Rice v. Cayetano (2000)

The Majority rejected the State's three arguments:

1. Native Hawaiians should be protected under the same doctrines that allow special and preferential programs for other Native Americans.

2. The one-person/one-vote rule does not apply to special-purpose programs such as water or irrigation districts.

3. The voting restriction simply allows the beneficiaries to control their trust.

Rice v. Cayetano (2000)

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

Rice v. Cayetano (2000)

The concurring opinion of ***Justice Breyer*** (joined by ***Justice Souter***) demonstrates an even greater lack of understanding of what has actually happened, and is now happening, in Hawaii. Justice Breyer says that the voting structure for the Office of Hawaiian Affair would allow someone with ***only one-five-hundredth*** Native Hawaiian blood to vote for the OHA Trustees.

He arrived at this figure by imagining ***nine generations*** of intermarriage since Captain James Cook's arrival in the islands in 1778.

His generations apparently occur every 24 ½ years, less than the 30 years normally utilized to mark generational shifts, and he apparently imagines substantial intermarriage occurring from the moment Captain Cook's sailors hit the beach. In fact, the numbers of nonHawaiians remained small in the islands until about 1865.

Intermarriage did start to become common at this point, but we have seen only four and a half generations since then, so almost all part-Hawaiians have at least one-sixteenth native blood, and most have much more.

Rice v. Cayetano (2000)

Although the spectre of a person with ***one-five-hundredth native blood*** is a theoretical possibility, ***the decision of the people of Hawaii to allow even that person to vote for the OHA Trustees was nonetheless logical***, because ***the purpose of OHA was to facilitate decision-making by the Hawaiian people***, in particular the important decision of ***defining their own membership.***

Justice Breyer acknowledges that all native groups have the power to define their own membership, and surely all people with some native blood should participate in that crucial decision.

How else can that goal be accomplished except by bringing them together in an organization designed to allow them to debate and decide how to define themselves?

Rice v. Cayetano (2000)

Justice Stevens' Hypos:

* "[I]t is quite wrong to ignore the relevance of ancestry to claims of an interest in trust property, or to a shared interest in a proud heritabe. There would be nothing demeaning in a law that established a trust to manage Monticello and provided that the descendants of Thomas Jefferson should elect the trustees."

"Suppose today we approach an island that we had previously not any political relationship with, but it's populated by a group of 1,000 people who are just all farmers. They don't even have a Government. Could we make an arrangement with that group that you can become part of the United States and in exchange we give all of you and your descendants a tax exemption, say, or free baseball tickets to the World Series." (Oral Argument)

Rice v. Cayetano (2000)

John Goemens: "Persons who opine that *Rice* does not extend beyond the narrow issue of the voting franchise are doing a great disservice. The Supreme Court held explicitly in *Rice* that legislation before the court contained a *racial* classification: i.e., Native Hawaiian.

"This means *all* governmental action preferring or discriminating in favor of Hawaiians is presumed to be unconstitutional and is subject to being struck down unless the governmental action can be shown to be for the purpose of remedying the present effects of past discrimination against the preferred group based on the race thereof." (Honolulu Advertiser, Feb. 27, 2000)

Theodore Olson: "If I were a legislator, I'd be thinking about whether [the programs based on being Native Hawaiian] can be justified under strict scrutiny." (N.Y. Times, Feb. 24, 2000)

Rice v. Cayetano (2000)

Is the Bishop Estate at Risk?

John Goemens: "[T]here exists in Hawaii a public trust with some $10 billion in assets. As a public trust its beneficiaries are all the citizens of Hawaii. That trust operates educational institutions that strictly restrict admission by race in direct disregard of U.S. Supreme Court decisions concerning race discrimination in education.

"Each year that trust claims exemption from state and federal taxation in violation of IRS regulations and civil rights laws." (Honolulu Advertiser, Feb. 27, 2000)

Rice v. Cayetano (2000)

The history of Hawai`i:

* The majority opinion describes the ***dramatic changes in land ownership*** during the nineteenth century, combined with ***the "constant efforts" of "the United States and European powers" "to protect their interests*** and to influence Hawaiian political and economic affairs in general."

* The opinion mentions ***four of the treaties*** between the United States and the Kingdom of Hawaii and acknowledges "the reality of American dominance in trade, settlement, economic expansion, and political influence."

* The opinion notes the actions by Westerners in 1887 that forced ***the Bayonet Constitution*** on King Kalakaua, which "reduced the power of the monarch and extended the right to vote to non-Hawaiians."

Rice v. Cayetano (2000)

* Then, in 1893, these Westerners "with the active assistance of ***John Stevens***, the United States Minister to Hawaii, ***acting with United States armed forces,*** replaced the monarchy with a provisional government."

* ***President Grover Cleveland*** refused to support the efforts of these revolutionaries to annex the islands to the United States, but ***President William McKinley*** had no such qualms, and annexation occurred in 1898.

* Significantly, the majority opinion cites the ***1993 Congressional Apology Resolution***, but it fails to recognize the significance of that enactment.

Rice v. Cayetano (2000)

* ***But then, Sections III and IV of the majority opinion, which address the efforts of the State of Hawaii to address this historical disaster, completely ignore the history summarized in Sections I and II and recognize no sense of obligation or responsibility on the part of the United States or the State of Hawaii for the events described.***

* The State of Hawaii, of course, did not exist when those events occurred, but it now controls, as trustee, 1.4 million acres of land acquired as a result of the illegal overthrow of the Hawaiian Kingdom "without the consent of or compensation to the Native Hawaiian people."

Rice v. Cayetano (2000)

As the Court's majority recognized, ***the Office of Hawaiian Affairs*** was established in 1978, pursuant to the ***trust responsibility*** transferred in part from the United States to the State in the 1959 Admission Act, in order to enable the Hawaiian people to determine their priorities, "promote the protection and preservation of the Hawaiian race, and "unite Hawaiians as a people."

* It was, in short, part of a process designed ***to promote self-determination*** by the Native Hawaiian people.

* The ***1993 Apology Resolution*** says that the Native Hawaiian people are ***"indigenous"*** and have an ***"inherent right to self-determination,"*** and that a process of ***"reconciliation"*** must be pursued to rectify the wrongs suffered by the Native Hawaiian people.

* ***The State was acting, therefore, in a manner consistent with the goals and instructions of the U.S. Congress.***

Rice v. Cayetano (2000)

The Good News:

* The Court did not undercut the essential status of treaty-based quasi-sovereign Native American groups.

* ***Separate and preferential programs*** for these groups will remain constitutional under ***Morton v. Mancari*** (1974), so long as they are ***rationally related*** to their special relationship with the United States.

* The Court ***limited its holding*** in this case to ***the Fifteenth Amendment***, and thus did not directly address the many other separate and preferential programs for Native Hawaiians.

Rice v. Cayetano (2000)

The Bad News:

* By characterizing any program based on Hawaiian ancestry as ***"racial" in nature***, and by excluding Native Hawaiians from the legal regime applicable to other Native Americans, the Court appears to be inviting challenges to all the other programs.

* These challenges will be governed by the ***Fourteenth Amendment***, which prohibits racial discrimination unless the government can demonstrate a ***compelling interest*** and that it has used ***the least restrictive alternative***.

* The only interest sufficiently compelling under current caselaw appears to be the goal of ***providing redress to specific past discrimination***. Alleviating general societal discrimination is not sufficient.

Rice v. Cayetano (2000)

"As the court of appeals did, ***we assume the validity of the underlying administrative structure and trusts***, without intimating any opinion on that point. Nonetheless, ***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."

Rice v. Cayetano (2000)

Are Native Hawaiians eligible to be treated as other Native Americans under ***Morton v. Mancari*** (1974)?

1. Has Congress, in the 1959 Admission Act, the Hawaiian Homes Commission Act of 1920, and the 1993 Apology Resolution, "determined that native Hawaiians have a status like that of Indians in organized tribes"?

2. Does Congress have the power to delegate "to the State a broad authority to preserve that status"?

3. Has it delegated this power to the State?

Rice v. Cayetano (2000)

Why can't the Hawaiians elect their own leaders, the way other natives can and do?

* Because OHA is ***a state-created agency***.

* The OHA Trustees are ***"public officials."***

* At least to some extent, they manage and distribute ***public moneys***.

"If a non-Indian lacks a right to vote in tribal elections, it is for the reason that such elections are ***the internal affair of a quasi-sovereign***. The OHA elections, by contrast are ***the affair of the State of Hawaii***. OHA is a state agency, established by the State Constitution, responsible for the administration of state laws and obligations.

Rice v. Cayetano -- *Briefs Supporting OHA:*

* State of Hawai`i

* OHA, Ka Lahui, Assoc. of Haw. Civic Clubs, COHO, NH Convention, NH Bar Assoc., NHLC, NHAC, Ha Hawai`i, Hui Kalai`aina, Alu Like, & Papa Ola Lokahi

* SCHHA, Hui Kako`o `Aina Ho`opulapula, Kalama`ula Homestead Association, & HHC

* Kamehameha Schools Bishop Estate

* The Hawai`i Congressional Delegation

* National Congress of American Indians

* Alaska Fdrtn of Natives & Cook Inlet Region

* California, Alabama, Nevada, New Mexico, Oklahoma, Oregon, Guam & CNMI

* The United States

Rice v. Cayetano -- *Briefs Opposing OHA:*

* Harold F. Rice (Theodore Olsen)

* Campaign for a Color-Blind America, Americans Against Discrimination and Preferences, & the United States Justice Foundation (Steptoe & Johnson, D.C.)

* Center for Equal Opportunity, New York Civil Rights Coalition, Carl Cohen, & Abigail Thernstrom (Robert Bork; Kirkland & Ellis, D.C.)

* Pacific Legal Foundation (Sacramento)

* Hou Hawaiians (Honolulu)

Rice v. Cayetano (9th Cir. 1998)

Rules that *restricting voters who vote for OHA Trustees to persons of Hawaiian ancestry* does *not* violate either the Fourteenth or the Fifteenth Amendments.

Judge Pamela Rymer recognized the special status of the Native Hawaiian people, stating that "the voting restriction for trustees is rooted in historical concern for the Hawaiian race," citing the Hawaiian Homes Commission Act, the 1959 Admission Act, and the 1993 Apology Resolution.

She also recognized the analogy between Native Hawaiians and other Native Americans:

> In this sense, the *special treatment* of Hawaiians and native Hawaiians reflected in the establishment of trusts for their benefit, and the creation of OHA to administer them, *is similar to the treatment of Indians* that the Supreme Court approved in *Morton v. Mancari*, 417 U.S. 535, 554 (1974).

Rice v. Cayetano (2000)

What Are the Options?

* ***Organize a quasi-sovereign political body***. This organization probably must have a specific membership/enrollment element to it – a voluntary association, rather than including all persons of Native Hawaiian ancestry.

* ***Define the membership*** of this organization – ***what does it mean to be a "Native Hawaiian"***?

* ***Seek recognition from the federal and state governments.***

Rice v. Cayetano

* Does the concept of a "tribe" include all native groups?

* What is the proper definition of a "Native Hawaiian"?

** Why is 1778 picked as the date?

** Why not 1893 or 1898?

** Should there be a blood quantum?

* Does the State of Hawai`i have the same power to establish programs for Native Hawaiians as the U.S. Congress has?

* Has Congress delegated its power to the State of Hawai`i?

** To recognize OHA?

** To establish a natives-only voting process?

Do Native Hawaiians Already Have Same Legal Status as Indian Tribes?

* Congress has repeatedly said that the United States has a "special political relationship" with the Native Hawaiian People.

* In the Defense Appropriate Act of 2001, Congress granted a procurement preference to "a qualified firm under 51% ownership by **an Indian tribe**, as defined in 25 U.S.C. sec. 450b(e), or **a Native Hawaiian organization**, as defined in 15 U.S.C. 637(a)(15)."

* 15 U.S.C. 637(a)(15): "the term '***Native Hawaiian Organization***' means any community service organization serving Native Hawaiianms in the State of Hawaii which –

(A) is a nonprofit corporation that has filed articles of incorporation with the director (or the designee thereof) of the Hawaii Department of Commerce and Consumer Affairs...,

(B) is controlled by Native Hawaiians, and

(C) whose business activities will principally benefit such Native Hawaiians.

The *Rice* Holding Rests Exclusively on the Fifteenth Amendment and Is Limited to Voting

* Justice Kennedy emphasized in ***Rice*** that "[t]he validity of the voting restriction is the only question before us."

* ***American Federation of Government Employees (AFL-CIO) v. United States***, 195 F.Supp.2d 4, 19 (D.D.C. 2002): "***Rice*** only dealt with the right to vote, which is a fundamental right evoking strict scrutiny review. Moreover, ***Rice*** involved neither a Fifth Amendment due process claim nor a Fourteenth Amendment equal protection claim." (citations omitted)).

* ***Igartua de la Rosa v. United States***, 229 F.3d 80, 84 (1st Cir. 2000): "The Court in ***Rice*** struck down a Hawaii statute that imposed race-based voting qualifications based on the Fifteenth Amendment's mandate that neither the National Government nor the states may deny or abridge the right to vote on account of race."

Rice v. Cayetano (2000)

Is it possible that the United States would be barred by its own Constitution from rectifying a wrong it had committed?

Are all trusts in which the beneficiaries are defined by their ancestry and they participate in the administration of the trust unconstitutional?

Is this then a case of a wrong that cannot be constitutionally remedied?

Has the Court imposed a "Catch-22" situation on the Native Hawaiians whereby any effort to addresses the taking of their lands and sovereignty will violate the U.S. Constitution?

Surely such an absurd result cannot be the case.

Rice v. Cayetano (2000)

Holding: The election of Trustees of the Office of Hawaiian Affairs solely by persons of Hawaiian ancestry violates the Fifteenth Amendment.

"'Racial discrimination' is that which singles out 'identifiable classes of persons...solely because of their ancestry or ethnic characteristics.'" (quoting from *Saint Francis College v. Al-Khazraji* (1987))

Rice v. Cayetano (2000)

Is the limitation on voting to persons of Hawaiian ancestry "racial discrimination"?

Some Polynesian people in Hawai`i are not allowed to vote – Samoans, Tongans, etc.

Some persons of Hawaiian ancestry are not allowed to vote – if they do not live in Hawai`i.

Rice v. Cayetano (2000)

* Section II of the majority opinion recounts the 1921 enactment of the ***Hawaiian Homes Commission Act***, the ***1959 admission*** of Hawaii as the 50th state, the 1978 creation of the Office of Hawaiian Affairs, as well as the efforts beginning in 1996 of Harold "Freddy" Rice to challenge the provision in Hawaii's Constitution that limits voting for OHA Trustees to persons of Hawaiian ancestry.

* One could quibble with many of the details listed in the Court's historical summary, but it is significant nonetheless that ***the Court understood and recognized the enormous social dislocation that the Native Hawaiians experienced and the crucial role that the United States and its citizens played in undermining Hawaiian culture, overthrowing the Hawaiian government, and then incorporating Hawaii as a colony of the United States.***

SUMMARY OF THE RICE VS. CAYETANO DECISION

The Court, by a vote of 7-2, held that the State of Hawai'i's denial of petitioner Rice's right to vote in Office of Hawaiian Affairs (OHA) trustee elections violates the Fifteenth Amendment. Justice Kennedy delivered the Opinion of the Court, in which Justices Rehnquist, O'Connor, Scalia, and Thomas joined. Justice Breyer, joined by Justice Souter, filed a concurring opinion. Justice Stevens, joined by Justice Ginsburg, filed a dissenting opinion.

Majority: The Court noted that States cannot violate a fundamental principle: "They may not deny or abridge the right to vote on account of race." The Court further stated that "ancestry can be a proxy for race....It is that proxy here." Noting that for centuries Hawai'i was isolated from migration and had a common culture, the Court stated that "the State, in enacting the legislation at issue, used ancestry as a racial definition and for a racial purpose;" thus, the Court concluded "the ancestral inquiry mandated by the State implicates the same grave concerns as a classification specifying a particular race by name...and is forbidden by the Fifteenth Amendment for the further reason that the use of racial classifications is corruptive of the whole legal order democratic elections seek to preserve."

First, the Court held that the State's argument that exclusion of non-Hawaiians from voting is permitted under cases allowing the differential treatment of certain members of Indian tribes does not stand because "if a non-Indian lacks a right to vote in tribal elections, it is for the reason that such elections are the internal affair of a separate quasi-sovereign." In contrast, the Court noted that OHA's elections "are the affair of the state of Hawai'i." The Court concluded that a State may not, by racial classification "fence out whole classes of its citizens from decision making in critical state affairs. The Fifteenth Amendment forbids this result."

In addition, the Court rejected the State's argument that the voting restriction is based on beneficiary status rather than race, noting that "it is not clear that the voting classification is symmetric with the beneficiaries of the programs OHA administers."

Concurrence: While the majority does not base its decision on a rejection of the State's argument that the voting scheme is justified based on an analogy between OHA and a trust for the benefit of Indian tribes, Justice Breyer, in a concurring opinion, states that "we should reject Hawai'i's effort to justify its rules through analogy to a trust for an Indian tribe because the record makes clear that (1) there is no "trust" for native Hawaiians here, and (2) OHA's electorate, as defined in the statues, doe not sufficiently resemble an Indian tribe."

Dissent: In their dissenting opinion, Justices Stevens and Ginsburg note three principles: (1) the Federal Government should have wide latitude in carrying out its obligations arising from the special relationship it has with aboriginal peoples, including native Hawaiians, (2) the State has fiduciary responsibility arising from its establishment of a public trust for administering assets granted it by the Federal Government in part for the benefit of native Hawaiians, and (3) there is no discrimination in this effort to ensure that indigenous peoples are compensated for past wrongs.

Ninth Circuit: "[E]ven if the voting restriction must be subjected to ***strict judicial scrutiny*** because the classification is based explicitly on race, it survives because the restriction is rooted in the special trust relationship between Hawaii and descendants of aboriginal peoples who subsisted in the Islands in 1778 and still live there – which is not challenged in this appeal. Thus, ***the scheme for electing trustees ultimately responds to the state's compelling responsibility to honor the trust***, and the restriction on voter eligibility is ***precisely tailored*** to the perceived value that a board [should be chosen from among those it represents]." 146 F.3d at 1082.

Judge Ezra: The State's interest in conducting the Native Hawaiian Vote was "perhaps even ***compelling*** in light of...the state's unique obligation to Native Hawaiians as demonstrated by its constitution and the HHCA." 941 F.Supp. at 1544.

Rice v. Cayetano (Judge Pamela Rymer, 9th Circuit):

[E]ven if the voting restriction must be subjected to ***strict judicial scrutiny*** because the classification is based explicitly on race, it survives because the restriction is rooted in the special trust relationship between Hawaii and descendants of aboriginal peoples who subsisted in the Islands in 1778 and still live there – which is not challenged in this appeal. Thus, ***the scheme for electing trustees ultimately responds to the state's compelling responsibility to honor the trust***, and the restriction on voter eligibility is ***precisely tailored*** to the perceived value that a board "chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles." 1 *Proceedings of the Constitutional Convention of Hawaii of 1978*, Standing Comm. Rep. No. 59 at 644.

Given the fact that only Hawaiians and native Hawaiians are trust beneficiaries, ***there is no race-neutral way to accord only those who have a legal interest in management of trust assets a say in electing trustees except to do so according to the statutory definition by blood quantum which makes the beneficiaries the same as the voters.*** We therefore conclude that because Hawaiians and native Hawaiians have the right to vote as such, not just because they are Hawaiian, that the Equal Protection Clause does not preclude Hawaii from restricting the voting for trustees to Hawaiians and excluding all others.

(Emphasis added.)

Rice v. Cayetano (2000)
Majority Opinion

WHY CAN'T THE HAWAIIANS ELECT THEIR OWN LEADERS, THE WAY OTHER NATIVES CAN AND DO?

The tribal elections established by the federal statutes the State cites illuminate its error. *See id., at 22 (citing, e.g., the Menominee Restoration Act, 25 U.S.C. Sec. 903b, and the Indian Reorganization Act, 25 U.S.C. Sec. 476).* **If a non-Indian lacks a right to vote in tribal elections, it is for the reason that such elections are the internal affair of a quasi-sovereign. The OHA elections, by contrast, are the affair of the State of Hawaii. OHA is a state agency, established by the State Constitution, responsible for the administration of state laws and obligations.**

Rice v. Cayetano (2000)

Justice Breyer's Concurring Opinion:

* Difficult to characterize.

* Acknowledges that "Native Hawaiians, considered as a group, may be analogous to tribes of other Native Americans."

* But concerned about the fact that the OHA electorate consisted of 130,000 persons of Hawaiian ancestry with less than 50% Hawaiian blood, in addition to the 80,000 persons who met the 50%-blood-quantum definition of "native Hawaiian" found in the Hawaiian Homes Commission Act of 1920.

* Concerned that the OHA electorate was not structured in a way that is "analogous to tribes of other Native Americans."

* Concerned that persons with only "one five hundredth original Hawaiian" blood could vote for the OHA Trustees, and that this expansive definition has no parallel among other native groups.

* Acknowledged that each native group has "broad authority to define its membership."

Congress Has Recognized That a *Special Political Relationship* Exists Between the United States and the Native Hawaiian People

* Hawaiian Homes Commission Act (1921)

* Admission Act (1959)

* Native Hawaiians have been included in numerous programs benefitting other Native Americans

* 1993 Apology Resolution

* Native Hawaiian Education Act of 1994

Implications of the Rice Decision

Worst Case Scenario

* All Programs for Native Hawaiians Would Be Unconstitutional

* Perhaps All Programs for Any Native Americans Would be Unconstitutional

Other Possibilities

* The OHA Trust (and Other Trusts for Native Hawaiians) Could be Upheld, But the Hawaiians-Only Voting Procedure Could Be Struck Down As a Violation of the Fifteenth Amendment

No. 98-818

IN THE

Supreme Court of the United States

HAROLD F. RICE, *Petitioner*,

v.

BENJAMIN J. CAYETANO, GOVERNOR OF THE STATE OF HAWAI'I, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE OFFICE OF HAWAIIAN AFFAIRS, KA LAHUI, THE ASSOCIATION OF HAWAIIAN CIVIC CLUBS, COUNCIL OF HAWAIIAN ORGANIZATIONS, NATIVE HAWAIIAN CONVENTION, NATIVE HAWAIIAN BAR ASSOCIATION, NATIVE HAWAIIAN LEGAL CORPORATION, NATIVE HAWAIIAN ADVISORY COUNCIL, HA HAWAI'I, HUI KALAI'AINA, ALU LIKE, INC., AND PAPA OLA LOKAHI AS *AMICI CURIAE* SUPPORTING RESPONDENT

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July 1999

No. 98-818

In the Supreme Court of the United States

HAROLD F. RICE, PETITIONER

v.

BENJAMIN J. CAYETANO,
GOVERNOR OF HAWAII

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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The Findings in the **1994 Native Hawaiian Education Act** reconfirm:

* that "Native Hawaiians are a *distinct and unique indigenous people*,"

* that the Kingdom of Hawai`i was overthrown with the assistance of officials of the United States,

* that the United States had apologized for "the deprivation of the rights of Native Hawaiians to self-determination," and

* that "Congress had affirmed the *special relationship* between the United States and the Native Hawaiians" through the enactment of the Hawaiian Homes Commission Act, the 1959 Admission Act, and other listed statutes.

Ahuna v. Dept. of Hawaiian Home Lands, 640 P.2d 1161 (Haw. 1982)(holding that laws affecting Native Hawaiians should be analyzed under the same tests that govern laws affecting Native Americans generally)

Naliielua v. State of Hawaii, 795 F.Supp. 1009 (D.Haw.1990)(following Ahuna and upholding the constitutionality of the preferences granted to Native Hawaiians through the Hawaiian Homes Commission Act)

Is It Logical to Limit Natives Who Have a "*Special Relationship*" Solely to Those that Are in "*Indian Tribes*"?

NO:

* Judicial decisions have always rejected the argument that Congress can establish preferential or separate programs only for members of "*Indian tribes*":

Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977)(benefits were distributed to Indians who were not in any tribe)

United States v. John, 437 U.S. 634 (1978)(separate criminal laws applied to Mississippi Indians who were not in any tribe)

Alaska Chapter, Associated General Contractors of America, Inc. v. Pierce, 694 F.2d 1162 (9th Cir. 1982)(holding that "rational-basis" judicial review applied to Alaskan natives even though they "have not historically been organized into reservations or into tribal units")

Implications of the Rice Decision

Best-Case Scenario

* The Decision of the Ninth Circuit Would Be Affirmed, and the Court Would Conclude:

** That the Same Standard of Judicial Review that Applies to Other Native Americans Applies to Native Hawaiians,

** That Congress Has Concluded that Native Hawaiians Are Native Americans and that a "Special Relationship" Exists Between Native Hawaiians and the United States, and

** That the State of Hawai`i Was Acting Properly When It Established OHA and the Hawaiians-Only Voting Procedure

Is It Logical to Limit Natives Who Have a "*Special Relationship*" Solely to Those that Are in "*Indian Tribes*"?

NO:

* All Indians were in tribes at the time the Constitution was written– they could not become citizens at that time– the term was used generically to refer to all Indians.

* The concept of a "*tribe*" has been malleable and elusive during most of our nation's history.

* Many of the Alaskan Natives are not "*tribal*," but they have always been viewed as having a "*special relationship*" with the United States.

Rice v. Cayetano/Kakalia v. Cayetano (D.Haw. Sept. 6, 1996)

Plaintiffs asserted that limiting the Native Hawaiian Vote to persons of Hawaiian ancestry triggers strict scrutiny analysis under Adarand (1995) and Shaw v. Reno (1993).

Plaintiffs further argued that Morton v. Mancari (1974) is limited (a) to programs benefiting members of tribes (b) established by the federal government.

Court rules that the Morton "rational basis" scrutiny applies because the Native Hawaiian Vote is part of the "rehabilitation" process promoted by Congress in the Hawaiian Homes Commission Act (1921) and from the state's "fiduciary obligations as the administrator of the HHCA and as trustee of the ceded lands." [The court also discusses the 1959 Admissions Act and the many federal statutes the provide benefits for Native Hawaiians.]

Silva v. United States, Civ. No. 95-00148 HG (D.Hawaii Oct. 19, 1995)(Judge Gillmor agrees with Judge Ezra's analysis in Naliielua and upholds the requirement that OHA Trustees be of Hawaiian ancestry).

Policy Reasons Explaining Why a Special Status for Native Peoples Is Justifiable:

** Unlike most other ethnic groups who migrated voluntarily to the United States, and implicitly agreed to participate in a multi-ethnic society, native people never made such a commitment.

** Native American groups are "peoples" under international law principles and are entitled to self-determination, autonomy, and self-government.

** Unlike other ethnic groups, natives have no "mother culture" elsewhere where their historical and cultural traditions are maintained. If they are not permitted to maintain some unique and special status here, their culture and traditions will be lost forever.

** Native peoples have a distinctive and frequently unfortunate political and historical relationship with the U.S. government, and in the case of Native Hawaiians have strong unresolved claims to reparations and land. The special status accorded to natives is justified because of the obligations owed to these peoples.

Rice v. Cayetano/Kakalia v. Cayetano (D.Haw. Sept. 6, 1996)

Even though Native Hawaiians "are not now a federally recognized tribe, they nevertheless have a special relationship with the United States that removes Act 359 from heightened constitutional scrutiny.

The court then concludes that the rational basis test is met: "Since the state is charged with the responsibility of administering the HHCA lands to benefit the Native Hawaiian people, the state has a pointed interest in ascertaining the popular Native Hawaiian sentiment on self-governance."

"With this backdrop, the court finds that the state's limited interest in polling Native Hawaiians on their views regarding sovereignty is rationally related to, and perhaps even compelling in light of, the state's unique obligation to Native Hawaiians as demonstrated by its constitution and the HHCA."

Should the SCHHA file an *amicus curiae* brief?

* To explain the breaches in the Hawaiian Home Lands Trust by both the State and Federal Governments during the past 78 years.

* To explain the value of allowing the Trust Beneficiaries to elect their own leaders – and thus to ensure that the trust assets are used for the benefit of the beneficiaries – to ensure accountability.

Amicus Curiae Brief of the United States

* "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."

* "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."

A Window of Opportunity

President Clinton has appointed:

* **John Berry,** Assistant Secretary for Policy, Management and Budget of the Interior Department, *and*

* **Mark Van Norman,** Director of the Justice Department's Office of Tribal Justice,

as *his special representatives* to work with the Native Hawaiian community to establish a long-term defined relationship between Native Hawaiians and the United States.

They will come to Hawai`i for meetings with all Native Hawaiian groups in October 1999.

The Clinton Administration comes to an end January 20, 2001.

A Window of Opportunity

The goal is to formalize the *special relationship* that exists between the United States and the Native Hawaiian People.

To make this initiative work, *a process* must be identified whereby the Native Hawaiians will be able to work toward creating *an autonomous political entity*.

Although the Native Hawaiian Nation does not have to be established by January 20, 2001, the process for establishing the Nation would have to be in place by then.

The political entity should be *separate* from the state and federal governments.

Participatory

The political entity should welcome all Native Hawaiians, but the Native Hawaiians interested in participating should take some affirmative step to indicate involvement and should thereby join together to govern their resources.

OHA Reconciliation Recommendations

1. Formalize relationship, and affirm that Native Hawaiians have equivalent status to other Native Americans.
2. Enforce existing trust obligations.
3. Allow claims to be filed; waive sovereign immunity and statutes of limitations.
4. Establish a tribunal like the Waitangi Tribunal in Aotearoa (New Zealand).
5. Support self-determination and provide funds for a Native Hawaiian convention.
6. Establish an Office of Native Hawaiian Affairs in the Department of Interior.
7. Assign one full-time attorney in the Dept. of Justice to address Native Hawaiian issues.
8. Formalize consultation on Native Hawaiian issues through OHA.
9. In consultation with OHA, determine which lands should be returned; & return them.
10. Return federal surplus property to the Native Hawaiian people.

OHA Reconciliation Recommendations

11. Compensate Native Hawaiians for the use of ceded lands by the federal government.

12. Impose a freeze on transfers or sale of ceded lands until Native Hawaiian claims are resolved.

13. Eliminate use of blood quantum (except for Hawaiian Homes Commission Act), and allow Native Hawaiians to define themselves.

14. Prepare an inventory of all ceded lands, including submerged lands, and an accounting of benefits received by the federal government from the ceded lands.

15. Affirm and protect Native Hawaiian traditional and customary rights.

16. Affirm that the *Winters* doctrine regarding water rights applies to Native Hawaiian land.

17. Enforce the trust obligation regarding submerged lands, including those around Johnston (Kalama), Palmyra, and Midway.

Rice v. Cayetano

Does the limitation of voters in OHA elections to "Hawaiians" use a "RACIAL" or a "POLITICAL" classification?

Are the people we call "Hawaiian" or "Native Hawaiian" of one single racial or ethnic origin?

Are all Polynesians eligible to vote in OHA elections?

What are the characteristics that tie together the people we call "Hawaiians" and "Native Hawaiians"?

Should they be entitled to separate and preferential programs?