RECENT DEVELOPMENTS

YES, VIRGINIA (TECH), OUR GOVERNMENT IS ONE OF LIMITED POWERS: *United States v. Morrison*, 120 S. Ct. 1740 (2000)

I. INTRODUCTION

The Framers of the Constitution designed the national government to be one of limited powers. Distrustful of the accumulation of power in any single body, the Framers provided for the division of powers both within the national, or general, government, and between the national government and the state governments. The separation of powers among the national government's legislative, executive, and judicial branches requires each branch to secure the acquiescence of the other two for the successful implementation of any policy, while the federalism that divides power between the national and the state governments prevents either from obtaining totalitarian control over the citizenry by limiting the authority of each to particular realms.[1] In this sense, "a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controulled by itself."[2]

The Constitution limits the national government by granting it certain enumerated legislative powers[3] and providing that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[4] By giving the national government specific powers, and not a general

1. *See, e.g.*, THE FEDERALIST NO. 46, at 315 (James Madison) (Jacob Cooke ed., 1961) ("The Federal and State Governments are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes."); THE FEDERALIST NO. 45, at 313 (James Madison) (Jacob Cooke ed., 1961) ("The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite.").

2. THE FEDERALIST NO. 51, at 351 (James Madison) (Jacob Cooke ed., 1961).

3. U.S. CONST. art. I, § 1 ("All legislative Powers *herein granted* shall be vested in a Congress of the United States . . . .") (emphasis added).

4. U.S. CONST. amend. X.

legislative power, the Framers made clear that "an act of Congress is invalid unless it is affirmatively authorized under the Constitution."[5]

Last Term in *United States v. Morrison*,[6] the United States Supreme Court reaffirmed this basic principle of American government. The Court, in a five-to-four opinion written by Chief Justice Rehnquist, held that the provision of the Violence Against Women Act ("VAWA" or "Act")[7] giving victims of gender-motivated violence a private damages remedy[8] was unconstitutional. The Court rejected arguments that VAWA was authorized under the Commerce Clause[9] or Section 5 of the Fourteenth Amendment.[10] The Court found that although violence against women affected the national economy, such violence was in no way "commercial." Penalizing those who committed violence thus lay beyond the powers of the national legislature to regulate interstate commerce.[11] The Court also rejected the claim that the Act enforced the Fourteenth Amendment, reasoning that the Amendment protects against discriminatory action only by *states*. The protections of the Fourteenth Amendment "erect[] no shield against merely private conduct, however discriminatory or wrongful."[12] As VAWA penalized purely private violent conduct, the Court did not give weight to claims that the states had violated women's rights by being indifferent to gender-motivated violence.[13]

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5. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 298 (2d ed. 1988) (emphasis omitted).

6. 120 S. Ct. 1740 (2000).

7. 108 Stat. 1941-1942 (1994).

8. 42 U.S.C. § 13981 (2000).

9. U.S. CONST. art. I, § 8, cl. 3.

10. U.S. CONST. amend. XIV:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
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> . . .
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> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Id.

11. *Morrison*, 120 S. Ct. at 1750 (2000) (noting that exertions of power under the Commerce Clause deal with "some sort of economic endeavor").

12. *Id.* at 1756 (quoting Shelley v. Kraemer, 334 U.S. 1, 13 (1948)).

13. *Id.* at 1758 ("Section 13981 . . . is directed not at any State or state actor, but

Morrison reaffirmed that legislation justified under the Commerce Clause will be sustained if the legislation regulates "the channels of interstate commerce," "the instrumentalities of interstate commerce, or persons or things in interstate commerce," or "those activities having a substantial relation to interstate commerce."[14] The Court thus declined to repudiate years of Commerce Clause jurisprudence that accepted national regulation of activities "substantially" affecting interstate commerce.[15] As Justice Thomas argued in his *Lopez* concurrence, this position cannot be squared with the text of the Constitution. Article I, Section 8, Clause 3 allows Congress to regulate activities that *are*, not those that *affect*, interstate commerce.[16]

The substantial effects test, however, raises the questions of how substantial an effect on interstate commerce is required for Congress to regulate a particular activity, and which body is to determine that sufficiency. In passing VAWA, Congress collected "a mountain of data . . . showing the effects of violence against women on interstate commerce."[17] *Morrison* held that despite a presumption in favor of the constitutionality of congressional statutes, Congress's research and conclusion that violence against women substantially affected interstate commerce were insufficient to save VAWA from a constitutional challenge. Instead, the Supreme Court itself, consistent with its duty to "say what the law is,"[18] determined that violence against women was not economic activity, and thus the "substantial effects test" did not apply to the Act.[19]

Congress has little incentive to adopt a principled interpretation of the limits of the Commerce Clause, and there is little evidence that Congress has done so. If the Court

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at individuals who have committed criminal acts motivated by gender bias.").

14. *Id.* at 1749 (quoting United States v. Lopez, 514 U.S. 549, 558-59 (1995) (internal citations omitted)).

15. *See, e.g.*, Hodel v. Indiana, 452 U.S. 314, 325 n.11 (1981) (stating that 5.16 million dollars worth of economic activity represented enough of an impact on commerce to trigger national legislative power); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937).

16. United States v. Lopez 514 U.S. 549, 587-88 (1995) (Thomas, J., concurring).

17. *Morrison*, 120 S. Ct. at 1760 (Souter, J., dissenting).

18. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

19. *Morrison*, 120 S. Ct. at 1750 (stating that the substantial effects test has been applied only to regulations of economic activity).

allowed Congress to legislate with regard to every topic, the Court would effectively abdicate its responsibility to protect states from infringements on their sovereignty by the national government. Even with *Morrison*'s pronouncement of limited government, the Court's retention of the substantial effects test (as opposed to its consideration of the original understanding of the Commerce Clause, as urged by Justice Thomas in *Lopez*) makes it difficult to predict whether, in the coming decades, the Commerce Clause will be interpreted as substantially limiting Congress's power.

The Court's refusal to allow Congress to adopt an ever-expanding interpretation of the Fourteenth Amendment gives hope to the idea that the national government will be constrained to a finite realm. Nevertheless, the Court has maintained the position that Congress's power to "enforce" the Fourteenth Amendment is not limited to punishing and deterring the conduct actually prohibited by that Amendment. The extent to which the Court will defer to congressional determinations about the scope of the national government's power is thus in doubt, despite the clarity with which the Court rejected Congress's determinations in *Morrison*.

II. THE FACTS OF THE CASE AND ITS PROCEDURAL HISTORY

A. Morrison's Alleged Assault of Brzonkala

In September 1994, while Christy Brzonkala was a student at Virginia Tech, she met Antonio Morrison and James Crawford.[20] Immediately after their meeting, according to Brzonkala, Morrison and Crawford raped her.[21] Brzonkala reported that the rape caused her great emotional distress.[22] Brzonkala registered a complaint in accordance with Virginia Tech's Sexual Assault Policy. Virginia Tech conducted a hearing, at which "Morrison admitted having sexual contact with [Brzonkala] despite the fact that she had twice told him 'no.'"[23] The university's Judicial Committee "found Morrison

20. *See id.* at 1745.
21. *See id.* at 1746.
22. *See id.*
23. *Id.*

guilty of sexual assault and sentenced him to immediate suspension for two semesters."[24] On appeal, however, Virginia Tech's senior vice president and provost allowed Morrison readmittance to the university, finding the punishment "excessive."[25] Upon discovering that Morrison would return to Virginia Tech, Brzonkala "dropped out of the university."[26]

Failing to find satisfaction within the university's disciplinary system, Brzonkala sued under 42 U.S.C. § 13981.[27] The district court held for Morrison, finding that Congress lacked the authority under the Commerce Clause and Section 5 of the Fourteenth Amendment to enact Section 13981.[28] A panel of the Fourth Circuit reversed, reinstating Brzonkala's claim.[29] The Fourth Circuit, however, sitting en banc, vacated the opinion of the panel and affirmed the district court, by a vote of 7-4, in an opinion written by Judge Luttig.[30]

B. The Supreme Court's Opinion

1. The Majority Opinion

Chief Justice Rehnquist began the Court's affirmance of the Fourth Circuit's opinion by describing the Violence Against Women Act. The provision of VAWA at issue in *Morrison* gave each victim of gender-motivated violence[31] a cause of "action

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24. *Id.*

25. *Id.* (quoting Brzonkala v. Va. Polytechnic Inst. & State Univ., 132 F.3d 949, 955 (4th Cir. 1997), *vacated on reh'g en banc*, 169 F.3d 820 (4th Cir. 1999)).

26. *Id.*

27. Brzonkala also sued under Title IX, 20 U.S.C. §§ 1681-1688. The Fourth Circuit held that Brzonkala's disparate treatment claim under Title IX did not state a claim, but her hostile environment claim was remanded pending the decision in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). *See* Brzonkala v. Va. Polytechnic Inst. & State Univ., 169 F.3d 820, 827-28 n.2 (4th Cir. 1999) (en banc). The Supreme Court did not consider the Title IX claims in its opinion. *See Morrison*, 120 S. Ct. at 1747 n.2.

28. *See* Brzonkala v. Va. Polytechnic Inst. & State Univ., 935 F. Supp 779 (W.D. Va. 1996).

29. Brzonkala v. Va. Polytechnic Inst. & State Univ., 132 F.3d 949, 955 (4th Cir. 1997) (panel opinion).

30. Brzonkala v. Va. Polytechnic Inst. & State Univ., 169 F.3d 820, 829, 889 (4th Cir. 1999) (en banc). Judge Luttig dissented from the 2-1 panel decision. Brzonkala v. Va. Polytechnic Inst. & State Univ., 132 F.3d 949, 974-78 (4th Cir. 1997) (Luttig, J., dissenting).

31. "[R]andom acts of violence unrelated to gender or . . . acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender" are not covered by VAWA. 42 U.S.C. § 13981(e)(1) (2000). Brzonkala's alleged rape

for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate."[32] Congress specified the constitutional authority on which it relied in enacting VAWA, invoking the power of "section 5 of the Fourteenth Amendment to the Constitution, as well as . . . section 8 of Article I of the Constitution."[33] The Court then proceeded to examine whether VAWA could be sustained on either of those bases.

a. Commerce Clause

The Court acknowledged that acts of Congress were granted a presumption of constitutionality. Accordingly, only "a plain showing that Congress has exceeded its constitutional bounds" would justify the Court's invalidation of the Act.[34] Nevertheless, the Court would not acquiesce to a conception of the Commerce Clause that would "embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectively obliterate the distinction between what is national and what is local and create a completely centralized government."[35] In short, the Court concluded that the enumeration of congressional powers in the Constitution "cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate."[36]

In order to distinguish between national and local affairs, the Court in *Lopez* described three categories of activity that Congress may constitutionally regulate under the Commerce Clause. Those three categories, which the Court in *Morrison* reaffirmed as the extent of Congress's Commerce Clause power, are "the use of the channels of interstate commerce,"

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was held by the Fourth Circuit to meet the criteria for "'a crime[ ] of violence . . . [committed] because of gender . . . and due, at least in part, to an animus based on the victim's gender,'" such that § 13981 applied to the case. Brzonkala v. Va. Polytechnic Inst. & State Univ., 169 F.3d 820, 829, 830 (4th Cir. 1999) (quoting 42 U.S.C. § 13981(d)(1)). The court held that, if truly made, Morrison's public statement following the rape that he "liked to get girls drunk and f*** the s*** out of them" was sufficient to indicate the required degree of gender animus. *Id.*

32. 42 U.S.C. § 13981(c) (2000).

33. 42 U.S.C. § 13981(a) (2000).

34. United States v. Morrison, 120 S. Ct. 1740, 1748 (2000).

35. *Id.* at 1749 (quoting United States v. Lopez, 514 U.S. 549, 557 (1995), in turn quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)).

36. *Id.* at 1754 n.8.

"the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities," and "those activities having a substantial relation to interstate commerce."[37] Because VAWA obviously did not involve a regulation of either the instrumentalities of or persons or things in interstate commerce, the remainder of the Court's discussion of the Commerce Clause concerned the application of the "substantial effects" test.[38]

The Court reiterated the conclusion reached in *Lopez* that the substantial effects test has sustained regulation in the past only when "the activity in question has been some sort of economic endeavor."[39] According to the Court, VAWA was not consistent with this history. "Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity."[40]

Congress, of course, concluded that gender-motivated violence did substantially affect interstate commerce. The Court acknowledged Congress's findings, but dismissed them just as quickly. In the Court's view, Congress's findings demonstrated that violence against women is the first link in a causal chain that affects interstate commerce. The Court found this "but-for" reasoning insufficient to support congressional power, holding that it is "unworkable if we are to maintain the Constitution's enumeration of powers."[41] The Court expressed fear that because every intrastate activity has some effect on interstate commerce, Congress could federalize areas of traditional state concern merely by noting in the Congressional Record the eventual effect on interstate commerce.[42] In fact, that is exactly what the Court thought Congress was doing with VAWA. According to the Court, "[t]he regulation and

37. *Id.* at 1749 (internal citations omitted).

38. *See Lopez*, 514 U.S. at 560 (1995) ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.").

39. *Morrison*, 120 S. Ct. at 1750; *see also id.* at 1751 ("[O]ur cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.").

40. *Id.* at 1751. The Court also noted that VAWA "contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce," which might have allowed the Court to sustain the Act. *Id.*

41. *Id.* at 1752.

42. *Id.* at 1752-53.

punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States."[43]

In sum, the Court concluded that the Violence Against Women Act could not be sustained under Congress's Commerce Clause authority. The problem of gender-motivated violence was held not to be commercial and not "substantially affecting" interstate commerce within the meaning of the Court's jurisprudence.

b. Section 5 of the Fourteenth Amendment

Because the Court rejected the Commerce Clause argument, Chief Justice Rehnquist next considered the question whether the Act could be sustained on the authority of Section 5 of the Fourteenth Amendment. The Fourteenth Amendment states that

> Section 1. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
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> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.[44]

The Amendment's text specifically proscribes certain actions when taken *by states*. VAWA, however, sought to penalize episodes of gender-motivated violence committed by private individuals by subjecting perpetrators of violence liability suits brought by their victim. The Court concluded that penalizing private conduct could not be interpreted as an "enforce[ment]" of the Fourteenth Amendment, because private conduct is not prohibited by the Amendment. The Court reaffirmed the limited reach of the Fourteenth Amendment by quoting language from *Shelley v. Kraemer*:

> [T]he principle has become firmly embedded in our

43. *Id.* at 1754.
44. U.S. CONST. amend. XIV.

> constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.[45]

After the Court noted this basic principle, it considered the impact of two precedents from 1883, *United States v. Harris*[46] and the *Civil Rights Cases*.[47] In both *Harris* and the *Civil Rights Cases*, the Court concluded that congressional attempts to regulate private conduct were beyond the constitutional power of the national government under the Fourteenth Amendment.[48] Section 2 of the Civil Rights Act of 1871, at issue in *Harris*, would have punished private parties for conspiring to deny persons the equal protection of the laws. The Court held that the Equal Protection Clause regulates the states rather than the individuals who may violate others' rights. Similarly, in the *Civil Rights Cases*, the Court held invalid public accommodation regulations in the Civil Rights Act of 1875 because they were directed against private conduct.

The *Morrison* Court acknowledged that six Justices[49] in *United States v. Guest*[50] had used language highly critical of the holding of the *Civil Rights Cases*.[51] According to Chief Justice Rehnquist, however, this language was not enough "to cast any doubt upon the enduring vitality of the *Civil Rights Cases* and *Harris*."[52] In addition to the fact that neither opinion carried the signatures of five Justices, the discussion of the *Civil Rights Cases* was wholly unnecessary to the decision in *Guest*. The *Guest* Court concluded that state action was present, so deciding whether state action was necessary to justify

45. *Morrison*, 120 S. Ct. at 1756 (quoting Shelley v. Kraemer, 334 U.S. 1, 13 & n.12 (1948)).

46. 106 U.S. 629 (1883).

47. 109 U.S. 3 (1883).

48. *Harris*, 106 U.S. at 640; *Civil Rights Cases*, 109 U.S. at 11.

49. The six were Chief Justice Warren, and Justices Black, Douglas, Clark, Brennan, and Fortas. Justices Clark and Brennan wrote the two concurring opinions, with two Justices joining each.

50. 383 U.S. 745 (1966).

51. *Id.* at 762 (Clark, J., concurring) (stating that state action should not be a requirement when Congress is legislating to protect Fourteenth Amendment rights); *id.* at 774 (Brennan, J., concurring in part and dissenting in part) (arguing that the *Civil Rights Cases* were wrongly decided).

52. United States v. Morrison, 120 S. Ct. 1740, 1757 (2000).

congressional legislation was irrelevant to the disposition of the case.[53] In the *Morrison* Court's view, moreover, Justice Clark's opinion on the question of the necessity of state action in *Guest* should not be given the force of *stare decisis* because he provided no explanation for his view, offering only the conclusion.[54] Accordingly, the *Morrison* Court felt unconstrained by the contrary position taken by the six members of the *Guest* Court thirty-four years earlier.

Citing *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[55] the Court declared that a regulation enacted pursuant to Section 5 must be congruent and proportional to the unconstitutional *state* conduct. The Court distinguished *Katzenbach v. Morgan*,[56] *South Carolina v. Katzenbach*,[57] and *Ex Parte Virginia*[58] on the ground that the legislation at issue in each of those cases was directed at state officials.[59] By contrast, VAWA prohibited strictly private conduct. The Court also noted that while the other cases dealt with legislation that was targeted at those states that had discriminated in violation of the Fourteenth Amendment, VAWA applied to each of the states irrespective of the fact that "Congress' findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all States, or even most States."[60]

Thus, although "no civilized system of justice could fail to provide [Christy Brzonkala] a remedy for the conduct of respondent Morrison,"[61] the Court held that the United States

53. *Guest*, 383 U.S. at 756. As the *Morrison* Court noted, this fact was not missed by Justice Clark, who mused that *Guest* "avoid[ed] the question whether Congress . . . has the power to punish private conspiracies that interfere with Fourteenth Amendment rights . . . ." *Morrison*, 120 S. Ct. at 1757 (quoting *Guest*, 383 U.S. at 762 (1966) (Clark, J., concurring)).

54. *Morrison*, 120 S. Ct. at 1757 ("This [failing to offer an explanation for a judgment] is simply not the way that reasoned constitutional adjudication proceeds.").

55. 527 U.S. 627 (1999).

56. 384 U.S. 641 (1966) (upholding Congress's power to prohibit a state from using literacy tests as a qualification for voting).

57. 383 U.S. 301 (1966) (upholding strict requirements imposed on states that had a history of discrimination).

58. 100 U.S. 339 (1880) (upholding a federal criminal punishment for state officials who discriminated in jury selection).

59. *Morrison*, 120 S. Ct. at 1758-59.

60. *Id.* at 1759.

61. *Id.*

was powerless to provide such a remedy. Because neither the Commerce Clause nor Section 5 of the Fourteenth Amendment allowed Congress to penalize Morrison for raping Brzonkala, Brzonkala's "remedy must be provided by the Commonwealth of Virginia, and not by the United States."[62]

2. The Concurrence

Justice Thomas, although joining the majority opinion of Chief Justice Rehnquist, wrote a brief concurring opinion. Justice Thomas reiterated the interpretation of the Commerce Clause that he articulated in *United States v. Lopez*.[63] Justice Thomas would have refused to apply the "substantial effects" test, as it was, in his view, inconsistent with the original understanding of the Commerce Clause. He warned that unless the Court dismissed the "substantial effects" test, "we will continue to see Congress appropriating state police powers under the guise of regulating commerce."[64]

3. The Dissents

a. Justice Souter's Dissent

Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, dissented. Justice Souter began with a nine-page discussion of "the mountain of data assembled by Congress . . . showing the effects of violence against women on interstate commerce."[65] He stated that the discrimination against women by private actors affected commerce in the same way that discrimination against blacks did when the Court approved the constitutionality of the Civil Rights Act of 1964.[66] To wit,

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62. *Id.*

63. United States v. Lopez, 514 U.S. 549, 584-602 (1995) (Thomas, J., concurring).

64. *Morrison*, 120 S. Ct. at 1759 (Thomas, J., concurring); *cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819).

> [S]hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.

Id.

65. *Id.* at 1760 (Souter, J., dissenting).

66. *See id.* at 1763 (Souter, J., dissenting).

"gender-based violence in the 1990's was shown to operate in a manner similar to racial discrimination in the 1960's in reducing the mobility of employees and their production and consumption of goods shipped in interstate commerce."[67]

Justice Souter then turned to attack the substantial effects test as applied by the Court. Justice Souter saw the Court's distinction between activities that are commercial and those that are not as folly. Justice Souter wrote that such a distinction had already been abandoned in *Heart of Atlanta Motel, Inc. v. United States*,[68] which sustained the power of Congress to ban racial discrimination in motels serving customers traveling in interstate commerce. According to Justice Souter, by giving weight to the character of the regulation, the Court was being intellectually dishonest. He complained that the Court's "nominal adherence to the substantial effects test is merely that."[69]

Justice Souter would have upheld regulation of "all activity that, when aggregated, has a substantial effect on interstate commerce."[70] In his view, the Necessary and Proper Clause[71] allows Congress to pass any law that it has a rational basis for believing affects interstate commerce.[72] Justice Souter understood this to be the rule that the Court followed in *Wickard v. Filburn*,[73] which allowed Congress to regulate the growing of wheat for home consumption because home consumption would decrease demand for wheat on the open market and thus affect interstate commerce. Justice Souter found no indication that the *Wickard* Court cared whether growing wheat could be called "commerce," because "[t]he characterization of home wheat production as 'commerce' or not is . . . ultimately beside the point. For if substantial effects

67. *Id.*

68. 379 U.S. 241 (1964).

69. *Morrison*, 120 S. Ct. at 1764 (Souter, J., dissenting).

70. *Id.* Justice Souter admitted that "Congress may claim no authority . . . to address any subject that does not affect commerce" without specifying what activities do not affect commerce. *Id.* at 1765 (Souter, J., dissenting).

71. U.S. CONST. art. I, § 8, cl. 18 (Congress shall have power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States . . . .").

72. *Morrison*, 120 S. Ct. at 1766 (Souter, J., dissenting).

73. 317 U.S. 111 (1942).

on commerce are proper subjects of concern under the Commerce Clause, what difference should it make whether the causes of those effects are themselves commercial?"[74]

Justice Souter criticized the Court for promoting a vision of federalism through a Commerce Clause jurisprudence inconsistent with precedent.[75] He rejected the federalism aims he attributed to the majority, citing *Garcia v. San Antonio Metropolitan Transit Authority*[76] for the proposition that "special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority."[77] He explicitly compared the *Morrison* majority to the *Lochner*[78]-era Court, which struck down economic paternalism as unconstitutional. Explaining why the *Morrison* Court chose to advance a formal distinction between economic and noneconomic activity, Justice Souter opined that "[j]ust as the old formalism had value in the service of an economic conception, the new one is useful in serving a conception of federalism."[79]

Justice Souter concluded by predicting a short life for the

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74. *Morrison*, 120 S. Ct. at 1768 n.13 (Souter, J., dissenting); *accord id.* at 1775 (Breyer, J., dissenting) ("[W]hy should we give critical constitutional importance to the economic, or noneconomic nature of an interstate-commerce-affecting *cause*?" (emphasis in original)).

75. *Id.* at 1768-69 (Souter, J., dissenting).

76. 469 U.S. 528 (1985). The four dissenters in *Garcia* included then-Justice Rehnquist and Justice O'Connor.

77. *Morrison*, 120 S. Ct at 1771 (Souter, J., dissenting) (quoting *Garcia*, 469 U.S. at 552). Justice Souter as much as admitted that this case was not one of "federal power *over the States*" (emphasis added) when, later in his dissent, he remarked that it was "not the least irony . . . that the States will be forced to enjoy the new federalism whether they want it or not." *Id.* at 1733 (Souter, J., dissenting). By using *Garcia*'s analysis in *Morrison*, Justice Souter suggested that judicial limitations on the scope of federal power should be applied neither in the case of power exercised over states, who had direct representation in the Senate and presidency under the original Constitution, nor in the case of power exercised by Congress over individuals (as is the case in *Morrison*). While there may be reasons to tread more lightly over powers traditionally exercised by states, *see National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia*, 469 U.S. 528 (1985) (holding unconstitutional the application of the (federal) Fair Labor Standards Act to state employees), the argument that Congress's limitations should be politically and not judicially enforced rests on the representation of States in the national government. Justice Souter thus significantly expands the reach of *Garcia* by using it in a context where the congressional action does not directly impinge the interests of *states*.

78. Lochner v. New York, 198 U.S. 45 (1905).

79. *Morrison*, 120 S. Ct. at 1768 (Souter, J., dissenting).

Commerce Clause doctrine advanced by the majority. He viewed the limits on the Commerce Clause as incapable of uniform application. According to Justice Souter, both the difficulties of separating economic from noneconomic activity in an integrated economy and the majority's unwillingness explicitly to overrule cases that require exceptions to a "substantial effects" test led him "to doubt that the majority's view will prove to be enduring law."[80]

b. Justice Breyer's Dissent

Justice Breyer also dissented, in an opinion joined by Justice Stevens, and joined in part by Justices Souter and Ginsburg. He pointed out that requiring a jurisdictional hook for seemingly noneconomic congressional acts to be valid under the Commerce Clause (for example, regulating those items that have passed through interstate commerce, but leaving purely intrastate items unregulated) would result in "random[]" applications of those laws.[81] In an interstate economic market, the items that would go unregulated under the majority's doctrine would neither be less severe violations of the law at issue nor would they "further the important federalist principles" that are the reason for limiting congressional power.[82]

Justice Breyer concluded his analysis of the Commerce Clause question by stating that he, like Justice Souter, preferred allowing Congress to legislate whenever it has a rational basis for believing that the activity at issue, when aggregated, affects commerce.[83] He acknowledged that taking into account the extent to which *Congress* has considered the question whether the activity *substantially* affects interstate commerce might provide a basis for distinguishing *Morrison* from *Lopez*. Justice Breyer, however, considered such a distinction hypothetically, for he did not "accept *Lopez* as an accurate statement of the law . . . ."[84]

80. *Id.* at 1773 (Souter, J., dissenting).
81. *Id.* at 1776 (Breyer, J., dissenting).
82. *Id.* (Breyer, J., dissenting).
83. *Id.* at 1778 (Breyer, J., dissenting).
84. *Id.* at 1777 (Breyer, J., dissenting). Justice Breyer's phrasing raises several questions. First, is not a Supreme Court decision joined by five members of the

Justice Breyer went on to consider the holding of the Court with respect to Section 5 of the Fourteenth Amendment. Justice Breyer stated that he "d[id] not [purport to] answer the § 5 question," opting instead to "leave [it] for more thorough analysis if necessary on another occasion."[85] Despite that caveat, Justice Breyer left little doubt that he thought the majority misguided on that question as well as on the Commerce Clause issue. Justice Breyer suggested that Congress might provide a remedy against private actors as a way of enforcing constitutional guarantees that themselves are directed merely at states.[86] He would have found the burdens on private citizens to be constitutional as prophylaxis permitted in *Katzenbach v. Morgan*.[87]

III. ANALYSIS

The Supreme Court continued in *Morrison* the commendable steps toward limited federal government begun in *United States v. Lopez*[88] and *City of Boerne v. Flores*.[89] Unfortunately, the Court's unwillingness explicitly to repudiate misguided precedent of the New Deal and Warren Court eras still leaves Commerce Clause and Section 5 doctrines confusing, at best, or incoherent and short-lived, at worst. The Court should evaluate assertions of congressional power in light of the original understanding of the Constitution, under which both the Commerce Clause and Section 5 questions in *Morrison* should have been decided against the constitutionality of the assertion of congressional power.

Court necessarily the law, in the same sense that the Court is infallible precisely because it is final? Second, could such a majority opinion be an *in*accurate statement of the law, and is that what Justice Breyer is implying about *Lopez*? Third, is there a difference between a "statement of the law" and "the law" when the source is a Supreme Court opinion? It seems an affirmative response would require a view of the law as existing independent of judicial opinions, which is an odd attitude for a judge to hold at the turn of this century. Fourth, would Justice Breyer suggest that a lower court judge should ignore the "law" of *Lopez* on a case that presented its facts?

85. *Id.* at 1779-80 (Breyer, J., dissenting).

86. *Id.* at 1779 (Breyer, J., dissenting).

87. 384 U.S. 641 (1966) (upholding a federal law banning literacy tests for voting because the tests, though not themselves unconstitutional, had been used to discourage minorities from voting).

88. 514 U.S. 549 (1995).

89. 521 U.S. 507 (1997).

A. Commerce Clause

One of the provisions often used to justify national legislation as "affirmatively authorized under the Constitution"[90] is the Commerce Clause, which gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[91] Under the Commerce Clause Congress has legislated, with the Supreme Court's approval, on such diverse subjects as regulating home-grown wheat production[92] and mining,[93] and prohibiting discrimination in hotels[94] and restaurants.[95]

From the Supreme Court's "revolution" of 1937[96] until the 1995 decision in *United States v. Lopez*, the Court had failed to use the Commerce Clause to limit Congress's power to legislate. Gone was the understanding, articulated by Charles Black, that "the concept of limitation [on governmental power] inheres not only in prohibitory language but also in the positive grants of power; . . . the government is not to travel

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90. TRIBE, *supra* note 5, at 298 (emphasis omitted).

91. U.S. CONST. art. I, § 8, cl. 3.

92. *See* Wickard v. Filburn, 317 U.S. 111 (1942).

93. *See* Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981).

94. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

95. *See* Katzenbach v. McClung, 379 U.S. 294, 304 (1964).

96. The conventional wisdom is that President Franklin Roosevelt's 1937 plan to pack the Court with jurists sympathetic to the New Deal influenced Justice Owen Roberts to switch sides and vote with the "liberals" (Justices Louis D. Brandeis, Harlan F. Stone, and Benjamin N. Cardozo, plus Chief Justice Charles Evans Hughes, who occasionally voted with each ideological side prior to 1937) instead of with the "conservative" "Four Horsemen" (Justices Willis Van Devanter, James McReynolds, George Southerland, and Pierce Butler). Until that time, New Deal programs had often been declared unconstitutional by the Court as exceeding Congress's Article I powers. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), is a typical example of the Court's attitude toward the New Deal at that time. Roberts's change in voting pattern is known as the "Switch in Time that Saved Nine." Roosevelt lost his bid to increase the number of Justices on the Court, but he gained favorable rulings in subsequent New Deal cases. This was due in part to the Switch in Time and in part to Roosevelt's tenure in office, which eventually allowed him to replace all nine members of the Court. The changeover began in 1937 with the nomination of Hugo L. Black, who as a senator from Alabama supported the President's court-packing plan, to replace retiring Justice Willis Van Devanter. *See generally* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN (1995); citations in Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 202-03 (1994). *But see generally* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998) (arguing that the Court's apparent change in jurisprudence was actually foreordained in pre-1937 Court opinions).

outside its allocated spheres, however wide these may be."[97] More generally, the Court had "abandoned any effort to articulate and enforce internal limits on congressional power."[98] Beginning with *NLRB v. Jones & Laughlin Steel Corp.*,[99] the Commerce Clause ceased to be an impediment to Congress. Instead, because "virtually every kind of activity, no matter how local, genuinely can affect commerce,"[100] Congress's power "[t]o regulate Commerce . . . among the several States"[101] became a license to legislate regarding "virtually every kind of activity." In short, "the Court's approval of national control over purely local behavior eliminated the 'interstate' aspects of the 'interstate commerce' clause,"[102] and the Court did not seem particularly interested in the "commerce" aspects, either.[103]

Arguably the high point (or low point, depending on one's perspective) of this expansion of the Commerce Clause's scope was the Court's decision in *Wickard v. Filburn*.[104] There, in an opinion by Justice Jackson, the Court upheld congressional regulation of wheat farmers despite the fact that the wheat grown would be used solely for home consumption. The wheat not only would never be part of the interstate commerce market, it would never be part of any commercial market. The Court nonetheless upheld the exercise of congressional power because home consumption of wheat relieved the farmer of the need to participate in the commercial market, thus suppressing demand for commercially available wheat.

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97. CHARLES BLACK, THE PEOPLE AND THE COURT 41 (1960).

98. TRIBE, *supra* note 5, at 297.

99. 301 U.S. 1 (1937).

100. United States v. Morrison, 120 S. Ct. 1740, 1776 (2000) (Breyer, J., dissenting).

101. U.S. CONST. art. I, § 8, cl. 3.

102. Anna Johnson Cramer, Note, *The Right Results for All the Wrong Reasons: An Historical and Functional Analysis of the Commerce Clause*, 53 VAND. L. REV. 271, 282 (2000).

103. Judge David B. Sentelle of the United States Court of Appeals for the District of Columbia Circuit well described the Commerce Clause jurisprudence from 1937 to 1995 this way: by upholding legislation under the interstate Commerce Clause despite the lack of a reasonable interstate connection and any commercial character of the regulated conduct, courts got interstate commerce "without 'interstate' and without 'commerce.' It was like having ham and eggs without the ham and without the eggs." David B. Sentelle, Lopez: Listeners at Last?, Address to the Harvard Law School Chapter of the Federalist Society (Feb. 7, 2000).

104. 317 U.S. 111 (1942).

That posture changed in 1995, when the Supreme Court decided *Lopez*. There the Court held that the Gun-Free School Zones Act of 1990[105] exceeded Congress's power under the Commerce Clause. Congress had attempted to criminalize the possession of a firearm around a school without requiring, for example, that the weapon had moved in interstate commerce or that the possession of the weapon was part of some economic endeavor. The *Lopez* Court held that legislation will be sustained under the Commerce Clause if it regulates one of three categories of activity, none of which was involved in the Gun-Free School Zones Act. These three categories are regulations of: 1) the channels of interstate commerce; 2) the instrumentalities of, or persons or things in, interstate commerce; and 3) those activities that substantially affect interstate commerce.[106] Dissenting Justices argued that the federal laws at issue in *Lopez* and *Morrison* fit squarely into category three, the "substantial effects" category. The Court in both cases held that for legislation to be sustained under this test, however, the activity at issue must be "economic."[107]

Lopez did not overrule *Filburn*. Rather, the three categories noted in *Lopez* were designed to reflect previous Commerce Clause jurisprudence. The *Lopez* Court specifically mentioned *Filburn* as an example of economic regulation upheld under the substantial effects test. This attempt to limit the reach of the Commerce Clause while retaining *Filburn* as precedent, however, ultimately fails to achieve doctrinal coherence or fidelity to the text and original understanding of that Clause. The basic flaw in the Court's analysis (introduced in *Lopez* and followed in *Morrison*) lies in its desire to draw a distinction between economic and noneconomic activities for purposes of the substantial effects test. Wheat production was economic only in the sense that wheat can be, and often is, sold for profit.[108] Similarly, gender-motivated violence and firearm

105. 18 U.S.C. § 922(q)(1)(A) (1990), *amended by* 18 U.S.C. § 922(q)(2)(A) (1996).

106. United States v. Lopez, 514 U.S. 549, 558-59 (1995).

107. *Lopez*, 514 U.S. at 559-60; United States v. Morrison, 120 S. Ct. 1740, 1751 (2000). The Court refused to create a "categorical rule against aggregating the effects of any noneconomic activity" but noted that every Commerce Clause case to date had aggregated only economic activities. *Id.*

108. *Filburn* itself stated that wheat production "may not be regarded as commerce." *Filburn*, 317 U.S. at 125. The hook to allow congressional legislation

possession can be undertaken for profit.[109] There is nothing intrinsically economic about *any* activity. What makes something economic or noneconomic is the context in which it is viewed. If the context is one of a transaction, the activity is economic. If the context does not involve a transaction, the same activity is noneconomic. The Court's failure to take into account the context of the activity is likely to result in future difficulties. Whether the test asks if the activity is *per se* economic or, as in *Filburn*, if the activity has a discernible economic impact,[110] it will involve fine line drawing.

Most importantly, the Commerce Clause does not allow Congress to regulate those activities that could be commerce, or those activities that result in commercial activities with some empirical frequency (i.e., are likely to be the subject of commerce). Instead, the clause permits Congress to regulate interstate commerce itself. While the text of the clause does not resolve every ambiguity about its application, it should be the starting point for answering questions about the limits of congressional power taken pursuant to the clause. The Constitution grants Congress the power "[t]o regulate Commerce . . . among the several States . . . ."[111] *Filburn* took that clause and the Necessary and Proper Clause together to mean that Congress may constitutionally regulate those activities that "exert a substantial economic effect on interstate commerce."[112] *Lopez* and *Morrison* agreed with this interpretation, so long as the regulated activity is "economic" or

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was the economic *effect*, not the economic nature *vel non* of the activity directly regulated. *See id.*

109. In this instance, there would be dual motives for the violence: gender and the profit. VAWA would apply to such conduct because the crime need only be motivated "*in part*, [by] an animus based on the victim's gender." 42 U.S.C. § 13981(d)(1) (emphasis added). Mere possession of a firearm appears less likely to demand payment, though one can imagine instances where an owner of a firearm would pay someone to keep careful watch over it for a time, for example. To the extent that the Court could have maintained a distinction between possession and other activities (only the latter of which could be "economic"), it abandoned that path in *Morrison*.

110. Obvious questions are *how* immediate, discernable *to whom*, and under what level of scrutiny such an impact is to be discerned. The inquiry cannot be too searching under *Lopez* and *Morrison*, else the economic impact of gender-motivated violence and gun possession would have triggered congressional power.

111. U.S. CONST. art. I, § 8, cl. 3.

112. *Filburn*, 317 U.S. at 125; *see also Morrison*, 120 S. Ct. at 1766 (Souter, J., dissenting) (citing United States v. Darby, 312 U.S. 100, 118 (1941)).

"commercial." But "commercial" is not the same as "Commerce . . . among the several States," and every law governing an activity relating to commerce is not a "regulat[ion]" of Commerce.[113]

The Supreme Court has repeatedly attempted to place limits on the exercise of national power absent a textual basis for those limits and without a sharp test to determine when those limits are reached.[114] Accordingly, the nation has been left without a clear idea of what the Commerce Clause means, much less a clear reason why its meaning must be secured by way of the "substantial effects" test. Ensuring a division of authority between the national and state governments, with "the great and aggregate interests being referred to the national, the local and particular to the state[,] legislatures"[115] is a worthy goal. As Justice Thomas emphasized in *Lopez*, however, such a goal can be accomplished only through application of the original understanding of the Clause.[116]

B. Section 5

The Fourteenth Amendment empowers Congress to "enforce" the Amendment's provisions.[117] The Supreme Court's decision in *City of Boerne v. Flores*[118] held that in enforcing the Fourteenth Amendment, Congress may not "attempt a substantive change in constitutional protections."[119] Nonetheless, the Court has left room for Congress to ban activities that are not themselves illegal under the Amendment.[120] These concessions were necessary to avoid

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113. *See* United States v. Lopez, 514 U.S. 549, 586 (1995) (Thomas, J., concurring) ("As one would expect, the term 'commerce' was used in contradistinction to productive activities such as manufacturing and agriculture.").

114. *See* Thomas W. Merrill, *Toward a Principled Interpretation of the Commerce Clause*, 22 HARV. J.L. & PUB. POL'Y 31, 33 (1998) ("The majority opinion of the Chief Justice [in *Lopez*] lacks any clear theory of the outer limits of the clause.").

115. THE FEDERALIST NO. 10, at 63 (James Madison) (Jacob E. Cooke ed., 1961).

116. *Lopez*, 514 U.S. at 585-89 (1995) (Thomas, J., concurring).

117. U.S. CONST. amend. XIV, § 5.

118. 521 U.S. 507 (1997).

119. *Id.* at 532.

120. *See, e.g., id.* at 532-33 (citing South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding Voting Rights Act of 1965)); City of Rome v. United States, 446 U.S. 156 (1980) (upholding an extension of the preclearance requirement under § 5 of the Voting Rights Act); Oregon v. Mitchell, 400 U.S. 112 (1970) (upholding ban on literacy tests) Katzenbach v. Morgan, 384 U.S. 641 (1966) (same). The fact that

repudiating civil rights cases in which the Court had accepted congressional prohibition of activities that, while not themselves unconstitutional, tended to impact rights protected by the Constitution.[121]

VAWA penalized private acts of violence and made the perpetrators subject to liability in suits by their victims. Despite the evidence before Congress that states had been derelict in

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those cases arose under the Fifteenth Amendment instead of the Fourteenth appears to be of no moment. *See also* Board of Trustees v. Garrett, 121 S. Ct. 955 (2001) (rejecting application of the Americans with Disabilities Act against states because such a remedy was not congruent with and proportional to discrimination by states, but accepting the Congress could use § 5 to ban activities beyond the Amendment's prohibitions); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) (rejecting application of the Age Discrimination in Employment Act against states).

121. The unwillingness of the *Flores* Court (and by extension, the *Morrison* Court) to repudiate *Katzenbach v. Morgan* has resulted in confusion over the constitutionality of the 1982 Amendments to Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (2000) ("VRA"). The VRA prohibits states from adopting voting qualifications that "result[]" in racial disenfranchisement, though the Constitution itself prohibits only those state actions that are taken with a discriminatory intent. *See* City of Mobile v. Bolden, 446 U.S. 55, 62 (1980) (plurality opinion). The Second Circuit, confronted with the question whether New York's statute disenfranchising felons, N.Y. Elec. Law. § 5-106 (2)-(5), violated the VRA because of its disproportionate impact on blacks, split the second circuit evenly. *See* Baker v. Pataki, 85 F.3d 919 (2d Cir. 1996) (en banc). Five members of the court would have held that the Voting Rights Act did not reach felon disenfranchisement because to do so would raise a serious constitutional problem, while five other members of the court upheld the application of the VRA to the New York statute. Note that because the VRA is directed at states, the distinction drawn in *Morrison* disfavoring exercises of Congress's power that are directed at individuals would not be helpful.

Aside from the dispute over the constitutionality of the Voting Rights Act's effects test, the tension between *Morgan* and *Flores* raises questions of the VRA's power to reach vote dilution claims, which have used Section 2 of the VRA with notable success. Vote dilution claims, which assert that one group is not given the opportunity to elect candidates of its choice consistent with its proportion of the electorate, have been held to concern "voting" within the meaning of the VRA. *See* Allen v. State Bd. of Elections, 393 U.S. 544, 565-66 (1969). Nevertheless, there remains considerable debate as to whether such an interpretation of the VRA is the wisest one and whether such an interpretation would bring the VRA in conflict with the term "vot[ing]" as used in the Fifteenth Amendment. *See Allen*, 393 U.S. at 591 (Harlan, J., concurring in part and dissenting in part); Holder v. Hall, 512 U.S. 874, 892-93 (1994) (Thomas, J., concurring in judgment). If there is such a conflict, *Flores* would require a court to assess whether Section 2 of the VRA represents a congruent and proportional means to remedy violations of the Fifteenth Amendment. The VRA would seem to fail the test of congruence, as vote dilution is claimed *precisely when the minority group is able to vote* (and those votes would be insufficient to elect enough candidates of the group's choice), thus negating a claim that members of the minority group were denied their right to cast a ballot and have it counted. At the very least, the principle that statutes should be construed to avoid a constitutional question, *see, e.g., Baker*, 85 F.3d 919 (2d Cir. 1996) (en banc), should lead the Court, in an appropriate case, to reconsider *Allen*.

the protection of women,[122] the Act did not confer liability on the states themselves.[123] Some supporters of the Act argued that even if there was no state action involved in the facts underlying *Morrison*, VAWA was still constitutional because it was meant to promote the equality of women. They argued that just as Congress was permitted in *Morgan* to protect the voting rights of Puerto Ricans by banning literacy tests, Congress should be able to penalize gender-motivated violence as a way of protecting women's equality.

The Court rejected this argument for two reasons. First, the Court found that, unlike the statute in *Morgan*, "Section 13981 is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor, but at individuals . . . ."[124] Second, the Court noted that VAWA did not limit the remedy to those states found to have committed constitutional violations;[125] rather it applied uniformly throughout the United States.

The first of these reasons appears to allow Congress latitude in prohibiting conduct not unconstitutional, so long as that prohibition is directed at state actors. The distinction lacks basis in the Fourteenth Amendment. VAWA exceeded its bounds under Section 5 because it attempted to "enforce" the Amendment by prohibiting conduct about which the Amendment does not speak. The Court provided no theoretical justification for basing its objection on the identity of the actor instead of on the substantive nature of the conduct. Instead, the Court should have repudiated *Morgan*'s freewheeling view of Section 5 and adopted in its place the (seemingly) unremarkable proposition that enforcement of the Fourteenth Amendment should be restricted to punishing violations of that Amendment.

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122. *See* United States v. Morrison, 120 S. Ct. 1740, 1755 (2000) (discussing "voluminous" evidence before Congress that "many participants in state justice systems are perpetuating an array of erroneous stereotypes and assumptions").

123. Such a scheme would most likely be a valid abrogation of states' sovereign immunity per *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

124. *Morrison*, 120 S. Ct. at 1758.

125. *Id.* at 1759.

C. The Respect Due Congress's Judgment

The *Morrison* and *Lopez* dissents suggested that questions of national power over the states should be resolved through the political process. They did not suggest, however, that Congress was likely to respect the limits that the Constitution places on it. Such an assertion would be incredible, and even the four dissenters seemed to recognize that Congress has passed the issue of constitutionality to the courts, abdicating its responsibility to ensure that its statutes comport with the Constitution. In light of this abdication of responsibility,[126] the presumption of constitutionality given congressional statutes reflects an inaccurate and idealistic vision of lawmaking. The presumption should be abandoned.

The Court may be moving in the direction of weakening a "presumption of constitutionality,"[127] but *Morrison* continues the practice of paying at least lip service to the idea that congressional statutes should be struck down "only upon a plain showing that Congress has exceeded its constitutional bounds."[128] Requiring this "plain showing" is, the Court announced, "demand[ed]" by "[d]ue respect for the decisions of a coordinate branch of government."[129] "Due respect" fits well in an understanding of government where it is Congress's

126. Senator Mathias candidly remarked on this trend during the confirmation hearings of Justice Sandra Day O'Connor. He commented that members of Congress "will say: 'Well, I am not sure whether this is constitutional or not but I think it is a good idea and therefore I am going to vote for it because there is always the Supreme Court who will make the ultimate decision about the constitutionality.'" He went on to undermine the respect given his institution further: "[S]ometimes we make a jump in the dark on the constitutional question. . . ." *Nomination of Sandra Day O'Connor: Hearings Before the Senate Comm. on the Judiciary, on the Nomination of Judge Sandra Day O'Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States*, 97th Cong. 68 (1982) (statement of Sen. Mathias, Member, Comm. on the Judiciary) (paragraphing deleted) [hereinafter Statement of Sen. Mathias].

127. *See, e.g.*, Robert A. Shapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 657 (2000) ("[In the 1990's, A]cross a broad range of legal doctrine, federal judicial deference to the constitutional interpretation of other branches of government declined markedly."); Tony Mauro, *Split Branches*, LEGAL TIMES, May 22, 2000, at 1 ("Since 1986, the Supreme Court under Chief Justice William Rehnquist has struck down 29 congressional acts, including 22 since 1995."). In fact, Mauro predicted that "more judicial disrespect for Congress is in the offing." *Id.* at 8.

128. *Morrison*, 120 S. Ct. at 1748 (2000).

129. *Id.*

"duty"[130] to consider the constitutionality of its statutes.

Such respect is unwarranted, however, when Congress legislates with regard solely for political expediency and ignores the constraints of the Constitution. Put another way, the determination by Congress, as a coordinate branch of government, that a particular law is constitutional may be entitled to respect, but the mere passing of a statute no longer implies (assuming that such an implication was ever warranted) that Congress has, in fact, made such a determination. As Justice Scalia said in a speech at Michigan State University, "if Congress is going to take the attitude that it will do anything it can get away with and let the Supreme Court worry about the Constitution . . . then perhaps that presumption [of the constitutionality of congressional statutes] is unwarranted."[131]

Congress cannot be expected to engage in impartial constitutional debate. The incentive for members of Congress is to vote for popular policies, with the courts at the ready to undo the popular will if required by the Constitution, without fear of political reprisal. What is more, having Congress seriously consider the constitutionality of statutes is not altogether desirable.[132] Courts are the institutions trained in the interpretation of the Constitution. Legislators are generally not selected for their views of constitutional interpretation, and they have demands on their time other than sifting through

130. City of Boerne v. Flores, 521 U.S. 507, 535 (1997).

131. Mauro, *supra* note 127, at 8 (ellipsis in original). The Court itself may have contributed to the lackadaisical attitude toward the Constitution by Congress. If, as the Court said, "the federal judiciary is supreme in the exposition of the law of the Constitution," Cooper v. Aaron, 358 U.S. 1, 18 (1958) (per curiam), there is less of a reason for Congress to devote energy to resolving a constitutional ambiguity than if the Court had consistently maintained that legislatures' views of the Constitution were to be given weight.

132. In "political question" situations where the decision of Congress is not likely to be reviewed by Courts, Congress should engage in constitutional analysis. The point is merely that courts are likely to do a better job interpreting the Constitution than is Congress in those situations where courts can opine on the issues. Aside from the policy question whether having members of Congress analyze the Constitution is wise, such analysis may be required by the document itself (not that we can trust Congress to enforce that requirement, either). *See* U.S. CONST. art. VI, cl. 3 ("The Senators and Representatives . . . shall be bound by Oath or Affirmation, to support this Constitution . . . ."). I am not prepared to excuse members of Congress from their oaths to support the Constitution; I simply note that the electorate has already refused to enforce the oath against Congress.

mountains of caselaw and commentary. Asking Congress to balk at a statute, otherwise grounded in good policy, for the reason of its questionable constitutionality would be detrimental to the public, which is entitled to have its legislators pursue creative solutions to national problems.

The presumption of constitutionality could theoretically rest on more than the assumption that Congress considered the constitutional issues before passing any given statute.[133] To the extent that other factors weigh in favor of the presumption, Congress's "jump in the dark on the constitutional question"[134] might weaken the presumption in favor of the statute. Such factors may include the stability interest in not having a high percentage of statutes overturned. It is difficult to see, however, much of an interest in retaining unconstitutional statutes, even if their demise would destabilize the legal system. Additionally, a presumption *against* the constitutionality of a statute would be disrespectful of Congress, as well as undemocratic, but that argument fails to demonstrate why there should be any presumption at all. Despite these possible reasons for retaining the presumption, the Court has explicitly declared that the only ample justification is that Congress "has not just the right *but the duty* to make its own informed judgment on the meaning and force of the Constitution . . . . Were it otherwise, we would not afford Congress the presumption of validity its enactments now enjoy."[135] The argument that Congress engages in a non-conclusory examination of the Constitution is questionable at best. The time has come for the Court to make good on its threat not to afford congressional statutes a presumption of validity. The divergence between *Morrison*'s language and its result may indicate that the Court is giving Congress one final warning before removing the presumption altogether.

133. *See* Oregon v. Mitchell, 400 U.S. 112, 207 (1970) (Harlan, J., concurring in part and dissenting in part) (noting the value of "efficiency" behind the presumption of validity of action by the political branches, whether of the states or the national government).

134. Statement of Sen. Mathias, *supra* note 126.

135. *Flores*, 521 U.S. at 535 (1997) (emphasis added).

IV. CONCLUSIONS

United States v. Morrison should not have been a hard case. The fact that four Justices voted to sustain the exercise of national power over quintessentially state-based criminal law is frightening testament to the continuing influence of the New Deal and the Warren Court.[136] For the Supreme Court to return to an interpretation of the Constitution that affirmatively limits congressional power will be difficult given that the public clamors for national legislation to solve every problem, however local.[137] Whether the public would expect so much from the national government absent the expansive precedent of the 1960s is an unanswerable question. The Court's failure in *Morrison* to construct a rule with clear limiting principles for the exercise of national power threatens to make *Lopez* and *Morrison* mere interruptions on the jurisprudential path to eliminating the doctrine of enumerated powers as a constraint on Congress.[138] Maintaining that doctrine is necessary, as Chief Justice Marshall recognized, for we rest our government "on the premise that the 'powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written.'"[139] Would that we never be so mistaken.

Michael Richard Dimino

136. *See* LUCAS POWE, THE WARREN COURT AND AMERICAN POLITICS 494 (2000) ("The Warren Court completed the eradication of federalism, once a cherished and innovative part of the American constitutional order."); *cf.* Mark Tushnet, *The Warren Court as History: An Interpretation, in* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE 2 (Mark Tushnet ed., 1993) ("[T]he Warren Court is in important ways still with us . . . .").

137. *See* Parker Douglas, Note, *The Violence Against Women Act and Contemporary Commerce Power: Principled Regulation and the Concerns of Federalism*, 1999 UTAH L. REV. 703, 720 (1999) (noting the concern in *Lopez* "to sustain a modicum of State sovereignty in the face of ever-broadening federal power").

138. In fact, many lower courts after *Lopez* read the case narrowly and continued to give effect to broad interpretations of the Commerce Clause. *See generally* Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 713-30 (1995).

139. *Flores*, 521 U.S. at 516 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803)).

NOT BECAUSE THEY ARE BROWN, BUT BECAUSE OF *EA*[1]: *Rice v. Cayetano*, 528 U.S. 495 (2000)

I. INTRODUCTION

During its 1999 Term the Supreme Court heard a case directly involving the status of Native Hawaiians for the first time in its history.[2] At issue was participation in the election of

1. The Native Hawaiian word *Ea* is often translated as "sovereignty," but the term encompasses more that the traditional Western notion of sovereignty. The concept of *Ea* in the Hawaiian state motto, "Ua Mau Ke Ea O Ka 'Aina I Ka Pono" (translated as "The sovereignty of the land is perpetuated in justice") includes not only notions of sovereignty but also that the essence of Native Hawaiian life is intertwined with the land, *'aina*, as well. *See generally* Troy M. Yoshino, *Voting Rights and the Native Hawaiian Sovereignty Plebiscite*, 3 MICH. J. RACE & L. 475 (1998). By convention, this Note uses the term sovereignty, but in doing so intends to evoke the full meaning of *Ea*.

2. The history of Hawaii did play a role in two prior Supreme Court decisions, *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) and *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), but the status of Native Hawaiians was not at issue in either

the board of trustees of the Office of Hawaiian Affairs (OHA), an agency that administers programs benefiting two subclasses of Hawaiian citizenry, "Hawaiians" and "Native Hawaiians."[3] The Hawaiian State Constitution limited the right to vote for the nine OHA trustees and the right to run in the statewide election for the position of OHA trustee to those two subclasses.[4] The Court held that because the definitions of these subclasses were racial rather than political in nature, the voting restrictions violated the Fifteenth Amendment.

At first glance it appears that the rights of yet another group of indigenous inhabitants of this nation were trampled upon. A closer inspection of the case reveals, however, that the Native Hawaiians were instead victims of a constitutionally faulty remedial infrastructure that was based on their race rather than their inherent sovereignty as indigenous people. The crux of the majority opinion was that the voting restrictions were both racially defined and imposed by the State, and thus were constitutionally impermissible.[5] Although the majority opinion does not elucidate acceptable alternatives, it implies that had the voting restrictions been based on membership in a Native Hawaiian political entity, and had that entity, rather than the State of Hawaii, been the administrator of the resources controlled by OHA, it is likely that the outcome would have been favorable to the Native Hawaiians. The constitutional defect identified by the majority was not an attempt to provide a measure of self-determination for Native Hawaiians but rather a faulty infrastructure that attempted to promote such self-determination as a function of race under the auspices of the State.

How this faulty infrastructure arose is in large part a function of history. Writing in dissent, Justice Stevens correctly admonished the majority that a proper decision required an understanding of the history of Native Hawaiians.[6] As Professor Frickey notes, "in federal Indian law, lawyerly

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case.

3. The statutory definitions of these two subclasses are racially defined. *See infra* note 107 (quoting HAW. REV. STAT. § 10-2 (2000)). Both out of respect and for the sake of convention, the author will capitalize Native Hawaiians throughout this Note, except where a statute or quotation uses an alternative capitalization.

4. *See* HAW. CONST. art. XII, § 5.

5. Rice v. Cayetano, 528 U.S. 495, 521-22 (2000).

6. *Id.* at 534 (Stevens, J., dissenting).

analysis that is devoid of broader historical and theoretical perspectives leads to misleading conclusions about the determinacy and substance of what the law 'is' [or 'was'] at any given moment."[7] Part II of this Note therefore reviews the history of Native Hawaiians in the broader context of the history of federal Indian law,[8] focusing on the vacillating congressional policies regarding Indians and how those policies almost always treated Indian tribes as political entities rather than ethnic communities. Part III reviews and analyzes the procedural history of the *Rice* case and its resolution by the Supreme Court. Part IV concludes with the argument that constitutionally permissible alternative methodologies exist for accomplishing the same objective of self-determination for Native Hawaiians.

II. CONTEXTUAL PERSPECTIVE ON RELEVANT HISTORY

Although Justice Kennedy allocates more than half of the majority opinion to the history of Hawaii,[9] he does not place that history in the broader context of the history of federal Indian law. Much of the argument from both sides centers on whether Native Hawaiians can legally be treated as Indians by way of the jurisprudence that identifies Indian status as a political rather than a racial classification.[10] It is thus necessary to understand the legal history of Indian policy. Numerous parallels exist between the treatment of Native Hawaiians on the islands and the treatment of Indians on the mainland. In several instances, however, the timing of major developments in Hawaiian history worked to the detriment of Native Hawaiians because of the character of Indian policy at the time. Like most renditions of the history of Indian law, this Part is organized according to the different eras of federal Indian law and policy.[11]

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7. Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1767 (1997) (commenting on the status of Native Hawaiians in response to Benjamin, *infra* note 210).

8. For the purposes of this Note, federal Indian law includes Supreme Court jurisprudence regarding Indian tribes as well as congressional and executive policy towards tribes, including Title 25 of the United States Code.

9. *Rice*, 528 U.S. at 499-511.

10. *See* discussion of Morton v. Mancari, 417 U.S. 535 (1974), *infra* notes 98-101, 129-32 and accompanying text.

11. Most scholars analyze federal Indian law based on the historical periods

A. Pre-contact

Under the doctrine of discovery[12] aboriginal peoples were typically viewed as heathen savages who, upon discovery, retained only limited "native title" to the lands they occupied, subject to the will of the sovereign that funded the discovery. Unlike the North American mainland, however, the Hawaiian Islands were isolated from Western European contact for centuries until 1778 when Captain James Cook arrived. Each high chief, or *ali'i nui*,[13] controlled a district of an island or an entire island.[14] Local chiefs, the *ali'i* or *konohiki*,[15] controlled specific lands, and commoners, or *maka'ainana*,[16] worked them. Typically, lands were divided into parcels defined by boundaries radiating from a point high on a mountaintop down to the sea level, so as to enclose a drainage area. The parcel was known as an *ahupua'a*,[17] an economically self-sufficient tract of land that usually included forest resources, farmland, fresh water, and access to the sea.

Operation of the Hawaiian land tenure system somewhat resembled the feudal arrangements that prevailed in medieval Europe in that a portion of all that was produced went to the chiefs.[18] There were, however, significant differences.[19] Hawaiians considered land to be held for the common benefit.[20] If the *maka'ainana* believed that they were being treated unfairly, they could simply move to another *ahupua'a*,

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that correspond with the prevailing policy towards Indians at that time: Pre-contact, Treaty Making and Removal (1789-1871), Allotment and Assimilation (1871-1928), Indian Reorganization (1928-1945), Termination (1945-1961), and Self Determination (1961-present). *See, e.g.*, FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW ch. 2 (1982); *see also* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 10-32 (3d ed. 1998); CLINTON, NEWTON AND PRICE, AMERICAN INDIAN LAW 137-65 (3d ed. 1991); GETCHES, WILKINSON AND WILLIAMS, FEDERAL INDIAN LAW chs. 2, 3 & 4 (4th ed. 1998).

12. *See, e.g.*, Johnson v. McIntosh, 21 U.S. 543, 573 (1823); *see also* COHEN *supra* note 11, ch. 2, § A; GETCHES, *supra* note 11, ch. 2.

13. *See* MELODY KAPILIALOHA MACKENZIE, NATIVE HAWAIIAN RIGHTS HANDBOOK 305 (1991).

14. The *ali'i nui* often fought amongst themselves for control of various territories, which resulted in periodic instability. *See* GETCHES, *supra* note 11, at 945.

15. *See* COHEN, *supra* note 11, at 798; *see also* MACKENZIE, *supra* note 13, at 306.

16. *See* MACKENZIE, *supra* note 13, at 307.

17. *See* COHEN, *supra* note 11, at 798; *see also* MACKENZIE, *supra* note 13, at 305.

18. *See* COHEN, *supra* note 11, at 798; GETCHES, *supra* note 11, at 945.

19. *See* MACKENZIE, *supra* note 13, at 4.

20. *See* GETCHES, *supra* note 11, at 945.

as they were not tied to the land.[21]

B. Treaty Making and Removal (1789-1871)

As the newly-formed United States began its inexorable march westward, it developed a nearly insatiable appetite for more land. Unfortunately,[22] the land was already occupied by Indians. To satisfy western expansion goals, the Indian lands usually were not taken by force but were instead ceded[23] to the United States by treaty in return for, among other things, the establishment of a trust relationship.[24] The federal government thus assumed a guardian-ward relationship with the Indians, not only because of prevailing racist notions of Indian societal inferiority[25] but also because the trust relationship was often

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21. *See* COHEN, *supra* note 11, at 799; MACKENZIE, *supra* note 13, at 4.

22. That is, unfortunately for the Indians.

23. Tribes in the East were more likely to be removed to Oklahoma, whereas tribes in the West tended to have their land holdings reduced to smaller reservations. *Compare* Treaty of Dancing Rabbit Creek, Sept. 1830, *in* 2 CHARLES J. KAPPLER, INDIAN AFFAIRS, LAWS AND TREATIES 310 (1904) (signed by Choctaw leaders at *bok chukfi ahithac*—"the little creek where the rabbits dance"—providing for the removal from the ancestral homelands in Mississippi and Alabama to land in southeastern Oklahoma), *with* Fort Laramie Treaty, Apr. 29, 1868, 15 Stat. 635 (1868), *in* FRANCIS PRUCHA, DOCUMENTS OF UNITED STATES INDIAN POLICY 109 (2000) (signed by the Sioux Nation at the conclusion of the Powder River War, establishing a reservation) [hereinafter Fort Laramie Treaty].

24. The scope of the trust relationship was multi-faceted. "Many treaties explicitly provided for protection by the United States." COHEN, *supra* note 11, at 65 n.38. For examples of treaties creating a trust relationship, see Treaty with the Creeks, Aug. 7, 1790, art. 2, 7 Stat. 35 (1790), *in* KAPPLER, *supra* note 23, at 25 [hereinafter Treaty with the Creeks]; Treaty with the Kaskaskia, Aug. 13, 1803, art. 2, 7 Stat. 78 (1803), *in* KAPPLER, *supra* note 23, at 67 [hereinafter Treaty with the Kaskaskia]. *United States v. Kagama*, 118 U.S. 375, 383-84 (1886), described this trust relationship:

> These Indian tribes are the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights . . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive, and by Congress, and by this court, whenever the question has arisen.

Id. Other treaties provided the means for subsistence. *See, e.g.*, Fort Laramie Treaty, *supra* note 23 (providing for subsistence rations for the Sioux.); 1828 Treaty with the Western Cherokees, Art. 8, 7 Stat. at 313 (1828), *in* KAPPLER, *supra* note 23, at 290 [hereinafter Treaty with the Western Cherokees]; COHEN, *supra* note 11, at 81 ("[E]ach Head of a Cherokee family . . . who may desire to remove West, shall be given, on enrolling himself for emigration, a good Rifle, a Blanket, and a Kettle, and five pounds of Tobacco: (and to each member of his family one Blanket,) . . . a just compensation for the property he may abandon.").

25. *See, e.g.*, Johnson v. McIntosh, 21 U.S. 590 (1823) ("But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and

consideration for the Indians' relinquishment of land.[26] It is important to note that these treaties were always entered into as government-to-government relationships between the tribes as collective political entities and the United States.[27] The United States "from the beginning of its political existence recognized a measure of autonomy in the Indian bands and tribes. Treaties rested upon a concept of Indian sovereignty . . . and in turn greatly contributed to that concept."[28]

In Hawaii, the situation was somewhat different. Perhaps "because of their geographic isolation and close proximity to one another, Native Hawaiians were able to unify to form a monarchy under King Kamehameha."[29] Political unification proved instrumental in dealing with the onslaught of foreigners who came to trade beginning in the nineteenth century. In addition to preserving the "feudal" land tenure system,[30] the Hawaiian Kingdom furnished governmental leadership with which foreigners could deal and thereby encouraged foreign governments to enter into diplomatic

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whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness."); Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831) ("[Indians] are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."); Worcester v. Georgia, 31 U.S. 515, 588 (1832) (discussing the "humane policy of the government towards these children of the wilderness must afford pleasure to every benevolent feeling"). These three cases, often referred to as the "Marshall Trilogy," form much of the foundation for federal Indian law, particularly the notion of the guardian-ward relationship and the concept of Indian tribes as "domestic dependent nations." *Cherokee Nation*, 30 U.S. at 17.

26. *See, e.g.*, Treaty with the Creeks, *supra* note 24; Treaty with the Kaskaskia, *supra* note 24; Treaty with the Western Cherokees, *supra* note 24; Fort Laramie Treaty, *supra* note 23.

27. *See, e.g.*, Treaty with the Six Nations of October 22, 1784, *in* PRUCHA *supra* note 23, at 4; Treaty of Fort McIntosh of January 21, 1785, *in* PRUCHA *supra* note 23, at 5; Fort Laramie Treaty of September 17, 1851, *in* PRUCHA *supra* note 23, at 84 (referring to the United States and the Sioux collectively as "the aforesaid nations").

28. FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 2 (1994).

29. COHEN, *supra* note 11, at 799. The availability of superior war fighting technology is often credited for the rapid unification of the Hawaiian Islands within a few decades of Western contact. *See, e.g.*, JARED DIAMOND, GUNS, GERMS, AND STEEL 64 (1997) ("After the arrival of Europeans, the Big Island's King Kamehameha I rapidly proceeded with the consolidation of the largest islands by purchasing European guns and ships to invade and conquer [the other islands].").

30. *See* Rice v. Cayetano, 528 U.S. 495, 501 (2000); Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) ("When Kamehameha I came to power, he reasserted suzerainty over all lands and provided for control of parts of them by a system described in our own cases as 'feudal.'"); Kaiser Aetna v. United States, 444 U.S. 164 (1979).

relationships with Hawaii.[31]

Before long, however, the Hawaiian government began to encounter substantial foreign influence in its domestic affairs. Westerners gave advice to the government, "often unsought and often in the shadow of a foreign military presence."[32] The land tenure system came under pressure as foreigners wanted land for themselves.[33] Originally, no formalized land titles existed because the property interests of the king, the chiefs, and the commoners were intertwined.[34] Pressure from Westerners who wanted to own land in fee simple, however, resulted in a series of developments that forever transformed Hawaiian land tenure relationships.

In 1840, on the advice of Westerners, King Kamehameha III promulgated a written constitution declaring that the monarchy controlled the land of the kingdom for the benefit of the chiefs and the people who owned the land collectively.[35] This initial formal declaration clarifying land ownership in the kingdom was followed by the "Great *Mahele*"[36] of 1848, which effected a division of the lands so that clear title could be determined and transferred. The *mahele* required that the king quitclaim his interest in about 1.5 million acres of *ahupua'a* and other lands to 245 chiefs, designate another 1.5 million acres of government lands for "the chiefs and people of my Kingdom,"[37] and set aside one million acres of crown lands "for me and for my heirs and successors forever, as my own property exclusively."[38] The *mahele* thus vested title in the king and the chiefs and imposed descendancy requirements on the crown lands, essentially creating an estate in fee tail.[39] Although the *mahele* did not accomplish many of its intended

31. 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, 313-14 (1994); *see also infra* notes 42-44 and accompanying text.

32. GETCHES, *supra* note 11, at 945.

33. *See* COHEN, *supra* note 11, at 799.

34. *See id.* at 798-99.

35. *See id.* at 799 n.14.

36. Literally "division." *See id.* at 799.

37. *In re* Estate of Kamehameha, 2 Haw. 715, 723 (1864).

38. *Id.*

39. *See id.* at 725-26 (ruling on the language of the *Mahele* and the accompanying descendancy requirements); *see also* COHEN, *supra* note 11, at 800 n.15.

objectives,[40] it did lay the groundwork for the establishment of a trust relationship between Native Hawaiians and the United States in the future.[41]

Throughout the nineteenth century the Kingdom of Hawaii was acknowledged to be a sovereign and independent state within the international community. As such, it entered into numerous treaties with various foreign governments,[42]

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40. The Native Hawaiian commoners

> never received lands as originally anticipated by the land commission that had recommended the *mahele*. In fact, very little land ever reached individual commoners. An intended remedy for the concentration of land outside commoners' hands was the provision of an 1850 act that allowed tenants to apply for *kuleana* - small parcels that they actually cultivated, and a houselot. Many of those eligible for *kuleana* did not get them because they could not afford the survey costs or meet other requirements of the law. Less than one percent of Hawaii's land was actually distributed as *kuleana*.
>
> Not only did the *mahele* fail to distribute land widely among natives, it ultimately resulted in large amounts of some of the best Hawaiian land passing to foreigners. The *mahele* and the laws passed soon after it effectively lifted the restriction on alienation of property that had been imposed by the 1840 Constitution. Government lands and the crown lands then were sold whenever the king approved. The chiefs had incurred large debts that they paid with land. Some attempted plantation farming but failed and lost their land through mortgage foreclosure. The king was free to sell, lease, or mortgage his crown lands as he pleased and the government sold considerable acreage, often at low prices. To check the loss of lands in this way the Hawaiian legislature, following a court decision ruling that crown lands would descend only to the successors of the king, declared in 1865 that crown lands were inalienable.

GETCHES, *supra* note 11, at 946.

41. The lands set aside as crown and government lands eventually become the basis for a land trust for Native Hawaiians. *See, e.g.*, Newlands Resolution, J. Res. 55, July 7, 1898, §1, 30 Stat. 750 (1898); Admissions Act of 1959, Pub. L. No. 86-3, 73 Stat. 4 (1959).

42. *See generally* Jennifer M.L. Chock, *One Hundred Years of Illegitimacy: International Legal Analysis of the Illegal Overthrow of the Hawaiian Monarchy, Hawai'i's Annexation, and Possible Reparations*, 17 U. HAW. L. REV. 463, 463-65 (1995) (citing Treaty of Friendship, Commerce and Navigation between Belgium and Hawai'i, Oct 14, 1862, Belg.-Haw., 126 Consol. T.S. 329; Treaty between Denmark and Hawai'i, Oct. 19 1846, Den.-Haw., 100 Consol. T.S. 13; Treaty of Friendship, Commerce and Navigation between Hawai'i and Sweden, July 1, 1852, Haw.-Swed., 108 Consol. T.S. 217; Treaty of Friendship, Commerce and Navigation between Hawai'i and Netherlands, Oct. 14, 1862. Neth.-Haw., 126 Consol. T.S. 343; Treaty of Friendship, Commerce and Navigation between Italy and Sandwich Islands, July 22, 1863, Italy-Haw., 128 Consol. T.S. 109; Treaty of Friendship, Commerce and Navigation between Hawaiian Islands and Spain, Oct. 29, 1863, Haw.-Spain, 128 Consol. T.S. 251; Treaty of Friendship, Establishment of Commerce between Hawai'i and Switzerland, July 20, 1864, Haw.-Switz., 129 Consol. T.S. 333; Convention of Commerce and Navigation between Hawai'i and Russia, June 19, 1869, Haw.-Russ., 139 Consol. T.S. 351; Treaty of Commerce and Navigation between Hawai'i and Japan, Aug. 19, 1870, Haw.-Japan, 141 Consol. T.S. 447; Treaty of Commerce and Navigation between Austria-Hungry and

including the United States, which viewed Hawaii as part of the American continental system.[43] The *Rice* Court noted that a number of treaties were signed between the United States and the Kingdom of Hawaii during this period: "The first 'articles of arrangement' between the United States and the Kingdom of Hawaii were signed in 1826 . . . and additional treaties and conventions between the two countries were signed in 1849, 1875, and 1887."[44] It is important to note that all of the treaties between the United States and the Kingdom of Hawaii treated Native Hawaiians as a collective political entity, not as an ethnic group.

C. Allotment and Assimilation (1871-1928)

During this next period on the mainland Congress ceased making treaties with the Indians[45] and instead embarked on a concerted program to destroy tribalism and assimilate Indians as individuals into the dominant society.[46] This policy involved

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Hawai'i, June 18, 1875, Aus.-Hung.-Haw., 149 Consol. T.S. 305; Convention between Hawai'i and Portugal for the Provisional Regulation of Relations of Friendship and Commerce, May 5, 1882, Haw.-Port., 160 Consol. T.S. 209).

43. *See* GETCHES, *supra* note 11, at 947. In 1842, U.S. Secretary of State Daniel Webster wrote "that the Government of the [Hawaiian] Islands ought to be respected; that no power ought either to take possession of the islands as a conquest, or for the purpose of colonization; and that no power ought to seek for any undue control over the existing government." RALPH S. KUYKENDALL, THE HISTORY OF HAWAI'I 157 (1945). Later, U.S. Secretary of State James Blaine would elucidate the U.S. position on the status of Hawaii as a sovereign state within the American continental system:

> This policy has been based upon our belief in the real and substantial independence of Hawai'i. The government of the United States has always avowed and now repeats that, under no circumstances, will it permit the transfer of the territory or sovereignty of these islands to any of the European powers.

ALICE FELT TYLER, THE FOREIGN POLICY OF JAMES G. BLAINE 198 (1927).

44. Rice v. Cayetano, 528 U.S. 495, 504 (2000) (citations omitted). For some reason, however, the Court omitted mention of the treaty between Hawaii and the United States that was signed in 1842. Perhaps the reason was that in the 1842 treaty, President Tyler explicitly recognized the sovereignty of the Kingdom of Hawaii and declared it United States policy to support Hawaiian independence. *See* RICH BUDNICK, STOLEN KINGDOM: AN AMERICAN CONSPIRACY 14 (1992); *see also* Pub. L. No. 103-150, 107 Stat. 1510 (1993) (discussed *infra* note 103).

45. Treaty making with the Indians was ended by Congress in 1871: "[H]ereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent, nation, or power with whom the United States may contract by treaty . . . ." 16 Stat. 544, 566 (1871), *in* PRUCHA, *supra* note 23, at 135. For timeline purposes it is worth noting that the end of treaty-making with the Indians was within a few years of the last treaty signed with the Kingdom of Hawaii.

46. *See* GETCHES, *supra* note 11, at 141.

taking collectively-owned lands away from tribes and allotting parcels to individual tribal members (and selling the surplus at bargain prices to non-Indians).[47] Although anti-Indian prejudices undoubtedly contributed to the passage of the General Allotment Act of 1887,[48] historians agree that it was mostly "pushed through Congress, not by western interests greedy for Indian lands, but by eastern [liberals] who deeply believed that communal landholding was an obstacle to the civilization they wanted the Indians to acquire . . . ."[49] These liberals believed that "[p]ride of ownership . . . would generate individual initiative . . . and bring material and cultural advancement" for the Indians.[50] Prominent liberal James Bradley Thayer of Harvard Law School enthusiastically praised the Dawes Act—designed to sever the individual from the tribal collective—as a "great, far-reaching, and beneficent" achievement.[51]

In an address to Congress in 1901, President Theodore Roosevelt expressed his view of the assimilation policy:

> [T]he time has arrived when we should definitely make up our minds to recognize the Indian as an individual and not as a member of a tribe. The General Allotment Act is a mighty *pulverizing engine* to break up the tribal mass [acting] directly upon the family and the individual . . . .[52]

During this period marked by aggressive policies intended to "pulverize" the communal political identity of the native peoples on the mainland, the Kingdom of Hawaii was overthrown and annexed. The United States did not subsequently identify Native Hawaiians as a separate political

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47. *See id.*

48. 24 Stat. 388 (1887). The statute is also known as the Dawes Act after Senator Henry L. Dawes of Massachusetts. While the Dawes Act represented the final, full-scale realization of the allotment policy, many treaties made with western tribes from 1865 to 1868 provided for allotment in severalty of tribal lands. *See* ROBERT WINSTON MARDOCK, THE REFORMERS AND THE AMERICAN INDIANS 212 (1971).

49. FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 669 (1984).

50. MARDOCK, *supra* note 48, at 22.

51. James Bradley Thayer, *The Dawes Bill and the Indians*, THE ATLANTIC MONTHLY, Mar. 1888, at 315.

52. 15 MESSAGES & PAPERS OF THE PRESIDENTS 6672 (1901) (emphasis added); *see also* PRUCHA, *supra* note 49, at 669 & n.26 (noting that the "mighty pulverizing engine for breaking up the tribal mass" language was originally used by Merrill E. Gates at the 1900 Lake Mohonk Conference).

entity for to do so would have been inconsistent with the overall policy of destroying indigenous political sovereignty.[53]

By the 1880s American officials had come to view the Kingdom of Hawaii as part of the American continental system,[54] meaning that the "kingdom had come under the virtual suzerainty of the United States."[55] It was a colony in substance, if not in form, so that efforts by another foreign power, such as England or Japan, to colonize the islands would have been regarded as acts in defiance of the United States's strategic interests in the Pacific.[56]

American officials and Presidents as far back as Ulysses S. Grant had suggested the idea of voluntary annexation of the kingdom by the United States,[57] but it was American merchants and missionary families that initiated the chain of events by which Hawaii formally became a territory of the United States. In 1887, having consolidated their economic gains into political dominance, these primarily American Westerners forced the resignation of the Prime Minister of the Kingdom of Hawaii and the subsequent adoption of a new "Bayonet Constitution."[58] The constitution greatly increased the foreigner's political role,[59] for example, by extending the right to vote to non-Hawaiians.[60]

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53. At times, these tactics included attempts to destroy any vestige of cultural identity whatsoever within the Native Hawaiian community. *See e.g.*, LILIKALA KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LA E PONO AI? 316 (1992) ("Once Hawai'i became an American territory in 1900, foreigners prohibited Hawaiian language and beat Hawaiian children for speaking it. As a result, we became ashamed to be Hawaiian."); *see also* Jon M. Van Dyke, *The Political Status of the Hawaiian People*, 17 YALE L. & POL'Y REV. 95, 103 n.50 (1998).

54. *See supra* note 43.

55. GETCHES, *supra* note 11, at 947.

56. *See, e.g.*, TYLER, *supra* note 43, at 1980 (comments of Secretary of State Blaine).

57. *See* GETCHES, *supra* note 11, at 947.

58. So called because it was literally forced on the King at gunpoint (presumably with a bayonet attached to the end). The coup was achieved with the help of two armed, vigilante groups: the Honolulu Rifles and the Hawaiian League. *See* Taryn Ranae Tomasa, *Ho'Olahui: The Rebirth of A Nation*, 5 ASIAN L.J. 247 (1998).

59. *See* COHEN, *supra* note 11, at 800.

60. *See* Rice v. Cayetano, 528 U.S. 495, 504 (2000); *see also* GETCHES, *supra* note 11, at 947 ("Under the 1887 Constitution, the king was stripped of power and the Hawaiian government was run by a United States-dominated cabinet. King Kalakaua's displeasure with the bayonet constitution moved him to propose restoration of his power. Attempts to reach that goal were all unsuccessful. The presence of American military forces in Hawaii helped to discourage these efforts, and American and European ministers directly intervened to pressure the king to

Still unsatisfied, the Westerners launched an insurrection in January 1893.[61] John Stevens, the United States Minister to Hawaii, ordered the United States Marines ashore in support of the insurrection and recognized the new provisional government even before Queen Lili'uokalani's lines of defense had surrendered.[62] Realizing the futility of fighting both the armed merchants and the United States Marines, the Queen,

> under this protest and impelled by said force, [yielded her] authority until such time as the Government of the United States shall, upon the facts being presented to it, undo the action of its representative and reinstate [her] and the authority which [she] claim[ed] as the constitutional sovereign of the Hawaiian Islands.[63]

Although the insurrectionists' goal had been annexation by the United States,[64] President Cleveland was unimpressed and indeed offended by the actions of the American Minister. He denounced the role of the American forces, calling for the restoration of the Hawaiian monarchy.[65] Attitudes changed with the next Administration, however, and in 1898 President McKinley signed a Joint Resolution, sometimes called the Newlands Resolution, to annex the Hawaiian Islands as a territory of the United States.[66] Under the terms of the Joint Resolution, the Republic of Hawaii[67] ceded all former "public, Government, or Crown lands"[68] to the United States. The resolution further provided that revenues from the public lands were to be "used solely for the benefit of the inhabitants of the

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retreat from his position.").

61. *See* COHEN, *supra* note 11, at 800.

62. *See id.*

63. Lili'uokalani v. United States, 45 Ct. Cl. 418, 435 (1910).

64. *See* COHEN, *supra* note 11, at 801.

65. *See* PRESIDENT OF THE UNITED STATES, MESSAGE RELATING TO THE HAWAIIAN ISLANDS, H.R. EXEC. DOC. NO. 47 (2d Sess. 1893).

> But for the presence of the United States forces in the immediate vicinity and in position to afford all needed protection and support the committee would not have proclaimed the provisional government from the steps of the Government building. . . . [B]ut for the lawless occupation of Honolulu under false pretexts by the United States forces . . . the Queen and her Government would never have yielded. . . .

Id. President Cleveland also found that "the provisional government lacked the popular support of the Native Hawaiian population." COHEN, *supra* note 11, at 801.

66. *See* COHEN, *supra* note 11, at 801.

67. The provisional government was later renamed The Republic of Hawaii. *See* COHEN, *supra* note 11, at 801.

68. J. Res. 55, July 7, 1898, §1, 30 Stat. 750 (1898).

Hawaiian Islands for educational and other public purposes."[69] Two years later "the Hawaiian Organic Act established the Territory of Hawaii, asserted United States control over the ceded lands, and put those lands 'in the possession, use, and control of the government of the Territory of Hawaii . . . until otherwise provided for by Congress.'"[70] By the provisions of the Act, an estimated 1.75 million acres of former crown and government lands in which the Native Hawaiians claimed an interest following the *mahele* became United States property. Just as it had with regard to the Pueblo, Navajo, and California Indians after the war with Mexico and the subsequent treaty of Guadalupe-Hidalgo,[71] the United States also inherited a trust responsibility with regard to Native Hawaiians at the moment of annexation.[72]

Although the stated policy of Congress was to destroy tribal cohesiveness, the existence of the trust responsibility prompted congressional action when the deteriorating economic conditions of the Native Hawaiians could not be ignored.[73] Rather than restoring the land base to a Native Hawaiian political entity, Congress enacted the Hawaiian Homes Commission Act (HHCA).[74] The Act created a system somewhat similar to allotment whereby 200,000 acres of the

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69. *Id.*

70. Rice v. Cayetano, 528 U.S. 495, 504 (2000) (quoting Act of Apr. 30, 1900, ch. 339, § 91, 31 Stat. 159 (1900)). It is clear from the statutory language that Congress was aware that it had assumed a trust relationship with the Native Hawaiians.

71. *See* Treaty of Peace, Friendship, Limits, and Settlement between the United States of America and the Mexican Republic, 9 Stat. 922 (1848); *see also* United States v. Sandoval, 231 U.S. 28 (1913).

> Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or *territory subsequently acquired*, and whether within or without the limits of a State.

Id. at 45 (emphasis added).

72. Just as the Pueblo, Navajo, and California Indians had been living under the foreign Mexican government, the Native Hawaiians had been living under the foreign (and arguably illegal) Republic of Hawaii.

73. Secretary of the Interior Lane testified before Congress that "the natives of the islands, who are our wards, I should say, and for whom in a sense we are trustees, are falling off rapidly in numbers, and many of them are in poverty." H.R. REP. NO. 839, at 4 (2d Sess. 1920).

74. *See* Act of July 9, 1921, ch. 42, 42 Stat. 108 (1921).

land ceded to the United States at annexation were set aside for the purpose of leasing homesteads for a nominal fee to individual Native Hawaiians. According to Professor Williams, "The Hawaiian Homes Commission Act was remarkably similar in purpose and effect to the General Allotment Act. Both statutes submerged Congress'ss good intentions in the ambitions of others who coveted the lands. Both were poorly carried out, often giving their purported beneficiaries parcels of inarable land."[75] Significantly, the HHCA defined Native Hawaiians racially[76] rather than politically because a collective political identification would have been inconsistent with the anti-tribal policies of the time. The "pulverizing engine" was, in effect, still running.[77]

D. The Period of Indian Reorganization (1928-1945)

By 1928 it was clear that the United States needed to change its policies towards tribal government structures. In response to the *Merriam Report*,[78] Congress passed the Indian Reorganization Act of 1934 ("IRA"), also known as the Wheeler-Howard Act,[79] The IRA completely repudiated the policy of allotment. The legislation allowed tribes to adopt constitutions and to reestablish structures for governance.

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75. GETCHES, *supra* note 11, at 949.

76. The Act defined Native Hawaiians to be "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." 42 Stat. 108 (1921). The sad irony of this restriction is that the blood quantum requirement was not an attempt by the Native Hawaiians to exclude others, but was rather incorporated at the urging of the sugar barons and ranching interests to ensure that only a limited number of Native Hawaiians could participate, thus leaving a larger surplus of land for ranching and sugar plantations. *See* Lesley Karen Friedman, *Native Hawaiians, Self-Determination, and the Inadequacy of the State Land Trusts*, 14 HAWAII L. REV. 519 (1992). In fact, an earlier version of the HHCA imposed only a 1/32 blood quantum requirement. *See* MACKENZIE, *supra* note 13, at 47; *see also* Rice v. Cayetano, 528 U.S. 495, 532 n.8 (2000) (discussing the "compromise between the sponsor of the legislation, who supported special benefits for 'all who have Hawaiian blood in their veins,' and plantation owners who thought that only 'Hawaiians of the pure blood' should qualify. [Eventually] the statute defined a 'native Hawaiian' as 'any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.'") (citations omitted).

77. *See supra* note 52 and accompanying text.

78. The *Merriam Report*, documenting the failure of federal Indian policy during the allotment period, was issued in 1928. The report's official title was INSTITUTE FOR GOVT. RESEARCH, STUDIES IN ADMINISTRATION, THE PROBLEM OF INDIAN ADMINISTRATION.

79. 25 U.S.C. §§ 461 *et seq.* (2000).

Congress also passed specific acts[80] to remedy the effects of certain policies that had been passed during the allotment era with the intention of destroying the governance structure of particular tribes, such as the Five Civilized Tribes in Oklahoma.[81] No one could deny that congressional policy had completely reversed itself—tribal sovereignty was now to be encouraged rather than destroyed. Many tribes began to thrive economically as a result. The IRA "provided a powerful stimulus to tribal governmental organization and in many cases so strengthened that organization as to enable continued development despite fluctuations in administrative policy."[82]

Unfortunately for the Native Hawaiians, congressional focus on their plight and the subsequent passage of the HHCA predated the IRA by more than a decade. The HHCA was an allotment-era policy[83] enacted when Congress still thought that the "civilization" of these indigenous savages required the destruction of their sense of autonomy and their identification as a separate political identity. Had the plight of Native Hawaiians been considered during the IRA era, congressional policy would have been to strengthen communal identity and

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80. The Oklahoma Indian Welfare Act of 1936 (OIWA), 49 Stat. 1967 (1936) (codified at 25 U.S.C. § 503 (2000)), "permitted Oklahoma Indians to take advantage of most of the provisions of the 1934 Wheeler-Howard Act, which ended allotments in severalty, allowed the re-establishment of communal lands, and permitted the organization of tribal governments with control over tribal funds." Morris v. Watt, 640 F.2d 404 (1981) (decided as *Morris v. Andrus*, reflecting a change in the Secretary of the Interior).

81. The Curtis Act, Act of June 28, 1898, ch. 517, 30 Stat. 495 (1898), and the Five Tribes Act, Act of Apr. 26, 1906, ch. 1876, 34 Stat. 137 (1906), were both designed to destroy tribal cohesiveness among the Choctaw, Chickasaw, Creek, Cherokee, and Seminole Nations. The Five Tribes Act was particularly brutal in its dismantling of any sense of political autonomy:

> That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year: Provided, That no act, ordinance, or resolution (except resolutions for adjournment) of the tribal council or legislature of any of the said tribes or nations shall be of any validity until approved by the President of the United States: Provided further, That no contract involving the payment or expenditure of any money or affecting any property belonging to any of said tribes or nations made by them or any of them or by any officer thereof, shall be of any validity until approved by the President of the United States.

34 Stat. 137 (1906).

82. GETCHES, *supra* note 11, at 197.

83. *See supra* note 75 and accompanying text.

native sovereignty. The resulting legislation might have recognized a Native Hawaiian political entity and fostered various exercises of Native Hawaiian sovereignty. In this respect, the Native Hawaiians were victims of history. Deleterious anachronisms of congressional policy toward Native Hawaiians were not limited to the timing of the passage of the HHCA, however. Other historical anomalies would damage the cause of Native Hawaiian sovereignty during the next shift in congressional Indian policy.

E. The Termination Period (1945-1961)

After World War II, congressional policy towards the Indians reversed itself once again. A 1949 Report on Indian Affairs by the Hoover Commission recommended "an about-face in federal policy: 'complete integration' of the Indians should be the goal so that Indians [will] move 'into the mass of the population as full . . . citizens.'"[84] The official congressional policy in 1953 was "to end [the Indians'] status as wards of the United States."[85] For the tribes that were "terminated" under this policy, the results were disastrous.[86]

The tragic saga of the Native Hawaiians moved into its next phase during this termination period. In 1959, as part of the Hawaiian Statehood Act,[87] Congress delegated to the State of Hawaii the trust responsibility owed to the Native Hawaiians. Congress ceded 1.2 million acres of land to the State for five specified purposes, including "the betterment of the conditions of Native Hawaiians, as defined in the Hawaiian Homes Commission Act."[88] In authorizing the grant, the Act "recited that these lands, and the proceeds and income they generated, were to be held as a public trust . . ."[89] In addition, the new State of Hawaii "agreed to adopt the [HHCA] as part of its own Constitution."[90] Unfortunately the Act's constitutionally-defective racial categorizations carried over because identifying Native Hawaiians as a political entity would have been

84. GETCHES, *supra* note 11, at 204.
85. H.R. Con. Res. 108, 83d Cong. (1953).
86. *See* CANBY, *supra* note 11, at 26.
87. *See* Admissions Act of 1959, Pub. L. No. 86-3, 73 Stat. 4 (1959).
88. *Id.* at 6.
89. Rice v. Cayetano, 528 U.S. 495, 507-08 (2000) (internal quotations omitted).
90. *Id.* at 507.

inconsistent with the termination policies of the time. Once again, historical anachronisms dealt Native Hawaiian sovereignty a crushing blow.

F. The Era of Self Determination (1961-present)

Just as Congress had reversed itself when it repudiated allotment and passed the IRA, the policy of termination was also short-lived. Ironically, as Professor Williams notes, termination had the opposite effect in its attempt to detribalize.[91] Indians finally recognized that federal policy too often was directed at destroying tribalism. From that perspective, they concluded "that only tribal control of Indian policy and lasting guarantees of sovereignty could assure tribal survival in the United States. . . ."[92] With the Kennedy and Johnson Administrations' abandonment of the termination policy, "programs such as the Economic Opportunity Act [began to be passed, which] recognized the permanency of Indian tribes and the importance of social investment in reservation communities."[93]

President Nixon was arguably the most ardent supporter of Indian sovereignty, and he issued a landmark statement calling for a new federal policy of "self-determination" for Indian nations.[94] Perhaps the greatest of Nixon's contributions to Indian tribal sovereignty was Public Law 638, the Indian Self-Determination and Education Assistance Act of 1975,[95] which expressly authorized the Secretaries of Interior and Health and Human Services to contract with and make grants to Indian tribes and other Indian organizations for the delivery of federal services. Acting at times pursuant to federal court orders,[96] the

91. *See* GETCHES, *supra* note 11, at 224.

92. *Id.*

93. *Id.* at 226.

94. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING RECOMMENDATIONS FOR INDIAN POLICY, H.R. DOC. NO. 91-363, 91st Cong., 2d Sess. (July 8, 1970); *see also* The Indian Financing Act of 1974, Pub. L. No. 93-262, 88 Stat. 77 (1974) (codified at 25 U.S.C. §§ 1451-1453 (2000)).

95. Pub. L. No. 93-638 (1994) (codified at 25 U.S.C. §§ 450a-450n (2000)).

96. *See, e.g.*, Morris v. Watt, 640 F.2d 404 (D.C. Cir. 1981); Harjo v. Kleppe, 420 F. Supp. 1110, 1121 (D.D.C. 1976), *aff'd sub nom.* Harjo v. Andrus, 581 F.2d 949 (D.C. Cir. 1978). In both instances, the court order reinstated tribal constitutions from the 19th century. The BIA subsequently assisted the tribes in redrafting modern constitutions. *See generally* Gavin Clarkson, *Reclaiming Jurisprudential Sovereignty: A Tribal Judiciary Analysis*, 50 U. KAN. L. REV. (forthcoming 2002) (HBS

Bureau of Indian Affairs ("BIA")[97] even assisted tribes in reconstituting their tribal governance structures.

During this period the Supreme Court handed down *Morton v. Mancari*,[98] one of the most important Indian cases of the modern era. The opinion held that tribal Indians were "members of quasi-sovereign tribal entities"[99] and that Indian status was thus "political rather than racial in nature."[100] *Mancari* involved the BIA's hiring preference for Indians, but the Court has extended its holding to other areas of Indian policy as "long as the special treatment can be tied rationally to the fulfillment of Congress'ss unique obligation toward the Indians" and the policy "is reasonable and rationally designed to further Indian self-government."[101]

Congress was not silent with regard to Native Hawaiians during this period either.[102] In 1993, Congress passed a joint resolution acknowledging the one hundredth anniversary of the January 17, 1893, overthrow of the Kingdom of Hawaii, with the participation of citizens and agents of the United States. Congress offered "an apology to Native Hawaiians on behalf of the United States" and called on the executive branch "to support reconciliation efforts between the United States and

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Working Paper No. 01-151).

97. The BIA is part of the Department of the Interior and is the primary agency responsible for managing Indian affairs, although other agencies such as DOJ and HHS also have specialized departments for interaction with Indian tribes.

98. Morton v. Mancari, 417 U.S. 535 (1974).

99. *Id.* at 554.

100. *Id.* at 553 n.24.

101. *Id.* at 554; *accord* United States v. Antelope, 430 U.S. 641, 645 (1977); Fisher v. District Court of Rosebud County, 424 U.S. 382, 390 (1976) (per curiam); *see also* Moe v. Confederated Salish & Kootenai Tribes 425 U.S. 463 (1976).

102. Numerous statutes mention Native Hawaiians. *See, e.g.,* the National Historic Preservation Act, § 4006(a)(6), 16 U.S.C. § 470a(d)(6) (2000); the National Museum of the American Indian Act, § 1-10, 13, 16, 20 U.S.C. §§ 80q -80q-12, 80q-15 (2000); the Drug Abuse Prevention, Treatment and Rehabilitation Act, § 4106(d), 21 U.S.C. § 1177(d) (2000) (defining the category of Native Americans as expressly including "Native Hawaiians"); Native American Languages Act, 25 U.S.C. §§ 2901-2912 (2000) (explicitly including Native Hawaiian languages); the Workforce Investment Act of 1998, § 29 U.S.C. § 2911 (2000); the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (2000) (stating that the Native Hawaiian faiths are explicitly included in the subset of religions described in the statutory heading as "Native American"); the Native American Programs Act of 1974, 42 U.S.C. §§ 2991-2992 (2000); the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act, § 311(c)(4), 42 U.S.C. § 4577(c)(4) (2000); the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (2000) (extending protection to American Indian and Native Hawaiian burial sites); *see also* Van Dyke, *supra* note 53, at 106 n.67.

the Native Hawaiian people."[103]

The State of Hawaii also began to reexamine the situation of Native Hawaiians and in 1978 amended its constitution to establish the Office of Hawaiian Affairs,[104] designating as its mission "the betterment of conditions of native Hawaiians . . . [and] Hawaiians."[105] A Native Hawaiian board of trustees manages OHA, receiving and expending the portion of income from trust lands that is allocable to Native Hawaiians.[106] The well-intentioned members of the Hawaiian legislature and the constitutional convention that established OHA did not make any concerted attempts to enter into a government-to-government relationship with a Native Hawaiian political entity or to recognize any element of Native Hawaiian sovereignty, perhaps because they were satisfied with the racial definitions of "Native Hawaiian" or "Hawaiian."[107] Yet, these particular racially-based classifications would be the linchpin in the case against the racially-exclusive system of election of the OHA board of trustees.

III. THE CASE OF *RICE V. CAYETANO*

Although OHA and related programs had "been in place for decades and [had often] proven themselves to be more divisive than beneficial"[108] within the Native Hawaiian community, it

103. Pub. L. No. 103-150, 107 Stat. 1510 (1993). Note that Section 2 of the Apology Resolution defines Native Hawaiians politically in terms of their sovereignty: "As used in this Joint Resolution, the term 'Native Hawaiian' means any individual who is a descendent of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii." *Id.*

104. HAW. CONST. art. XII, § 5 (1978).

105. HAW. REV. STAT. § 10-3 (1993).

106. *See* HAW. CONST. art. XII, §§ 4-6 (1978).

107. The term "Hawaiian" is defined by statute: "'Hawaiian' means 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." HAW. REV. STAT. § 10-2 (2000). The statute defines "Native Hawaiian" as follows:

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

Id.

108. Eric Steven O'Malley, *Irreconcilable Rights and the Question of Hawaiian*

was litigation from outside the community that proved to be its greatest threat.

A. Procedural History

The petitioner, Harold "Freddy" Rice, was a "citizen of Hawaii and a descendant of pre-annexation residents of the islands."[109] He was not, however, a "descendant of pre-1778 native inhabitants, and so [was] neither 'native Hawaiian' nor 'Hawaiian' as defined"[110] by statute.[111] Rice applied to vote in the election for OHA trustees in March 1996, but in order "to register to vote for the office of trustee," Rice was "required to attest: I am also Hawaiian and desire to register to vote in OHA elections."[112] Because "Rice marked through the words 'am also Hawaiian' and then checked the form 'yes,'" the State denied his application to vote.[113] Mr. Rice sued Benjamin Cayetano, the Governor of Hawaii, in the United States District Court for the District of Hawaii, on the grounds that the voting restriction violated the Fifteenth Amendment's guarantee that no citizen shall be denied the right to vote on the basis of race,[114] as well as the Fourteenth Amendment's Equal Protection Clause.[115]

Rice's primary argument was that the Fifteenth Amendment's command is clear and allows for no exceptions or excuses.[116] According to the Amendment, "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race."[117] Rice contended that "[d]espite the plain terms of the Fifteenth Amendment and more than a century of this Court's jurisprudence, the State of Hawaii has imposed a stark race-based restriction on the right to vote in statewide elections for officials who distribute public funds."[118] Rice further argued that "[t]his flagrant racial discrimination in the voting booth

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Statehood, 89 GEO. L.J. 501, 536 (2001).

109. Rice v. Cayetano, 528 U.S. 495, 510 (2000).

110. *Id.*

111. HAW. REV. STAT. § 10-2 (2000).

112. *Rice*, 528 U.S. at 510.

113. *Id.*

114. *See* Petitioner's Brief at 13, Rice v. Cayetano 528 U.S. 495 (2000) (No. 98-818) [hereinafter Petitioner's Brief].

115. *See id.* at 28.

116. *See id.*

117. U.S. CONST. amend. XV.

118. Petitioner's Brief, *supra* note 114, at 13.

plainly violates the Fifteenth Amendment's guarantee of race-neutral voting laws and is patently offensive"[119] Rice argued that nothing could salvage the OHA voting structure. Neither the beneficial motives of the state, the "special limited purpose" of the elections, nor the attempt to label the voting restriction as a political—as opposed to a racial—classification was sufficient to cure the alleged constitutional defect.[120]

Rice's second argument was that the voting scheme violated the Fourteenth Amendment's Equal Protection Clause.[121] Rice maintained that the race-based voting restriction could not withstand strict scrutiny and that no lesser form of scrutiny was appropriate.[122] In essence, Rice's position was that Native Hawaiians were not in the same position as Indian tribes on the mainland and therefore should not be treated as "Indians." If the Native Hawaiians were not "Indians," then the lesser scrutiny allowed by *Mancari*[123] could not be used in examining policies for Native Hawaiians.

The State argued that rational-basis judicial review was proper regarding the Hawaiian-only voting requirement because Native Hawaiians were just as "native" as any other Native Americans,[124] because the history of interaction between Native Hawaiians and the United States was similar to the history of other Native Americans, and because Congress had repeatedly "'extended to Native Hawaiians the same rights and privileges accorded to American Indian, Alaska[n] Native, Eskimo, and Aleut communities.'"[125] Citing case law governing the Pueblos in New Mexico[126] and Alaskan Natives,[127] the State argued that Congress had "historically exercised its Indian-affairs power over indigenous people not organized into tribes

119. *Id.*

120. *See id.* at 14-27.

121. *See id.* at 28.

122. *See id.* at 28-49. Under *Mancari*, the Court generally applies rational basis scrutiny when reviewing congressional statutes affecting Native Americans. Morton v. Mancari, 417 U.S. 535 (1974).

123. *See supra* notes 101, 122.

124. *See* Respondent's Brief at 15, Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818) [hereinafter Respondent's Brief].

125. *Id.* at 31 (quoting 20 U.S.C. § 7902(13) (2000)).

126. United States v. Joseph, 94 U.S. 614, 617 (1876); United States v. Sandoval, 231 U.S. 28 (1913).

127. Morton v. Ruiz, 415 U.S. 199 (1974); Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520 (1998).

in an anthropological sense, not recognized as tribes under then-prevailing definitions, or whose tribal status had been terminated . . ."[128] Further, the State noted, the Supreme Court had upheld the use of this power.

The State's objective in arguing that Native Hawaiians should be treated legally as Indians was to convince the district court to apply *Mancari*[129] and find that the OHA voting restriction worked to fulfill the unique congressional obligation toward Indians and to advance Indian self-governance. The State pointed to the Supreme Court's recognition in *Mancari* that Congress has passed innumerable laws with respect to Native Americans. "If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized."[130] The State also pointed out that the Court has embraced the *Mancari* rationale for reviewing "legislation that singles out Indians for particular and special treatment" in many cases[131] and has found the "the argument that [Indian] classifications are 'suspect' to be 'untenable'."[132]

The district court was persuaded by the State's arguments, particularly those comparing Native Hawaiians to the Indian tribes of the continental United States.[133] The court found that the history of the islands and their people revealed the existence of a guardian-ward relationship with Native Hawaiians and compared that relationship to the one between the United States and the Indian tribes in granting summary judgment.[134] The court granted the qualification for voting the same latitude as legislation relating to Congress's power over Indian affairs.[135] Finding that the voting requirement was

128. Respondent's Brief, *supra* note 124, at 31-32.

129. Morton v. Mancari, 417 U.S. 535 (1978).

130. Respondent's Brief, *supra* note 124, at 25 (quoting *Mancari*, 417 U.S. at 552).

131. *Id.* (quoting *Mancari*, 417 U.S. at 554-55 (citing Duro v. Reina, 495 U.S. 676, 692 (1990)); Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 673 n.20 (1979) (quoting *Mancari*); Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 500-01 (1979) (same)).

132. *Id.* at 26 (citing *Confederated Bands*, 439 U.S. at 501).

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

134. *See id.* at 1551-54.

135. *See id.* at 1554-55 (citing *Mancari*, 417 U.S. at 555).

"rationally related to the State's responsibility under the Admission Act to utilize a portion of the proceeds from the [trust] lands for the betterment of Native Hawaiians," the district court declared that the voting restriction was constitutional and did not violate the ban on racial classifications.[136]

The Court of Appeals for the Ninth Circuit affirmed, pointing out that Rice had not challenged the constitutionality of OHA and its programs.[137] Seeking to preserve "the trusts and their administrative structure as [it found] them, and assum[ing] that both are lawful," the court held that the State of Hawaii "may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be."[138] The fact that the Hawaiian Constitution and implementing statutes "contain a racial classification on their face"[139] was not sufficiently persuasive to justify invalidating the voting restrictions.[140]

The Supreme Court granted certiorari,[141] and numerous amicus curiae briefs were filed on both sides. The Office of the Solicitor General, on behalf of the United States, filed one of the strongest briefs supporting the OHA race-based voting restriction. This brief advanced two points: (1) "Congress has concluded that it has a trust responsibility to Native Hawaiians precisely because it bears responsibility for the destruction of their government and their loss of sovereignty over their land"[142]; and (2) "Congress does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous people of a once-sovereign nation as to whom the United States has established a trust relationship."[143]

136. *Id.* at 1555.
137. *See* Rice v. Cayetano, 146 F.3d 1075, 1079 (9th Cir. 1998).
138. *Id.*
139. *Id.*
140. *See id.* at 1080.
141. Rice v. Cayetano, 526 U.S. 1016 (1999) (granting cert.).
142. Amicus Brief of the Solicitor General at 9, Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818).
143. *Id.* at 10.

B. The Decisions

Voting seven to two, the Supreme Court reversed the Ninth Circuit, holding that the OHA voting restriction violated the Fifteenth Amendment.[144] The Court issued four separate opinions. Justice Kennedy delivered the opinion of the Court, joined by Justices Rehnquist, O'Connor, Scalia, and Thomas. Justice Breyer authored a concurring opinion joined by Justice Souter. Justices Stevens and Ginsburg each wrote dissenting opinions, with Justice Ginsberg joining part of Justice Stevens's dissent.

1. The Majority Opinion

Part I of the majority opinion presented a brief review of the history of the Hawaiian Islands. Part II discussed the historical development of the remedial federal and state structures put in place for the benefit of Native Hawaiians. Although Justice Kennedy's historical review consumed more than six pages, the opinion did not address the sovereignty exercised by Native Hawaiians prior to the illegal coup in 1893, nor did it examine the relevant history within the broader context of federal Indian law.[145] The basis for the majority opinion was presented in Part III. There, Justice Kennedy summarized the Court's understanding of the Fifteenth Amendment:

> The purpose and command of the Fifteenth Amendment are set forth in language both explicit and comprehensive. The National Government and the States may not violate a fundamental principle: They may not deny or abridge the right to vote on account of race.[146]

The Court then rejected the argument that the OHA voting restrictions were not racial but rather ancestral in nature, declaring that "[a]ncestry can be a proxy for race. It is that proxy here."[147]

Part IV of the majority opinion discussed the various arguments made by the State in support of the OHA voting restrictions. The Court first rejected the argument that the voting restriction was valid under prior Supreme Court

144. *See Rice*, 528 U.S. at 524.
145. See *supra* Part II for a discussion of this history.
146. *Rice*, 528 U.S. at 511-12.
147. *Id.* at 514.

decisions "allowing the differential treatment of certain members of Indian tribes."[148] The Court determined that if this argument were valid, it would require the treatment of Native Hawaiians as "tribes." The Court, however, did not resolve that issue: "Even were we to take the substantial step of finding authority in Congress, delegated to the State, to treat Hawaiians or native Hawaiians as tribes, Congress may not authorize a State to create a voting scheme of this sort."[149]

For the majority, the fatal flaw in OHA's remedial infrastructure was the fact that OHA was a state agency:

> Although it is apparent that OHA has a unique position under state law, it is just as apparent that it remains an arm of the State . . . . The . . . elections for OHA trustee are elections of the State, not of a separate quasi-sovereign, and they are elections to which the Fifteenth Amendment applies. To extend *Mancari* to this context would be to permit a State, by racial classification, to fence out whole classes of its citizens from decisionmaking in critical state affairs. The Fifteenth Amendment forbids this result.[150]

Thus, although Congress has the authority to pass laws regarding Indian tribes, and although that authority includes acknowledging tribes as quasi-sovereign entities, the Court found that Congress does not have the authority to allow states to violate constitutional provisions.[151] The OHA elections were not held by a tribe but rather by the State. Although tribal elections are exempt from the Fifteenth Amendment,[152] states are not. Ultimately, then, any quasi-sovereign status that the Native Hawaiians might enjoy was irrelevant to the case at hand.

The Court also rejected the argument that the OHA elections were "special, limited purpose" elections and thus exempt from constitutional restrictions on voting procedures.[153] The Court

148. *Id.* at 518.

149. *Id.* at 519.

150. *Id.* at 521-22.

151. *Id.*

152. The Supreme Court has repeatedly recognized the freedom of tribes from constitutional restraints against governmental action. *See generally* CANBY, *supra* note 11. While the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §§ 1301 *et. seq.* (2000), imposes many of the provisions of the Bill of Rights on tribes, ICRA does not include the restrictions found in the Fifteenth Amendment.

153. *Rice*, 528 U.S. at 522. Previously the Supreme Court had declared that certain elections for special governmental entities, such as those for water or

gave two reasons for rejecting the argument that the State was simply ensuring "an alignment of interests between the fiduciaries and the beneficiaries of a trust."[154] First, the Court determined that although both Native Hawaiians and Hawaiians had equal votes in electing trustees, the two groups were not treated equally in the budget of OHA, thus creating rather than eliminating "a differential alignment between the identity of OHA trustees and what the State calls beneficiaries."[155] Second, the majority found that

> [t]he State's position rests, in the end, on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters. That reasoning attacks the central meaning of the Fifteenth Amendment. . . . All citizens, regardless of race, have an interest in selecting officials who make policies on their behalf, even if those policies will affect some groups more than others.[156]

The Court determined that the State of Hawaii had created a voting restriction based on race and that it could not overcome the Fifteenth Amendment's prohibition of such a restriction.

2. The Concurring Opinion

Justice Breyer filed a concurring opinion, which Justice Souter joined. The concurring Justices went much farther than the majority in attacking the rationale of the OHA voting structure. According to Justice Breyer, "Hawaii's effort to justify its rules through analogy to a trust for an Indian tribe [must be rejected] because the record makes clear that (1) there is no 'trust' for native Hawaiians here, and (2) OHA's electorate, as defined in the statute, does not sufficiently resemble an Indian tribe."[157] For Justice Breyer, these two

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irrigation districts, were not subject to the "one person, one vote" rule if they were restricted only to those who might be affected by the regulations of the board. The State of Hawaii had argued that this same theory applied to OHA elections because the votes would create a special state agency serving a special class. The Court took the position that the special purpose cases arose under the Fourteenth, not the Fifteenth, Amendment. Discrimination on the basis of race was not considered in those cases.

154. *Id.* at 523.

155. *Id.*

156. *Id.*

157. *Id.* at 525 (Breyer, J., concurring). In particular, the concurring Justices had significant, although misplaced, reservations about highly fractionated blood quantum participants in a tribal society. *See id.* at 526-27. For the analysis of the

objections were sufficient "to destroy the analogy on which Hawaii's justification must depend."[158]

3. The Dissentting Opinion

Justice Stevens filed a dissenting opinion, which Justice Ginsburg joined in part, that began:

> The Court's holding today rests largely on the repetition of glittering generalities that have little, if any, application to the compelling history of the State of Hawaii. When that history is held up against the manifest purpose of the Fourteenth and Fifteenth Amendments, and against two centuries of this Court's federal Indian law, it is clear to me that Hawaii's election scheme should be upheld.[159]

Having correctly pointed out that the majority opinion lacked any sense of connectedness to the history of Hawaii and the trust responsibilities owed to Native Hawaiians, Justice Stevens proceeded to refute each of the majority's contentions, alluding often to concepts of indigenous sovereignty.[160] His ultimate conclusion that the racially defined voting restriction was not constitutionally defective, however, was not grounded in the inherent residual sovereignty of Native Hawaiians. Instead, Justice Stevens based his holding on the appropriateness of classifying Native Hawaiians based on the color of their skin in furtherance of a remedial objective.

C. Analysis

1. The Majority Opinion

In presenting a rather formalistic analysis that led to a narrow holding on Fifteenth Amendment grounds, the majority suggested an alternative remedial infrastructure that would have avoided the constitutional defect that resulted in reversal.[161] In addressing the State's argument that *Mancari*

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logical errors in the concurring opinion on this issue, *see infra* notes 179-82 and accompanying text.

158. *Rice*, 528 U.S. at 527 (Breyer, J., concurring).

159. *Id.* at 527-28 (Stevens, J., dissenting).

160. *See id.* at 529, 532-33, 536-37, 538-41, 542 n.14 (Stevens, J., dissenting).

161. *See id.* at 521-22. The majority also dismissed the two additional arguments, that the restrictions were analogous to special purpose districts and that the restrictions were intended to insure alignment of interests between the fiduciaries and beneficiaries of the trust, *see supra* text accompanying notes 153-56, but did not provide any further insight on what sort of structure would be

allowed the State to treat Native Hawaiians differently, Justice Kennedy identified that defect as the State's establishment of a race-based voting scheme. The majority avoided directly deciding whether Congress had determined that Native Hawaiians could be treated like Indians from a policy standpoint,[162] but it did not deny that Congress could make that determination. The majority stated unequivocally that *Mancari* did not allow Congress to "authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens."[163] But the Court's Indian law jurisprudence is equally clear under *Santa Clara Pueblo v. Martinez*[164] that tribes have broad authority to define their membership, including establishing ancestral requirements, and thus can control who can vote in an election based on ancestry. Significantly, the majority indicated if the entity in question, such as a Native Hawaiian polity, were "a separate quasi-sovereign," either *Mancari* or *Santa Clara*[165] or both would apply. The constitutional defect would thus be eliminated, as the Fifteenth Amendment does not apply to tribal elections.[166]

2. The Concurring Opinion

Although finding that "OHA bears little resemblance to a trust for native Hawaiians,"[167] the concurring Justices suggested that a trust responsibility is still owed to Native Hawaiians[168] since "Native Hawaiians, considered as a group, may be analogous to tribes of other Native Americans."[169] The problem, as Justice Breyer saw it, was that "the statute defines the electorate in a way that is not analogous to membership in an Indian tribe."[170]

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acceptable when it addressed those arguments.

162. See *id.* at 519.

163. *Rice*, 528 U.S. at 520.

164. 436 U.S. 49 (1978).

165. *See infra* note 173 and accompanying text.

166. *See Rice*, 528 U.S. at 520; *see also supra* note 152.

167. *Rice*, 528 U.S. at 525 (Breyer, J., concurring).

168. Although Justice Breyer contended that OHA was not a trust for Native Hawaiians, a trust responsibility owed to Native Hawaiians still existed even if OHA was not a proper embodiment of that trust responsibility. See *supra* notes 69-72 and accompanying text.

169. *Rice*, 528 U.S. at 526 (Breyer, J., concurring).

170. *Id.*

Justice Breyer reaffirmed that "a Native American tribe has broad authority to define its membership,"[171] but suggested that definitions of tribal membership should be limited to what is reasonable.[172] In his opinion, however, Justice Breyer was somewhat vague and inconsistent as to what reasonable tribal membership definitions might entail. In *Santa Clara*, cited by Justice Breyer, the children of a Navajo father and a Pueblo mother were denied Pueblo tribal membership because Pueblos are patrilineal.[173] It would seem that Justice Breyer was comfortable that such a membership determination was "reasonable," as well he should. The Court stated in *Santa Clara* that a

> tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community. Given the often vast gulf between tribal traditions and those with which federal courts are more intimately familiar, the judiciary should not rush to create causes of action that would intrude on these delicate matters.[174]

Justice Breyer seemed to have difficulty, however, with fractionated ancestral qualifications for tribal membership. As examples of reasonable tribal definitions, Justice Breyer first pointed to the Alaska Native Claims Settlement Act, citing the portion of the statute which conferred "Native" status to anyone

> "who is regarded as an Alaska Native by the Native village or Native group of which he claims to be a member and whose father or mother is . . . regarded as Native by any village or group" (a classification perhaps more likely to reflect real group membership than any blood quantum

171. *Id.* at 527 (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978)).

172. *See id.* Note that it is unclear from the text of his opinion whether Justice Breyer would impose his reasonableness limitations on all tribal membership definitions, or just those defined in state or federal statutes: "There must, however, be some limit on what is reasonable, at the least when a State (which is not itself a tribe) creates the definition." *Id.*

173. *Santa Clara*, 436 U.S. at 52. The children would also have been ineligible to be members of the Navajo Nation, since Navajos are matrilineal and matrilocal. In Navajo society, children "are 'born of' their mother's clan. . . ." James W. Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. INT'L & COMP. L. REV. 55, 77 (1997).

174. *Santa Clara*, 436 U.S. at 72 n.32 (citation omitted).

requirement).[175]

Justice Breyer also cited the Constitution of the Choctaw Nation of Oklahoma,[176] which provides that "[t]he Choctaw Nation of Oklahoma shall consist of all Choctaw Indians by blood whose name appears on the original rolls of the Choctaw Nation approved pursuant to Section 2 of the Act of April 26, 1906 (34 Stat. 136) and their lineal descendants."[177] Justice Breyer seemed to have great difficulty with someone with 1/512th of Hawaiian blood being eligible to vote in the OHA elections,[178] yet his approval of the Choctaw membership policies neglected to mention that if original enrollees[179] at the beginning of the twentieth century had 1/32nd Choctaw blood, as many did,[180] their modern day descendants would still be eligible for tribal membership even though their blood quantum could also be 1/512th[181] (applying the same assumptions Justice Breyer used with respect to Native Hawaiians[182]).

In essence, the concurring Justices arrived at the appropriate conclusion for the wrong reasons. The fixation on race is ill-founded when dealing with the political status of Indian tribal membership. The color of one's skin is not the determining factor for tribal membership; it is one's ancestry. For Indian tribes, ancestry need not be a proxy for race.

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175. *Rice*, 528 U.S. at 526 (Breyer, J., concurring) (quoting 43 U.S.C. § 1602(b) (2000)).

176. *Id.*

177. CHOCTAW CONST. of 1983, art. II, § 1.

178. *See Rice*, 528 U.S. at 527 (Breyer, J., concurring).

179. "Original enrollees" were tribal members whose names appear on the Dawes Rolls from the allotment era. *See supra* note 48 (.

180. On my paternal great-grandfather's roll page, there are six tribal members listed with 1/32nd Choctaw blood. *See* UNITED STATES COMMISSION TO THE FIVE CIVILIZED TRIBES, THE FINAL ROLLS OF CITIZENS AND FREEDMEN OF THE FIVE CIVILIZED TRIBES IN INDIAN TERRITORY 6 (1907). Additionally, on the second page of the Choctaw Rolls, there are six tribal members listed as having 1/64th Indian blood. *See id.* at 2. Modern descendants of those members would still be eligible for tribal membership even though they could have as little as 1/1024th Choctaw blood, assuming twenty-five year generations.

181. A telephone interview with the tribal membership office confirmed that there are indeed tribal members with even lower blood quanta than 1/512th. *Cf. Native American Roots, Once Hidden, Now Embraced*, WASH. POST, Apr. 7, 2001, at A01 (noting that the Cherokee Nation of Oklahoma has members with as little as 1/4096th Indian blood).

182. Justice Breyer assumed nine generations between 1778 and the present, or approximately twenty-five years per generation. *See Rice*, 528 U.S. at 527.

One way to distinguish Indians (and Native Hawaiians) collectively as a political, rather than a racial, entity is to focus on membership as a property right analogous to an estate in fee tail.[183] In matrilineal societies, such as the Navajo, membership is analogous to an estate in fee tail female,[184] whereas in patrilineal societies, such as the Pueblo, membership is analogous to an estate in fee tail male.[185] Rather than being considered racial in nature, blood quantum requirements for membership, such as with the Eastern Band of Cherokees,[186] can be viewed as analogous to estates in tail special[187] (i.e., membership is passed along to heirs so long as each heir has a threshold number of ancestors who were tribal members). The fee tail analogue is particularly suited to the situation of many Hawaiians given that several *ali'i* trusts were created when various lines of descendancy from Kamehameha I ended without any heirs.[188] These trusts, such as the Kamehameha Schools/Bishop Estate,[189] the Lili'uokalani Trust,[190] the Lunalilo Trust,[191] and the Queen Emma Trust,[192] all hold land for the benefit of Native Hawaiians.

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183. The fee tail allows the owner of a property interest to ensure that the property remains within his family indefinitely. If O conveys a fee tail to A, then upon A's death the property will go to A's heir, then to that heir's heir, and so on. Neither A nor any of A's decedents may convey the property outside the family line. If they try to do so, then the property reverts to O's heirs. The property also reverts to O's heirs if A's blood line runs out. Although uncommon in modern property regimes, some form of fee tail is still enforced in Delaware, Maine, Massachusetts, and Rhode Island. *See* JOSEPH WILLIAM SINGER, PROPERTY LAW § 4.5.3.3 (2d ed. 1997).

184. *See* BLACK'S LAW DICTIONARY 1466 (7th ed. 1999) ("tail female").

185. *See id.* ("tail male"). The situation of a child with a Navajo father and Pueblo mother that was therefore unable to inherit membership from either parent was at issue in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

186. The Eastern Band of Cherokee Indians restricts enrollment to those whose "direct lineal ancestor[s] . . . appear on the 1924 Baker Roll of the Eastern Band of Cherokee Indians [and who] possess at least 1/16th degree of Eastern Cherokee blood." E. BAND OF CHEROKEE INDIANS, ENROLLMENT INFO, *available at* http://www.cherokee-nc.com/enroll.htm (visited Mar. 17, 2001); *see also* 25 C.F.R § 75.6 (2000) (specifying 1/16 blood quantum requirement for additions to Eastern Cherokee roll). Note that other tribes, such as the Comanche, Kiowa, and Tonkawa tribes, require 1/4 blood quantum for membership. *See* OKLA. INDIAN LEGAL SERVS., TRIBAL MEMBERSHIP (Apr. 1998), *available at* http://thorpe.ou.edu/OILS/blood.html.

187. *See* BLACK'S LAW DICTIONARY 1466 (7th ed. 1999) ("tail special").

188. *See supra* notes 39-41 and accompanying text.

189. *See* MACKENZIE, *supra* note 13, at 281-84.

190. *See id.* at 284-86.

191. *See id.* at 286-87.

192. *See id.* at 288-89.

Another analogue to ancestral requirements for tribal membership is the "Law of Return" of the State of Israel.[193] Under the Law of Return, which is facially matrilineal in nature, every Jew has "the right to come to Israel as an *oleh* [a Jew immigrating to Israel] and become an Israeli citizen. For the purposes of this Law, 'Jew' means a person who was born of a Jewish mother . . ."[194] Since 1970 "the right to immigrate under this law has been extended to include the child and the grandchild of a Jew, the spouse of a child of a Jew and the spouse of the grandchild of a Jew."[195] Descendancy from a Jewish mother or grandmother therefore entitles one to Israeli citizenship, even if that mother or grandmother is not ethnically Jewish (such as an Ethiopian Jew). Similarly, lineal descendancy from a tribal member is the key requirement for tribal membership for many Indian tribes. In the contexts of Indian law and tribal membership, ancestry is not a proxy for race.

3. The Dissenting Opinion

Although Justice Stevens's dissent properly identified that a trust responsibility extends to Native Hawaiians,[196] he wrongly interpreted the *Mancari* decision as allowing their differential treatment without requiring tribal membership.[197] The oft-cited footnote 24 of *Mancari* clearly states that

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

193. *See* Israeli Ministry of Foreign Affairs, Law of Return 5710-1950, *available at* http://www.mfa.gov.il/mfa/go.asp?MFAH00kp0 (last visited Apr. 9, 2001).

194. *Id.* at 5730-1970, § 4B.

195. Israeli Ministry of Foreign Affairs, Acquisition of Israeli Nationality, *available at* http://www.mfa.gov.il/mfa/go.asp?MFAH00mz0 (last visited Apr. 9, 2001). Although the ancestral nature of the Law of Return is quite clear, the analogy breaks down somewhat because there is a further stipulation that for those that have converted to Judaism, the right to come to Israel as an *oleh* is only available to those who are "not a member of another religion." *Id.* However, for those individuals that fall in the ancestral category, ancestry alone would seem to be sufficient irrespective of that individual's religion.

196. *See* Rice v. Cayetano, 528 U.S. 495, 532 (2000) (Stevens, J., dissenting). Justice Stevens also correctly noted the analogue between Native Hawaiians and the Pueblo Indians. *See id.* at 530.

197. *But see* Frickey, *supra* note 7, at 1762.

racial in nature.[198]

Although Justice Stevens would extend *Mancari*'s scope to encompass Native Hawaiians as a "racial" group, both the majority and a proper reading of *Mancari* would not.

Justice Stevens also misidentified *Delaware Tribal Business Commission v. Weeks*[199] for the proposition that tribal membership is not required for *Mancari* coverage.[200] This mischaracterization is not surprising given that Justice Stevens dissented in *Weeks*. The issue in *Weeks* involved the distribution of an Indian Claims Commission judgment in favor of the descendants of the historical Delaware Nation.[201] The Kansas Delawares were excluded from the distribution because they had "'dissolve[d] their relations with their tribe.'"[202] Not comprehending the difference between tribal members and non-member (but ethnic) Indians, Justice Stevens argued for the inclusion of non-member Indians in the distribution of tribal property. Then, as now, Justice Stevens saw Indian status as racial, not political.

Refuting Justice Breyer's contention that defining a Native Hawaiian entity based on lineal descendancy from pre-1778 residents is too broad to be "reasonable," Justice Stevens correctly pointed out that "Federal definitions of 'Indian' often rely on the ability to trace one's ancestry to a particular group at a particular time."[203] As an example, he quoted a Bureau of Indian Affairs regulation defining persons of Indian descent as "'descendants of such [tribal] members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation.'"[204] Pointing out the flaw in Breyer's argument, Justice Stevens wrote that "[i]t can hardly be correct that once 1934 is two centuries past, rather than merely 66 years past, this classification will cease to be 'reasonable.'"[205]

Justice Stevens also suggested a property rights

198. Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974).

199. 430 U.S. 73 (1977).

200. *See Rice*, 528 U.S. at 532 n.6 (Stevens, J., dissenting).

201. *Weeks*, 430 U.S. at 75.

202. *Id.* at 78 (quoting Treaty with the Delaware Indians, July 4, 1866, U.S.-Del. Tribe of Indians, 14 Stat. 793 (1866)); *see also* PRUCHA, *supra* note 28, at 275, 394.

203. *Rice*, 528 U.S. at 535 n.11 (Stevens, J., dissenting).

204. *Id.* (quoting 25 C.F.R. § 5.1 (1999)).

205. *Id.*; *see also supra* notes 179-82 and accompanying text.

conceptualization of tribal membership in his hypothetical example of "a trust to manage Monticello [where] the descendants of Thomas Jefferson should elect the trustees."[206] Invoking *Hodel v. Irving*,[207] Justice Stevens elaborated further on the property rights concept in his response to Justice Breyer's problem with fractionated blood quanta:

> Indeed, "[i]n one form or another, the right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times." Even the most minute fractional interests that can be identified after allotted lands are passed through several generations can receive legal recognition and protection. Thus, we held not long ago that inherited shares of parcels allotted to the Sioux in 1889 could not be taken without compensation even though their value was nominal and it was necessary to use a common denominator of 3,394,923,840,000 to identify the size of the smallest interest. Whether it is wise to provide recompense for all of the descendants of an injured class after several generations have come and gone is a matter of policy, but the fact that their interests were acquired by inheritance rather than by assignment surely has no constitutional significance.[208]

Although Justice Stevens alluded to a property rights view of tribal membership, he did not rely on it to support his argument that there was no constitutional defect in the OHA voting restriction. Were it not for the fact that the definitions at issue were facially racial in nature, most of Justice Stevens's dissent is extremely persuasive. His ultimate conclusion, however, was based on a determination of the appropriateness of classifying Native Hawaiians racially in furtherance of a remedial objective rather than the inherent residual sovereignty of the Native Hawaiians themselves.

IV. EXPLORATION OF ALTERNATIVES

In the majority opinion, the Court cited a scholarly debate between professors Benjamin and Van Dyke.[209] In that debate, Professor Benjamin contends that only federally recognized

206. *Rice*, 528 U.S. at 545 (Stevens, J., dissenting).
207. 481 U.S. 704 (1987).
208. *Rice*, 528 U.S. at 545 n.16 (Stevens, J., dissenting) (citations omitted).
209. *See id.* at 518-19.

tribes get the benefit of *Mancari*.[210] Professor Van Dyke counters that all "ethnic" aboriginal descendants get *Mancari*'s benefit,[211] a position which was also argued in Justice Stevens's dissent.[212] It is likely that both the positive and normative realities lie somewhere in between. At the moment, however, Native Hawaiians are less autonomous than Indian tribes because they have no political identity, and a political identity is necessary if Native Hawaiians are to enjoy a government-to-government relationship with either the state or federal government.[213] As Justice Stevens said, "it is a painful irony indeed to conclude that native Hawaiians are not entitled to special benefits designed to restore a measure of native self-governance because they currently lack any vestigial native government—a possibility of which history and the actions of this Nation have deprived them."[214]

At the core of the Native Hawaiians' defeat is the fact that the remedial infrastructure that was crafted to benefit them was based on a notion of *racial*, as opposed to *political*, identity. The State did not employ the original statutory concept of "Hawaiian" based on descendancy from the aboriginal peoples who exercised sovereignty over the Hawaiian Islands in 1778. Instead, the State used a race based definition of "Hawaiian" in order to restrict votes for OHA trustees. It may be permissible for a tribe to limit voting to members of a certain blood quantum, but the Court held that it is not appropriate for any state to do so. What, then, could have been done to give Native Hawaiians the degree of self-determination that OHA was intended to provide?

One possible solution is that Congress might recognize Native Hawaiians as a political entity. Native Hawaiians' interaction with state or federal governments would then be on a government-to-government basis. Because the "validity of the voting restriction [was] the only question before"[215] the *Rice*

210. Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537 (1996).

211. Van Dyke, *supra* note 53, at 95.

212. *See Rice*, 528 U.S. at 535 (Stevens, J. dissenting).

213. *See* Mililani B. Trask, *Historical and Contemporary Hawaiian Self-Determination: A Native Hawaiian Perspective*, 8 ARIZ. J. INT'L & COMP. L. 77, 82-88 (1991).

214. *Rice*, 528 U.S. at 535 (Stevens, J., dissenting).

215. *Id.* at 521.

Court, if a Native Hawaiian entity had administered the trust, there would have been no question at all because only members of that entity would have been eligible to vote. Justice Stevens's hypothetical Monticello trust[216] is an appropriate analogue to this situation. As long as the State is not involved in the internal political matters of the Native Hawaiian entity, the Fifteenth Amendment does not restrict that entity's internal management or operations.

A bill was introduced by the Hawaiian congressional delegation during the 106th Congress that would have created a government-to-government relationship between Native Hawaiians and the federal government similar to that between mainland Indian tribes and the federal government.[217] Given that the spectrum of opinion on the practical implementation of Native Hawaiian self-determination is as varied as the flora and fauna of Hawaii itself,[218] the reaction to this bill was mixed.[219] As one Native Hawaiian activist notes:

> The Hawaiian native community is comprised of individuals with diverse philosophies and political views [that] range from those who believe it is unrealistic and impractical to advocate for independence from the United States to those who refuse to acknowledge that the United States or the

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216. *See id.* at 545 (Stevens, J. dissenting).

217. The bill was passed by the House but failed to move out of the Senate before Congress adjourned. *See Senators Reintroduce the "Akaka Bill"*, HONOLULU STAR-BULL., Jan. 22, 2001, *available at* http://starbulletin.com/2001/01/22/news/briefs.html [hereinafter *Senators Reintroduce the Akaka Bill"*].

218. For example, the membership of the Hawaiian Sovereignty Advisory Council includes, but is not limited to, the following organizations: Trustees of the Office of Hawaiian Affairs, Department of Hawaiian Home Lands; Ka Pakaukau; Ka Lahui Hawaii, Ohana O Hawaii, Pro-Hawaiian-Sovereignty Working Group, Na Kane O Ka Malo, Institute for the Advancement of Hawaiian Affairs, Hawaiian Association of Civic Clubs Political Action Committee, Na Oiwi; Council of Hawaiian Organizations, and State Council Hawaiian Homestead Association. *See* Act of June 26, 1991, No. 301, § 11, 1991 Haw. Sess. Laws 906, 909-10.

219. *Compare House Passes Native Hawaiian Recognition Bill*, AP Newswires, Sept. 26, 2000, *available in* WL, APWIRESPLUS (document number not available) ("The measure has caused disagreement among some in Hawaii. Some Native Hawaiians have complained it gives the federal government too much of a role in the Hawaiian sovereignty process. Many of those critics also advocate Hawaii's secession from the United States."), *with* Testimony of the Office of Hawaiian Affairs on S.2899, H.R.4904, submitted August 23, 2000, *available at* 2000 WL 1594804 ("This legislation provides us with the opportunity not only to protect current programs for Hawaiians, but to meaningfully address this lingering injustice. As such, it is the first step, but an essential step, on the journey for Hawaiians towards reconciliation.").

State of Hawaii has any authority over them.[220]

Within this continuum are groups that have indicated that they will be satisfied with nothing less than a completely independent Hawaiian nation.[221] Some sovereignty proponents contend that "the islands were never legally annexed to the United States and still exist as an independent country . . . . [thus] reviv[ing] the Republic of Hawaii."[222] Another "position is that the overthrow of the monarchy was also illegal [thus requiring] reestablish[ment of] the monarchy."[223] Others believe that "Hawaiians never voluntarily gave up their lands so that the present descendants of the Hawaiian people are, as

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220. Elizabeth Pa Martin, *Hawaiian Natives Claims of Sovereignty and Self-Determination*, 8 ARIZ. J. INT'L & COMP. L. 273, 281 (1991). Native Hawaiian activist Mililani Trask described the continuum among sovereignty proponents as follows:

> Discussions of Hawaiian sovereignty entail a choice among self-governing structures: a completely independent Hawai'i under the exclusive or predominating control of Hawaiians; "limited sovereignty" on a specified land base administered by a representative council but subject to United States Federal regulations; legally-incorporated land-based units within existing communities linked by a common elective council; or a "nation-within-a-nation" on the model of American Indian nations.

Trask, *supra* note 213, at 88. Trask was a former "Governor of Ka Lahui Hawai'i, the Sovereign Nation of Hawai'i," *id.* at 77, and an OHA board member, *see* Christine Donnelly, *The Hawaiian Roundtable*, HONOLULU STAR-BULL., Mar. 20, 2000, *available at* http://starbulletin.com/2000/03/20/special/story1.html; *see also* Christine Donnelly, *Several Ways To Approach Sovereignty*, HONOLULU STAR-BULL., Mar. 20, 2000, *available at* http://starbulletin.com/2000/03/20/special/story2.html.

221. *See* Garry Abrams, *The Liberation of Hawaii? 100 Years After the U.S. Toppled the Islands' Last Monarch, Native Hawaiians Demand Self-Government—or Even Independence*, L.A. TIMES, Jan. 17, 1993, at E1 ("A small minority advocates total independence, in effect re-creation of the old kingdom. An even smaller minority has gone on record for total independence coupled with expulsion of many non-natives, a position that is given no chance of success."); Hawai'i United for Liberation and Independence, *available at* http://www.huli.org ("Hawai'i, an independent nation-state, is now occupied by a belligerent power, the United States. Hawai'i is neutral and equal to all nations. Hawai'i's sovereignty has never been relinquished. . . . We have come together to form a united front, committed to the peaceful and non-violent restoration of our independent nation and the liberation of our lands, resources and people."); Ka Pae'aina o Hawai'i Loa, United Independence Statement, Dec. 9, 1999, http://www.hawaii-nation.org/united-independence.html ("We, individuals, organizations, and representatives of the nation of Hawai'i, though diverse in our various opinions of strategies and pathways to the achievement of Hawaiian sovereignty, hereby unite in our common voice for the independence of" Hawaii.).

222. Samuel P. King, *Hawaiian Sovereignty*, HAW. B.J., July 1999, at 6, 9.

223. *Id.*; *see also* Kingdom of Hawai'i, http://www.pixi.com/~kingdom/ (seeking the reinstatement and restoration of the Kingdom of Hawai'i and providing historical, common law, and international documents).

a group, the legal sovereigns of the islands."[224] Certain activists have even formed governments[225] and issued laws, decrees,[226] and constitutions.[227]

While substantial legal scholarship suggests that Native Hawaiians retain a right of self-determination under international law that supports their organization as an independent nation,[228] such an outcome is highly unlikely—"Secession from the Union will not happen."[229] Some "sovereignty advocates recognize that realistically the odds of achieving independence would be quite small—and that the Native Hawaiian movement is hindered by those who push for

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224. King, *supra* note 222, at 9.

225. *Id.* According to King,

> Dennis "Bumpy" Kanahele has achieved sovereignty already. He has established the Independent and Sovereign Nation of Hawaii with himself as the popularly chosen head of state. He and his followers are legally occupying government land and operating their own version of a Hawaiian nation. His followers are still few enough not to constitute a threat to the whole State.

Id. at 11; *see also* William H. Rodgers, Jr., *The Sense of Justice and the Justice of Sense: Native Hawaiian Sovereignty and the Second "Trial of the Century"*, 71 WASH. L. REV. 379 (1996) (discussing the sovereignty activities of "Bumpy" Kanahele).

226. *See, e.g.*, Proclamation Restoring the Independence of the Sovereign Nation State of Hawaii, Jan. 16, 1994, http://www.hawaii-nation.org/proclamsum.html. The Proclamation was promulgated under the guidance of Professor Boyle in response to the 1993 Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993); *see also supra* note 221.

227. *See, e.g.*, Hawai'i Constitution, Jan. 16, 1995, *available at* http://www.hawaii-nation.org/constitution.html.

228. *See, e.g.*, Anaya, *supra* note 31; Jon M. Van Dyke et al., *Self-Determination for Nonself-governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawaii*, 18 HAW. L. REV. 623 (1996); Chock, *supra* note 42; O'Malley *supra* note 108; Pa Martin, *supra* note 220; Trask, *supra* note 213; *see also* Lisa Cami Oshiro, Comment, *Recognizing Na Kanaka Maoli's Right to Self—Determination*, 25 N.M. L. REV. 65 (1995); Taryn Ranae Tomasa, Note, *Ho'Olahui: The Rebirth of a Nation*, 5 ASIAN L.J. 247 (1998).

One scholar, Professor Francis Boyle, has devoted particular attention to the formation of the Independent and Sovereign Nation of Hawaii. *See, e.g.*, Francis A. Boyle, *Restoration of the Independent Nation State of Hawaii Under International Law*, 7 ST. THOMAS L. REV. 723 (1995) (analyzing the Apology Resolution, *supra* note 103, and concluding that the legitimacy of Hawaiian sovereignty claims are one of the bill's implications); *Professor Believes U.S. Apology Gives Hawaiians Right to Nationhood*, MAUI PRESS, Jan. 14-20, 1994, *available at* http://www.alohaquest.com/archive/profapology.htm (describing Professor Boyle's views on Hawaiian sovereignty as a result of the Apology Resolution); Affidavit of Francis A. Boyle, Oct. 20, 1995, *available at* http://www.hawaii-nation.org/boyleaff.html (discussing how Professor Boyle came to serve as "Legal Adviser to the Nation of Hawaii"and stating that Professor Boyle provided "legal advice and counsel to Mr. Kanahele and the citizens of the Nation of Hawaii concerning the establishment of their state").

229. Trask, *supra* note 213, at 88.

so extreme a solution, and should instead concentrate its energies on more achievable goals."[230] Nonetheless, those who advocate a more pragmatic approach are not unsympathetic to those seeking a separate, independent nation, since there is universal agreement that the independence taken away is the basis for any position on sovereignty.[231]

Senator Akaka's legislation[232] seemed to emanate from the position advocating the incorporation of Native Hawaiians as a political entity into the federal Indian law model. On January 22, 2001, Senator Akaka reintroduced the bill and predicted its passage.[233] Importantly, the Akaka bill emphasized the residual sovereignty of the Native Hawaiian people rather than their racial characteristics and established procedures for creating a roll of Native Hawaiians:

> SEC. 2. DEFINITIONS.
>
> (1) ABORIGINAL, INDIGENOUS, NATIVE PEOPLE—The term 'aboriginal, indigenous, native people' means those people whom Congress has recognized as the original inhabitants of the lands and who exercised sovereignty prior to European contact in the areas that later became part of the United States.
>
> . . .
>
> (6) INDIGENOUS, NATIVE PEOPLE—The term 'indigenous, native people' means the lineal descendants of the aboriginal, indigenous, native people of the United States.
>
> (7) NATIVE HAWAIIAN—

230. Jeffrey Wutzke, Comment, *Dependent Independence: Application of the Nunavut Model to Native Hawaiian Sovereignty and Self—Determination Claims*, 22 AM. INDIAN L. REV. 509, 559 (1998).

231. *See, e.g.*, Christine Donnelly, *In Wake of* Rice vs. Cayetano, *What Happens Now?*, HONOLULU STAR-BULL., Mar. 20, 2000, *available at* http://starbulletin.com/2000/03/20/special/transcript.html.

232. *See supra* note 217.

233. *See* Susan Roth, *Hawaii Senators Reintroduce Native Recognition Bill*, GANNETT NEWS SERVICE, Jan. 23, 2001, *available at* 2001 WL 5104218 ("The lawmakers say . . . they remain optimistic that the bill, exactly the same as last year's version, can pass in the 107th Congress. . . . Akaka has said he believes the 50-50 partisan split in the Senate and an early reintroduction will work to the bill's benefit this year."); *see also Senators Reintroduce the "Akaka Bill"*, *supra* note 217. The bill was reintroduced as S.81, 107th Cong. (2001). *See* CONG. REC. S338 (daily ed. January 22, 2001).

> (A) Prior to the recognition by the United States of a Native Hawaiian government . . . the 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 . . . .
>
> (B) Following the recognition by the United States of the Native Hawaiian government . . . the term 'Native Hawaiian' shall have the meaning given to such term in the organic governing documents of the Native Hawaiian government.
>
> . . .
>
> Sec. 7(a) ROLL—
>
> (1) PREPARATION OF ROLL—The United States Office for Native Hawaiian Affairs shall assist the adult members of the Native Hawaiian community who wish to participate in the reorganization of a Native Hawaiian government in preparing a roll for the purpose of the organization of a Native Hawaiian Interim Governing Council. The roll shall include the names of the—
>
> (A) adult members of the Native Hawaiian community who wish to become citizens of a Native Hawaiian government and who are—
>
> (i) 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; or
>
> (ii) Native Hawaiians who were eligible in 1921 for the programs authorized by the Hawaiian Homes Commission Act (42 Stat. 108, chapter 42) or their lineal descendants; and
>
> (B) the children of the adult members listed on the roll prepared under this subsection.[234]

While many sovereignty advocates bristle at the notion of a congressional determination of an initial membership roll as

234. S.81, 107th Cong. (2001).

part of the reorganization process, the pragmatic reality is that Congress has the authority to do so[235] and has engaged in similar activities in the recent past.[236] Nonetheless, Senator Akaka subsequently introduced a revised version of the bill[237] that omitted mention of a specific reorganization process because such a "process must be determined by the native Hawaiian community."[238]

Some participants in the Native Hawaiian sovereignty debate accept that complete autonomy and independence are unlikely but argue that the federal Indian law model is inappropriate for Native Hawaiians except with regards to its concept of self-determination.[239] Others support the

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235. *See* 25 U.S.C. § 163 (2000) ("The Secretary of the Interior is hereby authorized, wherever in his discretion such action would be for the best interest of the Indians, to cause a final roll to be made of the membership of any Indian tribe. . . .").

236. *See, e.g.*, 25 U.S.C. § 585 (2000) (Northwestern Bands of Shoshone Indians); 25 U.S.C. § 601 (2000) (Yakima Tribes); 25 U.S.C. § 677 (2000) (Ute Tribe of Utah); 25 U.S.C. § 715 (2000) (Coquille Indian Tribe); 25 U.S.C. § 763 (2000) (Paiute Indians of Utah). Note that sometimes federal involvement in the establishment of tribal membership is established in the Code of Federal Regulations. *See, e.g.*, 25 C.F.R. § 61.4 (2000) (specifying membership criteria for numerous tribes including Pembina Chippewa, Hoopa Valley Tribe, and Coquille Tribe of Indians); 25 C.F.R. § 75.1-75.19 (2000) (specifying membership roll modification procedures for the Eastern Band of Cherokee Indians).

237. S.746, 107th Cong. (2001) was introduced on April 6, 2001. CONG. REC. S3757 (Apr. 6, 2001).

238. Pat Omandam, *Akaka, Inouye Change Native Recognition Bill*, HONOLULU STAR-BULL., Apr. 7, 2001, *available at* http://www.starbulletin.com/2001/04/07/news/story9.html. As compared to S.81, S.746 "deletes the prescribed reorganization process for a new native Hawaiian governing entity. The reorganization process was the most controversial part of it because it mandate[ed] how a new Hawaiian governing body was to be formed." *Id.*

239. *See, e.g.*, Donnelly, *supra* note 231 (quoting Robin Danner) ("Hawaiians deserve and should receive recognition by the federal government of our sovereign political status [but political status] can be defined in many, many ways. So I don't think that political status should be automatically assumed to be the domestic status of Alaskan natives or American Indians. I think . . . we are deserving of a third classification that has political autonomy, political status, and autonomy from the state and federal governments."); King, *supra* note 222, at 10 (Ka Lahui Hawai'i's proposed land base would "be the Hawaiian home lands now administered by the Hawaiian Homes Commission, plus approximately 1.6 million acres constituting the 'ceded lands trust,' plus the assets of the private trusts that benefit Hawaiians and which are now being administered by separate boards of trustees. Their economic base will be the activity conducted on this land base."); *see also* Trask, *supra* note 213, at 89 ("While Ka Lahui Hawai'i seeks inclusion in the federal policy for Indian self–determination, its position is that Hawaiians are not Indians, are not entitled to any percentage of the federal Indian budget and should not be placed under the control of the Bureau of Indian Affairs. Ka Lahui Hawai'i asserts that Native Hawaiians should be allowed to form a federally recognized nation to exercise jurisdiction over its land free from

development of an altogether different model along the lines of Nunavut territory,[240] which Canada carved out of the Northwest Territories[241] in 1999, or "the situation of the Maori people in New Zealand with their own territory under their own control and governance."[242] Finally, the reconciliation discussions resulting from the Apology Resolution[243] has generated discussion on the formation of a Native Hawaiian political entity.[244] Even this process, however, has generated some opposition from those who advocate complete independence as a separate nation.[245]

Whether arguing for the development of a new model or the application of the existing federal Indian model, the common objective remains the establishment of a Native Hawaiian political entity that can engage in government-to-government relations with the federal and state governments. Eventually the Akaka bill or some modified variant should pass, providing for the recognition of a collective political identity of Native Hawaiians. While their identity realistically will never be as a

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state incursion and control, and have jurisdictional powers similar to those of Indian Nations.").

240. *See generally* Wutzke, *supra* note 230.

241. *See, e.g.*, Steven Pearlstein, *Canada's Natives Reclaim "Our Land"; Country Has a New Territory, and Inuit Have New Hopes of Preserving Their Culture*, WASH. POST, Apr. 2, 1999, at A19.

242. King, *supra* note 222, at 9.

243. *See supra* note 102 and accompanying text.

244. A report on the reconciliation process between the federal government and Native Hawaiians, resulting from a series of public meetings between Native Hawaiian people and federal officials, was issued by the Department of Justice and the Department of Interior on October 23, 2000. *See* DEP'T OF THE INTERIOR & DEP'T OF JUSTICE, FROM MAUKA TO MAKAI: THE RIVER OF JUSTICE MUST FLOW FREELY (2000), *available at* http://www.oha.org/pdf/report1023fin.pdf. The report recommends that Native Hawaiians should be allowed to exercise self-determination within the framework of federal law: "As a matter of justice and equity, this Report recommends that the Native Hawaiian people should have self-determination over their own affairs within the framework of Federal law, as do Native American tribes." *Id.* at 17.

245. *See, e.g.*, Jan TenBruggencate, *"Restore the Kingdom"—Reconciliation Talks Draw 200 Hawaiians on Kauai*, HONOLULU ADVERTISER, Dec. 6, 1999, *available at* http://the.honoluluadvertiser.com/1999/Dec/06/localnews1.html ("Representatives of the federal government said they cannot give what most Native Hawaiian people who attended a meeting on reconciliation yesterday said they want: the sovereign Hawaiian nation restored."); Dep't of the Interior, Comments on Native Hawaiian Draft Report, http://www.doi.gov/nativehawaiians/nhcomments.htm (last updated Jan. 5, 2001); Dep't of the Interior, Written Statements Received in Connection with Meetings Held During December 1999 on the Reconciliation Process Between the Federal Government and Native Hawaiians, http://www.doi.gov/nativehawaiians/pdf/ (last updated Jan. 10, 2001).

sovereign, independent nation on equal footing with the United States, their organization as one political identity would make way for the formal exercise of Native Hawaiian *Ea* over a portion of their *'aina*.[246] Native Hawaiians deserve more than just federal recognition as a sovereign entity, but *pono*[247] dictates that they deserve at least that much.

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246. *See* MACKENZIE, *supra* note 13, at 305.

247. Justice, or "goodness, uprightness, moral qualities, correct or proper procedure, excellence." *Id.* at 308.

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