

# The Political Status of the Native Hawaiian People

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More than 200,000 people now living in Hawai'i are descendants of the Polynesian people,<sup>1</sup> who had a thriving isolated culture in the Hawaiian Islands until westerners started arriving at the end of the eighteenth century.<sup>2</sup> The Native Hawaiians<sup>3</sup> "lived in a highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion."<sup>4</sup> Their self-sustaining economy was based on agriculture, fishing, and a rich artistic life in which they created colorful feathered capes, substantial temples, carved images, formidable voyaging canoes, tools for fishing and hunting, surf boards, weapons of war, and dramatic and whimsical dances.<sup>5</sup> The newcomers

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1. See OFFICE OF HAWAIIAN AFFAIRS, NATIVE HAWAIIAN DATA BOOK 13 fig.1.5 (Mark Eshima ed., 1998). At least another 70,000 people of Hawaiian ancestry live in other parts of the United States, about half of them living in California. See *id.* at 13 fig.1.5, 18 tab.1.8.

2. See generally E.S. CRAIGHILL HANDY & ELIZABETH GREEN HANDY, NATIVE PLANTERS IN OLD HAWAII (1972); JOHN PAPA II, FRAGMENTS OF HAWAIIAN HISTORY (Mary Kawena Pukui trans., Bishop Museum Press 1959); SAMUEL MANAIAKALANI KAMAKAU, THE WORKS OF THE PEOPLE OF OLD (1976); LILIKALA KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LA E PONO AI? (1992); PATRICK VINTON KIRCH, FEATHERED GODS AND FISHHOOKS: AN INTRODUCTION TO HAWAIIAN ARCHAEOLOGY AND PREHISTORY (1985); DAVID MALO, HAWAIIAN ANTIQUITIES (Nathaniel B. Emerson trans., Bishop Museum Press 1951) (1898).

3. The term "[N]ative Hawaiian" is defined in section 201(a)(7) of the Hawaiian Home Commission Act, 1920, ch. 42, 42 Stat. 108 (1921), reprinted in 15 HAW. REV. STAT. ANN. 331 (Michie 1997) [hereinafter HHCA], as referring to persons with 50% or more Hawaiian blood, but in other federal statutes this term is used to cover all persons who are descended from the people who were in the Hawaiian Islands as of 1778, when Captain James Cook discovered the islands for the Western world. See statutes cited *infra* note 67. In this Article, "Native Hawaiian" is used to refer to all persons descended from the Polynesians who lived in the Hawaiian Islands when Captain Cook arrived.

4. 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, 1510 (1993) [hereinafter Apology Resolution].

5. See, e.g., JOSEPH FEHER, HAWAII: A PICTORIAL HISTORY 36-132 (1969).

from Europe and the United States brought their technology, their religions, their ideas about property and government, and their diseases to the islands.<sup>6</sup> By the end of the nineteenth century, the Native Hawaiian population had plummeted,<sup>7</sup> its traditional practices and communal land structures had been replaced by Western models,<sup>8</sup> the independent Kingdom of Hawai'i had been illegally overthrown,<sup>9</sup> Hawaiian lands had been taken with neither compensation to nor the consent of the Hawaiian people,<sup>10</sup> and Hawai'i had been annexed by the United States as a territory.<sup>11</sup> Native Hawaiians are now at the bottom of the socio-economic scale in their own islands.<sup>12</sup>

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6. See generally KAME'ELEIHIWA, *supra* note 2, at 67-93; DAVID E. STANNARD, BEFORE THE HORROR 50, 55-58, 69-78 (1989) (describing the introduction of diseases into Hawai'i); Melody K. MacKenzie, *Historical Background*, in NATIVE HAWAIIAN RIGHTS HANDBOOK 3-6 (Melody K. MacKenzie ed., 1991) (describing the introduction of Western ideas regarding land and government).

7. Estimates of the population of the Hawaiian Islands prior to the arrival of Captain Cook in 1778 range from 300,000, see OFFICE OF HAWAIIAN AFFAIRS, *supra* note 1, at 4 tbl.1.1, to 800,000 or more, see STANNARD, *supra* note 6, at 30-58. By 1850, the population in the islands had dropped to 84,165, and, by 1872, it had dropped further to 56,897. See OFFICE OF HAWAIIAN AFFAIRS, *supra* note 1, at 4 tbl.1.1. This population decline was

due in part to venereal disease—resulting in sterility, miscarriages, and death—and epidemics such as small pox, measles, whooping cough and influenza. Decline was also accelerated by a low fertility rate, high infant mortality, poor housing, inadequate medical care, inferior sanitation, hunger and malnutrition, alcohol and tobacco use.

Over two centuries after European contact many of these situations still exist.

*Id.* at 4.

8. See generally RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM 1778-1854 (1979) (providing a detailed history of these years); NATIVE HAWAIIANS STUDY COMMISSION, REPORT ON THE CULTURE, NEEDS, AND CONCERNS OF NATIVE HAWAIIANS 99-106, 147-62 (1983) (discussing the impact of Western contact on Hawai'i); Neil M. Levy, *Native Hawaiian Land Rights*, 63 CAL. L. REV. 848, 848-66 (1975) (providing a historical overview of land changes during the 19th century); MacKenzie, *supra* note 6, at 3-10 (describing the transfer of lands into private hands); Jon Van Dyke et al., *Water Rights in Hawaii*, in LAND AND WATER RESOURCE MANAGEMENT IN HAWAII 141, 146-76 (1979) (analyzing the impact of Western law on Hawai'i's water rights).

9. See Apology Resolution, *supra* note 4, 107 Stat. at 1513 (referring to the "illegal overthrow of the Kingdom of Hawaii on January 17, 1893" (emphasis added)). See *infra* note 69 (discussing how joint resolutions are enforceable statutes and are treated as the equivalents of statutes by judges, lawyers, and scholars).

10. Apology Resolution, *supra* note 4, 107 Stat. at 1512 ("Whereas the Republic of Hawaii also ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii, without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government." (emphasis added)).

11. See Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, ch. 55, 30 Stat. 750 (1898).

12. The average family income for Native Hawaiians in 1989 was nearly \$9,000 below the average income for all families in the State of Hawai'i, and the family income for about one-fifth of the Native Hawaiian families was under \$15,000. See OFFICE OF HAWAIIAN AFFAIRS, *supra* note 1, at 516. In the same year, 14% of all Native Hawaiian families were below the poverty level, compared to only 6% of all families in the state. See *id.* at 532. The unemployment rate for Native Hawaiians in 1997 was almost 1.7 times higher than the unemployment rate for the statewide population. See *id.* at 588 tbl.8.44.

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Ever since the illegal overthrow of their monarchy and their annexation, the native people of Hawai'i—who call themselves “Kanakā Maoli,” or “Native Hawaiians,” or just plain “Hawaiians”—have been struggling to regain their culture, recover their lands, and restore their sovereign nation.<sup>13</sup> Some argue that this process should be undertaken without any governmental assistance. Others believe accepting financial support from the state and federal governments is appropriate, because these governments have benefited from their possession of lands that rightfully belong to the Native Hawaiian people.<sup>14</sup> Some commentators have focused on regaining a land base and becoming economically self-sufficient, while still others have argued that restoring the Native Hawaiian Nation should come before any negotiations regarding the return of lands. Finally, some favor complete independence from the United States while others favor the establishment of a “nation within a nation” similar to the sovereign status of the large Indian tribes in the forty-eight contiguous states.<sup>15</sup> Although considerable disagreement exists among different Native Hawaiian groups, the momentum behind the movement for a return of land and a restoration of sovereignty appears to be irreversible.

Some of the Native Hawaiian groups have worked closely with native people in North America and throughout the world, looking particularly at the successes of the Maori people in New Zealand, who have regained substantial economic resources and rights in the last few years.<sup>16</sup> The Na-

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13. See generally 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 (1994) (explaining the claims of the Native Hawaiian people in light of international law governing indigenous groups); Karen Blondin, *A Case for Reparations for Native Hawaiians*, 16 HAW. B.J. 13 (1981) (providing a historical foundation for the claims of the Native Hawaiian people); Noelle M. Kahanu & Jon M. Van Dyke, *Native Hawaiian Entitlement to Sovereignty: An Overview*, 17 U. HAW. L. REV. 427, 451-53 (1995) (describing recent steps to reestablish the Native Hawaiian nation); MacKenzie, *supra* note 6 (describing the claims of the Native Hawaiian people and the legal issues and strategies related to their recovery of their land); Mililani B. Trask, *Historical and Contemporary Hawaiian Self-Determination: A Native Hawaiian Perspective*, 8 ARIZ. J. INT'L & COMP. L., Fall 1991, at 77, 84-90 (providing the views of the Ka Lahui Hawai'i, one of the groups seeking a sovereign status for the Native Hawaiian people); Jon M. Van Dyke et al., *Self-Determination for Nonself-governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawai'i*, 18 U. HAW. L. REV. 623 (1996) (describing Native Hawaiians in relation to other indigenous people).

14. In 1994, the Hawai'i State Legislature created the Hawaiian Sovereignty Elections Council as a semi-autonomous body to conduct an election to determine the views of the Native Hawaiian people regarding self-determination. An Act Relating to Hawaiian Sovereignty, ch. 200, § 1, 1994 Haw. Sess. Laws 479, 479. In 1996, the Council conducted the “Native Hawaiian Vote,” a mail ballot in which 73% of the voters indicated that they favored moving toward self-determination. HAWAIIAN SOVEREIGNTY ELECTIONS COUNCIL, FINAL REPORT 28 (1996). Some Native Hawaiian groups boycotted this process, viewing it as tainted because of its financing by the state government, and some have criticized its result, because fewer than half of the Native Hawaiians who received a mail ballot cast their vote.

15. See Trask, *supra* note 13, at 88-94 (discussing the range of sovereignty options).

16. The Maori in Aotearoa (New Zealand) are the Polynesian cousins of the Native Hawaiians, and their efforts to recover land, resources, and autonomy parallel in many ways the

tive Hawaiians belong to the only native group in the United States that has never been allowed to utilize a claims commission or other mechanism to seek redress for its losses from the federal government.<sup>17</sup> They have nonetheless been heartened by the enactment by Congress in 1993 of the Apology Resolution, which acknowledges the illegality of the 1893 overthrow and recognizes that 1,800,000 acres of lands were acquired by the United States without the consent of or compensation paid to the Native Hawaiian people.<sup>18</sup> This public law “urges” the President to seek a “reconciliation” with the Hawaiian people.<sup>19</sup> Statutes with similar findings have been passed by the Hawai‘i State legislature.<sup>20</sup>

The status of the Native Hawaiian people under federal law and their right to separate and preferential programs has been challenged in a long and heavily footnoted *Yale Law Journal* article written by Stuart Minor Benjamin,<sup>21</sup> a recent graduate of the Yale Law School now teaching at the University of San Diego. Because Professor Benjamin’s article was published in a prestigious journal,<sup>22</sup> it is being cited by persons opposed to

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efforts of the Native Hawaiians. The Maori, however, are considerably farther along in this struggle, and the courts of their country have acted repeatedly to protect and effectuate their rights.

The Waitangi Tribunal was established to examine claims that the British Crown failed to fulfill its obligation under the 1840 Treaty of Waitangi to protect Maori land and resources. See Treaty of Waitangi Act, 1975, No. 114, 2 N.Z. Stat. 825. When the New Zealand government opposed the Maori claims before the Waitangi Tribunal, the Maori proceeded to court and won a series of ten cases against the government. On several occasions, the courts have blocked the New Zealand government’s efforts to sell public lands pending the resolution of the claims by the Maori people. See generally *New Zealand Maori Council v. Attorney Gen.* [1987] 1 NZLR 641; Marilyn Lashley, *Implementing Treaty Settlements via Indigenous Institutions: Social Justice and the Problem of Detribalization in New Zealand*, 12 CONTEMP. PAC. (forthcoming 2000) (manuscript on file with *Yale Law & Policy Review*); Margaret Mutu, *Maori Issues*, 7 CONTEMP. PAC. 152, 154-55 (1995); Ranginui J. Walker, *Maori Issues*, 5 CONTEMP. PAC. 156, 158 (1993); *Maori Challenge Stalls Sale*, COAL WK. INT’L., Sept. 5, 1989, at 7, available in 1989 WL 2100147; *New Zealand Forest Sale Stalled*, L.A. TIMES, May 22, 1989, at 3, available in 1989 WL 2296115.

17. See FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 160-62 (Rennard Strickland et al. eds., 1982) (describing Congressional enactments allowing Indians to pursue claims, with a focus on the Act of Aug. 13, 1946, ch. 959, 60 Stat. 1049 (formerly codified at 25 U.S.C. §§ 70 to 70v-3) (expired Sept. 30, 1978)); see also Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (codified at 43 U.S.C. §§ 1601-1629e (1994)). This Act is discussed *infra* in Section II.A.5.

18. See Apology Resolution, *supra* note 4, 107 Stat. at 1512, 1513 (referring to the “illegal overthrow” of the Kingdom of Hawai‘i and the lack of “compensation” or “consent” in the acquisition of land during the overthrow).

19. *Id.* § 1(5), 107 Stat. at 1513 (stating that Congress “urges the President of the United States to . . . acknowledge the ramifications of the overthrow of the Kingdom of Hawaii and to support reconciliation efforts between the United States and the Native Hawaiian people”).

20. See *infra* notes 90, 96.

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

22. Its publication in a Yale periodical gives it a unique status in Hawai‘i, because Yale played an important role in bringing Christianity and Western values to Hawai‘i. It was at Yale College that a young Hawaiian man named Henry Opukahaia first inspired the Reverend Timothy Dwight to take a heightened interest in Hawai‘i. Opukahaia (he called himself Obookiah) arrived in New Haven around the year 1808, when he was 16 years old. Reverend

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the Native Hawaiian movement as evidence that it is improper and even unconstitutional for governmental bodies to support the efforts of Hawaiians to reestablish their sovereign nation and regain control over their own resources.<sup>23</sup> Because Benjamin's article has taken on a life of its own and is influencing public policy in Hawai'i, the errors in its legal analysis must be exposed.

Professor Benjamin's central thesis is that the United States Supreme Court changed the entire landscape of judicial review of legislation utilizing racial classifications in its recent decisions in *City of Richmond v. J.A. Croson Co.*<sup>24</sup> and *Adarand Constructors v. Peña*.<sup>25</sup> He maintains that these decisions affect programs benefiting native people because the classification of native people is, in his judgment, a "racial" classification unless it includes only natives organized in "Indian tribes." Otherwise, Benjamin argues, the classification is subject to strict scrutiny.<sup>26</sup> He also contends that compelling interests can be demonstrated only in extremely rare and unusual cases.<sup>27</sup> His article acknowledges that preferential programs for native people have been viewed as "political" rather than "racial" classifications under the line of cases following *Morton v.*

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Dwight invited Opukahaia into his home for several months, during which time he taught the lad to read and write English and educated him in the tenets of Christianity. Opukahaia later moved to the Foreign Mission School in Cornwall, Connecticut, to pursue his studies in Christianity. As a result of Opukahaia's presence in the New England community, the Foreign Mission School sent the first missionaries to Hawai'i in 1820. See generally EDWIN W. DWIGHT, MEMOIRS OF HENRY OBOOKIAH (1990); KUYKENDALL, *supra* note 8, at 100; ALBERTINE LOOMIS, TO ALL PEOPLE (1970).

It is also interesting to note that in 1894 the *Yale Law Journal* published a commentary on the constitution that had been written for the new "Republic of Hawaii" (after the overthrow of the Kingdom of Hawai'i) which demonstrated substantial insensitivity to the rights and concerns of the Native Hawaiian people. See A.F. Judd, *Constitution of the Republic of Hawaii*, 4 YALE L.J. 53, 55, 57 (1894) (describing how a parliamentary government and suffrage for women would be appropriate constitutional measures for a "civilized and enlightened constituency" but would be "unsafe" in Hawai'i's "heterogeneous" and "polyglot" communities). The author of the commentary, A.F. Judd, was a missionary's son who served as Chief Justice for the Republic of Hawai'i. See TOM COFFMAN, NATION WITHIN: THE STORY OF AMERICA'S ANNEXATION OF THE NATION OF HAWAII 172 (1998); THURSTON TWIGG-SMITH, HAWAII SOVEREIGNTY: DO THE FACTS MATTER? 29 (1998). Among the group of people who framed the Republic of Hawai'i's new constitution were four graduates of Yale. See Judd, *supra*, at 55. As a result, the new constitution reflected the "current discussion" of the United States academic community. *Id.*

23. The lawyers representing Harold Rice in the litigation of *Rice v. Cayetano*, see discussion *infra* notes 165-180, 183-209 and accompanying text, have relied heavily on Professor Benjamin's article and sent copies of it to many of Hawai'i's state legislators. The United States Court of Appeals for the Ninth Circuit cited Professor Benjamin's article in *Williams v. Babbitt*, 115 F.3d 657, 663, 665 (9th Cir. 1997), and in *Rice v. Cayetano*, 146 F.3d 1075, 1079 n.10 (9th Cir. 1998), but neither opinion accepts his perspective. See discussion *infra* notes 183-209, 307-315 and accompanying text.

24. 488 U.S. 469 (1989).

25. 515 U.S. 200 (1995).

26. Benjamin, *supra* note 21, at 558-92.

27. See *id.* at 593-94.

*Mancari*,<sup>28</sup> but he argues strenuously that this “political” characterization applies only to natives organized into federally recognized tribes because of language in the United States Constitution and in the *Mancari* opinion.<sup>29</sup> His highly technical analysis wishes away or ignores opposing precedents and arguments. Moreover, he pays scant attention to the fundamental policy justifications for separate or preferential programs for natives, and to the international law principles that confirm the validity (and even necessity) of such programs. By focusing on the trees, he has missed the forest.

Professor Benjamin’s article is particularly mischievous because it has the appearance of providing the definitive analysis of a previously unexamined topic. In fact, however, courts have addressed this issue in the past and have ruled consistently that programs for Native Hawaiians should be examined using the same level of review that applies to programs for other Native Americans.<sup>30</sup> The academic commentary has generally supported the proposition that programs for Native Americans should be viewed as political,<sup>31</sup> but few articles have been written on the specific status of the Native Hawaiian people.<sup>32</sup>

The only article that thus far has commented on Professor Benjamin’s views is one by Professor Philip P. Frickey of the University of Minnesota School of Law.<sup>33</sup> After summarizing Professor Benjamin’s thesis, Professor Frickey asserts that “in federal Indian law, lawyerly analysis that is devoid of broader historical and theoretical perspectives leads to misleading conclusions about the determinacy and substance of what the law ‘is’ at any given moment.”<sup>34</sup> He concludes that “the weak substructure of *Adarand* and *Mancari* cannot support the dense superstructure of analysis that Benjamin creates.”<sup>35</sup> Professor Frickey’s comments are incisive

28. 417 U.S. 535 (1974). See discussion *infra* Subsections II.A.2-3.

29. See Benjamin, *supra* note 21, at 558-92.

30. See discussion *infra* Subsection II.A.3.a.

31. See, e.g., Robert Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 1009-18 (1981); Carole Goldberg-Ambrose, *Not “Strictly” Racial: A Response to “Indians as Peoples”*, 39 UCLA L. REV. 169 (1991); Ralph W. Johnson & E. Susan Crystal, *Indians and Equal Protection*, 54 WASH. L. REV. 587, 598 n.80 (1979). But see David C. Williams, *The Borders of the Equal Protection Clause: Indians as People*, 38 UCLA L. REV. 759 (1991) [hereinafter Williams, *Indians as People*]; David Williams, *Sometimes Suspect: A Response to Professor Goldberg-Ambrose*, 39 UCLA L. REV. 191 (1991) [hereinafter Williams, *Sometimes Suspect*].

32. The only article cited by the Ninth Circuit in *Rice v. Cayetano*, 146 F.3d 1075, 1079 n.10 (9th Cir. 1998), as providing an opposing view to that of Professor Benjamin is Jon Van Dyke, *The Constitutionality of the Office of Hawaiian Affairs*, 7 U. HAW. L. REV. 63 (1985).

33. Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754 (1997).

34. *Id.* at 1767.

35. *Id.* at 1764; see *id.* (analogizing Professor Benjamin to the Wizard of Oz when the Wizard told Dorothy and her entourage not to look behind the curtain).

and correct, but his substantive critique of Benjamin is relatively brief,<sup>36</sup> as well as peripheral to Frickey's main focus, which is a methodological analysis of recent trends in the scholarship of Federal Indian law. A more expansive discussion of the entirety of Professor Benjamin's article, with particular attention paid to the practical ramifications of Professor Benjamin's thesis, is needed.

The present effort to provide this critique begins with a historical background in Part I, which introduces some of the specific programs that have been established for Native Hawaiians, with specific attention to congressional enactments that recognize the "special relationship" between the United States and the Native Hawaiian people. Part II explains why the constitutional and decisional language upon which Professor Benjamin relies does *not* support his conclusion that rational basis review applies only to programs favoring federally recognized "Indian tribes." This part introduces the numerous judicial decisions that have uniformly rejected Professor Benjamin's view, and it examines the *Croson* and *Adarand* opinions to see if they are designed to affect programs for native people. This part also explores what judicial scrutiny should apply to state government programs designed to aid native people and whether the programs established for Native Hawaiians can meet the "strict scrutiny"/"compelling state interest" test.

Part III synthesizes the material in Parts I and II to offer a comprehensive standard the judiciary can use to evaluate programs designed to benefit native people. The conclusion that follows from this analysis is that preferential or separate programs for the Native Hawaiian people must be evaluated under the same "rational basis" standard of judicial review applicable to programs applied to other native groups and that such programs are rational and constitutional if they are designed to protect or promote self-governance, self-sufficiency, or native culture.

## I. THE HISTORICAL BACKGROUND

Although Native Hawaiians controlled all of the land in the Hawaiian Islands when the nineteenth century began, almost all of it came under the control of non-Hawaiians by the beginning of the twentieth century. The most significant event in the conversion of the communal land system to the western system of private property ownership was the Mahele of 1848, during which the King conveyed about 1.5 million acres of the 4 million acres in the islands to the main chiefs, retaining about one million for himself (which became the "Crown Lands") and assigning the final

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36. *See id.* at 1763-64.

1.5 million to the government (as "Government Lands").<sup>37</sup> Although it was expected that the common people would receive a substantial share during this distribution, only 28,600 acres were given to about 8,000 individual farmers.<sup>38</sup> The fewer than 2,000 Westerners who lived on the islands were able to obtain large amounts of acreage from the chiefs and from the Government Lands, and by the end of the nineteenth century they had taken "over most of Hawaii's land . . . and manipulated the economy for their own profit."<sup>39</sup>

Throughout this period, the Kingdom of Hawai'i was recognized as an independent nation and as a full member of the family of nations.<sup>40</sup> It entered into four treaties with the United States,<sup>41</sup> and signed treaties with a number of other nations.<sup>42</sup>

In 1893, the Kingdom of Hawai'i "was overthrown and replaced by a provisional government," which evolved into the Republic of Hawai'i.<sup>43</sup> A century later, in the 1993 Apology Resolution, Congress acknowledged that the 1893 overthrow would not have been successful without the assistance of the U.S. troops who landed in Honolulu and the U.S. Minister, John L. Stevens, who indicated his support for the overthrow.<sup>44</sup> The Apology Resolution characterized the overthrow as "illegal" and in violation of international law, and would acknowledge that the United States had received the 1,800,000 acres of land "without the consent of or

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37. See JOHN J. CHINEN, *THE GREAT MAHELE* 1-31 (1958); KAME`ELEIHIWA, *supra* note 2, at 201-318; MacKenzie, *supra* note 6, at 7.

38. See MacKenzie, *supra* note 6, at 9.

39. Levy, *supra* note 8, at 858.

40. See Blondin, *supra* note 13, at 20-22; 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, 463-66 (1995).

41. The first of these four treaties was the Treaty with Hawaii on Commerce, Dec. 23, 1826, U.S.-Haw., 77 Consol. T.S. 34, reprinted in 3 U.S. DEP'T OF STATE, TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 1819-1835, at 269 (Hunter Miller ed., 1933). The treaty was never ratified by the United States Senate, but the State Department considered it a valid international act, see 3 U.S. DEP'T OF STATE, *supra*, at 274, and "for more than a decade, after Captain Jones had secured the signatures of Kaahumanu and Kalanimoku to this abortive treaty, American officials and residents in the Hawaiian Islands were seeking to impress upon the perplexed chiefs the sanctity of this agreement which the government of the United States had refused to accept." Harold W. Bradley, *Thomas Ap Catesby Jones and the Hawaiian Islands, 1826-1827*, in THIRTY-NINTH ANNUAL REPORT OF THE HAWAIIAN HISTORICAL SOCIETY 17, 25 (1931).

The remaining agreements between the United States and Hawai'i were: the Treaty with Hawaii on Friendship, Commerce and Navigation, Dec. 20, 1849, U.S.-Haw., 9 Stat. 977; the Convention on Commercial Reciprocity, Jan. 30, 1875, U.S.-Haw., 19 Stat. 625; and the Convention on Commercial Reciprocity, Dec. 6, 1884, U.S.-Haw., 25 Stat. 1399.

42. See Chock, *supra* note 40, at 464 & nn.7-18.

43. Rice v. Cayetano, 146 F.3d 1075, 1077 (9th Cir. 1998).

44. Apology Resolution, *supra* note 4, 107 Stat. at 1511 ("Whereas, without the active support and intervention by the United States diplomatic and military representatives, the [January 1893] insurrection against the Government of Queen Liliuokalani would have failed for lack of popular support and insufficient arms . . ." (emphasis added)).

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compensation to the Native Hawaiian people of Hawai'i or their sovereign government.”<sup>45</sup>

In 1898 “[t]he United States accepted the cession of sovereignty of Hawai'i,” and “roughly 1,800,000 acres of crown, government, and public lands were ceded to the United States.”<sup>46</sup> The Native Hawaiian people never had an opportunity to vote on whether they favored annexation by the United States.<sup>47</sup> Petitions signed by 21,269 people (98% of whom were Native Hawaiians) were sent to Washington in 1897 to emphasize the lack of support for the annexation.<sup>48</sup>

From 1898 to 1959, Hawai'i was a territory of the United States,<sup>49</sup> and during this period systematic efforts were made to discourage the use of the Hawaiian language and suppress expressions of Hawaiian culture.<sup>50</sup> Although in earlier periods the United States had entered into explicit treaties with native people whose land was taken,<sup>51</sup> after the enactment of

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45. *Id.* at 1512, 1513. In Section 1 of the Act of June 30, 1997, the Hawai'i State Legislature referred with implicit approval to the historical summary in the 1993 Apology Resolution. *See* ch. 329, 1997 Haw. Sess. Laws 2072, 2073; *see also supra* note 18.

46. *Rice v. Cayetano*, 146 F.3d 1075, 1077 (9th Cir. 1998).

47. *See* TWIGG-SMITH, *supra* note 22, at 235-38 (defending the decision to deny the Hawaiian people the opportunity to vote on annexation); *see also supra* text accompanying note 71 (quoting language to this effect from the Apology Resolution).

48. *See* Dan Nakaso, *Anti-Annexation Petition Rings Clear*, HONOLULU ADVERTISER, Aug. 5, 1998, at 1. These 21,269 petitions included the names of more than 50% of all the Native Hawaiians of all ages in Hawai'i at the time. *See* OFFICE OF HAWAIIAN AFFAIRS, *supra* note 1, at 4 tbl.1.1.

49. The formal transfer of sovereignty from Hawai'i occurred on August 12, 1898, under the guidance of a presidentially appointed annexation commission, *see* Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, ch. 55, 30 Stat. 750, 751 (1898), but it was not actually until April 30, 1900, that the United States officially established the Territory of Hawai'i pursuant to the Organic Act of 1900. *See* An Act to Provide a Government for the Territory of Hawai'i, ch. 339, 31 Stat. 141 (1900) [hereinafter Organic Act]. *See also* 15 HAW. REV. STAT. ANN. 27 (Michie 1997) (describing in a historical note to a reprinting of the Organic Act the history of the transfer of sovereignty). *See supra* note 47 and accompanying text. The 1898 Joint Resolution and the 1900 Act both recognized that the lands ceded to the United States were to be kept separate from the rest of the federal public lands and maintained in trust for the inhabitants of the islands. *See* Organic Act, *supra*, § 73, 31 Stat. at 155; Joint Resolution, ch. 55, 30 Stat. at 750. The Hawai'i Supreme Court later ruled that the United States had “no more than *naked title* to the public lands.” *State v. Zimring*, 566 P.2d 725, 737 (1977) (emphasis added).

50. *See, e.g.*, GAVAN DAWS, SHOAL OF TIME 309 (1968) (“Beginning in 1921 the schools were licensed by the territorial Department of Public Instruction. Teachers had to demonstrate a grasp of the English language, American history, and the ideals of democracy, and they had to pledge themselves to teach their students loyalty to the United States.”); KAME'ELEIHIWA, *supra* note 2, at 316 (“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.”); MAENETTE KAPE'AHIOKALANI ET AL., CULTURE AND EDUCATIONAL POLICY IN HAWAII 148-150 (1998) (describing the English-only policy during the 1920's); NATIVE HAWAIIANS STUDY COMMISSION, *supra* note 8, at 173-203 (describing the suppression of and importance of the Hawaiian language).

51. *See* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 17, at 62-107 (discussing the treaty-making era and its end).

the Appropriations Act of 1871,<sup>52</sup> the United States entered into no further formal treaties.<sup>53</sup> The history of the status and treatment of Native Hawaiians (like that of the status and treatment of Alaska Natives) is thus different from that of American Indians in the 48 contiguous states. But Native Hawaiians “developed their own trust relationship with the Federal Government as demonstrated by the passage of the [Hawaiian Homes Commission Act],”<sup>54</sup> and by a history of close and singular interaction with the United States government.

Indeed, the United States Congress could not be any more specific than it has been in affirming the existence of a “special relationship” between the United States and the Native Hawaiian people. In 1921, Congress enacted the Hawaiian Homes Commission Act (“HHCA”),<sup>55</sup> which set aside about 200,000 acres of the lands the United States received in 1898 to provide residences and farm lots for Native Hawaiians.<sup>56</sup> Although this statute was well intentioned, the lands allocated to the Homestead program had only marginal agricultural potential because of pressure from sugar interests that wanted to keep the best lands for themselves.<sup>57</sup> The program has never been properly funded,<sup>58</sup> and many of its lands remain undeveloped and unavailable for the many waiting applicants.<sup>59</sup>

Even though the HHCA was an inadequate response to the needs of the Native Hawaiian people, its passage was nonetheless significant, in that it offered clear affirmation of the federal government’s trust responsibilities to the Native Hawaiian people. During the hearings that led to the passage of the HHCA, federal officials analogized the relationship between the United States and Native Hawaiians to the relationship that

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52. Ch. 120, 16 Stat. 544 (codified at 25 U.S.C. § 71 (1994)).

53. One provision of the Appropriations Act of 1871 required that, in the future, no Indian nation or tribe would be recognized as an entity with which the United States could make a treaty. See 25 U.S.C. § 71 (1994); see also *Rice v. Cayetano*, 963 F. Supp. 1547, 1553 (D. Haw. 1997) [hereinafter *Rice v. Cayetano (II)*], *aff’d*, 146 F.3d 1075 (9th Cir. 1998); FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 17, at 105-07.

54. *Rice (II)*, 963 F. Supp. at 1553 (D. Haw. 1997) (referring to the HHCA, *supra* note 3).

55. *Supra* note 3.

56. In this statute, “[n]ative Hawaiians” are defined as persons with at least 50% blood of the races inhabiting the Hawaiian Islands previous to 1778. HHCA, *supra* note 3, § 201(7), 15 HAW. REV. STAT. ANN. 331, 334 (Michie 1997).

57. See Levy, *supra* note 8, at 865; MacKenzie, *supra* note 6, at 17-18.

58. See Alan Murakami, *The Hawaiian Homes Commission Act*, in NATIVE HAWAIIAN RIGHTS HANDBOOK 43, 51-56 (Melody K. MacKenzie ed., 1991).

59. See MacKenzie, *supra* note 6, at 18. In 1995, as a result of litigation and a protracted negotiating period, the Hawai’i State Legislature approved a \$600 million settlement to the Department of Hawaiian Home Lands to compensate the Department for lands improperly conveyed from the Department during the territorial period, to be paid in \$30 million increments over the next 20 years. See An Act Relating to Hawaiian Home Lands, ch. 14, §§ 6, 8, 1995 Haw. Sess. Laws 696, 700, 701; DEPARTMENT OF HAWAIIAN HOME LANDS, 1995 ANNUAL REPORT 1 (1995).

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had previously been established between the United States and American Indians.<sup>60</sup>

Subsequent developments reaffirmed the special relationship between the federal government and the Native Hawaiian people. In 1959, after a plebiscite in which the residents of Hawai'i voted overwhelmingly in favor of statehood,<sup>61</sup> the U.S. Congress admitted Hawai'i as the 50th state of the United States.<sup>62</sup> In so doing, Congress required the new state government to accept responsibility for the Hawaiian Home Lands as a condition of statehood.<sup>63</sup> Congress also conveyed, in trust to the state, another 1,200,000 acres of the lands that had been ceded to the United States in 1898.<sup>64</sup> To emphasize the trust nature of these lands, the Admission Act stated that these lands had to be used for five listed purposes, including "the betterment of the conditions of the native Hawaiians."<sup>65</sup> In

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60. See *Hearings Before the House Comm. on the Territories on the Rehabilitation and Colonization of Hawaiians and Other Proposed Amendments to the Organic Act of the Territory of Hawaii*, 66th Cong. 129-30 (1920) (quoting Secretary of the Interior Franklin D. Lane as saying that the basis for granting special programs for Native Hawaiians is "an extension of the same idea" that justifies granting such programs for Indians); *id.* at 169 (quoting Representative Curry, the Chairman of the Committee, as saying: "[T]he Indians received lands to the exclusion of other citizens. That is certainly in line with this legislation, in harmony with this legislation."); *id.* at 170 (quoting Chairman Curry, in response to a question from Representative Dowell about whether Native Hawaiians might be different because "we have no government or tribe or organization to deal with," as saying: "We have the law of the land of Hawaii from ancient times right down to the present where the preferences were given to certain classes of people."); *cf.* *Rice v. Cayetano* (II), 963 F. Supp. 1547, 1551 (D. Haw. 1997) (quoting Secretary Lane as saying that Native Hawaiians should be "given as close identification with their country as is possible."); *Ahuna v. Dept. of Hawaiian Home Lands*, 640 P.2d 1161, 1167 (Haw. 1982) (quoting Secretary Lane during the hearings as referring to Native Hawaiians as "our wards . . . for whom in a sense we are trustees").

61. Some Native Hawaiians have challenged the legitimacy of the 1959 vote because the only options given to the voters were to become a state or to remain a territory; they argue that the option of becoming independent or a freely associated state should also have been given to the voters. See *Van Dyke*, *supra* note 13, at 624 n.3. It is also sometimes argued that the United States violated international law by allowing large numbers of non-Hawaiians to immigrate to the islands, thus depriving Native Hawaiians of their unique right to exercise self-determination in their native islands and thus undercutting the validity of the 1959 vote as an act of self-determination. See *id.*

62. Admission Act of 1959, Pub. L. No. 86-3, 73 Stat. 4, reprinted in 15 HAW. REV. STAT. ANN. 107 (Michie 1997).

63. See *id.* § 4.

64. See *id.* § 5(b).

65. *Id.* § 5(f), 73 Stat. at 6. The five stated purposes are:

- [(1)] for the support of the public schools and other public educational institutions,
- [(2)] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, [(3)] for the development of farm and home ownership on as widespread a basis as possible[, (4)] for the making of public improvements, and [(5)] for the provision of lands for public use.

*Id.* This statute defined "native Hawaiians" by referring to the definition in the HHCA, *supra* note 3, which limited this category to persons with at least 50% aboriginal blood. See *supra* note 56. According to Congress's recent interpretation of the import of the Act, the United States "reaffirmed the trust relationship which existed between the United States and the Hawaiian people by retaining the legal responsibility of the State for the betterment of the conditions of Native Hawaiians under section 5(f) of the [Admission Act]." Native Hawaiian Health Care

fact, however, “no benefits actually went to native Hawaiians until the state constitution was amended in 1978.”<sup>66</sup>

Since the early 1970s, Congress has enacted numerous statutes providing separate programs for Native Hawaiians or including them in benefit programs that assist other native people.<sup>67</sup> “The inclusion of Native Hawaiians in legislation promulgated primarily for the benefit of Native American Indians and the promulgation of legislation solely for the benefit of Native Hawaiians constitutes further compelling evidence of

Improvement Act Amendments of 1992, 42 U.S.C. § 11,701(16) (1994).

66. *Rice v. Cayetano*, 146 F.3d 1075, 1077 (9th Cir. 1998). The State had interpreted the Admission Act as allowing it to use the revenues for any one of the five purposes and had allocated all of it to public education. See MacKenzie, *supra* note 6, at 19.

67. The following laws are among those that classify Native Hawaiians as Native Americans and include them in Native American benefit programs: the National Historic Preservation Act § 4006(a)(6), 16 U.S.C.A. § 470a(d)(6) (West Supp. 1998) (providing particular protection to properties with cultural and religious importance to Indian tribes and Native Hawaiians); the National Museum of the American Indian Act §§1-10, 13, 16, 20 U.S.C. §§ 80q to 80q-12, 80q-15 (1994) (providing for the return of Native Hawaiian human remains and funerary objects, as well as the creation of a museum exclusively for the preservation and study of the history and artifacts of Native Americans, a group of individuals statutorily defined to include Native Hawaiians); the Drug Abuse Prevention, Treatment and Rehabilitation Act § 4106(d), 21 U.S.C. § 1177(d) (1994) (giving preference to grant applications aimed at combating drug abuse among Native Americans, a classification that expressly “includ[es] Native Hawaiians”); Native American Languages Act, 25 U.S.C. §§ 2901-2912 (1994) (including Native Hawaiian languages in the ambit of Native American languages accorded statutory protection); the Workforce Investment Act of 1998 § 166, 29 U.S.C.A. § 2911 (West Supp. 1998) (supporting employment and training programs for Native Hawaiians and other Native Americans); the American Indian Religious Freedom Act, 42 U.S.C. § 1996 (1994) (pledging to protect and preserve Native Hawaiian faiths as a subset of religions described in the statutory heading as “Native American”); the Native American Programs Act of 1974, 42 U.S.C. §§ 2991-2992 (1994) (including Native Hawaiians in a variety of Native American financial and cultural benefit programs); the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act §311(c)(4), 42 U.S.C. § 4577(c)(4) (1994) (giving preference to grant applications aimed at combating drug abuse among Native Hawaiians and other Native Americans). For a sampling of other recent laws aimed at benefiting Native Hawaiians economically and culturally, see, for example, 20 U.S.C.A. § 4441 (West Supp. 1998) (providing funding for Native Hawaiian arts and cultural development); 20 U.S.C.A. §7118 (West Supp. 1998) (providing funding for Native Hawaiian drug prevention programs); the Native Hawaiian Education Act, 20 U.S.C.A. §§ 7901-7912 (West Supp. 1998) (establishing programs to facilitate the education of Native Hawaiians); the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001-3013 (1994) (extending protection to American Indian and Native Hawaiian burial sites); 42 U.S.C. § 254s (1994) (providing for health care scholarships for Native Hawaiian students); the Native Hawaiian Health Care Improvement Act of 1992, 42 U.S.C. §§ 11701-11714 (1994) (creating a number of programs aimed at improving health care for Native Hawaiians); the Cranston-Gonzalez National Affordable Housing Act § 958, Pub. L. No. 101-625, 104 Stat. 4079, 4422 (1990) (providing a preference for Native Hawaiians in HUD housing assistance programs). These recent statutes are often more expansive in scope than their earlier counterparts; they extend benefits to Native Hawaiians who are in any way descendants of the Hawaiian aboriginal people, even if they possess less than 50% Hawaiian blood. See, e.g., Native Hawaiian Education Act § 9212, 20 U.S.C.A. § 7912(1) (West Supp. 1998); National Museum of the American Indian Act § 16(11), 20 U.S.C. § 80q-14(11) (1994); Native American Graves Protection and Repatriation Act § 2(10), 25 U.S.C. § 3001(10) (1994); cf. *supra* notes 3, 56 (describing the HHCA, which features a 50% Hawaiian lineage requirement).

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the continuing guardian-ward relationship between Native Hawaiians and the Federal Government.”<sup>68</sup>

In two recent statutes—the 1993 Apology Resolution<sup>69</sup> and the Native Hawaiian Education Act of 1994<sup>70</sup>—Congress has explicitly acknowledged the special relationship that exists between the United States and the Native Hawaiian people. Congress confirmed in the Apology Resolution that Native Hawaiians are an “indigenous . . . people.”<sup>71</sup> The Apology Resolution states that United States 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.”<sup>72</sup> Among the other findings in the Apology Resolution are the following:

[T]he Republic of Hawaii . . . ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii without the consent of or compensation to *the native Hawaiian people* of Hawaii or their sovereign government . . . .

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68. *Rice v. Cayetano* (II), 963 F. Supp. 1547, 1553-54 (D. Haw. 1997).

69. Apology Resolution, *supra* note 4. The Apology Resolution is a statute of the United States Congress. The Senate passed this resolution on October 27, 1993, the House passed it on November 15, 1993, and President Clinton signed it on November 23, 1993. *See id.* at 1514. The joint resolution was styled as Public Law 103-150, and prefaced with the caption “To acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii.” *Id.* at 1510, 1514. Congress drafted this joint resolution “with great care because it is an enforceable statute.” Lisa Cami Oshiro, Comment, *Recognizing Na Kanaka Maoli’s Right to Self-Determination*, 25 N.M. L. REV. 65, 86 (1995). A “joint resolution” enacted by Congress as a public law and signed by the President is a statute of the United States and has the same effect as any other law enacted by Congress. *See, e.g.,* *Ann Arbor R. Co. v. United States*, 281 U.S. 658, 666 (1930) (treating a joint resolution as equivalent to any other legislation enacted by Congress); JACK DAVIES, *LEGISLATIVE LAW AND PROCESS IN A NUTSHELL* 66 (2d ed. 1986) (“[A] joint resolution originates in one house and, with the concurrence of the other house, has the force of official legislative action.”); ROBERT U. GOEHLERT & FENTON S. MARTIN, *CONGRESS AND LAW-MAKING: RESEARCHING THE LEGISLATIVE PROCESS* 42 (2d ed. 1989) (“In reality there is little difference between a bill and a joint resolution, as a joint resolution goes through the same procedure as a bill and has the force of law.”); HANS A. LINDE ET AL., *LEGISLATIVE AND ADMINISTRATIVE PROCESSES* 110 (1981) (“The prescribed form of a proposal for a statute is generally called a bill, *although Congress also uses the form of a joint resolution to enact legislation.*” (emphasis added)); HORACE E. READ ET AL., *MATERIALS ON LEGISLATION* 129 (4th ed. 1982) (“In recent years much major legislation has taken the form of a joint resolution; it is now rather generally conceded that *a joint resolution of Congress is just as much a law as a bill after passage and approval.*” (emphasis added)); L. Harold Levinson, *Balancing Acts: Bowsher v. Synar, Gramm-Rudman-Hollings, and Beyond*, 72 CORNELL L. REV. 527, 545 (1987) (“Courts have consistently held that the legal effect of a joint resolution is identical to that of an enacted bill.”). Among the many notable joint resolutions that have been treated as having the effect of law are the joint resolution that annexed Texas to the United States, 9 Stat. 108 (1845); *see Texas v. White*, 74 U.S. (7 Wall.) 700, 722, 726 (1868), and the joint resolution that annexed Hawai‘i to the United States, 30 Stat. 750 (1898); *see United States v. Fullard-Leo*, 331 U.S. 256, 259, 265 (1947).

70. 20 U.S.C. §§ 7902-7912 (West Supp. 1998).

71. Apology Resolution, *supra* note 4, 107 Stat. at 1512.

72. *Id.* at 1510.

....

[T]he indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum . . . .<sup>73</sup>

After documenting in detail the wrongs done to the Hawaiian people at the time of the illegal overthrow, including “the deprivation of the rights of Native Hawaiians to self-determination,”<sup>74</sup> the Apology Resolution urges the President of the United States to “support reconciliation efforts between the United States and the Native Hawaiian people.”<sup>75</sup>

The findings in the 1994 Native Hawaiian Education Act reconfirm that “Native Hawaiians are a distinct and unique indigenous people,”<sup>76</sup> that the Kingdom of Hawai‘i was overthrown with the assistance of officials of the United States,<sup>77</sup> that the United States had apologized for “the deprivation of the rights of Native Hawaiians to self-determination,” and that “Congress affirmed the *special relationship* between the United States and the Native Hawaiians”<sup>78</sup> through the enactment of the Hawaiian Homes Commission Act, the 1959 Admission Act, and other listed statutes.<sup>79</sup> The description in these multiple federal statutes of the special trust relationship between the United States and the Native Hawaiians makes it clear that a “political” relationship exists.<sup>80</sup>

The State of Hawai‘i has also actively recognized the unique political, cultural, and socioeconomic position of the Native Hawaiian people in establishing separate and preferential programs for their benefit. In response to neglect in the administration of Hawai‘i’s trust lands,<sup>81</sup> the delegates to Hawai‘i’s 1978 Constitutional Convention proposed a series of amendments to Hawai‘i’s Constitution which were subsequently adopted by the Hawaiian people. One of these amendments affirmed that the State holds the ceded lands as a Public Land Trust, with Native Hawaiians and the general public as the two distinct named beneficiar-

73. *Id.* at 1512 (emphasis added).

74. *Id.* § 1(3), 107 Stat. at 1513.

75. *Id.* § 1(5), 107 Stat. at 1513.

76. 20 U.S.C. § 7902(1).

77. *See id.* § 7902(5).

78. *Id.* § 7902(8).

79. *See* 20 U.S.C. § 7902(7)-(13) (discussing a vast array of statutes).

80. *See, e.g.,* *Morton v. Mancari*, 417 U.S. 535, 552-53, 554 n.24 (1974) (describing policies favoring Native Americans as “political” rather than “racial” classifications because of the “special relationship” between Native Americans and the United States government, and therefore exempting them from normal equal protection jurisprudence); *see also infra* Part II.A. As explained in Part II *infra*, the thrust of Professor Benjamin’s thesis is that the relationship between Native Hawaiians and the United States government cannot be characterized as a “special relationship.” *See, e.g.,* Benjamin, *supra* note 21, at 558-92.

81. *See supra* notes 65-66 and accompanying text.

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ies.<sup>82</sup> Other amendments created the Office of Hawaiian Affairs (“OHA”) and required the State to allocate a pro rata share of the revenues from the Public Land Trust to OHA to be used explicitly for the betterment of Native Hawaiians.<sup>83</sup>

Only persons who are at least one-half Hawaiian are eligible to receive homestead leases from the Department of Hawaiian Home Lands.<sup>84</sup> At least four of the nine members of the Hawaiian Homes Commission must be at least one-fourth Hawaiian.<sup>85</sup> All nine members of the Board of Trustees of the OHA must be of Hawaiian ancestry,<sup>86</sup> and only persons of Hawaiian ancestry can vote in the elections every two years to select Trustees.<sup>87</sup> In 1980, the Hawai‘i Legislature determined that OHA should receive 20% of the revenues generated from the ceded lands held in trust by the State of Hawai‘i.<sup>88</sup> Although substantial disputes remain regarding how much revenue OHA is owed, this revenue stream has already allowed OHA to accumulate more than \$300,000,000 in funds.<sup>89</sup>

More recently, in a statute enacted in 1993, the Hawai‘i State Legislature recognized that “Native Hawaiians are a distinct and unique indigenous people” whose lands and sovereignty were illegally taken from them.<sup>90</sup> This statute created the Hawaiian Sovereignty Advisory Commis-

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82. HAW. CONST. art. XII, § 4. See Noelle M. Kahanu & Jon M. Van Dyke, *supra* note 13, at 446-51; MacKenzie, *supra* note 6, at 19.

83. *Id.* art. XII, §§ 5-6. Section 6’s reference to Native Hawaiians imports the definition from the HHCA, which refers to those with 50 percent or more aboriginal blood. See MacKenzie, *supra* note 6, at 19; *supra* notes 3, 56.

84. See HHCA, *supra* note 3, §§ 201(7), 208(1), 15 HAW. REV. STAT. ANN. 331, 334, 357 (Michie 1997). Leases can be transferred to relatives who are only one-quarter Hawaiian. *Id.* §209(a)(1), 15 HAW. REV. STAT. ANN. at 359.

85. See *id.* §202(a), 15 HAW. REV. STAT. ANN. at 358.

86. See HAW. CONST. art. XII, § 5.

87. See *id.*; see also discussion *infra* Subsection II.A.4.

88. See HAW. REV. STAT. ANN. §§ 10-13.5 (Michie 1997).

89. Among the cases currently before the courts in which the OHA is seeking to increase its revenue base and prevent the State of Hawai‘i from transferring ceded lands prior to a comprehensive settlement are: *Office of Hawaiian Affairs v. Housing Financing Development Corporation*, Civ. No. 94-4207-11 (Haw. 1st. Cir. 1998) (seeking to prevent the State from transferring any of the ceded lands it holds in trust); *Office of Hawaiian Affairs v. State*, Civ. No. 94-0205 (Haw. 1st. Cir. 1996) (concerning the revenues from the Duty Free Shops in Waikiki and other ceded lands revenues).

90. The statute reads, in part:

...the United States Minister and the naval representative of the United States caused armed forces of the United States to invade the sovereign Hawaiian Nation in support of the overthrow of the indigenous and lawful government, and the United States Minister thereupon extended diplomatic recognition to a provisional government formed by the conspirators without the consent of the native Hawaiian people or the lawful Government of Hawai‘i in violation of treaties between the two nations and of international law...

An Act Relating to Hawaiian Sovereignty, ch. 359, §1(6), 1993 Haw. Sess. Laws 1009, 1010; cf. *State v. Lorenzo*, 883 P.2d 641, 643 (Haw. Ct. App. 1994) (stating that the Hawai‘i State Legislature “has tacitly recognized the illegal overthrow”).

sion and initiated a process to facilitate “the efforts of native Hawaiians to be governed by an indigenous sovereign nation of their own choosing.”<sup>91</sup> The following year, the Legislature transformed the Hawaiian Sovereignty Advisory Commission into the Hawaiian Sovereignty Elections Council, citing the 1993 congressional Apology Resolution<sup>92</sup> while again recognizing “the unique status that the native Hawaiian people bear to the State of Hawai‘i and to the United States.”<sup>93</sup> In 1996, the Elections Council used funds from the State and from OHA to conduct the “Native Hawaiian Vote” to measure sentiment on pursuing a self-determination process.<sup>94</sup> Only persons of Hawaiian ancestry were eligible to cast ballots in this election.<sup>95</sup> In 1997, Hawai‘i’s legislature again referred to the Apology Resolution and identified a process for returning lands to the Native Hawaiian people.<sup>96</sup>

The saga of the Native Hawaiian people demonstrates that the group has maintained strong historical and cultural bonds that have survived years of oppression. Native Hawaiians have lost their proper place in their own homeland, but their spirit, their link to their ancestors and heritage, and their determination to reestablish a sovereign Native Hawaiian nation continue. They are indigenous, native, aboriginal people under United States and international law and are entitled to their own cultural integrity, political autonomy, and all of the rights and privileges enjoyed by other native peoples.

## II. THE GOVERNING JUDICIAL DECISIONS AND STATUTES DO NOT SUPPORT PROFESSOR BENJAMIN’S THESIS

Professor Benjamin argues that only those separate or preferential programs that are designed to aid “Indian tribes” formally recognized by

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91. An Act Relating to Hawaiian Sovereignty, §2, 1993 Haw. Sess. Laws at 1010.

92. See *supra* notes 4, 44-45, 71-75 and accompanying text.

93. An Act Relating to Hawaiian Sovereignty, ch. 200, §1, 1994 Haw. Sess. Laws 479, 479; see also 1 HAW. REV. STAT. ANN. § 6K-9 (Michie 1997) (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”).

94. See *supra* note 14.

95. See *Rice v. Cayetano* (I), 941 F. Supp. 1529, 1535 (D. Haw. 1996) (observing that guidelines implemented by the Hawaiian Sovereignty Elections Council would restrict suffrage to Native Hawaiians).

96. See An Act Relating to the Public Land Trust, ch. 329, 1997 Haw. Sess. Laws 2072. The Act referred to Congress’s 1993 Apology Resolution as an accurate recounting of “the events of history relating to Hawaii and Native Hawaiians” and called for a “lasting reconciliation” and “a comprehensive, just, and lasting resolution.” *Id.* at 2073. To achieve this goal, the Legislature provided partial funding to undertake a complete inventory of the Public Lands, see *id.* at 2076, and established a joint committee consisting of representatives of the Governor, the Legislature, and OHA to determine “whether lands should be transferred to the Office of Hawaiian Affairs in partial or full satisfaction of any past or future obligations under article XII, section 6 of the Hawaii Constitution.” *Id.* at 2079-80.

the federal government are entitled to “rational basis” judicial review.<sup>97</sup> Under his view, programs aiding any other collection of native people—especially after *City of Richmond v. J.A. Croson Co.*<sup>98</sup> and *Adarand Constructors v. Peña*<sup>99</sup>—must be reviewed under the “strict scrutiny” level of review which requires the government to demonstrate that it has a “compelling interest,” and that its policies are “narrowly tailored” to achieve that interest.<sup>100</sup> At the very least, he suggests, state (as opposed to federal) programs must be held to this higher standard. He also contends it is almost impossible for programs designed to assist Native Hawaiians to meet this standard.<sup>101</sup> The sections that follow analyze these contentions in some detail to explain their flaws.

A. “Indian Tribes” and the Rational Basis Standard

As noted above, Professor Benjamin argues that only native people organized into federally recognized “Indian tribes” have the requisite “special relationship” with the federal government that justifies evaluating separate and preferential programs established for their benefit under deferential rational basis review.<sup>102</sup> He bases this argument (1) on the language in the Indian Commerce Clause of the U.S. Constitution<sup>103</sup> which gives Congress the power to regulate commerce “with the Indian tribes,” but, according to Professor Benjamin’s article, “not with Indians generally,”<sup>104</sup> and (2) on his view that *Morton v. Mancari*<sup>105</sup> “drew a sharp distinction between American Indians as a racial group and members of Indian tribes as a political group.”<sup>106</sup> Neither of these contentions is supported by logic or precedent. Indeed, federal and state courts have uniformly rejected Professor Benjamin’s position.

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97. Benjamin, *supra* note 21, at 558-92. The term “Indian” is not, of course, a native term, but it was used mistakenly by the Europeans who came to North America to describe the natives they met. Most natives in the United States prefer to describe themselves as “Native Americans” or by reference to their particular native tribes or heritage. The term “Indian” is nonetheless used in this Article when discussing particular legal texts, documents, and cases that use this term.

98. 488 U.S. 469 (1989).

99. 515 U.S. 200 (1995).

100. Benjamin, *supra* note 21, at 593-94.

101. *See id.* at 592-95.

102. *Id.* at 558-92.

103. U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, *and with the Indian Tribes* . . .” (emphasis added)).

104. Benjamin, *supra* note 21, at 561; *see also id.* at 542-45, 561-62, 567, 585, 605 (elaborating this argument).

105. 417 U.S. 535 (1974).

106. Benjamin, *supra* note 21, at 558.

### 1. *The Indian Commerce Clause*

The Indian Commerce Clause authorizes Congress to regulate commerce with "Indian tribes." Professor Benjamin argues that these are words of limitation that require nontribal natives to be treated differently from natives who are members of federally recognized tribes.<sup>107</sup> Nothing in the language or purpose of this clause supports this view.

At the time our Constitution was drafted, Indian tribes were viewed as separate nations, and the relationship between the federal government and the tribes was formal in nature.<sup>108</sup> Indians were not permitted to be citizens during the early years of our nation, even if they left their tribe or their tribal lands.<sup>109</sup> The early decisions of the United States Supreme Court confirmed this formal relationship and held that state governments could not regulate activities on tribal lands and that state officials could not even enter such lands without invitation.<sup>110</sup> It was perfectly normal for the framers of the Constitution to refer to "Indian tribes" rather than "Indians," because all Indians were connected to tribal units and no efforts whatsoever were being made at that time to integrate the Indians into the larger citizenry.

The original Constitution does contain another reference to Indians. Article I, Section 2, Clause 3, says that "Indians not taxed" shall not be counted for purposes of apportionment.<sup>111</sup> Professor Benjamin argues that this reference should be disregarded as irrelevant today, because all Indians are now taxed.<sup>112</sup> But his long footnote cannot erase the reality that the framers of the Constitution *did* recognize that individual Indians

107. *Id.* at 561-62. The somewhat uncommon term "nontribal" is used here because the legal arguments presented by Professor Benjamin focus on whether a native is a formal member of a recognized tribe. Most North American natives use the term "off-reservation" to refer to an individual of native ancestry who is not actively affiliated with a tribe.

108. *See, e.g., Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). Chief Justice Marshall observed:

The numerous treaties made with [the Cherokees] by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character of any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. *The acts of our government plainly recognize the Cherokee nation as a state*, and the Courts are bound by those acts."

*Id.* at 16 (emphasis added); *see also* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 17, at 63 ("Treaties with Indian tribes are accorded the same dignity as that given to treaties with foreign nations.")

109. *See* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 237-38 (2d ed. 1988); FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 17, at 641-42.

110. *See, e.g., Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

111. *Cf.* U.S. CONST. amend. XIV, § 2 (mandating in 1868 that "Indians not taxed" should not be counted when apportioning the U.S. House of Representatives)

112. *See* Benjamin, *supra* note 21, at 561-62 n.115.

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should be treated differently from other persons without regard to whether they were in “tribes.”

It is also important to recognize that the concept of a “tribe” has been malleable and elusive over the years. The leading treatise on Indian law states that “[t]he term tribe has no universal legal definition. There is no single federal statute defining an Indian tribe for all purposes.”<sup>113</sup> Another leading book, written by a judge currently sitting on the Ninth Circuit, agrees that “there is no all-purpose definition of an Indian tribe.”<sup>114</sup> A third author has written that:

[A] close scrutiny of the various executive orders, Congressional legislation, departmental policies, Solicitor’s opinions, and judicial decisions since 1783 . . . discloses an astonishing oblivion of the need for an express declaration or statement regarding which Indian tribes were to be recognized, until the enactment of the Wheeler-Howard (Indian Reorganization) Act of 1934.<sup>115</sup>

As a historical matter, “territorial officials who negotiated [Indian] treaties on behalf of the United States took the initiative in aggregating certain loose bands into designated tribes and even appointed many of the chiefs who signed the treaties.”<sup>116</sup>

The reference to “Indian tribes” in the Indian Commerce Clause must be understood in a generic sense, referring to historical and cultural groupings of native people. Although Native Hawaiians were not historically organized in tribal units, they did have sophisticated and evolved forms of governance. At the beginning of the nineteenth century the islands became united under the leadership of Kamehameha I, and the Kingdom of Hawai‘i was established, lasting nearly a century until its overthrow in 1893.<sup>117</sup> Native Hawaiians are clearly the sort of historical and social grouping of indigenous people governed by the Indian Commerce Clause.<sup>118</sup>

### 2. *Rational Basis Review Under Morton v. Mancari*

*Morton v. Mancari*<sup>119</sup> and its progeny<sup>120</sup> state that preferences for native peoples are properly viewed as “political” rather than “racial” classi-

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113. FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 17, at 3. See generally *id.* at 5-7.

114. CANBY, *supra* note 109, at 3.

115. William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 AM J. LEG. HIST. 331, 332 (1990).

116. *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 664 n.5 (1979).

117. FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 17, at 799.

118. See also *infra* notes 138-143 (discussing *United States v. John*, 437 U.S. 634 (1978)).

119. 417 U.S. 535 (1974).

120. Among the many U.S. Supreme Court cases that follow *Mancari* and uphold preferen-

fications, and are to be evaluated under a “rational basis” rather than a “strict scrutiny” test. The *Mancari* case upheld a statutorily codified hiring preference for Indians in federally recognized tribes for positions in the federal Bureau of Indian Affairs (“BIA”).<sup>121</sup> In an opinion written by Justice Harry A. Blackmun, the Court viewed this hiring preference not as a “racial” preference but as “an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It is directed to participation by the governed in the governing agency.”<sup>122</sup>

It is important to note that the *Mancari* preference was not free of racial overtones, because, as the Court observed, an individual did have to have “one-fourth or more degree Indian blood” to qualify for the preference.<sup>123</sup> Although this racial criterion was necessary, it was not sufficient, because the individual also had to be a member of a federally recognized tribe to qualify for this particular statutory preference.

The Court thus recognized that it was dealing with a mixed political/racial category, but it nonetheless concluded without hesitation that the “rational basis” level of judicial review should apply, because the prominent feature of this category was the political relationship between the native people and the United States Government. The Court then concluded that the statute easily satisfied the rational basis level of judicial review because the statute was rationally related to the goal of promoting self-governance for the Indians. The link between being a member of a tribe and being eligible for this particular preference for BIA employment was also rational, because the primary responsibility of the BIA is to regulate tribal activities.

Professor Benjamin’s interpretation of *Mancari* focuses on footnote twenty-four of the opinion, where Justice Blackmun noted that the preference statute applied only to Indians in “federally recognized tribes.”<sup>124</sup> Blackmun observed that this statutory limitation emphasized the self-

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tial or separate programs for native peoples are: *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658 (1979); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979); *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979); *United States v. Antelope*, 430 U.S. 641 (1977); *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977); *Moe v. Confederated Salish and Kootanai Tribes*, 425 U.S. 463 (1976); *Fisher v. District County Court*, 424 U.S. 382 (1976); *Antoine v. Washington*, 420 U.S. 194 (1975). In each of these decisions, the Court ruled unanimously that special treatment for native groups is permitted as long as the legislative program is rationally related to the government’s responsibility to promote or protect the self-governance, self-sufficiency, or culture of the native group concerned. See also *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 253 (1985) (citing *Mancari*).

121. See 25 U.S.C. §§ 472-472a (1994).

122. 417 U.S. at 554.

123. *Id.* (quoting 44 BUREAU OF INDIAN AFFAIRS MANUAL 335, § 3.1).

124. *Id.* at 546-48.

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determination and self-governance of the affected natives and provided further evidence for the view that the employment preference was “political” rather than “racial.”<sup>125</sup> Benjamin’s reliance on this footnote is misplaced. The Supreme Court’s decisions that followed shortly after *Mancari* demonstrate that the Court itself did not view this footnote in the same restrictive light. In *Delaware Tribal Business Committee v. Weeks*<sup>126</sup> and *United States v. John*,<sup>127</sup> the Court upheld, under deferential judicial review, programs that provided benefits to or established separate legal regimes for individual Indians who were not organized into formal tribes.<sup>128</sup>

*Weeks* involved a congressional statute that distributed assets to the heirs of two recognized tribes, but the heirs receiving the benefits did not themselves have to be members of a tribe to receive the benefits.<sup>129</sup> The majority opinion, written by Justice William Brennan, applied the *Mancari* test to the statute and ruled that the statute was legitimate and constitutional if it “can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians.”<sup>130</sup> Without making any special comment on the fact that benefits were going to individuals not affiliated with any tribe, the majority opinion indicated that Congress was free to “expand a class of tribal beneficiaries entitled to share in royalties from tribal lands”<sup>131</sup> or to assign rights of individual Indians to the tribe.<sup>132</sup> The bulk of the opinion for the Court discusses the claim by another group of nontribal Indians who sought a share of the distribution (the Kansas Delawares), and the Court ruled that Congress’s decision to exclude this group was rational and should not be disturbed under the rational basis level of judicial review recognized in *Mancari*.<sup>133</sup>

Of particular significance in the *Weeks* case is Justice Blackmun’s concurring opinion (joined by Chief Justice Warren Burger), because Blackmun was the author of the earlier *Mancari* opinion. Justice Blackmun supported the majority’s conclusion in *Weeks*, but he criticized the majority’s facile conclusion that Congress rationally excluded the Kansas Delawares from the distribution.<sup>134</sup> Nonetheless, Justice Blackmun con-

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125. *Id.* at 553 n.24.

126. 430 U.S. 73 (1977).

127. 437 U.S. 634 (1978).

128. *See John*, 437 U.S. at 652-54; *Weeks*, 430 U.S. at 83-85. *But cf.* Benjamin, *supra* note 21, at 564-65 (attempting to distinguish these cases).

129. *See* 430 U.S. at 82 n.14 (“[S]ome nonmembers of the [Absentee Delaware] tribe are eligible [for financial benefits] under the statute.”)

130. *Id.* at 85 (quoting *Mancari*, 417 U.S. at 555).

131. *Id.* at 84.

132. *See id.* at 85.

133. *See id.* at 85-90.

134. *See id.* at 90-91.

cluded that "I am not persuaded that the Court errs in its conclusion." He reaffirmed that the governing test is whether the congressional action was "unreasonable,"<sup>135</sup> the very same test that had been applied in *Mancari*. Justice Blackmun also confirmed that the courts should set aside a legislative judgment only when it is completely without any foundation: "I conclude that we must acknowledge that *there necessarily is a large measure of arbitrariness in distributing an award for a century-old wrong . . . .* Congress must have a large measure of flexibility in allocating Indian awards, and what it has done here is not beyond the constitutional pale."<sup>136</sup>

This decision obviously creates significant problems for Professor Benjamin's theory, because both the majority and concurring opinions reject the distinction he tries to tease out of the *Mancari* opinion between tribal and nontribal Indians. If the author of the *Mancari* opinion has stated explicitly that "rational basis" review applies to Congressional enactments favoring nontribal Indians, how can Professor Benjamin remain adamant that a higher level of review is required by that decision? Professor Benjamin tries to distinguish *Weeks* by saying that the favored nontribal Indians could have been viewed as members of the tribe if a different requirement of membership had been used.<sup>137</sup> This effort is neither persuasive nor successful in resuscitating the rigid distinction between tribal and nontribal Indians that Professor Benjamin believes is the basis for the *Mancari* decision.

The *John* decision also presents an enormous problem for Professor Benjamin's theory. While *John* is not an equal protection decision, the Court's unanimous opinion—written by Justice Blackmun, the author of *Mancari*—completely ignores the supposedly crucial distinction between tribal and nontribal Indians that Benjamin reads into the Indian Commerce Clause. Instead, the *John* Court uses the Indian Commerce Clause to affirm Congress's authority to establish a unique regime of criminal jurisdiction, preemptive of state jurisdiction, for nontribal Mississippi Indians. The Indians were part of a mere "remnant of a larger group of Indians" that had long ago moved to Oklahoma.<sup>138</sup> This separate regime was legitimate as applied to these Indians even though "federal supervision

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135. *Id.* at 91.

136. *Id.* (emphasis added). Justice Stevens dissented from the *Weeks* holding because he could find "no principled justification for the particular discrimination against the Kansas Delawares . . . . And . . . there is no reason to believe that the discrimination is the product of an actual legislative choice." *Id.* at 97-98. Justice Stevens thus implicitly believed that it would be constitutionally permissible to distribute funds to nontribal Indians and explicitly agreed that such a distribution was required in this situation.

137. See Benjamin, *supra* note 21, at 565.

138. 437 U.S. 634, 653 (1978).

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over them ha[d] not been continuous,”<sup>139</sup> and even though the Solicitor for the Department of the Interior had noted that these Indians “cannot now be regarded as a tribe.”<sup>140</sup> Justice Blackmun’s opinion stated that it was appropriate for the federal government to establish a separate program for them because the federal government was nurturing a self-government process for these Indians and was anticipating more formal federal recognition in the future.<sup>141</sup>

This decision effectively undercuts Professor Benjamin’s attempt to rely on *Mancari*’s footnote twenty-four to support his theory. The decision suggests that separate legislative programs designed for nontribal natives who are in the process of attaining self-determination and becoming self-governing should be evaluated under deferential review. The Native Hawaiians are in this same posture, and are now going through a process of self-determination designed to examine sovereignty options and to decide what model is appropriate for them.<sup>142</sup> If a separate legal regime established by the federal government to advance the self-determination process is constitutional for the nontribal Mississippi Choctaws, as the United States Supreme Court ruled, then it must also be constitutional for the Native Hawaiians.

In a series of sentences with an uncharacteristic lack of footnotes, Professor Benjamin attempts to explain away the *John* decision by asserting that “John was a member of the Choctaw tribe.”<sup>143</sup> But the Court’s opinion states that “there was no legal entity known as ‘the Choctaw tribe of Mississippi,’”<sup>144</sup> so of which “tribe” was Mr. John a member? Professor Benjamin appears here to be using the concept of “tribe” in a more generic sense, and, if such use is permissible, it is hard to explain why the Native Hawaiians cannot also be characterized as a “tribe.”

The overriding themes that emerge from these Supreme Court decisions are that judgments regarding the governance of natives are political in nature, that each situation requires an individualized solution because of its unique historical context, and that the courts must allow Congress the flexibility it needs to provide rough justice to each different native group. No absolutes—certainly not the rigid limitation against aiding

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139. *Id.*

140. *Id.* at 650 n.20 (emphasis added) (quoting Memorandum from the Solicitor for the Department of the Interior (Aug. 31, 1936), reprinted in FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 17, at 273).

141. *See id.* (“[T]he Department of the Interior anticipated that a more formal legal entity, a tribe for the purposes of federal Indian law, soon would exist.”).

142. *See generally* Kahanu & Van Dyke, *supra* note 13, at 430-36 (discussing the variety of arrangements adopted by other self-governing native groups).

143. Benjamin, *supra* note 21, at 565.

144. *John*, 437 U.S. at 650 n.20.

nontribal natives which Professor Benjamin erroneously promotes—have emerged to limit the power of Congress.

### 3. *Morton v. Mancari in the Lower Courts*

The Supreme Court's flexible and pragmatic approach was implemented in a 1982 decision of the U.S. Court of Appeals for the Ninth Circuit that addressed the unique situation of the Alaskan Natives in some detail. In *Alaska Chapter, Associated General Contractors v. Pierce*,<sup>145</sup> an association of private contractors challenged the requirement established by Congress and enforced by HUD that contractors give a preference when awarding subcontracts on housing projects to "Indian organizations and Indian-owned economic enterprises."<sup>146</sup> The district court had ruled that this preference was unconstitutional because it fell outside what the district judge believed was the outer perimeter of the *Mancari* principle, which, according to the district court, allowed classifications based on race only for "functions designed to further Indian self-government" of native people.<sup>147</sup> The Ninth Circuit reversed, citing Supreme Court cases decided before and after *Mancari*<sup>148</sup> to emphasize that the *Mancari* opinion meant what it said when it stated that "the special treatment [of natives] need only be rationally related to the furtherance of Congress' unique obligation toward the Indians."<sup>149</sup> The Ninth Circuit then concluded that programs designed to promote the economic well-being and self-sufficiency of the natives certainly fell within the boundaries of this test.

The *Pierce* decision is important, because it examines in some detail whether the *Mancari* standard of judicial review extends beyond programs governing Indian tribes to those covering individual Indians, while also addressing who exactly is an "Indian." These issues were directly raised by the facts of the case, because the preference went to any Indian organization or enterprise and "Indian" was defined in the HUD regulations as "any person recognized as being an Indian or Alaskan Native by a tribe, the Government, or any state."<sup>150</sup>

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145. 694 F.2d 1162 (9th Cir. 1982).

146. *Id.* at 1164 (quoting 25 U.S.C. § 450e(b) (1994)).

147. *Id.* at 1167.

148. The *Pierce* opinion cited: *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979); *United States v. Antelope*, 430 U.S. 641 (1977); *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463 (1976); *Morton v. Ruiz*, 415 U.S. 199 (1974); *Board of County Commissioners v. Seber*, 318 U.S. 705 (1943).

149. *Pierce*, 694 F.2d at 1167 (paraphrasing the language in *Mancari*, 417 U.S. at 555).

150. *Id.* at 1168 n.8 (quoting 24 C.F.R. § 805.102 (1998)).

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The court explained that “Alaskan Natives have not historically been organized into reservations or into tribal units”<sup>151</sup> but concluded that they had nonetheless been placed “under the guardianship of the federal government and entitled to the benefits of the special relationship” pursuant to the language in the 1867 treaty purchasing Alaska.<sup>152</sup> All the different Alaskan Natives (including Eskimos and Aleuts) are thus entitled to be considered to be “Indians” under federal law, and programs established for their benefit are entitled to the same deferential “rational basis” judicial review given to programs for other Native Americans. Courts have uniformly followed the path of *Pierce* in interpreting the proper contours of the *Mancari* test.

### *a. Judicial Decisions on the Status of Native Hawaiians*

The state and federal courts in Hawai'i, as well as the United States Court of Appeals for the Ninth Circuit, have applied the *Mancari* approach broadly to cover all native people, and have consistently ruled that separate and preferential programs for Native Hawaiians are “political” rather than “racial” and thus must be evaluated under the “rational basis” level of judicial review that applies to other native people. For example, the Hawai'i Supreme Court reached this conclusion in *Ahuna v. Department of Hawaiian Home Lands*.<sup>153</sup> This case involved the Department of Hawaiian Home Lands, which had been established in 1921 to provide housing for persons with fifty percent or more Hawaiian blood.<sup>154</sup> To determine “the extent or nature of the trust obligations”<sup>155</sup> owed to the Native Hawaiians by this department, the court turned to “well-settled principles enunciated by the federal courts regarding lands set aside by Congress in trust for the benefit of other native Americans, i.e., American Indians, Eskimos, and Alaska natives,”<sup>156</sup> because it recognized that Native Hawaiians have the same legal status as these other native peoples: “Essentially we are dealing with relationships between the government and aboriginal people. Reason thus dictates that we draw the analogy between native Hawaiian homesteaders and other native Americans.”<sup>157</sup>

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151. *Id.* at 1169 n.10.

152. *Id.* (citing Treaty Concerning Cession of Russian Possessions in North America, Mar. 30, 1867, U.S.-Russ., 15 Stat. 539).

153. 640 P.2d 1161 (Haw. 1982).

154. *See supra* notes 55-60 and accompanying text.

155. *Ahuna*, 640 P.2d at 1168.

156. *Id.*

157. *Id.* at 1169 (emphasis added); *see also* Public Access Shoreline Hawaii v. Hawai'i County Planning Comm'n, 903 P.2d 1246 (Haw. 1995) (recognizing and explaining the traditional and customary rights of native Hawaiians).

The federal district court judges in Hawai'i have also ruled without exception that separate and preferential programs for Native Hawaiians should be evaluated under rational basis review.<sup>158</sup> Judge David Ezra has written four opinions reaching this conclusion, starting with *Nalielua v. Hawai'i*,<sup>159</sup> which held that the preference for Native Hawaiians given by the Department of Hawaiian Home Lands is constitutional because of its link to self-governance and self-sufficiency. Later, in *Pai `Ohana v. United States*,<sup>160</sup> Judge Ezra quoted from his conclusion in *Nalielua* that

[a]lthough Hawaiians are not identical to the American Indians whose lands are protected by the Bureau of Indian Affairs, the court finds that for purposes of equal protection analysis, the distinction . . . is meritless. Native Hawaiians are people indigenous to the State of Hawai'i, just as American Indians are indigenous to the mainland United States.<sup>161</sup>

He later explained the *Nalielua* holding by saying that "[t]he court was convinced that the relationship between the Native Hawaiians as the aboriginal people of the Hawaiian Islands and the State of Hawai'i was sufficiently similar to that of American Indians and the United States to bypass the strict scrutiny requirement."<sup>162</sup>

In *Silva v. United States*,<sup>163</sup> Judge Helen Gillmor built on these decisions in upholding the constitutionality of the requirement that the Trustees of the OHA be of Hawaiian ancestry. Citing *Nalielua*, Judge Gillmor concluded that "the limitation on OHA Board membership is permissible because it promotes the legitimate goal of fostering Hawaiian self-government."<sup>164</sup>

Judge Ezra returned to this question in the two opinions he issued in the case of *Rice v. Cayetano*.<sup>165</sup> Harold F. Rice, a Caucasian rancher living on the Big Island of Hawai'i, challenged state legislation and regulations stating that only persons of Hawaiian ancestry could vote in both the "Native Hawaiian Vote," a mail ballot in 1996 to determine the sentiment of the Hawaiian people toward self-government, and the election for the Trustees of the OHA.<sup>166</sup> These two opinions directly addressed the arguments offered by Professor Benjamin and completely rejected

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158. The Attorney General of the State of Hawai'i also reached this result. See 80-8 Op. Haw. Att'y Gen. 7 (1980).

159. 795 F. Supp. 1009 (D. Haw. 1990), *aff'd*, 940 F.2d 1535 (9th Cir. 1991).

160. 875 F. Supp. 680 (D. Haw. 1995), *aff'd*, 76 F.3d 280 (9th Cir. 1996).

161. *Id.* at 697 n.35.

162. *Rice v. Cayetano* (I), 941 F. Supp. 1529, 1541 (D. Haw. 1996).

163. Civ. No. 95-00148 HG (D. Haw. Oct. 19, 1995).

164. *Id.*, slip op. at 7.

165. *Rice v. Cayetano* (II), 963 F. Supp. 1547 (D. Haw. 1997); *Rice v. Cayetano* (I), 941 F. Supp. 1529 (D. Haw. 1996). Only the second of these opinions reached the Ninth Circuit. See *Rice v. Cayetano*, 146 F.3d 1075 (9th Cir. 1998); see also *infra* notes 183-209 and accompanying text (discussing *Rice*).

166. See *supra* notes 87, 95 and accompanying text.

them.<sup>167</sup> In the first opinion, Judge Ezra concluded that the Hawaiians-only Native Hawaiian Vote constituted a constitutionally acceptable “political classification.”<sup>168</sup> He cited the *Weeks* and *John* cases to support the conclusion that “[t]he Supreme Court has itself applied the rational basis test in reviewing preferential legislation for American Indians not belonging to federally recognized tribes.”<sup>169</sup>

Judge Ezra observed that “Congress has clearly indicated that the Native Hawaiians have a special relationship with the United States government that closely parallels that of the American Indians,”<sup>170</sup> and that this “special relationship with the United States . . . removes [the statute establishing the Native Hawaiian Vote] from heightened constitutional scrutiny.”<sup>171</sup> The rational basis test applies because of this congressionally recognized “special relationship.” Judge Ezra concluded that the test is satisfied in the case of the Native Hawaiian Vote. Acting as “the appointed guardian of the Hawaiian home lands and as trustee of the public trust created by the federal government in the Admission Act,” the State of Hawai‘i has a responsibility to promote self-governance, and the administration of the Native Hawaiian Vote was a logical step toward that goal.<sup>172</sup> Judge Ezra’s second *Rice* opinion<sup>173</sup> confronted the issue of whether it is constitutional for the State of Hawai‘i to prevent persons who are not Native Hawaiians from voting to elect OHA’s Trustees. In this opinion, the judge examined in more detail the argument that the *Mancari* rational basis review approach “is not controlling because Native Hawaiians are not a recognized Indian tribe.”<sup>174</sup> Judge Ezra first acknowledged that the Hawaiians are not a federally recognized “tribe” and noted that they cannot obtain that status under current federal law,<sup>175</sup> which says that only “those American Indian groups indigenous to the *continental* United States”<sup>176</sup> are eligible for this status. Judge Ezra then observed, however, that “Native Hawaiians were incorporated into the United States twenty years after the treaty making era with Native

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167. Professor Benjamin saw the first of Judge Ezra’s *Rice* opinions prior to the publication of his article, and says simply that the judge “addressed the question fairly briefly.” Benjamin, *supra* note 21, at 540. The judge’s analysis of the constitutional questions raised by the plaintiffs covers over 12 pages in the Federal Supplement, *see Rice (I)*, 941 F. Supp. at 1539-52, with four of those pages focusing directly on the Equal Protection Clause issue, *id.* at 1540-44.

168. *Rice (I)*, 941 F. Supp. at 1541.

169. *Id.* at 1542.

170. *Id.* (citing numerous federal statutes).

171. *Id.* at 1543.

172. *Id.*

173. *Rice v. Cayetano (II)*, 963 F. Supp. 1547 (D. Haw. 1997).

174. *Id.* at 1549.

175. *Id.* at 1553 & n.7; *see also Rice (I)*, 941 F. Supp. at 1542 n.16.

176. 25 C.F.R. § 83.3 (1998) (emphasis added).

Americans was finished,"<sup>177</sup> and hence that the types of documents that regulate relationships with other natives were not developed for Native Hawaiians.

Noting that Congress has recognized that a special relationship exists between the United States and Native Hawaiians in numerous enactments,<sup>178</sup> Judge Ezra ultimately concluded that legislation favoring or providing separate programs for Native Hawaiians therefore must be evaluated under the same rational basis review that applies to other native groups because the Native Hawaiians have "developed their own trust relationship with the Federal Government. . . . As it is the unique guardian-ward relationship that is paramount, not formal recognition, the court finds that *Morton [v. Mancari]* is equally applicable to Native Hawaiians as to formally recognized Native Americans."<sup>179</sup> In reaching this conclusion, Judge Ezra ruled explicitly that the restriction of OHA elections to Native Hawaiians "*is not based on race*, but upon a recognition of the unique status of Native Hawaiians."<sup>180</sup>

Perhaps most compelling, however, are the conclusions of the United States Court of Appeals for the Ninth Circuit, which has always recognized that Native Hawaiians are a separate people and have upheld and enforced the separate programs that have been established for them.<sup>181</sup> The Ninth Circuit has also repeatedly observed that the Admission Act's ceding of land to the new State of Hawai'i in the Admission Act gave rise to a "trust obligation" between the United States and Native Hawaiians.<sup>182</sup> One recent decision is particularly noteworthy.

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177. 963 F. Supp. at 1553.

178. *See id.* at 1553-54 & nn.8-9; *cf. supra* note 67 (listing additional statutes).

179. *Id.* at 1553-54 (emphasis added).

180. *Id.* (emphasis added).

181. *See, e.g.,* *Pai`Ohana v. United States*, 76 F.3d 280 (9th Cir. 1996) (recognizing the existence and legitimacy of Native Hawaiian tenant rights created under the Hawai'i State Constitution and state statutes); *Napeahi v. Paty*, 921 F.2d 897 (9th Cir. 1990) (concluding that submerged lands surrounding the Hawaiian Islands were included in the public land trust, the proceeds of which should be used for the benefit of Native Hawaiians pursuant to the 1959 Admission Act).

182. *See, e.g.,* *Price v. Akaka*, 928 F.2d 824, 826-28 (9th Cir. 1991) (holding that Native Hawaiians had standing to bring claims under 42 U.S.C. § 1983 to challenge expenditures of the Trustees of the Office of Hawaiian Affairs because of "trust obligations" established by Congress in section 5(f) of the 1959 Admission Act); *Price v. Hawai'i*, 764 F.2d 623, 627 (9th Cir. 1985) (examining the applicability of federal court original jurisdiction statute for Indian tribe cases, and observing that "native Hawaiians *in general* may be able to assert a longstanding aboriginal history" sufficient to give rise to standing under the statute, and that the 1959 Admission Act codified "a trust obligation" between the United States and the Native Hawaiian people "that constitutes a 'compact with the United States.'"); *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n*, 739 F.2d 1467 (9th Cir. 1984) (finding the same right of action for the same reasons in a claim filed by Native Hawaiians against a county's appropriation of trust lands).

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In 1998, the Ninth Circuit directly addressed the status of Native Hawaiians when reviewing Judge Ezra's second opinion in *Rice v. Cayetano*,<sup>183</sup> which concerned the constitutionality of preventing non-Hawaiians from voting for the OHA.<sup>184</sup> Although the opinion is written cautiously, it contains clear language recognizing the special status of the Native Hawaiian people. It concludes decisively that limiting the OHA voters to persons of Hawaiian ancestry *is* constitutional.<sup>185</sup>

The opinion for a unanimous panel, written by Judge Pamela Ann Rymer, begins its substantive analysis by noting that "the constitutionality of the racial classification that underlies the trusts and OHA is not challenged in this case,"<sup>186</sup> and that the only issue before the court is whether the restrictive voting system used to elect OHA Trustees is constitutional.<sup>187</sup> The opinion then examines the issue under the Fourteenth and Fifteenth Amendments and concludes that the restriction to persons of Hawaiian ancestry is constitutional because "the voting restriction is not primarily racial, but legal or political."<sup>188</sup>

The court reaches this conclusion even though it recognizes that the provisions in Hawai'i's Constitution<sup>189</sup> and statutes<sup>190</sup> restricting voters to persons of Hawaiian ancestry do "contain a racial classification on their face."<sup>191</sup> The court notes that "restricting voter eligibility to Hawaiians cannot be understood without reference to what the vote is for."<sup>192</sup> After explaining that the OHA has limited rather than general governmental powers, the court draws a rough analogy between restricting the OHA franchise to those voters of Hawaiian ancestry and restricting the franchise of special purpose water-district elections to property owners, a longstanding practice which has been found constitutional by the United States Supreme Court.<sup>193</sup> But the court also concludes that although the

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183. *Rice v. Cayetano*, 146 F.3d 1075 (9th Cir. 1998), *aff'g* *Rice v. Cayetano* (II), 963 F. Supp. 1547 (D. Haw. 1997), *petition for cert. filed*, U.S.L.W. (daily ed. Dec. 2, 1998) (No. 98-818).

184. *See supra* text accompanying notes 83, 86-89 (discussing OHA).

185. *See Rice*, 146 F.3d at 1082.

186. *Id.* at 1079. The footnote to this remark reads as follows: "In this connection, we note that the scholarly work upon which *Rice* relies—and others that we have read—focuses on the underlying arrangement and its constitutionality, not on the voting rights provision at issue here." *Id.* at 1079 n.10 (citing Benjamin, *supra* note 21; Van Dyke, *supra* note 32).

187. *See id.* at 1079.

188. *Id.*

189. *See* HAW. CONST. art. XII, § 5.

190. 2 HAW. REV. STAT. ANN. § 13D-3(b) (Michie 1995). *See also id.* § 10-2 (defining the term "Hawaiian" as "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii.")

191. *Rice*, 146 F.3d at 1079.

192. *Id.* at 1079-80.

193. *Id.* at 1080 (citing *Ball v. James*, 451 U.S. 355 (1981); *Salyer Land Co. v. Tulare Water*

water-district cases have some “applicability,” they are not “dispositive,” because this case involves a qualification based on “race instead of ownership of land.”<sup>194</sup>

Judge Rymer next turns to the special status of the Native Hawaiian people and states that “the voting restriction for trustees is rooted in historical concern for the Hawaiian race,”<sup>195</sup> citing the Hawaiian Homes Commission Act, the Admission Act, and the 1993 Apology Resolution.<sup>196</sup> She then recognizes 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 the OHA to administer them, *is similar to the treatment of Indians* that the Supreme Court approved in *Morton v. Mancari*.”<sup>197</sup>

Just as it has earlier said of the special-district voting cases, the opinion states that *Mancari* is not “controlling,”<sup>198</sup> but *Mancari* appears to be at least helpful in convincing the court that this unique election procedure is constitutional. The opinion then connects the water-district and *Mancari* rationales to conclude that “to permit only Hawaiians to vote in special elections for trustees of a trust that we must presume was lawfully established for their benefit does not deny non-Hawaiians the right to vote in any meaningful sense”<sup>199</sup> and therefore that Rice’s Fifteenth Amendment right to vote has not been violated.

After proceeding cautiously and carefully through the Fifteenth Amendment analysis, the Ninth Circuit provides a dramatic and sweeping Fourteenth Amendment opinion. Judge Rymer states without hesitation that restricting the vote to persons of Hawaiian ancestry meets the “rational basis” level of judicial review: “We have no trouble under-

Dist., 410 U.S. 719 (1973)).

194. *Id.*

195. *Id.*

196. *See supra* note 4.

197. *Rice*, 146 F.3d at 1081 (emphasis added) (citation omitted). The court also cited *Alaska Chapter, Associated General Contractors v. Pierce*, 694 F.2d 1162, 1168 n.10 (9th Cir. 1982), for the proposition that “preferential treatment that is grounded in the government’s unique obligation toward Indians is a political rather than a racial classification, even though racial criteria may be used in defining eligibility.” *Rice*, 146 F.3d at 1081. *Pierce* is discussed *supra* in the text accompanying notes 145-152.

198. *See Rice*, 146 F.3d at 1081.

199. *Id.* The court distinguishes the classic Fifteenth Amendment cases, *see, e.g.*, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Smith v. Allwright*, 321 U.S. 649 (1944); *Lane v. Wilson*, 307 U.S. 268 (1939), by emphasizing that the OHA election is “not equivalent to a general election.” *Rice*, 146 F.3d at 1081. The Court instead characterizes the OHA election as one to select persons to manage trust resources and concludes that it is perfectly logical to limit the voters to persons in the beneficiary class in order to “enhance representative governance and decision-making accountability.” *Id.* at 1081 n.18 (quoting Standing Comm. Rep. No. 59, reprinted in 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 644).

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standing why Hawai'i would want the people who have an interest in the trust to vote for trustees, and *it is rational* for the state to make this decision in light of its trust responsibilities for Hawaiians and native Hawaiians.”<sup>200</sup>

Then, in the climactic part of the opinion, the court rules that this electoral scheme also meets the “strict scrutiny” level of judicial review because of “the special trust relationship” between the state and the Native Hawaiian people and the government’s responsibility to promote native self-government. This language, central to the opinion, is quoted here in full:

[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 the 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.”<sup>201</sup>

The opinion ends by addressing the “least drastic alternative” component of the “strict scrutiny” test, concluding that “the restriction on voter eligibility is precisely tailored” to allowing the beneficiaries to manage their resources,<sup>202</sup> and that “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.”<sup>203</sup>

This important opinion does not resolve all of the constitutional questions concerning preferential and separate programs for Native Hawaiians, but it goes a long way toward clarifying these issues and putting to rest the view that all separate and preferential programs for Native Hawaiians are in danger of being declared unconstitutional. The opinion characterizes Native Hawaiians as “descendants of aboriginal peoples.”<sup>204</sup> It explicitly recognizes the “historical concern for”<sup>205</sup> and “special treatment of”<sup>206</sup> Native Hawaiians by the governments of the United States and the State of Hawai'i and “the special trust relationship”<sup>207</sup> that now

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200. 146 F.3d at 1082 (emphasis added) (citing *Morton v. Mancari*, 417 U.S. 535 (1974); *Alaska Chapter, Associated Gen. Contractors v. Pierce*, 694 F.2d 1162 (9th Cir. 1982)).

201. *Id.* (emphasis added) (quoting Standing Comm. Rep. No. 59, reprinted in 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 644).

202. *Id.* at 1082.

203. *Id.*

204. *Id.*

205. *Id.* at 1080.

206. *Id.* at 1081.

207. *Id.* at 1082.

exists. By focusing on the ultimate purpose for the establishment of the Office of Hawaiian Affairs, i.e., to create a mechanism whereby the Native Hawaiian people could control their own land resources through their own elected representatives,<sup>208</sup> the court recognizes that the important goal of promoting and facilitating self-governance for all natives also applies to the Native Hawaiian people. Although the opinion states cautiously that “[w]e express no opinion on the constitutionality of the underlying trust structure, or of OHA’s purposes,”<sup>209</sup> the court explains why this “underlying trust structure” was established and concludes that Native Hawaiians, like other natives, are entitled to control their own resources through their own elected representatives. Unless the reasoning and analytical approach found in this opinion is completely rejected, a future court would have to conclude that the “underlying trust structure” and the establishment of OHA are also constitutional.

*b. Other Decisions Rejecting Professor Benjamin’s Approach*

The native population whose legal status is most analogous to that of the Native Hawaiians is the Alaskan Natives. These natives, a heterogeneous mix of peoples including Eskimos, Indians, and Aleuts, were also excluded from federal benefit programs for many years. Like Hawai‘i, Alaska became part of the United States after the period of signing treaties with Indians ended,<sup>210</sup> and the rights of the Native Alaskans were largely ignored until passage of the Alaskan Native Claims Settlement Act (“ANCSA”) in 1971.<sup>211</sup> Once Congress did begin enacting preferential and separate programs for the Alaskan Natives, the courts immediately recognized that it was appropriate to evaluate these programs under the same rational basis standard of judicial review that applied to programs for Indians in the lower forty-eight states.

In *Morton v. Ruiz*,<sup>212</sup> issued four months prior to *Morton v. Mancari*, the Supreme Court discussed the special status of “Indians” in Alaska, thereby implying that all Alaskan Natives are “Indians” for purposes of

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208. At two locations, the opinion quoted from Standing Committee Report No. 59 of the 1978 Constitutional Convention of Hawaii, which emphasized that the purpose of creating OHA was to allow the Native Hawaiian people to elect their own representatives and to control their own assets. See 146 F.3d at 1081 n.18; *id.* at 1082.

209. *Id.* at 1079 n.11.

210. Alaska was officially admitted into the Union on January 3, 1959, and eight months before Hawai‘i’s admittance became effective on August 21, 1959. Compare Alaskan Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958) (codified as amended at 48 U.S.C. Ch. 2 (1988)), and Proclamation No. 3269, Jan. 3, 1959, 24 Fed. Reg. 81 (1959), with Admission Act of 1959, Pub L. No. 86-3, 73 Stat. 4, reprinted in 15 HAW. REV. STAT. ANN. 107 (Michie 1997).

211. Pub. L. No. 92-203, 85 Stat. 688 (codified at 43 U.S.C. §§ 1601-1629e (1994)).

212. 415 U.S. 199 (1974).

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determining the appropriate level of judicial review.<sup>213</sup> In 1976, five years after the passage of ANCSA and two years after *Mancari*, the U.S. Court of Appeals for the Ninth Circuit stated that, when the term “Indians” appears in federal statutes, this word, “as applied in Alaska, includes Aleuts and Eskimos,”<sup>214</sup> and that “the word ‘Indian’ is commonly used in this country to mean ‘the aborigines of America,’”<sup>215</sup> i.e., all peoples that are native to what is now the United States.

Two years later, in 1978, Chief Judge James von der Heydt of the United States District Court for the District of Alaska issued an important opinion in the case of *Eric v. Secretary of the United States Department of Housing and Urban Development*<sup>216</sup> concluding without qualification or limitation that the “common law doctrine” that the “federal government stands in a fiduciary relationship to native Americans applies to Alaska natives.”<sup>217</sup> To emphasize this conclusion, he added that “[t]he fact that a treaty between the United States and Alaska Natives never existed does not affect the existence of the trust relationship.”<sup>218</sup> The dispute in *Eric* involved a claim brought by native villagers in western and northern Alaska that the United States had violated its trust responsibilities in administering the Bartlett Act,<sup>219</sup> which had been enacted to provide housing funds for Alaskan Natives. The court noted the Senate Report’s indication that this program was “directed at ‘the Eskimos, Indians, and Aleuts [who] are in urgent need of such assistance’”<sup>220</sup> without any requirement that these natives be formally organized into federally recognized tribes. Citing *Morton v. Ruiz*, Chief Judge von der Heydt rejected the narrow arguments presented by the federal lawyers and stated that “[t]he trust doctrine is not limited to situations in which the government is managing property owned by an *Indian tribe* as defendants contend.”<sup>221</sup> The court also explicitly rejected the argument presented by the federal lawyers that it would be “impermissible” to provide housing for natives and not for nonnatives,<sup>222</sup> ruling that “it is the very nature of the trust doctrine that it apply to Native Americans and not to others.

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213. *See id.* at 212.

214. *Pence v. Kleppe*, 529 F.2d 135, 138 n.5 (9th Cir. 1976) (holding that Alaskan Natives may file claims for allotments of public lands under the Alaska Native Allotment Act).

215. *Id.* (quoting *United States v. Native Village of Unalakleet*, 411 F.2d 1255 (Ct. Cl. 1969)).

216. 464 F. Supp. 44 (D. Alaska 1978).

217. *Id.* at 46.

218. *Id.* at 46-47.

219. 42 U.S.C. § 3371 (1994).

220. *Eric*, 464 F. Supp. at 49 (quoting S. REP. NO. 89-1455, at 16-20 (1966)).

221. *Id.* (emphasis added).

222. *Id.*

Such a distinction is neither unusual nor impermissible.”<sup>223</sup> Numerous other decisions—including in particular the *Pierce* case discussed above<sup>224</sup>—have treated Alaska Natives as “Indians” for a variety of purposes.<sup>225</sup>

Although few courts outside of Alaska and Hawai'i have confronted the argument that programs aiding nontribal Indians must endure “strict scrutiny, those that have addressed this argument have rejected it. They have ruled, for example, that it is not a violation of federal statutes or the Constitution to spend federal funds on projects for Native Americans, even if the funding is given to an organization that is not an “Indian tribe” and even if the organization provides housing for nontribal natives.

The case most directly on point is *St. Paul Intertribal Housing Board v. Reynolds*,<sup>226</sup> which examined the issue of whether federal funds administered by the Department of Housing and Urban Development (“HUD”) could be provided to a nonprofit corporation established to provide housing for low-income Indian families. The Office of Legal Counsel of the Department of Justice argued that HUD funds could not be provided to this nonprofit corporation because it was not an “Indian tribe” and because its benefits extended to nontribal Indians. The court rejected this argument, resting its decision on three bases. The first was the variety of congressional enactments promoting housing assistance for Indians generally,<sup>227</sup> the second was the decisions in *Morton v. Ruiz* and *Eric v. Secretary of the United States Department of Housing and Urban Development*,<sup>228</sup> and the third was the canon of interpretation that “statutes passed for the benefit of Indians must be liberally construed in their favor.”<sup>229</sup> The court therefore applied a rational basis test to this deployment of funds to nontribal Indians.<sup>230</sup>

Another relevant precedent is *Little Earth of United Tribes, Inc. v. United States Department of Housing and Urban Development*,<sup>231</sup> which involved an effort by HUD to foreclose its mortgage on the Little Earth

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223. *Id.* (citation omitted) (citing *United States v. Antelope*, 430 U.S. 641 (1977)).

224. *See supra* text accompanying notes 145-152.

225. *See, e.g.*, *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89-90 (1918); *Territory of Alaska v. Annette Island Packing Co.*, 289 F. 671, 674 (9th Cir. 1923) (holding that nontribal Indians who had moved from British Columbia, Canada, to Alaska were nonetheless “wards” of the United States who stood “in the same relationship to the United States as do Indians on other reservations”); *Aguilar v. United States*, 474 F. Supp. 840, 846 (D. Alaska 1979) (holding that some high fiduciary standards that apply to other Native Americans also apply to Native Alaskans).

226. 564 F. Supp. 1408 (D. Minn. 1983).

227. *Id.* at 1411-12.

228. *Id.* at 1414.

229. *St. Paul*, 564 F. Supp. at 1411.

230. *Id.* at 1413.

231. 675 F. Supp. 497 (D. Minn. 1987).

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Housing Project in Minneapolis, “the only major, urban housing project in the country run by American Indians.”<sup>232</sup> It was developed and run by the South High Nonprofit Housing Corporation, an organization created in 1971 for this purpose with the assistance of HUD, which insured loans and provided subsidy “interest reduction payments.”<sup>233</sup> In 1975, South High was restructured under the sponsorship of the American Indian Movement and renamed the Little Earth of United Tribes, Inc.<sup>234</sup> The court permitted HUD to foreclose on its mortgage, but, in the course of its opinion, it noted that “the long recognized trust relationship between the federal government and American Indians”<sup>235</sup> justified the federal support of this project even though it was not operated directly by an Indian tribe and even though it benefited Indians who were not living as part of a tribe:

This *trust relationship* creates a *fiduciary obligation* on the part of the United States government, including its various agencies, to act in the best interests of the American Indian people generally. *United States v. Mason*, 412 U.S. 391, 399 (1973).

The trust relationship extends not only to Indian Tribes as governmental units, but to *tribal members living collectively or individually, on or off the reservation*.<sup>236</sup>

This language was quoted with approval in a 1997 decision of the United States Court of Appeals for the Eighth Circuit, *Loudner v. United States*,<sup>237</sup> in which the court approved the payment of funds to Indians who were lineal descendants of tribal members *but who themselves were not members of any tribes*. In a holding similar to that of the Supreme Court in *Delaware Tribal Business Committee v. Weeks*,<sup>238</sup> the Eighth Circuit ruled that persons of Indian ancestry who were not members of any federally recognized tribe were entitled to benefit from a financial distribution program and that the U.S. government had a continuing fiduciary responsibility to these individuals.<sup>239</sup>

These cases demonstrate unequivocally that *Mancari*'s application of rational basis judicial review to preferential or separate programs for native people is not rigidly bound by a formalistic “Indian tribe” requirement. Professor Benjamin argues that, because Native Hawaiians have

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232. *Id.* at 501.

233. *Id.*

234. *Id.* at 502.

235. *Id.* at 535.

236. *Id.* (emphasis added) (citing *Morton v. Ruiz*, 415 U.S. 199, 237 (1974); *St. Paul Intertribal Housing Board v. Reynolds*, 564 F. Supp. 1408, 1413-14 (D. Minn. 1983)).

237. 108 F.3d 896, 901 (8th Cir. 1997).

238. 430 U.S. 73 (1977); *see* discussion *supra* notes 129-137.

239. 108 F.3d at 899, 900-901.

not been formally recognized by Congress as an "Indian tribe," they cannot have any special status in our legal system. Benjamin's perspective not only is at odds with established federal Indian law, but flies in the face of consistent recognition by the United States Congress<sup>240</sup> and by numerous court decisions<sup>241</sup> of the unique relationship between Native Hawaiians and the national government.

### B. *Judicial Review of State Programs for Natives*

Professor Benjamin presents the additional argument that, even if *federal* programs benefiting Native Hawaiians are found to meet constitutional standards, the establishment of the OHA by the State of Hawai'i "might be subject to strict scrutiny in any event" because *states* do not have the same power to establish programs for native people as the federal government.<sup>242</sup>

It is true that courts have examined legislation affecting natives enacted by state legislatures more carefully than congressional enactments because historically state and local authorities have frequently been hostile to natives.<sup>243</sup> Even today, "tense situations continue to arise over such matters as tribal economic development, hunting and fishing rights."<sup>244</sup> In many communities, however, the relationship between natives and non-natives is constructive and friendly, and state governments are frequently able to provide assistance in a more direct manner than the federal government. Many state governments have a long history of productive relationships with the natives within their borders.<sup>245</sup> States have frequently granted a special status to native groups that lacked federal recognition. The State of Maine, for instance, had "enacted approximately 350 laws which related specifically to the Passamaquoddy Tribe" between the time Maine was admitted to the Union as a state and 1975.<sup>246</sup> The State of Ha-

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240. See *supra* notes 67-80 and accompanying text.

241. See *supra* Subsection II.A.3.a.

242. Benjamin, *supra* note 21, at 592 n.217 (quoting *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 500-01 (1979)).

243. See, e.g., *United States v. Kagama*, 118 U.S. 375, 383-84 (1886) ("These Indian tribes . . . owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.").

244. Goldberg-Ambrose, *supra* note 31, at 183.

245. For a list of some of the many state-funded organizations designed to assist native communities, see Van Dyke, *supra* note 32, at 81-83. For a description of state-chartered corporations, state-municipal corporations, and political subdivisions established by states to promote self-governance and self-sufficiency by native people, see Kahanu & Van Dyke, *supra* note 13, at 433-37, 453-61.

246. *Joint Tribal Council v. Morton*, 528 F.2d 370, 374 (1st Cir. 1975). The court upheld these laws because "[v]oluntary assistance rendered by a state to a tribe is not necessarily inconsistent with federal protection." *Id.* at 378. For other examples of state aid for Native Americans, see *United States v. John*, 437 U.S. 634, 652 n.23 (1978) (describing efforts by the State of

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wai'i has been particularly involved in addressing concerns of Native Hawaiians, because the seat of the federal government is so geographically remote and the situation of the Native Hawaiians is unique.<sup>247</sup>

In actual practice courts employ a "strict scrutiny," or otherwise enhanced level of judicial review, only if a state is acting in a manner that is incompatible with the approach taken by the federal government. In *Washington v. Washington State Commercial Passenger Fishing Vessel Association*,<sup>248</sup> for instance, the Supreme Court summarily rejected arguments that state fishing regulations protecting Indian treaty rights violated equal protection laws. In doing so, the Court applied a rational basis test.<sup>249</sup>

A similar approach was used by the Court of Appeals for the Fifth Circuit in *Peyote Way Church of God v. Thornburgh*,<sup>250</sup> which upheld under *Morton v. Mancari's* deferential rational basis review, a Texas law providing an exemption from its peyote laws for Indian members of the Native American Church.<sup>251</sup> This opinion specifically addresses the issue whether states may enact laws providing preferential programs for natives and rules that such enactments are appropriate if pursuant to "an implied congressional will."<sup>252</sup> The opinion also emphasizes "the settled principle of statutory construction that 'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.'"<sup>253</sup>

Similar rulings among the lower courts abound. The Court of Appeals for the Ninth Circuit in *Squaxin Island Tribe v. Washington*<sup>254</sup> upheld vendor agreements promulgated by the Washington State Liquor Control Board that gave Indian vendors more favorable treatment than non-

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Mississippi to assist the Choctaw Indians remaining within its borders); *Prince v. Board of Education*, 543 P.2d 1176, 1183 (D.N.M. 1975) (describing approvingly the efforts of the State of New Mexico to operate schools and enforce compulsory attendance laws on the Navajo Reservation with the consent of the tribe and the federal government).

247. See *supra* text accompanying notes 81-96 (discussing examples of programs established by the State of Hawai'i for the Native Hawaiian people).

248. 443 U.S. 658 (1979).

249. *Id.* at 673 n.20; see also *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) ("The upshot has been the repeated statements of this Court to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law."). Professor Goldberg-Ambrose has similarly observed that "the lower federal courts have been generous in finding federal authorization for state Indian legislation." Goldberg-Ambrose, *supra* note 31, at 182 n.66 (citing *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991); *Livingston v. Ewing*, 455 F. Supp. 825 (D.N.M. 1978); *St. Paul Intertribal Housing Bd. v. Reynolds*, 564 F. Supp. 1408 (D. Minn. 1983)).

250. 922 F.2d 1210 (5th Cir. 1991).

251. See *id.* at 1214, 1216.

252. *Id.* at 1219.

253. *Id.* (quoting *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976)).

254. 781 F.2d 715 (1986).

Indians: “No compelling state interest need be shown since preferential treatment for tribal members is not a racial classification, but a political one.”<sup>255</sup> The United States District Court for the District of New Mexico, in *Livingston v. Ewing*,<sup>256</sup> upheld a program established by the Museum of the State of New Mexico in Santa Fe that reserved the portal in front of the museum exclusively to Indian merchants selling genuine hand-made Indian arts and crafts in order to protect and preserve the culture and economic prosperity of the Indians in the Santa Fe area. Similarly, *Krueth v. Independent School District No. 38*<sup>257</sup> upheld, using rational basis review, a state statute allowing school districts without any explicit federal authorization to give preferences to Indians during reductions-in-force.

These decisions establish two propositions. First, that many states have had close and long-established links with their native peoples and have adopted separate or preferential programs for their benefit. Second, courts evaluate these programs under the rational basis test, unless they are directly contrary to federal programs. If the state initiatives promote self-government or are designed to protect native culture, then reviewing courts consistently uphold them. The only additional burden ever imposed upon these state programs is that they comport with general congressional policy and existing federal laws. Certainly the efforts undertaken by the State of Hawai'i to return land and resources to the Native Hawaiians and to facilitate self-determination, through the creation of the Office of Hawaiian Affairs and the other initiatives described above,<sup>258</sup> are consistent with congressional enactments recognizing a “special relationship” with the Native Hawaiians<sup>259</sup> and seeking a “reconciliation” with them.<sup>260</sup> Hawaii's programs for its native population should, therefore, be scrutinized under rational basis review and upheld.

### C. *Adarand and Croson*

Professor Benjamin states that “[perhaps] the most significant point” in support of his position “is that *Adarand Constructors v. Pena* and *City of Richmond v. J.A. Croson Co.* have changed the constitutional landscape.”<sup>261</sup> These decisions hold that courts should examine all govern-

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255. *Id.* at 722 (citing *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974)).

256. 455 F. Supp. 825 (D.N.M. 1978).

257. 496 N.W.2d 829 (Minn. Ct. App. 1993).

258. *See supra* notes 81-96 and accompanying text.

259. *See supra* notes 67-80 and accompanying text.

260. *See* Apology Resolution, *supra* note 4. *See also supra* notes 18-20, 44-50, 69, 71-75 and accompanying text (discussing the Apology Resolution).

261. Benjamin, *supra* note 21, at 567.

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mental actions that rely on “racial” categories under the “strict scrutiny” level of judicial review. But within a few days after *Adarand* was issued, the United States Supreme Court made it clear that its new holding was *not* designed to alter the way courts should review preferential or separate programs established for Native Americans. In *Oklahoma Tax Commission v. Chickasaw Nation*,<sup>262</sup> the Court unanimously reaffirmed the legitimacy of a preferential program (an immunity from state property taxation) for a native group without any reference to *Adarand* or any requirement that the government demonstrate a compelling interest to support the preference.

Professor Benjamin points out that the statutes involved in the *Adarand* and *Croson* cases included native people among the minority racial groups that were to benefit from the set-aside programs and that the Court did not suggest that any different review should apply to the natives than to the other groups.<sup>263</sup> As Professor Benjamin also notes,<sup>264</sup> however, no natives were involved as parties in these two cases, and the Court gave no special attention to the question of native rights. The list of minority groups that the City of Richmond used in the *Croson* case was taken from the list used by the federal government in a national set-aside program that had been upheld in *Fullilove v. Klutznick*,<sup>265</sup> and the Court criticized the City for not narrowly tailoring its list to correspond to the past discrimination that had existed in its region. It may well have been that the inclusion, for instance, of Eskimos and Aleuts on Richmond’s list would not even have passed the rational basis level of judicial scrutiny, given the historical absence of members of these groups in the Richmond area. In any event, the *Chickasaw* case removes any doubt about the continued validity of the *Mancari* line of cases authorizing the use of rational basis review to scrutinize preferential or separate programs for native people.

Another post-*Adarand* decision reconfirming the unique status of Native Americans is *Kiowa Tribe v. Manufacturing Technologies*.<sup>266</sup> By a 6-3 vote, the Court ruled that the Kiowa Tribe was entitled to sovereign immunity from suit in any state court on a commercial promissory note it had signed, regardless of whether the note was signed on the reservation. The natives thus have a substantially broader immunity than would be given to a foreign government that had similarly defaulted on a commer-

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262. 515 U.S. 450 (1995).

263. See Benjamin, *supra* note 21, at 567-68.

264. See *id.* at 568.

265. 448 U.S. 448 (1980).

266. 118 S. Ct. 1700 (1998).

cial note.<sup>267</sup> This protective opinion demonstrates again that the special status that natives have in our legal system is alive and well after *Adarand* and that Professor Benjamin is incorrect in asserting that *Adarand* has altered the constitutional landscape affecting native people.<sup>268</sup>

#### D. *Strict Scrutiny*

Even if the "strict scrutiny" test were applicable to preferential and separate programs established for Native Hawaiians such as the Department of Hawaiian Home Lands and the Office of Hawaiian Affairs, these programs should meet this heightened scrutiny test: The programs are carefully designed to promote the self-governance and self-sufficiency of a native people, which is certainly an overriding goal of our nation, reinforced by emerging norms of international law. The right to self-determination is the most basic of human rights under federal and international law, and efforts to facilitate the exercise of this right are mandated by fundamental principles of human rights and human decency.

The Ninth Circuit's 1998 *Rice v. Cayetano* decision explicitly acknowledged that restricting voters for the Office of Hawaiian Affairs to persons of Hawaiian ancestry would meet "strict judicial scrutiny" because "the scheme for electing trustees ultimately responds to the state's *compelling* responsibility to honor the trust" and is "precisely tailored" to allow the beneficiaries of the trust to manage their own resources.<sup>269</sup>

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267. See *id.* at 1708 (Stevens, J., dissenting). A third post-*Adarand* Supreme Court opinion continuing to recognize the special status of natives and resources is *Alaska v. Native Village of Venetie Tribal Government*, 118 S. Ct. 948 (1998). The Court's unanimous opinion, written by Justice Thomas, reversed the Ninth Circuit's decision that the land owned by the tribe was "Indian country," and hence denied the tribe's right to tax business activity conducted on the land. But the opinion also recognized that the status of the tribal land was ultimately a question for Congress, which the Court would respect: "Whether the concept of Indian country should be modified is a question entirely for Congress." *Id.* at 956.

268. In her opinion in *Rice v. Cayetano*, 146 F.3d 1075 (9th Cir. 1998), Judge Rymer includes the following footnote: "Although we questioned *Mancari's* continuing vitality in light of *Adarand* in *Williams v. Babbitt*, and Rice believes *Adarand* trumps both, we are bound by Supreme Court authority and our own precedent until overruled, which neither *Mancari* nor *Pierce* has been." *Id.* at 1081 n.17 (citation omitted). As explained in Section III.C., *infra*, Judge Kozinski's opinion in *Williams v. Babbitt*, 115 F.3d 657 (9th Cir. 1997), does suggest that *Adarand* may place some boundaries on when the *Mancari* rational basis test will apply to separate or preferential programs for natives, but he does not suggest that the core principle found in *Mancari* is at risk. The examples of problematic programs he offers (governmental programs that would give natives "a complete monopoly on the casino industry or on Space Shuttle contracts," *id.* at 665, indicate Judge Kozinski's concern that natives should not receive unlimited preferences regarding matters that are completely unrelated to their status as natives. He acknowledges, however, that special or preferential programs for natives should receive rational basis review when they are designed to address the unique situation of natives, i.e., when they relate to "land, tribal status, self-government or culture." *Id.* at 664.

269. 146 F.3d 1075, 1082 (9th Cir. 1998) (emphasis added); see also *Rice v. Cayetano* (I), 941 F. Supp. 1529, 1544 (D. Haw. 1996) (concluding that rational basis review was appropriate but also stating that 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 demon-

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Under the strict scrutiny test, each program designed for Native Hawaiians would have to be examined individually to establish a compelling state interest and sufficiently narrow tailoring. For instance, the 1996 Native Hawaiian Vote,<sup>270</sup> a polling of persons of Hawaiian ancestry to determine their views, was a logical and appropriate step in the process of restoring the Native Hawaiian nation and should pass strict scrutiny review as a narrowly tailored procedure designed to promote self-determination. In fact, an earlier decision of the United States Court of Appeals for the Ninth Circuit ruled that it was reasonable for the OHA Trustees to believe “that a referendum to determine Hawaiian opinion on the proper definition of ‘native Hawaiian’ was for the ‘betterment of the conditions of native Hawaiians’ as presently defined.”<sup>271</sup> Similarly, the establishment and support of the activities of the Department of Hawaiian Home Lands and of the Office of Hawaiian Affairs are narrowly tailored to promote self-determination, self-sufficiency, and cultural integrity for the Native Hawaiian people. Meeting the strict scrutiny standard should not be too difficult for most programs because the specific past discrimination against Native Hawaiians is patent, as acknowledged in the 1993 Apology Resolution and numerous other Congressional enactments.<sup>272</sup>

Professor Benjamin acknowledges that Native Hawaiians have suffered discrimination and deserve support and protection.<sup>273</sup> He contends, however, that strict scrutiny is so difficult to satisfy that the separate and preferential programs that have been established for Native Hawaiians would be found unconstitutional under this level of review.<sup>274</sup>

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strated by its constitution and the HHCA.”).

270. See *supra* notes 14, 94, 165-172 and accompanying text.

271. *Price v. Akaka*, 3 F.3d 1220, 1226 (9th Cir. 1993) (quoting Admission Act of 1959, Pub. L. No. 86-3, §5(f), 73 Stat. 4, 6 (1959)).

272. See *supra* note 69 and accompanying text. See also the findings in the Native Hawaiian Health Care Improvement Act Amendments of 1992, Pub. L. 102-396, 106 Stat. 1948 (1992) (codified at 42 U.S.C. §§ 11701-11714 (1994)).

273. See, e.g., Benjamin, *supra* note 21, at 584 n.194 (“when the government chooses to assist Native Hawaiians (as I believe it should)”; *id.* at 585 n.199 (“This is not to say that the federal government’s actions did not harm Native Hawaiians; they often did.”).

274. Professor Benjamin describes the high standard that must be met as follows:

To satisfy the compelling interest requirement, the state and federal governments could not rely on historical, societal discrimination against Native Hawaiians, nor could they rely on amorphous claims of discrimination in particular industries or spheres. Instead they would have to produce particularized findings sufficient to ensure that each challenged program was remedying the present effects of past discrimination in the relevant sphere. Moreover they would have to show that they identified discrimination with some specificity *prior* to enacting the relevant programs. In addition, relying on underrepresentation of native Hawaiians in a given industry or sector would be insufficient; the federal or state government would have to demonstrate “a ‘strong basis in evidence for its conclusion that remedial action was necessary.’” Such evidence, it appears, must rise to the level of a *prima facie* showing of discrimination against Native Hawaiians. Satisfying the narrow tailoring requirement, meanwhile,

Professor Benjamin appears to set the bar too high. In her *Adarand* opinion, Justice O'Connor went out of her way "to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"<sup>275</sup> In doing so, she relied in part on the case of *United States v. Paradise*,<sup>276</sup> which involved a state program to remedy discrimination by the Alabama State Troopers. All of the Justices agreed that a narrowly tailored race-based remedy would be constitutional because of the persistent and systematic discrimination that had pervaded that organization. What type of remedy is "narrowly tailored" will always depend on what wrong is being remedied and whether a spectrum of alternatives are available.<sup>277</sup>

Because the claim of the Native Hawaiian people is for the right to reestablish their sovereign government, which was overthrown with crucial United States military and diplomatic support,<sup>278</sup> and for the return of their collectively owned lands, which the United States has acknowledged were taken without compensation to or the consent of the Native Hawaiian people,<sup>279</sup> the programs established to benefit Native Hawaiians and promote their self-determination (like the Department of Hawaiian Home Lands and the Office of Hawaiian Affairs) are narrowly tailored programs specifically designed to remedy past abuses. The strict scrutiny test requires that the "least drastic alternative" be chosen, but, when the goal is to reestablish sovereignty and restore a land base, the *only* course of action is to proceed down a logical path toward those goals. Where justified claims for the reestablishment of a sovereign nation and for the return of collectively-owned lands are involved, programs developed by the state and federal government to facilitate the process of self-

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would depend upon a number of factors, including whether the relevant government considered race-neutral alternatives and found that they would not achieve the program's aims; whether the program excluded those who, though Native Hawaiian, "ha[d] [not] suffered from the effects of past discrimination" against Native Hawaiians; whether status as a Native Hawaiian is a requirement for eligibility or merely one of many factors; whether the program was temporary or at least provided for periodic review; and whether the program's effects on non-Native Hawaiians was significant or intrusive.

Benjamin, *supra* note 21, at 593-94 (citations omitted).

275. *Adarand Constructors v. Peña*, 515 U.S. 200, 237 (1995) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring)).

276. 480 U.S. 149 (1987).

277. In *Williams v. Babbitt*, 115 F.3d 657, 665-66 (9th Cir. 1997), Judge Kozinski argued that establishing a complete monopoly for Native Alaskans in the reindeer industry could not be viewed as a "narrowly tailored" remedy, because "[u]nlike a subsidy, set-aside or even a quota, an absolute ban deprives the disfavored racial group of all opportunity to participate." He also argued that "a race-conscious remedy will not be deemed narrowly tailored until less sweeping alternatives—particularly race neutral ones—have been considered and tried." *Id.* at 666. But excluding nonnatives in other contexts might well meet the "narrow tailoring" standard, because it might be the only effective way to protect the native culture and to allow the natives to govern themselves and to be economically self-sufficient.

278. See *Apology Resolution*, *supra* note 4.

279. See *id.*

determination and to promote economic self-sufficiency must be viewed as narrowly tailored and as constitutional.

### III. A COMPREHENSIVE STANDARD FOR JUDICIAL EVALUATION OF PROGRAMS FOR NATIVE PEOPLE

Professor Benjamin's article fails to provide an accurate analysis of the status of Native Hawaiians under United States law because it is written from a narrow and technical perspective without an appreciation of the centuries of development of native rights law and the particular struggles of the Native Hawaiian people. The treatment of native people by the United States has been brutal and uncaring for most of our history,<sup>280</sup> but in the past thirty-five years serious efforts have been made to redress these injustices,<sup>281</sup> to honor commitments made to native people, and to return to them the resources they need to maintain and develop their culture and to prosper economically. Native Hawaiians lag significantly behind other natives in the United States in reestablishing self-governance and control over their resources, but they are slowly making gains. They are now engaged in a process of self-determination designed to reestablish a sovereign Native Hawaiian nation.<sup>282</sup>

Professor Benjamin's crabbed reading of the law would apparently prevent the federal or state government from establishing any program to aid the Native Hawaiian people while this self-determination process is underway, unless the program meets what he calls the "enormous hurdle" of the "strict scrutiny" test.<sup>283</sup> In his view, governmental aid would be evaluated under the lower rational basis standard only if the Native Hawaiians were somehow finally recognized by the federal government as an "Indian tribe."<sup>284</sup>

This requirement is impossible for the Native Hawaiian people to meet. They are not culturally tribal or, indeed, "Indians."<sup>285</sup> The Native Hawaiian people are, however, unquestionably "native" or "aboriginal"

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280. For one of the many sad stories of governmental injustice, see the description of the Choctaw Indian history retold in *United States v. John*, 437 U.S. 634, 638-46 (1978). See generally DEE BROWN, *BURY MY HEART AT WOUNDED KNEE* (1970).

281. See DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON INDIAN LAW* 224-55 (4th ed. 1998) (describing 1961 to the present as the "era of self-determination").

282. See *supra* text accompanying notes 13-14, 81-96.

283. Benjamin, *supra* note 21, at 594.

284. See, e.g., *id.* at 598-611 (examining the prospect of Native Hawaiians organizing themselves into a tribe in order to obtain deferential judicial review).

285. Native Hawaiians also face a practical hurdle under the current federal statutes, because these statutes do not allow them to achieve federal recognition since they do not reside in the "continental United States." 25 C.F.R. § 83.3 (1978), *quoted in* *Rice v. Cayetano* (I), 941 F. Supp. 1529, 1542 (D. Haw. 1996).

or “indigenous” people.<sup>286</sup> They must and do have the same status as other native and indigenous people under federal and international law,<sup>287</sup> and—as every court that has considered this question has concluded<sup>288</sup>—preferential and separate programs for them are proper and constitutional, if these programs are rationally related to the Native Hawaiians’ status as native people.

The technical analysis in Professor Benjamin’s article fails to examine the policies underlying the separate treatment of native groups, which are crucial to understanding why programs for native people have traditionally been evaluated under a separate legal regime. In addition to the policy reasons discussed earlier regarding the historical political relationships between the United States and its native peoples, other reasons based on equity and common decency also support allowing native people to maintain a separate status.<sup>289</sup>

#### A. *Native People’s Entitlement to Separate and Preferential Programs*

Unlike most other ethnic groups, whose ancestors came to the United States understanding that they would be participating in a multicultural community,<sup>290</sup> the ancestors of native people made no such commitment. They were here and the forebears of the rest of us just arrived, without asking whether they were welcome.

Equally important is the fact that, unlike other ethnic groups who can look to their ancestral homelands to revisit their culture and see that their heritage is being maintained, native groups have nowhere else to look.<sup>291</sup> If they have no separate arena within which to maintain and develop their culture here, it will be lost forever, to everyone’s detriment.<sup>292</sup>

286. See generally Van Dyke et al., *supra* note 13, at 632-35 (discussing internationally recognized definitions of “indigenous people”); *id.* at 641 (characterizing Native Hawaiians as “indigenous”).

287. The applicable international law principles are discussed *infra* Section III.B.

288. See text *supra* Subsection II.A.3.a.

289. See Van Dyke, *supra* note 32, at 91.

290. This rationale obviously does not apply to African-Americans whose ancestors were brought here against their will.

291. Professor Goldberg-Ambrose has made this point concisely:

Very simply, if Indians do not have a protected land base and some substantial measure of self-determination, Indian culture will fade and ultimately disappear. The land, and communal definition of values, are too central to the existence of Indian societies . . . . [U]nlike other American ethnic groups, Indians cannot rely on perpetuation of their tradition in a home country abroad. If Indian culture vanishes in America, it vanishes altogether.

Goldberg-Ambrose, *supra* note 31, at 184 (citing Kenneth Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 337-40, 356 (1986)). A contrary position can be found in Williams, *Sometimes Suspect*, *supra* note 31, at 204 n.62 (asserting that “Indians are not unique in facing assimilation with no ‘home’ country to preserve their culture” and, “in any event, the preservation of culture as culture does not seem to [be] a morally appealing basis for

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It is now widely recognized that a strong sense of one's culture and heritage is an important element of personal well-being, and in communities across our country ethnic diversity is celebrated and nurtured. Because native groups tend to be relatively small in number and culturally unique, some opportunities for them to function with others from their group apart from the rest of us seems to be essential if they are to survive as distinct cultures and to evolve in a manner that is linked to their heritage.

### B. *International Law*

International law is part of the law of the United States.<sup>293</sup> United States courts are bound by treaties made "under the Authority of the United States"<sup>294</sup> and by customary international law, unless the norm of customary law is explicitly contradicted by a federal statute or unambiguous executive pronouncement.<sup>295</sup>

Emerging norms of international law confirm that indigenous people are entitled to separate and preferential programs.<sup>296</sup> The international community has recognized the rights of indigenous peoples in the International Labor Organization's Convention Concerning Indigenous and

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Indian law").

292. See Goldberg-Ambrose, *supra* note 31, at 181 n.63 ("[P]reservation of Indian culture . . . expands the range of aesthetics, values, and ideas available to the general public.").

293. See *The Paquete Habana*, 175 U.S. 677, 700 (1900).

294. U.S. CONST. art. VI.

295. See, e.g., *United States v. Palestine Liberation Organization*, 695 F. Supp. 1456, 1464-65 (S.D.N.Y. 1988); *The Over the Top*, 5 F.2d 838, 842 (D. Conn. 1925).

296. For a sampling of the growing body of literature recognizing the rights of indigenous people in international law, see generally S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (1996); GORDON BENNETT, *ABORIGINAL RIGHTS IN INTERNATIONAL LAW* (1978); S. James Anaya, *A Contemporary Definition of the International Norm of Self-Determination*, 3 *TRANSNAT'L L. & CONTEMP. PROBS.* 131 (1993); Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 *YALE J. INT'L L.* 127 (1991); Van Dyke et al., *supra* note 13, at 632-40. Each of these sources discusses the international treaties and resolutions that are summarized in this section.

In a report commissioned by the U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Special Rapporteur Jose Martinez Cobo described the right of indigenous peoples to self-determination as follows:

Self-determination, in its many forms, must be recognized as the basic precondition for the enjoyment by indigenous peoples of their fundamental rights and the determination of their own future.

. . . [S]elf-determination . . . constitutes the exercise of free choice by indigenous peoples, who must, to a large extent, create the specific content of this principle, in both its internal and external expressions, which do not necessarily include the right to secede from the State in which they live and to set themselves up as sovereign entities.

This right may in fact be expressed in various forms of autonomy within the State. . . .

Jose Martinez Cobo, *STUDY OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS*, U.N. ESCOR, Comm'n on Hum. Rts., Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, 36th Sess., Agenda Item 11, at 74, U.N. Doc. E/CN.4/Sub.1983/21/Add.8, paras. 580-81, U.N. Sales No. E.86.XIV.3 (1983).

Tribal Peoples in Independent Countries (ILO Convention 169)<sup>297</sup> and the United Nation's Draft Declaration of the Rights of Indigenous Peoples.<sup>298</sup> The principles accepted in these documents are evidence of emerging customary international law applicable in U.S. courts.

ILO Convention 169 explicitly requires governments to assist native peoples in attaining self-governance and self-sufficiency. Article 2 of the Convention calls for governments to play an active role with indigenous peoples in developing and protecting their rights.<sup>299</sup> Article 4 requires governments to take "special measures" to safeguard the institutions, property, and culture of native people,<sup>300</sup> and subarticle 6(1)(c) requires governments, in appropriate situations, to provide the resources necessary to enable native people to establish their own institutions and initiatives.<sup>301</sup> The current version of the Draft Declaration on the Rights of Indigenous Peoples similarly emphasizes their right to a separate and distinct status.<sup>302</sup>

Although ILO Convention 169 has not yet received wide ratification<sup>303</sup> and the Draft Declaration is still being worked on, these documents reflect current international thinking about the rights owed to native people by their governments. It would therefore be a violation of principles underlying international law for the United States to treat one of its largest native peoples in a manner that fails to recognize their right to a separate and distinct autonomous status.<sup>304</sup>

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297. Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, International Labour Conference, 28 I.L.M. 1382 [hereinafter ILO Convention 169].

298. Draft Declaration on the Rights of Indigenous Peoples as Agreed upon by the Members of the Working Group at its Eleventh Session, U.N. ESCOR, Comm'n on Hum. Rts., Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, 45th Sess., Annex 1, Agenda Item 14, at 50, U.N. Doc. E/CN.4/Sub.2/1993/29 (1993) [hereinafter Draft Declaration].

299. See ILO Convention 169, *supra* note 297, at 1385.

300. *Id.*

301. See *id.* at 1386. In addition, the Inter-American Commission on Human Rights, an organ of the Organization of American States (OAS) with representatives from the United States, has stated that "special protection for indigenous populations constitutes a sacred commitment" of all members of the OAS. IACHR, OEA/Ser.P.AG/doc.305/73 rev. 1, at 90-91 (1973); see BENNETT, *supra* note 296, at 61.

302. Language in the recent draft states, for instance, that "[i]ndigenous peoples have the collective right to live in freedom, peace and security as distinct peoples . . ." and that they have the right to be protected "any form of assimilation or integration by any other cultures . . ." Draft Declaration, *supra* note 298, arts. 6, 7(d). The Draft Declaration also states that indigenous peoples have the right to autonomy in internal and local matters such as education, information, media, culture, religion, health, housing, employment, social welfare, land and resource management, and internal taxation. *Id.* art. 31.

303. As of July 1998, ILO Convention 169 had been ratified by 13 countries: Bolivia, Colombia, Costa Rica, Denmark, Ecuador, Fiji, Guatemala, Honduras, Mexico, Netherlands, Norway, Paraguay, and Peru. Interview with Durwood Zaelke, Center for International Environmental Law (Dec. 30, 1998).

304. See, e.g., Torres, *supra* note 296, at 142 ("Self-determination can take a variety of

C. *What Level of Judicial Scrutiny Is Appropriate?*

Although Professor Benjamin is wrong in concluding that courts should use “strict scrutiny” when reviewing programs for Native Hawaiians, he may be correct that something more than minimum rationality review is appropriate. Native people have been given a deferential standard of judicial review because courts have understood that their singular situations require flexible political responses. But some judicial boundaries are still appropriate to ensure that legislative enactments establishing programs for natives are linked to the overall political justifications for treating them differently. It is appropriate, therefore, for reviewing courts to determine whether a particular program is at least rationally linked to protecting or promoting the interests of the native people *as natives*.

Professor Benjamin is also correct in sensing that native people must have some cultural commonality and historical continuity in order for a legislative body to rationally provide separate or preferential programs to aid them. The programs established for native people should be rationally linked to their quest for self-governance, self-sufficiency, and cultural integrity. In evaluating these programs, courts should and usually do require some real link to one of these goals.<sup>305</sup>

Under a “real rationality” approach, the court examines whether a program set up by a statute really has a rational relationship to its goals. In contrast, the “minimum rationality” approach allows the legislation to stand if it is possible to imagine one single legislator who would have concluded that the statute is rationally related to its goals. Under “minimum rationality” review, legislation is sustained unless only a “babbling idiot” would have supported it.<sup>306</sup>

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forms along a spectrum from autonomy in particular subject matters such as cultural concerns, to full political autonomy, in which indigenous populations establish their own governments, design their own political systems, and enforce their own laws.”). The autonomy approach is growing increasingly common. For example, in August 1998, Canada granted sovereign autonomy to Nisga’a people in British Columbia, conveying to them control of resources and internal affairs in an area of about 750 square miles near southern Alaska. See Anthony DePalma, *Canada Pact Gives a Tribe Self-Rule for the First Time*, N.Y. TIMES, Aug. 5, 1998, at 1.

305. If the governmental program is logically designed to protect or promote self-governance, self-sufficiency, or native culture, it should be deemed constitutional even if it appears arbitrary or favors one native group over another, because the legislative body should be entitled to weigh competing arguments and make necessary judgments regarding the allocation of scarce resources. See, e.g., *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 91 (1977) (Blackmun, J., concurring) (“Congress must have a large measure of flexibility in allocating Indian awards . . .”).

306. The “babbling idiot” formulation is attributed to Professor Jerry Mashaw in DANIEL A. FARBER ET AL., *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 284 (1st ed. 1993). Cases frequently cited as examples of the application of the “real rationality” approach are *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); *Reed v. Reed*, 404 U.S. 71 (1971).

A recent case that illustrates a “real rationality” approach is *Williams v. Babbitt*,<sup>307</sup> in which the Ninth Circuit overturned the Interior Board of Indian Appeals’ interpretation of the Reindeer Industry Act and allowed nonnatives to participate in reindeer herding, so as to avoid “grave” constitutional questions.<sup>308</sup> Judge Kozinski began his opinion for the court by noting that “[c]ontrary to popular belief, reindeer are neither native to Alaska nor part of the Alaskan native way of life.”<sup>309</sup> Because the reindeer were not intrinsically linked to the culture and traditional economic life of the Alaskan natives, the court was concerned that the *Adarand* “strict scrutiny” standard might apply if the statute were interpreted to grant natives a complete monopoly in the raising of the reindeer.

But the *Williams* panel did not conclude that *Adarand* had altered the basic principle of *Morton v. Mancari*, and it did not interpret *Mancari* narrowly to cover only legislation affecting “tribes.” Although the opinion cites Professor Benjamin’s article for two other propositions,<sup>310</sup> it rejects his perspective that only governmental activity related to “Indian tribes” is protected by *Mancari* from the strict scrutiny mandated by *Adarand*. Instead, it says that “[l]egislation that relates to Indian land, tribal status, self-government or culture passes *Mancari*’s rational relation test because ‘such regulation is rooted in the unique status of Indians as ‘a separate people’ with their own political institutions.’”<sup>311</sup> Two paragraphs later, the court says that *Mancari* shields “only those statutes that affect uniquely Indian interests” (using “Indian” in its generic meaning since the case involved Alaskan natives who are not “Indian” in the more limited sense used in federal statutes).<sup>312</sup> To illustrate his perspective, Judge Kozinski said, “we seriously doubt that Congress could give Indians a complete monopoly on the casino industry or on Space Shuttle contracts.”<sup>313</sup>

It is especially instructive that, even with the recognition that *Adarand* imposes some boundaries on when the *Mancari* “rational basis” review can be applied, the *Williams* decisions recognizes boundaries that are considerably broader than those that Professor Benjamin would permit. Judge Kozinski states explicitly that the rational-basis level of review applies to any matter affecting “Indian land, tribal status, self-

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307. 115 F.3d 657 (9th Cir. 1997).

308. *Id.* at 666.

309. *Id.* at 659.

310. *See Williams*, 115 F.3d at 663, 665.

311. *Id.* at 664 (emphasis added) (quoting *United States v. Antelope*, 430 U.S. 641, 646 (1977) (quoting *Morton v. Mancari*, 417 U.S. 535, 553 (1974))).

312. *Id.* at 665.

313. *Id.*

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government or culture.”<sup>314</sup> Certainly the establishment and support of the Department of Hawaiian Home Lands and the Office of Hawaiian Affairs would meet this standard, because they are designed to provide land to Native Hawaiians, to promote self-government, and to allow the Native Hawaiian culture to prosper.<sup>315</sup>

### *D. Three Permissible Goals: Self-Governance, Self-Sufficiency, and Native Culture*

The three proper goals for programs designed to benefit natives—i.e., self-government, self-sufficiency, and native culture—are uniquely linked to the special status of native peoples and are the essential requirements for their survival as distinct units. Self-government is an obvious choice, and it was explicitly recognized in both *Mancari*<sup>316</sup> and *Antelope*<sup>317</sup> as a proper governmental goal. The continuing integrity of the culture of the native people is also central to the purpose of recognizing their special status and should be easily acceptable as a proper goal, although disputes may arise as to what is the essential core of the native culture when it evolves from its traditional roots to take new forms in the modern era.

The goal of “self-sufficiency” may be controversial in some situations, especially when natives move into new economic activities. Enactments designed to protect the lands and resources of the native people are clearly proper and should be evaluated under the deferential rational-basis standard of judicial review. But what about statutes that give natives preferences with regard to economic activities outside their own lands? A preference for natives fishing in traditional streams can be easily linked to their traditional practices and cultural heritage.<sup>318</sup> But what if

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314. *Id.* at 664.

315. *See, e.g.*, *Rice v. Cayetano* (II), 963 F. Supp. 1547, 1556-57 (D. Haw. 1997) (citing the statutory description of the Office of Hawaiian Affairs codified at 1 HAW. REV. STAT. ANN. §§ 10-3 to 10-6 (Michie 1997)).

316. The key language in *Mancari* follows:

As long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians, such legislative judgments will not be disturbed.

Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress’ classification violates due process.

417 U.S. at 555 (emphasis added).

317. The *Antelope* opinion responded to a challenge that a federal criminal statute applied to Indians was racially discriminatory by saying that: “[S]uch regulation is rooted in the unique status of Indians as ‘a separate people’ with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a ‘racial’ group consisting of ‘Indians’ . . . .” *United States v. Antelope*, 430 U.S. 641, 646 (1977) (quoting *Mancari*, 417 U.S. at 553 n.24).

318. *See, e.g.*, *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 673 n.20 (1979) (upholding preferential Indian fishing rights recognized in a treaty); *United States v. Decker*, 600 F.2d 733, 740 (9th Cir. 1979) (applying “rational basis” review to uphold regulations exempting Indians from certain fishing restrictions).

the preference involves an economic activity that did not exist in traditional times, and yet can assist the native group to prosper economically and thus to maintain their cultural integrity and political autonomy?

In 1982, the United States Court of Appeals for the Ninth Circuit upheld under "rational basis" review a preference for Alaskan Natives in subcontracts on housing construction projects,<sup>319</sup> but in 1997 this same court suggested that "grave" constitutional questions would exist if it upheld an interpretation of 1937 Reindeer Industry Act that would give a monopoly to natives in the Alaskan reindeer industry.<sup>320</sup> Congress passed the Reindeer Act to give the Alaskan Natives a viable economic option after white settlers had exhausted their natural food supply by overhunting and overfishing.<sup>321</sup> If raising reindeer to sell their meat and antler velvet was not historically part of the native culture, should a legislative program that gives the natives a preference (or a monopoly position) in this industry be evaluated under the deferential rational basis review or the demanding strict scrutiny level of judicial review? Should natives be strait-jacketed into their traditional economic activities in a rapidly-evolving global economy in which everyone is forced to shift gears in order to remain competitive? The 1997 opinion in *Williams v. Babbitt* addresses serious questions that will require additional thinking, but it would be unfortunate if the facilitation of self-sufficiency were not seen as a valid goal for programs benefiting natives, and if this goal were not evaluated in a flexible fashion that allows native economies to evolve in light of changing economic times.

#### *E. Applying This Test to Programs Established for Native Hawaiians*

Justice Blackmun's opinion in *Morton v. Mancari* emphasized that the reason for using the more deferential rational basis review is to promote self-governance for native peoples.<sup>322</sup> He thus recognized the crucial similarity shared by all native peoples: the destruction of their sovereign autonomy and authority over their lands and resources. This recognition suggests that rational basis review should apply to all programs promoting self-governance, self-sufficiency, and cultural integrity of native groups, regardless of whether they are presently organized into "tribes."

As explained above,<sup>323</sup> the Native Hawaiian people had their own internationally recognized independent nation until 1893, at which time

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319. Alaska Chapter, Associated General Contractors of America v. Pierce, 694 F.2d 1162 (9th Cir. 1982).

320. See *Williams v. Babbitt*, 115 F.3d 657, 666 (9th Cir. 1997).

321. See *id.* at 659.

322. See *supra* text accompanying note 122.

323. See *supra* notes 37-54 and accompanying text.

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that nation was illegally overthrown. Since then, they have been working to restore their lost land and sovereignty. Native Hawaiians do not now have, and (in light of their unique Polynesian heritage) do not seek, formal federal recognition as an “Indian tribe.” They have, however, “developed their own trust relationship with the Federal Government as demonstrated by the passage of the [Hawaiian Homes Commission Act].”<sup>324</sup>

In the *Antelope* case, which Judge Kozinski cited in *Williams v. Babbitt*, the Supreme Court noted that “[f]ederal regulation of Indian tribes . . . is governance of once-sovereign political communities; it is not to be viewed as legislation of a ‘racial’ group consisting of ‘Indians’ . . .”<sup>325</sup> The Native Hawaiians were also a “once-sovereign political community” and were in fact an independent country recognized by other nations. The Native Hawaiians therefore have the same right as other native groups to have separate and preferential programs established for their benefit evaluated under rational basis review. In order to ensure that this more lenient scrutiny does not become a *carte blanche* for bizarre programs that have nothing to do with their heritage and cultural autonomy, it is appropriate to ensure that the governmental program is *in fact* rationally related to promoting or protecting native “land, tribal status, self-government, or culture.”<sup>326</sup> These terms should nonetheless be interpreted generously to include other native resources and economic self-sufficiency. Once a real link to these goals is demonstrated, courts should defer to the judgments of the political branches of government and allow the programs to function.

## IV. CONCLUSION

Native Hawaiians are unquestionably native people in the United States, and thus—as long as Hawai‘i remains part of the United States—they must be characterized as Native Americans. Although they are culturally and ethnically distinct from North American Indians and Alaskan Natives, the Native Hawaiians’ historical relationship with the United States is similar. Their lands and sovereign autonomy were taken from them without compensation or consent. Attempts were made to destroy their culture. Their population declined dramatically, and they occupy the bottom of the socio-economic scale in their native region.

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324. *Rice v. Cayetano* (II), 963 F. Supp. 1547, 1553 (D. Haw. 1997).

325. *United States v. Antelope*, 430 U.S. 641, 646 (1977) (emphasis added) (quoting *Morton v. Mancari*, 417 U.S. 535, 553 n.24).

326. *Williams*, 115 F.3d at 664 n.6.

The United States Congress has repeatedly and explicitly recognized that the United States has a "special relationship" with and a trust obligation to Native Hawaiians. The State of Hawai'i has inherited and accepted a substantial 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-government and self-sufficiency and to protect Native Hawaiian culture are consistent with Congressional initiatives. It is perfectly appropriate 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-government, self-sufficiency, or the culture of the Native Hawaiian people.

The Supreme Court's decisions do not support Professor Benjamin's contention that rational basis review is limited to "Indian tribes." The language he relies upon in the Indian Commerce Clause and in footnote twenty-four of *Morton v. Mancari*<sup>327</sup> is too general and tenuous to bear the weight of his conclusions. The distinction between tribal and non-tribal Indians which he thought was crucial to the decision in *Mancari* was explicitly rejected by the very justice who supposedly authored that opinion, and has not been followed by lower court decisions. Courts readily have recognized that the term "Indians" includes all native people in the United States, and the term "tribe" also has a generic meaning referring to any historically and culturally distinct group of native people.

The decisions in *Adarand Constructors v. Pena*,<sup>328</sup> and *City of Richmond v. J.A. Croson Co.*,<sup>329</sup> do not alter or undercut the rational basis standard of judicial review applicable to legislation that establishes separate or preferential programs for Native Americans.<sup>330</sup> Courts have appropriately imposed boundaries on programs designed for natives, however. This Article advocates a "real rationality" standard that requires a program to be designed to promote or protect self-governance, self-sufficiency, or native culture.

If Professor Benjamin were correct, his analysis would lead to the anomalous result that one level of judicial review would apply to legislative programs designed to favor one group of native people while a dramatically different level of judicial review would apply to programs for another group of similarly-situated native people. Native Hawaiians have never organized themselves into tribal units but they are otherwise just as "native" as other Native Americans. They have had a similarly awkward

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327. 417 U.S. 535, 553 n.24 (1974).

328. 515 U.S. 200 (1995).

329. 488 U.S. 469 (1989).

330. See, e.g., *Oklahoma Tax Comm'n v. Chickesaw Nation*, 115 S. Ct. 2214 (1995).

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historical relationship with the United States, in which the United States acquired substantial amounts of Native Hawaiian lands and made a systematic and concerted effort to destroy the Native Hawaiian culture. They now have a similar trust relationship with the federal government, which the State of Hawai'i has partially inherited, and numerous programs have been established for their benefit to compensate for past injustices and in recognition of their separate rights. If Professor Benjamin's analysis were correct, all these programs would be at risk.

States have historically helped native groups, particularly those that have not yet attained federal recognition, and state programs aiding natives that are consistent with federal goals should be evaluated under the rational basis standard of review.

Even if the "strict scrutiny" test were to apply, most benefit programs established by the state and federal governments for the Native Hawaiians would be able to meet this test, particularly in light of the systematic past discrimination imposed upon the Native Hawaiians, who had their collective lands and sovereignty taken from them, with the active participation of United States military and diplomatic agents, without compensation or consent. Creating and supporting organizations designed to allow a native group to regain its lands and sovereignty is a narrowly tailored method of achieving these compelling interests. Emerging international law principles authorize and require governments to assist their native communities to attain self-governance and self-sufficiency.

The Native Hawaiian people have their own unique "special relationship" with the United States and the State of Hawai'i. Although they are not "Indians," they have a comparable legal status. They are entitled under U.S. and international law to govern their own land and resources, to maintain and develop their own distinct culture, and to prosper economically. Programs established by the federal and state governments to promote these goals should be evaluated under rational basis judicial review.