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Race and the Right to Vote after Rice v. Cayetano

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RACE AND THE RIGHT TO VOTE AFTER *RICE V. CAYETANO*

*Ellen D. Katz**

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INTRODUCTION

Four decades ago in *Gomillion v. Lightfoot*,¹ the Supreme Court struck down a racial gerrymander enacted by the Alabama legislature after African-American citizens in Tuskegee sought to participate in the city's political affairs.² The legislation redrew Tuskegee's bounda-

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1. 364 U.S. 339 (1960).

2. For more detailed descriptions of the events in Tuskegee, see generally MARGARET EDDS, *FREE AT LAST: WHAT REALLY HAPPENED WHEN CIVIL RIGHTS CAME TO SOUTHERN POLITICS* (1987); ROBERT J. NORRELL, *REAPING THE WHIRLWIND: THE CIVIL RIGHTS MOVEMENT IN TUSKEGEE* (1985); BERNARD TAPER, *GOMILLION V. LIGHTFOOT: THE TUSKEGEE GERRYMANDER CASE* (1962).

ries "from a square to an uncouth . . . strangely irregular twenty-eight sided figure," that removed virtually every African-American resident from the city without removing a single white voter.³ Justice Frankfurter's decision for the Court explained that the legislation was "solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote."⁴ Such action, he concluded, denied the former African-American residents of Tuskegee the right to vote on account of their race in violation of the Fifteenth Amendment.⁵

Last Term, the Supreme Court relied on *Gomillion* to hold that Hawaii, like Alabama before it, had segregated voters by race in violation of the Fifteenth Amendment. The state law at issue in *Rice v. Cayetano*⁶ provided that only "Hawaiians" could vote for the trustees of the state's Office of Hawaiian Affairs ("OHA"), a public agency that oversees programs designed to benefit the State's native people.⁷ *Rice* holds that restricting the OHA electorate to descendants of the 1778 inhabitants of the Hawaiian Islands embodied a racial classification that effectively "fenc[ed] out whole classes of . . . citizens from decisionmaking in critical state affairs."⁸

In one sense, the majority's equation of the OHA's voting restriction with Tuskegee's racial gerrymander comes as no surprise. To be sure, the Hawaiian scheme differed on its facts from the Alabama law at issue in *Gomillion*. Instead of an empowered, white majority "singl[ing] out a readily isolated segment of a racial minority for special discriminatory treatment,"⁹ and "depriv[ing] them of their pre-existing . . . vote,"¹⁰ the non-native Hawaiian majority, through the

3. *Gomillion*, 364 U.S. at 340, 341.

4. *Id.* at 341.

5. *See id.* at 347-48.

6. 120 S. Ct. 1044 (2000); *see also* U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

7. The state laws at issue distinguish among Hawaiians, who include any descendant of a person living on the Hawaiian Islands in 1778; Native Hawaiians, who include any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778; and implicitly all other citizens of Hawaii. *See, e.g.*, HAW. CONST., art. XII, § 5; *Rice*, 120 S. Ct. at 1047, 1055. In an effort to minimize confusion, this Article uses the terms "native," "aboriginal," and "indigenous" people to refer to those included within the OHA's electorate.

8. 120 S. Ct. at 1059.

9. *Gomillion*, 364 U.S. at 346.

10. *Id.* at 341. On the role of traditional and preexisting practices, *see, e.g.*, *Bush v. Vera*, 517 U.S. 952 (1996) (discussing the importance of traditional districting principles); *Romer v. Evans*, 517 U.S. 620, 633, 647 (1996) (noting the "absence of precedent" for a state amendment invalidating local laws that barred discrimination against homosexuals); *Gomillion*, 364 U.S. at 341-42 (noting the contrast between old and new boundaries of Tuskegee); *see also* Pamela S. Karlan, *Just Politics? Five Not So Easy Pieces of the 1995 Term*, 34 HOUS. L. REV. 289 (1997).

adoption of a new state constitution, voluntarily opted to fence itself out of the electorate for a new state agency expressly created to benefit a historically disempowered minority population.¹¹ Yet, to a Court increasingly convinced that racial classifications never exist benignly,¹² Hawaii's ostensible absence of invidious intent simply did not pertain. Once the Court in *Rice* concluded that Hawaii had defined the OHA's electorate in racial terms, the Justices viewed Hawaii's motives for doing so as irrelevant to the constitutional inquiry. In this regard, *Rice* simply imports into Fifteenth Amendment review the rigorous scrutiny currently applied to seemingly well-intentioned race-based classifications under the Fourteenth Amendment.¹³ While this holding may be nominally novel, the Court's decision to adopt this approach might easily have been predicted.

Quite startling and worthy of attention, however, is the path the Court took in reaching its holding. Justice Kennedy's majority opinion in *Rice* accepts, at least for argument's sake,¹⁴ Hawaii's claims that (1) the native people who compose the OHA's electorate hold a position similar to Native American Indian tribes, (2) the OHA itself resembles a special-purpose district and not a general governmental body, and (3) the OHA's electorate held a distinct property interest in OHA affairs.¹⁵ Hawaii maintained that these factors removed the case from the ambit of the Fifteenth Amendment: the first factor established that the OHA's voting scheme employed a nonsuspect, political classification as opposed to a highly suspect or forbidden racial one; the second factor indicated that the OHA elections themselves did not implicate a constitutionally protected right to vote; and the third factor meant that

11. Justice Stevens's dissent in *Rice* makes this point when he argues that Hawaii acted without invidious intent. *See Rice*, 120 S. Ct. at 1063 (Stevens, J., dissenting) ("[T]here is simply no invidious discrimination present in this effort to see that indigenous peoples are compensated for past wrongs, and to preserve a distinct and vibrant culture that is as much a part of the Nation's heritage as any.").

The Court, moreover, was unmoved by the fact that a democratically accountable body implemented the voting restriction. *See id.*; *see also* *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969); *Lucas v. Colorado Gen. Assembly*, 377 U.S. 713 (1964); *Ball v. James*, 451 U.S. 355, 373 (1981) (Powell, J., concurring).

12. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900 (1995); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *see also* *Holder v. Hall*, 512 U.S. 874, 905-08 (1994) (Thomas, J., concurring); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

13. *See Croson*, 488 U.S. at 469 (1989) (applying strict scrutiny to a Fourteenth Amendment challenge to a minority set-aside program). The Court has previously applied the Fourteenth Amendment's intent requirement to claims brought under the Fifteenth Amendment. *See, e.g.*, *Mobile v. Bolden*, 446 U.S. 55, 66-68 (1980) (applying the framework from *Washington v. Davis*, 426 U.S. 229, 240 (1976); *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979); *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265, 266 (1977)).

14. *See infra* notes 55, 92, 111 and accompanying text.

15. 120 S. Ct. at 1058-61.

the voting scheme involved neither race nor the right to vote at all.¹⁶ On a conventional understanding of the jurisprudence in this area, Hawaii should have prevailed in light of the Court's acceptance of these premises. Without both a racial classification and a selection process involving the right to vote, the State argued, the OHA's electoral regime could not violate the Fifteenth Amendment.

The Court instead consciously refused to reject these three premises, but nevertheless insisted that these factors did not save the OHA voting regime from invalidation under the Fifteenth Amendment.¹⁷ *Rice* holds that even if native Hawaiians resemble a Native American Indian tribe and thus qualify as a nonracial and therefore nonsuspect group for various purposes, they evolve into a highly suspect, indeed "forbidden," racial group when they compose the exclusive electorate for public officials serving on a public agency.¹⁸ Similarly, *Rice* holds that even if the powers of the OHA were sufficiently circumscribed such that it would otherwise constitute a special-purpose district, the use of a racial classification to define its electorate transforms the process of selecting its officials from a simple administrative act subject to the most deferential review into one implicating the constitutionally protected right to vote.¹⁹ Finally, *Rice* indicates that while the OHA electorate's common property interest might otherwise have legitimized the voting restriction, the coexistence of a racial classification with that interest fatally corrupts any legitimate basis for the voting regime.²⁰ In other words, *Rice* indicates that the use of a racial classification in an electoral process transforms that process into one involving the constitutionally protected right to vote, even if that process would not otherwise implicate such a right, and corrupts otherwise legitimate grounds for limiting the franchise. So too, where the process implicates the right to vote, a previously nonsuspect classification metamorphoses into one now deemed to be racial.

16. See Brief for Respondent at 13-16, *Rice* (No. 98-818). These same arguments, Hawaii contended, meant that the electoral regime also comported with Fourteenth Amendment requirements. See *id.*

17. The Court could have rejected outright each factor's applicability to the OHA. As petitioner argued and the concurring justices found, see *Rice*, 120 S. Ct. at 1060-62 (Breyer, J., concurring); Brief for Petitioner at 11, *Rice* (No. 98-818), the Court could have distinguished native Hawaiians from Native American Indian tribes and thus have held the former not entitled to the benefits that flow from the latter's "unique" political status. See *Morton v. Mancari*, 417 U.S. 535, 547-48 (1974) (discussing the "unique" status of Indian tribes). So too, the Court might have held that the OHA's powers did not qualify the agency as a "special-purpose" district such that elections for it would not implicate a constitutionally protected right to vote. Finally, the Court could have held that the State had not defined the electorate based on property interests because of the absence of full alignment between members of the OHA's electorate and OHA trust beneficiaries. See *Rice*, 120 S. Ct. at 1060.

18. 120 S. Ct. at 1058-59; see also *infra* Part II.A.

19. See *infra* Part II.B.

20. 120 S. Ct. at 1060; see also *infra* Part II.C.

This Article traces the Court's reasoning, which appears puzzling on its face, to a deeper understanding of racial classifications, participation in the electoral process, and the relationship between the two. *Rice* suggests that the primary value of political participation through voting lies not in the policies implemented by those elected, but in two distinct and related intrinsic benefits the vote produces: namely, the constitutive benefit an individual derives from political engagement with others and the expressive benefit derived from full membership in the political community.²¹ *Rice* posits, on the one hand, that a jurisdiction's use of race to define an electorate distorts these beneficial effects by imposing on voters a state-approved identity instead of leaving voters free to develop an identity on their own and by disseminating the message that racial identity represents a relevant criterion for entry into the political community. *Rice* presumes, on the other hand, that the constitutive and expressive aspects of voting provide a crucial element to a group identity that would otherwise not be viewed as "racial." This view of race confirms the idea that, at least within our constitutional practice, the concept of racial identity is a complex legal conclusion, not a pre-legal fact.

This conception of voting and the impact of race also has significant ramifications for future voting rights cases. At a minimum, it suggests that race-based districting plans actionable under *Shaw v. Reno*²² and its progeny may also produce the distinct injury recognized in *Rice*. After *Rice*, the Court may view the predominance of race in districting as not only causing an expressive harm that violates the Equal Protection Clause, but also as distorting the intrinsic values that the Fifteenth Amendment protects. So understood, claims brought under *Shaw* and *Rice* may capture the same conduct, but conceive of the injury in somewhat different terms.²³ *Rice* accordingly reinforces *Shaw* within the legal landscape, solidifying its approach and demonstrating how deeply the Court's discomfort with race-based electoral rules has been woven into doctrinal analysis.

Read more broadly, *Rice* implies that many applications of section 2 of the Voting Rights Act²⁴ are unconstitutional. Under this reading, *Rice* works a dramatic change in voting rights jurisprudence by indicating that electoral rules that even partially rely on race undermine the intrinsic values of voting and thereby violate the Fifteenth Amendment. In other words, districting plans not even subject to strict scrutiny under *Shaw* might be struck down under *Rice*.²⁵ We can

21. See *infra* Part III.A.

22. 509 U.S. 630 (1993).

23. See *infra* Part III.B.

24. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, § 2 (codified as amended at 42 U.S.C. § 1973 (1994)).

25. See *infra* Part III.B.

squarely confront these potentially far-reaching consequences of *Rice*, this Article suggests, only by recognizing the deeper conceptions of race and voting that underlie the case.

This Article begins in Part I by discussing the factual background that gave rise to the conflict in *Rice v. Cayetano*. Part II then addresses the Court's decision in *Rice*, emphasizing the puzzling doctrinal route the majority took to reach its conclusion that the OHA's voting system violates the Fifteenth Amendment. Part III explores why the Court might have chosen this path and suggests that the decision reflects the views that (1) the Constitution protects the vote primarily because of its intrinsic value to the individual and (2) the concept of race is a complex legal conclusion, not a pre-legal fact. It also explores the implications this conception may have in future cases brought under both section 2 of the Voting Rights Act and *Shaw v. Reno*. This Article concludes by discussing *Rice*'s distinct understanding of voting's constitutive benefit and by assessing *Rice*'s reliance on *Gomillion* in light of the decision's conception of voting's intrinsic values.

I. BACKGROUND

A. *The OHA's Electorate*

The voting restriction struck down in *Rice v. Cayetano* constituted the latest manifestation of the century-old effort to address the condition of Hawaii's aboriginal peoples. In 1898, following the U.S.-led overthrow of the Hawaiian monarchy,²⁶ a congressional joint resolution annexed Hawaii and provided that nearly two million acres of public land deemed ceded to the U.S. would be "used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."²⁷ Two years later, the Hawaii Organic Act

26. For nearly a century prior to the overthrow, U.S. commercial interests had gained increasing influence over the Hawaiian economy and political affairs. When, in the early 1890s, Queen Liliuokalani began to reassert Native Hawaiian control over governmental operations, these U.S. interests orchestrated her overthrow, with the aid of the U.S. minister to Hawaii, who provided military support. President Cleveland refused to recognize the resulting provisional government, but five years later, President McKinley signed the congressional joint resolution annexing the islands. See Message of the President to the Senate and House of Representatives, reprinted in H.R. REP. NO. 53-243, at 19-31 (1893). For a more detailed description of these events, see Pub. L. No. 103-150, 107 Stat. 1510 (1993); President's Annual Message, reprinted in S. Doc. No. 55-16, at 3-13 (1898); LAWRENCE H. FUCHS, HAWAII PONO: A SOCIAL HISTORY (1961); 3 RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM 582-650 (1967); RUTH TABRAH, HAWAII, A HISTORY (1984). See also MICHAEL H. HUNT, IDEOLOGY & U.S. FOREIGN POLICY 80-91 (1987).

For an assessment of the absence of discussion on the constitutional issues raised by U.S. expansion, see Sanford Levinson, *Why the Canon Should be Expanded to Include the Insular Cases and the Saga of American Expansionism*, 17 CONST. COMMENT. 241 (2000).

27. Act of July 7, 1898, 30 Stat. 750 (codified at 48 U.S.C. § 661 and repealed in 1959 upon Hawaii's admission to the Union); Hawaiian Organic Act, ch. 339, § 91, 31 Stat. 141, 159 (1900).

gave the newly established territorial government control over these lands.²⁸ In 1920, concern about the deteriorating condition of Hawaii's native people led Congress to enact the Hawaiian Homes Commission Act ("HHCA"), which designated 200,000 acres for homesteading by Native Hawaiians.²⁹ The HHCA defined a "Native Hawaiian" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778."³⁰

Pursuant to congressional command, the HHCA became part of Hawaii's constitution when Hawaii became a State in 1959. The State thereafter assumed trust responsibility for administering HHCA lands and an additional 1.2 million acres Congress acquired at annexation. Congress instructed Hawaii to administer these lands, known as the "Section 5(f) lands," for, *inter alia*, "the betterment of the conditions of native Hawaiians."³¹

Hawaii adopted a new constitution in 1978 in which it created the OHA "to address the needs of the aboriginal class of people of Hawaii,"³² and to "provide Hawaiians the right to determine the priorities which will effectuate the betterment of their condition and welfare and promote the protection and preservation of the Hawaiian race."³³ The State also intended the OHA to "unite Hawaiians as a people."³⁴ The OHA's responsibilities include the administration of two public trusts: the first is comprised of twenty percent of the proceeds from the Section 5(f) lands that must be used "for the betterment of the conditions of native Hawaiians,"³⁵ and the second consists of money appropriated by the state legislature and administered for the benefit of Hawaiians.³⁶ The OHA also administers federal funds made available for Native Hawaiians and Hawaiians.³⁷ The Hawaiian Constitution provides that the OHA shall be managed by a board of trustees, all of whom "shall be Hawaiians," and that these trustees shall be

28. Hawaiian Organic Act, ch. 339, § 91, 31 Stat. 141, 159 (1900).

29. Hawaiian Homes Commission Act, 1920, ch. 42, 42 Stat. 108. *See also* H.R. REP. NO. 66-839, at 4 (1920) (noting that Hawaiian people have been "frozen out of their lands and driven into the cities," and that "Hawaiian people are dying").

30. HHCA, § 201(a)(7), 42 Stat. 108 (1921).

31. Hawaii Admission Act, Pub. L. No. 86-3, 73 Stat. 4, §§ 4, 5(f) (1959).

32. HAW. REV. STAT. § 10-1(a) (1993).

33. COMMITTEE OF THE WHOLE REP. NO. 13 (1978), *reprinted in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 1018 (1980).

34. *Id.*

35. HAW. REV. STAT. § 10-13.5 (1993). A separate agency administers the 200,000 acres set aside by the HHCA. *See id.* § 26-17.

36. *See* HAW. CONST. art. XII, § 6.

37. *See id.* § 5.

“elected by qualified voters who are Hawaiians, as provided by law.”³⁸ Hawaii defines a Native Hawaiian the same way as the HHCA does, and 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.”³⁹ The constitutional restriction of board membership to Hawaiians reflects the view “that people to whom assets belong should have control over them” and that “a board of trustees chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles.”⁴⁰ The constitution likewise limits OHA’s electorate to Hawaiians because it was thought that they “would best protect their own rights.”⁴¹ The electoral restrictions, in keeping with the OHA’s overall mission, would allow “a great and proud people . . . the opportunity . . . to . . . have more impact on their future.”⁴²

B. *The Dispute*

In March of 1996, Harold F. Rice attempted to register to vote in the OHA elections. The registration form asks applicants to declare “I am also Hawaiian and desire to register to vote in OHA elections.” Rice’s ancestors, however, came to the Hawaiian islands in the mid-nineteenth century, and thus he qualifies neither as a Native Hawaiian nor as a Hawaiian under the applicable OHA definitions. Rice deleted the phrase “am also Hawaiian and” and then marked “yes” on the form. The State rejected his application, prompting Rice to file suit in

38. *Id.*; see also HAW. REV. STAT. § 13D-3(b) (1993) (“No person shall be eligible to register as a voter for the election of board members unless the person meets the following qualifications: (1) The person is Hawaiian.”).

Rice did not address the constitutional validity of the restriction requiring that OHA trustees be “Hawaiians,” and thus that question remains open. The Fifteenth Amendment, as originally proposed, provided that “[t]he right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States, or any State, on account of race” CONG. GLOBE, 40th Cong., 3d Sess. 379 (1869); see also WILLIAM GILLETTE, *THE RIGHT TO VOTE* 55 (1969); XI WANG, *THE TRIAL OF DEMOCRACY: BLACK SUFFRAGE AND NORTHERN REPUBLICANS, 1860-1910*, at 43-44 (1997). While the deletion of the officeholding phrase might suggest that the Fifteenth Amendment does not prohibit race-based officeholding requirements, such requirements may still contravene the expressive and constitutive benefits that the Court in *Rice* suggests underlie the Amendment, see *infra* Part III, and may, moreover, independently fail to survive scrutiny under the Fourteenth Amendment.

39. HAW. REV. STAT. § 10-2 (1993). The definition of Hawaiian thus includes “Native Hawaiian” and accords with the more contemporary federal government policy to extend benefits to all Hawaiians regardless of blood quantum.

40. STANDING COMM. REP. NO. 59 (1978), reprinted in 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 644 (1980).

41. *Id.* at 645.

42. COMMITTEE OF THE WHOLE REP. NO. 13 (1978), reprinted in 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 1018 (1980).

federal court on the grounds that the State had denied him his constitutionally protected right to vote on the basis of race in violation of the Fourteenth and Fifteenth Amendments.⁴³

The State of Hawaii defended its voting scheme by arguing that the OHA's electoral restriction did not involve race or the constitutionally protected right to vote at all. The State's argument rested on three contentions. First, it claimed that members of the OHA's electorate occupy a position similar to that occupied by members of Native American Indian tribes, and thus are classified according to a common legal status instead of shared racial characteristics. Second, the State insisted that the OHA's limited powers render it a "special-purpose district," to which the heightened constitutional protections governing the right to vote do not apply. Third, the State maintained that members of the OHA's constituency share a common property interest, given their status as beneficiaries of OHA-administered trusts, and that this shared interest makes the agency's electoral restriction non-racial in nature.⁴⁴ Although the lower federal courts substantially agreed and threw out Rice's claims,⁴⁵ the Supreme Court reversed.

II. THE RIDDLE OF *RICE*

In a seven to two decision that rested solely on the Fifteenth Amendment, the Supreme Court struck down the OHA's voting re-

43. See *Rice v. Cayetano*, 963 F. Supp. 1547, 1548 (D. Haw. 1997). Rice also challenged his exclusion from voting in a special election relating to native Hawaiian sovereignty held in August of 1996. The district court rejected that challenge. See *Rice v. Cayetano*, 941 F. Supp. 1529 (D. Haw. 1996).

44. See Brief for Respondent at 16-50, *Rice v. Cayetano*, 120 S. Ct. 1044 (2000) (No. 98-818).

45. The district court held that Hawaii did not base the OHA's electoral restriction on race and rested it instead on the "unique" guardian-ward relationship that exists between Hawaii's indigenous people and the State of Hawaii. The court further found that the right to vote was not implicated because the OHA's limited power rendered it akin to a special-purpose district. Applying the deferential review accorded to such districts, the district court held that the voting restriction rationally related to a legitimate governmental purpose, finding that it furthered the State's obligation under federal law to act for the betterment of its native peoples. See *Rice*, 963 F. Supp. at 1554.

Unlike the district court, the Court of Appeals for the Ninth Circuit agreed with Rice that the voting restriction constituted a facial race-based classification, but it nevertheless affirmed the district court's judgment. See *Rice v. Cayetano*, 146 F.3d 1075, 1081 (9th Cir. 1998). Noting that Rice challenged the voting restriction, and not the OHA's underlying administrative structure, the court held that limiting the vote to those for whose benefit the OHA-administered its trusts "does not deny non-Hawaiians the right to vote in any meaningful sense." *Id.* Mr. Rice, the court concluded, simply had no interest in the outcome of the OHA elections and consequently had not been denied the right to vote as protected by the Fifteenth Amendment. The appellate court further held that the voting restriction passed muster under the Fourteenth Amendment, even under the strictest scrutiny, in light of the special trust relationship that existed between Hawaii and the descendants of the islands' aboriginal peoples. See *id.* at 1082 (citing *STANDING COMM. REP. NO. 59* (1978), reprinted in *1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978*, at 64 (1980)).

striction. Justice Kennedy's opinion for the Court assumed, *arguendo*, that Hawaii correctly asserted that the members of OHA's electorate resembled members of Indian tribes, that the OHA could constitute a special-purpose district, and that the agency's constituency could be understood to hold a distinct property interest as beneficiaries of OHA-administered trusts.⁴⁶ As this Part shows, however, the opinion appears to ignore the doctrinal consequences that would ordinarily follow from each point, by holding that the OHA's electoral restriction denied Rice the right to vote based on race.

A. *Race as Malleable: The OHA Electorate as Indians*

In *Morton v. Mancari*,⁴⁷ the Supreme Court upheld a preference in hiring and promoting at the Bureau of Indian Affairs ("BIA") that favored those who were "one-fourth or more degree Indian blood and . . . member[s] of a Federally-recognized tribe."⁴⁸ The Court concluded that the preference was "political rather than racial in nature"⁴⁹ because it applied "to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion."⁵⁰ Based on this conclusion, *Mancari* applied a deferential standard of review to the employment preference and held that it was "rationally designed to further Indian self-government."⁵¹ In *Rice*, Hawaii argued its indigenous peoples held a position similar to that of Indian tribes, and thus that the Court should apply *Mancari*'s standard of review to the OHA's voting restriction. The restriction, the State claimed, relied not on race and instead reflected the special political and legal status of its native population.⁵²

46. To be sure, the Court expressed considerable skepticism about the validity of each point, but ultimately accepted each for purposes of its analysis. See *infra* notes 55, 92, 111 and accompanying text.

47. 417 U.S. 535 (1974).

48. *Rice*, 120 S. Ct. at 1058 (alteration in original).

49. *Mancari*, 417 U.S. at 553 n.24.

50. *Id.* at 554.

51. *Id.* at 555.

52. See Brief for Respondent at 20-38, *Rice* (No. 98-818). Hawaii's argument rests on the notion that the state's aboriginal peoples resemble Indian tribes in certain respects: they share a similar history of displacement and discrimination. Numerous federal statutes include Native Hawaiians in statutes designed for the benefit of Indians, see, e.g., 15 U.S.C. § 637(a) (1994); National Historic Preservation Act, 16 U.S.C. §§ 470-470(x) (1994); National Museum of the American Indian Act, 20 U.S.C. §§ 80q(1)-(15) (1994); 20 U.S.C. § 1106(b) (1994); Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (1994); Native American Languages Act, 25 U.S.C. §§ 2901-2906x; 38 U.S.C. §§ 3761-3764 (1994); 42 U.S.C. §§ 11701(2) & (19) (1994) (extending to Native Hawaiians "the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities"); Native American Programs Act of 1974, 42 U.S.C. §§ 2991-92 (1994); American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (1994); Indian Health Care Amend-

The Supreme Court in *Rice* expressed skepticism as to whether Congress may treat native Hawaiians as it treats Indian tribes and whether it may delegate to Hawaii the authority to act in accordance with that status.⁵³ The concurring justices rejected the analogy outright,⁵⁴ but the *Rice* majority opted ultimately to take no position on the question, concluding that even if the analogy was sound, it would not save "a voting scheme of this sort."⁵⁵ While acknowledging that Congress may permissibly adopt legislation to further the needs of Indian tribes, and that such legislation is not viewed as race-based, the Court highlighted the OHA's status as a state agency employing public officials, and disavowed the notion "that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens."⁵⁶ Justice Kennedy concluded that "[t]he elections for OHA trustee are elections of the State, not of a separate quasi-sovereign, and they are elections to which the Fifteenth Amendment applies."⁵⁷

Justice Breyer's concurring opinion chastises the majority for "decid[ing] this case on the basis of so vague a concept as 'quasi-sovereign.'" ⁵⁸ He might have also charged that the majority's analysis

ments of 1988, Pub. L. No. 100-713, 102 Stat. 4784, and other statutes that benefit Native Hawaiians invoke an analogy between them and Indian tribes, relying on the federal government's trust relationship toward aboriginal peoples as a justification. For example, when enacting the HHCA, Congress cited previous enactments granting Indians special privileges in using public lands. See H.R. REP. NO. 66-839, at 11 (1920). The Secretary of the Interior supported the legislation describing Native Hawaiians as "our wards . . . for whom in a sense we are trustees." *Id.* at 4.

In *Rice*, the lower federal courts both found the proffered analogy between Hawaii's native peoples and Indians probative, although not entirely convincing. The district court concluded that the Native Hawaiians enjoyed a "unique status" derived from trust obligations owed by Congress and Hawaii toward them, and that the OHA's voting restriction was not race-based. See *Rice v. Cayetano*, 963 F. Supp. 1547, 1551-55 (D. Haw. 1997). The appellate court, which viewed the restriction as race-based, found the comparison between Native Hawaiians and Indian tribes sufficiently powerful to provide the requisite compelling interest needed to save the restriction under the application of strict scrutiny. See *Rice v. Cayetano*, 146 F. 3d 1075, 1082 (9th Cir. 1998).

53. *Rice*, 120 S. Ct. at 1057-59.

54. Justice Breyer argued that even if Native Hawaiians resembled an Indian tribe, the OHA electorate and its programs extend to Hawaiians more generally, a group that includes individuals who may be less than one five-hundredth aboriginal Hawaiian. This, he argued, creates a "vast and unknowable body of potential members . . . [that] goes well beyond any reasonable limit." *Id.* at 1062 (Breyer, J., concurring). Acknowledging that tribes have considerable discretion to define their membership, he emphasized that the OHA's classification was drawn by the State, not a federally recognized tribe. See *id.* But see *id.* at 1066 n.11 (Stevens, J., dissenting).

55. *Id.* at 1058.

56. *Id.*

57. *Id.* at 1059.

58. *Id.* at 1061.

seems doctrinally confused. Insofar as aboriginal Hawaiians may fairly be analogized to Indian tribes, they should be viewed as a distinct political or legal group, as opposed to a racial one. This difference underlies the deferential review applied in cases like *Mancari* and is the reason Hawaii invoked the tribal comparison in the first instance. The Court's conclusion that the OHA's voting restriction violates the Fifteenth Amendment, however, necessarily rests on the view that Hawaii has restricted the OHA's electorate based on race. Thus, on this reading, *Rice* is simply incoherent. Either Hawaii's indigenous people enjoy a distinct political or legal status akin to that accorded to an Indian tribe, or they constitute a racial group such that the strictures of the Fifteenth Amendment apply to the OHA's voting regime. The Court in *Rice*, however, seems to be adhering to both propositions.

The Court certainly viewed the OHA's voting regime as bestowing a benefit distinct from the types of benefits provided to tribal members under a host of other federal programs, including the job preferences at issue in *Mancari*. Justice Kennedy explained that extending *Mancari* to approve the OHA's electoral regime would allow Hawaii "to fence out whole classes of its citizens from decisionmaking in critical state affairs."⁵⁹ Indeed, the Court appears to have understood the OHA's voting regime to implicate a fundamental constitutional right, namely the right to vote, while it saw *Mancari* as involving no correspondingly fundamental right to the benefits at issue there. As a result, the Court could simply have concluded under the Fourteenth Amendment that, *Mancari* notwithstanding, it must apply strict judicial scrutiny to the State of Hawaii's attempt to deny non-native Hawaiians the fundamental right to vote, and further that the restriction failed under such analysis.⁶⁰

The *Rice* Court, however, proceeded to hold that the OHA's restriction violates the Fifteenth, not the Fourteenth, Amendment, which necessarily implies that the restriction not only denies the right to vote, but also does so based on race. Justice Kennedy wrote that the voting restriction, "is neither subtle nor indirect" and specifically "grant[s] the vote to persons of defined ancestry and to no others."⁶¹ Noting that "[a]ncestry can be a proxy for race,"⁶² Justice Kennedy concluded that Hawaii, in enacting the voting restriction, "has used

59. *Id.* at 1059.

60. See, e.g., *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969) (applying strict scrutiny to a classification affecting the fundamental right to vote); see also *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966); Richard H. Pildes, *Diffusion of Political Power and the Voting Rights Act*, 24 HARV. J. L. & PUB. POL'Y 119 (2000).

61. *Rice*, 120 S. Ct. at 1055.

62. *Id.*

ancestry as a racial definition and for a racial purpose”⁶³ — an act that “implicates the same grave concerns as a classification specifying a particular race by name.”⁶⁴ The restriction, in short, constitutes a forbidden “race-based voting qualification.”⁶⁵

Rice thus oddly accepts the Indian analogy but nevertheless insists that the OHA’s electoral restriction rests on a racial classification. It holds that aboriginal Hawaiians may well enjoy a special legal or political status when receiving employment preferences or other benefits, such that Harold Rice and others cannot complain of a denial of these benefits based on race. But once Hawaii’s native people compose an exclusive electorate for a state agency like the OHA, they are transformed (at least for purposes of judicial review) into a racial group such that Mr. Rice’s exclusion from the OHA’s electorate now violates the Fifteenth Amendment.

The decision accordingly conceives of race not as an immutable physical characteristic,⁶⁶ but instead as a legal conclusion reached when the State organizes a group for some activities, but not others.⁶⁷ The distribution of employment benefits does not suffice to render a group racial, but the definition of a state agency’s constituency does. *Rice* appears to be based on the idea that race is contingent on political and social circumstances. While many scholars conceive of race as a position within a broad social network,⁶⁸ *Rice* implies that the con-

63. *Id.* at 1056.

64. *Id.* at 1057. The concurring justices agreed. *See id.* at 1062 (Breyer, J., concurring) (describing OHA electoral restriction as “a race-based voting definition”). *But see id.* at 1068-69 (Stevens, J., dissenting) (“The ability to trace one’s ancestry to a particular progenitor at a single distant point in time may convey no information about one’s own apparent or acknowledged race today. Neither does it of necessity imply one’s own identification with a particular race, or the exclusion of any others ‘on account of race.’”).

65. *Id.* at 1057.

66. *See, e.g.,* KWAME ANTHONY APPIAH, IN MY FATHER’S HOUSE 43-73 (1992); F. JAMES DAVIS, WHO IS BLACK? 1-16 (1991); JOE R. FEAGIN & CLAIRECE BOOHER FEAGEN, RACIAL AND ETHNIC RELATIONS 6-9 (5th ed. 1996); MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES (2d ed. 1994); *see also* Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 (1998).

67. In this sense, *Rice* comports with the view that law shapes the process of racial construction. *See generally* Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1 (1991); Ian F. Haney-López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993); Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161 (1997); Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263 (1995).

68. *See* OMI & WINANT, *supra* note 66, at 54 (“Race is a concept which signifies and symbolizes social conflicts and interests by referring to different types of human bodies.”); Sally Haslanger, *Gender and Race: (What) Are They? (What) Do We Want Them To Be?*, 34 NOUS 31, 44 (2000) (noting that a race is a group “demarcated by the geographical associations accompanying perceived body type, when those associations take on evaluative signifi-

cept of race is conjured up only selectively and depends on the purpose for which the group has been aggregated. Geographic origin, common ancestry, and social status play a role, but it is the activity in which the group is engaged that dictates whether, for the purpose of legal analysis, it is a racial group.⁶⁹

While *Rice* thus appears to subscribe to the idea that race is a malleable concept, it does not explain why the OHA's electoral process gives rise to a finding of race-based decisionmaking. Put differently, it fails to explain why the OHA's electoral process transforms a nonsuspect classification into a prohibited racial one.

B. *Race as Transformative: The OHA as a Special-Purpose District*

The Supreme Court has held that jurisdictions may limit the electorate for so-called "special-purpose" districts to those deemed most affected by district governance. It has reasoned that such districts do not exercise general governmental powers and thus, their restrictive voting regimes should be understood to implicate neither the fundamental right to vote nor the one-person, one-vote requirement of the Fourteenth Amendment. The Court, accordingly, does not subject such restrictions to strict judicial scrutiny and instead reviews them most deferentially.⁷⁰ For example, in *Salyer Land Company v. Tulare Lake Basin Water Storage District*,⁷¹ the Court upheld a California law

cance concerning how members of the group should be viewed and treated . . . [Race] is not an absolute fact, but will depend on context"; see also DON HERZOG, POISONING THE MINDS OF THE LOWER ORDERS 283-99 (1998) (discussing different conceptions of race); JACQUELINE STEVENS, REPRODUCING THE STATE (1999); Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231 (1994); Haney-López, *supra* note 67, at 1-5.

69. Cf. Gross, *supra* note 66, at 112-13, 163-64 (noting how litigants in the antebellum South could prove "whiteness" by reporting having engaged in acts of citizenship such as voting).

70. See, e.g., *Ball v. James*, 451 U.S. 355 (1981); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973); see also *Associated Enter. v. Toltec Watershed Improvement Dist.*, 410 U.S. 743 (1973); *Hadley v. Junior Coll. Dist.*, 397 U.S. 50, 56 (1970) (noting "that there might be some case in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with *Reynolds v. Sims* might not be required"); *Avery v. Midland County*, 390 U.S. 474, 483-84 (1968).

For academic critiques of the Court's approach to special-purpose districts, see SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY* 66-67 (1998); Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339 (1993); William A. Garton, *One Person, One Vote in Special District Elections: Two Ideas and an Illustration*, 20 S.D. L. REV. 245 (1975); David L. Martin, *"One Person, One Vote" and California's Water Districts*, 8 NATURAL RESOURCES LAWYER 9 (1973); Frank Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443, 465-69 (1989); William H. Riker, *Democracy and Representation: A Reconciliation of Ball v. James and Reynolds v. Sims*, 1 SUP. CT. ECON. REV. 39 (1982); Glenn P. Smith, *Interest Exceptions to One-Resident, One-Vote: Better Results from the Voting Rights Act?*, 74 TEXAS L. REV. 1153 (1996).

71. 410 U.S. 719 (1973).

allowing only landowners to vote for the board of directors for a water storage district, and apportioning votes according to the value of land owned. Because the water district had "relatively limited authority,"⁷² providing only for water storage and distribution as opposed to the general public services ordinarily financed by a municipal body, and because its actions "disproportionately affect[ed] landowners,"⁷³ the State could "rationally conclude that [resident and nonresident landowners], to the exclusion of residents, should be charged with responsibility for [district] operation."⁷⁴

Likewise, in *Ball v. James*,⁷⁵ the Court upheld an Arizona law that limited the electorate for the directors of the Salt River Project Agricultural Improvement and Power District to landowners and apportioned voting power based on the number of acres owned. While acknowledging that the district exercised more extensive powers over a greater portion of the State's population than did the special district at issue in *Salyer*,⁷⁶ the Court concluded that the district's authority fell short of providing the "normal functions of government."⁷⁷ Characterizing the relationship between nonvoting residents and the district as "essentially that between consumers and a business enterprise from which they buy,"⁷⁸ the Court concluded that the State could rationally limit the vote to landowners and apportion it depending on acreage owned, "since that number reasonably reflects the relative risks they incurred as landowners and the distribution of the benefits and the burdens of the District's water operations."⁷⁹

The claim that nonvoting residents lacked a substantial interest in district policy was highly questionable in *Salyer* given the district's authority over flood control measures,⁸⁰ and it was simply implausible

72. *Salyer*, 410 U.S. at 728.

73. *Id.* at 729.

74. *Id.* at 731.

75. 451 U.S. 355 (1981).

76. *Ball*, 451 U.S. at 365 (noting that the Salt River District includes half the population of the State, has statutory power to generate and sell electric power, and delivers water for both agricultural and nonagricultural purposes).

77. *Id.* at 366 (emphasizing that the district "cannot impose ad valorem property taxes or sales taxes[,] . . . cannot enact laws governing the conduct of citizens, nor . . . administer such normal functions of government as the maintenance of streets, the operation of schools, or sanitation, health, or welfare services").

78. *Id.* at 370.

79. *Id.* at 371.

80. See *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 737-38 (1973) (Douglas, J., dissenting); see also *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 342 F. Supp. 144, 150 (E.D. Cal. 1972) (Browning, J., concurring in part and dissenting in part) (noting interest of lessees in water district policies); LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1668 (2d ed. 1988); Briffault, *supra* note 70, at 361-62, 370; Melvyn R. Durchslag, *Salyer, Ball, and Holt: Reappraising the Right to Vote in Terms of Political "Interest" and Vote Dilution*, 33 CASE W. RES. L. REV. 1, 19 (1982); James A.

in *Ball*, where the record demonstrated that landowner voting led to a steep rise in electric costs for nonvoting residents.⁸¹ Indeed, the direct financial stake such residents had in the policies of the Salt River District makes *Ball* seem indistinguishable from bond cases such as *Cipriano v. City of Houma*,⁸² where the Court held that all ratepayers, not just property holders, had a fundamental right to vote on city bond issues, given that municipal policy affected them as well.⁸³ So too, *Ball* seems to be at odds with *Kramer v. Union Free School District*,⁸⁴ where the Court held that the exclusion from school board elections of a childless resident who neither rented nor owned property in the district ignored his substantial interest in district affairs and thus denied him his fundamental right to vote.⁸⁵

Nevertheless, the Court has not questioned the validity of the special-purpose doctrine, and it constituted one basis upon which Hawaii sought to defend the OHA's voting regime against both Fourteenth and Fifteenth Amendment challenges. The OHA resembles a special-purpose district in that it has no authority to tax, enact laws, or control the provision of basic services to the general public; its mandate limits it to promoting programs that benefit "Hawaiians."⁸⁶ Still, with regard to its designated beneficiaries, the OHA has considerable authority. Functioning state-wide, it administers a broad range of programs including educational scholarships, business loans, housing assistance, and various cultural activities.⁸⁷ Its mandate seems to defy characterization of the agency as "essentially [a] business enterprise."⁸⁸ Additionally, the OHA receives funding not just from trust lands, but also from general appropriations, such that all taxpayers arguably have a particularized interest in OHA affairs.⁸⁹ The district court in *Rice*, however, held that these latter characteristics were insufficient to distinguish the OHA from the districts in *Salyer* and *Ball*,⁹⁰ and the ap-

Gardner, *Liberty, Community, and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893, 916 (1997).

81. *Ball*, 451 U.S. at 384 (White, J., dissenting); Briffault, *supra* note 70, at 367-68; *see also* JOEL GARREAU, *EDGE CITY: LIFE ON THE NEW FRONTIER* 183-208 (1991).

82. 395 U.S. 701 (1969).

83. *Id.* at 705; *cf.* *Phoenix v. Kolodziejcki*, 399 U.S. 204 (1970); ISSACHAROFF, *supra* note 70, at 67.

84. 395 U.S. 621 (1969).

85. *Id.* at 632; *see also* ISSACHAROFF, *supra* note 70, at 66-67.

86. *See Rice v. Cayetano*, 146 F.3d 1075, 1080 (9th Cir. 1998) (equating OHA elections to the elections for the special-purpose districts at issue in *Salyer* and *Ball*).

87. *See* 1998 OHA FISCAL ANN. REP. 38, *available at* <http://planet-hawaii.com/oha>.

88. *Ball v. James*, 451 U.S. 355, 368 (1981).

89. *Cf. Cipriano*, 395 U.S. at 705.

90. *Rice v. Cayetano*, 963 F. Supp. 1547, 1558 (D. Haw. 1997) (finding that the OHA court was "constrained by its overall purpose to work for the betterment of Hawaiians," and

pellate court similarly found the analogy compelling, albeit not dispositive.⁹¹

The Supreme Court in *Rice* chose not to resolve this issue. While questioning whether *Salyer* and *Ball* applied to “statewide elections for an agency with the powers and responsibilities of OHA,” the Court indicated that it “would not find those cases dispositive in any event.”⁹² The Court was emphatic that the exemption of special-purpose districts from the Fourteenth Amendment’s one person, one vote requirement does not excuse compliance with the Fifteenth Amendment, which “has independent meaning and force.”⁹³ In other words, even if the powers of the OHA could fairly qualify it as a special-purpose district, the Court must still independently scrutinize its electoral rules to determine whether they deny or abridge the right to vote on account of race.

To be sure, insofar as OHA’s electoral restriction comprises a racial classification, *Rice* looks starkly different from both *Salyer* and *Ball*. Whatever the merits of limiting the electorate in a special-purpose district to property owners,⁹⁴ a similar restriction permitting only one racial group to participate raises wholly distinct questions — questions that are particularly acute for a Court that views all racial classifications as suspect, regardless of whether they are enacted for invidious or ostensibly benign purposes.⁹⁵ That the Court would view the nature of the OHA’s electorate as the basis for distinguishing *Rice* from *Salyer* and *Ball* is thus unsurprising.⁹⁶

exercised sufficiently limited powers to qualify as a special-purpose district, such that the challenged electoral restriction need only be rationally related to a legitimate governmental purpose).

91. *Rice*, 146 F.3d at 1081 (noting that the election for OHA trustees was not “a general election for government officials performing government functions of the sort that has previously triggered Fifteenth Amendment analysis”).

92. *Rice v. Cayetano*, 120 S. Ct. 1044, 1059 (2000).

93. *Id.* at 1060.

94. For criticisms of the special-purpose district doctrine, see Briffault, *supra* note 70, at 370-84 (describing the criteria for defining special-purpose districts as analytically unsound); Michelman, *supra* note 70, at 465-69; Riker, *supra* note 70, at 39; Smith, *supra* note 70, at 1160.

95. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring) (“[G]overnment-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice.”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (“Unless they are strictly reserved for remedial settings, [racial classifications] may in fact promote notions of racial inferiority and lead to a politics of racial hostility.”).

Salyer, *Ball*, and *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978), did not involve allegations of intentional racial discrimination and thus to the extent the voting restrictions at issue had a racially disparate impact, they would not trigger strict scrutiny under the Constitution. See *Washington v. Davis*, 426 U.S. 229 (1976).

96. Cf. *Rice*, 146 F.3d at 1081 (“[T]he voter qualification at issue here — albeit clearly racial on its face — does not . . . deny non-Hawaiians the right to vote in any meaningful sense.”); see also *Quinn v. Millsap*, 491 U.S. 95, 106 (1989) (rejecting a broad interpretation

What is curious is the Court's suggestion that the OHA might constitute a special-purpose district, while also insisting that the Fifteenth Amendment provides the doctrinal basis for analyzing the OHA's electoral restriction. The Court has applied deferential rational basis review to electoral restrictions in special-purpose districts in past cases only because it has not viewed such restrictions to implicate a fundamental right to vote. If district residents indeed had such a fundamental right to participate in special-purpose elections, the Court would have insisted on the application of strict scrutiny.⁹⁷ *Rice*, then, paradoxically holds both that the OHA might properly be characterized as a special-purpose district and that it implicates the fundamental right to vote.

Of course, the Court's conclusion that the OHA's voting regime embraces an express racial classification alone would have been sufficient to trigger heightened scrutiny under the Fourteenth Amendment. Indeed, the appellate court applied heightened scrutiny because it concluded that Hawaii had used a suspect racial classification, not because it deemed the OHA regime to implicate the fundamental right to vote.⁹⁸ The Court, however, insisted that the OHA's voting restriction ran afoul of the Fifteenth Amendment, and thus necessarily held that the restriction involved not only a racial classification, but also the fundamental constitutional right to vote.⁹⁹

Why then did the Court simultaneously accept that the OHA might qualify as a special-purpose district and yet ground its analysis in the Fifteenth rather than Fourteenth Amendment? One possible explanation stems from the posture of the case itself. Whether the OHA itself may constitutionally disburse benefits only to Hawaiians and Native Hawaiians is a disputed question,¹⁰⁰ but not one that was

of *Salier* because it "would render the Equal Protection Clause inapplicable even to a requirement that all members of the [limited government] board be white males").

97. See, e.g., *Santosky v. Kramer*, 455 U.S. 746 (1982); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969); *Shapiro v. Thompson*, 394 U.S. 618 (1969); see also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

98. See *Rice*, 146 F.3d at 1081 (arguing that the OHA electoral restriction "does not deny non-Hawaiians the right to vote in any meaningful sense"); see also *id.* at 1082 (emphasizing the special trust relationship between Hawaii and its indigenous people, and finding that the voting restriction "ultimately responds to the state's compelling responsibility to honor the trust, and . . . is precisely tailored to the perceived value that a board 'chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles'").

99. *Rice v. Cayetano*, 120 S. Ct. 1044, 1030 (2000).

100. See generally Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537 (1996); Philip P. Frickey, *Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1756-67 (1997); Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95 (1998).

before the Court in *Rice*. The Court reviewed only the validity of OHA's electoral restriction, and, consequently, it "assume[d] the validity of the underlying administrative structure and trusts, without intimating any opinion on that point."¹⁰¹ That assumption, of course, made analysis of the voting restriction under the Fourteenth Amendment more complex given that the application of strict scrutiny would require the Court to assess whether the State had narrowly tailored the restriction to a compelling interest while assuming the constitutionality of the OHA itself.¹⁰²

The task, however, would have been far from insurmountable. An assumption that the OHA is constitutional would not have required the Court to conclude that the OHA's mission constitutes a compelling interest.¹⁰³ Even if such a conclusion had necessarily followed or was otherwise reached, the Court's rejection of *Mancari*'s application to the OHA's voting restriction suggests that it would have struck down the voting restriction on the question of fit. The OHA might well represent a legitimate state office, and indeed, one serving compelling state interests, but *Rice* itself suggests that the Court would not have viewed the OHA's voting restriction as narrowly tailored to the agency's mandate.¹⁰⁴

In light of these difficulties, the Court simply might have viewed the Fifteenth Amendment as a cleaner basis upon which to decide the case.¹⁰⁵ But if the Court was looking for simplicity, its refusal to dis-

101. *Rice*, 120 S. Ct. at 1059.

102. Such complexity is not novel. Compare *Shaw v. Hunt*, 517 U.S. 899, 915 (1996) (assuming that compliance with section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (1994), is a compelling state interest); *Bush v. Vera*, 517 U.S. 952, 977 (1996) (same); *Miller v. Johnson*, 515 U.S. 900, 920-21 (1995) (same), with *Bush*, 517 U.S. at 992 (O'Connor, J., concurring) (noting that section 2 should be assumed to be constitutional "unless and until current lower court precedent is reversed and it is held unconstitutional"); *Chisom v. Roemer*, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting) (questioning the constitutionality of section 2). Of course, the morass that is the Voting Rights Act in the wake of the *Shaw* decisions may well have given the Court pause in pursuing a similar analytical path in *Rice*. See Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505 (1997).

103. As noted above, insofar as Hawaii's native people are fairly characterized as Indians, the Court would regard them as a political, as opposed to racial, group and accordingly would evaluate the OHA's electoral regime under rational basis review. See *supra* Part II.A.

104. See *Rice*, 120 S. Ct. at 1058 ("It does not follow from *Mancari*, however, that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens."); *id.* at 1061 (asserting that all citizens have an interest in OHA affairs).

105. At oral argument, petitioner's counsel argued in favor of reliance on what he viewed as the greater simplicity of a decision based on the Fifteenth rather than the Fourteenth Amendment. In so arguing, however, he was referring to the Fourteenth Amendment's one person, one vote principle, and not its application to race-based classifications. While insisting that the restriction violated the one person, one vote principle, counsel stated, "I think it is much easier to say that [the voting restriction] denies the right to vote on account of race. This a racial determination, and the right to vote is being denied here." Ar-

qualify the OHA as a special-purpose district seems difficult to explain. Of course, the Court may genuinely have thought the OHA could constitute such a district, or it may have been concerned that any effort to distinguish the OHA from special-purpose districts would necessarily call prior decisions including *Ball v. James* into question.

Rice's concurrent refusal to disavow the special-purpose label for the OHA and its finding of a Fifteenth Amendment violation may, however, be better understood as an illustration of the transformative power of racial classifications. *Rice* holds that, while a special-purpose district that restricts the electorate to property owners does not implicate the fundamental right to vote, a similarly empowered district that classifies voters by race does implicate this right. The property owners who selected the board of directors for the Salt River District at issue in *Ball* were engaged in an administrative act, and thus those excluded from participation found their claims of entitlement subject to the most minimal judicial review. Hawaii's exclusion of Mr. Rice from participation in OHA elections violated the Constitution not because the OHA exercised powers distinct from those held by Salt River District, but because the use of a race-based classification transformed an administrative electoral system into a highly significant one implicating the fundamental right to vote. Under *Rice*, then, the constitutional right to vote hinges on definition of the electorate, not on the purpose of the election. As with its treatment of the Indian analogy, the *Rice* majority does not explain why the use of race causes this transformation in the agency's selection process.

C. *Race as Infectious: The OHA Electorate as Property Holders*

Related to its reliance on the special-purpose district precedent, the State also maintained that the OHA's voting regime passed constitutional muster because members of the agency's electorate shared a common property interest as the beneficiaries of OHA-administered trusts. The restriction, the State insisted, merely limited the franchise to the beneficiaries of the OHA's programs "on entirely race-neutral terms,"¹⁰⁶ and comported with established principles of trust law, which rest on the view that "people to whom assets belong should have control over them."¹⁰⁷ The State reasoned that "a board of trustees chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed

gument for Petitioner at 4, United States Supreme Court Official Transcript, *Rice* (No. 98-818).

106. Brief for Respondent at 18, *Rice* (No. 98-818).

107. STANDING COMM. REP. NO. 59 (1978), reprinted in 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 644 (1980).

fiduciary principles.”¹⁰⁸ The beneficiaries of OHA programs “would best protect their own rights,”¹⁰⁹ while allowing others, who were not trust beneficiaries, to vote might create a conflict of interest for the trustees.¹¹⁰

The Court cursorily rejected this argument. It first questioned whether the restriction was “symmetric with the beneficiaries of the programs OHA administers,” citing the fact that some benefits go only to Native Hawaiians even though all Hawaiians may vote in OHA elections.¹¹¹ Regardless, the Court stated, the restriction failed “on more essential grounds,” namely that “[t]here is no room under the [Fifteenth] Amendment for the concept that the right to vote in a particular election can be allocated based on race. Race cannot qualify some and disqualify others from full participation in our democracy.”¹¹²

Property ownership, of course, does not provide a legitimate basis upon which to restrict the electorate for general purpose elections,¹¹³ and while the Court was willing to entertain the suggestion that the OHA was a special-purpose district for which property-based electoral restrictions are permissible,¹¹⁴ its conclusion that Hawaii defined the OHA’s electorate in racial terms left it unmoved by this seemingly distinct, legitimate factor that also explained the restriction. Put differently, the Court’s quick dismissal of Hawaii’s property-based defense suggests that it viewed the State’s use of race in this context as corrupting an otherwise valid basis for state action. Even if a shared property interest existed among members of the OHA electorate, the Court could not ignore what it saw as the vitiating effect of the racial classification. In contrast to its approach to so-called mixed motive

108. *Id.*

109. *Id.* at 645.

110. Brief for Respondent at 18, *Rice* (No. 98-818).

111. *Rice v. Cayetano*, 120 S. Ct. 1044, 1060 (2000).

112. *Id.*

113. See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666 (1966) (invalidating state poll tax under Fourteenth Amendment because a State violates the Equal Protection Clause “whenever it makes affluence of a voter . . . an electoral standard”). From the colonial period through much of the nineteenth century, property ownership, race and sex were the defining characteristics of the electorate in most jurisdictions in the United States. See, e.g., CHILTON WILLIAMSON, *AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY, 1760-1860* (1960); Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335 (1989). Ownership of land or other significant assets was deemed a prerequisite to voting because it was thought to ensure the independent thought and free will of the franchise holder. See GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 269 (1991); Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1328-29 (1987); Steinfeld, *supra*.

114. See *supra* notes 74-79 and accompanying text.

cases under the Fourteenth Amendment,¹¹⁵ the Court in *Rice* held that, on the facts before it, the State's reliance on race ends the inquiry under the Fifteenth Amendment, regardless of the nature of otherwise legitimate factors that might also explain the State's action. Why the Court adopted such an absolutist view of franchise restrictions is, once again, left unexplained.

III. THE INTRINSIC VALUE OF VOTING AND THE IMPACT OF RACE

The complex path by which the Court reached its holding in *Rice* embodies a distinct conception of the value of political participation, the nature of racial classification, and the relationship between the two. This Part first discusses the intrinsic benefits voting offers. It then argues that the puzzling path the Court followed in *Rice* reflects a distinct understanding of voting's intrinsic values and the way in which racially-defined electoral rules affect those values.

A. *Intrinsic Values*

Political participation through voting offers a mechanism through which citizens shape and legitimize public policy and protect themselves from governmental action that undermines individual liberty.¹¹⁶ In addition to these instrumental values, the right to vote and its exercise yield two related intrinsic benefits. The first is the expressive value derived from inclusion in the political community. This reflects an understanding of the vote as "an affirmation of belonging" that signals the jurisdiction's acceptance of the voter as a full citizen within the polity.¹¹⁷ Denial of the vote is tantamount to exclusion from the

115. See, e.g., *Mount Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). Had the Court in *Rice* grounded its analysis under the Fourteenth Amendment, it might well have deemed the difficult line-drawing process required in mixed-motive cases unnecessary given the apparent identity and causal connection between the race and property-based classifications. See also *infra* Part III.B.

116. See, e.g., C.B. MACPHERSON, *THE LIFE AND TIMES OF LIBERAL DEMOCRACY* 23-43 (1977); Michelman, *supra* note 70, at 451.

117. See KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 93 (1989) ("Voting . . . is an assertion of belonging to a political community."); JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 26 (1991); *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990*, at 15-16 (Chandler Davidson & Bernard Grofman eds., 1994) (noting that the right to vote "confer[s] full citizenship on the members of the group"); Gardner, *supra* note 80, at 906 ("To seek the vote is to seek formal recognition as a full member of society; to be denied the vote is to be either excluded altogether from membership in the community or consigned to some kind of second-class citizenship."); Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 237 (1989) (discussing the symbolic value of civic inclusion); Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1, 5 (1991) (noting that voting "announces that the voter is a full member of the political community"); see also HERZOG, *supra* note 68, at 29-33 (discussing gradations of citizenship).

community or relegation to second-class citizenship, with the message of exclusion being the primary harm produced.¹¹⁸

Related to, but ultimately distinct from,¹¹⁹ the view that an expressive benefit arises from inclusion in the polity lies the belief that a process of self-identification occurs as a result of one's participation in the political process through actual exercise of the franchise. Under this view, the denial of the vote does more than send a harmful message of exclusion; it denies the individual the constitutive benefit that active participation yields. Political engagement of this sort "is valued as a process of formation or field of exertion of self or community . . . [through which] persons or communities (or both, reciprocally) forge identities, and persons assume freedom in the 'positive' sense of social and moral agency."¹²⁰ By calling on individuals to deliberate on issues of public importance, voting becomes a vehicle for self-development and identification,¹²¹ and a means for creating alliances and thus a community among individuals so engaged.¹²²

For a discussion of the expressive benefit derived from the post-Civil War enfranchisement of African-American men and the expressive harm generated by post-Reconstruction disenfranchisement, see LEON F. LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* 531-556 (1979), and GLENDA ELIZABETH GILMORE, *GENDER AND JIM CROW* 123-24 (1996). For a discussion regarding the expressive benefits associated with the Nineteenth Amendment, see Reva B. Siegal, *Collective Memory and the Nineteenth Amendment: Reasoning About "the Woman Question" in the Discourse of Sex Discrimination*, in *HISTORY, MEMORY, AND THE LAW* (Austin, Sarat & Thomas R. Kearns eds., 1999).

118. See Gardner, *supra* note 80, at 906; see also Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000) (discussing expressive harms); 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) (same).

119. While closely related, voting's expressive and constitutive values offer distinct benefits. *But see* Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 364 (1993) (arguing that voting's constitutive value is a component of its expressive value). The expressive value rests on the message the electoral system is understood to disseminate, and accordingly represents something bestowed on the political community. *Cf.* SHKLAR, *supra* note 115, at 3 (voting is not "an aspiration to civic participation as a deeply involving activity"); Gardner, *supra* note 80, at 905-06 ("Voting, then, is something to be had rather than something to be done."). The constitutive benefit, by contrast, is something voters acquire for themselves through active engagement in the political process. The jurisdiction inevitably shapes the constitutive process through the electoral rules and structures adopted, but ultimately it is the voters who do the work required in order to derive constitutive benefits. The constitutive benefit thus may be seen to be more tangible than the expressive value that inheres in the vote.

Temporally, the relationship between voting's expressive and constitutive benefits is not fixed. An electoral system may give rise to an expressive benefit from which the constitutive benefit follows, or alternatively may create a constitutive process from which the expressive value derivatively follows. The latter relationship best explains the puzzling doctrinal route taken by the Court in *Rice*. See *infra* Part III.B.

120. Michelman, *supra* note 70, at 451.

121. See HANNAH ARENDT, *BETWEEN PAST AND FUTURE* 143-96 (1968); HANNAH ARENDT, *ON REVOLUTION* 251-81 (1963); John Stuart Mill, *Considerations on Representative Government*, in *ON LIBERTY AND OTHER ESSAYS*, 205, 303-24 (Gray, ed., Oxford University Press, 1991); Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal*

This understanding of voting's intrinsic value sees political participation as not simply the casting of a ballot, but instead the process by which individuals constitute themselves as citizens. It requires active individual engagement with the expectation that people will realize the constitutive benefit for themselves through the act of participation.¹²³ So understood, voting's constitutive value requires a process akin to that advocated by proponents of so-called "deliberative democracy," who argue that principled and open-minded debate among diverse people should be the defining characteristic of a democratic polity.¹²⁴ Like deliberative democracy, the constitutive understanding of the vote envisions active participation among persons of equal dignity and autonomy, but places less emphasis on legitimated outcomes than on the direct impact participation has on the individual.¹²⁵

B. *Rice, Race, and the Intrinsic Values of the Vote*

While *Rice* alludes to voting as a process designed to achieve designated outcomes,¹²⁶ the decision is best explained by a conception of

Theory and the Moral Foundation of Deliberative Democracy, 82 CAL. L. REV. 329 (1994); see also MACPHERSON, *supra* note 116, at 47-48, 50-52.

122. See, e.g., ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 520-24 (J.P. Mayer ed., 1969); BENJAMIN R. BARBER, *STRONG DEMOCRACY* 133 (1984) ("[S]trong democratic theory understands the creation of community as one of the chief tasks of political activity in the participatory mode."); Kathryn Abrams, "Raising Politics Up": *Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449, 477 (1988) ("By acting together in the political sphere, a group of apparently disparate individuals may come to appreciate the strength of their common interests, and those already so connected may recognize the power that comes from concerted effort." (footnotes omitted)).

123. See MACPHERSON, *supra* note 116, at 60 (noting that "developmental democracy" seeks "not to impose a utopia on the people but to have the people reach the goal themselves, improving themselves by participating actively in the political process, every installment [sic] of participation leading to an improvement in their political capacity, as well as their all-round development, and making them capable of more participation and more self-development").

124. See, e.g., Michelman, *supra* note 70, at 447-48 (arguing that participation contributes to a deliberative process, through which competing arguments are developed and reasonable answers to questions of public ordering are produced); see also CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993); David M. Estlund, *Who's Afraid of Deliberative Democracy? On the Strategic/Deliberative Dichotomy in Recent Constitutional Jurisprudence*, 71 TEXAS L. REV. 1437 (1993); Galston, *supra* note 121, at 345-50; Amy Gutmann, *The Disharmony of Democracy*, in *DEMOCRATIC COMMUNITY: NOMOS XXXV*, at 126 (John W. Chapman & Ian Shapiro eds., 1993); Frank I. Michelman, *Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).

125. See Galston, *supra* note 121, at 350; Gutmann, *supra* note 124, at 141; see also ARENDT, *ON REVOLUTION*, *supra* note 121, at 234-47.

126. See *Rice v. Cayetano*, 120 S. Ct. 1044, 1054 (2000) (noting that the Fifteenth Amendment was meant to guarantee former slaves the vote "lest they be denied the civil and political capacity to protect their new freedom"); *id.* at 1057 ("The ancestral inquiry mandated by the State is forbidden by the Fifteenth Amendment for the further reason that the use of racial classifications is corruptive of the whole legal order democratic elections seek to preserve.").

voting's intrinsic values. The Court, in reaching its holding, demonstrates its view that voting has both expressive and constitutive effects and that the use of racially-motivated electoral rules undermines those effects.

The Court communicates its understanding of voting's expressive effect through its conviction that even ostensibly benign racial classifications have a destructive effect on both the individuals who are so classified and those who are left out. Justice Kennedy writes for the Court:

One of the principal reasons race is treated as a forbidden classification [under the Fifteenth Amendment] is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. An inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens.¹²⁷

Akin to the expressive harm underlying the Equal Protection Clause violation at issue in the *Shaw* cases,¹²⁸ the injury conceived of here rests on the view that the Constitution prohibits a race-based denial of the vote because that denial disseminates the impermissible message that race constitutes a relevant criterion upon which to define the political community.¹²⁹ This message itself becomes the harm the Fifteenth Amendment apparently prohibits, and the harm the Court concludes that Mr. Rice suffered as a result of the OHA's voting regime. Justice Kennedy thus writes: "The design of the [Fifteenth] Amendment is to reaffirm the equality of races at the most basic level of the

127. *Id.* at 1057. Justice Kennedy is, of course, overstating the point. While he identifies within the Constitution the broad notion of equality based on an obligation to engage in personal identification, *cf.* Bernard A.O. Williams, *The Idea of Equality*, in JUSTICE AND EQUALITY 127 (Hugo A. Bedau ed., 1971) (discussing the duty of individual identification), the Court has long recognized that jurisdictions may define their electorates and otherwise classify individuals according to a variety of criteria that wholly ignore an individual's "own merit and essential qualities," and his or her "unique personality." *See, e.g.,* Dunn v. Blumstein, 405 U.S. 330 (1972) (residency duration); Carrington v. Rash, 380 U.S. 89 (1965) (residency requirement). More precisely, then, Justice Kennedy is identifying race as a prohibited basis upon which to define the political community. This comports with the Court's approach in prior cases suggesting that the Constitution constrains the criteria upon which a jurisdiction may define the political community without imposing its own affirmative vision of that community. *See, e.g.,* Carrington, 380 U.S. at 92; Gray v. Sanders, 372 U.S. 368, 380 (1963) ("[T]here is no indication in the Constitution that . . . occupation affords a permissible basis for distinguishing between qualified voters within the State.").

128. *See* Bush v. Vera, 517 U.S. 952 (1996); Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993); *see also* Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000); Anderson & Pildes, *supra* note 118, at 1503; Pildes & Niemi, *supra* note 118.

129. Expressive harms are not limited to cases involving race-based classifications; indeed, they have been prominent in Establishment Clause jurisprudence. *See, e.g.,* Anderson & Pildes, *supra* note 118, at 1545-51.

democratic process, the exercise of the voting franchise.”¹³⁰ The OHA’s voting regime conflicts with that affirmation, the Court reasoned, because it “rests, in the end, on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters.”¹³¹

And yet, the Court’s conviction that Mr. Rice suffered an expressive harm as a result of his exclusion from OHA elections fails to explain fully the particular path that Court followed in reaching its holding that the State violated the Fifteenth Amendment. While *Rice* understands a race-based electoral system to give rise to an expressive harm, this harm does not account for why *Rice* suggests that a shared, nonsuspect group characteristic, such as that shared by members of an Indian tribe, evolves into a forbidden racial one when the State relies on it to structure an electoral system. In other words, the expressive harm does not explain how the OHA’s electorate became racial in the first instance. So too, *Rice* suggests that an expressive harm results when a jurisdiction defines the electorate for a special-purpose district in racial terms, but, again, that harm does not account for why an election in such a district evolves into one involving the constitutionally protected right to vote, when the State delimits the franchise by race. That is, the expressive harm does not explain how OHA elections came to implicate the right to vote and the Fifteenth Amendment. Finally, while the expressive harm informs the question, it does not fully account for why *Rice* declared an otherwise legitimate definition of a particular electorate to be illegitimate when coincident with race as the basis for the definition.¹³²

Voting’s constitutive effect provides the missing explanation. Indeed, Hawaii intended that participation in OHA elections would promote a constitutive value. The State limited the electorate for OHA trustees to Hawaiians not solely because they comprise the

130. *Rice*, 120 S. Ct. at 1054.

131. *Id.* at 1060; see also Pildes, *supra* note 60, at 121 (describing the perspective that the self-conscious use of race-based districting “expresses a view of political identity inconsistent with democratic ideals”).

While not confronted with the question, the Court’s language suggests that, in addition to Mr. Rice, those included within the OHA’s electorate could also have challenged the voting restriction under the Fifteenth Amendment given the nature of the expressive harm identified. This is not to say that an expressive harm causes a tangible individuated injury akin to those traditionally recognized at common law, but rather that the harm caused by the government’s impermissible message regarding its conception of community causes a harm not confined to members of one race. See Richard H. Pildes, *Why Rights Are Not Trumps: Social Meaning, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 756-60 (1998); Note, *Expressive Harms and Standing*, 112 HARV. L. REV. 1313, 1328 (1999) (suggesting that excessive reliance on race in redistricting “belittles members of both races; rather than sending a message of inferiority to one group, it presents an unacceptable vision of society”).

132. See *supra* Part II.

beneficiaries of the OHA trust property,¹³³ but also for its avowed purpose to “unite Hawaiians as a people.”¹³⁴ The restriction was meant to provide Hawaiians, “a great and proud people, the opportunity and the means” to determine the conditions for their own “betterment” and to promote self-determination and self-government among them.¹³⁵ Thus, the State’s purpose was not simply to ensure that the OHA pursued policies beneficial to Hawaiian interests, or to send a message of privileged inclusion in the polity, but to provide, through a process of exclusive political participation, a mechanism through which Hawaiians themselves could forge a united community and celebrate their heritage.

The State’s error, the Court’s holding in *Rice* implies, lay not in its understanding of the vote as having constitutive value, but in its attempt to use what the Court deemed to be race-based classification as the mechanism through which voters would realize this value. In other words, *Rice* holds that the Constitution itself limits the type of identity-forming processes one may experience through the exercise of the franchise. Thus, a jurisdiction’s use of race to define an electorate not only disseminates the constitutionally impermissible message that race can legitimately define the political community, but, under the constitutive understanding implicit in *Rice*, it actually undermines the process through which an individual develops an identity through voting. Instead of providing a forum through which the voter voluntarily forges alliances with others, a jurisdiction that relies on race to define the polity is seen to shape impermissibly the alliances to be formed by imposing the State’s own notion of what constitutes the relevant community.¹³⁶ The Court thus sees the OHA’s electoral rule to effect an artificial and impermissible replacement of the process of dialogic self-identification with a ready-made, state-approved, race-based identity.

This understanding both that the vote has a constitutive effect and that a racially defined electorate distorts that effect best explains why the Court selected the path that it did in reaching its holding in *Rice*. The expressive harm *Rice* discusses follows derivatively from the defect *Rice* identifies in the constitutive process.

133. For a discussion, see *supra* note 40 and accompanying text.

134. COMMITTEE OF THE WHOLE REP. NO. 13 (1978), *reprinted in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 1018 (1980).

135. *Id.*

136. Cf. MACPHERSON, *supra* note 116, at 60; Pildes, *supra* note 60, at 121-22. For a discussion of how state programs and political parties affect individual and class organization and identification, see PRADEEP K. CHHIBBER, *DEMOCRACY WITHOUT ASSOCIATIONS* (1999).

1. *The Indian Analogy*

Consider first *Rice*'s suggestion that a nonracial group becomes racial in the legal sense when it exercises the franchise. The Court's acceptance of the analogy between the OHA's electorate and an Indian tribe presumably means that, under *Mancari*, the Justices would deem a program providing aboriginal Hawaiians employment preferences or other benefits not to be race-based, and instead reflective of their special political status.¹³⁷ Insofar as Hawaii chooses to grant specified employment preferences to the descendants of the inhabitants of the Hawaiian Islands in 1778, the Court seems willing to accept that the State would not be disbursing benefits based on a racial classification. *Rice*, however, deems Hawaii's decision to grant the very same group of people the exclusive franchise in OHA elections to rest on a race-based and therefore forbidden classification.

The malleability of the Court's interpretation of racial classification suggests that race, in this context, is best understood as a legal conclusion that rests not only on the findings of common ancestry and a shared social status,¹³⁸ but also on the nature of the activity for which the State has assembled the group. The State may permissibly bring a group of people together for one activity, but the State engages in illegitimate race-based decisionmaking when it brings together the very same group of people for another activity.¹³⁹

Voting, viewed as a constitutive rather than administrative act, adds the crucial element to an association of individuals and allows for the Court's conclusion that the State has brought these individuals together on the basis of race. For example, Hawaii maintained that it restricted the vote in OHA elections to people of common ancestry in order to "unite Hawaiians as a people."¹⁴⁰ Thus, it meant to provide a means by which Hawaiians could forge a common identity as individuals and as a community in accordance with this shared ancestry. The State created the electorate for the specific purpose of setting this group off from others in society. Put differently, Hawaii sought to provide this group with a state-sponsored identity, on the basis of which

137. See *supra* Part II.A. *Rice*, of course, carefully avoided resolving the question of the constitutionality of the OHA itself. *Rice v. Cayetano*, 120 S. Ct. 1044, 1059 (2000) (noting that the question was not before the Court). The assumptions the Court was willing to accept for purposes of this dispute, namely its acceptance of the Indian analogy, in no way binds the Court to that analogy should Mr. *Rice* or another litigant now challenge the OHA itself.

138. See *supra* note 68.

139. See *supra* note 67 and accompanying text.

140. COMMITTEE OF THE WHOLE REP. NO. 13 (1978), reprinted in 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 1018 (1980).

the group would enjoy what the State understood as the constitutive benefit of the vote.¹⁴¹

To the Court in *Rice*, this project appeared invidious. Instead of providing a forum in which members of a pre-existing community linked by numerous characteristics can participate, forge alliances, and develop as individuals and citizens, the OHA's voting regime, in *Rice*'s view, treats the shared trait of common ancestry as the defining criterion for community membership and the basis upon which alliances and individual identities should be formed. The regime thus understood brings people together who otherwise might not have joined forces and instructs them to "unite." The result, *Rice* concludes, renders OHA voters "racial" for purposes of the Fifteenth Amendment because it distorts the constitutive value that inheres in the vote. In other words, the State may not aggregate this group of people for this purpose.

The expressive harm *Rice* identifies the OHA regime to create¹⁴² follows derivatively from this perceived distortion of the constitutive process. Under *Rice*, the use of the vote in OHA elections as a vehicle for identity creation renders Hawaii's native people "racial" for purposes of the Fifteenth Amendment. The identity of its electorate thus transformed, the OHA regime is now seen to disseminate the impermissible message that race comprises a relevant criterion upon which to define the political community, thus giving rise to the expressive harm identified.

Rice's treatment of the Indian analogy reflects the view that the employment preferences at issues in *Mancari* gave rise to neither a constitutive nor expressive harm. Whatever the effect that follows from awarding members of Indian tribes employment preferences, the Court does not apparently think it to implicate the same issues of community and identity as does the OHA's voting regime, and thus

141. The holding in *Rice*, however, did not turn on Hawaii's specific goal in creating the OHA's electoral regime. The outcome would no doubt have been the same had the State acted with the admittedly implausible purpose of fostering cleavages among native Hawaiians. Under this hypothetical, the State posits that native Hawaiians would act as a bloc in a diverse electorate, but disagree among themselves in an exclusive one. The State argues that it created the OHA's electoral regime precisely to foster such division in the hope that it would diminish the role race (or what the Court perceives to be race) plays in defining political identity.

Regardless, however, of whether the *Rice* Court would applaud the goal of reducing race-based political identifications (and leaving aside the question whether the State's imagined argument represents a plausible mechanism for doing so), the *Rice* Court certainly would repudiate the method selected, namely the use of what it deems to be an express race-based classification to define an electorate. Yet, this deep and seeming categorical mistrust of race-based decisionmaking of any kind, *see supra* note 12, ignores and indeed exacerbates the numerous more subtle ways facially race-neutral state policy may shape racially-informed political identities and distort the constitutive values inhering in the vote. *See infra* text accompanying note 180.

142. *See supra* note 127 and accompanying text.

tribal members do not qualify as racial for that purpose.¹⁴³ *Rice* accordingly suggests that employment, for all its centrality, does not have the same constitutive effect on the individual that the vote provides.¹⁴⁴ Lacking this effect, moreover, *Mancari*'s employment program cannot render its beneficiaries racial and accordingly is not seen to disseminate an impermissible message regarding racially defined membership in the polity. As such, no expressive harm is understood to follow.¹⁴⁵

2. *The Special-Purpose District Analogy*

Rice indicates that the State's use of a racial classification transformed OHA elections from ones that might otherwise have fallen under the Court's special-purpose precedent into ones implicating the fundamental right to vote.¹⁴⁶ One explanation for the deferential review the Court applies to special-purpose districts suggests that these districts do not provide venues in which citizens can forge political identities because the districts exercise such circumscribed governmental authority.¹⁴⁷ *Rice* suggests, however, that when a jurisdiction

143. For a discussion of the way in which American law has implicitly recognized that one may acquire a racial identity through the exercise of the vote and through other acts of citizenship such as jury service, see Gross, *supra* note 66, at 112-13, 163-64.

144. The employment program in *Mancari* purported to advance constitutive goals in terms of encouraging self-governance among the beneficiaries. See *Morton v. Mancari*, 417 U.S. 535 (1974). *Rice*, however, suggests that political participation through voting is distinct in terms of its constitutive benefit, regardless of the intent of those framing benefit programs. See *Rice v. Cayetano*, 120 S. Ct. 1044, 1058 (2000) (noting that *Mancari* does not apply to "a voting scheme of this sort"); see also *infra* text accompanying note 180. This distinction between voting and employment may well be counterfactual. See Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 3-4 (2000).

145. Notwithstanding, *Rice* cannot fairly be read to provide support for affirmative action in employment, education, and other benefit programs. To be sure, the Court's treatment of the Indian analogy suggests that Hawaii went wrong by employing a regime focused on the definitional level of the polity, and that a more circumscribed effort to distribute public benefits to its indigenous population might have survived. But see *supra* text accompanying notes 100-101 (noting the validity of OHA programs was not before the Court). That suggestion, however, most likely reflects the Court's inability to place Hawaii's native people neatly into the racial classifications that generally arise on the mainland. The Court's equation of Hawaii's reliance on ancestry with a racial classification and the expressive harm it perceives to follow, see *supra* note 127 and accompanying text, suggests little receptivity on the part of the *Rice* majority to programs designed to benefit groups the Court has historically considered to be racial.

146. See *supra* Part II.B.

147. Michelman, *supra* note 70, at 469 ("[T]he Salt River District and its ilk . . . might easily have been perceived as *fora non conveniens* for the realization of the self-constitutive values of citizenship Perhaps the majority Justices [in *Ball*] doubted . . . that the Salt River District, given its history and the accompanying understandings about its place in the lives of the people, defined or constituted [a political community]."); see also Briffault, *supra* note 70, at 363-64 ("[T]here was no community to speak of in the Tulare Lake Basin district [The sparse population established] not an absence of governmental power for the

employs a racial classification to define the electorate of such a district, it elevates the act of participation from an administrative act subject only to rational basis review to the exercise of a fundamental right to vote protected by the Fifteenth Amendment. Hence, the use of the racial classification changes the nature of the participatory act. What previously might have been perceived of as a process ill-suited to the formation of the "self-constitutive values of citizenship"¹⁴⁸ now becomes a forum self-consciously designed and understood to promote a very specific type of self and community identity.

A constitutive understanding of the vote thus offers an explanation for *Rice's* concurrent acceptance of the special-purpose district analogy and its identification of a Fifteenth Amendment violation. Even if the OHA's power and authority are factually indistinguishable from those exercised by the Salt River District, Hawaii's decision to use a racial classification to define the OHA electorate transforms a regime that otherwise would not involve a constitutionally protected right into one that does. Precisely because the regime was understood to use race as a mechanism to foster self and group identity, *Rice* sees it as undermining the constitutive value of the vote by replacing the process of self-identification with a state-imposed identity.¹⁴⁹

3. *The Property Analogy*

An expressive and constitutive understanding of the vote also aids in understanding *Rice's* quick rejection of Hawaii's claim that a common property interest justified the OHA's voting restriction. While the Court's willingness to assume that the OHA might constitute a special-purpose district suggests that the State could constitutionally impose property-based restrictions on certain voting procedures,¹⁵⁰ the fact that Hawaii had, in the Court's view, defined the electorate in racial terms meant that the State could no longer rely on that otherwise legitimate basis for the electoral restriction as a defense. The illegitimate, racial basis for the State's action corrupted the legitimate basis

district's governing board but the lack of a community within the district appropriate for self-government.").

It is, however, hardly self-evident that constitutive values cannot be derived from participation in water district elections, particularly given the critical importance of water in particular parts of the country. See GARREAU, *supra* note 81, at 193 (describing water in Arizona as "the linchpin of the universe" and emphasizing the influence of water districts in everyday life).

148. See Michelman, *supra* note 70, at 469.

149. As with the Indian analogy, here too the expressive harm follows derivatively. The racial classification transforms the special use election into one involving the constitutionally protected right to vote. This transformation means that the OHA regime now disseminates the message that race comprises a relevant criterion upon which to define the political community vote.

150. See *supra* notes 74-79 and accompanying text.

for it. As explained above,¹⁵¹ the use of a racial classification changed the selection process for district governance into a constitutive process that thus is understood to involve the fundamental right to vote and, derivatively, to disseminate an impermissible message about membership in the polity. *Rice*'s dismissal of Hawaii's property-based justification means that the electorate's shared property interest does not alter the expressive and constitutive elements of the electoral process, even though that shared interest otherwise would have rendered the selection process nonconstitutive and devoid of expressive harm.¹⁵²

The question thus arises as to why the legitimate factor fails to save the electoral scheme, particularly since suspect and legitimate grounds for a contested state action can constitutionally coexist under the Fourteenth Amendment.¹⁵³ *Rice* may hold that the property interest shared by members of the OHA electorate fails to remove the case from the ambit of the Fifteenth Amendment because that interest functions simply as a proxy for the prohibited racial classification itself. All members of the OHA electorate share a property interest in OHA-administered trusts, and all members share a common ancestry, which the Court views as a racial classification. Indeed, the electorate has the property interest because of its common ancestry.¹⁵⁴ Insofar as the Court interprets the Fifteenth Amendment as not distinguishing an ostensibly benign racial classification from an invidious one,¹⁵⁵ it may have viewed the claim that property explains the OHA's voting regime, and not race, as just as implausible as the claim that a grandfather clause enacted in 1910 was also race-neutral.¹⁵⁶

151. See *supra* note 148 and accompanying text.

152. See *supra* note 148 and accompanying text.

153. See *supra* note 115 and accompanying text.

154. See *supra* note 31 and accompanying text. In the *Shaw* cases, a similar connection between race and an ostensibly nonsuspect factor such as a shared socioeconomic status explains the judicial rejection of the latter as a basis to avoid strict scrutiny.

155. See *supra* note 12.

156. See *Guinn v. United States*, 238 U.S. 347 (1915); see also *Lane v. Wilson*, 307 U.S. 268 (1939). Admittedly, the correspondence and causal relationship between property and race in *Rice* parallels the correspondence and causal relationship between race and the "political" status of tribal members in *Mancari*. Both criteria capture the same people. Yet, the legitimate nonsuspect factor trumped the illegitimate factor in *Mancari* but failed to do so in *Rice*. Justice Kennedy wrote that "[i]t does not follow from *Mancari* . . . that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens." *Rice v. Cayetano*, 120 S. Ct. 1044, 1058 (2000). Again, the constitutive understanding of the vote helps explain why. The special political status of Indian tribes suffices to neutralize the corresponding racial nature of the classification in *Mancari* because the award of employment preferences is not seen to involve an identity-forming process. Voting, however, is seen as precisely such a process. See *supra* notes 143-144 and accompanying text. The State's use of a racial classification in *Rice* transforms OHA elections into a constitutive process, and a constitutionally infirm one at that. The shared property interest also explaining the electoral restriction therefore cannot save the regime, because its design promotes an impressible conception of self and group identity.

A broader reading of *Rice*, however, suggests that since the Fifteenth Amendment, in contrast to the Fourteenth Amendment, wholly forbids the use of race, any reliance on race to define an electorate, or indeed, even the perception that race had been a factor,¹⁵⁷ not only skews outcomes, but also disseminates a bad message about membership in the polity and thwarts the constitutive process underlying the vote. Under this reading, a perceived reliance on race, even as one factor among many, imposes a state-approved identity on voters that undermines their ability to constitute themselves freely as citizens through the exercise of the franchise.

Whether the broad or narrow reading best explains the Court's decision in *Rice* depends on the scope of the "damage" the Court understands the use of race to cause to voting's expressive and constitutive benefits. The narrow reading says nothing about the ability of a jurisdiction to rely on race as one of many factors to define a political community so long as no direct causal connection exists between race and each other factor.¹⁵⁸ The broad reading, by contrast, indicates that when a jurisdiction defines an electorate by relying on race, even as one factor among many, it violates the Fifteenth Amendment.

Dramatically different consequences follow from each reading. The narrow reading suggests that *Rice* provides a Fifteenth Amendment complement to the Equal Protection Clause claim identified in the *Shaw* cases. An electorate defined predominantly by race not only gives rise to an expressive harm cognizable under the Fourteenth Amendment,¹⁵⁹ but may also violate the Fifteenth Amendment by undermining the expressive and constitutive effects underlying the vote itself.¹⁶⁰ While *Shaw* plaintiffs can cast a ballot, something Mr. Rice could not do, *Rice's* understanding that the vote has a constitutive

157. See Pildes, *supra* note 102, at 2506-09.

158. A more attenuated causal connection may exist between race and other nonsuspect factors.

159. See, e.g., *Bush v. Vera*, 517 U.S. 952, 984 (1996); *id.* at 1053 (Souter, J., dissenting); see also Anderson & Pildes, *supra* note 118, at 1053.

160. The *Shaw* cases require the application of strict scrutiny when race predominates over other factors in the drawing of a district, see, e.g., *Bush*, 517 U.S. at 962; *Miller v. Johnson*, 515 U.S. 900, 915 (1995), while the narrow reading of *Rice* would bar districts where race is the only factor that defines the electorate. See *supra* text accompanying note 156. Insofar as race may predominate but still not constitute the sole factor in districting, some *Shaw* plaintiffs may not be able to bring a claim under *Rice*, assuming the narrow reading prevails. While the prospect of such cases offers one explanation for the concurring opinion in *Rice*, see *infra* text accompanying notes 169-173, the close correspondence that often exists between race and other districting factors suggests that such cases will rarely arise.

So too, the peculiar standing rules that govern the *Shaw* cause of action may prevent some *Rice* claimants from raising *Shaw* claims. See *United States v. Hayes*, 515 U.S. 737 (1995); see also Samuel Issacharoff & Thomas C. Goldstein, *Identifying the Harm in Racial Gerrymandering Claims*, 1 MICH. J. RACE & L. 47 (1996); Samuel Issacharoff & Pamela S. Karlan, *Standing & Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276 (1998); Pamela S. Karlan, *Still Hazy After All These Years*, 26 CUMB. L. REV. 287 (1996).

value indicates that the nominal retention of the ability to mark a ballot does not preclude a Fifteenth Amendment violation where the challenged electoral rule is seen to thwart the constitutive process.¹⁶¹ Under this view, conduct giving rise to a *Shaw* violation will also violate *Rice*, although the injury identified is partially distinct. *Rice* accordingly solidifies *Shaw* as precedent by elaborating on the nature of the wrong understood to be caused by an excessive reliance on race in the design of electoral rules.¹⁶²

The broad reading, by contrast, suggests that a districting plan that fails to give rise to strict scrutiny under *Shaw* may still be invalid under *Rice*, and, even more dramatically, that most applications of section 2 of the Voting Rights Act are unconstitutional.¹⁶³ As amended in

161. So understood, *Rice* stands in some tension with dicta in the Court's nearly contemporaneous decision *Reno v. Bossier Parish School Board*, in which the Court insisted that it had "never held that vote dilution violates the Fifteenth Amendment . . . [W]e have never even 'suggested' as much." 528 U.S. 320, 334 n.3 (2000). Insofar as racial vote dilution and *Shaw*-type racial gerrymandering are understood to interfere similarly with the constitutive process, both, after *Rice*, should violate the Fifteenth as well as Fourteenth Amendments. *Bossier Parish's* dicta to the contrary should not, however, mandate a different reading of *Rice*. It falls short of actually holding that the Fifteenth Amendment does not encompass vote dilution, claiming instead that the Court has not yet so held. *See id.*; *cf.* *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966). Moreover, the Court's quick dismissal of *Gomillion's* Fifteenth Amendment holding as resting on the "denial of the right to vote in municipal elections" obscures the decision's broader import. As nonresidents, Tuskegee's former black voters ostensibly had no right to cast ballots in municipal elections. *See Gomillion v. Lightfoot*, 364 U.S. 339, 349 (1960) (Whittaker, J., concurring); *infra* text accompanying note 194. *Gomillion* nevertheless held that the State violated the Fifteenth Amendment because it manipulated political boundaries to diminish black voting strength, which, as Justice Souter notes in his dissent in *Bossier Parish*, would be called dilution in contemporary discourse. *See Bossier Parish*, 528 U.S. at 360 n.11 (Souter, J., concurring in part and dissenting in part); *see also* *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969) ("The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."). Finally, the *Bossier Parish* Court fails to reconcile its suggestion regarding the Fifteenth Amendment and vote dilution with the Court's prior recognition that section 2 of the Voting Rights Act both mirrors the relevant language in the Fifteenth Amendment and proscribes racial vote dilution. *See, e.g., Johnson v. DeGrandy*, 512 U.S. 997 (1994); *City of Mobile v. Bolden*, 446 U.S. 55, 60-61 (1980) (plurality opinion); *see also Bossier Parish*, 528 U.S. at 360 n.11 (Souter, J., concurring in part and dissenting in part).

162. *Rice*, of course, does not resolve the extent to which a perceived reliance on race in decisionmaking causes a harm that transcends voting. The question turns on whether voting's intrinsic values and indeed instrumental purposes may be unique such that, regardless of the harm race-based decisionmaking is understood to cause elsewhere, it generates a distinct injury when voting is involved. Compare Estlund, *supra* note 144, at 3, with Pildes, *supra* note 60, at 122.

163. *City of Boerne v. Flores*, 521 U.S. 507 (1997), raises the distinct question whether section 2 of the Voting Rights Act, as amended in 1982, goes beyond Congress's powers under Section 5 of the Fourteenth Amendment. *See* David Cole, *The Value of Seeing Things Differently: Boerne v. Flores and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31, 45; Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725, 725-28 (1998); Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 749-50 (1998).

1982,¹⁶⁴ section 2 sets forth a “results” test that requires jurisdictions expressly to consider race when designing electoral rules.¹⁶⁵ Under section 2, an electoral rule “results” in the denial or abridgment of the right to vote on account of race, *inter alia*, when members of a particular racial group “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”¹⁶⁶ The Supreme Court, long divided about how this standard should be implemented,¹⁶⁷ has allowed racially informed decisionmaking under section 2.¹⁶⁸ The strong reading of *Rice* would preclude such consideration of race in the districting process.

Whether the narrow or broad reading is governing law is not clear. To be sure, only the narrow reading can explain the puzzling concurring votes of Justices Breyer and Souter, both of whom have identified no judicially enforceable constitutional proscription against the type of racially-informed districting at issue in *Shaw* and its progeny.¹⁶⁹ Both justices evidently view the OHA voting regime as different in kind

164. Prior to 1982, section 2 tracked the language of the Fifteenth Amendment itself. See *Chisom v. Roemer*, 501 U.S. 380, 392 (1991) (noting that section 2, as originally enacted, “was unquestionably coextensive with the coverage provided by the Fifteenth Amendment”). Constructions of the pre-1982 statute (and accordingly of the Amendment itself) to prohibit minority vote dilution are not easily reconciled with the strong reading of *Rice* discussed above. See *White v. Regester*, 412 U.S. 755 (1973); *Whitcomb v. Chavis*, 403 U.S. 124 (1971); see also *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *aff’d sub nom.* *East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976) (per curiam).

165. Section 2(A) prohibits practices that “result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.” Voting Rights Act § 2, 42 U.S.C. § 1973(a) (1994). Under the broad reading of *Rice*, section 5 of the Voting Rights Act is also vulnerable to invalidation. Like section 2, section 5 prohibits changes to electoral rules that have a racially discriminatory effect, see 42 U.S.C. § 1973c (noting that covered jurisdictions must demonstrate that a proposed electoral change “does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race...”), and thus, it also requires that affected jurisdictions consider race when crafting such rules. The Court’s construction of section 5’s effects test to bar changes that “lead to retrogression in the positions of racial minorities with respect to their effective exercise of the electoral franchise,” *Beer v. United States*, 424 U.S. 130 (1976), similarly assumes that statutory compliance requires that jurisdictions engage in race-conscious decisionmaking. See also *Bossier Parish*, 520 U.S. at 478-85. Even if, however, the broad reading in *Rice* should prevail, the record of misconduct that gives rise to coverage under section 5 suggests that the Court may preserve this provision notwithstanding its reliance on race-conscious decisionmaking. See *Lopez v. Monterey County*, 525 U.S. 266 (1999) (upholding congressional power to enact section 5 as legislation enforcing the Fourteenth and Fifteenth Amendment).

166. *Id.* § 1973(b).

167. See, e.g., *Johnson v. DeGrandy*, 512 U.S. 997 (1994); *Thornburg v. Gingles*, 478 U.S. 30 (1986); see also *Holder v. Hall*, 512 U.S. 874, 891, 903-04 (1994) (Thomas, J., concurring) (rejecting the Court’s construction of section 2).

168. See *Shaw v. Hunt*, 517 U.S. 899, 915 (1996); *Miller v. Johnson*, 515 U.S. 900, 920-21 (1995); *Johnson*, 512 U.S. at 1011-12; *Bush v. Vera*, 517 U.S. 952, 990 (1996) (O’Connor, J., concurring).

169. See *Abrams v. Johnson*, 521 U.S. 74, 103 (1997) (Breyer, J., dissenting); *Bush*, 517 U.S. at 1045 (Souter, J., dissenting); *Shaw v. Reno*, 509 U.S. 630, 379 (1993).

from the type of racial gerrymandering at issue in *Shaw*, but the concurring opinion does not explain why. That *Shaw* plaintiffs retain the ability to vote in contested districts while Mr. Rice could not vote in OHA elections cannot have been dispositive since the concurring justices view the Fifteenth Amendment's prohibition as extending beyond the formal ability to cast a ballot.¹⁷⁰ Justice Souter has written that the proscription encompasses vote dilution and other "ways in which participation in the political process can be made unequal."¹⁷¹ Justice Breyer likewise has written that a jurisdiction violates the Fifteenth Amendment when it intentionally dilutes the voting strength of a racial minority.¹⁷²

Instead, the concurring opinion in *Rice* and Justice Breyer and Souter's dissents in the *Shaw* cases find explanation in the effect these justices understand a disputed racial classification to have on voting's constitutive process. The concurring justices agree with the *Rice* majority that the OHA's electoral regime thwarts the constitutive process because it defines the electorate solely in terms of race. They disagree, however, with the Court's majority in *Shaw* and its progeny that districts drawn predominantly based on race undermine voting's constitutive value. The disagreement then concerns when the use of race in designing an electoral rule becomes excessive. *Rice*'s concurring justices believe that voting's constitutive value as well as its expressive benefit can be derived in majority-minority districts, even when race was the jurisdiction's predominant motive in drawing the district,¹⁷³ but reject the OHA's regime and presumably would reject a districting plan that completely segregates voters by race based on the view that such electoral rules render voting's intrinsic benefits illusory. Racially-informed decisionmaking may, accordingly, be necessary to ensure the meaningful exercise of the franchise, but electoral rules that rely solely on race thwart the process of self and community identification that should inhere in the vote.

Rice's concurring justices consequently would recommend the narrow reading of the decision discussed above. But while the narrow

170. Cf. *Bossier Parish*, 528 U.S. at 334 n.3 (noting that precedent does not establish the Fifteenth Amendment's application to vote dilution); see also *supra* note 160.

171. *Bossier Parish*, 528 U.S. at 360 (Souter, J., concurring in part and dissenting in part).

172. See *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 493-95 (1997) (Breyer, J., concurring in part and concurring in the judgment).

173. Writing for the Court in *Johnson v. DeGrandy*, Justice Souter observed that majority-minority districts should not be used where meaningful cross-racial coalitions are possible in their absence. 512 U.S. at 1020 ("It bears recalling, however, that for all the virtues of majority-minority districts as remedial devices, they rely on a quintessentially race-conscious calculus aptly described as the 'politics of second best.'"). Such districts are, however, constitutionally permissible and statutorily required where needed "to ensure equal political and electoral opportunity." *Id.*

reading suffices to support the holding in *Rice*, and nothing in the decision expressly suggests an intent to call section 2 of the Voting Rights Act or the *Shaw* precedents into question, the facts of the case gave the Court no occasion to do either, and recognition of a distinct injury resting on an understanding of the Fifteenth Amendment to preclude any consideration of race leaves *Shaw* fully intact, although largely beside the point. *Rice*'s breadth, then, remains in question, and depending on the reading that prevails, *Rice* may have a tremendous impact on legal challenges that are sure to follow the districting plans adopted in the wake of the 2000 Census.

CONCLUSION

Rice sets forth a distinct conception of race, the right to vote, and the relationship between the two. The Court's analysis of the Indian analogy reveals its view that race is a malleable concept: a shared, nonsuspect group characteristic may transform into a forbidden racial one when the State relies on it to structure an electoral system. The Court's treatment of the special-purpose district cases demonstrates its view that race has transformative power: an activity subject to the most minimal constitutional scrutiny becomes one involving the constitutionally protect right to vote, and subject to the most rigorous review, when the State uses race to link the members of the group engaged in it. The Court's dismissal of the property interest held by the OHA electorate shows its view that the use of race is corruptive: property ownership, an otherwise legitimate ground upon which to restrict the electorate for a special-purpose district and thus to depart from the one-person, one-vote requirement of the Fourteenth Amendment becomes illegitimate when it coexists with race as the basis for the restriction. An implicit conception of voting as a constitutive act with derivatively expressive benefits best explains each component of the Court's analysis.¹⁷⁴

Like the Court's sentiments regarding a color-blind society,¹⁷⁵ however, this conception may be more aspirational than descriptive. The cynicism many feel toward the political process¹⁷⁶ coupled with

174. An expressive and constitutive understanding of the vote, moreover, helps explain why replacing an electoral system with an appointive one eliminates the constitutional defect, even though no one gets to vote under the resulting system. See *Avery v. Midland County*, 390 U.S. 474 (1968); cf. *Chisom v. Roemer*, 501 U.S. 380, 401 (1991).

175. See, e.g., Gotanda, *supra* note 67, at 1-5.

176. See generally BERNARD R. BERELSON, *VOTING* (1954); ANGUS CAMPBELL ET AL., *THE AMERICAN VOTER* (1960); CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY (Theda Skocpol & Morris Fiorina eds., 1999); E.J. DIONNE, JR., *WHY AMERICANS HATE POLITICS* (1991); *WHY PEOPLE DON'T TRUST GOVERNMENT* (Joseph Nye et al. eds., 1997).

the exceptionally low level of voter turnout in the United States¹⁷⁷ may suggest that, insofar as voting has a constitutive effect, very few people today derive its benefit.

There is some irony to this fact, especially when considered in the light of history. During much of the nineteenth century, the electorate was restricted, but voter turnout was high and elections were events of considerable pageantry.¹⁷⁸ Historian Robert Wiebe explains that during this period, "balloting became a form of self-expression, an assertion of one's place alongside innumerable others in the collective act of self-government."¹⁷⁹ Latent in *Rice* may well be nostalgia for this time and a hope that even without the restrictions characteristic of the franchise in the nineteenth century, legal recognition of voting's constitutive potential will aid its realization.

If so, *Rice* promotes a distinct conception of that potential. The decision posits that race thwarts voting's constitutive value by imposing a state-approved identity on voters. That may be correct, but it is not indisputably so. Absent the OHA's electoral restrictions, Hawaii's native people may well be unable to constitute themselves as citizens in the political process. Vote dilution, even if the result of a race-neutral electoral rule, might have not only blocked the election of candidates preferred by Hawaii's native people, but also prevented this population from engaging in the process of self-development and community identification that underlies the constitutive understanding of the vote.¹⁸⁰

Rice, however, squarely rejects this contention. Holding that Hawaii's reliance on race to foster constitutive benefits violates the Fifteenth Amendment, the Court seemingly finds no room in constitutional doctrine for the notion that race-conscious electoral rules of this

177. See FRANCIS FOX PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS DON'T VOTE* (1988).

178. See, e.g., Theda Skocpol et al., *How Americans Became Civic*, in *CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY*, *supra* note 176; LEON D. EPSTEIN, *POLITICAL PARTIES IN THE AMERICAN MOLD* 161-74 (1986); MICHAEL E. MCGERR, *THE DECLINE OF POPULAR POLITICS: THE AMERICAN NORTH, 1865-1928*, at 5-6 (1986); MICHAEL SHUDSON, *THE GOOD CITIZEN: A HISTORY OF AMERICAN CIVIC LIFE* 5 (1998); ROBERT H. WIEBE, *SELF-RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY* 68, 83 (1995); see also EDWARD MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 174-208 (1988); WOOD, *supra* note 113.

179. WIEBE, *supra* note 178, at 66; see also *id.* at 82-83 ("Approaching the polls, [voters] carried a fully panoply of insular loyalties. In the act of voting, however, it was as if citizens entered a peculiar state of nature, where as they cast their ballots they were stripped of any identity other than that of sovereign citizens deciding collectively. For that instant, they were the American People.").

180. See *Bush v. Vera*, 517 U.S. 952, 1071-72 (1996) (Souter, J., dissenting) ("[T]he price of imposing a principle of colorblindness in the name of the Fourteenth Amendment would be submerging the votes of those whom the Fourteenth and Fifteenth Amendments were adopted to protect, precisely the problem that necessitated our recognition of vote dilution as a constitutional violation in the first place.").

sort may be needed to render voting meaningful. In the process, *Rice* glosses over the extent to which race neutral laws may undermine voting's intrinsic values. In this regard, then, *Rice* appears to adhere to the established rule that invidious intent is a prerequisite to a Fifteenth Amendment violation.¹⁸¹

And yet, to the extent that an understanding of voting as a constitutive act best explains *Rice*, the decision may be seen as departing from this intent-based rule, and instead favoring a more functional approach that examines the effect a given jurisdictional rule has on voting's constitutive value. Hawaii, after all, maintained the position throughout the litigation not only that it acted with good intentions, but that it did not base the OHA's regime on race.¹⁸² The Court found this claim to be disingenuous,¹⁸³ but its holding no doubt would have been the same had the justices found it persuasive. That is, *Rice* understands the OHA's regime to be based on race, regardless of whether Hawaii so intended, and it is this understanding, as opposed to any specific motive held by the jurisdiction, that is seen as undermining voting's intrinsic values and causing the constitutional violation.¹⁸⁴

All of this, of course, is implicit, and *Rice* itself offers no express challenge to the intent-based approach. Even so, latent in *Rice* may well be some dissatisfaction with the intent standard as the exclusive definition of the constitutional proscription embodied in the Fifteenth Amendment. An understanding of voting as a constitutive act requires an examination of the manner in which electoral rules affect that act. *Rice* accordingly may signal some inclination to move toward the adoption of a results-based measure of constitutional voting violations, or, more narrowly, a relaxation of what constitutes intent under the existing standard.¹⁸⁵

Whether such a move would translate into more expansive voting rights is unclear. Recent decisions circumscribing congressional authority to enforce the Fourteenth and Fifteenth Amendments emphatically state that Congress may not "alter[] the meaning" of constitutional provisions.¹⁸⁶ A return to an effects-based standard for Fif-

181. See *City of Mobile v. Bolden*, 446 U.S. 55, 66-68 (1980).

182. See Brief for Respondent at 20-40, *Rice v. Cayetano*, 120 S. Ct. 1044 (2000) (No. 98-818); *Rice v. Cayetano*, 146 F.3d 1075, 1078-79 (9th Cir. 1998) (noting this position).

183. See *Rice*, 120 S. Ct. at 1056-57.

184. See Pildes, *supra* note 102, at 2539-41.

185. See *City of Mobile*, 446 U.S. at 134-37 (Marshall, J., dissenting) (arguing that a jurisdiction need not take action "because of" the result to act with the requisite intent and that the common law foreseeability presumption should suffice).

186. See *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) ("Congress does not enforce a constitutional right by changing what the right is."); see also *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 88 (2000) (invalidating a provision of the Age Discrimination in Employ-

teenth Amendment violations consequently could lead to the judicial invalidation of section 2 of the Voting Rights Act insofar as that statute's "results" test prohibits conduct the Court deems constitutional under a restored effects test.

Rice's ramifications, accordingly, may well be far-reaching. Its recognition that the Constitution protects voting as a constitutive act gives rise to an inquiry into which electoral rules foster and which frustrate voting's constitutive benefit. The *Rice* Court adopts a particular understanding as to which rules do what and concludes that this understanding is constitutionally mandated. The Court thus assumes that Harold Rice will derive a constitutive benefit from inclusion in OHA elections. As a corollary, it posits that his participation will enable the original members of the OHA's electorate properly to constitute themselves as citizens through engagement in the agency's electoral process.

This understanding sheds light on *Rice's* reliance on *Gomillion*. From *Gomillion's* facts, Alabama's racially discriminatory intent seems self-evident. The Alabama legislature enacted the disputed legislation without debate just after the majority black population of Tuskegee supported the election of a black woman to the local school board;¹⁸⁷ the gerrymander removed virtually every African-American resident from the city limits without displacing a single white voter.¹⁸⁸ Less clear, however, is how the gerrymander denied Tuskegee's black population the right to vote as protected by the Fifteenth Amendment. As Justice Whittaker's concurring opinion points out, "no one has the right to vote in a political division, or in a local election concerning only an area in which he does not reside."¹⁸⁹ Indeed, eighteen years later in *Holt Civic Club v. City of Tuscaloosa*,¹⁹⁰ the Court applied the most minimal level of review to an Alabama law denying citizens living outside municipal boundaries a vote in municipal elections, even though those excluded from the franchise were subject to considerable municipal authority. Given the immense discretion jurisdictions have in drawing political boundaries, and perhaps the absence of viable judicial standards regarding how better to draw them,¹⁹¹ the case, Justice Rehnquist wrote, must be "stripped of its voting rights at-

ment Act because, *inter alia*, Congress "has effectively elevated the standard for analyzing age discrimination to heightened scrutiny").

187. Jesse Guzman lost to a white candidate in a racially polarized vote in which virtually all eligible white voters participated, while many of the city's black residents had been unable to register. See TAPER, *supra* note 2, at 13-14.

188. See *id.* at 14-15; Pildes & Niemi, *supra* note 118, at 552.

189. *Gomillion v. Lightfoot*, 364 U.S. 339, 349 (1960) (Whittaker, J., concurring).

190. 439 U.S. 60 (1978).

191. See Larry Alexander, *Lost in the Political Thicket*, 41 FLA. L. REV. 563 (1989).

ture,”¹⁹² and the Court’s “inquiry . . . limited to the question whether ‘any state of facts reasonably may be conceived to justify’ ” the extra-territorial exercise of jurisdiction absent a concurrent extension of the franchise.¹⁹³

Despite these difficulties in identifying precisely why the racially-motivated gerrymander in *Gomillion* denied the excluded African Americans the right to vote, Justice Frankfurter overcame his aversion to the political thicket and identified a violation of the Fifteenth Amendment. *Gomillion*’s insistence that the Tuskegee gerrymander implicated the right to vote under the Fifteenth Amendment parallels the Court’s treatment of the OHA in *Rice*. In both cases, the Court’s conclusion that a racial classification underlies the challenged laws transforms an otherwise administrative act into a constitutive process that thus implicates the constitutionally protected right to vote. To the Court in *Rice*, Alabama and Hawaii were engaged in the same endeavor, namely delineating a political community along racial lines and thereby imposing on both those included and excluded a state-approved political identity.¹⁹⁴ This, the Court holds in both cases, is precisely what the Fifteenth Amendment prohibits when it bars the denial of the vote based on race.

192. *Holt*, 439 U.S. at 70.

193. *Id.* at 74 (quoting *Salyer Land Company v. Tulare Lake Basin Water Storage District*, 410 U.S. 719, 732 (1973)); see also Briffault, *supra* note 70, at 386-89 (discussing *Holt*); Karlan, *supra* note 10, at 289 (noting the different approaches in *Gomillion* and *Holt*); Note, *Holt Civic Club v. City of Tuscaloosa: Extraterritorials Denied the Right to Vote*, 68 CAL. L. REV. 126 (1980).

194. In contrast to both *Rice* and *Gomillion*, the Court in *Holt* may well have viewed the residents of Holt to have chosen voluntarily to live outside Tuscaloosa’s city limits and thereby to have denied themselves membership in the city’s political community. See Michelman, *supra* note 70, at 478-80. This view, questionable as it may be as a purely descriptive matter, may be the best explanation for the deferential review applied by the Court.