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Article

*109 A NEW SEGREGATION? RACE, RICE V. CAYETANO, AND THE CONSTITUTIONALITY OF HAWAIIAN-ONLY EDUCATION AND THE KAMEHAMEHA SCHOOLS

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I. Introduction

It is the second-richest educational institution in the United States, yet many Americans have never heard of it; its multi-billion dollar endowment [FN1] is said to be larger than that of any institution of higher learning save Harvard University, yet it does not involve itself in post-secondary education; and years after Brown v. Board of Education [FN2] moved to put an end to racial segregation, it denies admission to all who do not meet its ancestry/blood-quantum requirement. It is the Kamehameha Schools Bishop Estate [FN3] ("KSBE")-a charitable educational trust that owns a startling ten percent of the Hawaiian Islands and commands an investment empire stretching from Beijing to Wall Street. [FN4]

Founded through the 1884 will of Princess Bernice Pauahi Bishop, the last of the ali'i descended directly from King Kamehameha, the KSBE has traditionally limited admissions to those of Hawaiian descent. As a result, Native Hawaiians alone have enjoyed the benefits of this affluent charitable trust. However, in the wake of two landmark Supreme Court decisions-City ***110** of Richmond v. J.A. Croson Co. [FN5] and Adarand Constructors, Inc. v. Pena [FN6]-and in light of the ambiguous racial/political status of Native Hawaiians, many have questioned the continued viability of Hawaiian-only education, and, in particular, the continued survival of the KSBE.

A. The Rising Constitutional Threat to Hawaiian-Only Educational Programs: The Legacy of Croson and Adarand

The rising tide of attacks against Hawaiian-only education has come in three forms. First, direct federal government sponsorship of Hawaiian-only education, via such programs as the Native Hawaiian Education Act ("NHEA") of 1994, [FN7] may be unconstitutional. Adherents to this view argue that Croson and Adarand have radically altered the constitutional landscape of racial preferences by making any government support of racially-based programs, even remedial ones, subject to strict scrutiny and likely to fail a challenge on equal protection grounds. In the words of noted constitutional scholar Gerald Gunther, such scrutiny is typically "'strict' in theory, fatal in fact," [FN8] and ordinarily cannot pass constitutional muster. [FN9]

At the same time, some observers have even argued that Croson and Adarand undermine the continued viability of the Mancari doctrine, [FN10] which immunizes special programs for American Indians [FN11] from equal-protection scrutiny. According to Morton v. Mancari, [FN12] American Indians are a political, rather than racial, group and programs according them special treatment come under the plenary powers granted to Congress in the

Indian Commerce Clause. [FN13] However, in the quarter-century since Mancari was decided, the Supreme Court has grown increasingly hostile to any program that appears to accord special treatment on the basis of race. Moreover, there is a growing ***111** view arguing that even if Mancari is still good law, Native Hawaiians do not come under its purview, as they do not constitute American Indians. [FN14]

Secondly, indirect government sponsorship of racially discriminatory organizations such as the KSBE, through the granting of non-profit, tax-exempt status, can constitute state action impermissible under the Constitution. Despite its restrictive admissions policy, the KSBE enjoys tax-exempt status from the federal government. [FN15] However, this status has come under fire in recent years.

Based on the "national policy to discourage racial discrimination in education," [FN16] the IRS has, since 1970, refused to grant tax-exempt/charitable status [FN17] to any private school "not having a racially nondiscriminatory policy as to students." [FN18] Moreover, the IRS has announced that it will apply the Bob Jones University v. United States decision [FN19] to revoke tax-exemption to all racially restrictive trusts. [FN20] In the past, the Supreme Court has indicated that granting tax-exempt status in such instances, would constitute discriminatory state action prohibited by the Fifth and Fourteenth admendments. [FN21] Yet until recently, only invidious, white-only discrimination came under such constitutional scrutiny.

Third, and most seriously, should the courts find that the KSBE itself constitutes a state actor, the KSBE would be directly subjected to the Equal Protection Clause. Unlike the two prior methods of attack, this potential challenge is the most damaging to both the KSBE and the cause of Hawaiian-only education. If direct federal grants or continued tax-exempt status are declared unconstitutional, the KSBE can continue to survive, albeit with fewer economic resources. However, a court determination that the KSBE is a state actor could put the KSBE entirely out of the business of Hawaiian-only education. Future courts may draw upon this theory, first advanced by Hawai'i Supreme Court Justice Abe in his concurring opinion in In Re Estate ***112** of Bishop, [FN22] as Hawaiian-only education comes under attack in the litigation process.

B. Recent Developments: The KSBE Investigation and Rice v. Cayetano

Within this general legal setting, the issue of Hawaiian-only education policies has grown even more controversial as a result of two recent events. First of all, since 1997, the Attorney General of Hawai'i has engaged in a large-scale investigation of the administration of the KSBE. [FN23] This investigation has produced evidence of mismanagement and waste by the KSBE's trustees and corrupt KSBE entanglements with the State of Hawai'i. [FN24] As a result, all of the KSBE's prior trustees have resigned and several have faced the threat of civil and criminal charges. [FN25] These events have garnered national media attention, with featured articles on the subject in the Wall Street Journal and New York Times, [FN26] and have led to calls for massive reform of the charitable educational trust.

One key area of focus has been the Schools' admissions policy-which limits acceptance to only those students who, inter alia, can trace their ancestry to the pre-1778 inhabitants of the Hawaiian Islands. Legal technicalities aside, this is tantamount to the possession of a minimum quantum of Native Hawaiian blood, as only the Native Hawaiian people inhabited the islands prior to 1778, the year of Captain Cook's arrival. In late 1997, Harold F. Rice, a Caucasian who traces his roots in Hawai'i back to 1837, and twenty other plaintiffs filed suit in federal court against former Secretary of Treasury, Robert Rubin, alleging that Rubin had improperly accorded tax-exempt status ***113** to KSBE. [FN27] In his complaint, Rice claimed that tax-exempt status was impermissible because KSBE "enforces a strict policy of racial exclusion in the admission of students" to the Kamehameha Schools. [FN28] Consequently, Rice maintained that government support for the tax-exemption constitutes a violation of the equal protection component of the Fifth Amendment's Due Process Clause. Though dismissed on standing grounds, the case did not mark an end to the issue. The IRS, already in the midst of a massive audit of the KSBE since 1995, [FN29] has also looked into the possibility of revoking KSBE's tax-exempt status. [FN30] In late March of 1999, it announced that it had, for the time being, agreed to settle with the KSBE and allow it to retain its tax-exempt status. However, the issue could be reopened at any time. In part, the IRS was prevented from revoking tax-exempt status as it waited for clear legislative or judicial guidance on the constitutionality of the KSBE admissions policy.

This leads to the second recent event which threatens the continued viability of federal support for Hawaiian-only education: the decision of the Supreme Court in the case of Rice v. Cayetano. [FN31] The case, brought by the very

same Harold F. Rice in the case of Rice v. Rubin, [FN32] alleges the unconstitutionality of the voting procedures for the Office of Hawaiian Affairs ("OHA"), a state agency which administers a $300 million trust benefiting approximately 200,000 descendants of the islands' original inhabitants. [FN33] As Rice contends, OHA voting requirements, as determined by the State of Hawai'i, violate the Fourteenth and Fifteenth Amendments of the United States Constitution by creating an explicit racial requirement for suffrage: Currently, only state residents with a quantum of Native Hawaiian blood are eligible to elect OHA officials. Rice garnered no support for his position from the federal court for the District of Hawai'i, which granted summary judgment in the case to the State, [FN34] and the Ninth Circuit, [FN35] which affirmed the lower court decision by finding no constitutional shortcoming in the OHA voting requirements. However, Rice obtained reversal at the Supreme Court. [FN36] Granted a writ of ***114** certiorari in March of 1999 [FN37]-the same time at which the IRS declared a temporary settlement in its investigation of KSBE's tax-exempt status-oral arguments were heard in early October [FN38] and a decision was recently handed down. As expected by observers of the oral arguments, [FN39] the Supreme Court held that the blood-quantum requirement for OHA voting was unconstitutional under the Fifteenth Amendment. [FN40]

Though Rice does not deal explicitly with the issue of Native Hawaiian education, it has profound implications for the future of federal support for Hawaiian-only education. As a result, it is not surprising that KSBE hired Sidley & Austin and its chief appellate attorney Carter Phillips, one of the nation's most experienced Supreme Court litigators, to file an amicus brief supporting the respondents in the case. [FN41] Indeed, the High Court's ruling in Rice provides guidance as to whether Native Hawaiians truly come under the same political-status protections as other Native Americans and whether Mancari itself is still good law. This, in turn, plays a crucial role in determining the viability of Hawaiian-only education programs.

C. The KSBE and Hawaiian-Only Education in the Post-Rice Era

This article will examine the constitutional viability of direct and indirect federal support for Hawaiian-only education programs as well as the very constitutionality of the KSBE itself. As I will argue, the rising constitutional assault on Hawaiian-only education is misguided. First, a direct suit against the constitutionality of the KSBE should fail on the grounds that it is not a state actor for the purposes of the Fourteenth Amendment. Moreover, a challenge against direct and indirect federal support for Hawaiian-only education should fail. Native Hawaiians, like other indigenous peoples of the United States, do indeed enjoy a special trust relationship with the federal government and consequently the courts should view them as constituting a political group, not a racial category. Thus, despite Croson, Adarand, and Rice, the rational basis test continues to apply to policies according preferential treatment to indigenous peoples, and a clear link between the Hawaiian-only education programs and the policy goals of the trust relationship appears to exist. Specific support earmarked by the federal government for Native ***115** Hawaiian education, whether in the form of direct (outright grant programs) or indirect (tax-exempt status to institutions such as KSBE) subsidies by the federal government, is not in violation of the equal protection component of the Fifth Amendment's Due Process Clause.

Critics of Hawaiian-only education policies have misread Mancari and its progeny, which should apply to Native Hawaiians. Admittedly, the KSBE and its trustees may have wasted valuable resources that could have gone towards the betterment of the Native Hawaiian community. Moreover, the KSBE's performance as an educational institution has been less than stellar. [FN42] It is in desperate need of reform-reform that has only just begun. Nevertheless, its admissions policy must be respected. Indeed, the KSBE's admissions policy and direct federal programs for Native Hawaiian education play a vital role in the promotion of self-governance, self-sufficiency, and linguistic and cultural preservation for the Native Hawaiian people, a fact only strengthened in light of the events of the past century. Even if the courts apply strict scrutiny to Hawaiian-only education, there is a sufficiently compelling state interest in the benefits of the KSBE being exclusively derived by Native Hawaiians to enable Hawaiian-only education policies to pass constitutional muster. For these reasons, federal-government support of Hawaiian-only education, whether through direct spending programs or KSBE tax-exemption, is constitutional. [FN43]

***116** II. The Constitutionality of the KSBE

To begin with, the most serious threat to the KSBE and the future of Hawaiian-only education comes from the view that the KSBE represents a state actor directly subject to due process and equal protection requirements. If federal support of the KSBE and Native-Hawaiian education is found to be unconstitutional, whether directly through grants or indirectly through tax-exempt status, the KSBE could live on as a result of its tremendous wealth and could continue to limit admissions to Native Hawaiians. However, should the courts find the KSBE to

constitute a state actor, the KSBE itself would be prohibited from maintaining its admissions policy. Thus, if opponents of Hawaiian-only education could win on this issue, they could remove the KSBE from its critical role in this area.

A. The KSBE as State Actor

Whether the KSBE constitutes a state actor is a notoriously difficult determination to make, as no hard rules apply. The Supreme Court has held that inquiries about state action must be made on a case-by-case basis. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." [FN44] The Ninth Circuit has also taken this position, holding that "there is no specific formula for determining state action." [FN45] Traditionally, the courts have muddled through four different state-actor tests: [FN46] [1] the traditional public function test; [FN47] [2] the state compulsion test; [FN48] [3] the nexus test; [FN49] and [4] the joint action test. [FN50] More recently, however, the Supreme Court has fused these four tests into three primary variables that lower courts should weigh: "[1] the extent to which the actor relies on governmental assistance and benefits; [2] whether the actor is performing a traditional governmental function; and [3] whether the ***117** injury caused is aggravated in a unique way by the incidents of governmental authority." [FN51]

On the first consideration, the KSBE has an abundance of wealth and can potentially refuse all federal assistance and benefits so as to immunize it from this prong of the state-actor test. On the second consideration, however, KSBE faces a more difficult challenge. In fact, in his concurring opinion in the Estate of Bishop case, Justice Abe finds the KSBE to be a state actor on the exclusive basis of the public-function test. [FN52]

According to Justice Abe, "education is perhaps the most important function of state and local government." [FN53] Based on this fact, and his observation that the KSBE is virtually indistinguishable from the public school system, Abe asserts KSBE's state-actor status. However, this syllogism does not hold up under scrutiny. No matter how important a public function education represents, it does not follow that all educational institutions constitute state actors. Otherwise, all parochial education would be unconstitutional. Justice Abe recognizes this point when he attempts to distinguish parochial schools from public schools, noting that "Kamehameha Schools is indistinguishable from any public school in the State of Hawaii . . . . Its curriculum is substantially identical to the curriculum of any public school. Students are not required to be of any particular religious affiliation for admission, and the school is not run by any religious sect." [FN54] However, the division between public and private schools is not necessarily religiously-based. According to Justice Abe's logic, all non-denominational private schools would be subject to the Fourteenth Amendment, as they would be deemed state actors. Besides the detrimental consequences this would have on parental choice and educational freedom, no court has ever upheld this proposition.

Furthermore, though elementary and secondary education has historically been a vital public function, there is less truth to this observation with each passing year. Given the increased support for school choice, educational privatization, and voucher plans, the direct operation of schools is becoming less of a public function in the twenty first century.

Moreover, it is a matter of great dispute whether KSBE is truly indistinguishable from a public school. First of all, unlike a Hawai'i public school, the KSBE actually involves itself in post-secondary education by providing substantial sums of money through scholarships and grants to Native Hawaiian students for post-secondary education, including post-collegiate degree programs. Thus, the KSBE has a much more extensive scope than a ***118** typical grade school or high school. Secondly, while there is no religious affiliation requirement for admission to the school, the educational mission of the school does contain an explicitly Christian component that would be impermissible at public schools. [FN55] This component goes to the core of the separation of private schools from public ones, and the exemption that private schools receive from due process and equal-protection application.

Most importantly, in the years since Justice Abe's opinion, the Supreme Court has allowed private schools to continue to enforce policies that are blatantly discriminatory without subjecting them directly to the requirements of the Fourteenth Amendment. In Bob Jones University v. United States, [FN56] the Supreme Court held that nonprofit private schools that enforce racially discriminatory policies, even if they are based on religious doctrine, do not qualify for tax-exempt status on the basis of the equal protection component of the Fifth Amendment's Due Process Clause. [FN57] As the Court ruled, the granting of tax-exemption by the federal government constitutes state action. [FN58] However, the Court refused to go the way of Brown v. Board of Education [FN59] and take the additional

step of nullifying the racially discriminatory policies. Neither school was seen as a state actor in and of itself.

B. Attacking the KSBE as a Private Entity

Thus, the KSBE likely does not constitute a state actor for the purposes of the Fourteenth Amendment. However, the federal government has forced wholly private entities to end discriminatory policies before. Such suits have come under 42 U.S.C. § 1981, a statute that passed pursuant to the federal government's enforcement power in section two of the Thirteenth Amendment [FN60] and a statute that consequently has no state actor requirement. The most salient case in this area, Runyon v. McCrory, [FN61] involved a § 1981 action [FN62] against a series of private Virginia schools with racially discriminatory admissions policies. As the Supreme Court held in Runyon, the schools' discriminatory admissions policies constituted a violation of federal law even though the schools were wholly private entities, as § 1981 forbids all racial ***119** discrimination in both private and public contracts. [FN63] For better or worse, [FN64] however, § 1981's language is inapplicable to the KSBE's admissions policy. As § 1981 dictates:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoy by the white citizens. [FN65]

Thus, the baseline for a § 1981 violation is the rights and privileges enjoyed by white citizens. The KSBE, on the other hand, denies admission to any individuals of wholly caucasian descent who cannot trace their ancestry back to 1778 Hawai'i. Thus, no one can pursue a legitimate § 1981 action against the KSBE, since the KSBE is not denying anyone a privilege given to white citizens.

All told, the KSBE does not appear to constitute a state actor for the purposes of the equal protection doctrine. Moreover, due to the limitations of § 1981, it appears immune from Thirteenth Amendment enforcement under current federal law. No matter how discriminatory some individuals view its admissions policy, the KSBE itself is not unconstitutional. However, Hawaiian-only education faces a very real threat on two constitutional fronts-an equal protection challenge to the KSBE's tax-exempt status and an equal protection challenge to such programs as the NHEA which provide funding for Hawaiian-only education.

III. Racial versus Political Classification: Should the Courts View Native Hawaiians as Constitutionally Akin to American Indians?

In order to analyze the viability of Hawaiian-only education programs, it is first necessary to examine the constitutional issues that make up federal policy towards indigenous peoples of the United States. In particular, the viability of Hawaiian education programs rests largely on whether Native Hawaiians are viewed as a race or a political group for purposes of equal-protection law. The answer to this question determines the scrutiny to which Hawaiian-only policies will be subjected; this, in turn, largely determines the ability of such policies to pass constitutional muster.

As the Supreme Court has repeatedly affirmed, American Indians constitute a political, rather than racial, group, for they possess a special trust relationship ***120** with the federal government. Moreover, case law suggests that this special political status applies to all American Indians, regardless of tribal membership. This point is crucial to the applicability of American Indian precedent to the case of Native Hawaiians, who were never organized in strict tribal structures in the American Indian sense.

A. The Political Classification of American Indians

First of all, the Supreme Court has long recognized the unique legal status of American Indians. [FN66] In Morton v. Mancari, [FN67] the Court solidified this unique legal status. The Mancari court rejected an equal protection challenge to an employment preference for American Indians at the Bureau of Indian Affairs ("BIA"). [FN68] The Court held that the preference, codified in the Indian Reorganization Act ("IPA") of 1934, [FN69] did not conflict with the Equal Employment Opportunity Act of 1972 ("EEOA"), which proscribes discrimination in federal government employment of the basis of race. [FN70] As the Court held, American Indians constitute a political, not racial, group, [FN71] for the federal government has a trust obligation towards American Indian tribes. [FN72] This special relationship stems from the unique history between the federal government and American Indians, since the United States "overcame the Indians and took possession of their lands, sometimes by force . . . ." [FN73] In response to this history of war and conquest, the United States has undertaken the duty to "prepare the Indians to take their place as independent, qualified members of the modern body politic" through the creation of special programs for American Indians. [FN74] With their emphasis on political self-determination and self-sufficiency,

American Indian programs constitute a specific response to the issues of sovereignty long plaguing relations between the federal government and the indigenous peoples of the United States. As a result, programs geared towards fulfilling the government's trust obligation to the American Indians constitute political, rather than race-based, preferences.

Critics of federal government support for preferential treatment of Native Hawaiians contend that Mancari does not apply to Native Hawaiians, since they do not possess a tribal form of organization. However, the special ***121** relationship between the federal government and American Indians that makes American Indians a political rather than racial group applies not only to tribes but to individuals as well. "The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself," wrote the Mancari court. [FN75] Admittedly, a central portion of the decision relied on the trust relationship between the federal government and the American Indian tribes and Congress's plenary power-derived from the Constitution-to "regulate Commerce . . . with the Indian Tribes." [FN76] This has lead some observers, such as Stuart Minor Benjamin, to argue that the Mancari court:

> found that the relevant definition [used to allocate preferences to American Indians in the case] was political, even though it was effectively limited to members of a particular ethnic group, because there was a further limitation to tribal members; those individuals who were racially American Indians but who were not members of a tribe were excluded from the definition. [FN77]

Robert Bork has also concurred in this position, arguing that Mancari only provided rational-basis review to legislation dealing exclusively with American Indian tribes and reservations. [FN78]

However, this description is only partly accurate. First, the Mancari court may have actually upheld a congressional statute that gave preferences to American Indians whether they were members of a recognized tribe or not, even though the implementing BIA regulation applied to only members of federally-recognized tribes. [FN79]

Moreover, both Benjamin and Bork completely ignore the implications of Supreme Court decisions subsequent to Mancari. In fact, both United States v. John [FN80] and Delaware Tribal Business Committee v. Weeks [FN81] held that no constitutional problems arose from the provision of benefits or the establishment of separate legal regimes for individual American Indians who ***122** are not members of federally recognized tribes, so long as the programs related rationally to the advancement of self-government, self-sufficiency, or native culture. [FN82] Thus, the Supreme Court has upheld preferential treatment of American Indians on the basis of political status without regard to tribal membership. [FN83]

In Weeks, the Court upheld a policy that distributed funds authorized by an act of Congress [FN84] to the heirs of two federally recognized tribes-the Cherokee Delaware Tribe and the Absentee Delaware-even though many of the heirs receiving the benefits were not members of any tribe. [FN85] Justice Blackmun, who wrote the majority opinion in Mancari, concurred in the ruling, arguing that:

> we must acknowledge that there necessarily is a large measure of arbitrariness in distributing an award for a century-old wrong . . . . In light of the difficulty in determining appropriate standards for the selection of those who are to receive the benefits, I cannot say that the distribution directed by the Congress is unreasonable and constitutionally impermissible. [FN86]

With John, Justice Blackmun and the Supreme Court further affirmed the view that preferential treatment of tribal and non-tribal American Indians alike does not violate the Equal Protection Clause. [FN87] In a unanimous opinion written by Justice Blackmun, the Court acknowledged that the Mississippi Choctaws were not a federally recognized tribe. [FN88] Nevertheless, the Court upheld the power of Congress to establish a separate legal regime for the non-tribal American Indians, thereby rejecting a strict interpretation of the plenary powers contained in the Indian Commerce Clause. [FN89] As Blackmun reasoned, the federal action was permissible since it contained a rational link to the advancement of self-government for the indigenous people in question.

Thus, both Weeks and John make it clear that the Mancari ruling on the rational-basis test applies to both tribal and non-tribal American Indians. What is particularly significant about the Weeks and John decisions is the fact that they were supported by Blackmun, who authored the Mancari decision. As Professor Jon Van Dyke notes, "[n]o absolutes-certainly not the rigid limitation against aiding nontribal natives which Professor Benjamin erroneously

promotes-have emerged to limit the power of Congress." [FN90] ***123** Simply put, the plenary power granted to Congress via the Indian Commerce Clause is not limited to tribal American Indians. Furthermore, the special trust relationship between the federal government and American Indians extends beyond tribal boundaries. Thus, the fact that native Hawaiians are not organized into tribes is irrelevant to a Mancari analysis, as Mancari and its progeny apply to both tribal and non-tribal Native Americans like.

B. The Political Classification of Native Hawaiians

Although the Supreme Court has never spoken directly to the issue, Hawaiian history, legislative precedent, and prior case law all suggest that Native Hawaiians constitute an indigenous people representing a political class for the purposes of equal-protection challenges. Admittedly, the administrative procedures used to establish federal recognition of a tribe exclude indigenous people living outside of the continental United States. [FN91] However, as Mancari and its progeny dictate, tribal status is not necessary for American Indians to receive political, rather than racial, recognition by the courts. The federal government can provide preferential treatment for both tribal and non-tribal American Indians so long as the preferences are rationally related to the advancement of self-sufficiency, self-government, and native culture. Thus, recognition of tribal status is not dispositive in determining whether Native Hawaiians constitute a political or racial group. [FN92] The admissions policy of the Kamehameha Schools Bishop Estate and the eligibility requirements of the Native Hawaiian Education Act of 1994 both engage in political classification, not racial discrimination, and Native Hawaiians are sufficiently akin to American Indians for the purposes of equal protection challenges.

Congress, of course, derives its plenary, politically-based authority to deal with American Indians from the Constitution's Indian Commerce Clause. [FN93] As Jon Van Dyke argues, the Clause "must be understood in the generic sense, referring to historical and cultural groupings of native people." [FN94] This view is strongly affirmed by the consistent use of the term "Indian tribe" by courts to refer to any indigenous people who originally occupied lands that have now become a part of the United States. As established above, [FN95] the Supreme Court has interpreted the Indian Commerce Clause broadly, applying its terms to non-tribal Indians. [FN96] Moreover, in favoring an expansive view of who ***124** qualifies as American Indians, the Ninth Circuit has stated that "the word 'Indian' is commonly used in this country to mean 'the aborigines of America.'" [FN97] Thus, the word could encompass those groups originally inhabiting the current United States properties prior to the arrival of Europeans. Such a group would include those individuals residing in the Hawaiian Islands prior to the landing of Captain Cook in 1778. Indeed, there is ample evidence that this is what the Founding Fathers meant by the term "Indian tribes." [FN98] Consequently, it is quite ironic that a constitutional originalist such as Robert Bork [FN99] should be so quick to adopt the more restrictive, modern ethnographic meaning of the term "tribe" [FN100] and so eager to ignore what the Framers themselves meant by the term.

The case of Alaskan Natives is particularly instructive on the prevailing interpretation of the Indian Commerce Clause. Alaskan Eskimos have repeatedly received status as American Indians, enjoying rational basis review in preferential programs geared towards them, even at the Supreme Court level. [FN101] Yet, Alaskan Eskimos are viewed by modern scholars as linguistically, culturally and ancestrally distinct from American Indians, and their nomadic villages are not described as tribes. [FN102] Thus, the courts have explicitly rejected a narrow understanding of Congress' plenary powers with respect to the "Indian tribes."

Furthermore, in the limited number of cases examining equal protection issues related to Native Hawaiians, the courts have held that Native Hawaiians, like other American Indians, enjoy a unique political status for the purposes of equal protection challenges. [FN103] For example, in upholding the ***125** constitutionality of the Hawaiian Homes Commission Act against an equal-protection challenge, the court in Naliielua v. Hawaii [FN104] ruled that:

> Although Hawaiians are not identical to the American Indians whose lands are protected by the Bureau of Indian Affairs, . . . for purposes of equal protection analysis, the distinction plaintiffs seek to draw [between Native Hawaiians and American Indians] is meritless . . . . Native Hawaiians are people indigenous to the State of Hawaii, just as American Indians are indigenous to the mainland United States . . . . [FN105]

Contrary to the claims of Harold Rice and Robert Bork, [FN106] the absence of a specific "Hawaiian Commerce Clause" in the Constitution is not dispositive. After all, the Constitution was framed only a few years after the Hawaiian Islands were discovered by Westerners and a century before the Hawaiian Islands became a territory of the United States. [FN107]

Moreover, the courts have consistently acknowledged a special responsibility to the Native Hawaiian people. In Pai 'Ohana v. United States, [FN108] the courts recognized the special duty that the government has to protect certain access rights of Native Hawaiians to land for subsistence, cultural, and religious purposes, thereby upholding the Hawai'i Constitution's specific enumeration of rights reserved exclusively for Native Hawaiians. [FN109] Although this responsibility was ultimately transferred from the federal government to the State of Hawai'i with the Statehood Admission Act, [FN110] the trust obligation is still rooted in federal law. [FN111] Although the state has become the primary trustee of the Native Hawaiians, this does not preclude a federal role in the relationship.

***126** Indeed, the Joint Resolution on the Overthrow of Hawai'i ("Apology Bill") [FN112] explicitly supports a continuing federal role in the relationship by acknowledging the "deprivation of the rights of Native Hawaiians to self-determination" by agents and citizens of the United States and by expressing the federal government's "commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people." [FN113] These reconciliation efforts are political in nature, not racial, for the Apology Bill recognizes that the "inherent sovereignty," [FN114] of the Native Hawaiian people was never properly relinquished to the United States. It is of crucial significance that the Apology Bill couches the relationship with the Native Hawaiian people in political rather than racial terms.

The Apology Bill also undermines the revisionist views embraced by opponents of preferential programs for Native Hawaiians. Contrary to the claims of some observers, preferential programs for Native Hawaiians are not enacted as benign racial programs seeking to remedy past discrimination. A history of discriminatory, second-class status, however real, is not charged here. Instead, what is at issue is the illegitimate overthrow of a sovereign kingdom in violation of international law and rectification measures for the destruction of a peoples' language, culture, autonomy, self-sufficiency, and self-governance. It is now well-established that the Hawaiian people never consented to American annexation. [FN115] Instead, a small group of expatriate Americans of European descent forcibly overthrew the Native Hawaiian monarchy and then petitioned for annexation by the United States. [FN116] Like other indigenous peoples living on the land that now makes up the United States, the Native Hawaiians lost their land involuntarily, through a process of coercion and conquest. Thus, in the Apology Bill, Congress recognized the illegitimate "overthrow of the Kingdom of Hawaii," a term that admits the absence of consent in the annexation process, and declared that the "inherent sovereignty" [FN117] of the Native Hawaiian people was never properly relinquished to the United States. The special trust relationship between the federal government and the Native Hawaiian people exists, just as it does with the ***127** American Indian people, in order to rectify some of the injustices that were perpetuated upon the prior sovereign. Congressional authority via the Indian Commerce Clause therefore extends to the Hawaiian people, especially in light of their history of interaction with the federal government.

The courts have acknowledged the unique and special nature of the relationship between the federal government and American Indians to justify the group's treatment as a political, rather than racial, category. But it is possible that future jurisprudence could exclude Native Hawaiians from such a relationship by arguing that American Indians alone enjoy a unique status both as a separate people with their own political and cultural institutions and as a group with whom the federal government shares a trust-like obligation. Indeed, courts could look to Williams v. Babbit [FN118] to support this proposition, for it reads Mancari as "shielding only those statutes that affect uniquely Indian interests." [FN119] However, such a view would ignore the historical context of federal government relations with the Hawaiian people.

First of all, programs intended to benefit Native Hawaiians have consistently been viewed as political extensions of a special trust relationship, not racial preferences subject to strict scrutiny. Like Native Americans from the forty-eight contiguous states, Native Hawaiians enjoy a special relationship with the federal government, even though they lack formal recognition as a tribe. The Hawaiian Homes Commission Act ("HHCA"), which set aside some public lands as Hawaiian home lands, recognizes this special trust relationship between Hawaiians and the federal government:

In recognition of the solemn trust created by this Act, and the historical government to government relationship between the United States and the Kingdom of Hawaii, the United States and the State of Hawaii hereby acknowledge the trust established under this Act and affirm their fiduciary duty to faithfully administer the

provisions of this Act on behalf of the Native Hawaiian beneficiaries of the Act. [FN120]

Indeed, according to the House Report drafting the HHCA:

> The Hawaiian home lands are placed under the control of the commission to be used and disposed of for the purpose of aiding Native Hawaiians . . . . The commission is required to pay all delinquent taxes upon such lands in order to prevent their being sold and thus passing out of the control of the commission. [FN121] ***128** It is crucial to note that "[t]he above two duties, control of the 'corpus' of the trust and payment of taxes on trust lands, are classic duties of a trustee in a trust relationship." [FN122] Thus, most courts and commentators have agreed that a trust relationship exists between the Native Hawaiian people and the federal government. [FN123]

Furthermore, a Supreme Court ruling that Mancari is inapplicable to Native Hawaiians would ignore the existence of this trust relationship, evidenced in the host of public assistance programs and preferential policies to which the trust relationship has given rise. To start with, Hawaiians have repeatedly received classification as American Indians and received benefits in a wide variety of public programs administered by the federal government since statehood. [FN124] The Native Hawaiian Education Act of 1994 [FN125] even targets Native Hawaiians alone. Drawing on the spirit of the Apology Bill, the Act notes that Congress has repeatedly "affirmed the special relationship between the United States and the native Hawaiians." [FN126] The choice of words in the statute is particularly significant, as "special relationship" is the term historically used by Congress to denote the political relationship between the federal government and American Indians. [FN127] It is this term that removes preferential and separate programs for American Indians from the sphere of racial discrimination. [FN128]

***129** In all, courts have continually upheld special treatment of Native Hawaiians against equal-protection challenges. Although the Supreme Court has not spoken directly to the issue: [FN129]

> the state and federal court 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. [FN130]

The justification for this body of precedent is simple: Native Hawaiians constitute American Indians for the purposes of equal protection challenges. They have "developed their own trust relationship with the federal government as demonstrated by the passage of the [Hawaiian Homes Commission Act and a host of other legislation] and because Native Hawaiians were not being excluded from beneficial legislation in the same manner as unacknowledged mainland United States Indian tribes." [FN131]

III. Applying the Correct Standard of Review: Adarand, Croson, and the Threat of Strict Scrutiny to Hawaiian-Only Requirements in Education Policy

A. The Reach of Mancari and Its Progeny: American Indian Legislation and Beyond

With Morton v. Mancari, [FN132] the Supreme Court specified that rational-basis review would apply to preferential legislation geared towards the indigenous peoples of the United States. [FN133] As the Court argued, the EEOA did not apply to the case at hand since employment preferences to American Indians under the IPA constituted political, not racial, classifications and preferences: [FN134] "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." [FN135] Thus, the Supreme Court established a rational basis test to ascertain the equal protection status for such preferential treatment of American Indians.

***130** Since Mancari, the Supreme Court has never overturned a federal statute or treaty affecting indigenous people and has consistently upheld the constitutionality of benefit programs aimed at indigenous peoples. [FN136] Indeed, the Supreme Court has followed Mancari in unanimously upholding federally-based programs for native peoples. [FN137] Washington v. Yakima Nation [FN138] represented one of the last cases to address the constitutionality of laws that single out American Indians. With an air of finality, the case concluded that "it is settled that 'the unique legal status of Indian tribes under federal law permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive.'" [FN139]

The Court has not heard cases involving equal protection and the constitutionality of preferential-benefit programs

for American Indians in a number of years. Indeed, with Livingston v. Ewing, [FN140] the Court began to deny certiorari to such cases. However, on related issues, the Court has continued to cite Mancari favorably, reaffirming its solidity as controlling law. [FN141] Furthermore, judicial preferences for American Indians have continued to receive the Court's blessing. [FN142]

B. Croson and Adarand: The Viability of the Mancari Doctrine in the World of Strict Scrutiny for All Racial Preferences

In recent years, two landmark Supreme Court decisions, City of Richmond v. J.A. Croson Co. [FN143] and Adarand Constructors, Inc. v. Pena [FN144] have radically altered the constitutional landscape of racial preferences. Both cases apply a strict scrutiny/compelling-state-interest standard to all racial classifications and ***131** preferences supported by the government. In Croson, the Court ruled that a city's policy to set aside thirty percent of all construction contracts for minority-owned businesses violated the Equal Protection Clause. [FN145] As the Court ruled, a strict-scrutiny analysis applied to all state and local government classifications by race, even if the government classification was allegedly remedial and benign. [FN146] Subsequent to Croson, the Supreme Court applied an intermediate scrutiny to any federally-mandated, benign racial classifications, holding in Metro Broadcasting v. FCC [FN147] that congressional classifications "are subject to a different standard than such classifications prescribed by state and local governments." [FN148] With Adarand, however, the Court quickly overruled Metro and extended the strict-scrutiny standard to any and all racial classifications made by the federal government. [FN149] Thus, Adarand and Croson firmly established that all racial preferences, whether invidious or benign and remedial, faced a strict-scrutiny analysis.

Contrary to such commentators as Stuart Minor Benjamin, [FN150] however, Croson and Adarand have not radically altered the constitutional landscape for preferential policies aimed specifically at American Indians, including educational programs. Admittedly, both Adarand [FN151] and Croson [FN152] dealt with preferences to groups that included American Indians. However, it is irrelevant to claim, as Benjamin does, that "in none of these cases did the Supreme Court intimate in any way that the benefits for American Indians would be subject to rational basis review." [FN153] In fact, neither case deals with preferences specifically to American Indians; in both cases, treatment of American Indians was an incidental by-product of the legislation at issue. As Mancari and its progeny demonstrate, the Supreme Court has repeatedly upheld any case dealing with the constitutionality of legislation singling out Native Americans alone. [FN154] Furthermore, the Supreme Court has already established that preferential treatment of American Indians is subject to rational review since American Indians can constitute a political class. [FN155] By contrast, however, the legislation in Adarand and Croson treated American Indians as a race, clumping them together with those of African, Asian, and Hispanic descent. Helping those of African, Asian, and Hispanic descent more ***132** easily obtain government construction contracts has little to do with the advancement of self-determination or cultural autonomy of Americans Indians.

Additionally, the Court's ruling in Adarand tacitly acknowledged Mancari's place as controlling law. In Adarand, the Court expressed its profound reluctance to reopen issues in areas "in which we found special deference to the political branches of the Federal Government to be appropriate." [FN156] Indeed, American-Indian policy, as settled by Mancari, represents one of the areas, as the Court tacitly acknowledged in the Oklahoma Tax Commission v. Chickasaw Nation, [FN157] Seminole Tribe v. Florida, [FN158] and Alaska v. Native Village of Venetie, [FN159] decisions issued after Adarand. Meanwhile, the Ninth Circuit's decisions in the wake of Adarand more explicitly uphold Mancari's standing as good law and support the use of rational basis review in determining the constitutionality of preference programs for indigenous peoples. Three recent cases from the Ninth Circuit, discussion below, all issued in the post-Croson era, shed light upon the current thinking of the courts on preferences for indigenous peoples. [FN160]

First, Johnson v. Shalala [FN161] asserted that American Indian preferences continue to be constitutionally permissible as long as they are rationally linked to the special trust obligation of the government toward American Indians. [FN162] For support of this proposition, Shalala cited Mancari and Preston v. Keckler, [FN163] a case which upheld separate and independent qualifications for Indians in employment at Indian Health Services, as controlling law. [FN164]

Meanwhile, Williams v. Babbit [FN165] also affirmed the principles of Mancari, despite upholding an equal protection challenge to an American Indian preference program. In the case, the Ninth Circuit held that the Interior

Board of Indian Appeals ("IBIA") could not interpret the Reindeer Industry Act of 1937 [FN166] as prohibiting herding by nonnatives in Alaska without violating the Constitution. [FN167] However, in upholding the equal protection challenge, the court applied a rational basis test, just as Mancari dictates. [FN168] As the Williams court noted:

***133** Legislation that relates to Indian land, tribal status, self-government or culture passes Mancari's rational relation test . . . . As 'a separate people,' Indians have a right to expect some special protection for their land, political institutions (whether tribes or native villages), and culture. We therefore have upheld statutes that provide Indians with special fishing rights that were promised to them by treaty . . . and subsidies for 'low-income housing in remote Alaskan villages'. . . . [FN169]

However, the outcome of the rational basis test in Williams differed from Mancari because "Mancari did not have to confront the question of a naked preference for Indians unrelated to unique Indian concerns, [whereas] the IBIA's interpretation of the Reindeer Act would force [the court] to confront the very issue." [FN170] As the court observed, "reindeer are neither native to Alaska nor part of the Alaskan native way of life." [FN171] As a consequence, "[t]he Act in no way relates to native land, tribal or communal status, or culture." [FN172] No rational link existed between the preferential policy and the special trust obligation of the federal government to support native culture and self-governance. Thus, although its outcome differed from Mancari, Williams still affirmed the use of the rational basis test in American Indian legislation.

Finally, Rice v. Cayetano [FN173] denied an equal protection challenge to the voting procedures for the Office of Hawaiian Affairs ("OHA"), which limited the franchise to Native Hawaiians alone. Ultimately, the court argued that the special treatment of Native Hawaiians "reflected in establishment of trusts for their benefit, and the creation of OHA to administer them, is similar to the special treatment of Indians that the Supreme Court approved" [FN174] in Mancari. Though the ruling was reversed recently by the Supreme Court on Fifteenth Amendment grounds, the Ninth Circuit acknowledged Mancari's standing as good law. [FN175] Furthermore, the Ninth Circuit declined to overrule its own decision in Alaska Chapter, Associated General Contractors v. Pierce, [FN176] which declared that the preferential treatment of Indians rooted in the government's unique trust obligation represented a political, not racial, classification, [FN177] to which rational-basis review applied. [FN178] As I will ***134** demonstrate, the Supreme Court's decision in Rice did nothing to disturb these positions. [FN179]

C. The Impact of Rice on Hawaiian-Only Education Programs and Policies

All told, existing case law suggests that Native Hawaiian programs and preferences based on political classifications should be analyzed under a rational basis test. However, this principle is a precarious one to many observers, especially in light of the Supreme Court's reversal of the Ninth Circuit's decision in Rice. The Supreme Court recently held that OHA's Hawaiian-only voting procedure is unconstitutional because it violates the Fifteenth Amendment's strict prohibition of race-based voting requirements. [FN180] Despite this ruling, however, there is still plenty of constitutional breathing room for a Hawaiian-only education policy or program. Thus, the Supreme Court's decision in Rice is not dispositive of the constitutionality of Hawaiian-only education programs and policies.

First of all, there are powerful constitutional issues at work in Rice which are not present in Hawaiian-only education policies. As the Supreme Court plainly announced in Rice, "[t]he question before us is not the . . . Fourteenth Amendment, but the . . . Fifteenth Amendment . . . . In this case the Fifteenth Amendment invalidates the electoral qualification based on ancestry." [FN181] Thus, Rice was determined not on the basis of a violation of the Fourteenth Amendment, but because of a direct collision with the principles of the Fifteenth Amendment, [FN182] which as the petitioners even admitted was "the simplest, narrowest, easiest basis upon which [the] case could be decided." [FN183] This is a crucial distinction. The Fifteenth Amendment provides, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race[.]" [FN184] Based on the Fifteenth Amendment, the Supreme Court has held that "[r]acial classifications with respect to voting carry particular dangers." [FN185] As a result, the Fifteenth Amendment applies with unusually absolute force. As the Rice Court noted:

***135** We held four decades ago that state authority over the boundaries of political subdivisions, 'extensive though it is, is met and overcome by the Fifteenth Amendment to the Constitution.'. . . A State may not deny or abridge the right to vote on account of race, and this law does so. [FN186]

By contrast, the Fourteenth Amendment's Equal Protection Clause is much more nebulous, [FN187] providing that

no State shall "deny to any person within its jurisdiction the equal protection of the laws." [FN188] Thus, the courts have repeatedly held that the appearance of race-based restrictions is much more grave in the area of voting procedures than in other government regulations and policies. [FN189] As Judge Wisdom once wrote, "If there is one area above all others where the Constitution is color-blind, it is the area of state action with respect to the ballot and the voting booth." [FN190] The Supreme Court's reversal of the Ninth Circuit's decision in Rice rested exclusively on Fifteenth Amendment grounds [FN191] and the Constitution's explicit mandate for careful scrutiny of voting restrictions that carryany hint of racial discrimination. By contrast, Hawaiian-only education policies and programs invoke no such Fifteenth Amendment problems.

Secondly, the OHA elections and their voting procedures are administered by the State of Hawai'i, which is subject to the direct regulation of the Fourteenth and Fifteenth Amendments. Admittedly, equal protection requirements have been incorporated into the Fifth Amendment's Due Process clause which applies to the federal government. However, with respect to federal action, equal protection concerns must be balanced with the explicit plenary powers delegated to Congress. [FN192] In fact, Adarand implicitly acknowledged the continuing importance of special deference to the political branches of the federal government. [FN193] These areas include the plenary power to set immigration policy [FN194] and to deal with indigenous peoples via the Indian Commerce Clause. [FN195] By contrast, states do not have such a vitiating plenary ***136** power that can exclude their programs from equal-protection scrutiny. Thus, the constitutional case for federal support of indigenous policies with blood-quantum requirements is much stronger than the case for state support of such policies. The Supreme Court explicitly acknowledged this point as fundamental to its ruling in Rice: "Even were we to . . . find[] authority for Congress . . . to treat Hawaiians or native Hawaiians as tribes, Congress may not authorize a State to create a voting scheme of this sort." [FN196]

Thirdly, Rice reaffirms Mancari's standing as good law, acknowledging the exemption of preferential policies for American Indians from standard equal-protection analysis. [FN197] Thus, it appears that the Ninth Circuit's 1997 conjecture, that Mancari's days may be numbered, [FN198] was premature. At the same time, Rice left wide open the possibility that Native Hawaiians qualify as Indian tribes entitled to political rather than racial classification for equal-protection purposes. As the Court noted, "It is a matter of some dispute . . . whether Congress may treat the native Hawaiians as it does the Indian tribes. . . . We can stay far off that difficult terrain, however." [FN199] The concurring opinion of Justices Breyer and Souter is even more favorable to this proposition, arguing that "Native Hawaiians, considered as a group, may well be analogous to tribes of other Native Americans." [FN200] The only limitation that Rice placed on the Mancari doctrine and its applicability to Native Hawaiians was that "[i]t does not follow from Mancari, however, that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens." [FN201]

All told, a careful examination of available case law and the principles involved in balancing Congress' plenary power over policies relating to indigenous people with the requirements of the equal-protection doctrine dictate that Hawaiian-only education programs must be subject to a rational basis review, rather than strict scrutiny. Despite the fears of KSBE and NHEA proponents, the Supreme Court's ruling in Rice does not affect this analysis, as Rice involves particularly sensitive voting requirements and, more importantly, involves state policy, rather than federal policy-a crucial distinction in equal-protection analysis.

***137** IV. Means-Ends Analysis: Linking Hawaiian-Only Education to the Legitimate Advancement of Self-Government, Self-Sufficiency, and Linguistic and Cultural Preservation

In order to retain constitutionality, both the KSBE admission policy and the NHEA's Hawaiian-only limits must be rationally tied to government goals with respect to indigenous peoples. As I will argue, these policies pass constitutional muster for there is a clear link between the KSBE and NHEA's ancestral limitations and the advancement of legitimate non-racial interests related to Native Hawaiians-namely the preservation of Native Hawaiian culture and language, the advancement of self-governance, and the promotion of self-sufficiency, all of which constitute an essential part of the federal government's policy with respect to the indigenous peoples of the United States. Thus, besides a respect for precedent and the historical trust relationship, there are strong public policy reasons for the courts to respect the applicability of Mancari to the Native Hawaiian people and the continued constitutionality of support for Hawaiian-only education programs. As a consequence, Hawaiian-only education programs do not constitute discriminatory policies in violation of the equal protection requirements of the

Constitution.

Despite this analysis, there is always the chance that the courts will elect to apply strict scrutiny to Hawaiian-only education policies and programs. After all, there are certainly portions of the Rice decision and prior doctrine expressed through Croson and Adarand that could provide a jurisprudential basis for the application of strict scrutiny. Even if the courts apply strict scrutiny, however, the programs and policies should pass constitutional muster, particularly in the case of the KSBE. There is a compelling state interest in ensuring that Native Hawaiians remain the exclusive beneficiaries of the KSBE. In particular, there is a vital property issue present in the disposition of the KSBE's income and assets which deserves careful consideration.

A. Applying the Mancari Doctrine to Education

Admittedly, there is some ambiguity over the applicability of Mancari to education policy. First of all, one problem with the Mancari decision is its potentially limited scope. The statutory issue in the Mancari decision involved a Bureau of Indian Affairs employment preference for those of Indian blood, [FN202] not exclusive educational funding or indirect federal support for a Hawaiian-only educational admissions policy. However, as both Delaware Tribal ***138** Business Committee v. Weeks [FN203] and United States v. John [FN204] illustrate, programs need not be mere preferences or limited to employment issues to qualify for Mancari-like rational-basis review. Thus, the Mancari analysis has the potential to apply to all government policies dealing with indigenous peoples.

Secondly, and more importantly, given the history of segregation and the power of the Brown decision, there is a great deal of suspicion of explicit admissions requirements which appear to implicate race. Strict scrutiny typically results. As the Supreme Court has noted, "An unbroken line of cases following Brown v. Board of Education establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals." [FN205]

Moreover, even in areas where racial classifications are remedial and educational programs consider race as one of several qualifying elements, the judiciary has increasingly grown suspicious. Witness the demise, at the hands of the Fourteenth Amendment, of an admissions policy using separate procedures for whites and minorities at the University of Texas School of Law [FN206] and the invalidation of a University of Maryland scholarship program aimed at black students. [FN207] Indeed, the government has sought to revoke the tax-exempt status of any educational institution that engages in any racially discriminatory policies. In Bob Jones University v. United States, [FN208] the Supreme Court held that nonprofit private schools that enforce racially discriminatory policies, even if they are based on religious doctrine, do not qualify for tax-exempt status on the basis of the Fourteenth Amendment. [FN209] In this combined case, Bob Jones University lost its tax-exempt status as a result of its policy of denying admissions to any student who entered into an interracial relationship and Goldsboro Christian Schools lost its status as a result of its outright prohibition against the admission of black students. [FN210] As the Court concluded:

> Given the stress and anguish of the history of efforts to escape from the shackles of the 'separate but equal' doctrine of Plessy v. Ferguson, . . . it cannot be said that educational institutions that, for whatever reasons, practice racial discrimination . . . should be encouraged by having all taxpayers share in their ***139** support by way of special tax status. . . . [[R]acial discrimination in education is contrary to public policy. Racially discriminatory education institutions cannot be viewed as conferring a public benefit within the 'charitable' concept . . . [that underlies tax exemption]. [FN211]

However, the KSBE's admissions policy and the NHEA funding policy involve classifications of a political, rather than racial, nature. In constitutional terms, this stands in stark contrast to the classifications in Brown and Bob Jones, which involved race alone, and thereby invoked the equal-protection doctrine without any countervailing authority under the Indian Commerce Clause.

First of all, the KSBE and NHEA policies apply exclusively to individuals descended from citizens of the ancient Hawaiian political system, rather than to members of the Polynesian racial group as a whole. Though some might argue that this fact suggests the race-neutrality of the policies, the Rice decision has cast some doubt upon the validity of this argument. As the Court reasoned, "[s]imply because a class defined by ancestry does not include all members of the race does not suffice to make the classification race neutral." [FN212] Thus, it would appear that the KSBE's exclusion of non-Hawaiian Polynesians does not suffice to escape an equal protection analysis. The above-quoted observation by the Court is largely truistic, however, and it ignores the crux of the classification issue-

whether an ancestry requirement, be it one of American Indian or Native Hawaiian ancestry, is political at the core. Indeed, "[a]ncestry can be a proxy for race," [FN213] but as the Court implicitly acknowledges, it need not always be. For example, specific government programs aimed at specific Indian tribes use ancestral requirements that do not include all members of the American Indian racial group. Nevertheless, they are excluded from traditional equal protection analysis based on Mancari, for they are viewed as political at the core.

Indeed, the Kamehameha Schools currently limit admissions to only those students who can trace their ancestry back to the pre-1778 sovereign inhabitants of the Hawaiian Islands. Similarly, NHEA limits its programs to descendants of "the aboriginal people, who prior to 1778, occupied and exercised sovereignty in the area that now comprises the State of Hawaii." [FN214] The policies' emphasis on the prior exercise of sovereignty highlights their political, rather than racial, nature. Moreover, the policies are stated broadly, encompassing any individual [FN215] who can demonstrate that their ancestors ***140** resided in a particular place at a particular time under a particular system of government-the ancient Hawaiian political system. [FN216]

Secondly, the KSBE policy does not extend admissions to ethnic Hawaiians who no longer reside in the State of Hawai'i. Thus, it excludes those who would not possess a concrete and distinct interest in the preservation and advancement of Native Hawaiian culture, self-governance, and self-sufficiency on the ancient lands of the Native Hawaiians. Consequently, the policy does not merely extend blindly to those of Native Hawaiian ancestry, and is narrowly tuned to achieve its specific policy goals.

Thirdly, unlike the racial segregation condemned in Brown, the NHEA and KSBE policies still allow students of all races into the classrooms. Indeed, with its melange of students representing more than sixty different ethnic groups, the Kamehameha Schools is hardly a bastion of racial purity. One might even make the case that it is as racially diverse as any educational institution in the United States. [FN217]

Furthermore, even if the NHEA and KSBE policies seem to possess a but-for blood quantum requirement, this can be constitutionally permissible under current jurisprudence. [FN218] It is critical to note that the Mancari court upheld the BIA's criteria for preferential treatment of American Indians, [FN219] which included a but-for requirement of a one-fourth quantum of American Indian blood. [FN220] As the Ninth Circuit has held, blood-quantum requirements are acceptable when "there is no race-neutral way to accord only those who have ***141** a legal interest in management of trust assets." [FN221] The intended beneficiaries of the Bernice Pauahi Bishop's trust are schools for the Native Hawaiian people. [FN222] Clearly, those with a quantum of Hawaiian blood represent the one true group with a proper stake in the preservation and advancement of Native Hawaiian culture, self-governance, and self-sufficiency through educational development.

B. Means-Ends Congruence in Hawaiian-Only Education Programs and Policies

1. Means-ends congruence in KSBE's policies: precedent

It is critical to note that the KSBE has faced a discrimination challenge to its educational policies before. In Equal Employment Opportunity Commission v. Kamehameha Schools Bishop Estate, [FN223] the Ninth Circuit ruled that the KSBE had to give up its policy of hiring only Protestant teachers, despite the existence of an explicit condition in Bernice Pauahi Bishop's will calling for such a policy. [FN224] As the court maintained, such a hiring policy did not meet the religious-institution exemption to the Civil Rights Act of 1964 [FN225] because there was not a sufficiently tight fit between the religious-affiliation requirement for teachers and the educational goals of the school. [FN226]

In comparing EEOC v. KSBE to a potential challenge against Hawaiian-only admissions policies, there is a key factor which makes the case against the KSBE's admissions policy even more compelling than the case against the religious-affiliation requirement for teachers. Bernice Pauahi Bishop's will mandated the Protestant-only hiring requirement of the KSBE. [FN227] By contrast, her will contains no explicit instruction requiring an exclusionary policy limiting admissions to only those of Native Hawaiian ancestry. [FN228]

Interestingly enough, the content of Pauahi Bishop's will might present the most successful challenge to the KSBE and its admissions policy. Although the schools' admissions policy may be constitutional, it may well violate the law

of wills and its emphasis on testator intent. In fact, a plain-meaning ***142** interpretation of the will's language-the primary factor in carrying testator intent in the law of wills-suggests that Pauahi Bishop may have never intended such an exclusionary policy. According to the will, Pauahi Bishop wanted a portion of the income from her estate to go towards providing for the needs of orphans and indigents. [FN229] In this clause, she asks the trustees to grant individuals of full or part Hawaiian blood a preference in receiving this funding. [FN230] However, in no other part of her will does she create a Native Hawaiian preference, let alone an exclusionary policy.

Although this issue has never been directly litigated, it did receive mention in Justice Abe's concurring opinion in In re Estate of Bishop. [FN231] In the concurring opinion, Justice Abe suggests that the trustees carrying out the exclusionary admissions policy of the KSBE were actually violating the terms of Pauahi Bishop's will. [FN232] However, noting that neither of the litigating parties had raised the issue, the court's majority refused to rule on whether such a violation of trustee duty had actually occurred. [FN233]

While Justice Abe's argument presents a powerful challenge against the legitimacy of the KSBE's admissions policy, it fails to give due regard to several important facts. There is a wealth of evidence that suggests that Pauahi Bishop viewed herself as a trustee of the Hawaiian lands for the exclusive benefit of the Native Hawaiian people and likely intended the Kamehameha Schools to admit only those of Native Hawaiian descent. [FN234] However, if actually litigated, Pauahi Bishop's intentions outside of the four corners of her will might never obtain legal recognition. Under the strict formality of the late-nineteenth century law of wills, the no-extrinsic-evidence rule would likely apply, leading a court of law contemplating how to carry out the will's terms to ignore such statements made by Pauahi Bishop during her lifetime. [FN235] Still, the trustees could exercise discretionary power in concluding that Pauahi Bishop's orphans-and-indigents clause applied to her educational plans and that the preference was meant to be an exclusionary policy. The Hawai'i Supreme Court is deeply hesitant to subject the discretionary decisions of trustees to judicial interference in the absence of clear abuse. [FN236] However, one might ask if the KSBE trustees have ever properly investigated or researched whether Hawaiian-only education is in the best interest of the Native Hawaiian ***143** people. These are matters for the courts to consider; but from the perspective of the law of wills, there is a strong case against the Hawaiian-only admissions policy and this might represent the most successful avenue to force a change at the KSBE.

2. Rational basis review of the KSBE's Hawaiian-only admissions policy

However, under constitutional law, there is a firmer basis for a Hawaiian-only admissions policy than for a Protestant-only hiring requirement. Thus, although EEOC v. KSBE was properly decided, [FN237] this does not mark the death knell for KSBE's admissions policy. At a minimum, there is a rational link between a Hawaiian-only admissions program and legitimate policy goals while there was no similar exigency with respect to a Protestant-only teacher policy. Also, there is a lower standard of scrutiny applied to policies invoking political classifications-such as some Hawaiian-only policies that relate to the federal government's special trust relationship with the Native Hawaiian people-versus policies that utilize religious classifications-which must face strong First Amendment scrutiny.

All told, the political nature of Hawaiian-only classifications subjects such policies, under Mancari, to a lenient, rational-basis standard. In order to pass the Mancari test, a federal policy aimed at indigenous people must contain a rational link to the advancement of self-governance, self-sufficiency, and cultural preservation. In Mancari, the Supreme Court allowed a hiring preference for American Indians at the Bureau of Indian Affairs because it contained a rational link to the advancement of American Indian self-governance of their own lands. [FN238] The Supreme Court has held that "As long as . . . special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, . . . legislative judgments will not be disturbed." [FN239] Like the legislative policy in Mancari, there is a clear link between Hawaiian-only education policies and the advancement of Native Hawaiian culture, self-governance, and self-sufficiency.

The Kamehameha Schools' admissions policy passes the rational-basis test by advancing Native Hawaiian culture, self-governance, and self-sufficiency. By limiting admissions to those who can trace one ancestor back to pre-1778 ***144** Hawai'i, the Schools' policy helps to provide a unique educational environment for the study and practice of Native Hawaiian culture and helps to train the future leaders of the Native Hawaiian community. Indeed, a closer examination of the KSBE's admissions policy reveals how it is a political, not racial, classification. The Schools do

not allow admission to all Native Hawaiians; Native Hawaiians who do not live in the State or those whose parent or guardian does not live in the State are barred from admission to the School. Thus, the Kamehameha Schools' admissions policy seeks to advance a specific political goal-the preservation of culture and the promotion of self-governance and self-sufficiency for Native Hawaiians still tied to the land of Hawaii.

3. Strict scrutiny of the KSBE's Hawaiian-only admissions policy

As noted earlier, the judiciary has grown increasingly hostile to any policies with a hint of racial preference or exclusion. [FN240] Although judicial precedent and the preceding analysis suggest that rational review should apply to the Hawaiian-only education policies, the Supreme Court may find that Native Hawaiians constitute a racial group unable to claim the shield of the Mancari doctrine or the Supreme Court might conceivably overrule the Mancari doctrine altogether. Thus, it is entirely possible that Hawaiian-only education will have to weather strict scrutiny in order to survive. Though difficult, this is not an altogether impossible challenge.

To begin with, in the Adarand Constructors, Inc. v. Pena, [FN241] majority opinion, Justice O'Connor went out of her way to assert that courts should no longer view strict scrutiny as necessarily fatal. [FN242] As she argued, there are certain legitimate uses of race-based classifications. However, our nation's history of racism makes any race-based classification immediately suspect. "The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking." [FN243] As Justice O'Connor argued, government programs can meet strict scrutiny. "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." [FN244]

***145** Admittedly, programs that have withstood strict scrutiny are few and far between. To pass strict scrutiny, a policy advocated by the government must be both necessary to further a compelling state interest and narrowly tailored to achieve that purpose. [FN245] Typically, strict-scrutiny survival has resulted from two compelling interests-national security or highly specific remedies to detailed instances of past wrongful conduct in a well-defined and targeted area. In the area of domestic security, for example, Lee v. Washington [FN246] enabled prison officials to separate inmates on the basis of race if such efforts were made in good faith and particularized circumstances. At the time, race riots threatened to produce anarchy at the penitentiary and the Supreme Court accepted that at times a race-based segregation policy might be the only way to quell tensions. [FN247] Moreover, in United States v. Korematsu [FN248]-a case which one is loathe to cite as precedent-the Court utilized strict scrutiny but still upheld the World War II internment of Japanese-Americans on the grounds of national security. Clearly, the case of Hawaiian-only education does not fall under this national-security exception to strict-scrutiny fatalism.

However, the Supreme Court has also upheld government policies under strict scrutiny when they involve highly specific remedies to detailed instances of past wrongful conduct in a well-defined and targeted area. In United States v. Paradise, [FN249] for example, all nine Justices on the Court agreed that the Alabama Department of Public Safety's "'pervasive, systematic, and obstinate discriminatory conduct' [FN250] justified a narrowly tailored race-based remedy." [FN251] Thus, Paradise opened the door for explicit race-based hiring policies where necessary to make up for specific instances of well-documented past discrimination-in that case, prior racial disparities in the hiring of troopers in Alabama.

Despite its ability to pass rational review, Hawaiian-only education would have a hard time standing up to the exacting standards of strict scrutiny. Though Native Hawaiians have suffered an attempted cultural genocide and substantial discrimination, the mean-ends nexus between these wrongs and Hawaiian-only education is difficult to establish. Indeed, it is far from certain whether segregated education is even in the interest of Native Hawaiians, let ***146** alone dictated as necessary to fulfill a compelling government interest. Nevertheless, there are some compelling reasons to favor the constitutionality of Hawaiian-only education.

First of all, as established earlier, the United States government has a trust obligation towards the Native Hawaiian people and is morally and legally obligated to support the continued survival of the Native Hawaiian culture. A poignant example will illustrate the importance of the KSBE and NHEA support for Hawaiian-only education to the

continued survival of the Native Hawaiian people. Without delving too deeply into the theories of Noam Chomsky and Ludwig Wittgenstein, [FN252] it is well known that linguistic survival is inexorably entwined with cultural and ethnic survival. As a traditional Hawaiian saying goes, "I ka 'olelo no ke ola; I ka 'olelo no ka make. In the language rests life; In the language rests death." [FN253] To this effect, the dramatic and precipitous decline in the Hawaiian language through the twentieth century posed a critical threat to the durability of the Native Hawaiian way of life. Although many Hawaiian residents spoke the Hawaiian language in the late nineteenth century when Hawai'i was still a sovereign nation, fewer than a handful of individuals could speak fluent Hawaiian a century later. [FN254] In fact, after the overthrow of the Kingdom of Hawai'i in 1893, Hawaiian medium schools were eliminated and the use of the Hawaiian language in classroom instruction was banned until 1986. [FN255]

With the help of the KSBE (and other educational institutions), however, the situation has changed dramatically. By providing a strong lobbying interest for the revival of Hawaiian language studies-due in large part to its all-Hawaiian student body-the KSBE has played an important role in the revival of the near-extinct Hawaiian language over the past fifteen years. [FN256] Much in ***147** the way revival of the Hebrew language accompanied the creation of the state of Israel and a revitalization of the Jewish faith in the wake of World War II, the rebirth of the Hawaiian language has accompanied a reawakening in Native Hawaiian political activism and culture. Similarly, by recognizing "the unique right of the Native Hawaiian people to practice and perpetuate their culture and religious customs, beliefs, practices, and language," [FN257] the NHEA has supplemented this mission by providing funding for the use of the traditional Hawaiian language in education through the Islands.

Beyond the revitalization of the Hawaiian language, the KSBE and NHEA provide critical support for education in other aspects of Hawaiian life and culture. Study of the Hawaiian arts, such as the hula, ancient Hawaiian narrative song, and ancient Hawaiian instrumentation form an integral part of the curriculum. Since ancient Hawaiian was never a written language until the arrival of the missionaries, Hawaiian culture was transmitted through an oral tradition captured through its songs, dances, and music. [FN258] Thus, study of the Hawaiian arts is vital to a reemergence of Hawaiian cultural sovereignty. Moreover, the KSBE and NHEA provide critical resources for the intensive study of Hawaiian history, including the ancient ahupua'a feudal system, the unification of the Islands under Kamehameha the Great, and the constitutional monarchy. Long replaced by pure American history courses in the State-operated schools, such a study of Native Hawaiian history is vital to the restoration of the Hawaiian way of life. [FN259]

Furthermore, by extending educational opportunities to a community who, like their American Indian counterparts on the mainland, have suffered from disproportionately high rates of poverty, alcoholism, and incarceration, [FN260] the KSBE and NHEA have provided valuable opportunities for the training of future Native Hawaiian political leaders. To this effect, the NHEA has focused on assisting Native Hawaiians to reach National Education Goals [FN261] in order to increase the overall level of educational attainment in the Native Hawaiian community, and it has created gifted and talented programs for Native Hawaiians in order to increase Native Hawaiian representation in institutions of higher learning. [FN262] Meanwhile, by providing a free, Hawaiian-intensive ***148** education to all students of Native Hawaiian descent, the KSBE has provided the State of Hawai'i with a number of community leaders with a comprehensive knowledge of their peoples' past and a clear vision for their peoples' future. [FN263]

The above analysis provides compelling reasons for the continued survival of the KSBE and Hawaiian-only education. However, when viewed from another perspective-that of property rights-the case for enabling the KSBE to retain its Hawaiian-only policy becomes even stronger.

To pass strict scrutiny, a race-based policy must be necessary and narrowly tailored to rectify specific bad acts. With the overthrow of the Hawaiian monarchy in 1893 [FN264] and the subsequent annexation of Hawai'i by the United States in 1898, [FN265] the Hawaiian people lost their public lands and nation involuntarily, through a process of coercion and conquest. Indeed, the United States government has formally recognized the illegitimate "overthrow of the Kingdom of Hawaii," a term that admits the absence of consent in the annexation process, and declared that the "inherent sovereignty" [FN266] of the Native Hawaiian people was never properly relinquished to the United States. The most direct means for the federal government to address this prior bad act is to ensure that as much of the original Hawaiian lands as possible remain in the hands of the Native Hawaiian people.

The Bernice Pauahi Bishop estate represents the last remnant of the ancient Hawaiian kingdom. As the last ali'i descendant of King Kamehameha I, Pauahi Bishop acquired her vast land holdings through inheritance, and throughout her life, she viewed herself as a trustee of the lands for the Native Hawaiian people. [FN267] The maintenance of the Bishop Estate for the benefit of solely the Native Hawaiian people fulfills the federal government's compelling interest in rectifyingits illegitimate overthrow of the Hawaiian Kingdom. Keeping what remains of the ancient Hawaiian lands in the hands of the Native Hawaiian people is a specific remedial measure to the illegitimate overthrow.

Thus, by ensuring that the KSBE remains exclusively for the benefit of the Native Hawaiian people, the federal government will be engaging in a specific, land-based remedial measure to make up for the prior illegal seizure of the ***149** Hawaiian land. The government will thereby ensure that the last remaining private portion of the original Hawaiian lands continues to act exclusively for the benefit of its original owners. Such a result is not only dictated by law, but by justice as well.

Finally, even non-Hawaiians stand to benefit from the assurance that Bernice Pauahi Bishop's lands end up in the hands of their intended beneficiaries. If the KSBE's admissions policy is attacked on constitutional grounds, the Native Hawaiian people will not be the only victims. Indeed, the KSBE and NHEA make a contribution not only to Native Hawaiians but to all the people of Hawai'i. As Professor Jon Van Dyke concludes:

> Preferences for native people are upheld not for racial reasons, but because of the unique legal and political status that native groups have under statute and the United States Constitution. Unlike other ethnic groups in our multicultural community, native peoples have no 'mother culture' in another land where their culture is maintained and developed. Unless they are given the opportunity to protect their culture, language, religion, and traditions in their place of origin, their unique heritage will be lost forever. We all benefit by having diverse and strong cultures thriving in our community. [FN268]

Without continued support for the KSBE and NHEA, the Native Hawaiian people and the entire community-at-large stand to lose.

V. Conclusion: A New Segregation?

Admittedly, there are some serious policy issues that government programs such as the NHEA and admissions policies such as those of the KSBE must address. In a society that has traditionally espoused an assimilationist model of ethnic integration, educational programs that separate an entire group such as Native Hawaiians from other members of society seem to defeat the melting-pot ideal to which we have grown accustomed. If anything, such self-segregation might lead to increased fractionalization in society and greater pronouncement, rather than erosion, of ethnic and racial differences.

However, assimilation is not the only valid modus operandi for a multi-ethnic nation. For all too long, assimilation has involved a quid pro quo demanding white performance for white privilege. [FN269] At the educational level, this has involved denial of native culture, language, and institutions. Certainly, assimilation has its advantages, particularly from a macropolitical point of view; assimilation-based educational systems can help inculcate a ***150** common body of values in the future citizenry of the state, thereby advancing political stability and national unity. However, such inculcation frequently comes at the expense of ethnic diversity and has typically accelerated the disappearance of indigenous cultures and ways of life.

The danger, inherent in KSBE and NHEA policies, is of a new segregation. However, such policies can also help to revitalize a culture and polity driven to the brink of extinction in the colonization process. Either way, this is a policy choice to be weighed by the United States government and the Native Hawaiian people. Contrary to a recent rash of claims by some constitutional scholars, it is not a matter presumptively decided by the Fifth and Fourteenth Amendments to the United States Constitution.

Like other indigenous peoples of the United States, Native Hawaiians enjoy a political classification that results from their unique history and special trust relationship with the federal government. Unlike racial classifications, political classifications need only fulfill the rational basis test in order to withstand an equal protection challenge. Croson, Adarand, and their progeny do not alter the rational basis test announced in Mancari for preferential legislation dealing with indigenous peoples. Moreover, the recent Supreme Court decision in Rice v. Cayetano does

not alter this proposition with respect to Hawaiian-only education programs. Both the Kamehameha Schools admissions policy and the Native Hawaiian Education Act's Hawaiian-only limitation do not violate the equal protection component of the Fifth Amendment's Due Process Clause, since the policies and programs contain a rational link to the preservation of Native Hawaiian culture, the advancement of self-governance, and the promotion of self-sufficiency. Indeed, there is a sufficiently compelling state interest for federal support of Hawaiian-only education to survive even strict scrutiny. Thus, KSBE should not lose its tax-exempt status on the grounds that it is a racially-discriminatory educational institution, and the NHEA should not be struck down on constitutional grounds. Instead, the continued survival of Hawaiian-only education should be a matter of debate for educational-policy experts and not for constitutional scholars.

[FNa1]. A.B., Harvard University, 1995; J.D., Yale Law School, 2000; Associate, O'Melveny & Myers, Newport Beach, CA. I would like to thank Lucy Fowler, Kelly LaPorte, Geoff Rapp, Carroll Taylor, and Jon Van Dyke for their helpful comments on this article. As a disclaimer, I should note that in 1998, while at Cades, Schutte, Fleming & Wright, Honolulu, HI, I did some work on the Rice v. Cayetano amicus brief filed by the KSBE in support of the respondents. See Brief of Amicus Curiae Kamehameha Schools Bishop Estate, Rice v. Cayetano, 528 U.S. 495 (2000)(No. 98-818); 2000 WL 201127. I was also at Munger, Tolles & Olson, Los Angeles, CA, in 1999 when the firm filed an amicus brief for the Alaska Federation of Natives in support of the respondents, see Brief of Amicus Curiae Alaska Federation of Natives, Rice v. Cayetano, 528 U.S. 495 (2000)(No. 98-818); 2000 WL 201127, though I did no work on that brief.

[FN1]. Randall W. Roth, Selected Estate and Gift Tax Developments, SD51 A.L.I.-A.B.A. Course of Study Materials 823, 849 (Feb. 1999). Roth estimates a value of $10 billion, but there is no precise data available. Id.

[FN2]. 347 U.S. 483 (1954).

[FN3]. The KSBE has recently changed its official name to Kamehameha Schools in order to reflect its educational mission more clearly. For the purposes of this article, however, I am using its long-held name, Kamehameha Schools Bishop Estate, to retain consonance with prior court cases and scholarship.

[FN4]. KSBE holds a whopping eleven percent stake in Goldman Sachs. Roth, supra note 1, at 849.

[FN5]. 488 U.S. 469 (1989).

[FN6]. 515 U.S. 200 (1995).

[FN7]. See Native Hawaiian Education Act of 1994, 20 U.S.C. § § 7901-12 (1998).

[FN8]. Gerald Gunther, The Supreme Court, 1971 Term-Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972); see also Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 362 (1978) (Brennan, J., concurring in part).

[FN9]. It should be noted, however, that Justice O'Connor went out of her way in Adarand to suggest that this should not and need not be the case in the future. See Adarand, 515 U.S. at 237; infra section V.B.3.

[FN10]. Referring to Morton v. Mancari, 417 U.S. 535 (1974).

[FN11]. While I much prefer to use the word "Native American," I have chosen to use "American Indian" for the purposes of this article to avoid unnecessary confusion and to retain consonance with the vast majority of laws, which use the term "American Indian."

[FN12]. 417 U.S. 535 (1974).

[FN13]. Id. at 551-52.

[FN14]. See, e.g., Stuart Minor Benjamin, Equal Protection and the Special Relationship: The Case of Native

Hawaiians, 106 Yale L.J. 537 (1996). But see Jon M. Van Dyke, The Political Status of the Native Hawaiian People, 17 Yale Law & Pol'y Rev. 95 (1998).

[FN15]. See Rick Daysog, IRS Wants Bishop Trustees Out, Honolulu Star Bulletin, Apr. 28, 1999, at A1.

[FN16]. Rev. Rul. 71-447, 1971-2 C.B. 230-1.

[FN17]. See I.R.C. § 501(c)(3) (2000).

[FN18]. Rev. Rul. 71-447, 1971-2 C.B. 231.

[FN19]. 461 U.S. 574 (1983).

[FN20]. Gen. Couns. Mem. 39,702 (July 13, 1989).

[FN21]. See Bob Jones Univ. v. United States, 461 U.S. 574, 566-69 (1983); Green v. Connolly, 330 F. Supp. 1150, 1161-63 (D. D.C.) aff'd sub nom. Coit v. Green, 404 U.S. 997 (1971) (per curiam).

[FN22]. In re Estate of Bishop, 53 Haw. 604, 611-12, 499 P.2d 670, 675 (1972) (Abe, J., concurring).

[FN23]. See Paul M. Barrett, Legal Beat: Tempest Erupts over Secretive Hawaiian Trust, Wall Street. J., Oct. 10, 1997, at B1.

[FN24]. See Samuel King et al., Broken Trust, Honolulu Star Bulletin, Aug. 9, 1997, at A1; Roth, supra note 1, at 849-56.

[FN25]. For a synopsis of the events surrounding the trustee resignations, see Judge Robert Mahealani M. Seto & Lynne Marie Kohm, Of Princesses, Charities, Trustees, and Fairytales: A Lesson of the Simple Wishes of Bernice Pauahi Bishop, 21 U. Haw. L. Rev. 393, 396 n.18 (1999).

[FN26]. See Barrett, supra note 23; Alix M. Freedman & Laurie P. Cohen, Bishop's Gambit: Hawaiians Who Own Goldman Sachs Stake Play Clever Tax Game, Wall Street. J., Apr. 25, 1995, at A1; Todd S. Purdum, Hawaiians Angrily Turn on a Fabled Empire, N.Y. Times, Oct. 14, 1997, at A1. The KSBE scandal has even received coverage in legal textbooks. The new edition of Dukeminier and Johanson's popular Wills, Trusts & Estates textbook features a multi-paged spotlight on the investigation of KSBE's trustees and the charges they face for breach of fiduciary duties. See Jesse Dukeminier & Stanley M. Johanson, Wills, Trusts, & Estates 896-900 (6th ed. 2000).

[FN27]. See Rice v. Rubin, Civ. No. 97-01628 DAE (D. Haw. filed Dec. 17, 1997).

[FN28]. Plaintiff's Complant ¶ 2, Rice (NO.97-01628 DAE).

[FN29]. See Dukeminier & Johanson, supra note 27, at 899. The IRS has been investigating the KSBE and its trustees for self-dealing, conflicts of interest, and the use of improper perquisites. Id.

[FN30]. See Roth, supra note 1, at 849.

[FN31]. 528 U.S. 495 (2000).

[FN32]. Civ. No. 97-01628 DAE (D. Haw. filed Dec. 17, 1997).

[FN33]. See Akana Ousted as OHA Chair; Hee Regains Leadership, Associated Press Newswires, Jan. 3, 2000, at 1.

[FN34]. Rice v. Cayetano, 963 F. Supp. 1547 (D. Haw. 1997).

[FN35]. Rice v. Cayetano, 146 F.3d 1075 (9th Cir. 1998).

[FN36]. Rice v. Cayetano, 528 U.S. 495 (2000).

[FN37]. Rice v. Cayetano, 526 U.S. 1016 (1999).

[FN38]. Transcript of Oral Argument, Rice v. Cayetano, 528 U.S. 495 (NO.98-818); 1999 WL 955376.

[FN39]. See DeWayne Wickham, Native Hawaiians Face Another Insult, USA Today, Oct. 11, 1999, at 19A.

[FN40]. Rice, 528 U.S. at 1048.

[FN41]. Brief of Amicus Curiae Kamehameha Schools Bishop Estate, Rice v. Cayetano, 528 U.S. 495 (2000)(No. 98-818); 2000 WL 201127.

[FN42]. Of course, this does not necessarily suggest that trustee mismanagement is solely or even primarily responsible for KSBE's educational shortcomings. The literature on the economics of education suggests a number of alternate explanations. For example, economists have found negative returns to scale at schools as large as KSBE. See Ilyana M. Kuziemko, Does Elementary School Enrollment Size Affect Student Performance: Evidence from Panel and Instrumental-Variable Analysis (2000) (unpublished manuscript)(on file with author). The low level of inter-school competition in Hawai'i may also reduce pressure on KSBE teachers and administrators to maximize student achievement. See Geoffrey C. Rapp, Agency and Choice in Education: Does School Choice Enhance the Work Effort of Teachers?, 8 Educ. Econ. 37 (2000).

[FN43]. One important caveat bears mentioning before proceeding any further. On a metanarrative level, the merits of the seemingly capricious distinction between racial and political groupings are ripe for criticism. See generally, John Tehranian, Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America, 109 Yale L.J. 817 (2000)(arguing that the Supreme Court jurisprudence has repeatedly reified the concept of race, inventing an arbitrary semiotic system through which to organize the world). For better or worse, however, race remains a critical notion in our society, and a concept around which our law is still organized. Thus, despite intellectual objections to the construction of racial groupings, I have utilized traditional conceptions of race for the purposes of this article. After all, in addressing the very real threat to the continued viability of Hawaiian-only education, this piece seeks to be more policy-oriented, less esoteric, and pointed towards real change now. However, this is not to suggest that broader critiques of the very distinction between racial and political groupings are either unwarranted or invalid. See id.

[FN44]. Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

[FN45]. Howerton v. Gabica, 708 F.2d 380, 383 (9th Cir. 1983); Life Ins. Co. of N. Am. v. Reichardt, 591 F.2d 499, 501 (9th Cir. 1979); Melara v. Kennedy, 541 F.2d 802, 805 (9th Cir. 1976).

[FN46]. See Lugar v. Edmonson Oil Co., 457 U.S. 922, 939 (1982).

[FN47]. See Lombard v. Louisiana, 373 U.S. 267 (1963); Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946).

[FN48]. See Adickes v. S.H. Kress & Co. 398 U.S. 144, 170 (1970).

[FN49]. Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 171-79 (1972).

[FN50]. See Flagg Bros. v. Brooks, 436 U.S. 149, 164 (1978); United States v. Price, 383 U.S. 787, 794 (1966).

[FN51]. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 621-22 (1991) (citations omitted).

[FN52]. In re Estate of Bishop, 53 Haw. 604, 610-13, 499 P.2d 670, 674- 76 (1972)(Abe, J., concurring).

[FN53]. Id. at 613, 499 P.2d at 676 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

[FN54]. Id.

[FN55]. See Loring Gardner Hudson, The History of the Kamehameha Schools 17 (1935)(unpublished M.A. thesis, University of Hawai'i)(on file at Hamilton Library, University of Hawai'i, Manoa).

[FN56]. 461 U.S. 574 (1983).

[FN57]. See id. at 604.

[FN58]. See id. at 603.

[FN59]. 347 U.S. 483 (1954).

[FN60]. U.S. Const. amend. XIII, § 2.

[FN61]. 427 U.S. 160 (1976).

[FN62]. Referring to actions brought under 42 § 1981.

[FN63]. See id. at 168, 174-75.

[FN64]. For a critical assessment of § 1981, see Tehranian, supra note 43, at 842-46.

[FN65]. 42 U.S.C. § 1981 (1998).

[FN66]. See Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

[FN67]. 417 U.S. 535 (1974).

[FN68]. Id. at 555.

[FN69]. 25 U.S.C. § 472 (1998).

[FN70]. Mancari, 417 U.S. at 552-55.

[FN71]. Id. at 553 n.24.

[FN72]. See id. at 541-42, 551-54.

[FN73]. Bd. of County Comm'rs v. Seber, 318 U.S. 705, 715 (1943).

[FN74]. Id. (quoting Mancari, 417 U.S. at 552).

[FN75]. Mancari, 417 U.S. at 551-52.

[FN76]. U.S. Const. art. I, § 8, cl. 3.

[FN77]. Benjamin, supra note 14, at 569-70.

[FN78]. See Brief of Amicus Curiae Center for Equal Opportunity ("CEO") et al., Rice v. Cayetano, 528 U.S. 495 (2000)(No. 98-818); 1999 WL 345639, at * 27.

[FN79]. Philip P. Frickey, Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law, 110 Harv. L. Rev. 1754, 1762 (1997). The statute at issue, the Indian Reorganization Act, applied to members of federally recognized Indian tribes and "all other persons of one-half or more Indian blood." 25 U.S.C. § 479 (1998). It should also be noted that the preference upheld contained an explicit, individualized racial component. Mancari, 417 U.S. at 553 n.24. Thus, "[e]ven under the regulation, then, race, as measured by blood quantum, was a but-for requirement of eligibility for the preference." Id.

[FN80]. 437 U.S. 634 (1978).

[FN81]. 430 U.S. 73 (1977).

[FN82]. See Van Dyke, supra note 14, at 115-17.

[FN83]. See Rice v. Cayetano, 941 F. Supp. 1529, 1542 (D. Haw. 1996).

[FN84]. 25 U.S.C. § § 1291-1297 (1970 ed., Supp. V).

[FN85]. See Weeks, 430 U.S. at 82 n.14.

[FN86]. Id. at 91 (Blackmun, J., concurring).

[FN87]. See John, 437 U.S. at 652-54.

[FN88]. See id. at 650 n.20.

[FN89]. Id. at 652 (interpreting U.S. Const. art. I, § 8, cl. 3).

[FN90]. Van Dyke, supra note 14, at 117-18.

[FN91]. See 25 C.F.R. § 83.3 (1978).

[FN92]. See Rice v. Cayetano, 941 F. Supp. 1529, 1542 (D. Haw. 1996).

[FN93]. U.S. Const. art. I, § 8, cl. 3.

[FN94]. Van Dyke, supra note 14, at 113.

[FN95]. See supra section III.A.

[FN96]. See United States v. John, 437 U.S. 634 (1978); Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73 (1977).

[FN97]. Pence v. Kleppe, 529 F.2d 135, 139 (9th Cir. 1976); see also Naliielua v. Hawaii, 795 F. Supp. 1009, 1013 (D. Haw. 1990).

[FN98]. For an excellent perspective on the Founding Father's use of the word "tribe" as compared to its modern ethnographic meaning, see Brief of Amicus Curiae Alaska Federation of Natives, at 3-11, Rice v. Cayetano, 528 U.S. 495 (2000)(No. 98-818); 2000 WL 201127.

[FN99]. Bork's originalist constitutional persuasions are well documented. See, e.g., Robert H. Bork, The Tempting of America (1990).

[FN100]. See Brief of Amicus Curiae CEO et al., supra note 78, at *27.

[FN101]. See Alaska Pac. Fisheries v. United States, 348 U.S. 78 (1918); Williams v. Babbit, 115 F.3d 657, 665 (9th Cir. 1997); Native Vill. of Tyonek v. Puckett, 957 F.2d 631 (9th Cir. 1992); Alaska v. Annete Island Packing

Co., 289 F. 671 (9th Cir. 1923), cert. denied, 263 U.S. 708 (1923); Cape Fox Corp. v. United States, 4 Cl. Ct. 223 (1983); Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979); Eric v. Dep't of Hous. & Urban Dev., 464 F. Supp. 44 (D. Alaska 1978).

[FN102]. See Brief of Amicus Curiae Alaska Federation of Natives, supra note 98, at *1-2.

[FN103]. See Naliielua v. Hawaii, 795 F. Supp. 1009, 1013 (D. Haw. 1990); Rice v. Cayetano, 941 F. Supp. 1529, 1541-42 (D. Haw. 1996); Ahuna v. Dep't of Hawaiian Home Lands, 64 Haw. 327, 338-39, 640 P.2d 1161, 1168 (1982).

[FN104]. 795 F. Supp. 1009 (D. Haw. 1990).

[FN105]. Id. at 1012-13.

[FN106]. Brief of Amicus Curiae CEO et al., supra note 78, at *29.

[FN107]. The absence of a Hawaiian Commerce Clause in the Constitution is not surprising since Hawai'i was not a part of the United States in 1787. It is instructive to note that Alaska was not a part of the United States at that time either and the courts have had no problem applying the Indian Commerce Clause to Alaskan Natives. See Alaska Pacific Fisheries v. United States, 348 U.S. 78 (1918); Williams v. Babbit, 115 F.3d 657, 665 (9th Cir. 1997); Native Vill. of Tyonek v. Puckett, 957 F.2d 631 (9th Cir. 1992); Alaska v. Annete Island Packing Co., 289 F. 671 (9th Cir. 1923), cert. denied, 263 U.S. 708 (1923); Cape Fox Corp. v. United States, 4 Cl. Ct. 223 (1983); Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979); Eric v. Dep't of Hous. & Urban Dev., 464 F. Supp. 44 (D. Alaska 1978).

[FN108]. 875 F. Supp. 680 (D. Haw. 1995), aff'd, 76 F.3d 280 (9th Cir. 1995).

[FN109]. Id. at 687-88 (citing to Haw. Const. art. XII, § 7).

[FN110]. Pub. L. No. 86-3, 73 Stat. 4 (1959).

[FN111]. See Keaukaha-Paneawa Cmty. Assoc. v. Hawaiian Homes Comm'n, 739 F.2d 1467, 1472 (9th Cir. 1984).

[FN112]. Joint Resolution on the Overthrow of Hawai'i ("Apology Bill"), Pub. L. 103-150, 107 Stat. 1512 (1993).

[FN113]. Id. § 1.

[FN114]. Id.

[FN115]. See Jennifer M.L. Chock, Note, 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 (1995).

[FN116]. See Mark A. Inciong, Note, The Lost Trust: Native Hawaiian Beneficiaries Under the Hawaiian Homes Commission Act, 8 Ariz. J. Int'l & Comp. L. 171, 174 (1991).

[FN117]. Apology Bill, § 1.

[FN118]. 115 F.3d 657 (9th Cir.1997).

[FN119]. Id. at 665.

[FN120]. Hawaiian Homes Commission Act of 1920, ch. 42, § 101(c), 42 Stat. 108 (responsibility ultimately transferred to the State of Hawai'i via the Statehood Admission Act of 1959); see also Rice v. Cayetano, 963 F. Supp. 1547, 1551 (D. Haw. 1997).

[FN121]. H.R. Rep. No. 66-839, at 8 (1920).

[FN122]. Inciong, supra note 116, at 176; see also George G. Bogert, The Law of Trusts and Trustees § § 541, 602 (2d ed. 1980).

[FN123]. See S. Rep. No. 100-36, at 9-11 (1987); Inciong, supra note 116, at 176.

[FN124]. See National Historical Preservation Act of 1966, 16 U.S.C. § § 470-71 (1998); National Museum of the American Indian Act of 1989, 20 U.S.C. § 80q (1998); Drug Abuse Prevention, Treatment, and Rehabilitation Act of 1983, 21 U.S.C. § 1177(d) (1998); American Indian Languages Act of 1990, 25 U.S.C. § 2901 (1998); American Indian Graves Protection and Repatriation Act of 1990, 25 U.S.C. § 3001 (1998); American Indian Employment and Training Programs in the Comprehensive Employment and Training Act Amendments of 1978, Pub. L. No. 95-524, § 302, 92 Stat. 1909 (1978) (codified as amended in scattered section of 29 U.S.C.); American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (1998); American Indian Programs Act of 1974, 42 U.S.C. § § 2991 (1998); Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1983, 42 U.S.C. § 4577(c)(4) (1998); Cranston-Gonzalez National Affordable Housing Act of 1990, 42 U.S.C. § 12701 (1998). The legislation cited here clearly undermines the claim that every statute dealing with special treatment of Native Americans singles out only those tribal Native Americans on or near reservations for that special treatment.

[FN125]. 20 U.S.C. § § 7901-12 (1998).

[FN126]. 20 U.S.C. § 7902 (1998).

[FN127]. See Van Dyke, supra note 14, at 108.

[FN128]. See Morton v. Mancari, 417 U.S. 535, 552-53 (1974).

[FN129]. The Supreme Court decided Rice on narrow, Fifteenth Amendment grounds. See infra section IV.C.

[FN130]. Van Dyke, supra note 14, at 119.

[FN131]. Rice v. Cayetano, 963 F. Supp. 1547, 1553 (D. Haw. 1997).

[FN132]. 417 U.S. 535 (1974).

[FN133]. Id. at 555.

[FN134]. Id. at 554 n.24.

[FN135]. Id. at 555.

[FN136]. See Benjamin, supra note 14, at 548.

[FN137]. See Washington v. Wash. State Commercial Fishing Vessel Ass'n, 443 U.S. 658 (1979); Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979); Washington v. Confederated Bands of the Yakima Indian Nation, 439 U.S. 463 (1979); Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73 (1977); United States v. Antelope, 430 U.S. 641 (1977); Fisher v. Dist. County Court, 424 U.S. 382 (1976); Moe v. Confederated Salish of Flathead Indian Reservation, 425 U.S. 463 (1976); Antoine v. Washington, 420 U.S. 194 (1975).

[FN138]. 439 U.S. 463 (1979).

[FN139]. Id. at 500-01 (quoting Mancari, 417 U.S. at 551-52).

[FN140]. 601 F.2d 1110 (10th Cir. 1979), cert. denied, 444 U.S. 870 (1979) (upholding a New Mexico law that

allowed only American Indians to sell and display handicrafts on state-owned property since it advanced their education and cultural interest).

[FN141]. See Rice v. Cayetano, 528 U.S. 495, 519-20 (2000); County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 253 (1985); Duro v. Reina, 495 U.S. 676, 692 (1980).

[FN142]. See, e.g., Three Affiliated Tribes v. Wold Eng., 467 U.S. 138, 149 (1984) (arguing that it is a settled principal that vague language in statutes dealing with American Indians should be liberally construed in favor of American Indians).

[FN143]. 488 U.S. 469 (1989).

[FN144]. 515 U.S. 200 (1995).

[FN145]. 488 U.S. at 505-06.

[FN146]. Id.

[FN147]. 497 U.S. 547 (1990).

[FN148]. Id. at 565.

[FN149]. See Adarand, 515 U.S. at 225-27, 233-35.

[FN150]. See Benjamin, supra note 14, at 565.

[FN151]. See 515 U.S. at 205.

[FN152]. See 488 U.S. at 478.

[FN153]. Benjamin, supra note 14, at 567.

[FN154]. Supra notes 136-37 and accompanying text.

[FN155]. Mancari, 417 U.S. at 554-55.

[FN156]. Adarand, 515 U.S. at 217-18.

[FN157]. 515 U.S. 450, 457-62 (1995).

[FN158]. 517 U.S. 44, 62, 72 (1996).

[FN159]. 522 U.S. 520, 529 (1998).

[FN160]. See Johnson v. Shalala, 35 F.3d 402, 406 (9th Cir. 1994).

[FN161]. 35 F.3d 402 (9th Cir. 1994).

[FN162]. Id. at 406.

[FN163]. 734 F.2d 1359 (9th Cir. 1984).

[FN164]. Shalala, 35 F.3d at 406-07.

[FN165]. 115 F.3d 657 (9th Cir. 1997).

[FN166]. 25 U.S.C. § 500 (1998).

[FN167]. Williams, 115 F.3d at 666.

[FN168]. Id. at 664.

[FN169]. Id. (citations omitted).

[FN170]. Id. at 663.

[FN171]. Id. at 657.

[FN172]. Id. at 664.

[FN173]. 146 F.3d 1075 (9th Cir. 1998).

[FN174]. Id. at 1081.

[FN175]. Id.

[FN176]. 694 F.2d 1162 (9th Cir. 1982).

[FN177]. Id. at 1168 n.10.

[FN178]. See Rice, 146 F.3d at 1081.

[FN179]. See infra section IV.C.

[FN180]. Rice v. Cayetano, 528 U.S. 509-17 (2000).

[FN181]. Id. at 520-23; see also Oral Arguments, 1999 WL 955376, at * 42 (admitting, according to the petitioner, that "only the Fifteenth Amendment is involved here").

[FN182]. See Rice, 528 U.S. 520-21.

[FN183]. Transcript of Oral Argument, Rice v. Cayetano, 528 U.S. 495 (2000)(NO.98-818), 1999 WL 955376, at *41.

[FN184]. U.S. Const. amend. XV.

[FN185]. Shaw v. Reno, 509 U.S. 630, 657 (1993); see also Brief of Amicus Curiae CEO et al., supra note 78, at *14.

[FN186]. Rice, 528 U.S. at 495 (quoting Gomillion v. Lightfoot, 364 U.S. 339, 345 (1960)).

[FN187]. Even the amicus briefs for the petitioners in the case concede this point. See Brief of Amicus Curiae CEO et al., supra note 78, at *11.

[FN188]. U.S. Const. amend. XIV.

[FN189]. See Brief of Amicus Curiae CEO et al., supra note 78, at *13 (arguing that "Strict scrutiny . . . applies with particular force to racial classifications affecting the voting process").

[FN190]. Anderson v. Martin, 206 F. Supp. 700, 705 (E.D. La. 1962) (Wisdom, J., dissenting), rev'd, 375 U.S. 399

(1964); see also Center for Equal Opportunity, 1999 WL 345639, at *14.

[FN191]. See Rice, 528 U.S. at 522, (noting that "[t]he question before [[the Court] is not the one-person, one-vote requirement of the Fourteenth Amendment, but the race neutrality command of the Fifteenth Amendment").

[FN192]. See Hampton v. Mow Sun Wong, 426 U.S. 88, 101-02 n.21 (1976).

[FN193]. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 218 (1995).

[FN194]. See Hampton, 426 U.S. at 101-02 n.21.

[FN195]. See Morton v. Mancari, 417 U.S. 535, 551-52 (1974).

[FN196]. Rice, 528 U.S. 520.

[FN197]. Id. at 518.

[FN198]. See Williams v. Babbit, 115 F.3d 657, 665 (9th Cir. 1997)(citing Stuart Minor Benjamin, Equal Opportunity and the Special Relationship: The case of Native Hawaiians, 106 Yale L.J. 537, 567 (1996)).

[FN199]. Rice, 528 U.S. 518-19.

[FN200]. Id. at 526 (Breyer, J., concurring).

[FN201]. Id. at 520 (emphasis added).

[FN202]. See Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974).

[FN203]. 430 U.S. 73 (1977).

[FN204]. 437 U.S. 634 (1978).

[FN205]. Bob Jones Univ. v. United States, 461 U.S. 574, 593 (1983).

[FN206]. See Hopwood v. Texas, 78 F.3d 932, 962 (5th Cir. 1996).

[FN207]. See Podberesky v. Kirwan, 38 F.3d 147, 161-62 (4th Cir. 1994). Cf. United States v. Virginia, 518 U.S. 515 (1996).

[FN208]. 461 U.S. 574 (1983).

[FN209]. See id. at 593-94.

[FN210]. Id.

[FN211]. Id. (citation omitted).

[FN212]. Rice v. Cayetano, 528 U.S. 495, 516-17 (2000).

[FN213]. Id. at 514.

[FN214]. Native Hawaiian Education Act of 1994, 20 U.S.C. § 7912 (1998) (emphasis added).

[FN215]. On a technical aside, it is generally acknowledged that, in the years prior to 1778, Hawai'i was not racially pure. According to the Hawai'i legislature's conference committee on the 1979 OHA laws, "[T]here were cross-

migrations of people between Hawai'i and the South Pacific island groups previous to 1778 . . . [I]t is also conceivable that persons descended from any race which may have been shipwrecked on Hawai'i before 1778 could similarly claim [the distinction of being 'Native Hawaiian']." S. Stand. Comm. Rep. No. 784, 1979 Haw. Leg. Sess., Sen. J. 1353. Therefore, cross-migrators and potential shipwreckers all come under the NHEA and KSBE's definitions of Native Hawaiian. Though a technicality, this observation suggests that political grouping, rather than racial status, is the criteron in question in NHEA and KSBE policies. NHEA and KSBE policies do not care about racial stock so much as they care about benefiting the descendants of those who lived under the ancient Hawaiian political system prior to the arrival of Captain Cook, which ultimately led to the collapse of Hawaiian independence and sovereignty.

[FN216]. To this end, some might argue that the admissions policy is akin to water-and-irrigation-district requirements for voting constitutionally upheld by Ball v. James, 451 U.S. 355 (1981), and Salyer Land Co. v. Tulare Water District, 410 U.S. 719 (1973). However, the Rice case casts significant doubt on this proposition. See Rice v. Cayetano, 528 U.S. 521 (2000).

[FN217]. See Brief of Amicus Curiae Kamehameha Schools Bishop Estate, supra note 41, at *29, app. A.

[FN218]. Whether but-for blood quantum requirements should ever be constitutionally permissible in a society which aspires to become race-blind (but has yet to achieve that ideal) is a separate and distinct question.

[FN219]. 417 U.S. at 555.

[FN220]. See id. at 553 n.24. See generally Frickey, supra note 79, at 1762.

[FN221]. Rice v. Cayetano, 146 F.3d 1075, 1082 (9th Cir. 1998).

[FN222]. It should be noted, however, that Bernice Pauahi Bishop's will does not contain any explicit clause that specifically limits admission to the KSBE to Native Hawaiians alone. See infra notes 229-32 and accompanying text.

[FN223]. EEOC v. KSBE, 990 F.2d 458 (9th Cir. 1993), cert. denied, 510 U.S. 963 (1993).

[FN224]. See id. at 466-67.

[FN225]. 42 U.S.C. § 2000e-2(a)(1) (1998).

[FN226]. KSBE, 990 F.2d at 466-67.

[FN227]. In re Estate of Bishop, 53 Haw. 604, 608, 499 P.2d 670, 673 (1972) (Abe, J., concurring).

[FN228]. See Roth, supra note 1, at 823.

[FN229]. See Brief of Amicus Curiae Kamehameha Schools Bishop Estate, supra note 41, at *3 (quoting from Pauhi Bishop's will).

[FN230]. Bishop, 53 Haw. at 610, 499 P.2d at 674.

[FN231]. 53 Haw. 604, 499 P.2d 670 (1972)(Abe, J., concurring).

[FN232]. See id. at 610, 499 P.2d at 674.

[FN233]. Id. at 608, 499 P.2d at 673.

[FN234]. See Seto & Kohm, supra note 25, at 397-400, 403-08.

[FN235]. See Dukeminier & Johanson, supra note 26, at 409-14.

[FN236]. See Takabuki v. Ching, 67 Haw. 515, 530, 695 P.2d 319, 328 (1985).

[FN237]. Interview with Jon Van Dyke (Sept. 6, 2000). Of course, there are some problems reconciling the KSBE decision with other Supreme Court decisions that have given much more zealous religious organizations the right to discriminate on the basis of religion under a much more tenuous mean-ends nexus. See, e.g., Corp. of the Presiding Bishop v. Amos, 483 U.S. 327 (1987) (enabling the Mormon Church to maintain a requirement that all janitors be members of the Church). I am indebted to Jon Van Dyke for pointing out this comparison.

[FN238]. Mancari, 417 U.S. at 555.

[FN239]. Id.

[FN240]. See supra notes 206-07 and accompaning text.

[FN241]. 515 U.S. 2000 (1995).

[FN242]. Id. at 237.

[FN243]. Id. at 228.

[FN244]. Id. at 237.

[FN245]. See id.

[FN246]. 390 U.S. 333 (1968).

[FN247]. See id. at 334 (Black, J., Harlan, J., Stewart, J., concurring).

[FN248]. Korematsu v. United States, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny.").

[FN249]. 480 U.S. 149 (1987).

[FN250]. Id. at 167 (1987) (Brennan, J., plurality opinion); id. at 190 (Stevens, J., concurring); id. at 196 (O'Connor, J., dissenting).

[FN251]. Adarand, 515 U.S. at 237 (quoting Paradise, 480 U.S. at 167).

[FN252]. See generally, Noam Chomsky, Language and Politics 106-25 (C. P. Otero ed., 1988) (elucidating the powerful epistemological quality of language); Ludwig Wittgenstein, On Certainty ¶ 211 (G.E.M. Anscombe & G.H. von Wright eds., Denis Paul & G.E.M. Anscombe trans., Harper Torchbooks 1969) (arguing that language, through education and socialization, forms the basis of thought, identity, and the ways in which we see the world); Ludwig Wittgenstein, Philosophical Investigations 8E (G.E.M. Anscombe trans., Basil, Blackwell & Mott 2d ed. 1958)(1953) (noting that "to imagine a language means to imagine a form of life").

[FN253]. NHEA, 20 U.S.C. § 7902(19) (2000).

[FN254]. See Susan Essoyan, A Language Once Thought Dying Is Having a Rebirth; Outlook Brightens as an Immersion Program to Revive Hawaiian Takes Root but Some Fear Separatism, L.A. Times, Aug. 8, 1991, at A5.

[FN255]. 20 U.S.C. § 7902(19).

[FN256]. It should be noted that the KSBE has been criticized for not doing enough in this area, and some observers have even charged that other educational institutions which do not have exclusionary admissions policies have done a superior job in regenerating interest in the Hawaiian language. Nevertheless, it is hard to dispute that KSBE's contribution in this area has been positive.

[FN257]. NHEA, 20 U.S.C. § 7902(21)(A).

[FN258]. See A. Grove Day, Hawaii and Its People app. B. (1955).

[FN259]. Of course, in the long run, the most effective way to revitalize the Hawaiian language might well be to have Hawai'i's non-Native-Hawaiian population learn the language as well. By limiting admissions to Native Hawaiians, the KSBE may be foregoing a key opportunity to spread the understanding of Native Hawaiian culture and traditions beyond just Native Hawaiians. However, this is a matter for policy analysts to decide, not constitutional scholars.

[FN260]. See Ellen Nakashima, Native Hawaiians Consider Asking for Their Islands Back; 100-Year-Old Cause Spurs Sovereignty Vote, Wash. Post, June 27, 1996, at A1.

[FN261]. See 20 U.S.C. § 7903(1).

[FN262]. See 20 U.S.C. § 7902(17)(F).

[FN263]. Admittedly, this was not always the case. In its early years, the Schools did not provide a liberal-arts curriculum that would encourage students to achieve higher education and enter professional life. In its first four decades, for example, the Schools largely emphasized vocational and military training for boys and homemaker training for girls. See Lawrence H. Fuchs, Hawaii Pono: A Social History 77 (1961).

[FN264]. See Brief of Amicus Curiae Kamehameha Schools Bishop Estate, supra note 41, at *13-14.

[FN265]. Id. at *16.

[FN266]. Apology Bill, § 1.

[FN267]. See Seto & Kohm, supra note 25, at 397-400, 403-08.

[FN268]. Jon M. Van Dyke, The Kamehameha Schools/Bishop Estate and the Constitution, 17 U. Haw. L. Rev. 413, 415 (1995); see Jon M. Van Dyke, The Constitutionality of the Office of Hawaiian Affairs, 7 U. Haw. L. Rev. 63, 90- 92 (1985).

[FN269]. See Tehranian, supra note 43, at 821.

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