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Seeking Sovereignty: The Akaka Bill and the Case for the Inclusion of Hawaiians in Federal Native American Policy

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I. INTRODUCTION

In January 1993, the United States took the extraordinary step of apologizing for its wrongdoing. Even more extraordinarily, the United States issued this apology to a native people. Public Law 103-1501 ("Apology Resolution") apologized to the Hawaiians2 who, prior to the illegal overthrow of their government with the help of the United States in 1893, existed as a self-governing people.3 As evidenced by the passage of the Apology Resolution, Congress

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2. Confusion exists about the naming of the aboriginal people of Hawai'i. Kanaka maoli, the aboriginal people's term for themselves, is defined as a full-blooded Hawaiian people by the leading Hawaiian language dictionary. See MARY KAWENA PUKU'I & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 127 (revised and expanded ed. 1986). At times, people of 50% or more Hawaiian blood have been termed "Native Hawaiians." The term "Hawaiian" in most legislation means any person descended from the pre-1778 inhabitants of Hawai'i. See Marion Kelly, Hawai'i Committee for the Humanities Study, in HAWAIIAN SOVEREIGNTY: MYTHS AND REALITIES 1 (1992); Lisa Cami Oshiro, Comment, Recognizing Na Kanaka Maoli's Right to Self-Determination, 25 N.M. L. REV. 65 (1995).
and President Bill Clinton duly acknowledge that Hawaiians "never directly relinquished their claims to their inherent sovereignty."^4

Congress strangely does not uniformly recognize Hawaiians as Native Americans who have a right to self-determination, despite their status as a formerly-sovereign, indigenous people who inhabit a current American state. In response to this oversight and the continuing disparaging effects of the forcible American seizure of Hawaiian lands, many Hawaiians today advocate sovereignty from the United States, much like the sovereignty to which Native American tribes in the other forty-nine states are entitled. Inclusion of Hawaiians into federal Native American policy would ease the way to making this goal a reality and saving a people and culture on the verge of extinction.

Federal policy in modern times has focused upon granting greater degrees of self-government to Native Americans, particularly those organized into tribes. However, based upon case law, constitutional analysis, and policy, Hawaiians probably need not organize into a federally-recognized tribe for courts to subject legislation granting them preferential programs to a minimal standard of review. Although not currently organized into tribes, Hawaiians have a special relationship with the federal government based on trust obligations incurred as a result of the United States's acquisition of Hawai'i. Courts have considered this trust relationship an adequate basis for analogizing Hawaiians to Native Americans on the mainland United States and reviewing legislation granting them preferential programs under the rational basis standard.

Application of a minimal standard of review would aid Hawaiians in their quest for self-determination. Congress's goal of granting more self-determination to Native Americans

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4. 100th Anniversary of the Overthrow of the Hawaiian Kingdom, 107 Stat. at 1512.
6. See id. at 96-97.
on the mainland is aided by the courts’ application of a low standard of review. The same would happen with Hawaiians; should Congress formally acknowledge their status as Native Americans who have a special trust relationship with the federal government, some form of sovereignty would come within the Hawaiian grasp.

A recent ruling by the U.S. Supreme Court supplies renewed vigor for the burgeoning sovereignty movement. *Rice v. Cayetano*, 9 which invalidated on Fifteenth Amendment grounds the Hawaiians-only election for officers of a state-affiliated organization, 10 sent shockwaves through the Hawaiian community. The Supreme Court decision made many fear that congressional programs benefiting Hawaiians are in danger.

A bill, introduced in the 106th Congress and to be reintroduced in the 107th, would make some form of sovereignty a reality. The “Akaka Bill,” 11 named after Hawaiian senator Daniel K. Akaka who introduced the bill, would at the very least ensure the continuation of programs benefiting Hawaiians. The bill cleared the U.S. House of Representatives on September 26, 2000. 12 It died in the Senate on December 13, 2000, when it could not overcome Republican objections. 13

However, the Akaka Bill does not have universal support. During the joint congressional hearings on the bill in Hawaii in late August, opponents made their voices heard. Those who opposed the bill did so primarily on the basis that Hawaiians should seek not only a Native American-style sovereignty, but complete independence from the United States.

This comment will detail the legal justifications for including Hawaiians in federal Native American policy, as the Akaka Bill would do, and respond to activists who prefer that Hawaiians seek complete independence from the United States. Initially the discussion will focus upon the relevant history of the Hawaiian people and the illegal overthrow of

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10. See id.
their government. Pertinent constitutional provisions and congressional acts will be examined. Case law concerning United States treatment of Native American tribes as sovereign nations and the tribal requirement for the application of rational basis as a standard of review will also be analyzed. The current status of the Hawaiian sovereignty movement will also be reviewed, as will be the threat introduced by the Supreme Court in Rice v. Cayetano. The potential panacea to this threat, the Akaka Bill, will be detailed. Ultimately the relevant issue of whether Hawaiians should be included in federal Native American policy, thus subjecting potential legislation on sovereignty to mere rational basis review, will be explored. The comment then will propose that Hawaiians as Native Americans should be allowed to form their own sovereign nation with minimal interference from Congress and the courts, and that this should happen as soon as possible. Furthermore, this comment will propose that the Akaka Bill is the surest method of accomplishing sovereignty while also not prohibiting Hawaiians seeking complete independence from continuing their mission.

II. BACKGROUND

A. Historical Setting

People first arrived in what is now known as the Hawaiian Islands as early as 375 A.D.; they came from the Marquesas Islands, another Polynesian archipelago. However, Hawaiians trace their origins back even further through oral tradition, believing themselves to be descended

14. See discussion infra Part II.A.
15. See discussion infra Part II.B.
17. See discussion infra Part II.C.2.
18. See discussion infra Part II.D.
19. See discussion infra Part II.E.
20. See discussion infra Part II.F.
21. See discussion infra Part III.
22. See discussion infra Part IV.
23. See discussion infra Part V.
from forces of nature.\footnote{25} Centuries of isolation and a pristine environment allowed the population and its culture to flourish.\footnote{26} When Captain James Cook “discovered”\footnote{27} Hawai‘i in 1778 while en route to Tahiti, an estimated 250,000-800,000 Hawaiians inhabited the eight islands altogether.\footnote{26} Hawaiians lived in a thriving society, from which resulted a distinct culture, language, and dance.\footnote{29} They lived in a system of chiefdoms and communal land tenure\footnote{30} where the chiefs held the land for the benefit of all,\footnote{31} allowing commoners to cultivate the soil for a small tax of produce and labor.\footnote{32} Hawaiians viewed possessiveness and acquisitiveness as undesirable characteristics.\footnote{33}

\begin{footnotesize}
\footnote{25}{See Trask, supra note 5, at 80. As Hawaiian political activist Haunani-Kay Trask recites:}\\
In the mo'olelo (history) of Papa and Wakea, earth mother and sky-father, our islands are born. . . . From their human offspring came the taro plant and from the taro came the Hawaiian people. The lessons of our genealogy are that human beings have a familial relationship to land and to the taro, our elder siblings or kua'ana.}\\
\footnote{Id. at 186.}{See Dougherty, supra note 24, at 20.}\\
\footnote{27}{See id. at 32.}{See id. at 32.}\\
\footnote{28}{See Eleanor C. Nordyke, The Peopling of Hawai‘i 17 (2d ed. 1989) (stating that the lower figure, resulting from a study done by scholars Romanzo Adams, Andrew Lind, Bernard Hormann, and Robert Schmitt, represents the most accepted statistic); see also David E. Stannard, Before the Horror: The Population of Hawai‘i on the Eve of Western Contact (1989). Stannard estimates the population at that time to be between 675,000 and 800,000, based upon the capacity of the islands to house and feed, birth rates in similar societies, and observations by early visitors. He postulates that many historians place the population at a lower number in part based upon the disbelief that the forthcoming epidemics could have wiped out such huge numbers of people. See id.; see also Benjamin B. C. Young, The Hawaiians, in People and Cultures of Hawai‘i: A Psychocultural Profile 5, 10 (John F. McDermott, Jr. et al. eds., 1980) (noting that by 1930, the Hawaiian population had plunged to 60,000).}\\
\footnote{29}{See Jon M. Van Dyke et al., Self-Determination for Non-Self-Governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawai‘i, 18 Haw. L. Rev. 623, 635 (1996).}\\
\footnote{32}{See Gavan Daws, Shoal of Time 125 (1968).}\\
\footnote{33}{See Dougherty, supra note 24, at 18; see also Trask, supra note 5, at 4 (“[I]t [the early Hawaiian culture] was as antithetical to the European developments of . . . capitalism and predatory individualism as any society could have been.”).}
Beginning with King Kamehameha I’s unification of the Islands in the late 18th century, a system of royalty ruled the Kingdom of Hawai‘i as a sovereign nation. By the time a Western-style governmental structure was established in 1840, Hawai‘i had already negotiated foreign treaties and agreements with countries such as Great Britain, France, and the United States. The United States recognized the sovereignty of Hawai‘i in the Tyler Doctrine, issued on December 30, 1842.

Along with their government style, Westerners also introduced diseases to which Hawaiians had no immunity, starting a rapid decline in the native population. The first diseases to infect the Islands were venereal diseases, introduced to Hawai‘i by Captain Cook’s men. These diseases, such as syphilis and gonorrhea, led to stillbirths, birth defects, and infertility. Although some historians place the Hawaiian population in 1778 at one million, by the 1820s only about 200,000 remained; diseases, both venereal and other infectious types, caused most of the population decline. This would reflect an eighty percent decline within the first forty-five years of Western contact.

35. See TONY CASTANHA, THE MODERN HAWAIIAN SOVEREIGNTY MOVEMENT 2 (1993). By 1887, the Hawaiian kingdom had treaties with Belgium, Bremen, Denmark, the German Empire, Hamburg, Hong Kong, Italy, Japan, Netherlands, New South Wales, Norway, Portugal, Russia, Samoa, Spain, the Swiss Confederation, Sweden, and Tahiti. See id. at 3.
36. The doctrine proclaimed Hawai‘i to be within the “U.S. sphere of influence.” See TRASK, supra note 5, at 8.
37. See DOUGHERTY, supra note 24, at 33.
39. See DOUGHERTY, supra note 24, at 33.
40. See Jon M. Van Dyke, The Political Status of the Native Hawaiian People, 17 YALE L. & POLY REV. 95, 95 n.7 (1998). Other infectious diseases hit the Hawaiian population equally hard; the epidemics started in 1804 with typhoid fever, followed by influenza in 1826, whooping cough in 1832, mumps in 1839, Hansen’s disease (also known as leprosy) in 1840, smallpox in 1853, diphtheria in 1890, cholera in 1895, and bubonic plague in 1899-1900. See Kame‘eleihiwa, supra note 38, at 4. George Kenway, a resident of Waimea on the island of Hawai‘i in the 1850s, wrote, “It can hardly be said that there is any Native population at all.” DAWS, supra note 32, at 168.
41. See Kame‘eleihiwa, supra note 38, at 4.
42. See id. Some also attribute the high mortality rate to the denigration of
Hawaiian land division quickly changed under the influence of the West. The Hawaiian crown from Kamehameha I down had distributed land among the principal chiefs, who divided their land to lesser chiefs, who subdivided it to tenants. All persons in the line of ownership were considered to have rights in the land, rights which were "not clearly defined, although universally acknowledged." Ka Mahele (also known as the Great Mahele) of 1848 transferred this traditional Hawaiian land tenure into a property regime which facilitated the alienation of land—a more suitable system for the Western economic interests.

During the division, the king conveyed about 1.5 million acres to the main chiefs (numbering about 245), kept 1 million for himself (the "crown lands"), and gave the remaining 1.5 million to the government (the "government lands"). Only about 28,600 acres were distributed to about 8,000 individual farmers.

Rule by a Hawaiian monarch continued until 1887. In June of that year, a group of American residents with U.S. military support forced the reigning king, King Kalakaua, to

the Hawaiian culture by missionaries. According to John Dominis Holt, a student of Hawaiian history, the missionaries did much more harm than good in their proselytizing: "[H]awaiians were subjected to thunderous denunciation of their traditional beliefs. They were told quite bluntly that they could not be themselves because their way of life was full of evil... They willingly gave up their souls and died." See DOUGHERTY, supra note 24, at 60 (quoting JOHN D. HOLT, MONARCHY IN HAWAI'I 13-14 (1971)).

43. See In re Estate of Kamehameha IV, 2 Haw. 715, 718 (1864).
44. Id.
45. See NATIVE HAWAIIAN RIGHTS HANDBOOK 6-9 (Melody Kapilialoha MacKenzie ed., 1991); see also Estate of Kamehameha IV, 2 Haw. at 719 ("The subject of rights in land was one of daily increasing importance to the newly formed Government, for it was obvious that the internal sources of the country could not be developed until the system of undivided and undefined ownership in land should be abolished.").
46. See MacKenzie, supra note 45, at 8.
47. See Van Dyke, supra note 40, at 102 (citing JOHN J. CHINEN, THE GREAT MAHELE 1-31 (1958)); see also Estate of Kamehameha IV, 2 Haw. at 719 (stating that a government came about as a result of a voluntary relinquishment of some control by Kamehameha III).
48. See MacKenzie, supra note 45, at 9. Even these few farmers had problems controlling their land due to inexperience with Western property rights, the inability to raise capital necessary for required surveys, and a belief that the Mahele was a betrayal of their ancient system. See Office of Hawaiian Affairs, supra note 31.
49. See DOUGHERTY, supra note 24, at 161-62.
sign the “Bayonet Constitution.” This imposed Constitution reduced the King to a figurehead and placed the executive powers (to appoint judges and justices) in the hands of a U.S.-dominated Cabinet. The Bayonet Constitution also disenfranchised many Hawaiian voters by restricting voting rights to property owners or those with cash incomes greater than most Hawaiians earned. Thus began the United States’s take-over of the Hawaiian government.

In January 1893, partly as a result of a U.S.-imposed tariff on sugar, the economy of Hawai‘i had turned sour and Queen Lili‘uokalani appeared likely to introduce a new constitution which would threaten interests of the sugar coalition. Anticipating this change, on January 14, 1893, U.S. Minister John Stevens and the “Safety Committee" procured almost 200 U.S. Marines and positioned themselves in front of Iolani Palace “as a precautionary measure to protect American life and property." Seeking to prevent violence, the Queen conditionally abdicated her throne, relying on the American justice system for restoration.

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50. See Anaya, supra note 30, at 314. This document has been dubbed the “Bayonet Constitution” because of the force used in obtaining the King's signature. See id.

51. See id.; DOUGHERTY, supra note 24, at 161.

52. See DOUGHERTY, supra note 24, at 161-62. This Constitution also gave the missionaries and businessmen residing in Hawai‘i, even those who remained resident aliens and not citizens, the right to vote. See id.

53. This new constitution threatened to return the powers of the government (which had been extinguished in the Bayonet Constitution) to the Hawaiian people. This included the right to vote. The sugar coalition knew that if Hawaiians could vote, they would likely prevent the coalition’s goal of American annexation of Hawai‘i. Upon learning that she could be charged with committing a revolutionary act should she adopt such a constitution, the Queen declared her willingness to abide by the Bayonet Constitution to remove any justification for an overthrow. See Oshiro, supra note 2, at 70-71.

54. See id. at 110. American businessmen, individuals who were pro-annexation, and part of the sugar coalition made up the “Safety Committee.” See id.

55. Id. at 111. In fact, no occasion existed to justify the grouping of said committee, save the threat of enactment of a new constitution favoring Hawaiians.

56. See CASTANHA, supra note 35, at 5 (citing QUEEN LYDIA LILI‘U‘OKALANI, HAWAI‘I’S STORY BY HAWAI‘I’S QUEEN 392 (1898)). Part of the Queen's statement to American authorities included:

I, Queen Lili‘uokalani, by the grace of God and under the Constitution of the Hawaiian Kingdom, Queen, do hereby solemnly protest against any and all acts done against myself and the constitutional government of the Hawaiian Kingdom by certain persons claiming to have established a Provisional Government of and for this Kingdom...
Although the Committee members petitioned Congress for annexation, President Grover Cleveland strongly opposed the overthrow.\textsuperscript{57} In a December 1893 written address to Congress, Cleveland called the military demonstration an "act of war" which would not have happened "but for the lawless occupation of Honolulu under false pretenses by the United States forces."\textsuperscript{58}

Despite Cleveland's opposition, the provisional government declared itself an established government.\textsuperscript{59} A year later, the short-lived Republic of Hawai'i was born.\textsuperscript{60} Despite continued protests, appeals to Congress, and numerous trips to Washington, D.C. by the Queen, efforts to restore the monarchy failed.\textsuperscript{61} With the changing of the administration to pro-imperialist President William McKinley, Congress negotiated and signed an annexation treaty on June 16, 1897.\textsuperscript{62} A Congressional fact-finding mission "failed to find a Native Hawaiian who was not opposed to Annexation."\textsuperscript{63} In reality, an estimated ninety-five percent of Hawaiian adults signed petitions in 1897 protesting annexation.\textsuperscript{64}

The joint resolution annexation of the Islands created a trust obligation between the U.S. government and Hawai'i. The Newlands Resolution and the Organic Act of 1900\textsuperscript{65} placed all crown and government lands in the hands of the

Now, to avoid any collision of armed forces, and perhaps the loss of life, I do under this protest and impelled by said forces, yield my authority until such times as the Government of the United States shall, upon facts being presented to it, undo the actions of its representative, and reinstate me in the authority which I claim as the Constitutional sovereign of the Hawaiian Islands.

Id.


\textsuperscript{58} H.R. EXEC. DOC. No. 47, 53d Cong., 2d Sess. xiii (1893); \textit{see also} 100th Anniversary of the Overthrow of the Hawaiian Kingdom, Pub. L. No. 103-150, 107 Stat. 1510 (1993).

\textsuperscript{59} See DAWS, \textit{supra} note 32, at 279.

\textsuperscript{60} See Anaya, \textit{supra} note 30, at 315.


\textsuperscript{62} See Tomasa, \textit{supra} note 57, at 254.

\textsuperscript{63} Office of Hawaiian Affairs, \textit{supra} note 31.

\textsuperscript{64} See id.

\textsuperscript{65} An Act to Provide a Government for the Territory of Hawaii, ch. 339, 31 Stat. 141 (1900).
United States to be used “solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.”66 Under the Organic Act, any remnant of Hawaiian land tenure disappeared.67 Although the Hawaiian Homes Commission Act of 192068 (“HHCA”) set aside 200,000 of those 1.8 million acres in trust for Hawaiian homesteads as a means of “rehabilitating”69 the indigenous people, the poverty, despair, and population decline of Hawaiians continued.70

A second trust originated as a result of statehood. In 1959, after a plebescite in which an overwhelming majority of Hawai‘i residents voted in favor of statehood,71 Congress admitted Hawai‘i as the fiftieth state.72 Congress also conveyed in trust to the state73 another 1.2 million acres of land to be used for five listed purposes,74 one of which was for

67. See Anaya, supra note 30, at 315. This Act also disallowed some cultural practices, including use of the Hawaiian language. “This was in keeping with Western thinking, which regarded non-Western cultures as inferior, coupled with an official policy of assimilating the indigenous Hawaiians into American cultural life.” Id.
69. See id. § 1, 42 Stat. at 109.
70. See Anaya, supra note 30, at 316. (“In the process of Western encroachment, . . . many Hawaiians found they could not farm or gain access to the traditional gathering areas in the mountains and the ocean that once supported them.”). Furthermore, even based upon conservative estimates (which many believe to be grossly understated), the Hawaiian population dropped by at least 87% between 1778 and 1893. See id.
71. 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 say the option of becoming independent should also have been given to the voters. See Van Dyke et al., supra note 29, at 624 n.3.
72. See Hawaii Statehood Admissions Act of 1959, Pub. L. No. 86-3, 73 Stat. 4 (1959). As a condition of statehood, Congress required the new state government to accept responsibility for the Hawaiian Home Lands. See id. at 4. However, the United States affirmed its trust relationship with the Hawaiian people by retaining the exclusive power to enforce the trust, such as the power to approve land exchanges. See 42 U.S.C. § 11701(15) (1999).
"the betterment of the conditions of the native Hawaiians." The trust relationship remained between the United States and Hawaiians, as the United States retained legal responsibility of the state for improving the situation of the Hawaiians. However, "no benefits actually went to native Hawaiians until the state constitution was amended in 1978."

One of those constitutional amendments created the Office of Hawaiian Affairs ("OHA"), which receives and expends a portion of income from the trust lands. In fact, OHA receives $15 million dollars of its $30 million dollar annual budget from profits from the 1.2 million acres of ceded lands. This money goes to support education, housing, health, and economic development programs that aid the Hawaiian community. The Hawaiian legislature has given OHA the responsibility of "[s]erving as the principal public agency . . . responsible for the performance, development, and coordination of programs and activities relating to Hawaiians and Native Hawaiians." OHA's funds are administered by a nine-trustee board, the members of which "shall be Hawaiians" and "shall be elected by qualified voters who are Hawaiians, as provided by law."

Even with the two land trusts and OHA's efforts, Hawaiians have not recovered from the destruction of their traditional lifestyle. Hawaiians today comprise only about one-fifth of Hawai'i's population. However, they are over-
represented in the state's prisons and unemployment rolls.\footnote{84} Although six percent of all families in Hawai'i live below the poverty line, fourteen percent of all Hawaiian families do.\footnote{85} Hawaiians are underrepresented among high school graduates and college students.\footnote{86} Hawaiians also possess the shortest life expectancy among Hawai'i residents, suffering from the highest mortality rates for all major causes of death.\footnote{87} By some estimates, the extinction of full-blooded Hawaiians will occur by the year 2040.\footnote{88}

For these reasons, Congress has recently turned its attention to the past and present conditions of the Hawaiian people.\footnote{89} Beginning in the 1970s, Congress has included Hawaiians in some, but not all, of its legislation concerning Native Americans.\footnote{90} This creates confusion in the courts, as they must continuously struggle with the issue of what standard of review to apply to legislation granting preferential programs to Hawaiians.\footnote{91}

\footnote{84} See Richard Kekuni Blaisdell, Native Hawaiian 1992, in DOUGHERTY, supra note 24, at 183.


\footnote{86} See Blaisdell, supra note 84, at 183.

\footnote{87} See id.; see also TRASK, supra note 5, at 22 ("Hawaiians as a people register the same profile as other indigenous groups controlled by the United States: high unemployment, catastrophic health problems, low educational attainment, large numbers institutionalized in the military and prisons, occupational ghettoization in poorly paid jobs, and increasing outmigration that amounts to diaspora.").

\footnote{88} See Blaisdell, supra note 38, at A21.

\footnote{89} See Anaya, supra note 30, at 319.

\footnote{90} In all, over 150 pieces of legislation have included Hawaiians as a protected group of Native Americans. See Office of Hawaiian Affairs, supra note 31. Some laws which classify Hawaiians as Native Americans and include them in Native American benefit programs include: the National Historic Preservation Act, 16 U.S.C.S. § 470a(d)(6) (West Supp. 1998) (providing particular protection to properties with cultural and religious importance to Indian tribes and Hawaiians), Native Hawaiian Languages Act, 25 U.S.C. §§ 2901-2912 (1994) (including Native Hawaiian languages in the collection of Native American languages accorded statutory protection), and 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"). See also TRASK, supra note 5, at 97 ("In practice, federal policy had straddled two poles, acknowledging Hawaiians as Natives for some purposes (such as educational and health programs) but refusing to grant them the practice of Native self-determination.").

\footnote{91} See discussion infra Part IV.
to remedy these inconsistencies and ensure that courts always apply the rational basis standard of review.

B. Congressional Policy Toward Native Americans

Congress has the explicit Constitutional power to negotiate with Native Americans.92 Congress's power derives from the Indian Commerce Clause,93 which states: "Congress has the authority to regulate commerce between the several states and Indian tribes."94

In the early days of this country's history, Congress used this constitutional power to deal with the Native Americans through treaty-making and ratification, mostly to secure title to lands and to move the tribes westward.95 Congress today uses its plenary power over Native Americans primarily to promote their preservation and self-government.96 The Indian Reorganization Act of 193497 facilitated the creation of formal tribal governments while reserving for the Secretary of the Interior veto powers over the tribal governments' powers and structure.98 The Alaska Native Claims Settlement Act99 shows Congress's willingness to redress aboriginal grievances—it transferred $962.5 million and title to almost 69,000 square miles (about twelve percent of the state's area)

92. See U.S. CONST. art. 1, § 8 (granting Congress the authority to regulate Commerce "with the Indian tribes"); see also id. § 2, cl. 3 (stating that "representatives and direct taxes shall be apportioned among the several states . . . excluding Indians not taxed").
93. See id. § 8.
94. Id.
95. See Wutzke, supra note 3, at 554 (citing David H. Getches, Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law, 84 CAL. L. REV. 1573, 1584 (1996)). The Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388 (1887), repealed by 25 U.S.C. § 461 (1934), while on its face returned land to tribes, also served to distribute land to non-Indians. See Wutzke, supra, at 545.
98. See Noelle M. Kahanu & Jon M. Van Dyke, Native Hawaiian Entitlement to Sovereignty: An Overview, 17 HAW. L. REV. 427 (1995). While non-tribal governments have been recognized by the courts, they may not be entitled to some federal funds. See id. Ironically, Congress's next policy was the termination of tribal status in an effort to eliminate American Indians as a distinct people. See Wutzke, supra note 3, at 545.
to 200 aboriginal groups in the state of Alaska. Reaffirming Congress's recognition of Native American autonomy, the Indian Civil Rights Act seeks to reconcile individual rights of Native Americans while also fostering tribal self-government and cultural identity. The Indian Self-Determination and Education Assistance Act of 1975 allows tribal governments to control their relationship both among themselves and with non-Indian governments.

Nevertheless, throughout all this legislation Congress has delegated itself an oversight role. Tribal sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance." Congress has the ability to grant and remove a native people's land title. With its plenary authority and the Court's acquiescence, Congress could in theory abolish all forms of self-government "overnight."

C. Case Law

Throughout the history of the United States, Congress

100. See Kahanu & Van Dyke, supra note 98, at 433. Twelve tribal corporations were set up under the law of that state to control the transferred land. By assuming the corporate form, the aboriginal bands hold title—this also restricts the land's alienability. See id.

101. 25 U.S.C. §§ 1301-1341 (2000). However, the U.S. Supreme Court has held that the extension of civil rights under this act applies only to individual Native Americans to prevent interfering with the autonomy of the tribe. See Martinez v. Santa Clara Pueblo, 436 U.S. 49 (1978). Congress has not passed legislation denying this definition of the Act. See Wutzke, supra note 3, at 433.

102. See Wounded Head v. Tribal Council of Oglala Sioux Tribe, 507 F.2d 1079 (8th Cir. 1975); see also McCurdy v. Steele, 353 F. Supp. 629 (D. Utah 1973) (holding that the Indian Civil Rights Act should be considered within the context of Congress's concern for self-government and cultural autonomy).


104. See Wutzke, supra note 3, at 547; see also Kahanu & Van Dyke, supra note 98, at 437-38 (stating that under this Act, Native American tribes are given the freedom to establish whatever form of government they see fit).

105. See Wutzke, supra note 3 at 547.

106. United States v. Wheeler, 435 U.S. 313, 323 (1978); see also United States v. Sandoval, 231 U.S. 28, 46 (1913) (holding that Congress cannot "bring a community or body of people within the range of this power [Congress's plenary powers] by arbitrarily calling them an Indian tribe"); Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903) (holding that because the Native Americans were governed by stipulations of treaties, "it was never doubted that the power to abrogate existed in Congress").


has recognized Native Americans as once-sovereign peoples.\textsuperscript{109} Because of this country's special trust relationship with Native Americans, courts have reviewed legislation granting them preferential or separate treatment under the deferential rational basis review.\textsuperscript{110} Courts now view this preference as based upon politics, not race.\textsuperscript{111} Several courts have applied the rational basis standard of review to legislation giving preferential or separation treatment to Hawaiians in light of their special trust relationship with the federal government; however, since Hawaiians are not federally-recognized as Native Americans, disparities still exist regarding the appropriate standard of review to apply.\textsuperscript{112}

1. **Recognition of Native Americans as Once-Sovereign People**

Supreme Court decisions for over a century have recognized the unique situation of Native Americans and have largely recognized their continued right to sovereignty.\textsuperscript{113} Justice Marshall in *Cherokee Nation v. Georgia*\textsuperscript{114} espoused the famous notion of tribes as "domestic dependent nations," characterizing Native Americans as "wards" of the United States.\textsuperscript{115} Further negating the "discovery doctrine," in *Worcester v. Georgia*\textsuperscript{116} Marshall found it inconceivable that "the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied."\textsuperscript{117} The Court in *Ex parte Crow Dog*\textsuperscript{118} refused to extend a state's jurisdiction to a

\textsuperscript{111} Legislation giving preferences based upon race is reviewed under the strict scrutiny standard and is rarely upheld. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995).
\textsuperscript{114} 30 U.S. (5 Pet.) 1.
\textsuperscript{115} See *id.* at 17.
\textsuperscript{116} 31 U.S. (6 Pet.) 515.
\textsuperscript{117} *Id.* at 543.
\textsuperscript{118} 109 U.S. 556 (1883).
murder committed on a reservation, recognizing Congress's intent to grant Native Americans self-determination.119

The pledge to secure to these people, with whom the United States was contracting as a distinct political body, an orderly government, by appropriate legislation thereafter to be framed and enacted, necessarily implies, having regard to all the circumstances attending the transaction, that among the arts of civilized life which it was the very purpose of all these arrangements to introduce and naturalize among them, was the highest and best of all—that of self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs.120

These cases thus confirmed the sovereignty of tribes and that the states had only limited authority over tribes and tribal members.121

Modern courts which have had the opportunity to analyze whether Hawaiians are Native Americans for constitutional purposes have answered this question in the affirmative. The Supreme Court of Hawai'i utilized the existence of a trust relationship between the federal government and Hawaiians as the basis for analogizing Hawaiians to Native Americans.122 In Ahuna v. Department of Hawaiian Home Lands (“DHHL”),123 plaintiffs-appellees Ahuna et al. brought suit to enforce a judgment awarding them certain lots under the Hawaiian Homes Commission Act (“HHCA”).124 The Supreme Court of Hawai'i, in determining that the appellant owed a fiduciary duty to the appellee Ahuna,125 examined the purpose and history of the HHCA and found its primary purpose to be the rehabilitation of Hawaiians.126 Having determined the ward status of

119. See id.
120. Id. at 568.
121. See id. at 553-54.
123. Id.
125. See Ahuna, 640 P.2d at 1168-71.
126. See id. at 1168. The Supreme Court of Hawai'i also noted that the legislative history of the HHCA represented that the federal government stood in a trustee capacity to the Hawaiians as derived from the word “ward” being used to describe them. See id. at 1167. See generally H.R. REP. NO. 839-66, at 4
Hawaiians, the Supreme Court of Hawai‘i used “well-settled principles enunciated by the federal courts regarding lands set aside by Congress in trust for the benefit of other native Americans.”127 Noting that Congress had recently passed the American Indian Religious Freedom Act128 including native Hawaiians as Native Americans, the court declared, “Reason thus dictates that we draw the analogy between native Hawaiian homesteaders and other native Americans.”129 In applying a heightened duty of care to DHHL,130 the Supreme Court of Hawai‘i found that DHHL had breached its duty to the appellees.131

Similarly, a federal court did not distinguish between Hawaiians and Native Americans because of the trust obligations and Hawaiians’ status as the aboriginal people of a state in America.132 In Naliilelua v. Hawai‘i,133 plaintiffs challenged the HHCA as violating the Fourteenth Amendment by creating preferences based solely upon race.134 The district court affirmed the constitutionality of the Act, noting that the U.S. Supreme Court had held that legislation granting a preference to Native Americans was not racial discrimination because of Congress’s “unique obligation” toward Native Americans.135 The district court also noted, “Native Hawaiians are people indigenous to the State of Hawai‘i, just as American Indians are indigenous to the mainland United States.”136 Applying the “clear body of law”

(1920) (quoting ex-Secretary of Interior Franklin K. Lane as saying before the House Committee on the Territories: “One thing that impressed me . . . was the fact that the natives of the islands who are our wards . . . and for whom in a sense we are trustees, are falling off rapidly in numbers and many of them are in poverty.”).

127. Ahuna, 640 P.2d at 1168.
129. Ahuna, 640 P.2d at 1169. The court concluded this after stating, “Essentially, we are dealing with relationships between the government and the aboriginal people.” Id.
130. See id. at 1169-71; see also Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942) (stating the trustee relationship between the United States and Native Americans as one of “the highest responsibility and trust” which should be examined “by the most exacting fiduciary standards”).
131. See Ahuna, 640 P.2d at 1171.
133. Id.
134. See id. at 1011.
135. See id. at 1012 (citing Morton v. Mancari, 417 U.S. 535 (1974)).
136. Id. at 1013. The district court stated, “Although Hawaiians are not identical to the American Indians whose lands are protected by the Bureau of
surrounding preferences given to Native Americans, the district court found that the trust obligation to Hawaiians, as indicated by the Admissions Act and the HHCA, did not create a suspect classification.

2. **Native Americans and the Tribal Membership Requirement for Application of the Rational Basis Standard**

One of the biggest issues in Native American jurisprudence today is whether legislation concerning individual Native Americans or those not organized into federally recognized tribes should be reviewed under the same standard of review as that pertaining to federally recognized tribes. In *Morton v. Mancari*, the Supreme Court made a sweeping declaration as to which standard of review to apply when evaluating legislation giving separate or preferential treatment to Native Americans, while also clarifying who qualifies as such. The Court in *Mancari* upheld a statutorily codified hiring preference for Native Americans in federally recognized tribes for positions in the Bureau of Indian Affairs, finding this preference for native peoples as one properly viewed as "political" rather than "racial." Congress granted the preference not to Native Americans as a racial group, which would require the Court to use the strict scrutiny standard of review, but rather as quasi-sovereign tribal entities. The Court looked to the Indian Reorganization Act of 1934 and found that the "overriding purpose of that particular Act was to establish machinery whereby Native American tribes would be able to

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138. *See* *Naliilelua*, 795 F. Supp. at 1013.
140. *See id.*
142. *See* *Mancari*, 417 U.S. at 553-54.
144. *See* *Mancari*, 417 U.S. at 554.
THE AKAKA BILL

assume a greater degree of self-government, both politically and economically.\textsuperscript{146} Furthermore, the Court noted that Congress did not intend to repeal this preference with its enactment of the Equal Employment Opportunity Act of 1972\textsuperscript{147} because Title VII of the Civil Rights Act of 1964 excluded coverage of tribal employment,\textsuperscript{148} indicating Congress’s provision of a “unique legal status” to Native Americans.\textsuperscript{149} This “unique legal status” derives from the guardian-ward relationship between Congress and the Native American tribes\textsuperscript{150} as well as from provisions in the Constitution.\textsuperscript{151} Finding the preference “reasonably and directly related to a legitimate, nonracially based goal,” the Court upheld it.\textsuperscript{152}

While \textit{Mancari} placed an emphasis on the requirement that legislation must pertain to Native Americans organized into tribes, later cases downplay or eliminate this requirement. In \textit{Delaware Tribal Business Committee v. Weeks},\textsuperscript{153} the Court expanded \textit{Mancari} to allow preferential treatment for Native Americans not affiliated with a tribe. The Court applied the rational basis standard of review to the issue of whether Native Americans not part of a federally recognized tribe\textsuperscript{154} were denied equal protection of the laws in not receiving a distribution of an award to the tribe of which they once belonged.\textsuperscript{155} In applying this standard of review, the Court recognized the power of Congress to expand a class of tribal beneficiaries\textsuperscript{156} as well as to differentiate among groups of Native Americans in the same tribe when making a

\textsuperscript{146.} \textit{Mancari}, 417 U.S. at 542 (citing \textit{Hearings on S. 2755 before the Senate Comm. on Indian Affairs}, 73d Cong. 26 (1934) (statement of John Collier, Commissioner of Indian Affairs) (“This bill is designed not to prevent the absorption of Indians in white communities, but rather to provide for those Indians unwilling or unable to compete in the white world some measures of self-government in their own affairs.”)).


\textsuperscript{149.} See \textit{Mancari}, 417 U.S. at 547-48.

\textsuperscript{150.} See id. at 552.

\textsuperscript{151.} See discussion supra Part II.B.

\textsuperscript{152.} \textit{Mancari}, 417 U.S. at 554.

\textsuperscript{153.} 430 U.S. 73 (1976).

\textsuperscript{154.} See id. at 82 (explaining that the Kansas Delawares “are simply individual Indians with no vested rights in any tribal property”).

\textsuperscript{155.} See id.

\textsuperscript{156.} See id. at 84 (citing United States v. Jim, 409 U.S. 80, 82 n.3 (1972)).
distribution. In his concurring opinion, Justice Blackmun (who authored the majority opinion in *Mancari*) explicitly stated that Congress should have much flexibility in allocating Native American awards, and its action here was not beyond its constitutional limits.

The Court went further in disregarding the tribal requirement in *United States v. John*. While not an equal protection case, the Court relied upon the Indian Commerce Clause to justify the establishment of federal jurisdiction over some serious crimes committed in "Indian country." Although the people in question, the Choctaws of Mississippi, were "merely a remnant" of a larger group of Native Americans and federal supervision of them had not been continuous, the Court found that Congress retained the power to deal with them. The Court applied a deferential standard of review, noting that the government was anticipating the formation of a formal governing entity and hoped to nurture this self-governing process.

In the last two decades, some lower courts have struggled when reviewing congressional legislation regarding persons not traditionally considered Native Americans and who have not organized into tribes. The Ninth Circuit found that a group of Hawaiians could not be statutorily classified as a Native American tribe for the purpose of accessing federal administrative procedures such as those offered by the Bureau of Indian Affairs and the Department of Interior. In *Price v. Hawai‘i*, a self-declared Hawaiian tribal body sought to apply proceeds which the state had misappropriated from the Admissions Act's ceded lands to implement the Hawaiian Homes Commission Act. The

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157. *See id.* (citing Simmons v. Seelatsee, 384 U.S. 209 (1966)).
158. *See id.* at 91.
160. U.S. CONST. art. 1, § 8, cl. 3. *See also* discussion *supra* Part II.B.
162. *See John*, 437 U.S. at 653.
163. *See id.* at 650 n.20.
165. *Id.*
Ninth Circuit held that the Hou Hawaiians did not have federal jurisdiction under 28 U.S.C. § 1362 as an "Indian tribe or band with a governing body duly recognized by the Secretary of the Interior."\(^{168}\) By statute\(^{169}\) and regulation,\(^{170}\) the Hou could not be considered a tribe, for pertinent legislation only applied to people native to the continental United States.\(^{171}\) Furthermore, the Hou could not qualify for federal recognition because it had no historical continuity or longstanding tribal political authority.\(^{172}\) Bureau of Indian Affairs regulations also considered whether ""a substantial portion of the petitioning group inhabits a specific area or lives in a community viewed as American Indian and distinct from other populations in the area.""\(^{173}\) As the Ninth Circuit found that the Hou could meet none of these requirements, it denied jurisdiction.\(^{174}\)

However, the Ninth Circuit had earlier disregarded the tribal requirement when analyzing legislation pertaining to another group not traditionally thought of as Native Americans, the native Alaskans. In *Alaska Chapter, Associated General Contractors of America v. Pierce*,\(^{175}\) the Ninth Circuit upheld legislation conferring preferential

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169. See *id.* (citing 25 U.S.C. § 473 as excluding statutes governing the formal organization and incorporation of an Indian tribe from applying to "any of the Territories, colonies, or insular possessions of the United States [except for] the Territory of Alaska").
170. See *id.* at 626-27 (citing 25 C.F.R. Part 83 (1984) as requiring the establishment of tribal existence "as a prerequisite for the protection, services, and benefits from the Federal Government available to Indian tribes" and 25 C.F.R. § 83.3(a) as limiting the regulations to "only those American Indian groups indigenous to the continental United States").
171. See *id.*
172. See *id.* at 627. However, the court here notes that native Hawaiians in general may be able to assert the requisite historical continuity. See *id.*
173. *Id.* (quoting 25 C.F.R. § 83.7(b)). A 1974 letter from the Commission of Indian Affairs to the Chairman of the Senate Committee on Interior and Insular Affairs set out five factors that the Bureau of Indian Affairs used in determining eligibility for benefits. The tribe must: 1) have treaty relations with the United States; 2) have been denominated a tribe by an act of Congress or Executive Order; 3) have been treated as a tribe by other Indian tribes; 4) have demonstrated that the tribe exercises political authority over its members; 5) share collective rights in tribal lands or funds. See *id.* at 628. The court noted that although the Hou had been recognized as a tribe by Hawaiians, Hawaiians themselves had not been recognized as a tribe by the federal government. See *id.* at n.1.
174. See *Price*, 764 F.2d at 631.
175. 694 F.2d 1162 (9th Cir. 1982).
treatment upon Alaskan natives.\textsuperscript{176} The Ninth Circuit held that a preference for Housing and Urban Development ("HUD") contracts, as part of the Indian Self-Determination Act,\textsuperscript{177} did not deny non-Indians equal protection of the law.\textsuperscript{178} The court first affirmed \textit{Mancari}, holding that rational basis was the appropriate level of judicial review.\textsuperscript{179} While recognizing that Alaskan natives had not historically been organized into tribes\textsuperscript{180} or onto reservations, nor did they become wards of the federal government through treaties,\textsuperscript{181} the Ninth Circuit noted Congress's alternative methods for including Alaskan natives as Native Americans.\textsuperscript{182} The Ninth Circuit held that the HUD preference passed the rational basis test because encouraging and assisting Native American-owned businesses furthered the government's trust obligation to aid Native Americans in developing economic self-sufficiency.\textsuperscript{183}

\textbf{D. The Sovereignty Movement in Hawai'i}

The application of a lower standard of review to federal legislation granting sovereignty to Hawaiians could help to ensure the realization of a sovereign governing body. At the very least, federal recognition of Hawaiians as Native Americans could help preserve the preferential programs currently in existence. This is what the Akaka Bill, at a minimum, hopes to accomplish. With the notion of sovereignty enjoying high public support,\textsuperscript{184} recent legislative

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\item \textsuperscript{176} See \textit{id}.
\item \textsuperscript{178} See \textit{Pierce}, 694 F.2d at 1170.
\item \textsuperscript{179} See \textit{id} at 1168 (citing Morton v. \textit{Mancari}, 417 U.S. 535, 545 (1974)).
\item \textsuperscript{180} See \textit{id}.
\item \textsuperscript{181} See \textit{id}. Alaskan natives fall under the guardianship of the United States via the 1867 Treaty of Cession with Russia, by which the United States acquired Alaska. This treaty provides that "the uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to the aboriginal tribes of that country." \textit{Id} (citing Treaty of Mar. 30, 1867, U.S.-Russ., 15 Stat. 539).
\item \textsuperscript{182} See \textit{id} at 1169. These methods include providing for the formation of native groups eligible for federal benefits via the Indian Reorganization Act of 1934 and by making a political definition of which Alaska natives qualify for federal benefits. See \textit{id}.
\item \textsuperscript{183} See \textit{id} at 1170. The court also noted that one of the goals of the Indian Self-Determination Act is to develop leadership skills in Native Americans, another goal which would be furthered by the preference in question. See \textit{id}.
\item \textsuperscript{184} See Office of Hawaiian Affairs, 1999 \textit{Public Opinion Survey} (visited Jan. 530 SANTA CLARA LAW REVIEW [Vol. 41
action could ultimately lead to legislation granting some form of self-government to the Hawaiians.

The Apology Resolution of 1993 brought the issue of sovereignty to the forefront. In that Resolution, the federal government acknowledged both the sovereignty and independence of the Kingdom of Hawai‘i at the time of its 1893 overthrow. Also in the joint resolution, Congress recognized Hawaiians as indigenous people. Congress also expressed its commitment to form a reconciliation between the United States and Hawaiians.

Hundreds of sovereignty groups currently exist which educate the people of Hawai‘i and lobby politicians. Their goals tend to focus upon three models of sovereignty: a "state within a state" option, where a Hawaiian government similar to a municipal government would form; a "nation within a nation" option similar to that which Native Americans on the mainland have; and complete independence from the United States. The largest sovereignty group, Ka Lahui Hawai‘i, 5, 2000) <www.oha.org>. In a 1999 public opinion poll sponsored by OHA, 95% of Hawaiians and 88% of non-Hawaiians had heard of the sovereignty movement, making it one of the best known political issues in Hawai‘i. See id. at 13. Forty-two percent of those surveyed said they favored or partly-favored the idea of Hawaiian sovereignty. See id. at 14. Almost one-third of those who support sovereignty feel it is necessary to correct past wrongs, and that Hawaiians deserve sovereignty. See id. at 15. Hawaiians who do not support sovereignty believe that Hawaiians are not yet ready and/or that sovereignty is impossible. See id. Nearly two-thirds of Hawaiians who favor sovereignty support the return of all ceded lands to a Hawaiian nation. See id. at 18. Over 71% of those interviewed knew that Hawaiians were entitled to revenues from ceded lands, and over 66% were aware that the Admissions Act required the state to share ceded land revenue with Hawaiians. See id. at 22.


186. See id.

187. The resolution contained a definition of "Native Hawaiian" as "any individual who is a descendent of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawai‘i." Id. § 2, 107 Stat. at 1513.

188. See id., 107 Stat. at 1511.

189. Many sovereignty groups feel that a reconciliation is not an appropriate remedy. Even before the Apology Resolution, when Senator Dan Inouye’s Indian Affairs Committee came to Honolulu to hear testimony on reparations in the summer of 1988, native groups argued instead for self-government. See TRASK, supra note 5, at 97.

190. See 100th Anniversary of the Overthrow of the Hawaiian Kingdom § 1, 107 Stat. at 1513.

191. See generally Oshiro, supra note 2, at 91.

192. See Benjamin, supra note 141, at 579 n.173 (noting that the inability of
advocates the second goal.\textsuperscript{194} This group believes the land base of a sovereign government should include all 200,000 acres of Hawaiian Home Lands, half of the 1.4 million acres of the ceded lands, and additional lands provided as restitution for the overthrow of 1893.\textsuperscript{195} They also believe a Hawaiian government should be established before seeking a land base.\textsuperscript{196} Many sovereignty groups cite the illegal overthrow of the Hawaiian Kingdom as providing the impetus for their claims to sovereignty.\textsuperscript{197} Through sovereignty, these groups hope to re-establish a government based on distinct Hawaiian rights, values, and beliefs.\textsuperscript{198}

E. An Impetus for Change: Rice v. Cayetano

Although the sovereignty movement has been brewing for over thirty years, a February 23, 2000 Supreme Court decision has proven to be the wake-up call needed to get the political process moving. In \textit{Rice v. Cayetano},\textsuperscript{199} a white resident of Hawaii whose family had resided in Hawai‘i for many generations challenged the Office of Hawaiian Affairs’ (“OHA”) policy of allowing only people of Hawaiian descent to vote in its elections.\textsuperscript{200} The U.S. Supreme Court invalidated the Hawaiians-only election on Fifteenth Amendment grounds.\textsuperscript{201} While recognizing the possibility that Hawaiians could be considered Native Americans for purposes of judicial review,\textsuperscript{202} the Court carefully avoided that issue, noting, “The
validity of the voting restriction is the only question before us.203 The Court assumed the constitutionality of OHA, but held that even if the Court found the authority in Congress to treat Hawaiians as a tribe, Congress could not authorize a state to create a racial voting scheme for a state office.204

F. The Akaka Bill

Although Rice left intact all programs granted to Hawaiians as Native Americans, many Hawaiians viewed the decision as a threat205 and immediately began pushing for inclusion in the federal definition of Native American.206 U.S. Senator Daniel K. Akaka (Dem. Haw.) set up the Hawaiian Affairs Task force, made up of Hawai‘i’s congressional delegation and twenty-five Hawaiian community leaders, to draft a bill which would definitively establish a trust relationship between the United States and native Hawaiians for federal recognition similar to that enjoyed by Native Americans.207 The House of Representatives passed the Akaka Bill on September 26, 2000.208 However, the bill’s introduction was not as smooth in the Senate, as some senators questioned whether the bill would take funding from Native American programs to fund Hawaiian programs.209 The bill ultimately died in the Senate when a group of Republican opponents blocked the possible routes of passage, calling the bill a federally sanctioned system of racial preference for Hawaiians.210 Hawai‘i’s senators vow to

203. Id. at 1059.
204. See id. The Court distinguished the voting scheme in question from that for a quasi-sovereign organization like a tribal government. In that case, a racially-restricted voting policy could withstand constitutional scrutiny. See id.
207. See id.
208. See Omandam, supra note 12.
introduce the bill earlier in the 107th Congress, although supporters of the bill fear that a Republican executive may block its passage.\textsuperscript{211}

This bill opens the door to Hawaiians re-establishing self-government,\textsuperscript{212} affirms the special trust relationship between Hawaiians and the federal government,\textsuperscript{213} and protects existing federal and state programs for Hawaiians.\textsuperscript{214} It requires the creation of an Office of Special Trustee for Native Hawaiian Affairs in the Office of the Secretary of the Interior,\textsuperscript{215} and the preparation of a roll of adult members of the native Hawaiian community who wish to participate in the reorganization of a Native Hawaiian Interim Governing Council.\textsuperscript{216} The bill also contains clauses preserving rights “not inconsistent” with the bill’s provisions\textsuperscript{217} and clarifies that “[n]othing in [the] Act is intended to serve as a settlement of any claims against the United States.”\textsuperscript{218}

The bill, however, faces difficulties from those who opposed the bill from its introduction. Ka Pakaukau, a coalition of groups, opposes congressional efforts to give Hawaiians federal recognition\textsuperscript{219} because, among other things, it infringes upon their right under international law to self-determination.\textsuperscript{220} One model of the independent nation

\begin{footnotesize}
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\item See id. (noting that supporters felt President Clinton was more sympathetic than President Bush to the rights of Native Hawaiians); \textit{see also} Pat Omandam, \textit{Rougher D.C. road lies ahead for Akaka bill} (Dec. 14, 2000) \text{<http://starbulletin.com/2000/12/14/news/index.html>} (stating without further explanation that President Clinton said he would sign the Akaka Bill if it passed Congress).
\item See H.R. 4904, 106th Cong. § 3(a)(4)(C) (2000); S. 2899, 106th Cong. § 3(4)(C) (2000).
\item See H.R. 4904 § 3(a)(2); S. 2899 § 3(2).
\item See H.R. 4904 § 3(a)(3)(C); S. 2899 § 3(3)(C).
\item See H.R. 4904 § 4(a); S. 2899 § 4(a).
\item See H.R. 4904 § 7(a)(1); S. 2899 § 7(a)(1).
\item See H.R. 4904 § 7(d)(2); S. 2899 § 7(d)(2).
\item H.R. 4904 § 10; S. 2899 § 10.
\item See Pat Omandam, \textit{Returning land is priority for Hawaiians} (Aug. 24, 2000) \text{<http://starbulletin.com/2000/08/24/news/index.html>}. This comment will not explain the opposition of non-Hawaiians (instead focusing on the disagreements among Hawaiians) to the bill, who complain that it is “based on a revisionist history, would divide the state along ethnic lines, give superior rights to native Hawaiians at the expense of other citizens, and fund native Hawaiians regardless of income while needier people of other races go without government help.” See Donnelly & Adamski, \textit{supra} note 219.
\end{enumerate}
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includes a branch of government for native Hawaiians and another branch to govern the other citizens.\textsuperscript{221} Under this model, control of ceded lands would return to native Hawaiians.\textsuperscript{222} The basis for this independent nation would be the Hawaiian concept of \textit{pono}, or righteousness.\textsuperscript{223} Non-Hawaiian citizens could own property, but the government may forbid foreign ownership.\textsuperscript{224} Some supporters of an independent nation fear that the Akaka Bill would wrest the process of sovereignty from Hawaiians, placing control in the bureaucracy of the Department of the Interior.\textsuperscript{225} Others say inclusion in the definition of Native American would change the Hawaiian identity.\textsuperscript{226} Fear also exists that passage of the Akaka Bill would prevent any claims of rights to form an independent nation.\textsuperscript{227} Dr. Kekuni Blaisdell, member of the Kanaka Maoli Tribunal Komike, noted, "Should we kanaka maoli people permit this to happen [passage of the Akaka Bill] without protest, we will have silently relinquished our claims to our inherent sovereignty as a people and over our national lands to the U.S., just as the 1993 apology resolution states we have never done."\textsuperscript{228} The debate on the proper form of sovereignty—independence or nation-within-a-nation like the Native American model—is far from decided.

\section*{III. IDENTIFICATION OF THE PROBLEM}

Sovereignty is the inherent right of a people to be self-governing.\textsuperscript{229} The United States recognizes this, as it has granted Native Americans in forty-nine states the ability to be self-governing and the benefit of having courts subject legislation concerning them to a minimal level of judicial

\begin{footnotesize}
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\item\textsuperscript{222} See id.
\item\textsuperscript{223} See id.
\item\textsuperscript{224} See id.
\item\textsuperscript{225} See id.
\item\textsuperscript{226} See Group Protests, supra note 209, at 8.
\item\textsuperscript{227} See Fujimori, supra note 221.
\item\textsuperscript{229} See Office of Hawaiian Affairs, supra note 198; see also Kahanu & Van Dyke, supra note 98, at 445 ("The most fundamental element of sovereignty is the right to choose and establish a form of government.").
\end{enumerate}
\end{footnotesize}
Congress now has the opportunity in the Akaka Bill to grant Hawaiians sovereignty. Should the Akaka Bill be signed into law? Should these rights be extended to the native people of the 50th state as well? Do Hawaiians qualify as Native Americans? Should they be included in federal Native American policy, regardless of their ability to be considered a tribe? Is the nation-within-a-nation route the best way to achieve sovereignty? I propose that an affirmative answer to all these questions would substantially ease the way toward the establishment of a Hawaiian governmental body that many Hawaiians would like to see become a reality.

IV. ANALYSIS

A. Hawaiians Are Native Americans Who Lived as a Sovereign Nation Prior to the Illegal American Overthrow.

Logic dictates that Hawaiians be included in the federal definition of Native Americans. Hawaiians are the people indigenous to the Hawaiian Islands. Furthermore, like Native Americans on the mainland, they enjoyed a sovereign existence prior to American conquest. The recognition of the Kingdom of Hawai‘i as a sovereign nation adds credence to the argument that the United States should return sovereignty to the Hawaiians.

This position is not without its weaknesses. For example, Congress has not amended all legislation to include Hawaiians as Native Americans. Congress also does not employ one single definition of Hawaiians in its legislation, sometimes defining Hawaiians as descendants of the inhabitants of the Hawaiian Islands prior to 1778, and sometimes as only those people with one-half or more blood of

231. See infra Part IV.A.
232. See infra Part IV.B.
233. See infra Part IV.B.
234. See infra Part V.
235. See supra notes 24-27 and accompanying text.
236. See supra notes 34-36 and accompanying text.
237. See supra note 90 and accompanying text.
those pre-1778 inhabitants.238 As the Court recognized in Johnson v. M'Intosh,239 only Congress has the ability to grant and remove a native people's land title240—which Congress has not done. Furthermore, many who would posit the argument against Hawai'i existing as a sovereign kingdom prior to American interference point to the fact that at the time of annexation, Hawaiians made up less than half the population of Hawai'i,241 and the legislature consisted of some Americans.242

A stronger argument exists for categorizing Hawaiians as Native Americans. As the native people of what is now a part of America, Hawaiians are literally native Americans. They resided in this country in 1778 when non-natives “discovered” the land.243 At that time, Hawaiians alone lived in the Hawaiian Islands.244 This allowed Hawaiians to develop a distinct culture, similar to how Native American peoples on the mainland each have their own unique culture.245 The Supreme Court of Hawai'i in Naliilelua246 agreed with this logic, noting, “Native Hawaiians are people indigenous to the state of Hawai'i, just as American Indians are indigenous to the mainland United States.”247

Furthermore, Congressional legislation supports the case of Hawaiians as Native Americans. Congress has the exclusive power to designate a people as Native Americans248—which it has done with Hawaiians.249 Ahuna250 confirmed this, as the court noted that Congress had included Hawaiians in its definition of Native Americans in the American Indian Religious Freedom Act.251 As Congress has

238. See supra notes 2, 75 and accompanying text.
239. 21 U.S. (8 Wheat.) 543 (1823).
240. See supra note 107 and accompanying text.
241. See supra notes 41-42 and accompanying text.
242. See supra notes 51, 54 and accompanying text.
243. See supra notes 26-28 and accompanying text.
244. See supra notes 24-26 and accompanying text; see also DOUGHERTY, supra note 24, at 20.
245. See supra notes 26-33 and accompanying text.
247. Id. at 1012.
248. See discussion supra Part II.B.
249. See supra note 90 and accompanying text.
the sole ability to declare a people Native Americans, the courts must treat them as such.

Like Native Americans on the mainland, Hawaiians resided as a "highly organized" nation before the overthrow of their government. This nation consisted of a central leader, a variegated social system, and a self-sufficient economy. Similar to their mainland counterparts, Hawai'i negotiated treaties with other nations, and the Hawaiian Kingdom had gained recognition as a distinct sovereign entity. Thus Hawaiians have an entitlement to sovereignty, as Justice Marshall espoused in Worcester. To exclude Hawaiians as a sovereign nation upon American infiltration would be preposterous, as that would allow the United States to use unconstitutional methods to infiltrate the governing bodies of native people, then declare them to be non-sovereign precisely because of that unconstitutional activity.

B. The Rational Basis Standard of Review Should Apply to Legislation Concerning Hawaiians, Regardless of Their Classification as a Tribe.

According to Mancari and possible interpretations of the Constitution, courts can only subject legislation concerning persons in federally recognized Native American tribes to rational basis review (rather than the strict scrutiny level of review). Arguably, based upon statutes and policy, Hawaiians fit into a tribal model. However, Hawaiians probably need not organize into a federally recognized tribe for a lower standard of review to apply toward legislation regarding separate and/or preferential programs for Hawaiians. This would comport with Weeks, John, and Pierce. Case law, constitutional analysis, and policy provide justification for the non-necessity of tribal organization.

Explicitly, the Constitution in the Indian Commerce

253. See supra notes 30, 49 and accompanying text.
254. See supra note 35 and accompanying text.
259. Alaska Chapter, Associated Gen. Contractors of Am. v. Pierce, 694 F.2d 1162 (9th Cir. 1982).
Clause only allows for Congress to deal with Indian tribes. However, in the Framers' time, Native Americans existed only as tribes. The government made no effort to integrate Native Americans into American society, choosing instead efforts to ostracize and disenfranchise them, similar to the federal government's treatment of Hawaiians. Therefore, it seems logical that the only mention of Native Americans in the Constitution would frame them as being members of tribes.

The seminal Mancari case similarly provides a basis for the tribal requirement. The entire purpose for the evaluation of the hiring preference under the rational basis standard of review was to promote the self-governance of tribes (deemed a legitimate congressional goal, based upon the unique trust relationship between Congress and the tribes). The case only addresses using the rational basis standard of review for legislation affecting tribes, and a footnote makes explicit the distinction between tribes and individual Native Americans when choosing a standard of review. While Hawaiians may share a special trust relationship with Congress, if they cannot qualify as a federally recognized tribe then a higher standard of review may possibly be applied to legislation establishing separate programs for them.

According to statutes and congressional policy, Hawaiians can possibly organize into a tribe which, upon federal recognition, would be entitled to rational basis review of legislation establishing separate programs for them. While no statute explicitly states what requirements a group must meet before the Secretary of the Interior recognizes it as a tribe, the Ninth Circuit in Price applied the statute that determines eligibility for federal benefits. Examining 25 C.F.R. § 83.7, an argument can be made as follows: Hawaiians have existed since they first arrived in the

260. See supra notes 93-94 and accompanying text.
261. See Van Dyke, supra note 40, at 20 (noting that early cases referred only to tribes because all Native Americans then were connected to tribes and were discouraged from integrating into the larger society).
262. See supra note 52 and accompanying text.
264. See id. at 554 n.24.
265. See supra notes 65-76 and accompanying text.
267. See supra notes 169-70 and accompanying text.
Hawaiian Islands almost two thousand years ago, thus they have a historical continuity. The Kingdom of Hawai‘i enjoys a longstanding tribal political authority, as evidenced by the push for sovereignty to correct past wrongs and by the citizenship that some people still claim in the Kingdom. A substantial portion of the petitioning group lives in a specific area, as half or more Hawaiians continue to reside in Hawai‘i. Hawaiians observe formal procedures through which the group governs its affairs, evidenced by the continuance of traditional Hawaiian customs such as ho‘oponopono, a form of dispute resolution commonly used in public schools and within communities.

Admittedly these arguments, save perhaps the historical continuity, lack strength. No tribal authority has ruled in over 100 years. While some people claim the citizenship of the Hawaiian Kingdom (refusing, for example, to pay federal or state tax for this reason), the overwhelming majority of Hawaiians hold themselves out as citizens of the United States and Hawai‘i. Furthermore, Hawaiians, while concentrated primarily in Hawai‘i, live in mixed communities with people of various different ethnicities.

Second, Hawaiians could qualify as a tribe under the other standards used in Price, those set out in a 1974 letter from the Commission of Indian Affairs. However, while the Hawaiian Kingdom did have treaty relations with the United States, the Kingdom fails to meet the other four requirements. Thus, Hawaiians could probably not qualify as a tribe under a Price analysis.

However, as Mancari’s progeny show, courts have not strictly adhered to the tribal requirement—thus it may be possible for courts to review legislation pertaining to a separate program for Hawaiians using the deferential

268. See supra note 24 and accompanying text.
269. See discussion supra Part II.D.
270. Some people who claim the citizenship of Hawai‘i refuse to pay state and federal taxes, do not recognize the state’s jurisdiction over them, and occupy state lands without acquiring permits. See Oshiro, supra note 2, at 92.
271. See Office of Hawaiian Affairs, supra note 85.
272. See supra notes 49-51 and accompanying text.
273. But see Trask, supra note 5, at 22 (citing some statistics that show the same number of Hawaiians live outside the state as in it).
275. See supra note 35 and accompanying text.
276. See supra note 173 and accompanying text.
rational basis standard of review, even lacking organization into a federally-recognized tribe. These later cases apply the rational basis standard to Native Americans who are not members of a federally recognized tribe. Policy also supports the extension to native peoples not organized into a tribe.

A lower standard of review may apply to legislation concerning Hawaiians even if they lack membership in a federally recognized tribe. Hawai‘i’s Senator Daniel Inouye noted that Hawaiians can proceed with forming their own government with or without federal recognition, as “sovereignty is inherent in the people.” Exceptions made to the Mancari rule apply equally well to Hawaiians as they do to the Native Americans in Weeks and John. In Weeks, the Court found that the Kansas Delawares had no vested rights in aboriginal property, but Hawaiians possibly do have such rights as evidenced by the two land trusts held in their behalf. Like the Choctaws of Mississippi in John, Hawaiians of today exist only as a “mere remnant” of a once larger group of natives. However, unlike the Choctaws (and adding to the strength of their argument), Hawaiians arguably have continuously been supervised by the federal government through obligations accompanying the Hawaiian Homes Commission Act’s trust.

Furthermore, noting the similarities between the situation of the Hawaiians and that of Alaskan natives, Hawaiians should also be entitled to the use of a lower standard of review. Like the Alaskan natives in Pierce, the United States did not acquire control over Hawaiians through a treaty process with the native peoples. In addition, Hawaiians, like Alaskans, have not organized themselves into tribes. Yet in deciding to apply the rational basis standard of review, the Ninth Circuit recognized that Congress had included Alaskan natives into the definition of Native

277. See supra notes 180-82 and accompanying text.
278. Roth, supra note 13.
281. Weeks, 430 U.S. at 80.
282. See supra notes 28, 70 and accompanying text.
283. See supra notes 68-70 and accompanying text.
284. Alaska Chapter, Associated Gen. Contractors of Am. v. Pierce, 694 F.2d 1162 (9th Cir. 1982).
285. See supra notes 59-62 and accompanying text.
286. See supra notes 168-74 and accompanying text.
Americans in legislation which courts subjected only to the rational basis standard of review.\(^{287}\) Similarly, Congress has added Hawaiians into the definition of Native Americans in some legislation.\(^{288}\)

Policy also supports the application of a lower standard of review to separate programs for Hawaiians. The rationale behind the application of a lower standard of review for legislation affecting other Native Americans is that such preferential legislation encourages greater self-governance\(^ {289}\) of a people whose livelihoods and traditional forms of leadership the United States destroyed.\(^ {290}\) These past injustices necessitate reparations. Hawaiians share a similar history of subjugation at the hands of the American government.\(^ {291}\) Similarly, reparations are in order to make up for past wrongs as well as to preserve a culture and people on the verge of disappearance.\(^ {292}\) Again, it would be ironic indeed to deny this lower standard of review to people who may have been organized into what would be today a federally recognized tribe, but who no longer exist as such due to American efforts to destroy the people’s traditional form of government.

Even without being a federally recognized tribe, courts should evaluate legislation concerning sovereignty for Hawaiians under the rational basis standard of review. A court should read any Constitutional provisions in light of the circumstances of their making and conform them to fit the current situation. Furthermore, Hawaiians bear an even stronger trust relationship to the federal government than did the Native Americans involved in *Weeks*\(^ {293}\) and *John*.\(^ {294}\) Congress showed its willingness to disregard the tribal requirement when dealing with persons not traditionally thought of as Native Americans in *Pierce*.\(^ {295}\) Finally, policy arguments mandate that a lower standard of review should

\(^{287}\) See *supra* notes 180-83 and accompanying text.

\(^{288}\) See *supra* note 90 and accompanying text.

\(^{289}\) See discussion *supra* Part II.B.2.

\(^{290}\) See *supra* notes 43-52 and accompanying text.

\(^{291}\) See discussion *supra* Part II.A.

\(^{292}\) See *supra* note 88 and accompanying text.


\(^{295}\) Alaska Chapter, Associated Gen. Contractors of Am. v. *Pierce*, 694 F.2d 1162 (9th Cir. 1982).
be used as a means of upholding legislation providing for the re-genesis of self-governing native peoples.

V. PROPOSAL

Given the preceding analysis, Congress should extend federal recognition to Hawaiians as Native Americans as soon as possible. This could most easily be accomplished by passage of the Akaka Bill during the 107th Congress. The bill would also facilitate the creation of a sovereign Hawaiian governmental body. Courts should review federal legislation concerning sovereignty under the rational basis standard.

Hawaiians fit rather easily into the definition of Native Americans and they lived as a sovereign nation before the American overthrow.296 One of the goals of Congress is to provide for the self-governance of Native Americans whose traditional leadership the United States destroyed.297 Thus, policy dictates that Hawaiians regain that sovereignty.

Courts should review any legislation regarding sovereignty only under the rational basis standard. While Hawaiians may classify as a tribe,298 cases after Morton v. Mancari299 show the non-necessity of organization as a tribe for the application of a lower standard of review. This is especially true if the people involved once existed as a sovereign nation, and the legislation in question would effectuate the re-creation of such sovereignty, as sovereignty is an inherent right of a people.300

Perhaps most importantly, the current legislative means being sought to ensure the classification of Hawaiians as Native Americans must continue, as this is the strongest base from which to push for sovereignty.301 Although the Supreme Court did not rule on the constitutionality of OHA or the over 150 pieces of legislation that grant preferential programs to Hawaiians, the Court's eagerness to overturn OHA's Hawaiian-only election process may signal a hesitance to uphold those programs should they be challenged. Even if the nation-within-a-nation model is not the ideal form of

296. See discussion supra Part II.A.
297. See discussion supra Part II.B.
298. See discussion supra Part IV.B.
300. See supra, note 212 and accompanying text.
301. See discussion supra Part II.D-E.
sovereignty for all groups, inclusion in federal Native American policy today (as would happen under the Akaka Bill) would at least preserve those beneficial programs.

Should Hawaiians triumph in their quest for inclusion in federal Native American policy, Hawaiians must immediately launch a campaign for sovereignty from that position of strength. In developing their strategy, Hawaiians must learn to work together toward one common model of sovereignty. Education of the general public is necessary to inform residents of Hawai‘i of the implications of sovereignty.

Furthermore, Hawaiians should advocate for the nation-within-a-nation model of sovereignty supported by the Akaka Bill. Although ample justification exists in international law for declaring the United States's acquisition of Hawaii null and void, in reality the United States will not relinquish control of an entire state. In addition, the model advocated should mirror that of mainland Native Americans—a model easily digestible by Congress. However, that model should not be strictly confined to that of Native American models, for Hawaiians have a different culture and traditional land distribution structure.

However, the Akaka Bill's shortcomings must be addressed and rectified either before its passage or in amendments. Specifically, the bill does not allow for the transfer of state land (i.e., ceded lands) or money. Nor does it specify who would come under the jurisdiction of this newly-formed government, whether it will be all residents of Hawaii or just Hawaiians. The bill is also silent on the problem of Hawaiian Home Lands management, though it recognizes that 18,000 eligible native Hawaiians remain on a waiting list to receive assignments of land. Finally, no provision is made for monetary reparations for the United States's illegal taking of individuals' land. These issues should all be addressed before the bill is reintroduced in Congress.

The Akaka Bill is not perfect, but it is a more promising path to sovereignty than complete independence. There is ample support in international law for the platform of those seeking independence from the United States. However, the United States is not likely to grant complete independence to

302. See discussion supra Part II.D.
303. See supra notes 71-72 and accompanying text; see also discussion supra Part II.A.
one of its states. Furthermore, the majority of Hawai‘i's residents, and the majority of Native Hawaiians, do not wish to completely secede from the United States. Therefore, inclusion into federal Native American policy and the achievement of nation-within-a-nation status may be the best opportunity Hawaiians have to realizing sovereignty.

Furthermore, those supporting an independent Hawaii need not fear the Akaka Bill, but rather should support its passage. It does not forbid the establishment of an independent nation. In fact, it specifically reserves the right of Hawaiians to pursue an independent nation.

The momentum from *Rice v. Cayetano* is still strong and may fade with time. Should that happen, Hawaiian community leaders and politicians need to maintain the spirit. Even after inclusion into federal Native American policy, Hawaiians need to advocate more for some form of sovereignty, for this is the only way to salvage what is left of a slowly-dwindling population. Self-governance is not only an inherent right of Hawaiians, but a necessity. Hawaiians must not let injustices from over one hundred years ago overcome the proud history and heritage of the Hawaiian people.

VI. CONCLUSION

Given the recent threat from the Supreme Court, Hawaiians must move now to accomplish what they rightfully deserve—inclusion in federal Native American policy. All Hawaiians should come together to support passage of the Akaka Bill. Including Hawaiians in federal Native American policy is the logical outgrowth of their special status as indigenous people of the United States and beneficiaries of a trust obligation. They once existed as a sovereign nation, much like Native Americans on the mainland. Although they may not qualify as a tribe, courts should still review legislation granting them separate programs under rational basis review due to their special relationship with the government. This would allow the current preferential legislation to continue, as well as lay a foundation for some form of sovereignty to evolve. Only then will over one

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304. 120 S. Ct. 1044 (2000).
305. *See supra* notes 70, 83-88 and accompanying text.
hundred years of injustice begin to be remedied.