the court stated that under the test set out in *Mancari*, the voting method did not violate the constitutional ban on racial classifications because it was "rationally related" to fulfilling the mandate of the Admission Act.<sup>48</sup> The Ninth Circuit Court of Appeals affirmed the decision,<sup>49</sup> and the Supreme Court granted certiorari.<sup>50</sup>

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was analogous to a fiduciary-beneficiary relationship. *Id.* at 522–24. Both claims received scant attention, perhaps because race was not at issue in the leading special-purpose case cited by the State, *Salter Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 419 (1973). Addressing the State's argument based on *Salter*, the Court doubted that the election was of sufficient limited purpose and disproportionate effect on those permitted to vote to meet the exception standard. *See Rice*, 528 U.S. at 522 (citing *Ball v. James*, 451 U.S. 355 (1981)). Even if the requirements were met, the Court held that compliance with the Fourteenth Amendment did not excuse noncompliance with the Fifteenth Amendment. *Id.* The fiduciary argument failed because the correlation between the OHA constituency and its beneficiaries was questionable, and the reasoning still rested "on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters" in violation of the Fifteenth Amendment. *Id.* at 523.

45. *See Benjamin, supra* note 2, at 582–88 (noting that, unlike American Indians, who largely remained in quasi-sovereign groups, Native Hawaiians generally did not remain self-governing due to Western interference).

46. *See Rice v. Cayetano*, 963 F. Supp. 1547, 1558 (D. Haw. 1997).

47. *See id.* at 1547–54.

48. *Id.* at 1554–55 (citing the Admission Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 4, 6 (1959)); *see also supra* note 35 (describing the limitations on the use of the trust fund under the Admission Act).

49. *Rice v. Cayetano*, 146 F.3d 1075, 1082 (9th Cir. 1998).

50. *Rice v. Cayetano*, 526 U.S. 1016 (1999).

Reversing the Ninth Circuit's decision, the Supreme Court held that the voting scheme violated the Fifteenth Amendment's prohibition against the denial or abridgment of rights on account of race.<sup>51</sup> Observing that "[a]ncestry can be a proxy for race," the Court ruled that the ancestral requirement promulgated by the State was blatantly racial in nature.<sup>52</sup> Dismissing Hawaii's argument that the statute was race-neutral because it excluded persons of any race who did not meet its qualifications,<sup>53</sup> the Court focused on the statute's legislative history, which showed that the language of the ancestry requirements originally referred to "race" and later was revised to "peoples."<sup>54</sup> The analysis then proceeded to the State's main defense—that Hawaii's race-based voting scheme could be analogized

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51. *Rice v. Cayetano*, 528 U.S. 495, 517 (2000). Justice Kennedy issued the majority opinion, joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas. *See id.* Justice Breyer, joined by Justice Souter, wrote a concurring opinion. *See id.* at 498–524 (Breyer, J., concurring). Justice Stevens dissented, *see id.* at 527–47 (Stevens, J., dissenting), joined by Justice Ginsburg, who also filed a separate dissent. *See id.* at 547–48 (Ginsburg, J., dissenting).

52. *Id.* at 514. As the majority observed, questionable provisions need not expressly mention race; their evaluation also rests on their ensuing effects. *See id.* at 513–17. The Court has struck down state voting requirements that were thinly, or in some cases transparently, veiled to prevent African Americans and other minorities from voting. *See Gomillion v. Lightfoot*, 364 U.S. 339, 342–48 (1960) (holding that the state's power to determine municipal boundaries is limited by the Fifteenth Amendment); *Terry v. Adams*, 345 U.S. 461, 467–69 (1953) (ruling that a political party's "white primary" violated the Fifteenth Amendment); *Guinn v. United States*, 238 U.S. 347, 362–64 (1915) (striking down a grandfather clause); *cf. Shaw v. Reno*, 509 U.S. 630, 649 (1993) (holding that efforts to segregate voters into separate districts on account of race constitutes a claim under the Equal Protection Clause); *South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966) (invoking the Fifteenth Amendment to invalidate state voting qualifications or procedures which are facially or effectually discriminatory); *Louisiana v. United States*, 380 U.S. 145, 153 (1965) (invalidating a registration test for new voters on Fifteenth Amendment grounds); *Smith v. Allwright*, 321 U.S. 649, 665–66 (1944) (ruling that election machinery operated as an unconstitutional "white primary"); *Lane v. Wilson*, 307 U.S. 268, 275 (1939) (holding that a voter registration scheme operated unfairly and unconstitutionally against minorities); *United States v. Alabama*, 192 F. Supp. 677, 682 (D. Ala. 1961) (finding that a registration questionnaire discriminatorily denied blacks the right to vote). Before the decision in *Rice*, Professor Benjamin warned that the ancestry requirement in the "native Hawaiian" definition added an element that was ordinarily suspect, in contrast to non-suspect criteria such as voluntary membership in an organization. *See Benjamin, supra* note 2, at 571.

53. The Supreme Court rejected a similar claim in *Guinn*, holding that a voting literacy requirement, which provided a waiver for "lineal descendants" of those who were "on January 1, 1866, or any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation," was racially discriminatory in violation of the Fifteenth Amendment even though it made no reference to race and potentially excluded persons of any race from voting. 238 U.S. at 357, 365 (quoting OKLA. CONST. art. III, § 49 (1910)). In effect, the provision resulted in the disenfranchisement of virtually all blacks and practically no whites. *Id.* at 364–65.

54. *Rice*, 528 U.S. at 515–16.

to decisions permitting the special treatment of Indians.<sup>55</sup> The Court held that, regardless of the Hawaiian tribal status, the established congressional authority allowing preferential treatment of Indians in certain cases does not permit Congress to authorize a voting scheme like that promulgated by Hawaii.<sup>56</sup> The Court declined to address the unsettled question of whether Congress has recognized the status of Native Hawaiians as equivalent to that of organized Indian tribes—and whether Congress even has the authority to do so.<sup>57</sup> Even if Congress had properly conferred tribal-equivalent status to Native Hawaiians, the Court likely would have struck down the voting scheme under the Fifteenth Amendment because the OHA and its elections were administered not by a quasi-sovereign body but by the State.<sup>58</sup>

In his dissent, Justice Stevens maintained that the Fifteenth Amendment should not govern the case because the voting requirement was based on a cultural and political classification existing apart from race.<sup>59</sup> He reasoned that the systematic exclusion of racial minorities found in the classic Fifteenth Amendment cases referenced by the majority bore no relation to a structure intended to empower members of an oppressed group.<sup>60</sup> Along with the absence of invidious discrimination, Justice Stevens identified two principles distinguishing *Rice* from a standard race-discrimination case: the federal government's wide latitude in carrying out the obligations stemming from the federal government-native special relationship

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55. *See id.* at 518.

56. *See id.* at 519. Prior cases established that the types of elections encompassed by the Fifteenth Amendment are wide reaching and include "any election in which public issues are decided or public officials selected." *See Terry*, 345 U.S. at 468–69 (ruling that a political club's role in a pre-primary campaign excluded blacks from any meaningful participation in the vote and was therefore an abuse of the Fifteenth Amendment).

57. *See Rice*, 528 U.S. at 518–19.

58. *See id.* at 519–21.

59. *See id.* at 538–46 (Stevens, J., dissenting).

60. Justice Stevens declared that *Rice* is "virtually the polar opposite of the Fifteenth Amendment cases on which the Court relied." *Id.* at 540 (Stevens, J., dissenting). In his view, the Fifteenth Amendment's purpose is to extend the franchise to populations previously excluded from voting in general elections; thus, it does not necessarily follow that the Amendment prohibits ancestry-based voting requirements in an election governing discrete affairs for a limited group. While accepting the majority's view that ancestry can be a proxy for race, he stated that, in this case, the ancestry requirement did not operate as such because the OHA's structure and the purpose behind the voting provision were aimed at securing interests that are political and cultural in nature, not racial. *Id.* at 540–46. He likened the ancestry restriction to a hypothetical law that would permit only descendants of Thomas Jefferson to serve as trustees for Monticello, deeming that "[s]uch a law would be equally benign, regardless of whether those descendants happened to be members of the same race." *Id.* at 545.

and the State's responsibility to administer the public trust to benefit Hawaiian natives.<sup>61</sup> Justice Stevens also acknowledged the irony of depriving Native Hawaiians of special benefits aimed at restoring their society because of a lack of native political institutions, considering that the United States played a significant role in the downfall of those institutions.<sup>62</sup>

Arguably, Justice Stevens is correct that no racially invidious intent existed behind the decision to limit the right to vote for OHA trustees to descendants of "peoples inhabiting the Hawaiian Islands . . . in 1778."<sup>63</sup> The Fifteenth Amendment, however, prohibits any discrimination in voting "on account of race,"<sup>64</sup> even when it stems from honorable intentions. Ancestry requirements suggest bias regardless of their intent.<sup>65</sup> Indeed, the majority would have faced a particularly difficult task had it ruled that the statute was politically based despite apparent racial overtones.<sup>66</sup> While the final legislation did not mention race explicitly, its history spoke volumes.<sup>67</sup> A ruling in favor of the State would have eviscerated many well-established principles of Fifteenth Amendment jurisprudence.<sup>68</sup> To accept the dissent's position—that the Fifteenth Amendment should not apply when the aim is to promote self-governance for formerly sovereign peoples—would put the Court in the untenable position of evaluating

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61. See *id.* at 537 (Stevens, J., dissenting).

62. See *id.* at 535 (Stevens, J., dissenting).

63. *Id.* at 539 (quoting HAW. REV. STAT. § 10-2 (1993)).

64. U.S. CONST. amend. XV, § 1; see *Miller v. Johnson*, 515 U.S. 900, 911–13 (1995) (holding that racial classifications are impermissible regardless of which race is harmed or benefited).

65. See *Guinn v. United States*, 238 U.S. 347, 363–65 (1915) (noting that a provision setting a standard for suffrage based on ancestry could have no rational purpose other than perpetuating race-based voting).

66. See *Rice*, 528 U.S. at 515–17. The Court pointed out that the court of appeals found that the Hawaiian Constitution and applicable statutes "contain[ed] a racial classification on their face." *Id.* at 511 (quoting *Rice v. Cayetano*, 146 F.3d 1075, 1079 (9th Cir. 1998)); see also Robert J. Deichert, Note, *Rice v. Cayetano: The Fifteenth Amendment at a Crossroads*, 32 CONN. L. REV. 1075, 1106–19 (2000) (concluding that the *Rice* majority correctly held that the voting restriction violated the Fifteenth Amendment).

67. See *Rice*, 528 U.S. at 517 (noting that "the State's argument is undermined by its express racial purpose and actual effects").

68. See *Guinn*, 238 U.S. at 364–65; see also *Gomillion v. Lightfoot*, 364 U.S. 339, 345–46 (1960) (holding that the State could not use its inherent power to circumvent federally protected rights). The Ninth Circuit distinguished *Rice* from *Gomillion* and other Fifteenth Amendment cases by asserting that the OHA election was not equivalent to a general election and did not "deny non-Hawaiians of the right to vote in any meaningful sense." *Id.* at 124 (quoting *Rice*, 146 F.3d at 1081). For a list of other Fifteenth Amendment cases, see Van Dyke, *supra* note 22, at 124 n.199.



every ancestry-based preference to determine whether the legitimacy of its purpose.

By restricting its holding to the narrower question of the constitutional validity of a law limiting participation in a state-run election to statutorily defined Hawaiians, the majority sidestepped weightier questions. Had it taken a broader approach, the *Rice* Court could have eliminated the use of the rational basis test for programs mandating differential treatment for some or all Indians, or it could have reined in the currently expansive congressional latitude to deal with Native Americans.<sup>69</sup> Although the deferential approach to the federal government's ability to confer the special relationship remains intact for now, the Court indicated that congressional power to recognize Native Hawaiians—and presumably comparable groups of indigenous peoples lacking traditional quasi-sovereign governments—is in dispute.<sup>70</sup> This recognition might mean that the

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69. One lower court already has expressed doubt that the *Mancari* rational relation test applies to preferences other than those that provide special protection for Indian land, culture, or political institutions. See *Williams v. Babbitt*, 115 F.3d 657, 664–67 (9th Cir. 1997) (addressing the defendant's claims that *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), have overruled *Mancari*); see also *Morton v. Mancari*, 417 U.S. 535, 554–55 (1974) (holding that the BIA hiring preference was “sui generis,” possibly placing limits on the application of rational basis review); Robert N. Clinton, *Peyote and Judicial Political Activism: Neo-colonialism and the Supreme Court's New Indian Law Agenda*, 38 FED. B. NEWS & J. 92, 97 (1991) (asserting that the Court's opinion in *Department of Human Resources v. Smith*, 494 U.S. 872, 890 (1990), invited equal protection attacks on legislation exempting Native American Church members from prosecution for certain federal crimes); Ralph W. Johnson & E. Susan Crystal, *Indians and Equal Protection*, 54 WASH. L. REV. 587, 598 n.78 (1979) (asserting that the court's characterization of Indians as political in the *Mancari* case would not necessarily apply in all equal protection cases); cf. David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759, 867 (1991) (“[T]he equal protection clause itself suggests that Indians are in a unique position: because they are separate peoples, the clause's norm of racial equality simply does not apply to them . . . . Indian-specific legislation is free of equal protection strictures only to the extent that it is consistent with tribal self-determination, in effect and in intent.”).

70. See *Rice*, 528 U.S. at 518–19; cf. *United States v. John*, 437 U.S. 634, 652–54 (1978) (examining legislative history to determine whether Mississippi Choctaw Indians should be included in the federal relationship); *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84 (1977) (holding that Congress's plenary power does not preclude the Court from scrutinizing Indian legislation for violation of equal protection). Evaluating Congress's ability to confer tribal status, Professor Benjamin observes that “[t]he Supreme Court has stated that it will give some deference to a federal decision to recognize an Indian tribe but will make an independent judgment as to whether federal recognition was arbitrary or irrational.” Benjamin, *supra* note 2, at 603 n.271; see also Van Dyke, *supra* note 22, at 117 (asserting that the overall theme of the Court's decisions indicates that Congress must be given flexibility in the governance of natives). The doubts expressed by the Court might stem from the indefinite origins of the plenary power doctrine. See *supra* notes 10–12 (discussing theories of congressional empowerment over Indian affairs).

groups Congress includes in the special relationship will be examined with greater scrutiny in the future.

The Court's avoidance of these issues and its assumption that the trust is constitutional permit the survival of the OHA,<sup>71</sup> but its determination that the definition of "Hawaiians" is racial in nature will have effects that reach far beyond the invalidation of the voting method. Presumably, the ancestry requirement constitutes a racial classification under all circumstances; to interpret the requirement as legal or political in another context would be inconsistent. The decision that this definition is race-based indicates that preferential programs implemented under the suspect terminology—not only in state legislation but also in numerous federal laws providing benefits to descendants of the Native Hawaiians<sup>72</sup>—are subject to a strict scrutiny standard.<sup>73</sup> Courts previously assumed that the nature of the relationship between Native Hawaiians and the government was equivalent to that of other native groups and accordingly evaluated laws pertaining to Native Hawaiians under the more lenient rational relation test applicable to Indians.<sup>74</sup> Thus, whether the trust and

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71. See *Rice*, 528 U.S. at 521–22 (“[W]e assume the validity of the underlying administrative structure and trusts, without intimating any opinion on that point.”).

72. See *supra* note 23 (providing examples of federal laws that benefit Native Hawaiians and their descendants).

73. See *Rice*, 528 U.S. at 515–17.

74. See *Pai ‘Ohana v. United States*, 875 F. Supp. 680, 697 n.35 (D. Haw. 1995) (concluding that equal protection analysis is the same for Native Hawaiians and Indians), *aff’d* 76 F.3d 280 (9th Cir. 1996); *Nalielua v. Hawaii*, 795 F. Supp. 1009, 1013 (D. Haw. 1990) (“This court finds applicable the clear body of law surrounding preferences given to American Indians and finds that the United States’ commitment to the native people of [Hawaii] . . . does not create a suspect classification which offends the constitution.”), *aff’d*, 940 F.2d 1535 (9th Cir. 1991); *Ahuna v. Dep’t of Hawaiian Home Lands*, 640 P.2d 1161, 1168–69 (Haw. 1982) (drawing an analogy between Hawaiian natives and other aboriginal peoples). But see *Hoohuli v. Ariyoshi*, 631 F. Supp. 1153, 1159 n.22 (D. Haw. 1986) (stating that if the claimants had challenged special appropriations for Hawaiian natives, “‘strict scrutiny’ might be the appropriate standard”). Other courts had indicated a willingness to apply the rational basis test to non-tribal Indians generally, but none of these cases involved an ancestry definition issue. See *Little Earth of United Tribes, Inc. v. Sec’y of United States Dep’t of Hous. & Urban Dev.*, 675 F. Supp. 497, 535 (D. Minn. 1987) (declaring that a trust relationship extends to tribal members living together or individually), *aff’d per curiam*, 878 F.2d 236 (8th Cir. 1989); *St. Paul Intertribal Hous. Bd. v. Reynolds*, 564 F. Supp. 1408, 1414 (D. Minn. 1983) (holding that the trust doctrine can extend to Indians individually); *Eric v. Sec’y of United States Dep’t of Hous. & Urban Dev.*, 464 F. Supp. 44, 49 (D. Alaska 1978) (finding a trust duty between the government and individual Alaska Natives). In holding that the use of ancestral criteria likely ceases to make an Indian group classification political in nature, the Court applied a stricter interpretation of *Mancari*’s scope than lower federal court decisions and arguably even its own earlier decisions, some of which referred to Indians as a race. See, e.g., *United States v. Celestine*, 215 U.S. 278, 291 (1909) (affirming federal jurisdiction over members of the Indian “race”); *Montoya v. United States*, 180 U.S. 261, 266 (1901) (explaining that the

other mechanisms established to benefit Hawaiian natives could survive a strict scrutiny analysis is an open question that the *Rice* Court failed to address.<sup>75</sup>

Unlike the rational relation test, which merely requires that differential treatment be rationally related to fulfilling the goals of the federal government-native special relationship,<sup>76</sup> the strict scrutiny standard requires that racial and ethnic distinctions be upheld "only if they are narrowly tailored measures that further compelling governmental interests."<sup>77</sup> Under the strict scrutiny standard, distinctions based on race are presumed invalid.<sup>78</sup> Furthermore, general claims of past discrimination are insufficient to meet the compelling interest requirement.<sup>79</sup> Government actors must identify prior discrimination specifically, enact programs designed expressly to benefit the likely victims of that particular discrimination, and demonstrate substantial evidence that remedial action is necessary.<sup>80</sup> Exactly what kind of proof is sufficient to satisfy these guidelines is a question that the Supreme Court has left largely unanswered.<sup>81</sup>

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Court understood the word "tribe" to mean "a body of Indians of the same or similar race").

75. Whether a trust exists at all is another question the majority did not reach in *Rice*. Justice Stevens did conclude, however, that the programs administered by the OHA are valid because legislative history, explicitly articulated by Congress's formal apology to Native Hawaiians for the United States's role in the overthrow of the Hawaiian kingdom, shows a well-established federal trust relationship. *Id.* at 532-34 (Stevens, J., dissenting). *But see id.* at 525 (Breyer, J., concurring) ("[T]here is no 'trust' for native Hawaiians here . . .").

76. *Morton v. Mancari*, 417 U.S. 535, 554-55 (1974).

77. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986) (plurality opinion).

78. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-99 (1989); David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?*, 91 COLUM. L. REV. 790, 802 (1991).

79. *See Croson*, 488 U.S. at 498-99.

80. *See id.* at 505-07; George R. La Noue, *Who Counts?: Determining the Availability of Minority Businesses for Public Contracting After Croson*, 21 HARV. J.L. & PUB. POL'Y 793, 793-94 (1998).

81. *See Wessmann v. Gittens*, 160 F.3d 790, 795 (1st Cir. 1998) ("The question of precisely what interests government may legitimately invoke to justify race-based classifications is largely unsettled."); Nicole Duncan, *Croson Revisited: A Legacy of Uncertainty in the Application of Strict Scrutiny*, 26 COLUM. HUM. RTS. L. REV. 679, 684 (1995) ("The cases which follow *Croson* reflect the confusion on the part of both the courts and the local and municipal governments as to what amount of statistics, written testimony, and historical evidence is needed to satisfy the . . . standard of *Croson*."); Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2339-41 (2000) (commenting that neither *Adarand* nor *Croson* completely settled the issue of what strict scrutiny requires in the affirmative action context); Brent E. Simmons, *Reconsidering Strict Scrutiny of Affirmative Action*, 2 MICH. J. RACE & L. 51, 88 (1996) (asserting that lower court decisions in the wake of *Croson* have been erratic and

The outlook for programs designed to assist and support Native Hawaiians is uncertain under the strict scrutiny test.<sup>82</sup> Unquestionably, America's imperialist overthrow of the Hawaiian government in 1893 and subsequent seizure of land had a well-documented, devastating impact on Hawaii's native population.<sup>83</sup> Congressional findings consistently show that Native Hawaiians lag far behind non-Native Hawaiians in education, health, and income.<sup>84</sup>

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inconsistent due to the Court's failure to make a coherent analysis of strict scrutiny); *see also, e.g.,* *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1174-75 (10th Cir. 2000) (accepting the results of a disparity study that found evidence of lending discrimination, race-based barriers to membership in subcontractors' unions, and bid shopping that harmed minority-owned businesses in government contracting as sufficient to support a compelling interest); *Middleton v. City of Flint*, 92 F.3d 396, 407-09 (6th Cir. 1996) (rejecting the validity of a disparity study on the basis that it failed to consider that minorities might be less inclined than non-minorities to seek law enforcement jobs for reasons unrelated to prior discriminatory practices); *Hopwood v. Texas*, 78 F.3d 932, 952-55 (5th Cir. 1996) (striking down a University of Texas School of Law admissions program because the school could not completely eliminate societal discrimination as a contributing cause of the effects it sought to remedy); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 425-27 (D.C. Cir. 1992) (rejecting the relevance of statistical evidence to justify a set-aside program on the grounds that the government's data lacked specificity).

82. In its assessment of *Rice*, the Ninth Circuit contemplated whether the voting scheme would withstand strict scrutiny and concluded that, because the restriction was "rooted in the special trust relationship" and was designed precisely to choose a board who would best represent the beneficiaries of that trust in furtherance of the state's duties, it could withstand strict scrutiny. *Rice v. Cayetano*, 146 F.3d 1075, 1082 (9th Cir. 1998). *Contra* Benjamin, *supra* note 2, at 592-96 (concluding that programs for Native Hawaiians would not pass strict scrutiny). This position assumes that a trust relationship does exist between Hawaiian natives and the federal government, which the United States Supreme Court was not willing to concede. *See supra* note 54 and accompanying text.

83. *See Rice*, 528 U.S. 495, 500-06 (2000); S. REP. NO. 106-424, at 62-63 (2000) (Sup. Docs. No. Y1.1/5:106-424) (detailing the decline of Native Hawaiian culture and society); Trask, *Native Hawaiian Nationalism*, *supra* note 13, at 17-18 (recounting the devastating impact of native land dispossession, disease epidemics, and attacks on cultural practices); *see generally* RALPH S. KUYKENDALL & A. GROVE DAY, *HAWAII: A HISTORY* (1964) (providing a definitive history of the islands). Hawaii's downfall, however, did not happen solely at the hands of the United States. *See* NOEL J. KENT, *HAWAI'I: ISLANDS UNDER THE INFLUENCE* 29-30 (1983) (describing British, French, and American efforts to establish dominance in the islands); ROBERT H. MAST & ANNE B. MAST, *AUTOBIOGRAPHY OF PROTEST IN HAWAI'I* 10 (1996) (noting that exploitation by foreign traders beginning in the 1780s led to Hawaii's loss of control over its economy).

84. *See* S. REP. NO. 106-424, at 34-40 (providing demographics on pervasive problems in the Native Hawaiian community including inferior health and housing conditions and low educational performance); 1 UNITED STATES DEP'T OF THE INTERIOR, *NATIVE HAWAIIANS STUDY COMMISSION REPORT* 33-139 (1983) (Sup. Docs. No. Y3.H31/2:2N21/v1-2) (presenting a demographic profile of Native Hawaiians as compared to non-Native Hawaiians); *see also Draft Bill Entitled The Native Hawaiian Housing Assistance Act of 1994: Hearing Before the Select Comm. on Indian Affairs*, 103d Cong. 2 (1994) (Sup. Docs. No. Y4.In2/11:S.Hrg.103-497) (reporting the results of an investigation documenting that Native Hawaiians represent the highest percentage of the state's homeless persons and have the "worst housing conditions" in the state); *Reauthorization*

These general disparities, however, fail to meet strict scrutiny review without specific evidence that Native Hawaiians suffered prior discrimination in particular instances in areas addressed by the differential treatment programs.<sup>85</sup> The breadth and variety of programs developed for Native Hawaiians would make this a difficult task in any case.<sup>86</sup> Given the movement toward colorblind standards exhibited under the Rehnquist Court,<sup>87</sup> Native Hawaiians have cause for concern that the government cannot adequately justify their differential treatment, leaving the door open for challenges to any programs relying on the ancestry requirement to designate beneficiaries.<sup>88</sup> Because virtually all legislation for Native Hawaiians

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*of the Native Hawaiian Health Care Improvement Act: Hearing Before Select Comm. on Indian Affairs*, 102d Cong. 3 (1992) (Sup. Docs. No. Y4.In2/11:S.Hrg.102-776) (noting the exceptionally high incidence of mortality, disease, and emotional disorders among the Native Hawaiian population); *Indian Education Act: Hearings on S. 830 Before the Subcomm. on Indian Affairs*, 99th Cong. 29 (1986) (Sup. Docs. No. Y4.In2/11:S.Hrg.99-730) (producing statistical evidence that a disproportionately high percentage of Native Hawaiians are unemployed or live in poverty).

85. See Benjamin, *supra* note 2, at 594–95 (analyzing the application of strict scrutiny to programs for Native Hawaiians); Chang, *supra* note 78, at 836–37 (suggesting that formal legislative findings of specific past discrimination are a threshold for passing the strict scrutiny test); see also Kamaki Maunupau, *Ho'ohaole Maila 'Ia Kākou—Make Us into Whites: A Kupuna's Thoughts on Assimilation and Decolonization*, in HAWAII: RETURN TO NATIONHOOD, *supra* note 13, at 44, 47–48 (contrasting the subtle nature of discrimination against Native Hawaiians with discrimination against African Americans).

86. See *supra* note 23 (providing examples of federal laws benefiting descendants of Native Hawaiians).

87. See *Miller v. Johnson*, 515 U.S. 900, 910–15 (1995) (striking down a redistricting plan that took race into account); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 221–27 (1995) (requiring federal affirmative action programs to pass strict scrutiny); *Shaw v. Reno*, 509 U.S. 630, 641–49 (1993) (holding that redistricting statutes that can only be explained on racial grounds are presumptively unconstitutional); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) (advocating colorblindness in discrimination cases, with Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy joining); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (“Absent searching judicial inquiry into the justification for . . . race-based measures, there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.”); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277–78 (1986) (plurality opinion) (observing that the main objective of the Fourteenth Amendment is to eliminate all government distinctions based on race); *Fullilove v. Klutznick*, 448 U.S. 448, 522–32 (1980) (Stewart, J., dissenting) (asserting that the Constitution requires that government action be colorblind); see also John Marquez Lundin, *The Call for a Color-Blind Law*, 30 COLUM. J.L. & SOC. PROBS. 407, 433 (1997) (asserting that *Wygant*, *Croson*, and *Adarand* demonstrate that the Court’s “view of what constitutes a compelling governmental purpose sufficient to overcome strict scrutiny is becoming progressively more restrictive”).

88. See Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 2–3 (1991) (criticizing “color-blind constitutionalism” as a tool for perpetuating white domination); Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727, 730–31 (1998)

incorporates the ancestry requirement, all laws that benefit them are at risk.<sup>89</sup>

The loss of special government assistance programs would be devastating to the Native Hawaiian community. Federal funding and grants to Hawaiian natives have exceeded \$440 million in recent years, providing capital to improve education, health care, and housing conditions, and to preserve the native culture and environment.<sup>90</sup> Scholars who have studied the issue conclude almost universally that Native Hawaiians deserve some form of reparations for the harms inflicted by Westerners,<sup>91</sup> and, prior to *Rice*, most

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(charging that that Supreme Court's "color blind" policies have effectively nullified minority access to the electoral process and eviscerated the equal protection clause); Frank R. Parker, *The Damaging Consequences of the Rehnquist Court's Commitment to Color-Blindness Versus Racial Justice*, 45 AM. U. L. REV. 763, 764 (1996) (describing recent Court decisions as "enormous setback[s] to minority efforts to achieve equal opportunity"); see also Benjamin, *supra* note 2, at 567–68 (identifying a "hostility to racial classifications" in recent Court decisions). But see Lundin, *supra* note 87, at 409 (arguing that "the color-blind law advocated by Justices Thomas and Scalia is the best modern interpretation of the Constitution"). The *Rice* majority hinted at these sentiments, expressing fears that upholding the OHA voting scheme might make the law "the instrument for generating the prejudice and hostility all too often directed against persons whose particular ancestry is disclosed by their ethnic characteristics and cultural traditions." 528 U.S. at 517.

89. See *supra* notes 2, 37 (discussing the definitions of "Native Hawaiian" used in federal and state legislation).

90. See Pat Omandam, *Hawaiian Funding Tops \$440 Million*, HONOLULU STAR-BULLETIN, Mar. 20, 2000, <http://starbulletin.com/2000/03/20/special/story3.html> (on file with the North Carolina Law Review) (listing funding amounts for the top programs). The loss of such a significant amount of funding would reach beyond natives and have a negative impact statewide. See Jan TenBruggencate, *The State of the Hawaiian*, THE HONOLULU ADVERTISER, Jan. 7, 2001, <http://www.honoluluadvertiser.com/specials/stateofthehawaiians/index.html> (on file with the North Carolina Law Review) (pointing out that federal money trickles throughout the economy).

91. See GETCHES ET AL., *supra* note 22, at 944 ("[T]he history of the United States' conduct in Hawaii makes a particularly compelling case for redress of claims . . ."); NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 34, 78 (asserting that while Hawaiians' loss of control over their lands and affairs may not be actionable in a court of law, the loss should be compensated); NIKLAUS R. SCHWEIZER, TURNING TIDE: THE EBB AND FLOW OF HAWAIIAN NATIONALITY 461 (observing an increasing sentiment that the Western world owes natives a duty); S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 361 (1994) (arguing that the United States has a duty to remedy human rights violations in Hawaii through reparations, legislation, or other reforms); Karen N. Blondin, *A Case for Reparations for Native Hawaiians*, 16 HAW. B.J. 13, 30 (1981) (concluding that Native Hawaiians deserve payment for lost lands seized by Westerners); Noelle M. Kahanu & Jon M. Van Dyke, *Native Hawaiian Entitlement to Sovereignty: An Overview*, 17 U. HAW. L. REV. 427, 444–46 (1995) (advocating the return of lands held by the federal government to Native Hawaiians); Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 19 B.C. THIRD WORLD L.J. 477, 520–21 (1998) (explaining why money alone is insufficient to repair the

considered the special relationship as one means of remediating the detrimental effects of American imperialism and achieving sovereignty.<sup>92</sup> Additionally, legislative history of acts concerning Hawaiian natives strongly indicates that Congress has accepted responsibility for the harmful effects of the United States' involvement in the islands and that it recognizes it has a duty to repair the damage America wrought.<sup>93</sup> Now, the problem is how to work toward fulfilling that goal within the confines prescribed by the Court.

Because of the risks inherent in a challenge to the preferential scheme under strict scrutiny, Native Hawaiians' major objectives should include steps to avoid being evaluated under that standard. The most effective strategy toward achieving this end would be for Hawaiian natives to define their own membership, eliminating the state's involvement and bringing them closer to the self-governing structure of other indigenous groups now judged under the rational relation test, while simultaneously seeking congressional recognition of the special relationship.<sup>94</sup> Accomplishing both of these tasks will

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harm done to Hawaiian natives).

92. See Mililani B. Trask, *Historical and Contemporary Hawaiian Self-Determination: A Native Hawaiian Perspective*, 8 ARIZ. J. INT'L & COMP. L. 2:77, 80-88 (1991) [hereinafter Trask, *Hawaiian Self-Determination*] (urging formal recognition of Native Hawaiians for inclusion in the trust relationship); Van Dyke, *supra* note 22, at 97 (outlining the argument that the government owes Hawaiian natives obligations because it benefited from the wrongful seizing of land); Charles F. Wilkinson, *Land Tenure in the Pacific: The Context for Native Hawaiian Land Rights*, 64 WASH. L. REV. 227, 231-32 (1989) (endorsing equivalent legal treatment for all aboriginal peoples). *But see* Benjamin, *supra* note 2, at 588 (agreeing that the historical mistreatment of Hawaiian natives is a strong argument for congressional action to remedy the mistakes but discrediting the special relationship as a means for redress).

93. See, e.g., Joint Resolution (Apology Resolution), Act of Nov. 23, 1993, Pub. L. No. 103-150, 107 Stat. 1510 (1993) (expressing a "commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii" and recognizing that natives never fully relinquished their sovereignty claims); H.R. REP. NO. 66-839, at 4 (1920) (Sup. Docs. No. Y1.1/2:7653) (testimony of Franklin K. Land, Secretary, Department of the Interior) (describing Native Hawaiians as "wards . . . for whom in a sense we are trustees" in advocating passage of the HHCA); *see also* H.R. EXEC. DOC. NO. 53-47, at xiv-xvi (1893) (Sup. Docs. No. Y1.1/2:3224) (statement of Pres. Cleveland) (concluding that the United States involvement in the overthrow of the Hawaiian government was in violation of national policy and international law and calling for the restoration of the monarchy).

94. Congressional action is necessary because logistical difficulties and statutory constraints preclude valid recognition through the Bureau of Indian Affairs. By law, the BIA can only confer tribal status on groups indigenous to the continental United States. 25 C.F.R. § 83.3 (2000) (setting criteria for tribal recognition). Even if some exception were made for islanders, the recognition process is time-consuming and requires extensive resources. See GETCHES ET AL., *supra* note 22, at 357 (blaming protracted evidentiary review for slow resolution of cases); NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 34, at 87 (noting the limited success of the petition process). Further complicating matters, many Native Hawaiian sovereignty leaders resist BIA involvement on the grounds that the

be difficult, and success would not guarantee that courts would apply the minimum rational basis review standard.<sup>95</sup>

Recognizing the potentially disastrous consequences for Native Hawaiian assistance initiatives, Hawaii's congressional delegation moved quickly to introduce legislation that would, among other

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current model vests too much power in the agency at the expense of economic self-sufficiency. See James Podgers, *Greetings from Independent Hawaii*, A.B.A. J., June 1997, at 74, 78 (citing critics' view that current status of American Indians does not provide the level of autonomy sought by islanders); Haunani-Kay Trask, *Tourist, Stay Home: Native Hawaiians Want Their Land Back*, THE PROGRESSIVE, July 1993, at 32, 34 (commenting that federal agencies "short-circuit Indian sovereignty"); see also Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 135-36 (1993) (criticizing the BIA as a remnant of colonialism that unnecessarily interferes with Indian sovereignty).

95. Although changing the Native Hawaiian definition appears straightforward, complexities arise from the lack of a coherent native structure existing apart from government entities. See NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 34, at 92 (noting criticism in the Hawaiian community over state involvement in the sovereignty effort); Benjamin, *supra* note 2, at 598-601 (warning that any state involvement in attempts to create a tribe would raise constitutional problems); Trask, *Native Hawaiian Nationalism*, *supra* note 13, at 23-28 (charging that the OHA's dominant role has vested power in the state and undermined self-determination for Hawaiians). The effects of a nonsingular structure are evident in the sovereignty movement, which has been slow-moving in part because of disagreement about what form of self-government to pursue. See MAST & MAST, *supra* note 83, at 356-60 (posturing that disparities in class and group identities originating from Western interference are largely responsible for divergent views on sovereignty); Mindy Pennybacker, *Should the Aloha State Say Goodbye? Natives Wonder*, THE NATION, Aug. 12, 1996, at 21, 23-24 (reporting on efforts among at least sixteen Hawaiian sovereignty and homesteader groups to develop a sovereignty approach). Natives also have clashed over the requirements for receiving benefits. See Timothy Egan, *Aboriginal Authenticity To Be Decided in a Vote*, N.Y. TIMES, Jan. 19, 1990, at A16 (describing the difficulties of determining who has legal native status); see also Lee Cataluna, *Who's More Hawaiian Is Now A Question Of Power*, HONOLULU ADVERTISER, Jan. 7, 2001, <http://www.honoluluadvertiser.com/specials/stateofthehawaiians/8cataluna.html> (on file with the North Carolina Law Review) ("[It] isn't really about who's welcome in the *halau* or who gets to give the *pule* at dinner. We as a society have answered those questions already. It's about who gets a share of the entitlements."). Assuming that natives could overcome these obstacles and formulate a definition that satisfied all groups, they would then have to convince Congress to amend legislation containing the old definition. Finally, any congressional action conferring Indian status would be subject to judicial review, and as discussed *infra* notes 123-24, its validity would hinge on how broadly the Court reads the "Indian tribes" language in the Indian Commerce Clause. See U.S. CONST. art. I, § 8, cl. 3 (conveying power to "regulate Commerce with . . . the Indian Tribes"). Cases at the height of the Court's activism in Indian issues used a wide interpretation. See, e.g., *Morton v. Ruiz*, 415 U.S. 199, 212-13 (1974) (treating Alaska Natives as "Indians" in discussing rational basis as the proper test for judicial review); see also *Eric v. Sec'y of the United States Dep't of Hous. & Urban Dev.*, 464 F. Supp. 44, 49 (D. Alaska 1978) (asserting that the trust doctrine applies to all "Native Americans"). Recent decisions, however, curtail Congress's Commerce Clause power. See *infra* notes 128-33 and accompanying text.



objectives, redefine who belongs to the group receiving benefits.<sup>96</sup> The bill called for a temporary definition of Native Hawaiians—lineal descendants of native people who resided in the islands before 1893, the year the United States overthrew the Kingdom of Hawaii<sup>97</sup>—until a Native Hawaiian governing body, also established by the bill, could formulate its own definition.<sup>98</sup> The proposed legislation, which was passed the United States House of Representatives but died in the Senate,<sup>99</sup> notably retains an ancestry requirement, demonstrating the challenge facing Native Hawaiians as they attempt to define their membership to avoid strict scrutiny. The mere presence of the ancestry requirement, while suspect, does not necessarily render the

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96. See Pat Omandam, *Hawaiian Clarification Bill is Planned*, HONOLULU STAR-BULLETIN, Apr. 19, 2000, <http://starbulletin.com/2000/04/19/news/story7.html> (on file with the North Carolina Law Review). Within a few weeks of the *Rice* decision, the state's congressional delegation established a task force to develop legislation to protect government programs benefiting Hawaiians. *Id.* Senators Daniel Akaka and Daniel Inouye co-sponsored the resulting draft legislation, which was introduced on the Senate floor in July 2000. S. 2899, 106th Cong. (2000). Representative Neil Abercrombie sponsored the measure in the House, H.R. 4904, 106th Cong. (2000), without the co-sponsorship of fellow Hawaiian Representative Patsy Mink, who initially feared that the bill's impact would be counterproductive but later supported an amended version. See Pat Omandam, *Mink Says Governing Body Proposed in Akaka Bill Should Be Considered First*, HONOLULU STAR-BULLETIN, Sept. 2, 2000, <http://starbulletin.com/2000/09/02/news/story4.html> (on file with the North Carolina Law Review).

97. The text of the bill as passed by the House of Representatives read:

[T]he term 'Native Hawaiian' means the indigenous, native people of Hawaii who are the lineal descendants of the aboriginal, indigenous, native people who resided in the islands that now comprise the State of Hawaii on or before January 1, 1893, and who occupied and exercised sovereignty in the Hawaiian archipelago, including the area that now constitutes the State of Hawaii, and includes all Native Hawaiians who were eligible in 1921 for the programs authorized by the Hawaiian Homes Commission Act ... and their lineal descendants.

H.R. 4904 § 2.

98. S. 2899 § 7. The original version suggested that genealogical records, verification from Native Hawaiian elders, and church, census or vital statistic records would be the primary means of establishing lineal descendency. See *id.* The inclusion of the census data as adequate proof of Native Hawaiian lineage is particularly strange because ethnic and racial classifications are self-reported on census forms; persons are free to include themselves in any category. See Bureau of Indian Affairs, *Answers to Frequently Asked Questions*, at [http://www.doi.gov/bia/aitoday/q\\_and\\_a.html](http://www.doi.gov/bia/aitoday/q_and_a.html) (last modified June 21, 1999) (on file with the North Carolina Law Review). The version passed in the House eliminates references to suitable evidentiary material. See H.R. 4904 § 7; *supra* note 81.

99. 146 CONG. REC. H8152-53 (daily ed. Sept. 26, 2000); see Audrey Hudson, *House Passes Bill Bypassing Court on Native Hawaiian Self-Governing*, WASH. TIMES, Sept. 27, 2000, at A7; Susan Roth, *Native Legislation Dies in U.S. Senate*, HONOLULU ADVERTISER, Dec. 14, 2000, <http://www.honoluluadvertiser.com/2000/Dec/14/1214localnews13.html> (on file with the North Carolina Law Review) (citing the controversy over the 2000 Presidential election as a factor in diverting attention from the bill). Senator Akaka pledged to reintroduce the bill in the 107th Congress. See *id.*

definition racially charged; other Native American groups whose tribal definitions are considered political employ lineal descendancy and blood quantum requirements.<sup>100</sup> Courts look at the effect of the definition to gauge whether its intent is primarily racial.<sup>101</sup> The designated year post-dates the massive influx of Western immigrants that began in the 1830s.<sup>102</sup> Not surprisingly, the newcomers' subsequent intermarriage with Native Hawaiians increased the number of part-Hawaiians of mixed racial background. This fact undoubtedly did not elude the bill's sponsors.<sup>103</sup> Also, the ultimate

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100. See *United States v. John*, 437 U.S. 634, 650 (1978) (applying the Indian Reorganization Act's definition of "Indian," which includes the phrase "all other persons of one-half or more Indian blood" (quoting 25 U.S.C. § 479 (1976))); see also, e.g., CONST. OF THE CHOCTAW NATION OF OKLA., art. II (including in membership all Choctaw Indians by blood whose names appear on the 1906 tribal rolls and their lineal descendants); CONST. OF THE ELY SHOSHONE TRIBE, art. II (defining as eligible members persons of at least one-quarter degree Shoshone Indian blood who are descendants of members); CONST. OF THE MUSCOGEE (CREEK) NATION, art. III (2) (defining as eligible members tribal members by blood whose names appear on the 1906 final rolls and persons who are lineal descendants by blood of those whose names appear on the final rolls); REV. CONST. OF THE NEZ PERCE TRIBE, art. IV (including within the class of eligible members children who are of at least one-fourth degree Nez Perce Indian ancestry and are born to a tribe member); CONST. OF THE SAC AND FOX TRIBE OF INDIANS OF OKLA., art. I (including in membership all persons of at least one-fourth total combined Sac and Fox Indian blood with at least one parent who is a member of the Sac and Fox Nation). These constitutions are available at <http://thorpe.ou.edu/const.html> (last modified Feb. 2, 2001) (on file with the North Carolina Law Review). Justice Breyer criticized the Native Hawaiian definition as broad "beyond any reasonable limit" and listed these classifications as contrary examples, perhaps indicating a willingness to interpret some ancestry definitions as non-racial in nature. See *Rice v. Cayetano*, 528 U.S. 495, 526–27 (Breyer, J., concurring). That the tribes formulated these classifications of tribal membership distinguishes them from the classification at issue in *Rice* because Hawaii's definition originated from the federal government. See *id.* (Breyer, J., concurring). Traditionally, courts have granted tribes wide leeway to set the terms of their membership. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55–59 (1978) (invoking tribal power to regulate internal relations in denying membership to children of females who married outside the tribe). This distinction, however, would not entirely explain the Court's acceptance in *United States v. John* of the federally generated blood-quantum specification in the Indian Reorganization Act (IRA). If Breyer's suggestion that a narrow blood-quantum qualification renders a federally implemented ancestry-based definition non-suspect is unacceptable to a majority of the Court, the IRA standard is vulnerable.

101. See *Rice*, 528 U.S. at 513–15 (Breyer, J., concurring).

102. See SALLY ENGLE MERRY, *COLONIZING HAWAII: THE CULTURAL POWER OF LAW* 86–87 (2000) (documenting the decimation of the Native Hawaiian population).

103. By sidestepping the pre-1778 era of homogeneous racial composition, Native Hawaiians have a new argument that the revised statute's ancestry requirement is political and not racial in nature. Nevertheless, a court may interpret this as a superficial change. Any classification of Hawaiians by descendancy is arguably racial for the same reasons that a statute granting special benefits to African Americans who could prove descendancy from slaves would be treated as racial. See *Rice*, 528 U.S. at 514 (noting that the voting qualification might still be deemed racially based even if pre-1778 Hawaiian

goal of the new federal legislation is to empower Native Hawaiians to define themselves.<sup>104</sup> Under the bill, the ancestry-based definition only applies temporarily until Native Hawaiians themselves define whom the trust shall benefit.<sup>105</sup>

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inhabitants had been more ethnically diverse); Benjamin, *supra* note 2, at 571 n.151 (“[I]t seems highly unlikely that a court would find that the addition of a nonracial criterion to an explicitly racial definition would thereby cure the definition of its racial character . . . .”); Williams, *supra* note 69, at 807 (“It cannot be . . . that the simple addition of a non-suspect trait to a suspect one yields a non-suspect class.”). With the change of political parties in the White House, the ancestry qualification is likely to face opposition from another front. The previous Republican administration described the Native Hawaiian definition as a “race-based classification [that] cannot be derived from the constitutional authority granted to the Congress and the executive branch to benefit native Americans as member of tribes.” *President’s Statement on Signing the Cranston-Gonzalez Affordable Housing Act*, 1990 PUB. PAPERS 1699, 1701 (Nov. 28, 1990). President George H.W. Bush also directed the Department of Justice and the Secretary of Housing and Urban Development to prepare corrective legislation. *Id.*

104. The bill provided for the development of a roster by a commission of the Department of the Interior of certified “Native Hawaiians” who want to participate in the reorganization of a Native Hawaiian government. *See* S. 2899, 106th Cong. § 7 (2000); S. REP. NO. 106-424, at 39–40 (2000) (Sup. Docs. No. Y1.1/5:106-424). Adult members on the roll would be able to elect representatives to a Native Hawaiian Interim Governing Council that would be responsible for promulgating governing documents that would include a Native Hawaiian definition. *Id.*

105. The descendency requirement appears entrenched in how the law defines Native Hawaiians for sovereignty purposes. Absent a significant shift in policy prompted by the *Rice* decision, the descendency requirement is likely to remain part of any definition, although which year it will specify is uncertain. *See* S. 2899, 106th Cong. § 2(6)(A) (2000). The blood quantum requirement, however, is not generally accepted. *See* Timothy Egan, *Aboriginal Authenticity to be Decided in a Vote*, N.Y. TIMES, Jan. 19, 1990, at A16 (“For years, Congress and the courts have been grappling with the definition.”); Susan Essoyan, *Voters OK Plan to Expand Native Hawaiian Category*, L.A. TIMES, Jan. 31, 1990, at A4 (quoting an OHA trustee who criticized the blood-quantum requirement as a means of dividing Hawaiian natives into “‘two separate classes,’” with one group eligible for benefits and the other not); *Native Hawaiians Vote on Sharing a Trust’s Riches*, N.Y. TIMES, Dec. 26, 1989, at B11 (noting opposition to the definition change from critics who contended that the benefits were already spread too thin). The OHA has referred to the blood quantum requirement as the “single most divisive issue in the Hawaiian community.” *Price v. Akaka*, 3 F.3d 1220, 1222 (9th Cir. 1993). Controversy over the definition also leads to the troubling prospect of conflicting claims as to which group is the “proper” beneficiary of the trust relationship. This precise issue was litigated in *Hoohuli v. Ariyoshi*, 631 F. Supp. 1153 (D. Haw. 1986), in which a group of taxpayers challenged the OHA definition of “Hawaiian” as unconstitutional because the absence of a blood quantum requirement made it overly inclusive. The Court rejected the claim. *See id.* at 1163. In an analogous case, *Menominee Tribe v. United States*, 391 U.S. 404 (1968), two entities with tribal ties each claimed to be the legal successor to treaty rights. *Id.* at 409 n.10 One was a corporation that had received all of the tribal assets previously held in trust by the United States, while the other was a corporation made up of the members of the tribe. *See id.* Because resolution of the issue was not required, the Court specifically reserved the question of which party could assert the rights. *See id.*

Beyond the implications for Hawaii, the *Rice* Court's decision to classify the ancestry requirement as race-based signals trouble for other Native American groups whose status is based primarily on ancestry requirements, rather than tribal status. The decision is particularly significant for Alaska Natives, whose history largely parallels that of the Native Hawaiians.<sup>106</sup> The Alaska Native Claims Settlement Act of 1971 (ANCSA),<sup>107</sup> the major piece of legislation governing Alaska Natives, uses a blood quantum requirement to define "Native," but also provides discretion to accommodate those persons who do not meet the criteria.<sup>108</sup> The *Rice* majority opinion

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106. In addition to having natives without traditional tribal structures, see *supra* note 29, both Alaska and Hawaii became territories of the United States after Congress discontinued making treaties with Indians. See HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 2, at 208 (noting that 1871 marked the end of the treaty period); Mitchell, *supra* note 3, at 360–62 (noting a lack of recognition of tribal sovereignty, treaties, or a special relationship with Alaska Natives); Van Dyke, *supra* note 22, at 121–23 (observing that the post-treaty era resulted in the failure to develop documents for Native Hawaiians similar to those regulating relationships with other native groups). Because courts viewed treaty obligations as one of the elements giving rise to the federal-Indian special relationship, the absence of treaties in the cases of Hawaii and Alaska cast doubt on their claims of a similar relationship. See HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 2, at 208 n.4; Mitchell, *supra* note 3, at 359–62, 394 (reporting on efforts of Alaskan lobbyists who opposed the inclusion of the natives in the special relationship to prevent their subordination). But see *N. Slope Borough v. Andrus*, 642 F.2d 589, 611 (D.C. Cir. 1980) (stating that trust responsibility can arise from a statute, a treaty, or an executive order); *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975) (observing that the enactment of a statute on a tribe's behalf is sufficient to establish the special relationship); *Eric v. Sec'y of the United States Dep't of Hous. & Urban Dev.*, 464 F. Supp. 44, 46 (D. Alaska 1978) (ruling that the nonexistence of a treaty does not affect the existence of a trust relationship).

107. 43 U.S.C.A. §§ 1601–1629g (West 1986 & Supp. 2000). ANCSA demonstrates that whatever the similarities Alaska and Hawaii natives share, Congress's policies toward each group differ considerably. Legislation referring to the Alaska Native "Indians" appeared as early as 1934 in the Indian Reorganization Act. 25 U.S.C. § 473 (1994). Since the passage of ANCSA, Alaska Natives have been included as beneficiaries in virtually all Indian legislation, and the judiciary has affirmed the federal government's continuing trust obligation to them. See *Morton v. Ruiz*, 415 U.S. 199, 231–36 (1974) (implying that Alaska Natives are "Indians" for constitutional purposes); *Adams v. Vance*, 570 F.2d 950, 953 n.3 (D.C. Cir. 1978) (observing that the United States' trustee relationship with Alaska Natives remains intact); *People of Togiak v. United States*, 470 F. Supp. 423, 428 (D.D.C. 1979) (imposing a trust duty to protect subsistence hunting rights); *Eric v. Sec'y of United States Dep't of Hous. & Urban Dev.*, 464 F. Supp. 44, 49 (D. Alaska 1978) (holding that the obligation is limited only by common law principles and not by statutory language); *Edwardsen v. Morton*, 369 F. Supp. 1359, 1371, 1378–80 (D.D.C. 1973) (allowing a cause of action for breach of fiduciary duty). But see Van Dyke, *supra* note 22, at 126–28 (arguing that the strong parallels between Alaska Natives' and Native Hawaiians' dealings with the federal government preclude treating the groups differently for purposes of the special relationship).

108. For tribal purposes, an Alaska "Native" is "a person of one-fourth degree or more Alaska Indian . . . [or one] who is regarded as an Alaska Native by the Native village or

does not speculate about whether the inclusion of a discretionary clause would alter its holding. The Court's emphasis on the Fifteenth Amendment violation, however, suggests that the majority found the ancestry requirement particularly offensive because of its proximity to a statewide, state-controlled voting scheme.<sup>109</sup> Under circumstances not involving electoral fairness concerns, the Court might be less inclined to find that the ancestry requirement is equivalent to a race-based restriction.<sup>110</sup> If so, tribes whose governing bodies are far removed from the state and whose affairs are discretely contained have little to fear from *Rice*, even if those tribes' membership standards include lineal descendant provisions.<sup>111</sup> Because few tribes face the Native Hawaiians' predicament of depending on a non-tribal entity to manage their affairs—particularly

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Native group of which he claims to be a member and whose father or mother is . . . regarded as Native by any village or group." 43 U.S.C. § 1602(b). A Ninth Circuit Court of Appeals case predating *Rice* held that the blood quantum requirement "does not detract from the political nature of the classification." *Associated Gen. Contractors of Am., Inc. v. Pierce*, 694 F.2d 1162, 1168–69 n.10 (9th Cir. 1982) (citing the absence of other practicable methods, like tribal rolls or proximity to reservations, for determining membership). One aspect of the Alaska Native definition distinguishing it from its Native Hawaiian counterpart is that membership can be based on non-ancestral factors, which supports its treatment as politically based.

109. The state-developed voting scheme instituted under the OHA is an anomaly among forms of tribal governance. See NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 34, at 18–20. Other natives' tribal elections are administered by tribal bodies. See generally HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 2, at 246–57 (describing various methods of tribal organization). As the Court reiterated in *Rice*, the Fifteenth Amendment exists to "reaffirm the equality of the races at the most basic level of the democratic process, the exercise of the voting franchise," when public issues are at stake. *Rice v. Cayetano*, 528 U.S. 495, 512 (2000). While the Constitution's Bill of Rights does not apply to American Indian governing bodies, see *Talton v. Mayes*, 163 U.S. 376, 384 (1896), the courts have stepped into tribal matters when voting concerns were at issue, even when only tribal members were affected. See, e.g., *Brown v. United States*, 486 F.2d 658, 662–63 (8th Cir. 1973) (determining that the one-person, one-vote standard applied in a particular tribal election through general provisions of the Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 77 (1968) (codified at 25 U.S.C. §§ 1301–1303) (1994)); *Daly v. United States*, 483 F.2d 700, 705 (8th Cir. 1973) (same); *White Eagle v. One Feather*, 478 F.2d 1311, 1314 (8th Cir. 1973) (same); *Luxon v. Rosebud Sioux Tribe*, 455 F.2d 698, 700 (1972) (upholding jurisdiction to hear an equal protection complaint stemming from tribal candidacy disqualification).

110. See *Rice*, 528 U.S. at 527 (Breyer, J., concurring) (stating that Hawaii's definitions do not necessarily violate the Constitution when considered outside the voting context).

111. See *id.* at 520 ("If a non-Indian lacks a right to vote in tribal elections, it is for the reason that such elections are the internal affair of a quasi-sovereign."). The Court also has upheld the legitimacy of tribal councils and affirmed their power to enact ordinances, including those applicable to non-Indians. See *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 201 (1985).

the election of tribal leaders or trustees—the fallout from *Rice* is likely to be limited.<sup>112</sup>

The Native Hawaiians' dilemma in constructing a definition that will survive strict scrutiny is moot, however, if the judiciary refuses to include them within the special relationship; inclusion in the relationship is a threshold prerequisite for application of the rational relation test.<sup>113</sup> While the *Rice* Court did not rule on that issue, the majority acknowledged uncertainty as to whether the federal government has recognized the status of Native Hawaiians as equivalent to that of Indians in organized tribes.<sup>114</sup> The potential implications of the Court's pronouncement cast doubt on whether Hawaiian natives will ever be able to claim membership in the special relationship.

The Native Hawaiians' relationship with the United States government does not closely resemble that of any American Indians.<sup>115</sup> Dealings between American Indians and the federal government were akin to a "government-to-government" interaction,

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112. In addition to Hawaiians, Alaska Natives, who manage their affairs through a corporate structure established by ANCSA, may also be potentially affected. Governance of these corporations, however, is not through a state agency but by Indian groups or villages organized into a corporate form. See 43 U.S.C. §§ 1606–1607 (setting standards for the creation and provision of benefits). Such formal organization and recognition does not necessarily insulate Alaska Natives from questions regarding their ability to claim the special relationship. See Benjamin, *supra* note 2, at 602 ("[T]he constitutional status of these corporations for purposes of equal protection analysis is not clear.").

113. See *Morton v. Mancari*, 417 U.S. 535, 551–52 (1974) (stating that the outcome of the case hinged on the unique status of "Indian tribes").

114. *Rice*, 528 U.S. at 518–19.

115. The major factor distinguishing Native Hawaiians from other indigenous groups is that Western nations treated the ruling monarchy as a foreign sovereign. See S. EXEC. DOC. NO. 52-77, at 40–41 (1893) (Sup. Docs. No. Y1.1/2:3062) (statement of Sec'y of State Webster) (affirming the United States' official position that the existing island government should be respected); Dep't of the Interior & Dep't of Justice, *From Mauka to Makai: The River of Justice Must Flow Freely* 22 (Oct. 23, 2000), at <http://www.doi.gov/nativehawaiians/pdf/1023fin.pdf> (on file with the North Carolina Law Review) [hereinafter *From Mauka to Makai*] (finding that the existence of numerous treaties with America, as well as at least fifteen other countries, demonstrate that the United States considered the Hawaiian kingdom an independent nation). As Felix S. Cohen, the pre-eminent scholar in Indian law, points out, the recognition of Hawaiians as an equal player in foreign affairs contrasts markedly with the view of tribes in the continental United States, whose sovereign status "was considered subordinate to 'discovering' nations." HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 2, at 799 (quoting *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823)); see also NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 34, at 77 ("Indian nations had some, but not all, of the aspects of sovereignty; the Kingdom of Hawai'i possessed all of the attributes of sovereignty and was so recognized by the world community of sovereign nations."); PRUCHA, *supra* note 5, at 39 ("Procedures for dealing with established foreign nations were quite different from those for dealing with the Indian nations . . .").

which assisted in preserving tribal sovereignty.<sup>116</sup> In contrast, the United States' treatment of Hawaii is more accurately described as colonialism, marked by deliberate efforts to "civilize" the natives by subordinating their political infrastructure to purge them of their cultural practices.<sup>117</sup> These efforts culminated in the overthrow of the native government; accordingly, few vestiges of their sovereign

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116. See HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 2, at 232 ("[T]he United States from the beginning permitted, then protected, the tribes in their continued internal government."). Although whites commonly disregarded Indians rights, the existence of treaties provided a form of protection for American Indians by granting political recognition, verifying land ownership, and strengthening autonomy. See PRUCHA, *supra* note 5, at 2-5 (asserting that in many cases "recognition of independence meant more to Indian groups than did their lands"). Reservations served a similar purpose by encouraging a "measured separatism" desired by tribes as well as the federal government. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW 32 (1987) (describing the reservation system as a means of establishing "islands of tribalism largely free from interference by non-Indians or future state governments"). Notwithstanding the racist motives behind its creation, the reservation system increased tribes' ability to retain control over their internal affairs and preserve their cultural practices. See *id.* at 52-54 (arguing that reservations to some extent insulated tribes from the threat of assimilation). This is not to understate the horrors that the United States inflicted on American Indians or deny that assimilation policies undermined tribal autonomy. See, e.g., Indian Removal Act, Act of May 28, 1830, ch. 148, §§ 1-8, 4 Stat. 411, 411-12 (forcing tribes to relocate in the West); ALVIN M. JOSEPHY, JR., NOW THAT THE BUFFALO'S GONE 154 (1982) ("[T]ribes were cheated and robbed, their assets were mishandled and subjected to fraud, and it became a habit not even to inform them of developments and agreements made in their name that would adversely affect their resources."); Clinton, *supra* note 94, at 102 (noting that mandatory off-reservation boarding schools for Indian adolescents played a significant role in wiping out tribal cultural and religious practices). The failure to commit to a policy of complete assimilation combined with periodic efforts to bolster Indian self-determination, however, helped assure the survival of some tribal government structure. See Clinton, *supra* note 94, at 123 ("Indian resistance and resentment to . . . federal colonialist practices tend to strengthen, rather than diminish, Indian peoplehood and their own sense of political autonomy.") The diametric approaches of assimilation and separatism—the latter virtually absent from the Native Hawaiian experience—have uniquely characterized the federal-Indian relationship. See WILKINSON, *supra*, at 13-14 (characterizing relations with Indians as a pattern of conflicting approaches); John W. Ragsdale, Jr., *Anasazi Jurisprudence*, 22 AM. INDIAN L. REV. 393, 434 (1998) (describing assimilation from two perspectives: the promotion of societal acceptance and economic independence, and a "cultural annihilation that approached genocide"); Sharon O'Brien, *Tribes and Indians: With Whom Does the United States Maintain a Relationship?* 66 NOTRE DAME L. REV. 1461, 1465-66 (1991) (recounting continual shifts between assimilation and separatism).

117. See MERRY, *supra* note 102, at 23-24 (describing the central goals of American colonialism as assimilation and incorporation by converting Hawaiian natives into "civilized" Christian people); Maunupau, *supra* note 85, at 44-46 (assessing the negative impact of American influence on native culture); see also TOM COFFMAN, NATION WITHIN: THE STORY OF AMERICA'S ANNEXATION OF THE NATION OF HAWAII 119-27 (1998) (recounting the events leading up to the American overthrow of the Native Hawaiian government).

structure survived,<sup>118</sup> and what did remain bore little resemblance to a "tribe."<sup>119</sup> The significance of these factors, brought to the forefront by *Rice*, is that the lack of a tribal structure has a bearing on whether a special relationship exists with Native Hawaiians under existing law, and whether Congress has the authority to include them within that relationship.<sup>120</sup>

Prior to *Rice*, lower courts largely operated on the assumption that, because the experience of Native Hawaiians closely paralleled that of American Indians, Native Hawaiians should be included within the special relationship even though their structure was not "tribal."<sup>121</sup> The courts based this view on legislation indicating that

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118. As one scholar observes, Indians were displaced from entire regions, but Hawaiians "lost an entire country" and their government when supporters of American annexation seized power through an armed invasion and forced the Queen to abdicate. See GETCHES ET AL., *supra* note 22, at 947-48 (describing the extent of U.S. government involvement in the takeover); SCHWEIZER, *supra* note 91, at 283-90 (documenting the careful planning behind efforts to take control of the islands); see also Joint Resolution (Apology Resolution), Act of Nov. 23, 1993, Pub. L. No. 103-150, 107 Stat. 1510 (1993) (acknowledging the illegality of the overthrow of the Kingdom of Hawaii by American insurrectionists); KENT, *supra* note 83, at 43-45 (characterizing sovereignty as a "façade" in light of the power foreign plantation owners wielded starting in the mid-1800s). Following the fall of the monarchy, Americans ruled Hawaiians through a provisional government unit, placing such stringent qualifications for voting and holding office that few natives were eligible. See NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 34, at 13-15 (detailing Hawaiian protests of the overthrow); Trask, *Native Hawaiian Nationalism*, *supra* note 13, at 15-18 (observing that U.S. actions rendered Hawaiian natives "a conquered people, their lands and culture subordinated to another nation").

119. At the time of Captain Cook's arrival in 1778, Native Hawaiians shared common cultural traits and practices but were governed under four separate kingdoms. R. TABRAH, HAWAII, A HISTORY 13-14 (1984). The kingdoms later were united into a single monarchy under King Kamehameha I. *Id.* One could view the movement away from more traditional forms of native government as a strategy of self-preservation. As Sally Engle Merry explains, "[c]onstructing a society that appeared 'civilized' to the Europeans in nineteenth-century terms clearly helped to win acceptance from those European powers whose recognition conferred sovereignty. . . . Elites engaging in 'civilizing' their nations did so because they saw this as a form of resistance to imperialism." MERRY, *supra* note 102, at 13; see also NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 34 at 9-11 (observing how Hawaii's fight to protect itself from Western dominance led to drastic changes in the structure of its political institutions); Trask, *Hawaiian Self-Determination*, *supra* note 92, at 84 (commenting that Hawaiians "historically have not organized as tribes").

120. See *Rice v. Cayetano*, 528 U.S. 495, 518-19 (2000).

121. See *Rice v. Cayetano*, 963 F. Supp. 1547, 1553-54 (D. Haw. 1997) (finding that a broad definition of "tribe" is appropriate because statutory requirements unnecessarily limit federal recognition); *Nalielua v. Hawaii*, 795 F. Supp. 1009, 1012-13 (D. Haw. 1990) ("Although Hawaiians are not identical to the American Indians whose lands are protected by the Bureau of Indian Affairs, the court finds that for purposes of equal protection analysis, the distinction . . . is meritless."); *Ahuna v. Dep't of Hawaiian Home Lands*, 640 P.2d 1161, 1169 (Haw. 1982) ("Essentially, we are dealing with relationships between the government and aboriginal people. Reason thus dictates that we draw the



the federal government has obligations toward the Native Hawaiians<sup>122</sup> and on precedent from the Supreme Court and the circuit courts indicating that Congress's power with respect to "Indians"<sup>123</sup> is not limited to members of recognized tribes.<sup>124</sup> The

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analogy between native Hawaiian homesteaders and other native Americans."); *see also* Neil M. Levy, *Native Hawaiian Land Rights*, 63 CAL. L. REV. 848, 875-76 (1975) (arguing for legal treatment of Native Hawaiians analogous to that of American Indians).

122. *See, e.g.*, Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 9202, 108 Stat. 3518, 3796 (codified in scattered sections of 20 U.S.C.) (recognizing "the special relationship which exists between the United States and the Native Hawaiian people"); Joint Resolution (Apology Resolution), Act of Nov. 23, 1993, Pub. L. No. 103-150, 107 Stat. 1510 (1993) (apologizing to Native Hawaiians for the United States' role in overthrowing their government and supporting "reconciliation efforts"); Act to Provide for the Admission of the State of Hawaii into the Union (Admission Act), Pub. L. No. 86-3, § 5(f), 73 Stat. 4, 6 (1959) (conveying land to a "public trust" to benefit Native Hawaiians); Hawaiian Homes Commission Act of 1920, Pub. L. No. 66-34, ch. 42, 42 Stat. 108 (1921) (analogizing the Act's provisions to other enactments granting "Indians . . . special privileges in obtaining and using the public lands"). The *Rice* Court also noted that federal government programs specially intended to benefit the island natives have existed since at least 1898. *Rice v. Cayetano*, 528 U.S. at 505. Justice Stevens' dissent went further, asserting that congressional history, explicitly articulated by the formal apology to Native Hawaiians, shows a well-established federal trust relationship. *Id.* at 532-34 (Stevens, J., dissenting).

123. Briefs filed by the United States government and the Hawaiian congressional delegation contended that the framers of the United States Constitution used the terms "Indian" and "aboriginal" synonymously and that "Indian tribe" thus describes any distinct group of indigenous people. Brief of Amicus Curiae United States at 12, *Rice v. Cayetano*, 528 U.S. 495 (2000) (No. 98-818); Brief of Amicus Curiae Hawai'i Congressional Delegation at 6-7, *Rice v. Cayetano*, 528 U.S. 495 (2000) (No. 98-818). Historical evidence indicates that the language originally proposed for the Constitution used "Indians" without a reference to tribes. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 321 (Max Farrand ed., 1966). Correspondence between James Monroe and James Madison concerning the construction of what became the Indian Commerce Clause referred to "Indians not members of any State." 2 THE FOUNDERS' CONSTITUTION 529 (Philip B. Kurland & Ralph Lerner eds., 1987).

124. *United States v. John*, 437 U.S. 634, 650 (1978) (holding that the Indian Reorganization Act, Pub. L. No. 73-383, ch. 576, § 19, 48 Stat. 984, 988 (codified in part at 25 U.S.C. § 479 (1994 & Supp. IV 1998)) applies to any person of at least fifty percent "Indian blood"); *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 77 (1977) (listing congressional treatment, not just official recognition, as determinative); *United States v. Sandoval*, 231 U.S. 28, 46 (1913) (holding that the government has "the power and the duty of . . . care and protection over all dependent Indian communities within its borders"); *see also* *Associated Gen. Contractors of Am., Inc. v. Pierce*, 694 F.2d 1162, 1162-70 (9th Cir. 1982) (addressing whether the rational relation standard extends to programs for individual Indians); *cf. United States v. Kagama*, 118 U.S. 375, 381 (1886) (indicating that Indians have a quasi-sovereign status "when they preserve[] their tribal relations"). Part of the confusion surrounding what constitutes a "tribe" stems from the absence of any precise federal statutory or common law test. HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 2, at 3 (observing that "[t]here is no single federal statute defining an Indian tribe for all purposes"); Quinn, *supra* note 4, at 334-35 (noting that federal law and policy left "Indian" and "tribe" undefined until the late 1800s); *see Montoya v. United States*, 180 U.S. 261, 266 (1901) (interpreting "Indian tribe" to mean "a

*Rice* majority, however, expressly avoided addressing whether Congress has settled the status of Native Hawaiians.<sup>125</sup> Thus, the lower courts' analysis is not necessarily incorrect, but it is far from conclusive. Until Congress officially pronounces the extent of its obligations, any claim the Native Hawaiians have to the special relationship is tenuous at best. Legislative efforts are under way to clarify and correct this problem,<sup>126</sup> but the *Rice* Court provided troubling indications that congressional recognition might not resolve the issue.<sup>127</sup>

By noting that Congress's authority to treat Native Hawaiians in the same manner as Indian tribes "is a matter of some dispute,"<sup>128</sup> the

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body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory"). Official federal tribal recognition can come from Congress or from executive branch agencies such as the BIA and the Department of the Interior. 25 C.F.R. §§ 83–84 (2000); see L.R. Weatherhead, *What is an "Indian Tribe"?—The Question of Tribal Existence*, 8 AM. IND. L. REV. 1, 8 (1980) ("Recognition is shown by some treaty, agreement, executive order, or course of dealings . . ."). Under modern legislation, an "Indian tribe" is often defined as a "tribe, band, nation or other organized group or community . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." Indian Self-Determination Act, 25 U.S.C. § 450b(e) (1994 & Supp. IV 1998). Such a definition leaves much of the responsibility for determining Indians' eligibility for benefits to the Department of the Interior. See Weatherhead, *supra*, at 14–15 (citing similar statutory language in the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301(1) (1994); Indian Financing Act of 1974, 25 U.S.C. § 1452(c) (1994); Indian Health Care Improvement Act, 25 U.S.C. § 1603(d) (1994 & Supp. IV 1998); Indian Child Welfare Act of 1978, 25 U.S.C. § 1903(8) (1994)).

125. See *Rice*, 528 U.S. at 518.

126. See 146 CONG. REC. S7394–95 (daily ed. July 21, 2000) (statement of Sen. Akaka) (stressing the need for legislation to secure a government-to-government relationship between Native Hawaiians and the United States). The Executive Branch also became involved, with two cabinets issuing a report on reconciliation that recommends granting Native Hawaiians control over their affairs within the framework of federal law. See *From Mauka to Makai*, *supra* note 115, at 3–4. Among the report's main proposals are the enactment of federal legislation to clarify Native Hawaiians' political status, the establishment of an office within the Department of the Interior to address Native Hawaiian issues, and the creation of a Native Hawaiian Advisory Committee that would work with the Department of the Interior on land management issues. *Id.*

127. See *Rice*, 528 U.S. at 518; see also Benjamin, *supra* note 2, at 598–611 (suggesting that constitutional concerns could preclude any possibility that a federally recognized or created Hawaiian native body would fall within the protected relationship).

128. *Rice*, 528 U.S. at 518. As the Court acknowledged, embarking on this inquiry would require resolving issues of "considerable moment and difficulty." *Id.* At the very least, the answer would require some pronouncement on the extent of the congressional "plenary power" over Indians under the Commerce Clause. Recent cases curtailing Congress's Commerce Clause power have been aimed primarily at regulation of interstate commerce. See *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 548, 567–68 (1995). But see *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996) (holding that the Indian Commerce Clause does not grant authority to Congress to abrogate states' sovereign immunity under the Eleventh Amendment). Other Commerce

Court suggests that any provision seeking to secure the Native Hawaiians' sovereign status is vulnerable to challenge on the basis that "creating" a tribe falls outside the powers granted to Congress.<sup>129</sup> Should the Court decide to confront this question in a future case, it would mark a dramatic departure from prior case law that grants Congress substantial power over Native American affairs.<sup>130</sup> In particular, judicial review of power regarding the determination of tribal status, which was previously seen as a political issue properly left to Congress or the Executive Branch, would deviate drastically from previous policy.<sup>131</sup> In leaving the underlying trust structure

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Clause powers—regulation of commerce with foreign nations and Indian tribes—are areas traditionally of less concern to the states. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 133 (5th ed. 1995) (observing that, even during periods of debate over the limits of congressional power to regulate interstate commerce, "there was no serious advocacy of restrictions on the federal powers in these other [commerce] areas . . . . [T]he Justices have never recognized any important or legitimate state interest in foreign affairs or dealings with American Indians."); *cf.* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1625–29 (1996) (denouncing recent Court decisions that consider state interests in tribal sovereignty issues as an abandonment of firmly established principals in Indian law). Because Indian lands are necessarily within state borders, the opportunity for tension between states and tribes is omnipresent.

129. *See* *United States v. Sandoval*, 231 U.S. 28, 46 (1913) (stating that Congress cannot include a group in the special relationship by arbitrarily labeling it a tribe); *see also* *United States v. Candelaria*, 271 U.S. 432, 439 (1926) (citing *Sandoval*); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 582 n.3 (1st Cir. 1979) (same); *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (explaining that a tribe must be something more than a private, voluntary organization).

130. *See Sandoval*, 231 U.S. at 46 (observing that Congress's power includes authority to decide when and to what extent it shall recognize a particular Indian community as a dependent tribe under its guardianship); *In re Kansas Indians*, 72 U.S. (5 Wall.) 737, 756–57 (1867) (stating that courts will accord substantial weight to federal recognition of a tribe); *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 418–20 (1865) (explaining that whether a group is a tribe is primarily a question for Congress); *see also* *Antoine v. Washington*, 420 U.S. 194, 199–200 (1975) (noting that legislation conferring benefits or protection on Indians is to be construed liberally in their favor); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930) (same); *United States v. Nice*, 241 U.S. 591, 598 (1916) (ruling that only Congress can determine when a special relationship ceases); *Tiger v. W. Inv. Co.*, 221 U.S. 286, 315 (1911) (same); *Weatherhead*, *supra* note 124, at 8 ("The courts essentially accept the judgment of Congress or Interior that an Indian group is a tribe, as they do in other matters involving political questions.").

131. *See* *United States v. McGowan*, 302 U.S. 535, 538–39 (1938) ("Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out . . . ."); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government."); HANDBOOK OF INDIAN LAW, *supra* note 2, at 3 ("When Congress or the Executive has found that a tribe exists, courts will not normally disturb such a determination."). *But see Sandoval*, 231 U.S. at 46 ("Congress may [not] bring a community or body of people within the range of this power

intact, the majority exhibited some willingness to entertain the possibility that Native Hawaiians merit inclusion within the special relationship.<sup>132</sup> The Court provided few clues, however, as to whether it would maintain its deferential stance toward Congress on matters regarding Indians or whether it would employ a stricter standard of review, making it impossible to determine whether the Court would affirm or invalidate a statute recognizing a trust relationship.<sup>133</sup>

Native Hawaiians favoring special relationship status may take heart in the Court's decision to assume the validity of OHA and other programs that operate to their benefit, but they must recognize that the relief might be temporary.<sup>134</sup> If the Court implements a new standard of review and declares that the federal government may not legislate Native Hawaiians into membership of "unique obligation" beneficiaries, preferential programs based on a trust relationship will be prohibited.<sup>135</sup> Until the Court rules on the scope of congressional authority over the status of Native Americans—which it may never do—Native Hawaiians nevertheless can take steps to minimize the negative impact of the *Rice* ruling. A look at the immediate impact and response to *Rice* and some proposals aimed at helping Native Hawaiians move toward their goal of sovereignty demonstrates how Native Hawaiians are beginning to proceed.

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by arbitrarily calling them an Indian tribe . . .").

132. See *Rice*, 528 U.S. at 521–22 ("[W]e assume the validity of the underlying structure and trusts . . .").

133. Efforts to limit Congress's authority to deal with tribes would conform with the recent trend of the Rehnquist Court, widely denounced by Indian law scholars, to turn away from core principles of Indian jurisprudence. See *Dep't of Human Res. v. Smith*, 494 U.S. 872, 886 (1990) (abandoning the requirement that a state must have a compelling interest to regulate religious use of peyote in the Native American Church); Clinton, *supra* note 69, at 93–94 (criticizing the Court for renouncing its traditional countermajoritarian role of protecting Indians from state intrusions upon tribal sovereignty); Getches, *supra* note 128, at 1573–74 (commenting on a disturbing departure from the court's traditional role "as the conscience of federal Indian law, protecting tribal powers and rights at least against state action"); Robert A. Williams, Jr., *Columbus's Legacy: The Rehnquist Court's Perpetuation of European Cultural Racism Against American Indian Tribes*, 39 FED. B. NEWS & J. 358, 361 (1992) (charging that the Court has extended "the racist legacy brought by Columbus to the New World of the use of law as an instrument of racial domination and discrimination against indigenous tribal peoples' rights of self-determination").

134. Lawsuits in the wake of *Rice* challenge the constitutionality of the OHA and preference programs for Hawaiian natives. See *Barrett v. Hawaii*, No. 1:2000cv00645 (D. Haw. filed Oct. 3, 2000); *Carroll v. Nakatani*, No. 1:2000cv00641 (D. Haw. filed Oct. 2, 2000).

135. See *Morton v. Mancari*, 417 U.S. 535, 555 (1974).

Following *Rice*, the Hawaii Legislature amended its statutes to open the OHA election to all eligible voters.<sup>136</sup> Expanding voter eligibility to the general population was a quick and easy response to avoid the Fifteenth Amendment violation identified by the Supreme Court. It was not, however, the best way to promote sovereignty for Native Hawaiians because it potentially places a substantial amount of control over their affairs in the hands of non-Native Hawaiians.<sup>137</sup> A better short-term solution would be appointment of OHA board members through an application process, which would allow greater scrutiny over those members and ensure that their interests were aligned with the trust's stated purpose of improving conditions for Native Hawaiians.<sup>138</sup> One of the benefits of temporarily appointing

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136. Act of April 26, 2000, No. 59, § 2, 2000 Haw. Sess. Laws. 115, 116 (extending OHA electoral eligibility to all voters in the state), *amending* HAW. REV. STAT. § 13D-3 (1993 & Supp. 1999). The trustee membership criteria is still in transition. Act of April 26, 2000, No. 59, § 1, 2000 Haw. Sess. Laws. 115, 115 (restricting seats on the OHA board to Hawaiians), *amending* HAW. REV. STAT. § 13D-2 (1993 & Supp. 1999). The United States District Court issued a preliminary injunction permitting non-Hawaiians to join the OHA trustee board race. See Pat Omandam, *OHA Seats Still Open to All*, HONOLULU STAR-BULLETIN, Sept. 9, 2000, <http://starbulletin.com/2000/09/09/news/story2.html> (on file with the North Carolina Law Review). Governor Cayetano also declared his belief that the *Rice* decision rendered OHA board seats vacant because the election was invalid. See Yasmin Anwar, *After a Year of Turmoil, OHA Faces More Trials*, HONOLULU ADVERTISER, Jan. 7, 2001, <http://www.honoluluadvertiser.com/specials/stateofthehawaiians/2oha.html> (on file with the North Carolina Law Review). The incumbent board successfully defended their posts before the Supreme Court of Hawaii. Office of Hawaiian Affairs v. Cayetano, 6 P.3d 799, 806-07 (Haw. 2000). In a surprise move, all nine members resigned from the board the day before the decision was handed down in a sign of solidarity. Pat Omandam & Rosemarie Bernardo, *OHA Trustees Resign*, HONOLULU STAR-BULLETIN, Sept. 8, 2000, <http://starbulletin.com/2000/09/08/news/story1.html> (on file with the North Carolina Law Review).

137. Because Native Hawaiians constitute just twenty percent of the state population, S. REP. NO. 106-424, at 36-37 (2000) (Sup. Docs. No. Y1.1/5:106-424), they are unable to wield sufficient voting power to guarantee substantial representation on the OHA board.

138. States commonly employ appointed boards to assist in governing, particularly in areas in which specialized knowledge is advantageous. See, e.g., ARIZ. REV. STAT. ANN. § 23-1386(B) (West 1995) (agriculture employment relations board); COLO. REV. STAT. § 17-2-201(2) (2000) (parole board); N.C. GEN. STAT. § 143B-350 (1999) (transportation board). Another advantage of an appointed board is that it could be structured as a public-private entity, with appointees from designated Native Hawaiian groups as well as members representing the general public. See, e.g., U.F.W. v. Ariz. Agric. Empl. Rels. Bd., 727 F.2d 1475, 1477 (9th Cir. 1984) (affirming the constitutionality of a state employment relations board consisting of two members appointed from labor groups, two members appointed from agricultural employers, and three members representing the general public). Several states have established commissions specifically to address matters concerning Native Americans, with representatives selected by designated tribal groups. See ALA. CODE § 41-9-708(b) (2000) (establishing the Alabama Indian Affairs Commission, consisting of seven representatives chosen by the governor based on recommendations submitted by each of the seven recognized groups); MASS. ANN. LAWS

the OHA trustees is flexibility; membership may include individuals who are not statutorily defined Hawaiians without severely compromising sovereignty goals.<sup>139</sup> As a long-term solution, however, board appointment risks undermining the ability of Native Hawaiians to govern themselves.<sup>140</sup> If the appointment process is controlled by

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ch. 6A, § 8A (Law. Co-op. 1998) (establishing the Commission on Indian Affairs, consisting of seven members appointed by the governor); MICH. STAT. ANN. § 3.547(101) (Michie 2000) (establishing the Indian Affairs Commission, consisting of eleven members, nine of whom must have a quarter Indian blood and at least two recommended by an intertribal council); MONT. CODE ANN. § 2-15-217 (1999) (establishing a coordinator of Indian affairs to be appointed from a list of five qualified applicants agreed upon by tribal councils in the state); N.J. STAT. ANN. § 52:16A-53 (West Supp. 2000) (establishing the Commission on Native American Affairs, consisting of two members each appointed on recommendation of three state-recognized tribes); N.C. GEN. STAT. § 143B-407 (1999) (establishing the Commission of Indian Affairs, including 19 representatives selected by tribal or community consent from Indian groups recognized by the state); OKLA. STAT. ANN. tit. 74 § 1201 (West 1995 & Supp. 2001) (establishing the Oklahoma Indian Affairs Commission, consisting of twenty members, all of whom must be enrolled in one of thirty-nine state tribal governments); VA. CODE ANN. § 9-138.1 (Michie 1998) (establishing the Council on Indians, consisting of representatives from eight tribes recognized by the state and two representatives from the Indian population at large). If Hawaii adopted a similar scheme, members could be chosen from among the diverse groups advocating different forms of sovereignty for Hawaii. See *infra* note 145. The Hawaii legislature could change the structure of the board by further amendments to section 13D-1 of the Hawaii Revised Statutes.

139. Examples of non-Hawaiians who might add valuable perspective to the board include Hawaiian studies scholars, native policy experts, non-Hawaiians whose family members are overwhelmingly Hawaiian, descendants of natives who consider themselves Native Hawaiians but who fall outside the blood quantum requirement, and others with a compelling interest in working toward sovereignty. Through the selection process, their seats could be limited to a minority of the membership so they would not dominate the OHA governing scheme. Of course, an appointed board also must comply with equal protection standards. See *Quinn v. Millsap*, 491 U.S. 95, 109 (1989) (holding that a requirement limiting appointments to a government advisory board to owners of real property violated the equal protection clause of the Fourteenth Amendment).

140. A permanent appointment scheme runs the risk of overly politicizing the process. For instance, a governor or legislature hostile to the Native Hawaiian cause could hold up appointments or attempt to load the board with appointees with anti-sovereignty views. Potential problems inherent in board appointments are illustrated by the case of Hawaii's Bishop Estate, a \$10 billion public land trust whose trustees are appointed by Hawaii Supreme Court Justices. See Martin Kasindorf, *In Hawaii, a Loss of Trust in Once-Sacred Estate*, USA TODAY, Nov. 12, 1997, at 5A, 1997 WL 7019654. Alleged mismanagement and improper use of funds prompted investigations by the IRS and the state attorney general, leading to the indictment of several trustees. See *id.*; see also Judge Robert Mahealani M. Seto & Lynne Marie Kohm, *Of Princesses, Charities, Trustees, and Fairytales: A Lesson of the Simple Wishes of Princess Bernice Pauahi Bishop*, 21 U. HAW. L. REV. 393, 395 n.18 (1999) (listing examples of trustee indiscretion). Critics have complained that the trusteeships, which carry a yearly compensation of just less than \$1 million, often go to political insiders, creating an appearance of impropriety. See Hazel Beh, *Why the Justices Should Stop Appointing Bishop Estate Trustees*, 21 U. HAW. L. REV. 659, 662 (1999) (arguing that the appointment process undermines public confidence in the judicial system).

non-Native Hawaiians, someone outside the historically oppressed group is effectively exercising authority, which is precisely the situation Native Hawaiians have been struggling to overcome.<sup>141</sup>

In any case, a structure aimed at achieving maximum autonomy for Native Hawaiians necessarily must eliminate the State of Hawaii's intervention to the greatest extent possible.<sup>142</sup> Reduction of state involvement accomplishes several goals. First, the nature of the relationship changes from state government-native in nature to federal government-native—the relationship from which the trust obligation springs.<sup>143</sup> Second, reduced state involvement promotes

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An electoral scheme such as the OHA's, however, does not necessarily guarantee total political autonomy. The agency's independence is limited because the legislature controls its funding. NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 34, at 89–90. Current state law allocates only twenty percent of the income from public lands to the OHA, with the rest going into the general state treasury. HAW. REV. STAT. § 10-13.5 (1993). This arrangement has withstood court challenges from those who believe that the terms of the trust require all funds to be used to benefit natives. *See, e.g.,* *Hou Hawaiians v. Cayetano*, 183 F.3d 945, 947–48 (9th Cir. 1999) (noting that as long as the trust proceeds are used for one of the five specified purposes, the State of Hawaii has discretion in allocating the funds). The significant amount of money at stake makes political tension almost inevitable, as illustrated by the OHA's ongoing efforts to gain a greater share of funds generated by income from the lease of public lands to businesses such as hotels, shopping malls, and airports. *See* *Trs. of Office of Hawaiian Affairs v. Yamasaki*, 737 P.2d 446, 458 (Haw. 1987) (designating the appropriate boundaries of a trust a political question to be resolved by the legislature and not the judiciary); Podgers, *supra* note 94, at 78–79 (chronicling native challenges to state efforts to limit development or limit access to public lands). The State and the OHA are currently in negotiations attempting to settle a lawsuit over past-due revenues from ceded lands, with the amount owed estimated at between \$300 million and \$1.2 billion. *See* Pat Omandan, *Activism Takes Place on Many Fronts*, HONOLULU STAR-BULLETIN, March 20, 2000, <http://starbulletin.com/2000/03/20/special/story6.html> (on file with the North Carolina Law Review).

141. Even if the entity or office in charge of appointments earnestly supports the Native Hawaiian effort, sovereignty advocates are unlikely to endorse the arrangement because it smacks of the “benevolent” paternalism that has characterized native relations with outsiders. *See* Maunupau, *supra* note 85, at 48 (asserting that federal government efforts to assist sovereignty are simply another means of control and domination over natives); Mililani B. Trask, *The Politics of Oppression*, in HAWAII: RETURN TO NATIONHOOD, *supra* note 13, at 71, 86–87 [hereinafter Trask, *Politics of Oppression*] (presenting the pro-sovereignty view that federal programs instituted to assist natives act as a continuing forced wardship).

142. Without pervasive government involvement, the *Rice* outcome might have been different. *See Rice v. Cayetano*, 528 U.S. 495, 519 (2000) (noting that Congress cannot authorize such a voting scheme, leaving open the possibility that tribes can). Even if the OHA election had been conducted outside the state machinery, the Court could have held that the method deprived some citizens of their right to vote on account of race. *See Terry v. Adams*, 345 U.S. 461, 469–70 (1953) (ruling that the state need not be formally involved in an election for the Fifteenth Amendment to apply).

143. The State of Hawaii's administration of the OHA trust naturally de-emphasized ties between the federal government and Native Hawaiians, which probably contributed to their uncertain federal status. For instance, the OHA never attempted to pursue federal

the deconstruction of a system in which entities other than Hawaiian natives develop and manage a system of "self-governance."<sup>144</sup> Thus,

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recognition of Native Hawaiians, perhaps on the theory that the state's infrastructure was sufficient. See Trask, *Native Hawaiian Nationalism*, *supra* note 13, at 24. States share neither the same historical relationship with Native Americans nor the federal government's express constitutional authority; thus their ability to deal directly with Indians is more limited. See *Rice*, 528 U.S. at 518–22 (questioning Hawaii's ability to claim the special relationship in its attempt to overcome the Fifteenth Amendment challenge despite explicit authority delegating trust responsibilities to the State). But see *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500–01 (1979) (noting that "[s]tates do not enjoy [the] same unique relationship with Indians," but upholding the state's authority to enact legislation in response to federal law). The Court's pronouncements in *Rice* raise concerns for states that have granted their own, independent recognition to tribes, some of which have not achieved federal recognition. See, e.g., ALA. CODE §§ 41-9-708 to 41-9-717 (2000) (Poarch Band of Creeks, Mowa Band of Choctaws, Star Clan of Muscogee Creeks, Echota Cherokees, Cherokees of northeast Alabama, the Cherokees of southeast Alabama, Ma-Chis Lower Creek Indian Tribe); CONN. GEN. STAT. § 47-59a (1995) (Schaghticoke, Paucatuck Eastern Pequot, Mashantucket Pequot, Mohegan, Golden Hill Paugussett); DEL. CODE ANN. tit. 29 § 105 (Michie 1997) (Nanticoke Indians); GA. CODE ANN. § 44-12-300 (Supp. 2000) (Georgia Tribe of Eastern Cherokee, Lower Muscogee Creek Tribe, Cherokee of Georgia Tribal Council); N.J. STAT. ANN. § 52:16A-53 (West Supp. 2000) (Confederation of the Nanticoke Lenni Lenape Tribes, Ramapough Mountain Indians, Powhatan Renape Nation); N.C. GEN. STAT. §§ 143B-404 to 143B-411 (1999) (Coharie, Eastern Band of Cherokees, Haliwa Saponi, Lumbees, Meherrin, Waccamaw-Siouan); VA. CODE ANN. § 9-138.1 (Michie 1998) (referring to "eight Virginia tribes officially recognized by the Commonwealth"). States administering their own preference-based programs for native groups have even more cause for alarm in the wake of *Rice*.

144. Native Hawaiian sovereignty groups are openly hostile towards the OHA, perceiving the agency as a vehicle for state and federal control over their affairs, and vehemently criticizing the current governing structure as a perpetuation of the wrongs committed by the United States government. See MAST & MAST, *supra* note 83, at 371–72 (referring to the OHA and other government agencies as a colonialist effort to co-opt the sovereignty movement (quoting Kekuni Blaisdell of the Pro-Kanaka Maoli Sovereignty Working Group)); NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 34, at 92 (responding to concerns that a state agency should not be guiding sovereignty discussions); *Another Royal Scandal*, THE ECONOMIST, Apr. 3, 1993, at 33, 33 (commenting on criticism of the OHA's ties to the Democratic Party machinery); Trask, *Politics of Oppression*, *supra* note 141, at 82 (asserting that the OHA's purpose "is to achieve assimilation of the Native culture and to guarantee state control of Native trust lands in perpetuity"). One commentator cites the OHA's reputation for scandal as one reason behind the distrust towards those running the agency. See Trask, *Native Hawaiian Nationalism*, *supra* note 13, at 23–24 (alleging that minutes of OHA meetings from 1982 through 1992 indicate that some board members misused funds, falsified credentials, and misrepresented programs to state leaders); Pennybacker, *supra* note 95 (noting that only two percent of the OHA's \$250 million total assets goes to help Native Hawaiians, who are badly in need of health care, education, and jobs); see also Anwar, *supra* note 136 (referencing a statement by Governor Cayetano describing the OHA board as "dysfunctional"); David Waite and Tanya Bricking, *Ex-OHA Trustees Headed Back to Office*, HONOLULU ADVERTISER, Nov. 8, 2000, <http://the.honoluluadvertiser.com/2000/Nov/08/118ohamain.html> (on file with the North Carolina Law Review) (making note of perceptions that former trustees' "bickering" was a barrier to progress). To push for sovereignty under a structure whose origins are strongly rooted in the same government that bears responsibility for



Native Hawaiians will be able to attain sovereignty on their own terms.<sup>145</sup> Third, eliminating state intervention would allow Native Hawaiians to seek explicit federal recognition that they share a political relationship with the United States government that entitles them to the benefits of the “unique obligation” Congress owes to the Indians.

The bill proposed by the Hawaiian congressional delegation would accomplish these objectives.<sup>146</sup> In addition to recognizing a special relationship, the proposed legislation calls for re-establishing a government-to-government relationship between the United States and a reorganized Native Hawaiian sovereign group, removing the State from its current administrative role.<sup>147</sup> This group would construct its own definition of “Native Hawaiian”—enabling natives

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suppressing the native population seems ill-conceived.

145. Hawaii has experienced an emergence of sovereignty groups who are working to develop a mechanism for self-governance. See Shannon Brownlee, *Taking Back the Islands: Native Hawaiians' Claims for Sovereignty*, U.S. NEWS & WORLD REPORT, Sept. 16, 1996, at 86, 86 (observing the existence of “[d]ozens of sovereignty group . . . each with a different plan, ranging from outright secession from the United States to ‘nation within a nation’ status similar to that of American Indians”); ‘Aha Hawai‘i ‘Ōiwi-Native Hawaiian Convention, *Operational Plan*, at <http://www.hawaiianconvention.org/> (last visited Feb. 26, 2001) (on file with the North Carolina Law Review) (assembling delegates from various Hawaiian organizations and sovereignty movements across the state to explore sovereignty options); Hawai‘i United for Liberation and Independence (HULI), at <http://www.HULI.org/> (last visited Feb. 26, 2001) (on file with the North Carolina Law Review) (asserting that Hawaii is a occupied state that never relinquished sovereignty); Hui Kalai‘ aina, at <http://members.nbc.com/HUIKALAIAINA/> (last visited Feb. 26, 2001) (on file with the North Carolina Law Review) (calling for self-governance and establishment of a cultural refuge without eliminating current government institutions); Kingdom of Hawai‘i, *Reinstatement & Recognition*, at <http://www.pixi.com/~kingdom/> (last visited Feb. 26, 2001) (on file with the North Carolina Law Review) (advocating the reinstatement and restoration of the monarchy); see also Trask, *Native Hawaiian Nationalism*, *supra* note 13, at 24–26 (documenting developments in the quest for self-determination). The most influential of these groups, Ka Lāhui Hawai‘i, founded by lawyer Mililani B. Trask, has developed a series of strategies to move toward a “nation-with-a-nation” structure similar to that of Indians on the mainland. See Pennybacker, *supra* note 95; Mililani B. Trask, *Ka Lāhui Hawai‘i: A Native Initiative for Sovereignty*, at <http://www.hawaii-nation.org/turningthetide-6-4.html> (last visited Feb. 26, 2001) (on file with the North Carolina Law Review) (seeking inclusion in the special relationship and return of native lands); Trask, *Politics of Oppression*, *supra* note 141, at 84–86.

The emergence of ‘Aha Hawai‘i ‘Ōiwi (AHO), which encompasses sovereignty-seeking groups with divergent views, offers hope that Native Hawaiians will be able to construct a quasi-sovereign entity without state or federal involvement that can lead to a consensus regarding the form of self-governance. See Charles Rose, *Viewpoint: Hawaiian Convention is More Important Than Ever*, HONOLULU STAR-BULLETIN, March 11, 2000, <http://starbulletin.com/2000/03/11/editorial/viewpoint.html> (on file with the North Carolina Law Review).

146. See S. 2899, 106th Cong. (2000).

147. *Id.*

for the first time to designate their own members—and would develop its own governing body, working in conjunction with a federal agency.<sup>148</sup> Such measures would provide a means for Native Hawaiians to address comprehensively the sovereignty issues that have plagued them since the American overthrow of their government.

The Court's uncertain pronouncement on congressional authority to declare Native Hawaiians eligible for special relationship status leaves any legislation vulnerable to challenge. If the Court determines that congressional power over Native American affairs is less plenary than previously thought, Native Hawaiians risk losing not only programs that benefit them, but any chance to attain the sovereignty they seek. While Native Hawaiians await such a determination, their best strategy is to work to secure their status within the special relationship but prepare to defend preferential programs under a strict scrutiny review. If and when the Supreme Court decides to address the extent of Congress's power to handle Indian affairs, answers to the weighty issues at which the Court merely hinted in *Rice* will be revealed.

At first glance, the impact of *Rice* seems overwhelmingly negative. The Court struck down a voting scheme intended to help Native Hawaiians in their quest for self-governance, determined that the ancestry-based definition used to define members of their group was racial in nature, raised doubts about whether Congress has authority to include Native Hawaiians in the federal-Indian special relationship, and left preference programs that benefited them vulnerable to challenge. *Rice* has, however, had some positive effects on the Native Hawaiian goal of achieving self-determination. The potential severity of harm to Native Hawaiians amplified attention to their sovereignty efforts, sparked a series of initiatives designed to secure their status under the federal trust relationship, boosted efforts to promote self-governance, and put them on notice to defend their

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148. *Id.* That the definition responsible for the invalidation of the Native Hawaiian voting scheme originated in legislation passed without the natives' input is ironic and evidences the strong case for allowing them to reclaim control over their affairs. Additionally, cues from the Court regarding the ancestry requirement provide insight into how the Native Hawaiian governing body can define its membership in a way that would survive rational basis review. See *supra* notes 100–05 and accompanying text.

differential treatment. Without *Rice*, these important aspects of their plight otherwise might have gone unnoticed.

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