

**It Is Constitutional for the University of Hawai`i  
Administer Scholarships and Allocate Tuition Waivers  
That Are Available Only to Native Hawaiians**

Goal III of the University of Hawai`i Strategic Plan 1997-2007 declares that "[d]iversity enriches the academic experience and is essential to the quality of higher education." This Goal reinforces this observation by concluding that "[r]eflecting the multicultural society of the state and the nation is a compelling societal and University interest."

Native Hawaiians – *i.e.*, persons who are descended from the Polynesian and aboriginal people who inhabited Hawai`i before 1778 – are Native Americans and are recognized as indigenous people under U.S. and international law. The U.S. Congress and the Legislature of the State of Hawai`i have stated repeatedly that Native Hawaiians have a "special relationship" with the Federal and State Governments similar to the trust relationship that exists between these governments and Indian tribes and Alaskan Natives. Because of this special historical trust relationship, preferential and separate programs for Native Hawaiians are not "racial," but are instead viewed as "political" classifications. These programs are constitutional if they are rationally related to protecting or promoting self-governance, self-sufficiency, or native culture. Providing educational opportunities to Native Hawaiian students is certainly rationally related to the promotion of these goals.

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**Memorandum of Support**

Programs designed to help Native Hawaiians, *i.e.*, those persons descended from the Polynesian and aboriginal people who inhabited Hawai`i prior to 1778, are not based on "race." They are based on the unique "political" relationship that exists between the federal and state

governments, on the one hand, and the Native Hawaiian people, on the other. This “political” relationship is similar to the relationship that other Native Americans have with the U.S. government, but is also distinct because of the unique history of Hawai`i. The U.S. Congress has recognized this “special relationship” repeatedly in statutes, as has the State of Hawai`i, and federal and state courts have consistently confirmed the validity and constitutionality of this special relationship, and of separate and preferential programs for Native Hawaiians.

Because of this special political relationship, separate and preferential programs designed to assist Native Hawaiians are reviewed under the flexible and deferential “rational-basis” level of judicial review, rather than under the higher “strict-scrutiny” standard. Programs for Native Hawaiians are thus constitutional if they have a “rational relationship” to the promotion or protection of self-governance, self-sufficiency, or native culture, and the government does not have to prove that it has a “compelling state interest” for its action. See Morton v. Mancari, 417 U.S. 535 (1974), and its progeny, regarding Native Americans in general, and see Ahuna v. Dept. of Hawaiian Home Lands, 64 Hawai`i 327, 640 P.2d 1161 (1982), and Rice v. Cayetano, 941 F. Supp. 1529 (D.Haw. 1996) and 963 F. Supp. 1547 (D.Haw. 1997), aff’d 146 F.3d 1075 (9<sup>th</sup> Cir. 1998), regarding Native Hawaiians. Although it is sometimes contended that Morton v. Mancari holds that rational-basis review applies only to programs involving “Indian tribes,” subsequent cases clearly demonstrate that rational-basis review is also applicable to governmental programs that affect Native Americans who are not members of a tribe. Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977); United States v. John, 437 U.S. 634 (1978); Loudner v. United States, 108 F.3d 896, 901 (8<sup>th</sup> Cir. 1997); Rice v. Cayetano, supra.

Native Hawaiians are unquestionably native people in the United States, and are thus Native

Americans. Although they are culturally and ethnically distinct from North American Indians and Alaskan Natives, their historical relationship with the United States is similar. Their lands and sovereign autonomy were taken without compensation or consent. Attempts were made to destroy their culture. Their population declined dramatically, and they are at the bottom of the socio-economic ladder in their own islands. The U.S. Congress has repeatedly and explicitly recognized that the United States has a "special relationship" with Native Hawaiians and a trust obligation to Native Hawaiians. See especially the Findings that articulated the bases for the Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. 103-150, 107 Stat. 1510 (1993) (hereafter cited as the "Apology Bill") and the Native Hawaiian Education Act of 1994, Pub. L. 103-382 (1994), 108 Stat. 3794 (1994), codified in 20 U.S.C. sec. 7902. The Congress confirmed in the Apology Bill that Native Hawaiians are an "indigenous people," which is the key characterization that establishes that a "political" (rather than "racial") relationship exists between the Native Hawaiians and the United States government. The Apology Bill states that U.S. military and diplomatic support was essential to the success of the 1893 overthrow of the Hawaiian Monarchy and that this aid violated "treaties between the two nations and international law." Among the other findings in the Apology Bill are the following:

Whereas the Republic of Hawai'i also ceded 1,800,000 acres of crown, government and public lands<sup>1</sup> of the Kingdom of Hawaii without the consent of or compensation to the native Hawaiian people of Hawaii or their sovereign government ....

Whereas the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United

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<sup>1</sup> It should also be noted that 102 acres on the Manoa and Hilo campuses of the University of Hawai'i are situated on the ceded lands that were taken from Kanaka Maoli without compensation or consent. Office of the Legislative Auditor, Final Report on the Public Land Trust 37-38 (1986).

States, either through their monarchy or through a plebiscite or referendum ....

After documenting in detail the wrongs done to the Native Hawaiian people at the time of the illegal overthrow--including (in section 1(3)) "the deprivation of the rights of Native Hawaiians to self-determination," the Apology Bill urges (in section 1(5)) the President of the United States to "support reconciliation efforts between the United States and the Native Hawaiian people."

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" (emphasis added) through the enactment of the Hawaiian Homes Commission Act, 1920, 42 Stat. 108 (1921), the 1959 Admissions Act, Pub. L. 86-3, 73 Stat. 4 (1959), and other listed statutes. The reference in these Findings to the "special relationship" between the United States and the Native Hawaiians is particularly significant, because these are the words that have been traditionally used by Congress to identify the political relationship between the federal government and native people that takes preferential and separate programs for them outside of the racial discrimination category. See, e.g., Morton v. Mancari, 417 U.S. 535, 552-53 (1974).

The State of Hawai`i inherited a portion of that trust responsibility along with the ceded lands it received in 1959 at the time of statehood. The efforts by the State of Hawai`i to facilitate Native Hawaiian self-governance and self-sufficiency and protect Native Hawaiian culture are consistent with Congressional initiatives. In Section 1 of Act 359 (1993), the Hawai`i State Legislature stated that "Native Hawaiians are a distinct and unique indigenous people" whose lands and sovereignty

were illegally taken from them. Section 2 of this statute then initiated a process to facilitate "the efforts of native Hawaiians to be governed by an indigenous sovereign nation of their own choosing." The following year, in Act 200 (1994), the Legislature transformed the Hawaiian Sovereignty Advisory Commission into the Hawaiian Sovereignty Elections Council, citing to the 1993 Apology Bill passed by the U.S. Congress, and again recognizing "the unique status that the native Hawaiian people bear to the State of Hawaii and to the United States." See also H.R.S. sec. 6K-9 stating that the Island of Kaho`olawe is to be transferred to "the sovereign native Hawaiian entity upon its recognition by the United States and the State of Hawaii."

Even more recently, in Act 329 (1997), the Legislature again referred to the Apology Bill and described a process for returning lands to the Native Hawaiian people. It is clear, therefore, that the State of Hawai`i agrees with the U.S. Congress that a special "political" relationship exists with the Native Hawaiian people.

State programs to aid native people are also reviewed under the "rational-basis" standard if they are consistent with federal legislation. Although it is sometimes argued that states do not have the same power to establish preferential or separate programs for native people as the federal government does, this perspective is illogical and is directly contrary to a long history of relationships between states and the natives within their borders. States have frequently granted a special status to native groups that lack federal recognition. The State of Maine had, for instance, enacted "approximately 350 laws which related specifically to the Passamaquoddy Tribe" between Maine's admission to the Union as a state and 1975. Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 374 (1st Cir. 1975). The U.S. Supreme Court summarily rejected arguments that state fishing regulations protecting Indian treaty rights violated equal protection laws

in Washington v. Fishing Vessel Assn., 443 U.S. 658 (1979). Because the state was acting in conformity with governing federal statutes, the actions of the state was allowed under the "rational-basis" level of judicial review.

Other cases upholding state programs that aid natives under "rational-basis" review include

\* Squaxin Island Tribe v. State of Washington, 781 F.2d 715 (1985), where the court upheld (using "rational-basis" review) vendor agreements promulgated by the Washington State Liquor Control Board that gave Indian vendors more favorable treatment than non-Indians.

\* Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991), which upheld under "rational-basis" review a Texas law providing an exemption from its peyote laws to Indian members of the Native American Church.

\* Livingston v. Ewing, 455 F. Supp. 825 (D.N.M. 1978), aff'd, 601 F.2d 1110 (10th Cir. 1979), cert. denied, 444 U.S. 870 (1979), upholding a program established by the Museum of the State of New Mexico in Santa Fe reserving the portal in front of the museum exclusively to Indian merchants selling genuine handmade Indian arts and crafts in order to protect and preserve the culture and economic prosperity of the Indians in the Santa Fe area.

\* Kreuth v. Independent Sch. Dist. No. 38, Red Lake, Minn. 496 N.W.2d 829 (Minn.Ct.App. 1993), upholding, using "rational-basis" review, a state statute allowing school districts to give preferences to Indians during reductions-in-force, without any explicit federal authorization.

The decisions in Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), and City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), do not undercut the standard of judicial review applicable to legislation that establishes separate or preferential programs for Native Americans. See, e.g., Oklahoma Tax Comm'n v. Chickesaw Nation, 115 S.Ct. 2214 (1995)(unanimously

upholding a preferential program for Native Americans after the Adarand decision, without applying the "strict-scrutiny" level of judicial review).

In conclusion, it is perfectly appropriate and long overdue for the federal and state governments to establish preferential and separate programs for Native Hawaiians. These programs are constitutional if they are rationally related to promoting and protecting self-governance, self-sufficiency, or native culture. Because providing financial aid for Native Hawaiian students promotes all of these goals, and supports the "political" relationship between the State of Hawai'i and Native Hawaiians, aid exclusively available for such students is constitutional.

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