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## Ua Mau Ke Ea O Ka Aina I Ka Pono: Voting Rights and the Native Hawaiian Sovereignty Plebiscite

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# UA MAU KE EA O KA AINA I KA PONO:<sup>†</sup> VOTING RIGHTS AND THE NATIVE HAWAIIAN SOVEREIGNTY PLEBISCITE

Troy M. Yoshino\*

*Using the Native Hawaiian Sovereignty Plebiscite to investigate the complex interplay between race, nationalism, and the special purpose district exception, this Note chronicles the development of relevant legal doctrines and the history of the Native Hawaiians' quest for self-government in an attempt to untangle those issues. In doing so, this Note concludes that the Native Hawaiian Sovereignty Plebiscite was an unconstitutional method of securing sovereign rights for Native Hawaiians, but that a Native Hawaiian claim to at least some form of self-government is justified. As a result, this Note searches for a method that will guarantee self-government as well as constitutionality and the recognition of all interests involved. It proceeds to analyze various voting systems, administrative mechanisms, and constitutional doctrines, and concludes by using this analysis to design a process that balances democratic philosophies, public interests, and the interests of Native Hawaiians who want sovereignty.*

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† Loosely translated, the Hawaiian phrase, "Ua mau ke ea o ka aina i ka pono" sends a prayer asking that the "life of the land be perpetuated in righteousness." Originally coined by King Kamehameha III during the nineteenth century, it has since become the official motto of the State of Hawaii. See HAW. CONST. preamble.

The Plebiscite that this Note examines is indicative of the larger sovereignty debate that threatens to alter the current state of Hawaiian society. See James Podgers, *Greetings from Independent Hawaii*, A.B.A. J., June 1997, at 74, 75 ("The sovereignty movement is 'inherently divisive' because it is based on racial preferences that would give Hawaiians special rights."). Generally speaking, this Note seeks to create a process that is constitutional by the American standard (and thus protective of the 1.2 million American citizens present on Hawaiian soil), but makes sure to preserve the interests of Native Hawaiians seeking sovereignty and redress for the misappropriation of their lands by the United States government. It does so because it feels that such a move is necessary to both resolving the current dilemma and fulfilling the commands of the Hawaii State motto.

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*A civilization progresses when what was viewed as a  
misfortune becomes viewed as an injustice.<sup>1</sup>*

## INTRODUCTION

When millions of Americans went to the polls on November 5, 1996, to voice their opinions on a wide variety of high-profile issues ranging from affirmative action (California Proposition 209) to the tax exemption status of non-profit and religious organizations

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1. See Martha Minow, *Introduction* to *OUTSIDE THE LAW: NARRATIVES ON JUSTICE IN AMERICA* 1, 6 (Susan Richards Shreve & Porter Shreve eds., 1997) [hereinafter *OUTSIDE THE LAW*] (quoting an unknown source).

(Colorado Proposition 11),<sup>2</sup> few voters missed the fact that an initiative concerning the Native Hawaiian sovereignty movement was absent from their ballots. But the issue of Hawaiian sovereignty, ultimately affecting the future of Hawaii (home to nine U.S. military installations, over a million Americans, and a burgeoning tourist industry) as part of the United States,<sup>3</sup> would seem to be much more important to most Americans—regardless of where they reside—than “[r]estrictions or bans on the use of traps, bait or dogs in hunting” (voted on in five states during election day: Colorado, Idaho, Massachusetts, Michigan, and Washington).<sup>4</sup>

Harold F. Rice, a non-Hawaiian resident of the State of Hawaii,<sup>5</sup> certainly considered the issue of Hawaiian sovereignty to be an important one, and surely missed the initiative concerning the future of the Hawaiian sovereignty movement when he saw that it was absent from his election day ballot. In fact, Rice was infuriated when he learned that the sovereignty movement had been cleared to move forward without his input or the input of all but approximately 30,000 of Hawaii’s 1.2 million residents. Harold Rice felt that because all residents of Hawaii would be affected by any meaningful form of redress through social and economic changes, all such residents should decide whether delegates would be elected to a constitutional convention that would determine the desired form of a sovereign Hawaiian government. During the summer of 1996, however, a Native Hawaiian Sovereignty Plebiscite was held, giving only persons of Hawaiian ancestry a say on that very issue.

As a result, Rice filed a motion for a preliminary injunction in the United States District Court for the District of Hawaii shortly before the Plebiscite results were to be announced. The motion requested that the results of the vote be withheld pending a trial to determine the constitutionality of the Plebiscite and was based on a belief that the Plebiscite results would cause irreparable harm to the constitutional rights of Hawaii’s residents—and perhaps all

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2. See Robert Pear, *Ballot Initiatives Around the Nation*, N.Y. TIMES, Nov. 7, 1996, at B7. Overall, voters in twenty-three states were polled on a total of ninety different initiatives. Peter Schrag, *California, Here We Come: Government by Plebiscite Which Would Have Horrified the Founding Fathers, Threatens to Replace Representative Government*, ATLANTIC MONTHLY, Mar. 1998, at 20 (noting that issues covered “everything from hunting rights to gambling to logging regulations to sugar production to the legalization of medical marijuana use.”).

3. *Hawaii*, MICROSOFT ENCARTA (1997).

4. See Pear, *supra* note 2, at B7.

5. While some use the term “Hawaiian” to refer to residents of the State of Hawaii in a manner analogous to “Californian” or “Michigander,” I use the terms “Hawaiian” and “Native Hawaiian” to refer only to the indigenous persons who are descendants of those who lived in Hawaii before contact with British Naval Captain James Cook in 1778. Others are referred to as “non-Hawaiians.”

Americans—if released.<sup>6</sup> Among other things, the motion argued that the “one person, one vote” principle of *Reynolds v. Sims*<sup>7</sup> meant that when Rice was not allowed to vote in the Native Hawaiian Plebiscite, his constitutional rights to equal protection and to the franchise under the Voting Rights Act, and the Fourteenth and Fifteenth Amendments were abridged.<sup>8</sup>

Rice’s motion eventually was denied on the grounds of a special purpose district exception to the “one person, one vote” principle. That exception allows elections that concern issues involving only limited governmental authority and that disproportionately affect certain groups to be limited to members of those groups.<sup>9</sup> But this Note argues that the special purpose district exception should *not* apply to the Native Hawaiian Sovereignty Plebiscite because that election circumvents constitutional regulations on the political process. Moreover, the decisions and legitimacy generated by the initiative have the potential to substantially affect many groups other than the Native Hawaiians who were granted the right to vote in the Plebiscite.

The positive result of the Plebiscite at issue in *Rice v. Cayetano*<sup>10</sup> means that further steps to establish sovereignty are imminent and, in some cases, are already occurring.<sup>11</sup> As the campaign for sovereignty

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6. Rice’s motion was considered in *Rice v. Cayetano*, 941 F. Supp. 1529 (D. Haw. 1996).

7. 377 U.S. 533 (1964).

8. *Rice*, 941 F. Supp. at 1536.

9. *See, e.g., Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 728–30 (1973).

10. On September 11, 1996, the Hawaiian Sovereignty Elections Council (HSEC) announced that 73.3% (22,294 out of the 30,423 valid ballots) of all eligible persons (i.e., Native Hawaiians over 18 years of age) voting in the Plebiscite voted “yes.” Walter Wright, *Hawaiians Vote Yes*, HONOLULU ADVERTISER, Sept. 12, 1996, at A1. By voting “yes,” these Hawaiians opted to (1) elect delegates to a convention that will propose the form of a Native Hawaiian government, and (2) move toward some form of sovereignty for Native Hawaiians. *See Rice*, 941 F. Supp. at 1536.

11. A non-profit group called *Ha Hawaii* has organized with the goal of raising some of the more than \$8 million needed for further sovereignty elections and the Native Hawaiian convention called for by the Plebiscite. *Hawaiian Sovereignty Council Expires*, ASSOC. PRESS POL. SERV., Dec. 31, 1996, at 1, available in 1996 WL 5430305 [hereinafter *Expires*].

The next phase of the process calls for 100 to 200 Hawaiian delegates to be elected to a constitutional convention. *Further Sovereignty Discussions Set for February*, OJIBWE NEWS, Dec. 20, 1996, at 2, available in 1996 WL 15812582 [hereinafter *Further Discussions*]. In the meantime, HSEC plans for the formation of a research group that would collect information about possible forms of government. HAWAIIAN SOVEREIGNTY ELECTIONS COUNCIL, TO BUILD A NEW NATION (HO’OKUKUKULU HE AUPUNI HOU) (n.d.), at 6. These things would allow a proposal for a sovereign Hawaiian government to be in place by March 1999, and for a subsequent vote by Native Hawaiians on the ratification of that proposal to follow shortly thereafter. *Id.*; *Further Discussions*, *supra*, at 2.

moves forward, however, more and more individuals are likely to recognize that any form of meaningful redress will affect the interests of many individuals who are not Native Hawaiians. This Note argues that unless something is done to change the structure of the sovereignty process, these combined circumstances almost guarantee that the voting rights issues of *Rice v. Cayetano* will be litigated again. Recognizing this, and contending that the current process is unconstitutional, this Note proposes an alternative decision-making process for determinations related to the issue of Native Hawaiian sovereignty.

Although the focus of this Note is on voting rights and alternative electoral systems, its first Part gives some historical background on the improper annexation of the Hawaiian Kingdom by the United States and the developing movement to reclaim Hawaiian sovereignty. In doing so, it does not attempt to provide a comprehensive discussion of Hawaii's history or expound on sovereignty and its merits or disadvantages. Rather, this Note draws on history in an attempt to recognize the legitimacy of requests for some form of redress, to analyze the types of reform that Native Hawaiians desire, and to focus on the practical (rather than the academic or doctrinal) difficulties of designing a decision-making process that protects the interests of all parties potentially affected by Native Hawaiian sovereignty.<sup>12</sup>

Part II of this Note analyzes voting rights issues raised by the Native Hawaiian Sovereignty Plebiscite and attempts to answer the question of whether the right to vote in an election concerning Native Hawaiian sovereignty can or should be limited to individuals of Hawaiian ancestry. It concludes that such a limitation is impermissible—in other words, that the *Rice* court misapplied *Reynolds* and the special purpose district exception—and that other existing doctrines do nothing to change the unconstitutional status of the existing decision-making structure. Given Part I's conclusion about the legitimacy of Hawaiian requests for redress, however, this Note also recognizes the need for a forum in which those

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It is significant to note that most of the relevant literature on the topic fails to define exactly how the sovereignty process will work after the Native Hawaiians reach some form of consensus on sovereignty. Specifically, it is unknown at this time whether the status quo demands that the sovereignty issue ultimately be decided by the general population of Hawaii or the Hawaii State Legislature.

12. Cf. Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1757 (1997) (“[U]nless injected with a heavy dose of historical perspective and legal realism, formal lawyerly analysis not only often fails to illuminate the issues . . . , but can also result in deceiving conclusions.”).

requests can at least be heard within the political process. Part III, therefore, goes on to suggest a procedure that should pass constitutional muster and adequately balance the interests of Native Hawaiians, the residents of the State of Hawaii, and the United States government.

## I. THE NATIVE HAWAIIAN SOVEREIGNTY MOVEMENT

### A. Historical Background

Although historians are uncertain about exactly how long Native Hawaiians have inhabited their island home,<sup>13</sup> they mark the arrival of the first *haole*,<sup>14</sup> Captain James Cook of the British Navy, on January 19, 1778, as the day that the course of Hawaiian civilization changed forever.<sup>15</sup> Word of the abundant sandalwood, beautiful beaches, rich agricultural soils, and enormous economic opportunities available in Hawaii spread quickly. By the 1840s, the United States had not only discovered the virtues of the island paradise for itself, but had also set its eye toward all-out domination of the islands and its people.<sup>16</sup>

A combination of religious, political, and economic forces enabled Americans to enter the Hawaiian national government and exert strong influence over the monarchy.<sup>17</sup> By 1887, these outsiders

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13. Good archeological estimates say that Hawaiian civilization is approximately 2000 years old. Shirley Streshinsky, *Hawaiian Renaissance: From Traditional Polynesian Voyaging Canoes to Herbal Medicines and Chanting, Hawaiian Culture Is Making a Comeback*, S.F. EXAMINER, Apr. 6, 1997, at T1.

14. "Haole" is the Hawaiian word for "foreigner" (i.e., non-Hawaiian). HELENA G. ALLEN, *THE BETRAYAL OF LILIUOKALANI* 13 (1982).

15. See HAUNANI-KAY TRASK, *FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAII* 6-7 (1993).

16. Haunani-Kay Trask notes:

President John Tyler enunciated the infamous Tyler doctrine of 1842 which asserted to European powers that Hawai'i was in the "U.S. sphere of influence" and therefore off-limits to European interventions. The U.S. House Committee on Foreign Affairs, meanwhile, replied to the Tyler doctrine with a Manifest Destiny statement suggesting "Americans should acknowledge their own interests" in Hawai'i as a "virtual right of conquest" over the "mind and heart" of the Hawaiian people.

*Id.* at 8.

17. The story chronicling the overthrow of the Hawaiian monarchy is too replete with diplomatic maneuverings and deceptions to be fully laid out in this Note, but comprehensive accounts of the annexation can be found in ALLEN, *supra* note 14; MICHAEL DOUGHERTY, *TO STEAL A KINGDOM* (1992); NATIVE HAWAIIANS STUDY

had gained effective control over the government by means of the "Bayonet Constitution"—a document in which King Kalakaua, the reigning monarch, ceded much of his power to Americans and disenfranchised about seventy-five percent of the Native Hawaiian population via an income and property ownership requirement that was too stringent for all but the most privileged indigenous persons to meet.<sup>18</sup>

On January 17, 1893, at the urging of American businessmen who were irked by increasing sugar tariffs and Queen Lili'uokalani's<sup>19</sup> threat to amend the Hawaiian constitution to increase the monarchy's power, a group of pro-annexationist Americans known as the "Committee of Safety" seized control of the Hawaiian government.<sup>20</sup> Backed by 160 armed United States Marines mobilized under the direction of United States Minister John L. Stevens, American revolutionaries seized Iolani Palace and declared a provisional government.<sup>21</sup> Although Minister Stevens acted throughout this entire incident without presidential approval, he immediately recognized the provisional government on behalf of the United States.<sup>22</sup> This recognition gave the insurrectionists some much-needed legitimacy and allowed them to declare the abolition of the Hawaiian national government, expropriate the Crown lands without compensation to the Queen, and place the Queen herself under house arrest.<sup>23</sup>

Confronted by a provisional government that was backed by the United States and an occupying U.S. military force that was assembling near her palace, Lili'uokalani relinquished her

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COMMISSION, REPORT ON THE CULTURE, NEEDS AND CONCERNS OF NATIVE HAWAIIANS (1983) [hereinafter NEEDS]; TRASK, *supra* note 15, at 4–21.

18. See NEEDS, *supra* note 17, at 277 (noting that Article 31 of the Hawaiian constitution was amended in 1887 to cede much of the King's power to his cabinet of American outsiders); Bradley Hideo Keikiokalani Cooper, Comment, *A Trust Divided Cannot Stand—An Analysis of Native Hawaiian Land Rights*, 67 TEMP. L. REV. 699, 704 (1994); Michael M. McPherson, Comment, *Trustees of Hawaiian Affairs v. Yamasaki and the Native Hawaiian Claim: Too Much of Nothing*, 21 ENVTL. L. 453, 460–61 (1991); Ron Staton, *Injustice of 1893 Hawaii Overthrow Evident in 'Last Queen'*, PORTLAND OREGONIAN, Jan. 27, 1997, at C8.

19. With King Kalakaua's death in 1891, Queen Lili'uokalani ascended to the throne. See NEEDS, *supra* note 17, at 292.

20. See *id.* at 293–94; Jennifer M.L. Chock, *One Hundred Years of Illegitimacy: International Legal Analysis of the Illegal Overthrow of the Hawaiian Monarchy, Hawaii's Annexation, and Possible Reparations*, 17 U. HAW. L. REV. 463, 465 (1995).

21. See 3 RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM 1874–1893, at 582–605 (1967).

22. See *id.*

23. See *id.* at 465; see also Mililani B. Trask, *Historical and Contemporary Hawaiian Self-Determination: A Native Hawaiian Perspective*, 8 ARIZ. J. INT'L & COMP. L. 77 (1991) (giving a more complete historical account of Hawaii's annexation).



authority—not to the provisional government, but to the United States.<sup>24</sup> She wrote:

I, Liliuokalani, by the Grace of God and under the Constitution of the Kingdom, Queen, do hereby solemnly protest against any and all acts done against myself and the constitutional government of the Hawaiian Kingdom by certain persons claiming to have established a provisional government of and for this Kingdom. That I yield to the superior force of the United States of America, whose minister plenipotentiary, His Excellency John L. Stevens, has caused United States troops to be landed at Honolulu and declared that he would support the said provisional government. Now to avoid any collision of armed forces and perhaps the loss of life, I do under this protest, and impelled by said force, yield my authority until such time as the Government of the United States shall, upon the facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the constitutional sovereign of the Hawaiian Islands.<sup>25</sup>

Hearing her protest and sympathizing with her plight, President Grover Cleveland denounced the actions of Minister Stevens and refused to submit a treaty of annexation to the United States Senate,<sup>26</sup> but his successor, President William McKinley, supported the annexation of Hawaii and tirelessly pushed the Senate to move in that direction.<sup>27</sup> Finally, five years after the overthrow of Queen Lili'uokalani, the United States passed the Annexation Act of 1898,<sup>28</sup> and on August 12 of that year, the flag of the Hawaiian nation that flew at Iolani Palace was lowered for the last time. It was then "cut into small ribbons and given to the sons and daughters of the missionary families as tokens of their victory over the Hawaiian kingdom."<sup>29</sup>

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24. See TRASK, *supra* note 15, at 17.

25. JAMES BLOUNT, REPORT OF THE COMMISSIONER TO THE HAWAIIAN ISLANDS 120 (1893) (quoting letter from Queen Lili'uokalani to Sanford B. Dole, Provisional Governor of Hawaii (Jan. 17, 1893)).

26. See ROGER BELL, LAST AMONG EQUALS: HAWAIIAN STATEHOOD AND AMERICAN POLITICS 28–29 (1984).

27. NEEDS, *supra* note 17, at 299–301.

28. Act of July 7, 1898, 30 Stat. 750.

29. Staton, *supra* note 18, at C8.

### B. The Campaign for Sovereignty

While the United States government has recognized its mistakes in improperly overthrowing the Hawaiian government,<sup>30</sup> it has taken only a few token steps toward correcting these mistakes.<sup>31</sup> In response to this apathy, Native Hawaiians have become more active and more vocal in their search for redress and sovereignty.

Their campaign for self-government first gained prominence in 1976, when a group of activists occupied Kaho'olawe, an uninhabited island that the United States Navy used as a bombing range.<sup>32</sup> Today, approximately forty sovereignty organizations are involved in the drive to reclaim lands lost to the United States government.<sup>33</sup> Haunani-Kay Trask, a professor at the University of

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30. See Pub. L. No. 103-150, 107 Stat. 1510 (1993) (stating that Congress "acknowledge[s] the 100th anniversary of the January 17, 1893, overthrow of the Kingdom of Hawaii, and . . . offers an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii"); Chock, *supra* note 20, at 465-66 (noting that a commission appointed by President Grover Cleveland concluded that the United States was responsible for the ousting of Queen Lili'uokalani and that President Cleveland even recommended reinstating the queen); Susan Essoyan, *Hawaiian Firm Says History Decrees Land Sales Invalid*, L.A. TIMES, Mar. 20, 1997, at A5; Adam Pertman, *Native Hawaiians Seek Self-Rule*, BOSTON GLOBE, Mar. 20, 1996, at 1, available in 1996 WL 6854172.

It is perhaps also significant to note that many non-Hawaiians view persons of Hawaiian ancestry as entitled to some compensation for their maltreatment by the United States government. See, e.g., Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 372 n.208 (1987) (citing the results of a study concluding that an overwhelming number of individuals view at least some type of program to address the wrongs inflicted on Native Hawaiians as appropriate); Eric K. Yamamoto, *Rethinking Alliances: Agency, Responsibility and Interracial Justice*, 3 ASIAN PAC. AM. L.J. 33, 39 (1995) (reporting that a number of Asian American groups in Hawaii wanted apologies and multimillion dollar reparations for Native Hawaiians).

31. See, e.g., S. REP. NO. 103-126, at 35 (1993) (stating that the "enactment of [Pub. L. No. 103-150] will not result in any changes in existing law").

Some argue that redress is impossible because actual damages or specific performance directed at remedying years of legal wrongs could surpass the revenue and assets of the State of Hawaii. See CHARLES R. LAWRENCE III & MARI J. MATSUDA, *WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* 241 (1997). Professors Lawrence and Matsuda discount this argument by pointing to reparations paid to Japanese Americans for their wrongful internment during World War II. See *id.* at 241-42. "The practical reality is that no litigant will ever collect full damages if they will bankrupt the state. At some point the political process will have to allow for compromise." *Id.* at 241.

32. See Mindy Pennybacker, *Should the Aloha State Say Goodbye? Natives Wonder*, NATION, Aug. 12, 1996, at 21.

33. See Luis H. Francia, *Ka Lahui Hawai'i: After 100 Years of Colonialism, the Hawaiian Sovereignty Movement Stirs*, VILLAGE VOICE, June 20, 1995, at 31.

Hawaii-Manoa and a noted sovereignty expert and activist observes that

[a]t the largest level, discussions of Hawaiian sovereignty entail a choice between self-governing structures: a completely independent Hawai'i under the exclusive or predominating control of Hawaiians; "limited sovereignty" on a specified land base administered by a representative council but subject to U.S. federal regulations; legally incorporated land based units within existing communities linked by a common elective council; a "nation-within-a-nation" on the model of American Indian nations.<sup>34</sup>

Just what "Hawaiian sovereignty" means more specifically, however, is "nebulous."<sup>35</sup> Several leading voices claim to represent the approximately 200,000 Native Hawaiians (*kanaka maoli*) who trace their ancestries back to the original inhabitants of Hawaii.<sup>36</sup> The largest of these groups is *Ka Lahui Hawai'i*, which has declared itself the government for Native Hawaiians and wants to create a "nation-within-a-nation" with dual citizenships.<sup>37</sup> Despite the fact that it is

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It would be a mistake, however, to assume that all Hawaiians want sovereignty. In fact, quite the contrary is true. See Stella Danker, *Rumblings of Discontent in Hawaii*, BUS. TIMES (Singapore), Dec. 24, 1996, at 1, available in 1996 WL 6296416 ("A lot of Hawaiians don't want sovereignty because they feel that it will turn [Hawaii] into a banana republic."); Podgers, *supra* note †, at 78 (quoting Mililani Trask, leader of the sovereignty group *Ka Lahui Hawai'i*, as observing that most Hawaiians "are not worried about independence. They're worried about paying the bills."); cf. Todd S. Purdum, *Hawaiians Angrily Turn on a Fabled Empire*, N.Y. TIMES, Oct. 14, 1997, at A1 (demonstrating that Native Hawaiians remain largely and bitterly divided over what to do with entitlements that they already possess through a discussion regarding allegations of mismanagement against the Bishop Estate, a trust organization established to benefit Native Hawaiians).

34. TRASK, *supra* note 15, at 48; see also Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1290 (1991) ("Nationhood is a concept defined, ostensibly at least, by those included in it, not in any state of nature. . . . Legal recognition as sovereign is thus based on neither correspondence nor distinction, but on an equal entitlement to self-determination."); Podgers, *supra* note †, at 78 (quoting Clayton Hee, Chairman of the Board of Trustees for the Office of Hawaiian Affairs, as defining the general contours of sovereignty to include "the right to self-determination, the right to make [your] own rules, to choose leaders and to change both [sic] as appropriate;" also noting that a better definition is impossible because sovereignty is "amorphous—an unquantifiable, shapeless concept").

35. Meki Cox, *Federal Court Case Could Nix Native Hawaiian Sovereignty Movement*, ASSOC. PRESS, Aug. 31, 1996, at 1, available in 1996 WL 4438206.

36. See Pennybacker, *supra* note 32, at 21. In truth, depending on whose definition of "Hawaiian" you use, Native Hawaiians make up between 12% and 20% of the State's 1.2 million residents. According to the statutory definition of "Hawaiian," found in HAW. REV. STAT. § 10-2 (1996), the number is closer to 20%.

37. See Cox, *supra* note 35, at 1.

not recognized as legitimate by the government of the State of Hawaii, *Ka Lahui* still claims over 21,000 registered citizens, has an elected legislature, and is governed by a ratified constitution.<sup>38</sup> *Ka Lahui*

argues for federal recognition of Hawaiian sovereignty, including claims to self-determination on an identifiable land base[,] . . . opposes all efforts by [the Office of Hawaiian Affairs] to settle for money rather than land[,] . . . [and] argues that Hawaiians should have standing to sue for breaches of trust in both state and federal courts.<sup>39</sup>

Another major sovereignty group, *Pu'uhonua* (also known as "the Nation of Hawaii"), claims approximately 13,000 members, wants to reinstate the Hawaiian monarchy, and argues for the return of lands that they say rightfully belong to Native Hawaiians.<sup>40</sup> In the early 1990s, *Pu'uhonua* received several acres of land in Waimanalo, Oahu, from the State of Hawaii as part of a settlement agreement that helped move a *Pu'uhonua* encampment away from one of Oahu's more popular tourist beaches.<sup>41</sup> Today, it uses that land base to operate a virtually self-sufficient agrarian society, complete—much to the dismay of the State government—with license plates and civil disobedients who refuse to recognize the law of either the United States or the State of Hawaii.<sup>42</sup>

A third group, *Ka Pakaukau*, advocates a return to pre-Western civilization, secession from the United States, and ejection of all non-Hawaiians, including tourists, from the islands.<sup>43</sup>

At base, however, most groups recognize that any form of meaningful Native Hawaiian sovereignty would involve sweeping changes from the status quo and would substantially affect the lives of most Americans, especially the residents of Hawaii. For example,

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38. See Pennybacker, *supra* note 32, at 21.

39. TRASK, *supra* note 15, at 48.

40. See *id.* at 21.

41. *Pu'uhonua* had set up its original encampment at Makapu'u Beach in Waimanalo, Oahu. It did so in order to strengthen its claim that the lands at Makapu'u really belonged to Native Hawaiians and had been wrongfully misappropriated by the State of Hawaii.

42. See William H. Rodgers, Jr., *The Sense of Justice and the Justice of Sense: Native Hawaiian Sovereignty and the Second "Trial of the Century,"* 71 WASH. L. REV. 379, 380–81 (1996); *id.* at 384 (noting that leaders of *Pu'uhonua* have previously been convicted of harboring fugitives from the force of U.S. law); Podgers, *supra* note †, at 76 (discussing *Pu'uhonua* in the context of their leader, Dennis "Bumpy" Kanahele).

43. See Cox, *supra* note 35, at 1.

a number of sovereignty groups want to return almost two million acres of public land—about half the total acreage of all the islands combined—within the current boundaries of the State of Hawaii to the control of Native Hawaiians.<sup>44</sup> These lands include approximately 400,000 acres under federal control, most significantly the land comprising and surrounding the Pearl Harbor Naval Base; 1.35 million acres under the control of the State of Hawaii, including the land where the Honolulu International Airport is situated; and 203,500 acres that Congress set aside in 1921 to provide homesteads for persons with at least fifty percent Hawaiian blood.<sup>45</sup> Some sovereignty groups also contend that the United States government should pay them at least \$10 billion in back rent for the use of their lands.<sup>46</sup>

### C. *The Native Hawaiian Plebiscite*

After years of active debate, the Hawaii State Legislature finally passed a legislative act relating to Hawaiian sovereignty in 1993. The stated purpose of this law was “to acknowledge and recognize the unique status the Native Hawaiian people bear to the State of Hawaii and to the United States and to facilitate the efforts of Native Hawaiians to be governed by an indigenous sovereign nation of their own choosing.”<sup>47</sup>

Among other things, this legislation and later amendments<sup>48</sup> established the Hawaiian Sovereignty Elections Council (HSEC) and charged it with the responsibility of developing an electoral mechanism to determine what form Hawaiian sovereignty might take. Together, these statutes appropriated over \$4 million from the State treasury to accomplish this task.<sup>49</sup>

Ultimately, HSEC decided to hold a plebiscite to answer the question: “Shall the Hawaiian people elect delegates to propose a Native Hawaiian government?”<sup>50</sup> HSEC also decided, however, to limit the right to vote in the Native Hawaiian Plebiscite to (1)

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44. See Podgers, *supra* note †, at 78.

45. See Cox, *supra* note 35, at 1.

46. See *id.*

47. 1993 Haw. Sess. Laws 359, § 2.

48. This act was later amended by Act 200 in 1994 and Act 140 in 1996. In general, these amendments made technical changes and appropriated additional funds in order to facilitate the accomplishment of Act 359’s stated purpose. See 1996 Haw. Sess. Laws 140; 1994 Haw. Sess. Laws 200.

49. See *Rice v. Cayetano*, 941 F. Supp. 1529, 1535 (D. Haw. 1996).

50. See *id.* at 1536.

Hawaiians,<sup>51</sup> who (2) were over eighteen years of age on September 2, 1996.<sup>52</sup>

An estimated 85,000 ballots were sent to registered "Native Hawaiian" voters, some of whom did not reside in and/or were not even citizens of either Hawaii or the United States at the time of the Plebiscite. Approximately 30,000 ballots were returned and counted using State election computers and resources. Those who voted overwhelmingly chose to proceed with the Hawaiian sovereignty movement by a margin of almost three to one.<sup>53</sup>

## II. CONSTITUTIONAL ISSUES RAISED BY THE NATIVE HAWAIIAN PLEBISCITE

### A. Voting Rights Issues

Within its five subsections, Part II.A first gives background on *Rice v. Cayetano* in an effort to provide critical information about the context in which the topics of this Note were litigated. It subsequently proceeds to a discussion of the "one person, one vote" principle that governs the structure of most elections and then carves out two potential exceptions to that doctrine: a special purpose district exception and a proposed rule that focuses on the level of control invested in a constitutionally elected body rather than the inclusiveness or exclusiveness of the particular initiative. Finally, Part II.A.5 critiques the logic of the court in *Rice v. Cayetano* in applying the special purpose district exception by noting that it ignored organizational structure and legitimacy factors that other courts have considered in applying the exception. It continues by arguing that neither the special purpose district exception or the proposed rule focusing on the level of control by a constitutionally elected body works to trump the principle of "one person, one vote." Because of this, Part II.A ultimately concludes that the Plebiscite at issue in *Rice* should have been held unconstitutional.

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51. Hawaii State law defines "Hawaiian" as "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian islands in 1778, and which peoples thereafter have continued to reside in Hawaii." HAW. REV. STAT. § 10-2 (1996). Eligibility to vote in the Native Hawaiian Plebiscite was determined using this definition. See *Rice*, 941 F. Supp. at 1536 n.5.

52. See *Rice*, 941 F. Supp. at 1536.

53. The actual margin was 73%-27%. See Carey Goldberg, *Native Hawaiian Vote Favors Sovereignty*, N.Y. TIMES, Sept. 14, 1996, at A1; *Move Toward Sovereignty Gains Momentum in Hawaii*, CHARLESTON GAZETTE & DAILY MAIL, Sept. 15, 1996, at 19A [hereinafter *Momentum*].

### 1. *Rice v. Cayetano*—A Backdrop for Voting Rights Litigation

Shortly before the announcement of the Native Hawaiian Sovereignty Plebiscite results, Harold F. Rice, a non-Hawaiian who was not allowed to vote on the initiative, filed a motion for preliminary injunction in the United States District Court for the District of Hawaii. That motion attempted to prevent the announcement of the Plebiscite's results by contending that the Plebiscite itself was unconstitutional. Specifically, Rice claimed that, among other things, the Native Hawaiian Plebiscite violated his right to equal protection under the Fourteenth Amendment and his rights to suffrage under the Fifteenth Amendment and the Voting Rights Act.<sup>54</sup>

Rice contended that the State's exclusion of non-Native Hawaiian people from participation in the Sovereignty Plebiscite was presumptively unconstitutional because it infringed on the fundamental right to vote.<sup>55</sup> In response, the State argued that the Native Hawaiian Plebiscite was a special purpose election that could constitutionally be limited to members of the group most "directly affected" under the *Ball v. James*<sup>56</sup> and *Salyer Land Co. v.*

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54. See *Rice*, 941 F. Supp. at 1536. Rice and his co-plaintiffs (collectively referred to by the court as the "Kakalia plaintiffs") also brought claims contesting the constitutionality of the Plebiscite under the Supremacy Clause, the First Amendment, the Civil Rights Act, and Hawaii State constitutional provisions dealing with the relationship of Native Hawaiians to the State of Hawaii. *Id.* The scope of this Note is limited to voting rights problems that the Sovereignty Plebiscite raises, however.

The *Rice* court felt somewhat limited by *Morton v. Mancari*, 417 U.S. 535 (1974), *Nalielua v. Hawaii*, 795 F. Supp. 1009, 1013 (D. Haw. 1990), *aff'd*, 940 F.2d 1535 (9th Cir. 1991), and various state and federal statutes that might collectively be read to stand for "the proposition that Native Hawaiians may be treated separately in matters affecting their own affairs without violating equal protection guarantees," *Rice*, 941 F. Supp. at 1539-44. Because I disagree with the *Rice* court's conclusion that the Native Hawaiian Plebiscite substantially affected only Native Hawaiian affairs, however, I view the limitations set by these cases as irrelevant to my discussion of the Plebiscite's constitutionality.

For a good discussion of the equal protection and special relationship aspects of the sovereignty controversy, refer to Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537 (1996). But see Frickey, *supra* note 12, 1756-67 (criticizing Benjamin's equal protection analysis as misfocused and too narrow).

55. See *Rice*, 941 F. Supp. at 1539 (citing *Shaw v. Reno*, 509 U.S. 630 (1993)); see also Benjamin, *supra* note 54, at 599-600 (discussing the fact that State funding or involvement in the sovereignty movement may lead to invalidation of the entire HSEC process).

56. 451 U.S. 355 (1981).

*Tulare Lake Basin Water Storage District*<sup>57</sup> exceptions to the “one person, one vote” standard of *Reynolds v. Sims*.<sup>58</sup>

## 2. *Reynolds v. Sims*—The “One Person, One Vote” Principle

Although the facts of *Reynolds* dealt with the narrow issue of legislative apportionment schemes and alleged vote dilution as they related to the election of Alabama state legislators, subsequent cases and scholarship have recognized that *Reynolds* stands for a much broader proposition known as the “one person, one vote” principle.<sup>59</sup> Specifically, *Reynolds* announced that “[f]ull and effective participation by all citizens in . . . government requires . . . that each citizen have an equally effective voice . . . .”<sup>60</sup> Almost by logical inference, this holding has since been interpreted to mean not only that vote dilution is unconstitutional, but also that elections limited to a certain portion of the voting population on the basis of immutable characteristics are generally unconstitutional because they effectively deny citizens a “voice” where they are entitled to have one by the provisions of the Fifteenth Amendment.<sup>61</sup>

But the United States Supreme Court, under a doctrine generally referred to as the special purpose district exception, has recognized that the right to participate in elections might be limited to disproportionately affected groups in cases where these

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57. 410 U.S. 719 (1973).

58. 377 U.S. 533 (1964).

59. *Id.* at 536–37.

60. *Id.* at 565.

61. See, e.g., *Salyer Land*, 410 U.S. 719 (1973). Compare cases like *Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928), and *Eubank v. City of Richmond*, 226 U.S. 137 (1912). Both of these cases involved ordinances that allowed the modification of zoning plans on the vote of two-thirds of the residents within the district in question. The Court struck such ordinances as unconstitutional because “part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction [the owners in the minority] are impotent.” *Eubank*, 226 U.S. at 143. Although these cases are distinguishable because the ordinances at issue in *Eubank* and *Roberge* precluded a right to judicial review that the plaintiffs in *Reynolds* obviously had (and that non-Native Hawaiian residents of the State of Hawaii would also possess), these cases are interesting because they can be read to show the Supreme Court’s unwillingness to let groups of private citizens impose their will on other citizens when it comes to certain subjects. Cf. *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 679 (1976) (upholding an ordinance that mandated approval via public referendum on any changes in land use agreed to by the city council). The *Forest City* Court specifically distinguished *Eubank* and *Roberge* by noting that the unconstitutional ordinances in those cases delegated zoning decisions “to a narrow segment of the community, not to the people at large.” *Id.* at 677.



groups are specially subjected to some limited governmental authority that affects a limited land area.<sup>62</sup>

### 3. The Special Purpose District Exception

In *Salyer Land*, the United States Supreme Court upheld a California voting qualification that restricted the right to participate in an election for the directors of a water control district based on land ownership.<sup>63</sup> The Court was persuaded that the restrictions were constitutional because: (1) the water district had relatively limited governmental authority; (2) the water district's primary purpose was to provide for the acquisition, storage, and distribution of water for farming in a limited area; and (3) its actions disproportionately affected landowners within the water district.<sup>64</sup> Under those circumstances, the Supreme Court applied a rational basis test to the qualifications and determined that the statutes did not violate the Equal Protection Clause.<sup>65</sup>

Similarly, in *Ball v. James*, the United States Supreme Court upheld the constitutionality of an Arizona system for electing the directors of an agricultural improvement and power district that limited voter eligibility to landowners and apportioned voting power according to the number of acres owned.<sup>66</sup> In deciding the case, the Court first observed that the district's purpose was sufficiently specialized and narrow.<sup>67</sup> It therefore went on to conclude that the district's activities affected landlords and landowners so disproportionately that it should be released from the strict demands of the *Reynolds* "one person, one vote" standard.<sup>68</sup>

The court in *Rice v. Cayetano* was convinced by the State of Hawaii's argument that the Native Hawaiian Sovereignty Plebiscite was similar to the limited-participation elections held in both *Salyer Land* and *Ball* because, in the court's eyes, the Plebiscite was held for a very specific purpose and HSEC was mainly an "information-gatherer" vested with only limited governmental authority.<sup>69</sup>

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62. See *Salyer Land*, 410 U.S. at 728-30.

63. See *id.* at 730-34.

64. See *id.* at 728-30.

65. See *id.* at 734-35.

66. See 451 U.S. 355, 367-68 (1981).

67. See *id.* at 370-71.

68. See *id.*

69. See 941 F. Supp. 1529, 1545 (D. Haw. 1996).

This Note disagrees with that conclusion. While it is clear that the Native Hawaiian Sovereignty Plebiscite "disproportionately affected" Native Hawaiians, the *Rice* court seemed to discount the fact that the results of the Plebiscite might substantially affect many other Americans, especially Hawaii residents.<sup>70</sup> Such an effect puts this vote outside the *Salyer Land* and *Ball* exceptions for special purpose districts because, although they have been held to apply in a myriad of circumstances, these exceptions have *never* been held to apply to an issue that has the potential to dramatically affect the society or economy of an entire state, like sovereignty or the disposition of two million acres of land.<sup>71</sup>

Although the *Rice* court noted that "there is undoubtedly some interest and anxiety generated by [the Native Hawaiian sovereignty movement] among non-Native Hawaiian citizens of the State," it (1) agreed with the State's attorneys in casting the Plebiscite as more of an opinion poll,<sup>72</sup> (2) held that the Native Hawaiian Plebiscite represented a stage too early in the sovereignty process to substantially affect the citizens of Hawaii,<sup>73</sup> and (3) pointed to language in an amendment to Act 359 that, in its eyes, guaranteed the protection of the interests of non-Native Hawaiians presently residing within the State of Hawaii.<sup>74</sup>

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70. Admittedly, there are many things that *might* "substantially affect" the entire population of the United States. The distinction to draw here, however, is whether that possibility of substantial effect arises out of ways in which a state actor is organized or whether that possibility can only result from an accident caused by something like human error or an "act of God." For further discussions on this point, refer *infra* to notes 94-99 and their accompanying text.

71. See, e.g., *Porterfield v. Van Boening*, 744 P.2d 468 (Ariz. Ct. App. 1987) (applying the *Salyer Land* exception to an irrigation district); *State v. Frontier Acres Community Dev. Dist. Pasco County*, 472 So. 2d 455 (Fla. 1985) (community development district); *Stelzel v. South Indian River Water Control Dist.*, 486 So. 2d 65 (Fla. Dist. Ct. App. 1986) (water control district); *Foster v. Sunnyside Valley Irrigation Dist.*, 687 P.2d 841 (Wash. 1984) (irrigation district); cf. *Hadley v. Junior College Dist.*, 397 U.S. 50, 53-54 (1970) (finding that limited elections were impermissible where governmental functions such as the right to collect fees and make contracts were implicated).

72. Telephone Interview with John P. Deller, Deputy Attorney General for the State of Hawaii and Lead Attorney in *Rice v. Cayetano* on Behalf of the State (Oct. 31, 1996) [hereinafter Deller Interview].

73. See *Rice*, 941 F. Supp. at 1552.

74. That language read:

Nothing arising out of the Hawaiian convention provided for in this Act, or any result of the ratification vote on proposals from the Hawaiian convention, shall be applied or interpreted to supersede, conflict, waive, alter, or affect the constitution, charters, statutes, laws, rules, regulations, or ordinances of the State of Hawaii or its political subdivisions.

#### 4. Justice Powell's "Political Process" Exception to the "One Person, One Vote" Standard

Although an argument applying a political process exception to uphold the constitutionality of the Native Hawaiian Sovereignty Plebiscite was not raised by the State of Hawaii in its argument against Harold Rice's motion, this Section explores the possibility of taking that position. Justice Stevens, in his concurring opinion in *Holt Civic Club v. City of Tuscaloosa*,<sup>75</sup> noted that the mere fact that citizens are not allowed to vote in specific elections does not necessarily mean that they are excluded from the political process.<sup>76</sup> Instead, "through their state representatives, they participate directly . . ."<sup>77</sup> Three years later, in a concurring opinion to the *Ball v. James*<sup>78</sup> case, Justice Powell clearly delineated the importance of this form of representation by explaining how such legislative representation adequately protected the interests of non-voters in special interest elections. He noted that "we should expect that a legislature elected on the rule of one person, one vote will be vigilant to prevent undue concentration of power in the hands of undemocratic bodies. . . . [In such a case, we] should allow the political process to operate," rather than allow the Court to dictate an election scheme that would detract from democratic processes.<sup>79</sup>

Justice Powell's opinion can be summarized into the following rule: (1) where the legislature is elected under a one person/one vote scheme, *and* (2) has demonstrated its control over the processes of the governing body of the special purpose district, limited elections should be allowed—*as long as* (3) the issues are salient enough to ensure "that the people will act through their elected legislature when further changes in the governance of the District are warranted."<sup>80</sup>

Justice Powell's "rule," stated in a concurring opinion, is not binding authority. In fact, Powell's rule probably *conflicts* with

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75. 439 U.S. 60 (1978).

76. *See id.* at 77 (Stevens, J., concurring); *see also* Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339 (1993) (discussing the significance of Justice Stevens's concurrence in *Holt*).

77. *Holt*, 439 U.S. at 77.

78. *See Ball*, 451 U.S. at 373-74.

79. *Id.* at 374; *see* Jeffrey L. Snyder, Note, *Ball v. James and the Rational Basis Test: An Exception to the One Person-One Vote Rule*, 31 AM. U. L. REV. 721 (1982) (giving an overview and analysis of Justice Powell's concurrence in *Ball*); Karen Malm Weaver, *Constitutional Law—Fourteenth Amendment—Equal Protection—Ball v. James*, 31 EMORY L.J. 201 (1982) (same).

80. *Ball*, 451 U.S. at 374; *see id.* 373-74.

explicit and binding statements made by the court over the years.<sup>81</sup> Nevertheless, it raises an interesting question—should we be concerned about a situation that currently seems to be safely within the control of the Hawaii State Legislature? The answer in this case is an unequivocal yes. This is because the Native Hawaiian Plebiscite works to legitimize the principle of Native Hawaiian sovereignty and leaves the legislature powerless to do anything about that newly created legitimacy.<sup>82</sup> That is, the Plebiscite fails the second prong of Justice Powell's test because the Hawaii State Legislature does not have control over its *effects*. The next subsection expounds on this reason for concern.

##### 5. Why "One Person, One Vote" Should Be Applied to the Native Hawaiian Sovereignty Plebiscite

One can only guess at what the positive results of the Plebiscite mean for the future of Hawaii. HSEC has claimed that the Plebiscite is a massive victory and a "very big step" forward.<sup>83</sup> But some have questioned the election's validity because of a low participation rate,<sup>84</sup> and others have totally rejected the state-controlled Plebiscite as an illegal attempt to limit Native Hawaiians in their quest for self-government.<sup>85</sup> One thing, however, is clear—as a result of the Plebiscite, the State of Hawaii now must fund the election of delegates for a constitutional convention that will determine the type of sovereign government that Native Hawaiians want.<sup>86</sup> The positive result of the Native Hawaiian Sovereignty

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81. See, e.g., *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627 (1969) ("[T]he deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials.").

82. For a more complete discussion regarding the creation of legitimacy for the Hawaiian sovereignty movement, refer *infra* to Part II.A.5.

83. See Teri Sforza, *Hawaii's Struggle for Independence*, ORANGE COUNTY REGISTER, Nov. 9, 1996, at A14 (quoting Tara Lulani McKenzie, Executive Director of HSEC).

84. See *Hawaiian Vote: A Signal for Caution*, HONOLULU ADVERTISER, Sept. 12, 1996, at A12 (observing that only 40% of the 85,000 ballots mailed out were returned).

85. See *Expires*, *supra* note 11, at 1 (quoting Kekuni Blaisdell, leader of *Ka Pakaukau*: "[w]e . . . reject the state's *hewa* (wrong) process of predetermination for a puppet government; and we join our *kanaka maoli* people's *pono* (right) process for self-determination under international law"); *Ballots Burned in Protest of Hawaiian Plebiscite*, ASSOC. PRESS POL. SERV., July 22, 1996, at 1, available in 1996 WL 5394756.

86. See Pennybacker, *supra* note 32, at 21; *Momentum*, *supra* note 53, at 19A. HSEC "estimates it will cost \$1.1 million to hold the election and \$7.2 million to hold the convention." ASSOC. PRESS POL. SERV., Dec. 12, 1996, at 1, available in 1996 WL 5427490.

Plebiscite has started “an irreversible negotiating process, with unpredictable consequences.”<sup>87</sup>

Unless the constitutional convention is a meaningless exercise, the efficacy of the Act 200 language protecting the interests of non-Hawaiians that the *Rice* Court points to is highly questionable.<sup>88</sup> It would seem that, by definition (i.e., because of the collective goals of the sovereignty groups), a “productive” sovereignty convention would conflict with at least some of the social, economic, and political interests belonging to the State of Hawaii and its non-Hawaiian residents. Either the language of Act 200 or the goals of the convention will be compromised. That is, unless the convention is to be a meaningless exercise spouting sovereignty reforms that cannot ever legally be approved, significant and snowballing momentum toward substantial change is already developing.

Given the history the Native Hawaiian sovereignty movement, the control of the Hawaii State Legislature over the movement is precarious at best. To begin with, most Hawaiian sovereignty groups (including the two largest, *Ka Lahui Hawai'i* and *Pu'uhonua*) and even some legal commentators reject the notion that the legislature has *any* control over whether Native Hawaiians declare independence or what the form and/or boundaries of an independent Native Hawaiian government might be. Francis A. Boyle states:

Clearly, Hawaii has the right under international law to declare itself an independent nation . . . . There's no way to avoid dealing with that. It's not going to go away. It's just going to gain more and more momentum. . . . [T]he Native Hawaiians have a right to self-determination that has never been exercised.<sup>89</sup>

In recent years, Native Hawaiians have asserted those rights to self-government with increasing frequency. For example, both

87. Pertman, *supra* note 30, at 1.

88. See *supra* note 74 and accompanying text.

89. Sforza, *supra* note 83, at A14 (quoting Boyle in a newspaper interview); see also Trask, *supra* note 23, at 91–94 (discussing Native Hawaiian claims to independence under established international law); Podgers, *supra* note 1, at 76 (quoting Professor Richard Falk from the Princeton University Center of International Studies: “It can . . . be concluded as a matter of law [that Native Hawaiians] never relinquished, in any appropriate and binding form, their right to self-determination under international law”).

For a deeper discussion of Native Hawaiian claims to sovereignty and reparations under international law and provisions that are protective of human rights, refer to TRASK, *supra* note 15, at 31–86; S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309 (1994).

independent families and groups of Hawaiians have begun to erect "tent cities" on beaches in an attempt to occupy lands that they claim as rightfully belonging to them, and both *Ka Lahui Hawai'i* and *Pu'uhonua* have already established their own constitutions and governments.<sup>90</sup> Such assertions of independence have even seen some success. Recently, the United States Navy returned a site that it had used for some of its bombing exercises—i.e., the sacred island of Kaho'olawe—to the ownership of the Native Hawaiians.<sup>91</sup>

Poka Laenui, the leader of another self-proclaimed independent nation of Native Hawaiians has observed that

[r]esistance to the "occupying colonial power" is mounting . . . . In the schools, children are refusing to join in the morning flag Pledge of Allegiance to the United States. People are refusing to file tax returns or to pay income taxes. More and more defendants charged with criminal offenses are denying the jurisdiction of the American courts over them . . . .<sup>92</sup>

The future HSEC elections present a problem that cannot be analyzed within our current legal paradigms. That is, one could construct a good argument that Justice Powell's rule should apply today, when the Hawaii State Legislature seems to have adequate control over the campaign for self-government. But each future election is likely to stir up more controversy and more news coverage, thereby creating more legitimacy and more momentum for the sovereignty process.<sup>93</sup> Judging by the recent examples of resistance and assertions of Native Hawaiian independence, it seems reasonable to conclude that at some point, the sovereignty movement may grow to proportions beyond the control of both the federal government and the Hawaii State Legislature. It therefore fails the second prong of Justice Powell's test and the Plebiscite cannot be excepted from the rigors of the "one person, one vote" standard.

The *Rice* court would try to have us believe that the Native Hawaiian Plebiscite is as inconsequential to most Americans as the water control district in *Salyer Land* or the agricultural improvement district in *Ball*. But even if this Note has overstated the "legitimacy effect" of the Plebiscite and it is true that all the currently feasible effects of sovereignty are inconsequential, the

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90. See Pennybacker, *supra* note 32, at 21.

91. See Guy Trebay, *The State of Aloha: Hawaiian Culture Elbows Its Way onto the World Stage*, VILLAGE VOICE, May 13, 1997, at 32.

92. Sforza, *supra* note 83, at A14.

93. See *infra* note 115 and accompanying text.

Rice court still misses a major distinguishing factor that renders the special purpose district exception inapplicable to the Native Hawaiian Sovereignty Plebiscite—courts have approved special purpose district elections only in circumstances where the election cannot be said to have a realistic chance of significantly affecting a wide segment of the population.

In *Collins v. Brennan*,<sup>94</sup> for example, the Court applied the special purpose district exception to a referendum on a sewer project that failed to include non-resident property owners. While it is remotely possible that the sewer approved in *Collins* could overflow, such an incident would be an almost unpreventable accident—most likely either an act of God or the work of disgruntled employees or human error.

On the other side of the line are cases like *Hadley v. Junior College District*.<sup>95</sup> There, the Supreme Court rejected the application of the special purpose district exception because the entity in question had the power to collect fees and issue bonds. That is, the exception was held not to apply because the junior college district had powers that could *purposefully* be used by the entity to affect groups other than those who were entitled to select the members of the board that governed the district.

Although such a distinction might seem arbitrary, it is similar to that drawn in other circumstances. In *Federal Election Commission v. NRA Political Victory Fund*,<sup>96</sup> for example, the D.C. Circuit held unconstitutional an attempt by Congress to place non-voting members onto the Federal Election Commission (FEC). Instead of inquiring into the likelihood that Congress would use this power to exert an impermissible influence on the voting members of the FEC,<sup>97</sup> the court immediately held that this was a violation of the separation of powers norm. This result can be interpreted in light of *Hadley* to show that where only a purposeful, rather than an accidental and almost unpreventable, action separates structured situations from unconstitutionality, the law establishing the structure of that situation is unconstitutional.<sup>98</sup>

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94. 456 N.Y.S.2d 931 (Sup. Ct. 1982).

95. 397 U.S. 50, 54 (1970).

96. 6 F.3d 821 (D.C. Cir. 1993).

97. As an aside, even more than the possibility of sovereignty for Native Hawaiians, the possibility of such unconstitutional influence was extraordinarily remote because the non-voting members were meant to be "observers," and their interference would probably be construed as unethical, if not illegal.

98. See also *Bowsher v. Synar*, 478 U.S. 714 (1987) (holding unconstitutional a structural scheme that granted Congress the power to remove an executive officer in spite of a total lack of evidence to suggest that Congress would use its power to exert impermissible influences).

The Native Hawaiian Sovereignty Plebiscite represents a circumstance that is closer to *Political Victory* and *Hadley* rather than *Collins* because it represents a very significant (albeit the first) step toward Native Hawaiian sovereignty, a change that has the present potential—however remote—to dramatically affect the lives of many.<sup>99</sup>

But the Plebiscite is also problematic because its structure basically groups Native Hawaiians with a potentially impermissible ideological gerrymander that would give them an unfair advantage in the political process.<sup>100</sup> In cases like *Shaw v. Reno* (“*Shaw I*”),<sup>101</sup> *Miller v. Johnson*,<sup>102</sup> *Shaw v. Hunt* (“*Shaw II*”),<sup>103</sup> and *Bush v. Vera*,<sup>104</sup> for example, the Supreme Court has held unconstitutional redistricting plans meant to assist groups that had been empirically proven to be historically disadvantaged and underrepresented.<sup>105</sup> The plans that

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99. Cf. *Terry v. Adams*, 345 U.S. 461, 469 (1953) (finding what were effectively “White primary” elections to violate the Fifteenth Amendment because they excluded African American citizens from participating in “an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in this country”).

100. Although the Supreme Court has traditionally been more cautious of groupings established on the basis of race and more accepting of groupings based on politics, a number of scholars have noted that there is a distinct linkage between both politics and race. See Pamela S. Karlan, *Our Separatism? Voting Rights As an American Nationalities Policy*, 1995 U. CHI. LEGAL F. 83, 92–94 (arguing that Blacks have a distinct political viewpoint because their viewpoints are colored by their social experiences and interactions).

Irrespective of whether Professor Karlan is right or not, it is difficult to deny the connection between race and politics in this context; there is a high correlation between being Native Hawaiian and one’s stance on the issue of whether Native Hawaiians should have a right to self-governance. It is therefore easy to believe that the Supreme Court would be concerned about the type of grouping that the Native Hawaiian Sovereignty Plebiscite effects.

101. 509 U.S. 630 (1993).

102. 515 U.S. 900 (1995).

103. 116 S. Ct. 1894 (1996).

104. 116 S. Ct. 1941 (1996).

105. See *Bush*, 116 S. Ct. at 1962; *Shaw II*, 116 S. Ct. at 1902–03; *Miller*, 515 U.S. at 920–22; *Shaw I*, 509 U.S. at 647–49 (justifying such a decision because of expressive harms—i.e., a promotion of the belief that “members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls”—and threats to the structure of representative democracy—i.e., that “elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than the constituency as a whole”).

Professor Pam Karlan argues, however, that in attempting to prevent certain expressive harms, the Court has really promoted even more invidious ones. Besides denigrating the political choices to affiliate along racial lines that are made by Black voters, Karlan says that the Court’s expressive harms rationale assumes that being placed in a setting where they do not constitute the dominant group somehow injures Whites. See Pamela S. Karlan, *Still Hazy After All These Years:*



were found unconstitutional in these cases used race-conscious redistricting—in the form of geographically based gerrymanders—to eliminate non-minority populations from the districts in question with the express purpose of increasing the possibility of electoral success for minority candidates in those districts (i.e., increasing minority representation in decision-making bodies).<sup>106</sup>

The Native Hawaiian Sovereignty Plebiscite can also—with a little stretching—be cast as this type of unconstitutional gerrymander.<sup>107</sup> Although it is not geographically based, the Plebiscite works like the redistricting plans in *Shaw I*, *Miller*, *Shaw II*, and *Bush* because it cuts out most oppositional interests and ideologies by simply disallowing them any political voice.<sup>108</sup> In doing so, it

*Voting Rights in the Post-Shaw Era*, 26 CUMB. L. REV. 287, 293 (1996); *Shaw II*, 116 S. Ct. at 1908 (Stevens, J., dissenting).

Professor Karlan also rejects the validity of the Court's second rationale by observing that the justification perniciously assumes that legislators who are elected out of predominantly minority communities are less fair or responsive than their counterparts who are elected by White constituents. See Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201, 1217–19 (1996).

106. See *Bush*, 116 S. Ct. at 1956–57; *Shaw II*, 116 S. Ct. at 1899; *Miller*, 515 U.S. at 907–08; *Shaw I*, 509 U.S. at 635; cf. *Shaw II*, 116 S. Ct. at 1904 (noting that the “maximization” of minority voting strength does not constitute a compelling governmental interest under the terms of the Voting Rights Act).

107. But cf. Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589 (1993). In that article, Professor Guinier contends that redistricting plans like the ones at issue in *Shaw* and its progeny do not constitute gerrymanders at all, much less unconstitutional ones. See *id.* at 1593 n.18. This is because those redistricting plans do not “arbitrarily allocate disproportionate political power” to any group. See *id.* at 1593 (emphasis added). Rather, Guinier argues that those plans were directed at a specific, constitutional purpose—remedying a long history of racial exclusion and disenfranchisement. See *id.* at 1593 n.18.

Many scholars disagree with this characterization, however. Professor Robert Dixon, for example, has noted that “all districting is gerrymandering.” ROBERT G. DIXON, JR., *DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS* 462 (1968). He notes that this is true because “[a] near infinite number of sets of ‘equal’ districts may be drawn in any state; each set, however, [has] a quite different effect in terms of overall party balance and minority representation.” *Id.*

108. See *Bush*, 116 S. Ct. at 1956 (“[T]o the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation.”). But cf. *id.* at 1954 (“We have not subjected political gerrymandering to strict scrutiny.”) (emphasis added); *Davis v. Bandemer*, 478 U.S. 109, 147 (1986) (O’Connor, J., concurring) (noting that “purely political gerrymandering claims” are not justiciable) (emphasis added).

In *Bush* itself, the Supreme Court describes the line between these two contrasting ideas:

If the State’s goal is otherwise constitutional political gerrymandering, it is free to use the kind of political data on which Justice Stevens focuses—precinct general election voting patterns, precinct

enhances the possibilities for the electoral success of “minority” ideals. Such success, I argue, in turn creates legitimacy for the principle of Hawaiian sovereignty and thereby works to increase the sovereignty movement’s chances for success in the overall political process.

Whether awarding this advantage to a historically oppressed and underrepresented group like the Native Hawaiians is actually *distressing* depends largely on your political and philosophical perspectives. Later, in Part III.C.2 for example, I argue that some form of head start for Native Hawaiians may be warranted in the name of leveling the playing field. In any case, this same type of coalition-building head start occurs, in some senses, whenever Gallup or Times/Mirror takes an opinion poll because people are less hesitant to support a movement that they know will not be a waste of their time and their vote.

Remember, however, that Gallup and Times/Mirror are privately funded entities. Because of the Fourteenth Amendment’s state action requirement, an unconstitutional election occurs only where the *public* funds a limited election that does not meet the special purpose district exception.<sup>109</sup> Other forms of limited polling are constitutionally permitted. Moreover, political process advantages for any group, including those that have been historically oppressed, may also be problematic because of the Supreme Court’s recent stance against such head starts that has been espoused in cases following the *Shaw v. Reno*<sup>110</sup> and *Adarand Constructors, Inc. v. Peña*<sup>111</sup> lines of case law.

In any case, a third line of argumentation may also render the *Rice* court’s approach incorrect. Although courts have decided that the single purpose district exception can be applied to limit the range of individuals who are eligible to sign an original petition asking that a special purpose district be created,<sup>112</sup> there is an exception

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primary voting patterns, and legislators’ experience—to achieve that goal regardless of its awareness of its racial implications and regardless of the fact that it does so in the context of a majority-minority district.

*Bush*, 116 S. Ct. at 1956 (citations omitted). The overlap between race and political ideologies apparent in the issue of the Native Hawaiian Sovereignty Plebiscite makes the side of the line that the Plebiscite lies on somewhat unclear.

109. See U.S. CONST. amend. XIV, § 5; *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 924 (1982) (“Because the [Fourteenth] Amendment is directed at the states, it can be violated only by conduct that may be fairly characterized as ‘state action.’”).

110. 509 U.S. 630 (1993).

111. 515 U.S. 200 (1995). For a discussion of how *Adarand* and cases related to it can be read to prohibit the types of racial preferences that the sovereignty plebiscite extends to Native Hawaiians, refer *infra* to Part II.B.1.

112. See, e.g., *Gillard v. Estrella Dells I Improvement Dist.*, 541 P.2d 932 (Ariz. Ct. App. 1975); *Doenges v. City of Salt Lake City*, 614 P.2d 1237 (Utah 1980).

to this general rule. If the result of a successful petition would be a vote by the full electorate, then the special purpose district exception cannot constitutionally be applied.<sup>113</sup> While the Plebiscite at issue is not—in form or substance—such a petition, these cases bring to light the realization that it is simply insufficient for the *Rice* court to answer organizational structure and legitimacy concerns about the Plebiscite by noting that the initiative represents a stage too early in the process to make any substantial difference in the outcome. The court cannot simply assume away these problems by assuming that subsequent elections will be held with a broader voter base when necessary.<sup>114</sup>

If the Native Hawaiian Plebiscite was only meant to be an opinion poll of Native Hawaiians, it was unnecessary because it was already known that there are many Native Hawaiians backing the sovereignty movement—the over forty active sovereignty groups boasting a collective membership greatly exceeding the 30,000 voters polled in the Plebiscite make that fact clear to most Hawaiians, if not many Americans. The *real* question is whether those Native Hawaiians, who are too small a group to cause such dramatic political change by themselves, can create political coalitions and convince a broad base of non-Hawaiians to join them in their quest for self-governance.

Instead, I argue that the Native Hawaiian Plebiscite was an attempt to gain funding and legitimacy for the principle of Native Hawaiian sovereignty through the support of the government of the State of Hawaii and an “official” election.<sup>115</sup> The measure approved by the Plebiscite could have also been approved by the Hawaii State Legislature, HSEC, a coalition of sovereignty groups, or through any number of other mechanisms. But that would mean that the legitimacy to be gained by holding an official election would be lost. Moreover, the Supreme Court has consistently held that even if a political process can be carried out through other means (e.g., appointment, legislative decision), when a government decides to open the process to an election, the election must be made

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113. See *Hayward v. Clay*, 573 F.2d 187, 189–90 (4th Cir. 1978) (justifying this rule by concluding that one group cannot be allowed to control the full electorate’s ability to vote); *City of Seattle v. State*, 694 P.2d 641, 648 (Wash. 1985).

114. See *Rice v. Cayetano*, 941 F. Supp. 1529, 1552 (D. Haw. 1996).

115. See, e.g., Pennybacker, *supra* note 32, at 21, 23 (quoting Honolulu attorney and Native Hawaiian sovereignty activist Haydn Aluli as noting that the Plebiscite has caught the attention of many and “influence[d] the east coast urban centers on the mainland,” thereby giving the sovereignty movement some of the mainstream voices that it needs to gain the attention, if not the support, of powerful policy-makers).

open to all eligible voters and conform to the constitutional requirements of the Fourteenth and Fifteenth Amendments.<sup>116</sup>

In the past, some courts have allowed limited-participation elections on specific issues.<sup>117</sup> But I have been hard pressed to find *any* examples of valid limited-participation elections that decided broad-based social principles.<sup>118</sup> In fact, both case law and the propositions voted on in the November 1996 elections seem to indicate just the opposite<sup>119</sup>—when social principles have any real possibility of being altered by a referendum or plebiscite, a broad-based election is warranted. For example, in *Hadley v. Junior College District*,<sup>120</sup> the court applied the “one person, one vote” standard to the election of trustees for a community college district because those trustees “exercised general governmental powers”<sup>121</sup> and “perform[ed] important governmental functions”<sup>122</sup> that had a significant effect on all citizens residing within the district.

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116. See, e.g., *Avery v. Midland County*, 390 U.S. 474 (1968) (holding that the “one person, one vote” principle of *Reynolds v. Sims* applies to the election of a Commissioners Court, even though such a court *could* have been appointed, rather than elected).

117. See, e.g., *Arizona Farmworkers Union v. Agricultural Employment Relations Bd.*, 712 P.2d 960 (Ariz. Ct. App. 1985) (immunizing a limited election concerning a union representation district from the “one person, one vote” principle); *Goldstein v. Mitchell*, 494 N.E.2d 914 (Ill. App. Ct. 1986) (applying the single purpose district exception to uphold a limited election concerning a drainage district); *Lane v. Oyster Bay*, 603 N.Y.S.2d 53 (App. Div. 1993) (allowing a vote concerning the extension of a sanitation collection district to be limited to freeholders); *Collins v. Brennan*, 456 N.Y.S.2d 931 (Sup. Ct. 1982) (approving a referendum election on a sewer project that failed to include non-resident property owners).

118. By “broad-based social principles,” I mean the types of ideas that have some real potential to change the structure of society. I believe that Native Hawaiian sovereignty *is* such an idea because, if successful, it would result in at least the appropriation of a substantial amount of land within the existing State of Hawaii and, at most, could change the entire structure of the Hawaiian government.

In defining the parameters of a permissible limited-participation election, Professor Richard Briffault takes an alternative approach and draws a line between the proprietary and legislative functions of government. Only “[p]roprietary governments may use assessment-based voting, acreage-based voting, or even one owner/one vote for qualified owners.” Briffault, *supra* note 76, at 369. On the other hand, modalities of government that decide legislative issues are limited by the principle of “one person, one vote” in designing their elections. Thus, even under Professor Briffault’s test, the Native Hawaiian Sovereignty Plebiscite could not qualify as a special purpose district election.

119. See, e.g., Pear, *supra* note 2 (discussing initiatives and propositions on the ballot in various states during the November 1996 elections).

120. 397 U.S. 50 (1970).

121. *Id.* at 53.

122. *Id.* at 54. Among the “important governmental functions” cited by the Court are the power to make contracts, collect fees, and issue bonds. *Id.* at 53. Since Native American tribes with reservations are given these powers, it might easily be

Similarly, in *Kramer v. Union Free School District No. 15*,<sup>123</sup> the United States Supreme Court invalidated a statute restricting participation in school board elections to the parents of school children and the owners or lessors of taxable real property. The Court reached this conclusion despite the fact that the parents of school children were obviously more directly affected by most of the actions that the school board might consider.<sup>124</sup> *Fumaloro v. Chicago Board of Education*,<sup>125</sup> a case dealing with a similar issue (i.e., the disenfranchisement of part of the voting population for the purpose of school board elections), explains that all members of society should be allowed to elect school board members because “the operation of our schools is a fundamental governmental activity in which all members of society have an interest.”<sup>126</sup>

In a similar fashion, although the issue of whether doctors can prescribe marijuana for chronic pain directly affects only a small percentage of the population (i.e., presumably only a small percentage of the population will ever be able to get a marijuana prescription), because the partial legalization of marijuana could dramatically affect the structure of society, a broad-based referendum or initiative (or direct action by the legislature) rather than a limited special purpose election, is required for approval.<sup>127</sup> The wide-ranging effects that Hawaiian self-governance could potentially have on society puts the Native Hawaiian Sovereignty Plebiscite in a class with elections concerning school boards and the partial legalization of marijuana—not water control and agricultural improvement.

#### B. *The Equal Protection Clause—Does it Change This Voting Rights Analysis?*

In *Rice v. Cayetano*,<sup>128</sup> United States District Judge David Alan Ezra noted that “[w]hile there is undoubtedly a racial component to the voter qualifications for the Native Hawaiian Vote, the emphasis here is placed on the Native Hawaiian community as one targeted for ‘rehabilitation’ and special consideration by

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presumed that sovereign Native Hawaiians could potentially enjoy these powers as well.

123. 395 U.S. 621 (1969).

124. *See id.* at 631.

125. 566 N.E.2d 1283 (Ill. 1990).

126. *Id.* at 1298.

127. Broad-based initiatives regarding this subject were on the ballot in both California (Proposition 215) and Arizona (Proposition 200) on November 5, 1996. *See* Pear, *supra* note 2.

128. 941 F. Supp. 1529 (D. Haw. 1996).

Congress.”<sup>129</sup> Although Judge Ezra misconstrues congressional intent because Native Hawaiians are incapable of constitutionally receiving “special consideration by Congress,”<sup>130</sup> his idea raises an interesting question. Can a limited participation sovereignty plebiscite be justified on the grounds that Native Hawaiians are a minority group that historically has been oppressed and wronged in a situation analogous to that seen in affirmative action, vote dilution, and majority-minority district cases? That is, can these doctrines preserve the constitutionality of a plebiscite that cannot be saved by either the special purpose district exception or Justice Powell’s political process exception?

### 1. Analogies to Affirmative Action

An analogy to affirmative action conceptualizes the Native Hawaii Sovereignty Plebiscite as a type of special preference that attempts to correct a past wrong hindering current progress.<sup>131</sup> Specifically, it argues that the Plebiscite recognizes that the deprivation of the right to self-determination from Native Hawaiians has also denied them opportunities to participate in the political process. It uses a limited election in an attempt to return self-determination to these individuals.

Justice Marshall provides support for this vision by noting that “[a] profound difference separates governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism . . . .”<sup>132</sup> This difference may be especially true in the Fifteenth Amendment context because the right to vote is paradigmatic of the right to participate in the political process—a right that the court explicitly sought to protect for minorities like Native Hawaiians in *United States v. Carolene Products*.<sup>133</sup> Marshall’s

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129. *Id.* at 1541.

130. See *supra* note 54; see also, e.g., Benjamin, *supra* note 54, at 540 (“[T]here is no ‘special relationship’ between Native Hawaiians and the federal government pursuant to which programs singling out Native Hawaiians would be subject to rational basis review.”).

131. Cf. Randall Kennedy, *Persuasion and Distrust*, in RACIAL PREFERENCE AND RACIAL JUSTICE 45, 50–51 (Russell Nieli ed., 1991) (arguing that affirmative action is necessary to provide a remedy for past discrimination).

132. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 551–52 (1989) (Marshall, J., dissenting).

133. 304 U.S. 144, 152 n.4 (1938) (noting that a “more searching judicial inquiry” may be undertaken where the interests of “discrete and insular minorities” are at stake). Justice Powell has said that the primary theoretical interpretation of this footnote is that

the Supreme Court has two special missions in our scheme of government: [f]irst, to clear away impediments to participation, and

premise has gained significant support on the current court,<sup>134</sup> and could potentially be good law—even if it might only be applicable in the context of educational institutions.<sup>135</sup>

But more recent Supreme Court decisions in the affirmative action context indicate that preferences for historically oppressed

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ensure that all groups can equally engage in the political process; and [s]econd, to review with heightened scrutiny legislation inimical to discrete and insular minorities who are unable to protect themselves in the legislative process.

Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1089 (1982); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST* 75–77 (1980) (interpreting this famous footnote to require access to the political process for minorities).

134. See *Miller v. Johnson*, 515 U.S. 900, 947–48 (1995) (Ginsburg, J., dissenting) (noting that legislation enacted for the purpose of protecting minorities is fundamentally different from, and less needful of strict scrutiny than action taken to advance the interests of the White majority); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting) (“There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination.”); Lincoln Caplan et al., *The Hopwood Effect Kicks In on Campus*, U.S. NEWS & WORLD REP., Dec. 23, 1996, at 26, 27–28 (“[Justices Stevens, Souter, Ginsburg, and Breyer] have argued that there is a clear distinction under the Constitution between racial classifications designed to help minorities and those that discriminate against them.”); see also Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 246 & n.6 (1997) (noting that two past Justices, White and Blackmun, have also argued for a distinction between remedial and invidious racial classifications).

135. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317–18 (1978) (stating that race can be considered as a “plus” factor in admissions); *id.* at 307 (observing that race has sometimes been allowed as a consideration where a prior history of discrimination based on race exists); *Univ. and Community College Sys. of Nevada v. Farmer*, 930 P.2d 730 (Nev. 1997) (overturning a jury verdict in favor of a White female college professor whose hiring was deferred for a year so that the University of Nevada could hire a Black man for a position in its sociology department), *cert. denied*, 118 S. Ct. 1186 (1998). But see *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir.) (upholding a California proposition striking all racial preferences against constitutional scrutiny), *cert. denied*, 118 S. Ct. 397 (1997); *Board of Educ. of Piscataway v. Taxman*, 91 F.3d 1547 (3d Cir. 1996) (en banc) (striking an affirmative action plan preferring minority teachers over non-minority teachers in layoff decisions where teachers are equally qualified; holding that affirmative action can never be valid except to remedy instances of proven discrimination), *cert. granted*, 117 S. Ct. 2506, *cert. dismissed*, 118 S. Ct. 595 (1997); *Hopwood v. Texas*, 78 F.3d 932, 940 (5th Cir. 1996) (dealing with an affirmative action admissions policy devised by the University of Texas, the court noted: “there is now absolutely no doubt that courts are to employ strict scrutiny when evaluating all racial classifications, including those characterized by their proponents as ‘benign’ or ‘remedial’ ”), *cert. denied*, 116 S. Ct. 2581 (1996); *id.* at 940 n.17 (noting that *Adarand* overruled *Metro Broadcasting* “insofar as it applied intermediate scrutiny to congressionally mandated ‘benign’ racial classifications”). The contrasting results of cases like *Farmer* and *Taxman* promote considerable confusion about the law of affirmative action in the context of educational institutions. See, e.g., Linda Greenhouse, *Same-Sex Harassment Furrows Brow of Court*, N.Y. TIMES, Mar. 10, 1998, at A14.

groups like Native Hawaiians are unconstitutional. In *Adarand Constructors, Inc. v. Peña*, for example, the Court held that "all governmental action based on race . . . should be subjected to [strict scrutiny]"<sup>136</sup> and explicitly noted that "holding 'benign' state and federal classifications to different standards" is contrary to the ideals of the Fourteenth Amendment.<sup>137</sup> This, Justice Thomas has said, is because "[s]o-called 'benign' discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence."<sup>138</sup> Thus, it is unlikely that the Native Hawaiian Sovereignty Plebiscite could be saved by an affirmative action argument.

## 2. Vote Dilution and Majority-Minority District Cases

Cases directly concerning the Fifteenth Amendment/Voting Rights Act arena also raise doubts as to whether Marshall's conception of the Equal Protection Clause applies there.<sup>139</sup> *Miller v. Johnson*, for example, can be read to express the Supreme Court's reluctance to allow Fifteenth Amendment considerations to trump Fourteenth Amendment protections.<sup>140</sup> Older cases in the vote

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136. *Adarand*, 515 U.S. at 227.

137. *Id.*; see also *Croson*, 488 U.S. at 494 ("[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification."); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) ("[T]he level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination."). *But cf.* Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 356-58 (1992) (noting the confusion in the Court's Equal Protection doctrine); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 315-16 (1991) ("[T]he Court's recent hostility toward affirmative action [as well as its adoption of strict scrutiny for racial preferences benefiting persons of color] . . . seems inconsistent with the strict constructionist constitutional philosophy that many of the Justices purport to espouse.").

138. *Adarand*, 515 U.S. at 241 (Thomas, J., concurring).

139. See *supra* note 132 and accompanying text; see also Chapin Cimino, Comment, *Class-Based Preferences in Affirmative Action Programs After Miller v. Johnson: A Race-Neutral Option, or Subterfuge?*, 64 U. CHI. L. REV. 1289, 1293-94 (1997) (observing that recent decisions involving race redistricting could eliminate all affirmative action, including programs based on socioeconomic preferences).

140. See *Miller*, 515 U.S. at 904-05 (noting that any redistricting using race as a "predominant factor" triggers strict scrutiny); see also *Bush v. Vera*, 116 S. Ct. 1941, 1951 (1996) ("For strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were 'subordinated' to race."); *Shaw v. Hunt*, 116 S. Ct. 1894, 1904 (1996) (finding that a "maximization" of minority voting strength cannot constitute a "compelling governmental interest" that meets the demands of strict scrutiny).

Collectively, these cases may indicate that the historical oppression of Native Hawaiians cannot justify limited elections which might bolster their



dilution context indicate that race can be used as a determinative factor in redistricting where findings show “that the political processes leading to nomination and election [are] not equally open to participation by the group in question—that its members [have] less opportunity than . . . other residents in the district to participate in the political processes and to elect legislators of their choice.”<sup>141</sup> But, even though these cases have not been directly overruled, their vitality is threatened by *Shaw v. Reno*<sup>142</sup> and its progeny. That is, cases like *Shaw* make it doubtful that a history of racial oppression and practical disfranchisement could be used to justify a plebiscite that was not otherwise justified by the special purpose district exception.

### III. FINDING AN ADEQUATE SOLUTION

Because I conclude that (1) more elections concerning sovereignty are likely, (2) the special purpose district exception fails to validate the current plebiscite mechanism, and (3) generalized equal protection doctrines are questionably—or maybe even doubtfully—applicable, an alternative to the Plebiscite is required. Obvious constitutional solutions would involve either limiting the decision-making process to the legislature itself, or opening the decision-making process to all residents of Hawaii.<sup>143</sup>

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ability to succeed within the political process. See *supra* notes 101-108 and accompanying text (discussing the possible impermissibility of “ideological gerrymanders” that use race as a proxy for political ideology).

141. *White v. Regester*, 412 U.S. 755, 766 (1973) (citing *Whitcomb v. Chavis*, 403 U.S. 124, 149-50 (1971)); see also *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (finding that one of the fundamental goals of the Voting Rights Act was to “banish the blight of racial discrimination in voting,” and to provide remedies for voting discrimination “where it persists on a pervasive scale.”).

The intersection of equal protection and voting rights in the race-as-a-redistricting-factor context spans a body of issues and jurisprudence too broad to be dealt with adequately in the context of the Native Hawaiian Plebiscite. For a deeper treatment of these problems, refer to T. Alexander Aleinoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 592 (1993); Laughlin McDonald, *Can Minority Voting Rights Survive Miller v. Johnson*, 1 MICH. J. RACE & L. 119 (1996); Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505 (1997); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483 (1993).

142. 509 U.S. 630 (1993) (finding districts drawn with solely racial motivations to invoke strict scrutiny). Cases following *Shaw* have further limited the use of race to justify preferences in voting. See *supra* note 140.

143. In this second option, I imagine that ballot questions would be formulated by the lieutenant governor’s office (the lieutenant governor is in charge of State elections in Hawaii) and voted on by all eligible residents of the State.

But in both of these situations, the process takes on a paternalistic feeling because Native Hawaiians would have little say in *how* they would be governed and would be denied their right to self-determination (Hawaiians make up approximately twenty percent of all residents and are not significantly represented—at least as a racial group—in the Hawaii State Legislature).<sup>144</sup> It therefore becomes imperative to search for an even better fix.

A. *Step One—Deciding Whether to Emphasize  
“Process” or “Substance”*

An old folktale of American jurisprudence has Judge Learned Hand accompanying Justice Oliver Wendell Holmes on his way to the courthouse and saying in farewell, “Do justice!” only to be reprimanded by Justice Holmes who retorted, “That is not my job. My job is to apply the law.”<sup>145</sup> While both humorous and ironic, this story encapsulates an ongoing and hotly contested debate in legal circles: given a trade-off between “process” and “substance,” should

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A third alternative, of questionable constitutionality, would be to limit the boundaries of a sovereign Hawaiian nation to the funds and trust lands currently under the control of the Office of Hawaiian Affairs (OHA), and then allow OHA to administer any elections and constitutional conventions that might be necessary to reach Hawaiian sovereignty. See 80-8 Op. Haw. Att’y Gen. (1980) (finding the limitation of the franchise to Native Hawaiians in OHA elections constitutional because OHA’s limited governmental authority and structure meet the *Salyer Land* exception). But see Benjamin, *supra* note 54, at 610 (questioning the constitutionality of OHA itself).

Since elections run under the control of OHA evoke the same Fifteenth Amendment questions as the Native Hawaiian Plebiscite, and since OHA is itself of questionable constitutionality, it is unlikely that this third alternative would be any more constitutional (or advantageous) than the current HSEC election process.

144. See also Derrick A. Bell, Jr., *The Referendum: Democracy’s Barrier to Racial Equality*, 54 WASH. L. REV. 1, 25 (1978) (“[I]n a particular referendum on a particular issue, a matter extremely harmful to minority interests but only moderately beneficial to non-minority interests may be passed; the ballot does not easily register intensity of interest as the legislative process does.”); cf. DONALD G. SAARI, GEOMETRY OF VOTING 13 (1994) (running through a set of mathematical proofs that indicate “the commonly used plurality vote turns out to be one of the wors[t] methods that could ever be adopted”). But cf. Kenneth O. May, *A Set of Independent, Necessary, and Sufficient Conditions for Simple Majority Decision*, 20 ECONOMETRICA 680, 683 (1952) (proving, mathematically, that majority rule is the only decision-making principle capable of meeting basic conditions of fairness and rationality without privileging the status quo).

145. Michael Herz, *Do Justice!: Variations of a Thrice-Told Tale*, 82 VA. L. REV. 111, 114 & n.9 (1996) (quoting Learned Hand, *A Personal Confession*, in THE SPIRIT OF LIBERTY 302, 306–07 (Irving Dilliard ed., 3d ed. 1960)). But see J. Skelly Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 797 (1971) (“The ultimate test of the Justices’ work, I suggest, must be goodness . . .”).

process be subverted in order to reach just results? Or should process be followed strictly and result-oriented paradigms be cast aside?<sup>146</sup>

One need look only as far as the nearest administrative law casebook to determine that the American legal system has emphasized the importance of process and the structure of government.<sup>147</sup> Doctrines of standing, timing, and reviewability, for example, all limit the right to adjudication without regard to the substantive merits of the dispute.<sup>148</sup> Moreover, within the Native Hawaiian sovereignty context specifically, Professor Laurence Tribe asserts that the importance of constitutional structure works to deny Native Hawaiians adjudication based on the substantive merits. He notes that “[t]he concept that statehood ‘is a permanent fix is probably as deeply ingrained an idea as any you can find in the Constitution. . . . Once something becomes a state, the idea that there can be some consensual parting of the ways seems quite troubling.’”<sup>149</sup>

Even the *Carolene Products* footnote, often used to protect the rights of “discrete and insular minorities” in the name of substantive justice,<sup>150</sup> may really emphasize the importance of process. Professor John Hart Ely observes that it

ask[s] us to focus not on whether this or that substantive value is unusually important or fundamental, but rather on whether the opportunity to participate either in the political process by which values are appropriately identified and accommodated, or in the accommodation

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146. Compare, e.g., OUTSIDE THE LAW, *supra* note 1 (collecting personal narratives and short essays on the definition of justice; commonly emphasizing substance and results over process and structure) and Mitchell F. Crusto, *Shattering the Pseudo-Conservative Federalism Paradigm: Federalism, Liberty, and Civil Rights*, 49 HASTINGS L.J. (forthcoming 1998) (arguing that civil rights should prevail over legal provisions protecting the structure of government) with ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970) (contending that process and access are enough to fulfill constitutional guarantees) and ELY, *supra* note 130, at 44–70 (arguing that, because “justice” and our conception of rights changes over time, the only sensible solution is to depend on a process which renders consistent results).

147. See, e.g., STEPHEN G. BREYER & RICHARD B. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES* (1992).

148. See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 822 (1985) (concluding that review of the substantive merits of the action was precluded because enforceability of statute was committed to agency discretion); *Sierra Club v. Morton*, 405 U.S. 727, 741 (1972) (denying standing to plaintiffs and failing to consider the actual merits of their claim); *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 448 (1907) (deciding to wait for agency administrative action before taking up a review of substantive issues).

149. Podgers, *supra* note †, at 76 (quoting Professor Tribe).

150. See *supra* note 133 and accompanying text.

those processes have reached, has been unduly constricted.<sup>151</sup>

Indicting the courts of the United States for *always* emphasizing the importance of “process” over “substance” would be unfair, however. In *Michael M. v. Superior Court of Sonoma County*, for example, the Supreme Court upheld a statute criminalizing statutory rape by male—but not female—perpetrators because of California’s substantial interest in preventing adolescent pregnancy.<sup>152</sup> Even here, however, when the interest at stake is one that most Americans agree is important, it is telling to note that a substantial minority of the Court criticized the approach emphasizing substantive concerns:

I fear that the [other opinions] reach the opposite result by placing too much emphasis on the desirability of achieving the State’s asserted statutory goal—prevention of teenage pregnancy—and not enough emphasis on the fundamental question of whether the sex-based discrimination in the California statute is substantially related to the achievement of that goal.<sup>153</sup>

Professors Mari Matsuda and Charles Lawrence note that this “[o]bsession with precision puts the demands of arithmetic before the demands of justice, ignoring the more central goals of stability and fairness.”<sup>154</sup> When the law loses sight of the *ideals* it is intended to protect, the law becomes sterile, formalistic, and unjust.<sup>155</sup> The early matter of *Johnson v. M’Intosh*,<sup>156</sup> dealing with

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151. ELY, *supra* note 130, at 77.

152. 450 U.S. 464 (1981).

153. *Id.* at 488–89 (Brennan, J., dissenting). That both Justices White and Marshall joined in Brennan’s opinion and agreed with his statement indicates that the commitment to process is neither a stereotypically “liberal” nor “conservative” view.

154. LAWRENCE & MATSUDA, *supra* note 31, at 239. In his forthcoming article, Professor Mitchell F. Crusto warns that a strict adherence to process may also be dangerous because such an approach ignores unjust substantive results that may follow when processes are contorted. Crusto, *supra* note 146. By analyzing cases in a myriad of contexts from civil rights and voting rights to abortion and habeas corpus, Professor Crusto first demonstrates that the Supreme Court’s recent use of the federalism doctrine strays far from the original intent of deference to state and local governments that Justice O’Connor espoused in *Gregory v. Ashcroft*. *Id.* (citing *Gregory*, 501 U.S. 452, 457, 463 (1991)). He then goes on to observe that federalism (in its mutated form) has been used to justify “anti-rights decisions.” *Id.*; see also, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (demonstrating the Court’s contorted usage of governmental structure and process—in the form of “military necessity”—to justify the war-time internment of thousands of Japanese Americans without the use of due process).

155. See PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 139 (1991); see also *id.* (“Living solely according to the letter of the law means that we live without

claims to land based on prior Native American ownership, starkly makes this point. Although the Supreme Court noted that the result of denying the existence of good title in the original Native American occupants was unjust, it rationalized its decision by noting that “[c]onquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.”<sup>157</sup>

Given the result of *Johnson*, now almost universally viewed as unjust, it is easy to sympathize with positions like those taken by Professors Matsuda and Lawrence. But Professor Ely makes a similarly good argument in noting that because our fundamental values are ever-changing and hard to identify, we must depend on process to vindicate the interests of American society.<sup>158</sup> That is, can we ever—in a manner consistent with constitutional norms—agree on what a “just” result entails, especially considering that the result stands for all time? Take, for example, Native American sovereignty—the area at issue in *Johnson*. Even if most agree that *Johnson* itself was unjust, there is large disagreement about what “just” result is now mandated to right that wrong.<sup>159</sup>

Further substantiating Ely’s point is the reality of the Native Hawaiian sovereignty debate. Although one might think that the United States’s admission of fault<sup>160</sup> would provide clear insight into what the “just” result is, Sam Slom, the president of Small Business Hawaii, contends otherwise:

I don’t believe that any segment of the population is entitled to reparations . . . because we’ve got a problem of fixing responsibility if there in fact was a wrong done to a group of people or to individuals. I think that you have a problem with time and you have a problem with responsibility. I[,] for example, don’t

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spirit, that one can do anything one wants to as long as it complies in a technical sense.”).

156. 21 U.S. (8 Wheat.) 543 (1823).

157. *Id.* at 588.

158. See ELY, *supra* note 130, at 70.

159. See Timothy Egan, *Backlash Growing as Indians Make a Stand for Sovereignty*, N.Y. TIMES, Mar. 9, 1998, at A1. Egan quotes James Thompson, a small businessman in Crow Agency, Montana as noting, “I didn’t persecute anybody at Plymouth Rock . . . This is the 1990s. We didn’t do anything to them, and we don’t owe them anything.” *Id.* Later in the article, United States Senator Slade Gorton, a Republican from Washington, speaks out against the proposed expansion of Native American sovereign rights: “Citizens of the United States should not have their rights limited by separate governments within the United States.” *Id.*

160. See *supra* note 30 and accompanying text.

feel responsible for problems that happened long before I was here and able to do something about them. I would be responsible if there is something I see now or that I contribute to. But I think it's unfair to try and force people living today to pay for a wrong which may have been committed by their ancestors or perhaps by someone with whom they have no connection at all.<sup>161</sup>

Because ideas of justice are hard things to form consensus on, "substance," acting alone, forms an unsuitable basis for the design of a representational process. Some scholars suggest that the Constitution and justice only require that barriers preventing access to the political process by persons of color be removed.<sup>162</sup> But acknowledging reality, Professor Ely contends that process, in and of itself, is not enough either: "[n]o matter how open the process, those with most of the votes are in a position to vote themselves advantages at the expense of the others, or otherwise to refuse to take their interests into account."<sup>163</sup> In other words, striking the proper balance between "process" and "substance" involves giving political minorities a voice without overwhelming or excluding those in the political majority.

### B. *The Proposed Process*

This means that the more democratic alternative<sup>164</sup> would utilize the political party-type structure that groups like *Ka Lahui*

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161. Matsuda, *supra* note 30, at 372 n.209 (quoting from *Hawaiian Reparations: Three Points of View*, KA WAI OLA O OHA, Feb. 1986, at 1); see also Yamamoto, *supra* note 30, at 41 (observing that many Chinese Americans whose families have lived in Hawaii for four or five generations feel that apologies and reparations are unnecessary because they did nothing wrong). The current struggles of the Hawaiian economy, illustrated by dwindling welfare payments and skyrocketing consumer prices, see Martin Kasindorf, *Hard Times in Hawaii*, USA TODAY, Nov. 7, 1997, at 17A, may lead more residents of Hawaii to adopt these anti-Hawaiian viewpoints.

162. See, e.g., BICKEL, *supra* note 146, at 37.

163. ELY, *supra* note 130, at 135.

164. I use the term "democratic alternative" here to indicate that I recognize other constitutional alternatives exist, see *supra* note 143 and accompanying text, but choose to design a process that is both constitutional and reflective of the democratic principles driving the original plebiscite (i.e., direct democracy). Cf. *Romer v. Evans*, 517 U.S. 620, 647 (1996) (Scalia, J., dissenting) (describing a referendum as the "most democratic of procedures"); *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 672 (1976) ("[A]ll power derives from the people, who can delegate it to representative instruments which they create. In establishing legislative bodies, the people can

*Hawai'i, Pu'uhonua, and Ka Pakaukau* have adopted and give them a position in the Hawaiian political process.<sup>165</sup> This Note suggests the following: in the first phase of its proposed system, these groups, and presumably any others who wanted the opportunity, would be given the chance to submit proposals for what resources they want to be made available to an independent Hawaiian nation, disregarding the question of how they will use those resources for now.<sup>166</sup> For example, a proposal could potentially exist of the things that many sovereignty groups generally agree Native Hawaiians deserve: (1) some form of independent government; (2) the return of approximately two million acres of land within the current boundaries of the State of Hawaii to the control of Native Hawaiians; and (3) ten billion dollars in back rent for the use of lands that they feel rightfully belong to Hawaiians.<sup>167</sup> Another proposal could simply recommend that the status quo be preserved by allocating no additional resources to Native Hawaiians and continuing non-recognition of any Native Hawaiian sovereign state. With over forty sovereignty groups and one million interested parties (i.e., the residents of Hawaii), one can imagine that the proposals would be numerous and varied.<sup>168</sup>

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reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature.") (citation omitted).

Note, however, that some scholars contend that all plebiscites (and other tools of direct democracy) should be seen as unconstitutional under the Guarantee Clause. See Hans A. Linde, *When Initiative Lawmaking is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 20 (1993); Catherine A. Rogers & David L. Faigman, *"And to the Republic for Which It Stands": Guaranteeing a Republican Form of Government*, 23 HASTINGS CONST. L.Q. 1057, 1072 (1996).

165. See HAWAIIAN SOVEREIGNTY ELECTIONS COUNCIL, REPORT TO THE LEGISLATURE 13 (1995) ("Some Hawaiian organizations have developed constitutions, position papers, and master plans for sovereignty or independence. In essence these organizations are political parties, each earnestly advancing their own platforms. These organizations are self-appointed. They have not received the consent of the Hawaiian people, as a whole, to be their government.").

166. Although allowing racially defined groups like *Ka Lahui Hawai'i* to propose the level of resources that should be made available to an independent Hawaiian nation may raise some constitutional issues, *see infra*, discussion at Part III.C.1, it is a practical necessity of sorts because *only* Native Hawaiians (or residents of the independent Hawaiian nation) can know what resources they want.

167. *But see* Streshinsky, *supra* note 13, at T5 ("There are almost as many opinions about sovereignty as there are people with some degree of Hawaiian blood."); Cox, *supra* note 35, at 1.

168. One article notes that pleas for Native Hawaiian sovereignty include everything from homestead associations seeking legally promised, but long-delayed, parcels of trust lands to groups calling for the full restoration of the Hawaiian National Government and/or the monarchy. See Cox, *supra* note 34, at 1; *see also supra*, discussion at Part I.B (reviewing the wish-lists of various sovereignty groups).

The next phase of the proposed process would utilize the HSEC bureaucracy<sup>169</sup> and the funds allocated to it (some two million dollars of funds remain) to (1) pare down these proposals into no more than ten specific ballot proposals—rejecting utterly frivolous ones, consolidating ones that look virtually the same, eliminating others that are weeded out in the political process—and (2) work with other agencies to specify lands and budget dollars that would be given to the independent Hawaiian nation under these proposals. Presumably, HSEC would do this through a series of public hearings that would allow individuals to question both the efficacy and constitutionality of the sovereignty proposals and allow groups to defend and refine their proposals. While the discretion to choose proposals would generally remain with HSEC, I would impose one restriction: all decisions must meet the requirements of administrative legitimacy.<sup>170</sup>

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169. Delegation to an administrative agency is a wise maneuver for several reasons beyond HSEC's existing bureaucratic structure. First, the allocation of land in the Hawaiian sovereignty context represents an allocation of both concentrated benefits and concentrated burdens. See JAMES Q. WILSON, *POLITICAL ORGANIZATIONS* 335–36 (1973). In such a situation, a legislature is not only likely to side-step the difficult choices that need to be made, but is wise to do so; the time-consuming and resource-intensive negotiations necessary to resolve situations where concentrated interests battle each other are better left to specialized bodies that can give more attention to the problem. See *id.* at 336; see also Steven P. Croley, *Making Rules: An Introduction*, 93 MICH. L. REV. 1511 (1995):

The necessity of legislative delegation stems, in part, from the collective action problems Congress faces. Because individual legislators have their own personal sets of interests, goals, and ambitions, and because these do not always overlap with the interests, goals, and ambitions of Congress collectively, single members seldom have powerful incentives to contribute to—what are for Congress as a whole—collective goods. More concretely, individual members of Congress typically have little incentive to invest the resources necessary to become experts . . . .

*Id.* at 1526. But see *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring) (“It is the hard choices . . . which *must* be made by [Congress].”) (emphasis added).

Delegation also makes good use of HSEC's familiarity with many of the various sovereignty proposals and its expertise in dealing with sovereignty issues and, perhaps more importantly, sovereignty groups.

170. Although a discussion about the administrative minutiae of the proposed system is not the purpose of this Note, it is worth pointing out that any legitimate process has several prerequisites. Decision-making processes in American government are grounded in a process of reasoned elaboration. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF THE LAW* 143–52 (1994). That is, there is an expectation of consistent procedure allowing for the consideration of relevant factors and an expectation of a connection between an analysis of those factors and the policy produced. See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*,



In the third phase of the process, these revised proposals will be submitted to the public during a general election in which all residents of Hawaii will vote using a modified Borda count procedure. Under this modified Borda count procedure, each voter would take the list of ten sovereignty alternatives prepared by HSEC and rank his or her top three choices in order of preference.<sup>171</sup> The voter's top choice would be given three points, his second preference two points, and his third preference one point.<sup>172</sup> In the end, each voter's list of preferences is tallied, and the option receiving the largest number of total points wins.<sup>173</sup> Although it would certainly be *easier* to have the legislature decide on a proposal to implement, one plausible reading of the Hawaii State Constitution indicates that the release of any State lands to an independent Native Hawaiian nation may require amendment of the constitution (a process requiring approval by all residents of the State anyway).<sup>174</sup> Thus, rather than running into the possible quandary of having the legislature approve a particular solution and then having the general public turn it down when they

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463 U.S. 29 (1983) (reversing an agency alteration of policy that failed to explain the reasons for its decision or consider all reasonable alternatives); *SEC v. Chenery Corp.*, 318 U.S. 80 (1943) (rejecting an agency decision that had no rational basis in law or the agency's expertise); *United States v. Nova Scotia Food Prod. Corp.*, 568 F.2d 240 (2d Cir. 1977) (chastising an agency for concealing basis the basis for its decisions and failing to address the relevant concerns of involved parties).

Legal procedures should also be informed (all relevant information should be obtained), deliberative (a full interchange of views and arguments among the competing interests should take place), and efficient (proposals should be disposed of in the time available). See HART & SACKS, *supra*, at 695 (noting that "the needs of efficiency may interfere with the ideals of information and deliberation").

171. An election using the normal Borda count procedure has the voter rank *all* alternatives. See Jean-Pierre Benoit & Lewis A. Kornhauser, *Assembly-Based Preferences, Candidate-Based Procedures, and the Voting Rights Act*, 68 S. CAL. L. REV. 1503, 1522 n.44 (1995) (describing the normal Borda count procedure); Mayer G. Freed et al., *Unions, Fairness, and the Conundrums of Collective Choice*, 56 S. CAL. L. REV. 461, 522 (1983) (discussing the normal process of the Borda count).

172. This modification to the normal Borda count procedure is necessary because of the administrative convenience and informational problems that arise when too many possible alternatives are available. For example, this modified Borda count procedure is very similar to the one used by Major League Baseball for determining the winner of the Rookie of the Year award (because there are simply too many rookies, voters are asked to rank the three most deserving). See Claire Smith, *Garciparra Is Named Top Rookie in Landslide*, N.Y. TIMES, Nov. 4, 1997, at C2. It is also similar to an alternative voting procedure initially considered by the San Francisco Board of Supervisors last year. See Diana Walsh, *Supervisors Ponder New Voting Scheme: Activists Say Change Should Bring More Minorities Aboard*, S.F. EXAMINER, Dec. 11, 1995, at A2.

173. Benoit & Kornhauser, *supra* note 171, at 1522 n.44; Freed et al., *supra* note 171, at 552.

174. See Pennybacker, *supra* note 32, at 21.

consider it in conjunction with a constitutional amendment, it makes more sense to simply combine the approval process.

In addition, opening an election to the general public has the "democratic" effect of allowing all interested residents of Hawaii to have some say in deciding how sovereignty will affect their *own* lives.<sup>175</sup> But conducting an election under the traditional American plurality/winner-take-all system in this context poses special problems. In particular, mathematicians and political scientists have found that in elections where the number of major issues or candidates rises above two, the chances that the most popular issue or candidate will not win increase greatly.<sup>176</sup> This "paradox" arises in situations with multiple options because (1) similar options tend to split support between themselves, or (2) in situations where people have only one vote, they are unlikely to "waste" it on an unrealistic (but actual) preference.<sup>177</sup> Since this sovereignty election is likely to have (1) a number of controversial proposals on the ballot, (2) critical effects that are more wide-ranging over a large segment of Hawaii's population, and (3) results that are more difficult to reverse than the effects of normal candidate or issue elections, it is highly desirable to have a system, such as the modified Borda count, that reduces the possibility of anything but the most popular alternative prevailing.<sup>178</sup>

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175. It is significant to note that many residents of Hawaii view Native Hawaiians as entitled to some compensation for their maltreatment by the United States and Hawaii. See Matsuda, *supra* note 30, at 372 & n.208; Sforza, *supra* note 83, at A14. Thus, while a general election would undoubtedly temper some of the more radical proposals, it would probably not have the effect of eliminating the possibility of any compensation at all.

Even if that were the result, however, this alternative process gives the Native Hawaiian sovereignty movement all that it is constitutionally entitled to (i.e., access to the political process). Cf. *Thornburg v. Gingles*, 478 U.S. 30, 83 (1986) (O'Connor, J., concurring) (noting that the Constitution does not guarantee that minorities will prevail in political contests; it merely grants them equal access to the political process and an equal opportunity to prevail in such contests).

176. See Kenneth J. Arrow, *The Principle of Rationality in Collective Decisions*, in *SOCIAL CHOICE AND JUSTICE* 45 (1983); Kathy Sawyer, *A Paradox of Majority Politics*, *WASH. POST*, Oct. 9, 1995, at A3.

177. For a real-life example of a voting paradox, reference the 1970 New York senatorial election where the conservative candidate won, even though over 60% of the voters would have preferred one of the two more liberal candidates. See SAARI, *supra* note 144, at 1; see also K.C. Cole, *Vetoing the Way We Vote: Blame America's Electoral Woes on How We Pick Our Leaders, Mathematicians Say*, *L.A. TIMES*, Aug. 16, 1995, at 1, available in 1995 WL 9817639 (claiming that by "dumping winner-take-all pluralities for other methods," apathy, extremism, and misjudging may be reduced).

178. Professor Donald Saari has mathematically proven that the Borda count voting system has the advantages of, among other things, minimizing: (1) the number and kinds of paradoxes that can occur; (2) the likelihood of any paradox occurring; (3) the likelihood that a small group could successfully manipulate the

The Borda count system is not perfect. To begin with, it favors those who can list at least three preferences, "since their list will amount to a greater number of points and thus have a more significant impact on the outcome."<sup>179</sup> Moreover, like most alternative voting systems, the Borda count voting procedure will probably have difficulty in being understood and accepted as democratic.<sup>180</sup> In fact, acceptance of Borda count voting in Hawaii is likely to become a problem because there is little, if any, perceived need for a change in voting practices.<sup>181</sup>

Because of this, I also strongly considered using an "approval voting" system to determine the boundaries and breadth of the independent Hawaiian nation. Under an "approval voting" regime, voters are allowed to cast a vote for any and every alternative that they consider acceptable, and the option that is "approved" by the largest number of voters wins.<sup>182</sup> This system has the desirable advantages of (1) giving voters the total freedom to express all of their true preferences—i.e., vote for all acceptable alternatives without fear of wasting a vote on a sure loser—and, (2) ensuring that the option with the greatest overall support will win.<sup>183</sup>

Ultimately, choosing the right voting system is a close call—truly proving that "Arrow's impossibility theorem" (hypothesizing that no democratic voting system can be completely fair) holds true today.<sup>184</sup> But the overriding consideration in choosing a structure for this election is to ensure that the popular will prevails,<sup>185</sup> and

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outcome of an election; and (4) the possibility of voting errors adversely changing the outcome of the election. SAARI, *supra* note 144, at 14.

179. Freed et al., *supra* note 171, at 522.

180. Cf., e.g., Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241, 282–85 (discussing these comprehension and acceptance problems in the context of the cumulative voting procedure used in Chilton County, Alabama). At least part of the perception of the Borda count as an undemocratic system rises from its rejection of pure majority rule. For a statement regarding why deviations from the traditional American philosophy of majoritarianism should not be troubling—and indeed may be advantageous—see Luis Fuentes-Rohwer, *The Emptiness of Majority Rule*, 1 MICH. J. RACE & L. 195 (1996).

181. Cf. Pildes & Donoghue, *supra* note 180, at 283–84 (noting that cumulative voting was generally accepted in Chilton County in spite of its perceived faults, but *only* because it was also seen as needed to combat another, more pressing, evil—minority underrepresentation).

182. See Sawyer, *supra* note 176, at A3.

183. See *id.*

184. See Kenneth J. Arrow, *Values and Collective Decision Making*, in SOCIAL CHOICE AND JUSTICE 52, 71–77 (1983); see also Cole, *supra* note 177, at 1 (discussing Arrow's impossibility theorem).

185. See SAARI, *supra* note 144, at 9 ("The ultimate goal is to choose a procedure that always honors the beliefs of the voters.").

Donald Saari, a mathematician at Northwestern University, has determined that Borda counts produce the fewest contradictions and voting paradoxes.<sup>186</sup>

Finally, if and when the voters of Hawaii agree to give Native Hawaiians some package of resources with which they can construct their independent nation, the State of Hawaii should then step out of the picture and allow Native Hawaiians to determine for themselves what the structure of their government will look like and exactly how their allocated resources will be distributed.<sup>187</sup>

With over forty sovereignty groups and a much larger number of perspectives on what sovereignty should look like, it is clear that Native Hawaiians will have a difficult time allocating these resources—no matter what the general population ultimately decides to give to them. In the first place, however, such an allocation of resources is no more difficult than the choices that sovereign governments around the world face everyday. More importantly, it is necessary that Native Hawaiians—rather than the State of Hawaii or its residents—make distributional decisions in order to assert and preserve their newly garnered right to self-determination.

Thus, the entire process is geared toward three things: (1) allowing Native Hawaiians and other interested parties to propose boundaries on the Native Hawaiian right to self-government; (2) allowing the residents of Hawaii to ultimately determine what those boundaries will be; and (3) allowing Native Hawaiians to accomplish whatever they wish within those boundaries.

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186. See *id.* at 13–14 (1994).

187. Having the State of Hawaii step out of the process at this point may also be necessary to preserve the constitutionality of the scheme. See Benjamin, *supra* note 54, at 600; *id.* at 600 n.259 (“If the state were not involved, a referendum of other process leading toward the creation of an independent Native Hawaiian organization would, of course, raise no constitutional issues; it would stand on the same footing as any other private election to the governing board of a private entity.”).

It is also possible to allow the State (in the form of HSEC) to remain in the process and proceed with (1) the election of delegates to a convention to allocate the resources of the independent Hawaiian nation, (2) a constitutional convention, and (3) a ratification vote concerning the convention’s proposed constitution. While this would *probably* be constitutional and have the positive effect of organizing the process and limiting conflicts between the Native Hawaiian sovereignty groups, it would also probably create litigation on the same grounds as *Rice v. Cayetano* that would further slow the eventual establishment of the independent Hawaiian nation. Because of this, I think the costs of involvement by the State of Hawaii at this fourth phase outweigh any benefits that might accrue.

C. Potential Constitutional Problems & Possible Solutions<sup>188</sup>

## 1. Fifteenth Amendment Concerns

The major problem with HSEC's decision-making process is that it violates the Fifteenth Amendment insofar as it does not permit all substantially affected persons to have a say in what Native Hawaiian sovereignty will be like. In reality, however, the Fifteenth Amendment only raises concerns with regard to one of the two components constituting the proposed system. That component is the one represented in the first three phases of the process and concerns the *boundaries, jurisdiction, and breadth* of a Hawaiian sovereign nation. Fifteenth Amendment concerns arise here because these issues directly involve all residents of Hawaii (and, potentially, the entire nation). That is, whether Pearl Harbor belongs to the United States government or the Hawaiian sovereign nation, does not only substantially affect Native Hawaiians. The second component, represented in the last phase of the proposed process, does not raise such Fifteenth Amendment concerns because it primarily concerns only the *form and structure* of a Hawaiian sovereign nation, and disproportionately affects only Native Hawaiians. That is, whether Native Hawaiians decide to allow tourists on their parcels of land has a far greater effect on the Native Hawaiians themselves.<sup>189</sup>

The proposed decision-making process recognizes the separable nature of these two components and tackles the Fifteenth Amendment problem by opening up democratic processes with

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188. There is at least one non-constitutional, but nevertheless pressing, problem inherent in the proposed alternative. It stems from the possibility that voters will be unable to intelligently choose three proposals that they like from 10 relatively complex alternatives. Cf. THOMAS CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 74-75 (1989); Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures that Do and Don't Work*, 66 U. COLO. L. REV. 47, 91-92 (1995); David Magleby, *Let the Voters Decide?: An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 31-34 (1995).

In the first place, this problem will probably be no more severe than whatever problems arise from inundating California voters with a multitude of complex initiatives and a thick booklet explaining them. More honestly, however, this informational problem is probably not solvable. Cf. *supra* note 177 and accompanying text (discussing "Arrow's impossibility theorem"). My answer, then, is that although the Borda count method is not perfect, it remains the *best* method for ensuring that the public's will is served in this process.

189. Undoubtedly, there will be some unforeseen disputes about what items are "boundaries, jurisdiction, and breadth" and what items are "form and structure." These will be left to HSEC (and the courts, if necessary) to resolve, using the "substantially affecting all residents/substantially affecting only Native Hawaiians" dichotomy as a guiding principle.

respect to questions that substantially affect everyone involved (i.e., where the Constitution requires that they be open), but allowing limited elections and/or special purpose districts where issues disproportionately affect Native Hawaiians (i.e., where *Ball* and *Salyer Land* say they are permitted).

## 2. The White Primary Problem

Recognizing sovereignty groups like *Ka Lahui Hawai'i* and *Pu'u'honua* (which are, for all intensive purposes, racially defined) as political parties with the power to place proposals on the ballot may seem similar to some of the practices that were held unconstitutional in the White primary cases—i.e., limiting participation in the preliminary phases of an electoral process solely on the basis of race.<sup>190</sup> For example, in *Terry v. Adams*,<sup>191</sup> the U.S. Supreme Court found that the primary elections held by the Jaybird Party in Texas violated the Fifteenth Amendment because they excluded African Americans from participating in “an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in this country.”<sup>192</sup>

Several arguments counter this position, however. To begin with, it is highly unlikely that the power to merely propose solutions will determine what proposal is accepted in the same way that the Jaybird Party primary in *Terry* determined the winner of Texas elections. After these groups make their proposals, they will be scrutinized by HSEC, at public hearings, and finally by the general public. Although some of these checks, such as a general election, existed in the case of *Terry v. Adams*, this case is fundamentally different because (1) Native Hawaiians do not hold the same type of dominance that the Jaybird party did, and (2) even if they did, there will be ten proposals, not just one candidate, coming out of the part of the process controlled by the sovereignty groups.

Unlike the powerful White, Jaybird majority in *Terry*, Native Hawaiians are outnumbered, four to one, by the other residents of Hawaii. Perhaps even more importantly, Native Hawaiians have historically been *underrepresented* in Hawaii State Government. In fact, the whole reason and need for giving Hawaiians the power to propose and implement ideas about what their sovereign government should look like is precisely because they are a minority group that has historically been oppressed and wronged.<sup>193</sup>

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190. See *supra* note 165 (likening sovereignty groups to political parties).

191. 345 U.S. 461 (1953).

192. *Id.* at 469.

193. But see *supra* discussion at Part II.B.1 & 2.

More suspicious is the last phase of the process—where only Native Hawaiians will have a voice in determining the form and structure of their independent nation. This part of the process is undoubtedly more like the Jaybird primary in *Terry* because it is “an integral part . . . of the elective process that determines who shall rule and govern . . . .”<sup>194</sup> To begin with, however, the constitutionality of this final phase is ensured by the judgments of several federal courts holding that Native Hawaiians may be treated separately in matters affecting their own affairs without violating equal protection guarantees.<sup>195</sup>

Moreover, as explained previously, while the first three phases of the process, which determine the boundaries, jurisdiction, and breadth of the Hawaiian nation, directly affect all residents of Hawaii, the last phase of the process—determining the form and structure of the independent Hawaiian nation—allows Native Hawaiians to resolve a matter that ultimately affects only “their own affairs.” As a result, participation in the last phase of this process can be constitutionally limited to Native Hawaiians under the *Salyer Land* doctrine.<sup>196</sup>

## CONCLUSION

Upon the denial of his motion for a preliminary injunction in Hawaii’s Federal District Court, Harold Rice immediately filed a motion to stay the district court’s judgment with the United State Court of Appeals for the Ninth Circuit.<sup>197</sup> Although the Ninth Circuit denied that motion without opinion, Hawaii State Deputy Attorney General John P. Dellera (lead attorney for the Defendant State of Hawaii in *Rice v. Cayetano*) believed that the Ninth Circuit denied the

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194. *Terry*, 345 U.S. at 469.

195. *Rice v. Cayetano*, 941 F. Supp. 1529, 1540–41 (D. Haw. 1996) (citing *Morton v. Mancari*, 417 U.S. 535 (1974), and *Nalielua v. Hawaii*, 795 F. Supp. 1009, 1013 (D. Haw. 1990), *aff’d*, 940 F.2d 1535 (9th Cir. 1991)). *But see* Benjamin, *supra* note 54 (noting generally that *Mancari* should be read to limit rational basis review of special preference programs to Native Americans and that *Rice & Nalielua* have misinterpreted *Mancari*).

Although I disagree with the *Rice* Court’s application of *Mancari & Nalielua* to the Native Hawaiian Sovereignty Plebiscite itself, because the alternative solution proposed here adequately limits areas where *only* Native Hawaiians are allowed to participate in the political process to those areas where *only* Native Hawaiians are substantially affected, the *Nalielua* rule is appropriately applied to the process that this Note proposes.

196. *See supra* discussion at Part III.C.1 (explaining why the *Salyer Land* exception applies to the fourth phase of the alternative process, but not the first three phases or the HSEC process).

197. Dellera Interview, *supra* note 72.

motion because it saw Rice's claim as having no chance of success on the merits.<sup>198</sup>

A strict adherence to the language of *Salyer Land* may allow for such a conclusion. Deciding to hold a constitutional convention concerning issues of Hawaiian sovereignty in itself (1) extends very limited governmental authority to the participants, (2) does not necessarily allow convention participants to affect *any* area, much less a limited one, and (3) is disproportionately meaningful to Native Hawaiians.<sup>199</sup>

But such a holding clearly violates the *spirit* of the special purpose district exception. The Native Hawaiian Sovereignty Plebiscite is distinct from the board of directors election in *Salyer Land* because it *legitimizes a principle* (i.e., Native Hawaiian sovereignty) that has dramatic implications for many more people than just the 30,000 voters who decided its legitimacy. By calling the Plebiscite a special purpose election and allowing the State of Hawaii to limit participation in the Plebiscite, the federal courts deciding *Rice v. Cayetano* have downplayed the important role that legitimacy plays in the decision-making process. They have also abridged the constitutional right of over ninety-nine percent of Hawaii's residents to voice their opinions on an issue that certainly plays a central role in determining their future. Such an abrogation is not permitted by either the "one person, one vote" principle or by doctrines focused on ameliorating the plight of the historically oppressed.

While many non-Native Hawaiians are directly affected by the boundaries, jurisdiction, and breadth of Hawaiian sovereignty, however, only Native Hawaiians should be allowed to determine the form and structure of their sovereign government because only they are significantly affected by that government. Resolving this tension mandates a bifurcated decision-making process—all citizens should have a say in the allocation of resources to the cause of Hawaiian sovereignty, but only Native Hawaiians interested in sovereignty should command those resources. The procedure outlined in this Note gives but one option and I am humble enough to know that it is far from flawless. But the lesson motivating the procedure's design is too important to be missed: successfully asking that the life of Hawaii's lands always be preserved in righteousness—*Ua mau ke ea o ka aina i ka pono*—first involves *reconciling*

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198. See *id.*

199. See *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 730–34 (1973) (finding that a limited-participation election was constitutional where the elections concerned a body (1) with limited governmental authority, (2) governing a very limited area, and (3) disproportionately affecting the voters in the election).



the conflicting American and Hawaiian conceptions of what “righteousness” is. A workable and legitimate procedure can ill afford to ignore either perspective any longer.