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EXPRESSING THE POLICY OF THE UNITED STATES REGARDING THE UNITED STATES RELATIONSHIP WITH NATIVE HAWAIIANS AND TO PROVIDE A PROCESS FOR THE RECOGNITION BY THE UNITED STATES OF THE NATIVE HAWAIIAN GOVERNING ENTITY, AND FOR OTHER PURPOSES

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JUNE 27, 2003.—Ordered to be printed

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Mr. CAMPBELL, from the Committee on Indian Affairs,  
submitted the following

### R E P O R T

[To accompany S. 344]

The Committee on Indian Affairs, to which was referred the bill (S. 344) expressing the policy of the United States regarding the United States relationship with Native Hawaiians and to provide a process for the recognition by the United States of the Native Hawaiian governing entity, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

#### PURPOSE AND BACKGROUND

The purpose of S. 344 is to authorize a process for the reorganization of the Native Hawaiian government and to provide for the recognition of the Native Hawaiian government by the United States for purposes of carrying on a government-to-government relationship.

On January 17, 1893, the government of the Kingdom of Hawai'i was overthrown by a group of American citizens and others, who acted with the support of U.S. Minister John Stephens and a contingent of U.S. Marines from the USS *Boston*. One hundred years later, a resolution extending an apology on behalf of the United States to Native Hawaiians for the illegal overthrow of the Native Hawaiian government and calling for a reconciliation of the relationship between the United States and Native Hawaiians was enacted into law (Public Law 103-150, Apology Resolution). The Apology Resolution acknowledges that the overthrow of the Kingdom of

Hawai'i occurred with the active participation of agents and citizens of the United States and further acknowledges that the Native Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people over their national lands to the United States, either through their government or through a plebiscite or referendum.

In December of 1999, the Departments of Interior and Justice initiated a process of reconciliation in response to the Apology Resolution by conducting meetings in Native Hawaiian communities on each of the principal islands in the State of Hawai'i and culminating in two days of open dialogue. In each setting, members of the Native Hawaiian community identified what they believe are the necessary elements of a process to provide for the reconciliation of the relationship between the United States and the Native Hawaiian people. A report, entitled "From Mauka to Mauki: The River of Justice Must Flow Freely," (Reconciliation Report) was issued by the two departments on October 23, 2000. The principal recommendation contained in the Reconciliation Report is set forth below:

Recommendation 1. It is evident from the documentation, statements, and views received during the reconciliation process undertaken by Interior and Justice pursuant to Public Law 103-150 (1993), that the Native Hawaiian people continue to maintain a distinct community and certain governmental structures and they desire to increase their control over their own affairs and institutions. As a matter of justice and equity, this report recommends that the Native Hawaiian people should have self-determination over their own affairs within the framework of Federal law, as do Native American tribes. For generations, the United States has recognized the rights and promoted the welfare of Native Hawaiians as an indigenous people within our Nation through legislation, administrative action, and policy statements. To safeguard and enhance Native Hawaiian self-determination over their lands, cultural resources, and internal affairs, the Departments believe Congress should enact further legislation to clarify Native Hawaiians' political status and to create a framework for recognizing a government-to-government relationship with a representative Native Hawaiian governing body.<sup>1</sup>

S. 344 provides a process for the reorganization of the Native Hawaiian government and, upon certification by the Secretary of the Interior, that the organic governing documents of the Native Hawaiian government are consistent with Federal law and the special political and legal relationship between the United States and the indigenous, native people of the United States, S. 344 provides for the recognition of the Native Hawaiian government by the United States for purposes of carrying on a government-to-government relationship with the Native Hawaiian government.

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<sup>1</sup> U.S. Department of the Interior and U.S. Department of Justice, From Mauka to Makai: The River of Justice Must Flow Freely: Draft Report on the Reconciliation Process Between the Federal Government and Native Hawaiians 17 (August 23, 2000).

## NEED FOR LEGISLATION

Since the loss of their government in 1893, Native Hawaiians have sought to maintain political authority within their community. In 1978, the citizens of the State of Hawai'i recognized the long-standing efforts of the native people to give expression to their rights to self-determination and self-governance by amending the State constitution to provide for the establishment of a quasi-independent State agency, the Office of Hawaiian Affairs. The State constitution, as amended, provides that the Office is to be governed by nine trustees who are Native Hawaiian and who are to be elected by Native Hawaiians. The Office administers programs and services with revenues derived from lands which were ceded to the United States by the Republic of Hawai'i upon the annexation of Hawai'i by the United States in 1898 and were conveyed to the State of Hawai'i in trust upon its admission into the Union of States pursuant to § 5 of the Hawai'i Admission Act,<sup>2</sup> and Public Law 88-233.<sup>3</sup> The dedication of these revenues reflects the provisions of the Admission Act, section 5(f) of which provides that the ceded lands and the revenues derived therefrom should be held by the State of Hawai'i as a public trust for five purposes—one of which is the betterment of the conditions of Native Hawaiians. The Admission Act also provides that the new State assumes a trust responsibility for approximately 203,500 acres of land that had previously been set aside under Federal law in 1921 for Native Hawaiians in the Hawaiian Homes Commission Act.<sup>4</sup>

On February 23, 2000, the United States Supreme Court issued a ruling in the case of *Rice v. Cayetano*.<sup>5</sup> The Supreme Court held that because the Office of Hawaiian Affairs is an agency of the State of Hawai'i, funded in part by appropriations made by the State legislature, the election for the trustees of the Office of Hawaiian Affairs must be open to all citizens of the State of Hawai'i who are otherwise eligible to vote in statewide elections.<sup>6</sup> Accordingly, all citizens of the State of Hawai'i may vote for the candidates for the nine trustee positions and may themselves be candidates for these offices.

The native people of Hawai'i have thus been divested of the mechanism that was established under the Hawai'i State Constitution that, since 1978, has enabled them to give expression to their rights as indigenous, native people of the United States to self-determination and self-governance. S. 344 is designed to address these developments by providing a means under Federal law, consistent with the Federal policy of self-determination and self-governance for America's indigenous, native people, for Native Hawaiians to have a status similar to that of the other indigenous, native people of the United States.

<sup>2</sup> Pub. L. No. 83-3, § 5, 73 Stat. 4, 5 (March 18, 1959) (Admission Act).

<sup>3</sup> 77 Stat. 472 (December 23, 1963).

<sup>4</sup> 42 Stat. 108 (July 9, 1921), as amended (Hawaiian Homes Commission Act).

<sup>5</sup> 528 U.S. 495 (2000).

<sup>6</sup> The Court held that the provision of state law requiring those voting for the office of Trustee of the Office of Hawaiian Affairs to be Native Hawaiian violated the Fifteenth Amendment of the U.S. Constitution. Subsequently, in *Arakaki v. State of Hawai'i*, 314 F.3d 1091 (9th Cir. 2002), the provision requiring candidates for that office to be Native Hawaiian was invalidated on similar grounds.

## FEDERAL DELEGATION OF AUTHORITY TO THE STATE OF HAWAII

For the past two hundred and ten years, the United States Congress, the Executive Branch, and the U.S. Supreme Court have recognized certain legal rights and protections for America's indigenous peoples. Since the founding of the United States, Congress has exercised a constitutional authority over indigenous affairs and has undertaken an enhanced duty of care for America's indigenous peoples. This has been done in recognition of the sovereignty possessed by the native people—a sovereignty which pre-existed the formation of the United States. The Congress' exercise of its constitutional authority is also premised upon the status of the indigenous people as the original inhabitants of this nation who occupied and exercised dominion and control over the lands over which the United States subsequently acquired jurisdiction.

The United States has long recognized the existence of a special political relationship with the indigenous people of the United States. As Native Americans—American Indians, Alaska Natives, and Native Hawaiians—the United States has recognized that they are entitled to special rights and considerations, and the Congress has enacted laws to give expression to the respective legal rights and responsibilities of the Federal government and the native people.

From time to time, with the consent of the affected States, the Congress has sought to more effectively address the conditions of the indigenous people by delegating Federal responsibilities to various states. In 1959, the State of Hawaii assumed the Federally-delegated responsibility of administering 203,500 acres of land that had been set aside by Congress in 1921 for the benefit of the native people of Hawaii under the Hawaiian Homes Commission Act.<sup>7</sup> In addition, the State agreed to the imposition of a public trust upon all of the lands ceded to the State upon admission.<sup>8</sup> One of the five purposes for which the public trust was established is the "betterment of the conditions of native Hawaiians[.]"<sup>9</sup> The Federal authorization for this public trust clearly anticipated that the State's constitution and laws would provide for the manner in which the terms of trust would be carried out.<sup>10</sup>

In 1978, the citizens of the State of Hawaii exercised the Federally-delegated authority by amending the State constitution in furtherance of the special relationship with Native Hawaiians. The delegates to the 1978 constitutional convention recognized that Native Hawaiians had no other homeland, and thus that the protection of Native Hawaiian subsistence rights to harvest the ocean's resources, to fish the freshwater streams, and to hunt and gather, as well as the protection of Native Hawaiians' rights to exercise their rights to self-determination and self-governance, and to preserve their culture and language, could only be accomplished within their native homeland, the present State of Hawaii.

Hawaii's adoption of amendments to the State constitution to fulfill the special relationship with Native Hawaiians is consistent with the practice of other states that have established special rela-

<sup>7</sup>Id., § 4; Haw. Const., Art. XVI, § 7.

<sup>8</sup>Id., § 5(f); Haw. Const. Art. XII, § 4.

<sup>9</sup>Id., § 5(f); Haw. Const. Art. XII, § 4.

<sup>10</sup>Id.

tionships with the native inhabitants of their areas. Fourteen states have extended recognition to Indian tribes that are not recognized by the Federal government, and thirty-two states have established commissions and offices to address matters of policy affecting the indigenous citizenry.

#### HISTORY

There is a history, a course of dealings, and a body of law which inform the special status of the indigenous, native people of the United States. It is a history that begins well before the first European set foot on American shores—it is a history of those who occupied and possessed the lands that were later to become the United States—the aboriginal, indigenous native people of this land who were America’s first inhabitants.

The indigenous people did not share similar customs or traditions. Their cultures were diverse. Some of them lived near the ocean and depended upon its bounty for their sustenance. Others made their homes amongst the rocky ledges of mountains and canyons. Some native people fished the rivers, while others gathered berries and roots from the woodlands, harvested rice in the lake areas, and hunted wildlife on the open plains. Their subsistence lifestyles caused some to follow nomadic ways, while others established communities that are well over a thousand years old. Those who later came to America call them “aborigines” or “Indians” or “natives” but the terms were synonymous. Over time, these terms have been used interchangeably to refer to those who occupied and possessed the lands of America prior to European contact.

Although the differences in their languages, their cultures, their belief systems, their customs and traditions, and their geographical origins may have kept them apart and prevented them from developing a shared identity as the native people of this land—with the arrival of western “discoverers” in the United States, their histories are sadly similar. Over time, they were dispossessed of their homelands, removed, relocated, and thousands, if not millions, succumbed to diseases for which they had no immunities and fell victim to the efforts to exterminate them. In the early days of America’s history, the native peoples’ inherent sovereignty informed the course of the newcomers’ dealings with them. Spanish law of the 1500’s and 1600’s presaged how the United States would recognize their aboriginal title to land, and treaties became the instruments of fostering peaceful relations.<sup>11</sup>

As America’s boundaries expanded, new territories came under the protection of the United States. Eventually, as new States entered the Union, there were other aboriginal, indigenous, native people who became recognized as the “aborigines” or “Indians” or “natives” of contemporary times—these included the Eskimos, and the Aleuts, and other native people of Alaska, and later, the indigenous, native people of Hawai’i.

For nearly a century, Federal law has recognized these three groups—American Indians, Alaska Natives, and Native Hawaiians—as comprising the class of people known as Native Americans. Well before the Fourteenth and Fifteenth Amendments to the

<sup>11</sup>Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31, *Geo. L.J.* 1 (1942).

U.S. Constitution were adopted to address the effects of historic patterns of racial discrimination, the Supreme Court had recognized the unique status of America's native peoples under the Constitution and laws of the United States.

Native Hawaiians are the indigenous, aboriginal people of the island group that is today the State of Hawai'i. Hawai'i was originally settled by voyagers from central and eastern Polynesia, traveling immense distances in double-hulled voyaging canoes and arriving in Hawai'i perhaps as early as 300 A.D. The original Hawaiians were thus part of the Polynesian family of peoples, which includes the Maori of New Zealand, the Samoans, Tongans, Tahitians, Cook Islanders, Marquesans, and Easter Islanders.<sup>12</sup> Hundreds of years of Hawaiian isolation followed the end of the era of "long voyages."<sup>13</sup> During these centuries, the Polynesians living in Hawai'i evolved a unique system of self-governance and a "highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion."<sup>14</sup>

At the pinnacle of the political, economic, and social structure of the major Hawaiian islands was a mo'i, a king. Below the king, individuals occupied three major classes. The highest class, the ali'i, were important chiefs. Next in rank were members of the kahuna class, who advised the ali'i as seers, historians, teachers, priests, astronomers, medical practitioners, and skilled workers. Third, the maka'ainana were the "people of the land," who fished and farmed and made up the bulk of the population.<sup>15</sup>

The political, economic, and social structures were mutually supportive. The kings held all land and property which they subdivided among the chiefs. Substantial chiefs supervised large land areas (ahupua'a) which extended from the sea to the mountains so that they could fish, farm, and have access to the products of the mountain forest. They, in turn, divided the ahupua'a into 'ili, run by lesser chiefs whose retainers cultivated the land. The commoners worked the land and fished, exchanging labor for protection and some produce from their own small plots. Agriculture was highly diverse, including taro (kalo), bananas, yams, sugar cane, and breadfruit. The taro plant, whose starchy root is pounded into poi, requires substantial moisture so Hawaiians developed a superior system of irrigation.<sup>16</sup>

The Hawaiian economy was also dependent upon many skilled artisans. For example, special skills were necessary for the building of outrigger canoes, the making of tapa (a paper-like material used for clothing and bedding), the drying of fish, the construction of irrigation systems and fishponds, the catching of birds (whose feathers were worn in chiefs' cloaks and helmets), and the sharpening of stones for building and fighting.<sup>17</sup>

"The concept of private ownership of land had no place in early Hawaiian thought."<sup>18</sup> The authority of the mo'i or king was derived

<sup>12</sup> 1 Ralph S. Kuykendall, *The Hawaiian Kingdom* 3 (1938).

<sup>13</sup> *Id.*

<sup>14</sup> Public Law 103-150. (Cite to relevant section of Findings)

<sup>15</sup> Lawrence H. Fuchs, *Hawai'i Pono: An Ethnic and Political History* 5 (1961); *Native Hawaiian Rights Handbook* 5 (Melody K. MacKenzie ed., 1991).

<sup>16</sup> See Jon J. Chinen, *The Great Mahele* 3-4 (1958); Fuchs, *supra* at 5-7; MacKenzie, *supra* at 3-5.

<sup>17</sup> MacKenzie, *supra* at 4.

<sup>18</sup> *Id.* at 4.

from the gods, and he was a trustee of the land and other natural resources of the island.<sup>19</sup> Chiefs owed military service, taxes, and obedience to the king, but neither chiefs, nor skilled laborers, nor commoners were tied to a particular piece of land or master. All lands conferred by the king or chief were given subject to revocation. In turn neither commoners nor skilled laborers were required to stay with the land; if maltreated or dissatisfied, an individual could move to another ahupua'a or 'ili.<sup>20</sup> Hawaiians also had a complex religion focused on several major gods—most notably Kane, god of life and light, Lono, god of the harvest and peace, Ku, god of war and government, and Pele, goddess of fire. The religion generated a detailed system of taboos (kapu), enforced by priests, which supported the political, economic and social systems of the islands.<sup>21</sup>

The language and culture of the Hawaiian people were rich and complex. Hawaiians possessed an “extensive literature accumulated in memory, added to from generation to generation, and handed down by word of mouth. It consisted of mele (songs) of various kinds, genealogies and honorific stories \* \* \* [much of which] was used as an accompaniment to the hula.”<sup>22</sup> Hawaiians also had a “rich artistic life in which they created colorful feathered capes, substantial temples, carved images, formidable voyaging canoes, tools for fishing and hunting, surfboards, weapons of war, and dramatic and whimsical dances.”<sup>23</sup>

The communal nature of the economy and the caste structure of the society resulted in values strikingly different from those prevalent in more competitive western economies and societies. For example, Hawaiian culture stressed cooperation, acceptance, and generosity, and focused primarily on day-to-day living.<sup>24</sup>

Hawai'i was not utopia. There were wars between the island chiefs and among other ali'i. Natural disasters, such as tidal waves and volcanic eruptions, often killed or displaced whole villages. But Hawai'i's social, economic, and political system was highly developed and evolving, and its population, conservatively estimated to be at least 300,000<sup>25</sup> was relatively stable before the arrival of the first European explorers.

Hawai'i was “discovered” by Europeans in 1778, when the first haole, or white foreigner, Captain James Cook of the British Royal Navy, landed. Because he arrived during a festival associated with Lono in a ship whose profile resembled Lono's symbol, he was greeted as that long-departed god. Other foreign vessels soon followed on journeys of exploration or trade.<sup>26</sup>

In the years that followed the arrival of Cook and other non-Hawaiians, warring Hawaiian kings, now aided by haole weapons and advisers, fought for control of Hawai'i. King Kamehameha I won control of the Big Island of Hawai'i, and then successfully invaded Maui, Lana'i, Moloka'i, and O'ahu. By 1810, he also gained the al-

<sup>19</sup> Id.

<sup>20</sup> Id.; see also Fuchs, *supra* at 5.

<sup>21</sup> See Ralph S. Kuykendall & A. Grove Day, *Hawai'i: A History* 11 (1964).

<sup>22</sup> 1 Kuykendall, *supra* at 10–11.

<sup>23</sup> Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 *Yale L. & Pol'y Rev.* 95, 95 (1998) (citing, e.g., Joseph Feher, *Hawai'i: A Pictorial History* 36–132 (1969)).

<sup>24</sup> See, e.g., Fuchs, *supra* at 74–75.

<sup>25</sup> This estimate is conservative; other sources place the number at one million. David E. Stannard, *Before the Horror: the Population of Hawai'i on the Eve of Western Contact* 59 (1989).

<sup>26</sup> E.S. & Elizabeth G. Handy, *Native Planters in Old Hawai'i* 331 (1972).

legiance of the King of Kaua'i. Despite the political unification of the islands, Kamehameha I's era was but another in a series of steps toward the devastation of the Hawaiian people.

The immediate and brutal decline of the Native Hawaiian population was the most obvious result of contact with the West. Between Cook's arrival and 1820, disease, famine, and war killed more than half of the Native Hawaiian population. By 1866 only 57,000 Native Hawaiians remained from the basically stable pre-1778 population of at least 300,000. The impact was greater than the numbers can convey: old people were left without the young adults who supported them; children were left without parents or grandparents. The result was a rending of the social fabric.

This devastating population loss was accompanied by cultural, economic, and psychological destruction. Western sailors, merchants, and traders did not respect Hawaiian kapu (taboos) or religion and were beyond the reach of the priests. The chiefs began to imitate the foreigners whose ships and arms were so superior to their own. The kapu were abolished soon after Kamehameha I died.<sup>27</sup> Christianity, principally represented by American missionaries, quickly flowed into the breach. Christianity condemned not only the native religion, but the world view, language, and culture that were intertwined with it. The loss of the old gods, along with the law and culture predicated on their existence, resulted in substantial social conflict and imbalance.<sup>28</sup>

Western merchants also forced rapid change in the islands' economy. Initially, Hawaiian chiefs sought to trade for western goods and weapons, taxing and working commoners nearly to death to obtain the supplies and valuable sandalwood needed for such trades and nonetheless becoming seriously indebted. As Hawai'i's stock of sandalwood declined, so, too, did that trade, but it was replaced by whaling and other mercantile activities.<sup>29</sup> More than four-fifths of Hawai'i's foreign commerce was American; the whaling services industry and mercantile business in Honolulu were almost entirely in American hands.<sup>30</sup> What remained to the Hawaiian people was their communal ownership and cultivation of land, but, as described, that, too was soon replaced by a western system of individual property ownership.

As the middle of the 19th century approached, the islands' small non-native population wielded an influence far in excess of its size.<sup>31</sup> These influential westerners sought to limit the absolute power of the Hawaiian king over their legal rights and to implement property law so that they could accumulate and control land. By dint of foreign pressure, these goals were achieved.<sup>32</sup> In 1840, King Kamehameha III promulgated a new constitution, establishing a hereditary House of Nobles and an elected House of Commons. And in 1842, the King authorized the Mahele—the beginning of the division of Hawai'i's communal land which led to the transfer of substantial amounts of land to western hands. In the 1848

<sup>27</sup> See Fuchs, *supra* at 8–9.

<sup>28</sup> *Id.* at 9; Kuykendall & Day, *supra*, at 40–41.

<sup>29</sup> See Fuchs, *supra*, at 10–11; Kuykendall & Day, *supra*, at 41–43; MacKenzie, *supra*, at 5.

<sup>30</sup> See Fuchs, *supra*, at 18–19; Mackenzie, *supra*, at 6, 9–10.

<sup>31</sup> See Felix S. Cohen, *Handbook of Federal Indian Law* 799 (2d ed. 1982) (“[a] small number of Westerners residing in Hawai'i, bolstered by Western warships which intervened at critical times, exerted enormous political influence[.]”).

<sup>32</sup> See e.g., Mackenzie, *supra*, at 6; 1 Kuykendall, *supra*, at 206–26.

Mahele, the King conveyed about 1.5 million of the approximately 4 million acres in the islands to the main chiefs; he reserved about 1 million acres for himself and his royal successors (Crown Lands), and allocated about 1.5 million acres to the government of Hawai'i (Government Lands). All land remained subject to the rights of native tenants. In 1850, after the division was accomplished, an act was passed permitting non-natives to purchase land in fee simple. The expectation was that commoners would receive a substantial portion of the lands that were distributed to the chiefs because they were entitled to file claims to the lands that their ancestors had cultivated. In the end, however, only 28,600 acres (less than 1% of the land) were awarded to about 8,000 individual farmers.<sup>33</sup>

Soon after the Mahele, there was a dramatic concentration of land ownership in plantations, estates, and ranches owned by non-natives. Ultimately, the 2,000 westerners who lived on the islands obtained much of the profitable acreage from the commoners and chiefs.

These economic changes were devastating for the Native Hawaiian people. The communal land system of subsistence farming was replaced by an economy dominated by western-owned plantation agriculture, and water formerly used for taro cultivation was increasingly diverted for irrigation of sugar plantations. Native Hawaiians were not considered sufficiently cheap, servile labor for the backbreaking plantation work, and, indeed, did not seek it. Unable successfully to adjust either to the new economic life of the plantation or to the competitive economy of the city, many Native Hawaiians became part of "the floating population crowding into the congested tenement districts of the larger towns and cities of the Territory" under conditions which many believed would "inevitably result in the extermination of the race."<sup>34</sup> Native Hawaiians developed a debilitating sense of inferiority, and descended to the bottom tier of the economy and the society of Hawai'i.

The mutual interests of Americans living in Hawai'i and the United States became increasingly clear as the 19th century progressed. American merchants and planters in Hawai'i wanted access to mainland markets and protection from European and Asian domination. The United States developed a military and economic interest in placing Hawai'i within its sphere of influence. In 1826, the United States and Hawai'i entered into the first of the four treaties the two nations signed during the 19th century. Americans remained concerned, however, about the growing influence of the English (who briefly purported to annex Hawai'i in 1842) and the French (who forced an unfavorable treaty on Hawai'i in 1839 and landed troops in 1849). American advisors urged the King to pursue international recognition of Hawaiian sovereignty, backed up by an American guarantee of continued independence.

In pronouncements made during the 1840s, the administration of President John Tyler announced the Tyler Doctrine, an extension of the Monroe Doctrine. It asserted that the United States had a paramount interest in Hawai'i and would not permit any other na-

<sup>33</sup> Many *maka'ainana* (commoners) did not secure their land because they did not know of or understand the new laws, could not afford the survey costs, feared that a claim would be perceived as a betrayal of the chief, were unable to farm without the traditional common cultivation and irrigation of large areas, were killed in epidemics, or migrated to cities. *Id.*

<sup>34</sup> (quoting S. Con. Res. 2, 10th Leg. of the Territory of Hawai'i, 1991 Senate Journal 25-26).

tion to have undue control or exclusive commercial rights there. Secretary of State Daniel Webster explained:

The United States \* \* \* are more interested in the fate of the islands, and of their government, than any other nation can be; and this consideration induces the President to be quite willing to declare, as the sense of the Government of the United States, that the Government of the \* \* \* Islands ought to be respected; that no power ought either to take possession of the islands as conquest, or for the purpose of colonization, and that no power ought to seek for any undue control over the existing government, or any exclusive privileges or preferences in matters of commerce.<sup>35</sup>

America's already ascendant political influence in Hawai'i was heightened by the rapid growth of the island sugar industry which followed the Mahele. Sugar planters in Hawai'i were eager to eliminate the United States' tariff on their exports to California and Oregon. Although sugar growers within the United States strongly resisted the lifting of the tariff, American fear of "incipient foreign domination of the Islands" was a stronger influence than the mainland growers' lobby. The 1875 Convention on Commercial Reciprocity<sup>36</sup> eliminated the American tariff on sugar from Hawai'i and virtually all tariffs that Hawai'i had placed on American products. Critically, it also prohibited Hawai'i from giving political, economic, or territorial preferences to any other foreign power. Finally, when the Reciprocity Treaty was extended in 1887, the United States also obtained the right to establish a military base at Pearl Harbor.

Americans were determined to ensure that the Hawaiian government did nothing to damage Hawai'i's growing political and economic relationship with America. But the Hawaiian King and people were bitter about the loss of their lands to foreigners and were hostile both to the tightening bond with the United States and the increasing importation of Asian labor to work the plantations.

Matters came to a head in 1887, when King Kalakaua appointed a prime minister who had the strong support of the Hawaiian people and who opposed granting a base at Pearl Harbor as a condition for extension of the Reciprocity Treaty, and took other measures that were considered anti-western. The business community, backed by the non-native military group, the Honolulu Rifles, forced the prime minister's resignation and the enactment of a new constitution. The new constitution—often referred to as the Bayonet Constitution—reduced the king to a figure of minor importance. It extended the right to vote to western males whether or not they were citizens of the Hawaiian Kingdom, and disenfranchised almost all native voters by giving only residents with a specified income level or amount of property the right to vote for members of the House of Nobles. The representatives of propertied westerners took control of the legislature. A suspected native revolt in favor of the King's younger sister, Princess Lili'uokalani, and a new constitution were quelled when the American minister summoned United States Marines from an American warship off Honolulu. Westerners remained firmly in control of the government until the

<sup>35</sup> S. Exec. Doc. No. 52-77, 40-41 (1893) (describing 1842 statement).

<sup>36</sup> Jan. 30, 1875, U.S.-Haw., 19 Stat. 625 (1875) (Reciprocity Treaty).

death of the King in 1891, when Queen Lili'uokalani came to power.

On January 14, 1893, the Queen was prepared to promulgate a new constitution, restoring the sovereign's control over the House of Nobles and limiting the franchise to Hawaiian subjects.<sup>37</sup> She was, however, forced to withdraw her proposed constitution.<sup>38</sup>

Despite the Queen's apparent acquiescence, the majority of westerners recognized that the Hawaiian monarchy posed a continuing threat to the unimpeded pursuit of their interests. They formed a Committee of Public Safety to overthrow the Kingdom. Mercantile and sugar interests also favored annexation by the United States to ensure access on favorable terms to mainland markets and protection from Oriental conquest.

A Honolulu publisher and member of the Committee, Lorrin Thurston, informed the United States of a plan to dethrone the Queen. In response, the Secretary of the Navy informed Thurston that President Harrison had authorized him to say that "if conditions in Hawai'i compel you to act as you have indicated, and you come to Washington with an annexation proposition, you will find an exceedingly sympathetic administration here."<sup>39</sup> The American annexation group collaborated closely with the United States' Minister in Hawai'i, John Stevens.

On January 16, 1893, at the order of Minister Stevens, American soldiers marched through Honolulu, to a building known as Anion Hall, located near both the government building and the palace. The next day, local revolutionaries seized the government building and demanded that Queen Lili'uokalani abdicate. Stevens immediately recognized the rebels' "provisional government" and placed it under the United States' protection.

President Harrison promptly sent an annexation treaty to the Senate for ratification and denied any United States involvement in the revolution. Before the Senate could act, however, President Cleveland, who had assumed office in March of 1893, withdrew the treaty. An investigator reported that the revolution had been accomplished by force with American assistance and against the wishes of Hawaiians.<sup>40</sup> To Congress, President Cleveland declared:

[I]f a feeble but friendly state is in danger of being robbed of its independence and its sovereignty by a misuse of the name and power of the United States, the United States cannot fail to vindicate its honor and its sense of justice by an earnest effort to make all possible reparation.<sup>41</sup>

Cleveland demanded the restoration of the Queen. But the Senate Foreign Relations Committee issued a report ratifying Stevens' actions and recognizing the provisional government, explaining that relations between the United States and Hawai'i are unique

<sup>37</sup> See MacKenzie, *supra* at 11; 3 Kuykendall, *supra* at 585–86.

<sup>38</sup> See Fuchs, *supra* at 30.

<sup>39</sup> L.A. Thurston, *Memoirs of the Hawaiian Revolution* 230–32 (1936).

<sup>40</sup> See Kuykendall & Day, *supra* at 179.

<sup>41</sup> President's Message Relating to the Hawaiian Islands, House Ex. Doc. No. 47, 53d Cong., 2d Sess. (December 18, 1893), reprinted in *Foreign Relations of the United States: 1894: Affairs in Hawai'i*, App. II, at 443, 457 (1895).

because “*Hawai‘i has been all the time under a virtual suzerainty of the United States.*”<sup>42</sup>

As a result of this impasse, the United States government neither restored the Queen nor annexed Hawai‘i. The Provisional Government thus called a constitutional convention whose composition and members it controlled.<sup>43</sup> The convention promulgated a constitution for the new Republic of Hawai‘i that imposed property and income qualifications as prerequisites for the franchise and for the holding of elected office.<sup>44</sup> Furthermore, Article 101 of the Constitution of the Republic of Hawai‘i required prospective voters to swear an oath in support of the Republic and declaring that they would not, “either directly or indirectly, encourage or assist in the restoration or establishment of a monarchical form of government in the Hawaiian Islands.” The overwhelming majority of the Native Hawaiian population, loyal to their Queen, refused to swear such an oath and was thus effectively disenfranchised.<sup>45</sup>

“Native Hawaiians were, perhaps, not extremely sophisticated in governmental matters, but it took no great amount of political insight to perceive that this constitutional system was a beautifully devised oligarchy devoted to the purpose of keeping the American minority in control of the Republic.”<sup>46</sup> The Republic also claimed title to the Government Lands and Crown Lands without paying compensation to the monarch.<sup>47</sup> In 1894 Sanford Dole was elected President of the Republic of Hawai‘i and the United States gave his government prompt recognition.<sup>48</sup>

The election of President McKinley in 1896 gave the annexation movement new vigor. Another annexation treaty was sent to the Senate. Simultaneously, the Native Hawaiian people adopted resolutions which they sent to Congress stating that they opposed annexation and wanted to be an independent kingdom.<sup>49</sup> The annexation treaty failed in the Senate because a two-thirds majority could not be obtained as required under the Treaty Clause of the U.S. Constitution. Accordingly, pro-annexation forces in the House of Representatives introduced a Joint Resolution of Annexation, the adoption of which required only a simple majority in each House of Congress. The balance was tipped at this moment by the United States’ entry into the Spanish-American War. American troops were fighting in the Pacific, particularly in the Philippines, and the United States needed to be sure of a Pacific base.<sup>50</sup> In July 1898,

<sup>42</sup> S. Rep. No. 53–277, at 21 (1894) (emphasis supplied).

<sup>43</sup> See Kuykendall & Day, *supra* at 183.

<sup>44</sup> *Id.* at 184; MacKenzie, *supra* at 13.

<sup>45</sup> Noenoe Silva, *Ke Ku‘e Kupa‘a Loa Nei Makou: Kanaka Maoli Resistance to Colonization* 170 (1999) (Silva).

<sup>46</sup> W.A. Russ, *The Hawaiian Republic (1894–1898)* 33–34 (1961).

<sup>47</sup> See MacKenzie, *supra* at 13.

<sup>48</sup> A short-lived counter-revolution commenced on January 7, 1895. Republic police discovered it, arrested many royalist leaders, and imprisoned the Queen. Eventually, she was forced to swear allegiance to the new Republic in exchange for clemency for the revolutionaries. MacKenzie, *supra* at 13; Fuchs, *supra* at 34–35; Silva, *supra* at 172–176. Among those arrested for supporting the counter-revolution were Robert Wilcox and Prince Jonah Kalaniana‘ole, later elected as the Territory of Hawai‘i’s first and second Delegates, respectively, to the U.S. House of Representatives.

<sup>49</sup> Russ, *supra* at 198, 209. The resolutions were signed by 21,269 people, representing more than 50% of the Native Hawaiian population in Hawai‘i at that time. See Van Dyke, *supra* at 103 & n.48 (citing Dan Nakaso, *Anti-Annexation Petition Rings Clear*, *Honolulu Advertiser*, Aug. 5, 1998, at 1); Tom Coffman, *Nation Within: The Story of America’s Annexation of the Nation of Hawai‘i* 273–82 (1998); Silva, *supra* at 184–206.

<sup>50</sup> See Kuykendall & Day, *supra* at 188; MacKenzie, *supra* at 14.

the Joint Resolution was enacted—“the fruit of approximately seventy-five years of expanding American influence in Hawai‘i.”<sup>51</sup>

On August 12, 1898, the Republic of Hawai‘i ceded sovereignty and conveyed title to its public lands, including the Government and Crown Lands, to the United States.<sup>52</sup> In 1900 Congress passed the Hawai‘i Organic Act,<sup>53</sup> establishing Hawaiians territorial government. And, with the enactment of the Admission Act in 1959, Congress admitted Hawai‘i to the Union as the fiftieth state.

#### *Hawaiian Homes Commission Act*

Congress explicitly recognized the existence of a special or trust relationship between the Native Hawaiian people and the United States with the enactment of the Hawaiian Homes Commission Act in 1921.

In 1826 it was estimated that there were 142,650 full-blooded Native Hawaiians in the Hawaiian islands. By 1919 their numbers had been reduced to 22,600. Historically, the Native Hawaiian’s subsistence lifestyles required that they live near the ocean to fish and near fresh water streams to irrigate their staple food crop (taro) within their respective ahupua‘a. Beginning in the early 1800’s, more and more land was being made available to foreigners and was eventually leased to them to cultivate pineapple and sugar cane. Large numbers of Native Hawaiians were forced off the lands that they had traditionally occupied. As a result, they moved into the urban areas, often lived in severely-overcrowded tenements and rapidly contracted diseases for which they had no immunities.

By 1920, there were many who were concluding that the native people of Hawai‘i were a “dying race,” and that if they were to be saved from extinction, they must have the means of regaining their connection to the land, the ‘aina. In hearings on the matter, Secretary of the Interior Franklin Lane explained the trust relationship on which the statute was premised:

One thing that impressed me \* \* \* was the fact that the natives of the islands who are our wards, I should say, and for whom in a sense we are trustees, are falling off rapidly in numbers and many of them are in poverty.<sup>54</sup>

Lane explicitly analogized the relationship between the United States and Native Hawaiians to the trust relationship between the United States and other Native Americans, explaining that special programs for Native Hawaiians are fully supported by history and “an extension of the same idea” that supports such programs for other Indians.<sup>55</sup>

<sup>51</sup>Fuchs, *supra* at 36.

<sup>52</sup>Joint Resolution for Annexing the Hawaiian Islands to the United States, ch. 55, 30 Stat. 750, 751 (1898) (Annexation Resolution).

<sup>53</sup>Act of April 30, 1900, ch. 339, 31 Stat. 141 (1900) (Organic Act).

<sup>54</sup>H.R. Rep. No. 66–839, at 4 (1920).

<sup>55</sup>Hearings before the Committee on the Territories, House of Representatives, 66th Cong., 2d Sess., on Proposed Amendments to the Organic Act of the Territory of Hawai‘i, February 3, 4, 5, 7, and 10, 1920, at 129–30 (statement of Secretary Lane that “[w]e have got the right to set aside these lands for this particular body of people, because I think the history of the islands will justify that before any tribunal in the world,” and rejecting the argument that legislation aimed at “this distinct race” would be unconstitutional because “it would be an extension of the same idea” as that established in dealing with Indians); see also *id.* at 127 (colloquy between Secretary Lane and Representative Monahan, analogizing status of Native Hawaiians to that of Indians), and at 167–70 (colloquy between Representative Curry, Chair of the Committee, and

Senator John H. Wise, a member of the Legislative Commission of the Territory of Hawai'i, testified before the United States House of Representatives:

The idea in trying to get the lands back to some of the Hawaiians is to rehabilitate them. I believe that we should get them on lands and let them own their own homes \* \* \*. The Hawaiian people are a farming people and fishermen, out of door people, and when they were frozen out of their lands and driven into the cities they had to live in the cheapest places, tenements. That is one of the reasons why the Hawaiian people are dying. Now, the only way to save them, I contend, is to take them back to the lands and give them the mode of living that their ancestors were accustomed to and in that way rehabilitate them.<sup>56</sup>

Prince Jonah Kuhio Kalaniana'ole (Prince Kuhio), the Territory's sole delegate to Congress, testified before the full U.S. House of Representatives: "The Hawaiian race is passing. And if conditions continue to exist as they do today, this splendid race of people, my people, will pass from the face of the earth."<sup>57</sup> Secretary of Interior Lane attributed the declining population to health problems like those faced by the "Indian in the United States" and concluded the Nation must provide similar remedies.<sup>58</sup>

The effort to "rehabilitate" this dying race by returning Native Hawaiians to the land led the Congress to enact the Hawaiian Homes Commission Act on July 9, 1921. The Act sets aside approximately 203,500 acres of public lands (former Crown and Government lands ceded to the United States upon Annexation) for homesteading by Native Hawaiians.<sup>59</sup> Congress compared the Act to "previous enactments granting Indians \* \* \* special privileges in obtaining and using the public lands."<sup>60</sup>

In support of the Act, the House Committee on the Territories recognized that, prior to the Mahele, Hawaiians had a one-third interest in the land. The Committee reported that the Act was necessary to address the way Hawaiians had been short-changed in prior land distribution schemes. Prince Kuhio further testified before the U.S. House of Representatives that Hawaiians had an equitable interest in the unregistered lands that reverted to the Crown before being taken by the Provisional Government and, subsequently, the Territorial Government:

[T]hese lands, which we are now asking to be set aside for the rehabilitation of the Hawaiian race, in which a one-third interest of the common people had been recognized, but ignored in the division, and which reverted to the Crown, presumably in trust for the people, were taken over by the Republic of Hawai'i. \* \* \* By annexation these lands became a part of the public lands of the United

Representatives Dowell, and Humphreys, making the same analogy and rejecting the objection that "we have no government or tribe to deal with here").

<sup>56</sup>Id. at 3-4. Wise's testimony was quoted and adopted in the House Committee on the Territories' report to the full U.S. House of Representatives.

<sup>57</sup>59 Cong. Rec. 7453 (1920) (statement of Delegate Jonah Kuhio Kalaniana'ole).

<sup>58</sup>H.R. Rep. 839, 66th Cong., 2d Sess. 5 (statement of Secretary Lane).

<sup>59</sup>Hawaiian Homes Commission Act, §203.

<sup>60</sup>H.R. Rep. No. 66-839, at 11 (1920).

States, and by the provisions of the organic act under the custody and control of the Territory of Hawai'i. \* \* \* We are not asking that what you are to do be in the nature of a largesse or as a grant, but as a matter of Justice.<sup>61</sup>

The Act provides that the lessee must be a Native Hawaiian, who is entitled to a lease for a term of ninety-nine years, provided that the lessee occupy and use or cultivate the tract within one year after the lease is entered into. A restriction on alienation, like those imposed on Indian lands subject to allotment, was included in the lease. Also like the general allotment acts affecting Indians,<sup>62</sup> the leases were intended to encourage rural homesteading so that Native Hawaiians would leave the urban areas and return to rural subsistence or commercial farming and ranching. In February, 1923, the Congress amended the Act to permit one-half acre residence lots and to provide for home construction loans. Thereafter, the demand for residential lots far exceeded the demand for agricultural or pastoral lots.<sup>63</sup>

For the next forty years, during the Territorial period (1921–1959) and the first two decades of statehood (1959–1978), inadequate funding forced the Department of Hawaiian Home Lands to lease its best lands to non-Hawaiians in order to generate operating funds. There was little income remaining for the development of infrastructure or the settlement of Hawaiians on the home lands. The lack of resources—combined with questionable transfers and exchanges of Hawaiian home lands, and a decades-long waiting list of those eligible to reside on the home lands—rendered the home lands program a tragically illusory promise for most Native Hawaiians.<sup>64</sup> While the Act did not succeed in its purpose, its enactment has substantial importance because it constitutes an express affirmation of the United States' trust responsibility to the Native Hawaiian people.

#### *Hawai'i Admission Act*

As a condition of statehood, the Hawai'i Admission Act required the new State to adopt the Hawaiian Homes Commission Act and imposed a public trust on the lands ceded to the State. The 1959 Compact between the United States and the People of Hawai'i by which Hawai'i was admitted into the Union expressly provides that:

As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State, as provided in section 7, subsection (b) of this Act, subject to amendment or repeal only with the consent of the United States, and in no other manner: Provided, That (1) \* \* \* the Hawaiian home-loan fund, the Hawaiian home-operating fund, and the Hawaiian home-development fund shall not be reduced or impaired by any such amendment, whether made in the constitution or in the manner

<sup>61</sup> 59 Cong. Rec. 7453 (1920) (statement of Delegate Jonah Kuhio Kalaniana'ole).

<sup>62</sup> 25 U.S.C. §§ 331–334, 339, 342, 348, 349, 354, 381 (1998).

<sup>63</sup> Office of State Planning, Office of the Governor, Pt. I, 1 Report on Federal Breaches of the Hawaiian Home Lands Trust, 4–6 (1992).

<sup>64</sup> *Id.* at 12.

required for State legislation, and the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of said Act, shall not be increased, except with the consent of the United States; (2) that any amendment to increase the benefits to lessees of Hawaiian home lands may be made in the constitution, or in the manner required for State legislation, but the qualifications of lessees shall not be changed except with the consent of the United States; and (3) that all proceeds and income from “available lands”, as defined by said Act, shall be used only in carrying out the provisions of said Act.<sup>65</sup>

The lands granted to the State of Hawai‘i by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.<sup>66</sup>

These were explicit delegations of Federal authority to be assumed by the new State. They were not discretionary. The language is not permissive. The United States did not absolve itself from any further responsibility in the administration or amendment of the Hawaiian Homes Commission Act. Nor did the United States divest itself of any ongoing role in overseeing the use of ceded lands or the income or proceeds therefrom. Sections 4 and 5(f) of the Hawai‘i Admission Act, quoted above, clearly contemplate a continuing Federal role, as do sections 204 and 223 of the Hawaiian Homes Commission Act, which provide that the consent of the Secretary of the Interior must be obtained for certain exchanges of trust lands and reserved to Congress the right to amend that Act. The Federal and State courts have repeatedly noted that the United States retains the authority to bring an enforcement action against the State of Hawai‘i for breach of the section 5(f) trust.<sup>67</sup> Despite the overthrow and annexation of the Hawaiian nation, Native Hawaiian culture has survived, and the Native Hawaiian people have a unique culture that continues today.

<sup>65</sup> Hawai‘i Admission Act, § 4, 73 Stat. at 5.

<sup>66</sup> Id. § 5(f), 73 Stat. at 6.

<sup>67</sup> *Han v. United States*, 45 F3d 333 (9th Cir. 1995); *Pele Defense Fund v. Paty*, 837 P2d 1247 (Hawai‘i, 1992), cert. denied, 507 U.S. 1163 (1996).

*Native Hawaiian culture, traditions, political organization, and navigation*

*Aloha 'Aina* (Love of the Land)—Native Hawaiians honored their bond with the land (*aloha 'aina*) by instituting one of the most sophisticated environmental regulatory systems on earth, the *kapu* system. For Hawaiians, the life of the land depended on the righteousness of the people.<sup>68</sup> This concept motivated three decades of efforts by Hawaiian leaders to regain Kaho'olawe, an island with deep spiritual significance. Once a military bombing practice target, Kaho'olawe is now listed in the National Register of Historic Places and is the subject of a massive Federal clean-up project.<sup>69</sup>

*Subsistence*—Ancient Native Hawaiians supplemented the produce of their farms and fishponds by fishing, hunting, and gathering plants. These subsistence activities became increasingly more difficult to pursue as changing land ownership patterns barred access to natural resources. Nonetheless, in predominantly Hawaiian rural areas such as Hana, Puna, and the island of Moloka'i, Native Hawaiians continue to feed their families as their ancestors did before them.<sup>70</sup> Hawai'i law has always guaranteed subsistence gathering rights to the people so they may practice native customs and traditions.<sup>71</sup>

*Kalo* (Taro Cultivation)—In Hawaiian legend, the staple crop of *kalo* (taro) was revered as the older brother of the Hawaiian people.<sup>72</sup> Taro cultivation was not only a means of sustenance, but also a sacred duty of care to an older sibling. As land tenure changed, however, the ancient, stream-irrigated taro paddies (*lo'i*) were lost to newer crops, encroaching development, and the diversion of riv-

<sup>68</sup>The State's motto reflects this concept: "Ua mau ke ea o ka 'aina i ka pono." (The life of the land is perpetuated in righteousness.) Haw. Const. Art. XV, Sec. 5 (1993).

<sup>69</sup>Kaho'olawe Island: Restoring a Cultural Treasure. Final Report of the Kaho'olawe Island Conveyance Commission to the Congress of the United States 2 (March 31, 1993) ("This report calls upon the United States government to return to the people of Hawai'i an important part of their history and culture, the island of Kaho'olawe. The island is a special place, a sanctuary, with a unique history and culture contained in its land, surrounding waters, ancient burial places, fishing shrines, and religious monuments"). Title X of the Fiscal Year 1994 Department of Defense Appropriations Act, Pub. L. No. 103-139, 107 Stat. 1418 (1994) was enacted on November 11, 1993, Section 10001(a) of Title X states that the island of Kaho'olawe is among Hawai'i's historic lands and has a long, documented history of cultural and natural significance to the people of Hawai'i. It authorized \$400,000,000 to be spent for the clean-up of military ordnance from portions of the island. *Id.* See Haw. Rev. Stat. Chap. 6K (1993). The state Kaho'olawe Island Reserve Commission holds the resources and waters of the island of Kaho'olawe in trust until such time as the State of Hawai'i and the federal government recognize a sovereign Hawaiian entity. *Id.* at §6K-9.

<sup>70</sup>See Davianna McGregor, et al., Contemporary Subsistence Fishing Practices Around Kaho'olawe: Study Conducted for the NOAA National Marine Sanctuaries Program (May 1997). See also Jon K. Matsuoka, et. al., Governor's Moloka'i Subsistence Task Force Report (1993); Andrew Lind, An Island Community: Ecological Succession in Hawai'i 102-03 (1968 ed.) (observing, in 1938, that traditional and customary practices survived in rural "havens where the economy of life to which they are best adapted can survive."). Hawaiian homestead tracts provide such rural havens.

<sup>71</sup>Haw. Const. Art. XII, Sec. 7 (1978). Hawaiian usage supersedes other sources of common law in Hawai'i. Haw. Rev. Stat. 1-1 (1993); *Branca v. Makuakane*, 13 Haw. 499, 505 (1901) ("The common law was not formally adopted until 1893 and then subject to precedents and Hawaiian national usage."). See also Haw. Rev. Stat. 7-1 (1993); *Kalipi v. Hawaiian Trust Co.*, 656 P.2d 745 (Haw. 1982); *Pele Defense Fund v. Paty*, 837 P.2d 1247 (Haw. 1992) cert. denied, 507 U.S. 918 (1993); *Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission*, 903 P.2d 1246 (Haw. 1995), cert. denied, 517 U.S. 1163 (1996).

<sup>72</sup>Lilikala Kame'elehiwa, Native Land and Foreign Desires: Pehea La E Pono Ali? 23-33 (1992). Hawaiian legend traces the ancestry of Hawai'i islands and people to the sky god, Wakea, and earth goddess, Papa. Their first-born child, Haloa naka, was stillborn and his small body, when buried, became the first taro root. Their second child, Halao, named for the first, was the first Hawaiian. 6 A. Fornander, Collection of Hawaiian Antiquities and Folklore 360 (1920); David Malo, Hawaiian Antiquities 244 (1951).

ers and streams.<sup>73</sup> In recent years, Native Hawaiians have reclaimed and restored ancient taro fields, and formed a statewide association of native planters, 'Onipa'a Na Hui Kalo.

*'Ohana* (Extended Family)—In the earliest era of Hawaiian settlement, governance was a function of the family.<sup>74</sup> For Native Hawaiians, family included blood relatives, beloved friends (hoaloha) and informally adopted children (hanai).<sup>75</sup> Family genealogies were sacred, and passed down in the form of oral chants only to specially chosen children—when those children were barred from learning their language, many of these ancient genealogies were lost. Nevertheless, family traditions of respect for elders, mutual support for kin and the adoption of related children have continued over the past two centuries.

The 'ohana beliefs, customs, and practices predated the ali'i; co-existed under the rule of the ali'i; and have continued to be practiced, honored and transmitted to the present. The 'ohana continued to honor their 'aumakua (ancestral deities). Traditional kahuna la'au lapa 'au (herbal healers) continue their healing practices using native Hawaiian plants and spiritual healing arts. Family burial caves and lava tubes continue to be cared for. The hula and chants continue to be taught, in distinctly private ways, through 'ohana lines.<sup>76</sup> Today, there is an extensive and growing network of reclaimed family genealogies, one of which is formally maintained by the Office of Hawaiian Affairs (Operation 'Ohana). Huge Hawaiian family reunions are routinely held throughout the islands, in every week of the year. In honor of a cultural tradition that reveres the taro root as the older brother of the Hawaiian race, these modern activities are called "ho'i kou i ka mole," or "return to the tap-root."

*'Iwi* (Bones)—In Hawaiian culture, the remains of the deceased carried the mana (spiritual power) of the decedent. These remains were treated with great reverence, and fearful consequences were sure to befall any who desecrated them. The protection of the bones of their ancestors remains a solemn responsibility for modern day Native Hawaiians. The State of Hawai'i has recognized the importance of protecting Native Hawaiian burial sites, and has established a Hawaiian Burial Council to ensure the 'iwi of Hawaiian ancestors are treated with proper respect.<sup>77</sup>

*Wahi Kapu* (Sacred Places)—Ancient Hawaiians also recognized certain places as sacred, and took extraordinary measures to prevent their desecration. A contemporary example of this concept is found at Mauna 'Ala on the island of O'ahu, where the remains of Hawai'i's ah'i (monarchs) are interred. This royal mausoleum is cared for by a kahu (guardian), who is the lineal descendant of the

<sup>73</sup> See e.g., *Reppun v. Board of Water Supply*, 656 P.2d 57 (Haw. 1982) (in this case, taro growers prevailed against water diversions that would have adversely affected their crops), cert. denied, 471 U.S. 1040 (1985).

<sup>74</sup> See generally E.S. Craighill Handy and Mary Kawena Pukui, *The Polynesian Family System in Ka'u* (1952); 1 Mary Kawena Pukui, E.W. Haertig & Catherine A. Lee, *Nana I Ke Kumu* 49–50 (6th pag. 1983) (explaining Hawaiian concepts of adoption and fostering).

<sup>75</sup> 'Ohana is a concept that has long been recognized by Hawai'i courts. See, e.g., *Leong v. Takasaki*, 520 P.2d 758, 766 (Haw. 1976); *Estate of Cunha*, 414 P.2d 925–129 (Haw. 1966); *Estate of Farrington*, 42 Haw. 640, 650–651 (1958); *O'Brien v. Walker*, 35 Haw. 104, 117–36 (1939), aff'd., 115 F.2d 956 (9th Cir. 1940), cert. denied, 312 U.S. 707 (1941); *Estate of Kamauoha*, 26 Haw. 439, 448 (1922); *Estate of Nakuapa*, 3 Haw. 342, 342–43 (1872).

<sup>76</sup> McGregor, *supra*, at 9.

<sup>77</sup> Haw. Rev. Stat. Sec. 6E–43.5 (1993). This provision requires consultation with appropriate Native Hawaiian organizations, like Hui Malama I Na Kupuna O Hawai'i Nei.

family charged since antiquity with protecting the bones of this line of chiefs.

*'Olelo Hawai'i* (Hawaiian Language)—“I ka 'olelo no ke ola; i ka 'olelo no ka make. With language rests life, with language rests death.”<sup>78</sup> The Hawaiian language was banned from the schools in 1896.<sup>79</sup> During the time of the Republic and the territorial period, the speaking of the Native Hawaiian language was strictly forbidden anywhere within school yards or buildings, and physical punishment for using it could be harsh. Teachers who were native speakers of Hawaiian (many were in the first three decades of the Territory) were threatened with dismissal for using Hawaiian in school. Some were even a bit leery of using Hawaiian place names in class. Teachers were sent to Hawaiian-speaking homes to reprimand parents for speaking Hawaiian to their children.<sup>80</sup> The language was kept alive in rural Hawaiian families and in the mele oli (songs and chants) of native speakers.<sup>81</sup>

In 1978, the Hawai'i state Constitution was amended to make Hawaiian one of the two official languages of the State.<sup>82</sup> In the past twenty-five years, Hawaiian language has become a required offering in the State Department of Education curriculum, and private non-profit Hawaiian language schools have been established in all major islands with the assistance of Federal funds.<sup>83</sup> In 1997–1998, 1,351 students were enrolled in fourteen Hawaiian language immersion programs throughout the State, from pre-school through high school.<sup>84</sup> Hawaiian remains the first language of the Native Hawaiian community located on the isolated island of Ni'ihau, which was spared the effects of the 1896 ban.<sup>85</sup>

*Ho'oponopono* (Conflict Resolution)<sup>86</sup>—This ancient Hawaiian tradition of conflict resolution resembles the western practice of

<sup>78</sup> Ka'u: University of Hawai'i Hawaiian Studies Task Force Report, 23 (Dec. 1986). These anti-Hawaiian language efforts were falsely cast in terms of assimilation and societal unity. Nevertheless, the core issues of sovereignty and self-determination remained for, “to destroy the language of a group is to destroy its culture.” Adeno Addis, Individualism, Communitarianism, and the Rights of Ethnic Minorities, 66 *Notre Dame L. Rev.* 1219, 1270 (1991).

<sup>79</sup> Revised Laws of Hawai'i § 2, at 156 (1905). As a direct result of this law, the number of schools conducted in Hawaiian dropped from 150 in 1880 to zero in 1902. Albert J. Schütz, *The Voices of Eden: A History of Hawaiian Language Studies* 352 (1994). Hawaiian language newspapers, which were the primary medium for communication in Hawai'i at that time, declined from a total of twelve (nine secular and three religious) in 1910 to one religious newspaper in 1948. *Id.* at 362–63.

<sup>80</sup> Larry K. Kimura and William Wilson, 1 *Native Hawaiians Study Commission Minority Report*, 196 (U.S. Dept. of Interior 1983). See also Davianna McGregor-Alegado, *Hawaiians: Organizing in the 1970s*, 7 *Amerasia Journal* 29, 33 (1980) (“Through a systematic process of assimilation in the schools, especially restricting the use of the native language, Hawaiians were taught to be ashamed of their cultural heritage and feel inferior to the haole American elite in Hawai'i.”).

<sup>81</sup> “[T]he renewal of interest in the Hawaiian language and culture in the 1970s did not relight an extinguished flame, but fanned and fed the embers[.]” Schütz, *supra*, at 361.

<sup>82</sup> Haw. Const. Art. XV, sec 4 (1978). See also Haw. Const. Art. X, sec. 4 (1978) (requiring the State to “promote the study of Hawaiian culture, history and language [through] a Hawaiian education program \* \* \* in the public schools.”) Restrictions on the use of Hawaiian language in public schools were not actually lifted until 1986. See Haw. Rev. Stat. Sec. 298–2(b) (1993).

<sup>83</sup> Native Hawaiian Education Act, Pub. L. No. 103–382, Sec. 101, 108 Stat. 3518 (Oct. 20, 1994).

<sup>84</sup> Office of Hawaiian Affairs, *Native Hawaiian Data Book* 244–45 (1998) (Table/Figure 4.22). Projected enrollment for the 2005–2006 school year is 3,397. *Id.* Dramatic increases in the enrollment of Hawaiians at the University of Hawai'i took place shortly after adoption of the 1978 Constitutional Amendments and again after statutory restrictions were lifted in 1986 on use of the Hawaiian language in schools. *Id.* at 216–17 (Table/Figure 4.7). According to the 1990 Census, Hawaiian is spoken in 8,872 households. *Id.* at 240–41 (Table/Figure 4.20).

<sup>85</sup> Karen Silva, *Hawaiian Chant: Dynamic Cultural Link or Atrophied Relic?*, 98 *Journal of the Polynesian Society* 85, 86–87 (1989), cited in Schütz, *supra* note 27, at 357.

<sup>86</sup> See generally Victoria Shook, *Ho'oponopono, Contemporary Uses of a Hawaiian Problem-Solving Process* (1985).

mediation, but with the addition of a deeply spiritual component. It was and is traditionally practiced within families, and used to resolve disputes, cure illnesses, and reestablish connections between family members and their akua (gods). Today, trained practitioners are formally teaching the ho'oponopono methods, and there has been a resurgence of its use. The State courts have implemented a formal ho'oponopono program that is designed to help families to resolve their problems outside the courtroom.

**Civic Associations**—Prior to Annexation, Native Hawaiians were active participants in the political life of the Islands. Political associations were organized to protest against the Bayonet Constitution of 1887 and subsequent annexation efforts.<sup>87</sup> Hawaiian Civic Clubs were established at the turn of the century to campaign against the destitute and unsanitary living conditions of Hawaiians in the city of Honolulu and its outskirts.<sup>88</sup> These associations still exist, and count among their membership many of Hawai'i's most distinguished native leaders. In addition, Hawaiians living on Hawaiian Home Lands have, from the program's beginning in 1921, established homestead associations that are increasingly assuming responsibilities for the provision of governmental services to homestead areas.

**La'au Lapa'au (Hawaiian Healing)**—Quietly practiced over the past two centuries following European contact, Native Hawaiian medicine has always been an important alternative to western medical care. Today it is a credible form of treatment for many.<sup>89</sup> Practitioners use Hawaiian medicinal plants (la'au), massage (lomilomi), and spiritual counseling to heal. Hawaiian health centers established with Federal financial support<sup>90</sup> now incorporate traditional Hawaiian healing methods into their regimen of care. These traditional methods of healing are recognized and financed through appropriations under the Native Hawaiian Health Care Improvement Act of 1988.<sup>91</sup>

**Halau Hula (Hula Academies)**—Once banned by missionaries as sacrilege, the ancient art of hula<sup>92</sup> accompanied by chanting in the native tongue, flourishes today. Halau exist throughout the islands, and hula and chants are now regularly incorporated into public ceremonies.

**Voyaging/Celestial Navigation**—Ancient Hawaiians were skilled navigators, finding their way thousands of miles across the open

<sup>87</sup> Hui Kalai'aina, a Hawaiian political organization, lobbied for the replacement of the 1887 Bayonet Constitution, and led mass, peaceful protests that stalled negotiations for a new Treaty of Reciprocity. 3 Kuykendall, *supra*, at 448; Noenoe Silva, *Kanaka Maoli Resistance to Annexation*, 1 *O'iwi: A Native Hawaiian Journal* 45 (1998); see also Silva, *Kanaka Maoli Resistance*, *supra* at 158–63 (activities of Hui Kalai'aina), and at 184–206 (opposition to annexation).

<sup>88</sup> Davianna Pomaika'i McGregor, 'Aina Ho'opulapula: Hawaiian Homesteading, 24 *The Hawaiian Journal of History* 1, 4–5 (1990).

<sup>89</sup> Isabella Aiona Abbott, *La'au Hawai'i: Traditional Uses of Hawaiian Plants* 135 (1992); Nannette L. Kapulani Mossman Judd, *La'au Lapa'au: Herbal Healing Among Contemporary Hawaiian Healers*, 5 *Pacific Health Dialog Journal of Community Mental Health and Clinical Medicine for the Pacific: The Health of Native Hawaiians* 239–45 (1998).

<sup>90</sup> These traditional methods of healing are recognized and financed through appropriations under the Native Hawaiian Health Care Improvement Act of 1988, Pub. L. No. 100–579, 102 Stat. 2916 (now codified at 42 U.S.C. §§ 11701e et seq.).

<sup>91</sup> Pub. L. No. 100–579, 102 Stat. 2916 (now codified at 42 U.S.C. Sec. 11701e, et seq.).

<sup>92</sup> “[A] few chanters, dancers, and teachers among the po'e hula [hula people] kept alive the more traditional forms, and with the flowering of the ‘Hawaiian Renaissance’ in the 1970’s their knowledge and dedication became a foundation for revitalizing older forms.” Dorothy B. Barrere, Mary Kawena Pukui & Marion Kelly, *Hula Historical Perspectives* 1–2 (1980). Hula was recently designated the state dance. Act 83, *Relating To Hula* (June 22, 1999) (codified at *Haw. Rev. Stat.* 5–21).

Pacific using only the stars and the currents as guides. In the 1970's, a group of Native Hawaiians formed the Polynesian Voyaging Society. The Society researched Polynesian canoe-making and navigating traditions, and commissioned the construction of an historically authentic double-hulled voyaging canoe, the *Hokule'a* (Star of Gladness). A Native Hawaiian crew was trained to sail the canoe, and a Native Hawaiian navigator was chosen to learn the art of celestial navigation from one of its few remaining Polynesian practitioners. The canoe's first voyage to Tahiti in 1976 confirmed the sophisticated navigational skills of ancient Polynesians and also instilled a sense of pride in Hawaiian culture.<sup>93</sup> Other canoes have been built, and more voyages made since.<sup>94</sup> The art of voyaging is alive and well in modern Hawai'i, a testament to the skill and courage of the ancient navigators who first settled the Hawaiian islands.

Native Hawaiians today live in a markedly different world from the one that shaped their ancient practices. Yet they struggle to perpetuate a culture passed down to them through two millennia.

#### FEDERAL ACTIONS WITHIN THE CONTEXT OF FEDERAL INDIAN POLICY

The two most significant actions of the United States as they relate to the native people of Hawai'i must be understood in the context of the Federal policy towards America's other indigenous, native people at the time of those actions.

In 1921, when the Hawaiian Homes Commission Act was enacted into law, the prevailing Federal Indian policy was premised upon the objective of breaking up Indian reservations and allotting lands to individual Indians. Those reservation lands remaining after the allotment of lands to individual Indians were opened up to settlement by non-Indians, and significant incentives were authorized to make the settlement of former reservation lands attractive to non-Indian settlers. Indians were not to be declared citizens of the United States until 1924, and it was typical that a twenty-year restraint on the alienation of allotted lands was imposed. This restraint prevented the lands from being subject to taxation by the states, but the restraint on alienation could be lifted if an individual Indian was deemed to have become "civilized." However, once the restraint on alienation was lifted and individual Indian lands became subject to taxation, Indians who did not have the wherewithal to pay the taxes on the land, found their lands seized and put up for sale.

This allotment era of Federal policy was responsible for the alienation of nearly half of all Indian lands nationwide—hundreds of millions of acres of lands were no longer in native ownership, and hundreds of thousands of Indian people were rendered not only landless but homeless. The primary objective of the allotment of lands to individual Indians was to "civilize" the native people. The fact that the United States thought to impose a similar scheme on the native people of Hawai'i in an effort to "rehabilitate a dying

<sup>93</sup> Ben Finney, *Voyage of Rediscovery: A Cultural Odyssey through Polynesia* (1995). In 1995, the *Hokule'a* and *Hawai'iloa* sailed to the Marquesas Islands. PBS recently broadcast an hour-long documentary of this voyage entitled *Wayfinders—A Pacific Odyssey*. See <http://pbs.org/wayfinders>.

<sup>94</sup> *Hokule'a* left Hawai'i on June 15, 1999 for Rapa Nui (Easter Island).

race” is thus readily understandable in the context of the prevailing Federal Indian policy in 1921.

In 1959, when the State of Hawai'i was admitted into the Union, the Federal policy toward the native peoples of America was designed to divest the Federal government of its responsibilities for the indigenous people and to delegate those responsibilities to the several states. A prime example of this Federal policy was the enactment of Public Law 83-280, an Act which vested criminal jurisdiction and certain aspects of civil jurisdiction over Indian lands to certain states. In similar fashion, in 1959, the United States transferred most of its responsibilities related to the administration of the Hawaiian Homes Commission Act to the new State of Hawai'i, and in addition, imposed a public trust upon the lands that were ceded back to the State for five purposes, one of which was the betterment of conditions of Native Hawaiians.

#### CONSTITUTIONAL SOURCE OF CONGRESSIONAL AUTHORITY

The United States Supreme Court has so often addressed the scope of Congress' constitutional authority to address the conditions of the native people that it is now well-established.<sup>95</sup> Although the authority has been characterized as “plenary,”<sup>96</sup> the Supreme Court has addressed the broad scope of the Congress' authority.<sup>97</sup> It has been held to encompass not only the native people within the original territory of the thirteen states but also lands that have been subsequently acquired.<sup>98</sup>

The ensuing course of dealings with the indigenous people has varied from group to group, and thus, the only general principles that apply to relations with the first inhabitants of this nation is that they were dispossessed of their lands, often but not always relocated to other lands set aside for their benefit, and that their subsistence rights to hunt, fish, and gather have been recognized under treaties and laws, but not always protected nor preserved.

It is likely that no other group of people in America has been singled out so frequently for special treatment, unique legislation, and distinct expressions of Federal policy. Although the relationship between the United States and its native people is not a history that can be said to have followed a fixed course, it is undeniably a history that reveals the special status of the indigenous people of this

<sup>95</sup> “The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection. As well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States \* \* \* From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them, and the treaties in which it has been promised, there arises a duty of protection, and with it the power. This has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen.” *United States v. Kagama*, 118 U.S. 375 (1886).

<sup>96</sup> *Morton v. Mancari*, 427 U.S. 535 (1974).

<sup>97</sup> *Delaware Tribal Business Council v. Weeks*, 430 U.S. 73 (1977); *United States v. Sioux Nation*, 448 U.S. 371 (1980). The rulings of the Supreme Court make clear that neither the conferring of citizenship upon the native people, the allotment of their lands, the lifting of restrictions on alienation of native land, the dissolution of a tribe, the emancipation of individual native people, the fact that a group of natives may be only a remnant of a tribe, the lack of continuous Federal supervision over the Indians, nor the separation of individual Indians from their tribes would divest the Congress of its constitutional authority to address the conditions of the native people. *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902); *United States v. Celestine*, 215 U.S. 278 (1909); *Tiger v. Western Inv. Co.*, 221 U.S. 286 (1911); *United States v. Nice*, 241 U.S. 591 (1916); *Chippewa Indians v. United States*, 307 U.S. 1 (1939); *Delaware Tribal Business Council v. Weeks*, 430 U.S. 73 (1977); *United States v. John*, 437 U.S. 634 (1979).

<sup>98</sup> *United States v. Sandoval*, 231 U.S. 28 (1913).

land. American laws recognize that the native people do not trace their lineage to common ancestors and, from time to time, our laws have in fact discouraged the indigenous people from organizing themselves as “tribes.” But this much is true—that for the most part, at any particular time in our history, the laws of the United States have attempted to treat the native people, regardless of their genealogical origins and their political organization, in a consistent manner.

*Organization as a tribe and the scope of constitutional authority*

It has been suggested that the scope of constitutional authority vested in the Congress is constrained by the manner in which the native people organize themselves. Under this theory, if the native people are not organized as tribes, then the Congress lacks the authority to enact laws and the President is without authority to establish policies affecting the native people of the United States. However, the original language proposed for inclusion in the Constitution made no reference to “tribes” but instead proposed that the Congress be vested with the authority “to regulate affairs with the Indians as well within as without the limits of the United States.”<sup>99</sup> A further refinement suggested that the language read “and with Indians, within the Limits of any State, not ‘subject to the laws thereof[.]’”<sup>100</sup>

The exchanges of correspondence between James Monroe and James Madison concerning the construction of what was to become Article I, Section 8, Clause 3 of the Constitution make no reference to Indian tribes, but they do discuss Indians.<sup>101</sup> Nor is the term “Indian tribe” found in any dictionaries of the late eighteenth century, although the terms “aborigines” and “tribe” are defined.<sup>102</sup>

*Native Hawaiians and the meaning of “Indian”*

Whether the reference was to “aborigines” or to “Indians”, the Framers of the Constitution did not import a meaning to those terms as a limitation upon the authority of Congress, but as descriptions of the native people who occupied and possessed the lands that were later to become the United States—whether those lands lay within the boundaries of the original thirteen colonies, or any subsequently acquired territories. This construction is consistent with more than two hundred Federal statutes which establish that the aboriginal inhabitants of America are a class of people

<sup>99</sup>The Records of the Federal Convention of 1787, Volume II, Journal Entry of August 18, 1787, p. 321.

<sup>100</sup>The Records of the Federal Convention of 1787, Volume II, Journal Entry of August 22, 1787, p. 367.

<sup>101</sup>In his letter to James Monroe of November 27, 1784, James Madison observes, “The federal articles give Congs, the exclusive right of managing all affairs with the Indians not members of any State, under a proviso, that the Legislative authority, of the State within its own limits be not violated. By Indian[s] not members of a State, must be meant those, I conceive who do not live within the body of the Society, or whose Persons or property form no objects of its laws. In the case of Indians of this description the only restraint on Congress is imposed by the Legislative authority of the State.” The Founders’ Constitution, Volume Two, Preamble through Article 1, Section 8, Clause 4, p. 529, James Madison to James Monroe, 27 Nov. 1784, Papers 8:156–57; See also, James Monroe to James Madison, 15 Nov. 1784, Madison Papers 8:140.

<sup>102</sup>The term “aborigines” is defined as “the earliest inhabitants of a country, those of whom no original is to be traced,” and the term “tribe” is defined as “a distinct body of the people as divided by family or fortune, or any other characteristic.” A Dictionary of the English Language (Samuel Johnson ed., 1755). The annotations accompanying the term “Indian” in the 1901 Oxford dictionary indicates the use of the term as far back as 1553. Oxford English Dictionary (James A.H. Murray ed., 1901).

known as “Native Americans” and that this class includes three groups—American Indians, Alaska Natives and Native Hawaiians.

The unique native peoples of Alaska have been recognized as “Indian” and as “tribes” for four hundred years. The Founders’ understanding of the “Eskimaux” as Indian tribes, and Congress’ recognition of its power over Alaska Natives ever since the passage of the Fourteenth Amendment and the acquisition of the Alaskan territory, help illuminate Congress’ power over, and responsibility for, all Native American peoples.

The treatment of Alaskan Eskimos is particularly instructive because the Eskimo peoples are linguistically, culturally, and ancestrally distinct from other American “Indians.” Many modern scholars do not use the word “Indian” to describe Eskimos or the word “tribe” to describe their nomadic family groups and villages. The Framers, however, recognized no such technical distinctions. In the common understanding of the time, Eskimos, like Native Hawaiians, were aboriginal peoples; they were therefore “Indians.” Their separate communities of kind and kin were “tribes.” Congress’s special power over these aboriginal peoples is beyond serious challenge.

During the Founding Era, and during the Constitutional Convention, the terms “Indian” and “tribe” were used to encompass the tremendous diversity of aboriginal peoples of the New World and the wide range of their social and political organizations. The Founding generation knew and dealt with Indian tribes living in small, familial clans and in large, confederated empires. Native Alaska villages and Native Hawaiians residing in their aboriginal lands (i.e., the small islands that comprise the State of Hawai’i) are “Indian Tribes” as that phrase was used by the Founders. The Framers drafted the Constitution not to limit Congress’ power over Indians, but to make clear the supremacy of Congress’ power over Indian affairs. The Congress has exercised the power to promote the welfare of all Native American peoples, and to foster the ever-evolving means and methods of self-governance as exercised by Native people.

This history is accurately reflected in nearly two centuries of U.S. Supreme Court jurisprudence. Beginning with Chief Justice Marshall, the Supreme Court has recognized the power of the United States to provide for the welfare, and to promote the self-governance, of Indian peoples. This recognition of the right of the indigenous, native people of the United States to self-determination and self-governance is part of the structure of America’s complex multi-sovereign system of governance.

In the language and understanding of the Founders, “tribes” or “peoples” did not lose their identity as such when conquered or ruled by kings. Like other Native American people, Native Hawaiians lived for thousands of years as “tribes,” then as confederations of tribes, now as conquered tribes. All aboriginal peoples of the New World were “Indians.” That is what it meant to be an “Indian.” The Founders knew that Columbus had not landed in India or the Indies; Columbus’s navigational error had been corrected, but his malapropism had survived. And so, in the words of one of the earliest English books about America, the native people were

“Indians,” for the simple reason that “so caule wee all nations of the new founde lands.”<sup>103</sup>

The earliest explorers of the New World encountered an extraordinary diversity of aboriginal peoples—from the elaborate Aztec and Inca civilizations of the South to the nomadic “Esquimaux” of the North. These early experiences and the contemporary fascination with these diverse cultures informed the concept of “Indians” in the colonial era.

There was no understanding in the founding generation that Indians constituted a distinct or separate race. Indians were often assumed by the European settlers to be peoples like themselves. Before the development of modern dating methods that established beyond doubt the great antiquity of early man in America, it was believed that the Indians were offshoots of known civilizations of the Old World. Some scholars argued that they came from Egypt, others that they had broken away from the Chinese, and still others that they were descendants of Phoenician or Greek seamen. Another belief, more legend than theory, held that various light-skinned tribes possessed the blood of Welshmen who had come to America in the remote past.<sup>104</sup> Others theorized the Indians were the “lost tribes” of Israel.<sup>105</sup>

In his popular, “Notes on the State of Virginia”, Thomas Jefferson accepted the plausibility of the popular notion that the Indians had migrated to America from Europe via “the imperfect navigation of ancient times.”<sup>106</sup> Jefferson noted, however, that Cook’s voyage through the Bering Strait suggested that all the “Indians of America” except the “Eskimaux” migrated from Asia. Jefferson theorized that the Eskimos had come to America via Greenland from “the northern parts of the old continent,” i.e., Northern Europe.<sup>107</sup>

Modern scholars might be “puzzled whether they [Eskimos] were Indians, or a separate and somewhat mysteriously distinct people on earth.”<sup>108</sup> Others might question whether the native people of Hawai’i are “Indians.” Efforts to draw such distinctions would themselves have puzzled the Founding generation. The “Indians” were many peoples, with distinct languages, cultures and socio-political organizations. They had diverse origins: perhaps Asia, perhaps Europe, perhaps the lands of the Bible. But from wherever they came, and whatever their distinct cultures and governments, they were all “Indians,” for they were aboriginal inhabitants of the

<sup>103</sup> Gonzalo Fernandez de Oviego y Valdez, *De la natural hystoria de las Indas* (1526), trans. by R. Eden (1955), in E. Arber, ed., *The First Three English Books on America* (Birmingham, Eng., 1885) (emphasis added).

<sup>104</sup> A.M. Joseph, Jr., *The Indian Heritage of America* 40 (rev. ed. 1991).

<sup>105</sup> Id.; Letter, Jefferson to Adams, June 11, 1812 (discussing a popular book arguing “all the Indians of America to be descended from the Jews \* \* \* and that they all spoke Hebrew”), in Jefferson, *Writings* (Library of America, 1984), 1261; Bernal Diaz, *The Conquest of New Spain* 26 (1568) (J.M. Cohen, tr., 1963) (Objects at Indian site attributed “to the Jews who were exiled by Titus and Vespasian and sent overseas”).

<sup>106</sup> Jefferson, *Notes on the State of Virginia* (1787), in Jefferson, *Writings*, at 226. Jefferson’s Notes—which had circulated among several of the Founders for years before the Constitutional Convention—were written in 1781, published in February 1787 and appeared in newspapers during the Convention. Barlow to Jefferson, June 15, 1787, in *Papers of Thomas Jefferson* (Boyd, ed.), 11:473 (“Your Notes on Virginia are getting into the Gazetts in different States”); see also, e.g., id. at 8:147, 9:38, 517, 12:136 (Madison’s copy); id. at 10:464, 15:11 (Rutledge’s comments on); id. at 8:160, 164 (Adams comments on); id. at 8:147, 229, 245 (Monroe’s copy); id. at 21:392–93 (citations re circulation of Notes).

<sup>107</sup> Jefferson, *Notes*, at 226.

<sup>108</sup> Joseph, *supra*, at 57; see also Oxford English Dictionary (1st ed.) (“OED”), “Indian” (“The Eskimos \* \* \* are usually excluded from the term \* \* \*”).

New World. The Founding generation had no difficulty thinking of Eskimos as “Indians.” They would have had no more difficulty treating as “Indians” native peoples whose origins lay a thousand years ago in the South Pacific. Indeed, as one historian reports, Captain James Cook, the English “discoverer” of the Hawaiian islands and a contemporary of the Founders, referred to the inhabitants of the Hawaiian Islands as “Indians.”<sup>109</sup> As far as the Founders knew, all the “aboriginal inhabitants” of the New World came from the South Pacific via the “imperfect navigation of ancient times.”

The Founding generation used “tribes” to denote peoples of like kind or kin. As used in the Constitution, the word “tribe” does not refer to some specific type of government or social organization. All Native American peoples were “tribes,” whether they lived in villages or spread out in vast federations or empires. “Tribe” and “nation” were used to refer not to governments, but to groups of people recognizing a common membership or identity as such. Application of the biblical concept of “tribes” to the “Indians” reflected the understanding that the natives of the New World were not one people, but many “peoples,” “nations,” or “tribes”—terms used interchangeably well into the Nineteenth Century.<sup>110</sup>

The Founders had seen analogies to the complex tribal history of the Bible. The Founders knew the native peoples evolved, united and divided in ever shifting-forms of government. The native peoples had formed “powerful confederac[ies],” tribes united under common chiefs, and federations of tribes joined with other federations.<sup>111</sup> The colonies and the States under the Articles of Confederation had repeatedly dealt with vast federations of tribes, including the “Six Nations” in the north and the “Five Civilized Tribes” in the south.<sup>112</sup> The Indian peoples were “tribes” not because they formed any particular organization, but because they recognized themselves as distinct peoples, with cultures, languages and societies separate from each other and from the European invaders.

As Jefferson’s “Notes on the State of Virginia” and other contemporary works show, the division of the world into “European settlers” and “Indians” was not essentially racial. The Indians were not a race, they were many peoples, thought to share diverse ancestry with peoples all over the world. The distinction between European and Native American peoples was political. The European settlers (who arrived with Royal charters) recognized the “aboriginal peoples” as separate nations—separate sovereigns with whom they would have to deal as one nation to another. Before and after the Constitution, the new settlers treated the Indian peoples as

<sup>109</sup> Gavan Daws, *Shoal of Time, A History of the Hawaiian Islands* 2, 19, 23, 52 (1968) (Cook “spent several years among the savages of the Pacific, ‘Indians,’ as he and everyone else called them.”). Multiple references in logs and diaries of Captain Cook and his officers refer to the indigenous people they found in the Hawaiian Islands as “Indians.” For example, Cook wrote that his first mate “attempted to land but was prevented by the Indians coming down to the boat in great numbers.” J.C. Beaglehole, *The Journal of Captain James Cook on His Voyages of Discovery* 111267 (1967). David Samwell, the surgeon on Cook’s flagship *Discovery*, wrote, “The Indians opened and made a lane for the Marines to pass.” *Id.* at 1161.

<sup>110</sup> Robert F. Berkhofer, Jr., *The White Man’s Indian* 16 (1979).

<sup>111</sup> Jefferson, *Notes*, at 221.

<sup>112</sup> See, e.g., *Treaty with the Six Nations*, Oct. 22, 1784 (treaty with the many tribes of Senecas, Mohawks, Onondagas, Cayugas, Oneida and Tuscarora), in C.J. Kappler, ed., *Indian Affairs: Laws and Treaties* 2:5–6; *Treaty of Treaty of Forth McIntosh*, Jan. 21, 1785 (treaty with the Wiandot, Delaware, Chippewa, and Ottawa “and all their tribes”), in *id.* at 2:6–8; *Treaty of Hopewell*, Nov. 28, 1785 (treaty with all the “tribes” of the Cherokee), in *id.* at 2:8–11.

separate nations, with whom they made war, peace and treaties. The treatment of the aboriginal peoples under the Constitution was systematically and structurally distinct from the inhumane and unendurable treatment accorded to “slaves.” This distinctive nation-to-nation relationship survived the settlement of the West, the Civil War Amendments to the Constitution, and two hundred years of Congressional action and judicial construction.

*History of the origins of the constitutional term “Tribe”*

The Articles of Confederation gave the Continental Congress power over relations with the Indians only so long as Congress’ dealings with Indians within a State did not “infringe” that State’s legislative power. This created constant friction over where the States’ power ended and Congress’ power began. The sole stated purpose of the Indian terms of the new Constitution was to eliminate any uncertainty as to Congress’ supremacy. The Framers intended to grant Congress broad, supreme authority to regulate Indian affairs. The two references to “Indians” in the Constitution generated virtually no debate at any time in the Constitutional Convention. That relations with the Indians should be one of the Federal powers appears to have been universally accepted. The Framers sought only to make clear that Congress’ power here was supreme.

The Articles had given the Continental Congress “sole and exclusive right and power” of regulating relations with Indians who were “not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated.”<sup>113</sup> As Madison explained, this language created two major problems. First, no one knew when or whether Indians were “members of states”; second, the grant to Congress of “sole and exclusive power,” so long as Congress did not “intrud[e] on the internal right” of States was “utterly incomprehensible.” The provision had been a source of “frequent perplexity and contention in the federal councils.”<sup>114</sup> Capitalizing on the uncertainty, several states (Georgia, New York and North Carolina) had infringed Congress’ power by making their own arrangements with local Indians. As a result, during the Constitutional Convention and Ratification, Georgia was in armed conflict, and on the verge of war, with the powerful Creek Nation.

The only debate on the issue in the Convention focused on the need for federal supremacy over the states. Madison objected early on to the “New Jersey Plan” on the ground that it failed to bar states from encroaching on Congress’ power over “transactions with the Indians.”<sup>115</sup> In August, Madison proposed that Congress be given the power “[t]o regulate affairs with the Indians as well within as without the limits of the United States.”<sup>116</sup> Madison’s proposal was submitted to the Committee on Detail without discussion. The Committee on Detail recommended that power over Indi-

<sup>113</sup> Articles of Confederation, Art. X, March 1, 1778.

<sup>114</sup> Federalist 42, in XIV Documentary History of the Ratification of the Constitution (J. Kaminiski, ed., 1983) (“Documentary History”), XV:431.

<sup>115</sup> “Notes of James Madison,” June 19, 1787, in The Records of the Federal Convention of 1787, at 3:316 (Max Farrand, rev. ed. 1966) [hereafter, “Federal Convention”] (“By the federal articles, transactions with the Indians appertain to Congress. Yet in several instances, the States have entered into treaties & wars with them”); see also, id. at 325–26.

<sup>116</sup> 2 Federal Convention, at 321, 324; see also id. at 143 (Rutledge noted that “Indian affairs” should be added to Congress’ powers).

ans be dealt with in the Commerce clause, which would provide Congress with power over commerce “with the Indians, within the limits of any State, not subject to the laws thereof.” The proposal provoked no debate.<sup>117</sup> On August 31 st, the Convention referred various “parts of the Constitution” (including the Commerce Clause) to a “Committee of eleven,” including Madison.<sup>118</sup> Without recorded discussion, the Committee recommended that the language be simplified to commerce “with the Indian tribes.”<sup>119</sup> The Convention accepted the recommendation without debate or dissent.<sup>120</sup>

As noted above, the debate in the Convention focused solely on making clear the supremacy of Congress’ power. During the ratification debates, the new Constitution was defended on the ground that it gave Congress power over “Indian affairs” and “trade with the Indians.”<sup>121</sup> In the only extended discussion of the issue during ratification, Madison used the phrases “commerce with the Indian tribes” and “trade with Indians” interchangeably, explaining that the purpose of the new provision was to eliminate the limitation on Congress’ power over trade with the Indians living within the States.<sup>122</sup> The notion that the reference to “tribes” was a limit on Congress’ ability to deal with the native peoples is without support in history and is contrary to the only expressions of the Framers’ original intent. The Constitution gave Congress power over the Indian peoples, however and wherever it found them.

The First Federal Congress treated the Constitution as granting broad power to regulate “trade and intercourse” with “Indians,” “Indian tribes,” “nations of Indians,” and “Indian country.”<sup>123</sup> Congress understood its power to “operate immediately on the persons and interests of individual citizens.”<sup>124</sup> The actions of the new government also show that even when the Framers knew nothing about the organization of Indian peoples, they nevertheless intended to assert Federal power over those peoples. Shortly after taking office, President Washington gave instructions to Commissioners to negotiate with the Creeks. It was, as noted, the war between the Creeks and Georgia that had fostered the apparently universal conclusion that the new Federal government must be given supremacy over Indian affairs. Washington instructed the Commissioners to determine the nature of the Creek’s political divisions and governments, including “[t]he number of each division”; “[t]he number of Towns in each District”; “[t]he names, Characters and residence of the most influential Chiefs—and \* \* \* their

<sup>117</sup> Id. at 367. Similarly, since Indians did not pay tax, the proposal to exclude “Indians not taxed” from the apportionment clause was accepted without discussion.

<sup>118</sup> Id. at 481.

<sup>119</sup> Id. at 493, 496–97, 503 (emphasis added).

<sup>120</sup> See id. at 495. The language appears in the final version. Id at 569, 595.

<sup>121</sup> Federalist 40, in *Documentary History*, XV: 406 (Constitution represents “expansion on the principles which are found in the articles of confederation,” which gave Congress power over “trade with the Indians”); Federal Farmer, October 8, 1787, in id. at XIV: 24 (under the new Constitution, federal government has power over “all foreign concerns, causes arising on the seas, to commerce, imports, armies, navies, Indian affairs”); Federal Farmer, October 10, 1787, in id. at 30, 35 (federal power over “foreign concerns, commerce, impost, all causes arising on the seas, peace and war, and Indian affairs”). The Federal Farmer Letters are considered “one of the most significant publications of the ratification debate.” Id. at 14.

<sup>122</sup> Madison, Federalist 42, in *Documentary History* XIV: 430–31.

<sup>123</sup> “An Act to regulate trade and intercourse with the Indian tribes,” July 22, 1790, ch. 33, Sec. 4, 1 Stat. 137, in 1 *Doc. Hist. of the First Federal Congress, 1789–1791* (De Pauw, ed., 1972) (“First Federal Congress”), at 440.

<sup>124</sup> Madison, Federalist 40, in *Documentary History*, XV: 406.

grades of influence.” And, most tellingly, the Commissioners were to learn “[t]he kinds of Government (if any) of the Towns, Districts, and Nation.”<sup>125</sup> Washington, like other Founders, did not know how the Creek lived and how they governed themselves. But however the Indian peoples lived, and however they governed themselves, they were still Indian peoples and they were still subject to the supreme power of the Federal government over Indian tribes.

President Jefferson gave similar instructions to Lewis and Clark. When they encountered unknown Indian peoples, the explorers were to learn the “names of the nations”; “their relations with other tribes or nations”; their “language, traditions, monuments”; and the “peculiarities in their laws, customs & dispositions.”<sup>126</sup> Like Washington, Jefferson knew there was much he and his fellow citizens did not know about the “Indian” peoples; but he intended to find out and to assert Federal authority over whatever he found.

*Fourteenth Amendment to the United States Constitution*

It is inconceivable anyone thought that if Washington’s Commissioners or Lewis and Clark found a native people living without “chiefs,” like many Eskimo, or under a King like Montezuma or Kamehameha, these people would be beyond Congress’ power over Indian “tribes” or nations. Nor did the Framers of the Fourteenth Amendment intend to eliminate Congress’ special power to adopt legislation singling out and favoring Indians; they did not intend to alter the nation-to-nation relationships between the United States and the Indian peoples created by the Constitution. Indeed, the Framers of the Amendment were at pains to make certain that they preserved that structure.

“Indians” are expressly singled out for special treatment by the text of the Amendment. In order to eliminate the morally repugnant language which counted slaves as three-fifths persons, the Framers of the Fourteenth Amendment redrafted the apportionment clause. The Framers deleted the “three-fifths persons,” but retained the express exclusion of “Indians not subject to tax” (Amend. XIV, Sec. 1), because, while they intended to wipe out the badges and incidents of slavery, they intended to preserve the special relationship between the United States and the Indian people. Before and after the Amendment, Indians were not citizens of the United States, they did not have the right to vote, they did not count for purposes of apportionment, but they were subject to special legislation in furtherance of Congress’ historic trust responsibilities.

The only debate during the drafting and ratification of the Fourteenth Amendment was not about whether the special relationship with the Indian people should be preserved, but about how to make certain it was preserved. When one Senator suggested that specific reference be made excluding “Indians” from the citizenship clause, the Senator presenting the clause argued this was unnecessary. The Amendment provided citizenship only to persons “within the

<sup>125</sup> Washington, Instructions to the Commissioners for Southern Indians, August 29, 1789, in 2 First Federal Congress, at 207 (emphasis added).

<sup>126</sup> Thomas Jefferson, “Instructions to Captain Lewis,” June 20, 1803, in Jefferson, Writings, supra, at 1126, 1128.

jurisdiction” of the United States,<sup>127</sup> and Indian nations were treated like alien peoples not fully within the jurisdiction of the government:

in the very Constitution itself there is a provision that Congress shall have power to regulate commerce, not only with foreign nations and among the States, but also with Indian tribes. That clause, in my judgment, presents a full and complete recognition of the national character of the Indian tribes.<sup>128</sup>

Congress debated what language to adopt in order to make certain that the special status of the Indian tribes was preserved.<sup>129</sup> There was no support for, or consideration given to, eliminating the special relationship between the United States and the Indian peoples. The uniform intent was to preserve Congress’ ability to decide when Indians would be granted citizenship, when Indians would be taxed, and when Indians would be subject to special legislation.<sup>130</sup>

For nearly two hundred years, the Supreme Court has recognized the political distinction the Constitution draws between “Indian tribes” and all other people. The early opinions of Chief Justice John Marshall reflect the original intent of the Framers and lay the groundwork for the Supreme Court’s jurisprudence. Marshall wrote that “[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence.”<sup>131</sup> With deliberate irony, he called the Indian tribes “domestic dependent nations.”<sup>132</sup> The Indian peoples had surrendered “their rights to complete sovereignty,”<sup>133</sup> and yet they continued to be “nations” that governed themselves.<sup>134</sup>

Marshall knew that the constitutional text reflected this pre-existing nation-to-nation relationship. The Indian Commerce Clause, U.S. Const. art. I, 3, cl. 8, and the Treaty Clause, art. II, §2, cl. 2, granted Congress broad power to regulate Indian affairs. These provisions permitted the United States to fulfill its obligations to the dependent Indian “nations” that were its “wards.”<sup>135</sup> As “guardian,” Congress had both the obligation and the power to enact legislation protecting the Indian nations.<sup>136</sup>

Marshall defined “Indians” broadly to include all of the “original inhabitants” or “natives” who occupied America when it was discovered by “the great nations of Europe.”<sup>137</sup> He also conceived of

<sup>127</sup> Similar limiting language occurs in the Equal Protection Clause.

<sup>128</sup> Cong. Globe, 39th Congress, 1st Sess. 2895.

<sup>129</sup> See, e.g., Remarks of Sen. Doolittle, Cong. Globe, 39th Cong., 1st Sess., 2895–2896 (1866) (“[Senator Howard] declares his purpose to be not to include Indians within this constitutional amendment. In purpose I agree with him. I do not intend to include them. My purpose is to exclude them”).

<sup>130</sup> Congress expressed the same intent in the Civil Rights Act that same year. The Act, granting citizenship to the emancipated slaves, specifically excluded “Indians not taxed.” Civil Rights Act, ch. 31, 14 Stat. 27 (1866).

<sup>131</sup> *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831).

<sup>132</sup> *Id.* at 17.

<sup>133</sup> *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 572–74 (1823).

<sup>134</sup> See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

<sup>135</sup> *Cherokee Nation*, 30 U.S. (5 Pet.) at 17–18; *Worcester*, 31 U.S. (6 Pet.) at 558–59.

<sup>136</sup> See *Worcester*, 31 U.S. (6 Pet.) At 560–61; accord *Cherokee Nation*, 30 U.S. (5 Pet.) At 16 (“[t]hey look to our government for protection, rely upon its kindness and its power; appeal to it for relief to their wants”).

<sup>137</sup> *Johnson*, 21 U.S. (8 Wheat.) at 572–74; *Worcester*, 31 U.S. (6 Pet.) at 544 (1832) (Indians are “those already in possession [of land], either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man”). See also *Johnson*, 21 U.S. (8 Wheat.) at 575 (Indians in French Canada); *id.* at 581 (Indians in Nova Scotia); *Id.* at 584–87 (Indians in

“tribes” in broad, inclusive terms. He used “tribe” and “nation” interchangeably: A “tribe or nation,” he noted, “means a people distinct from others”—a “distinct community”<sup>138</sup> Like the Founders, Marshall defined an “Indian tribe” as nothing more than a community, large or small, of descendants of the peoples who inhabited the New World before the Europeans.

Although the aboriginal “tribes” or “nations” or “peoples” were defined in part by common ancestry, their constitutional significance lay in their separate existence as “independent political communities.”<sup>139</sup> The “race” of Indian peoples was constitutionally irrelevant. Native peoples were “nations,”<sup>140</sup> and the relationship between the United States and the natives reflected a political settlement between conquered and conquering nations.

The Supreme Court has kept faith with Marshall’s conception. The Indian nations have always been defined by ancestry and political affiliation. In the native cultures, the two are inextricably intertwined. The Supreme Court’s definition is legal, and the Native American’s self-definition is historic, religious or cultural; but the two reduce to the same elements: “Indians” are (i) the descendants of aboriginal peoples who (ii) belong to some Native American “people,” “nation,” “tribe,” or “community,” as the founding generation understood those terms.<sup>141</sup>

These interwoven qualifications reflect the Supreme Court’s consistent understanding that constitutionally-relevant Indian status, while based in part on ancestry, is a political classification.<sup>142</sup> It is an individual’s membership in a “political community” of Indians—even a community in the making—and not solely his or her racial identity, that brings him or her within Congress’ broad authority to regulate Indian affairs.<sup>143</sup>

#### *Indian Tribes and Blood Quantum*

Nor does the use of blood quantum as part of the formula to determine who is and is not a Native American constitute impermissible “racial” discrimination. The Supreme Court has repeatedly made clear that Indian tribes are the political and familial heirs to “once-sovereign political communities”—not “racial groups.”<sup>144</sup> The Court has long recognized that a tribe’s “right to determine its own membership” is “central to its existence as an independent political community.”<sup>145</sup> From time immemorial, Native American commu-

Virginia, Kentucky, the Louisiana Purchase, and Florida). Marshall noted the United States had dealt with variously organized “tribes” or “confederacies.” See *id.* at 546–49.

<sup>138</sup> *Worcester*, 31 U.S. (6 Pet.) at 559, 561. See also *Cherokee Nation*, 30 U.S. (5 Pet.) At 20 (“an Indian tribe or nation within the United States”); *Johnson*, 21 U.S. (8 Wheat.) At 590 (“the tribes of Indians inhabiting this country”).

<sup>139</sup> *Id.*, at 559.

<sup>140</sup> *Id.* at 559–60.

<sup>141</sup> See, e.g., *Montoya v. United States*, 180 U.S. 261, 266 (1901) (“a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory”); *United States v. Candelaria*, 271 U.S. 432, 442 (1926); see *Oklahoma Tax Comm’n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993); *United States v. Antelope*, 430 U.S. 641, 647 n.7 (1977) (individuals “anthropologically” classified as Indians may be outside Congress’ Indian commerce power if they sever relations with tribe).

<sup>142</sup> *United States v. Antelope*, 430 U.S. 641, 646–47 (1977).

<sup>143</sup> *Id.*, at 646.

<sup>144</sup> *Antelope*, 430 U.S. at 646; see *Fisher v. District Court*, 424 U.S. 382, 389 (1976); *Mancari*, 417 U.S. at 553–54; see also *Sac & Fox Nation*, 508 U.S. at 123; *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

<sup>145</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978); *Cherokee Intermarriage Cases*, 203 U.S. 76, 95 (1906); *Boff v. Burney*, 168 U.S. 218, 222–23 (1897).

nities have defined themselves at least in part by family and ancestry.<sup>146</sup> Kinship and ancestry is part of what it means to be an “Indian.” To the Framers, the essence of “Indianness” was determined by ancestry or blood. It is what Chief Justice Marshall meant by “Indians.” It is what the Framers of the Fourteenth Amendment meant by “Indians.” This central conception of “Indian” identity is woven into the Constitution and the entire body of law that has grown up in reliance on that conception.

Congressional authority to use such traditional requirements for tribal membership or benefits has never been doubted. In *United States v. John*, the Supreme Court approved Congress’ establishment of an Indian reservation for the benefit of “Chocktaw Indians of one-half or more Indian blood, resident in Mississippi.”<sup>147</sup> The Court unhesitatingly applied the definition of “Indian” that appears in the Indian Reorganization Act, which has governed Indian tribes since 1934: “all other persons of one-half or more Indian blood.”<sup>148</sup> Similarly, the Alaska Native Claims Settlement Act’s use of a blood quantum formula as one factor in determining “native” status is a valid method of defining those belonging to the group eligible for statutory benefits, and the use of the blood quantum “does not detract from the political nature of the classification.”<sup>149</sup> The use of blood ties is integral to the nature of the political deal struck between the conquering Europeans and the native peoples, as they set out to maintain partially separate existences while inhabiting the same country.

This is not to suggest, however, that the Constitution imposes any minimum blood quantum requirement for tribal membership, and suggestions to the contrary have no legal or historical basis.

The constitutional text and historic relationship gives Congress not just the “right” to discriminate between Native Americans and others, but the responsibility to do so. As the Supreme Court has long recognized, from the relationship between these former sovereign peoples and the “superior nation” that conquered them arises “the power and the duty” of the United States to “*exercis[e] a fostering care and protection over all dependent Indian communities within its borders. \* \* \**”<sup>150</sup> Recently, the Supreme Court acknowledged the continued significance of this historic trust relationship.<sup>151</sup>

Like the 556 Indian tribes currently recognized by the United States, Native Hawaiians are a group of people defined by their common descent from an ancestral class, each forming a distinct polity and having a unique historical existence. Any contemporary group whose members are defined by their lineal descendancy from

<sup>146</sup> See Indian Policy Report at 108–09 (“the tribe, as a political institution, has primary responsibility to determine tribal membership for purposes of voting in tribal elections \* \* \* and other rights arising from tribal membership. Many tribal provisions call for one-fourth degree of blood of the particular tribe but tribal provisions vary widely. A few tribes require as much as one-half degree of tribal blood \* \* \*”); accord Felix S. Cohen, *Handbook of Federal Indian Law* 22–23 & n.27 (1982 ed.).

<sup>147</sup> *Id.*, 437 U.S. at 646.

<sup>148</sup> *Id.* at 650 (quoting 25 U.S.C. Sec. 479).

<sup>149</sup> *Alaska Chapter v. Pierce*, 694 F.2d 1162, 1168–69 n. 10 (9th Cir.1982) (noting absence of other practicable methods, like tribal rolls or proximity to reservations).

<sup>150</sup> *United States v. Kagama*, 118 U.S. 375, 384–85 (1886) (emphasis added); See *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942) (the government owes a “distinctive obligation of trust” to Indians).

<sup>151</sup> See *Greater New Orleans Broadcasting Assn v. United States*, 527 U.S. 173, 193 (1999) (recognizing “special federal interest in protecting the welfare of Native Americans”).

a historically-defined class will necessarily share an ethnic identity with the original members of the historical class, even though intermarriage may attenuate the degree of blood quantum shared by the original historical class members. Nevertheless, a definition that is based primarily on the historical uniqueness of the original class is no more race-based than the definition of those who are members or citizens of the historic Indian tribes that greeted the first Europeans immigrants to this nation's shores.

The Supreme Court has repeatedly applied the concepts of "Indian" and "tribe" to a wide variety of Native American communities, recognizing the constant evolution of Native community life and that the questions of whether and how to treat with these changing communities are assigned by the Constitution to Congress. In *The Kansas Indians*,<sup>152</sup> the Court recognized that the Ohio Shawnees remained a "tribe," even though tribal property was no longer owned communally and the tribe had abandoned Indian customs "owing to the proximity of their white neighbors."<sup>153</sup>

Fifty years later, the Supreme Court approved a similar tribal designation for the Pueblo Indians of New Mexico. After long experience under Spanish rule, the Pueblo Indians seemed little like the "savages" of James Fennimore Cooper. The Pueblo Indians lived in villages with organized municipal governments; they cultivated the soil and raised livestock; they spoke Spanish, worshiped in the Roman Catholic Church; and prior to the acquisition of New Mexico by the United States, they enjoyed full Mexican citizenship.<sup>154</sup> Nevertheless, the Pueblo Indians lived in "distinctly Indian communities," and Congress acted properly under the Indian Commerce Clause in determining that they were "dependent communities entitled to its aid and protection, like other Indian tribes."<sup>155</sup> For Native American "communities," the Court held that "the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress \* \* \*."<sup>156</sup>

As indicated above, sixty years later, in *United States v. John*,<sup>157</sup> the Supreme Court recognized Congress' authority to establish a reservation for the benefit of Choctaw Indians in Mississippi, even though (1) they were "merely a remnant of a larger group of Indians" that had moved to Oklahoma; (2) "federal supervision over them had not been continuous"; and (3) they had resided in Mississippi for more than a century and had become fully integrated into the political and social life of the State.<sup>158</sup> The Mississippi Choctaw were Indians. They had recently organized into a distinctly Indian community. The Court therefore deferred to Congress' determination that they were a "tribe for the purposes of Federal Indian law."<sup>159</sup>

<sup>152</sup> 72 U.S. 737 (1866).

<sup>153</sup> *Id.*, 72 U.S. at 755-57.

<sup>154</sup> See *United States v. Joseph*, 94 U.S. (4 Otto.) 614, 616 (1877).

<sup>155</sup> *United States v. Sandoval*, 231 U.S. 28, 46-47 (1913); *Candelaria*, 271 U.S. at 439-40, 442-43.

<sup>156</sup> *Sandoval*, 231 U.S. at 46; accord *Tiger v. Western Inv. Co.*, 221 U.S. 286, 315 (1911).

<sup>157</sup> 437 U.S. 634 (1978).

<sup>158</sup> *Id.*, 437 U.S. at 652-53.

<sup>159</sup> *Id.*, at 650 n.20, 652-53.

Similarly, the Supreme Court has recognized Congress' broad authority to deal with individual "Indians"<sup>160</sup> or large organizations comprised of numerous "tribes."<sup>161</sup> Congress may recognize new aggregations of Native Americans, so long as such legislation is rationally related to the fulfillment of Congress' trust obligation to the historic Indian peoples.<sup>162</sup> Congress' treatment of the Alaska native people—including the establishment of unique regional corporations whose shareholders comprise numerous Native villages—has properly been upheld as within Congress' special power over and responsibility for the Native American peoples.<sup>163</sup>

### *Citizens of the Kingdom of Hawai'i*

Contrary to well-established principles of Federal-Indian law that recognize the right of a tribe to determine its own members as a fundamental aspect of the tribe's sovereignty,<sup>164</sup> some have argued that the Kingdom of Hawai'i somehow lost its "native" character because some non-Hawaiians became naturalized citizens of the Kingdom. This argument is used as the basis for asserting that Native Hawaiians cannot now be "recognized" as a native group with which the United States may maintain a special legal and political relationship.<sup>165</sup> However, as evident from the preceding discussion of Supreme Court rulings and precedent, this argument lacks any constitutional basis. The Supreme Court has often decided cases relating to the status of non-Indians who had become members or citizens of Indian tribes,<sup>166</sup> but the Court has never suggested that a tribal law that provides for the membership or citizenship in the tribe of previously non-tribal members renders those tribes or their modern-day successors ineligible for recognition as having a special legal and political relationship with the United States pursuant to the Indian Commerce Clause. Similarly, opposition to the recognition of a Native Hawaiian governing entity premised upon the attenuation of the blood quantum of its citizens lacks any historical or constitutional basis.

<sup>160</sup> *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 417 (1865) (regulation of "commerce with the Indian tribes means" regulation of "commerce with the individuals composing those tribes"); see *Morton v. Ruiz*, 415 U.S. 199, 230–38 (1974) (addressing the scope of federal Indian welfare benefits for individuals living in Indian communities); *Mancari*, 417 U.S. at 551–55.

<sup>161</sup> See *Cherokee Nation v. Journeycake*, 155 U.S. 196 (1894) (Delaware Indians entitled to rights of Cherokee Nation which Delawares had joined); *United States v. Blackfeather*, 155 U.S. 218 (1894) (same for Shawnee).

<sup>162</sup> See *John*, 437 U.S. at 652–53; *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 480 (1976).

<sup>163</sup> Although the Alaska natives' situation is "distinctly different from that of other American Indians," *Alaska Chapter*, 694 F.2d at 1168–69 n.101, see *Metlakatla Indian Community v. Egan*, 369 U.S. 45, 50–51 (1962), it is "well established" that Athabascan Indians, Eskimos, and Aleuts are "dependent Indian people" within the meaning of the Constitution. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 87–89 (1918); see also *Pence v. Kleppe*, 529 F.2d 135, 138–39 n.5 (9th Cir. 1976) ("Indian" means "the aborigines of America" and includes Eskimos and Aleuts in Alaska); *United States v. Native Village of Unalakleet*, 411 F.2d 1255, 1256–57 (Ct. Cl. 1969) ("Eskimos and Aleuts are Alaskan aborigines" and, therefore, "Indians").

<sup>164</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978).

<sup>165</sup> See, e.g., Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L.J. 537, 607–8 & n.287 (1996) (discussing this argument, while noting that "[i]nclusion of some Westerners would not necessarily defeat a claim of tribal status" as the Supreme Court has never directly addressed the question, and noting that "some Indian tribes included Westerners. \* \* \*").

<sup>166</sup> See, e.g., *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846); *Westmoreland v. United States*, 155 U.S. 545 (1895); *Alberty v. United States*, 162 U.S. 499 (1896); *Lucas v. United States*, 163 U.S. 612 (1896); *Nofire v. United States*, 164 U.S. 657 (1897). The question of whether such non-Indian tribal citizens should be treated as "Indians" for purposes of particular Federal jurisdictional statutes is a separate issue that has no bearing on the eligibility of the tribe itself for recognition.

Many contemporary tribes define their citizenship or membership based upon lineal descendancy from a tribal roll, and the Congress has from time to time established criteria for membership in certain tribes.<sup>167</sup> What neither the Congress nor the Supreme Court has done is to suggest that the Constitution imposes a blood quantum limitation or requirement on tribal citizenship.

*The Significance of “Federal Recognition”*

It is important to recognize that the legal distinctions that have been drawn in contemporary times between Indian tribes that are “acknowledged” by the Department of the Interior<sup>168</sup> or “recognized” by the Congress—tribes that have a direct government-to-government relationship with the United States and are thereby eligible for various Federal benefits—and Native American groups that are not so recognized and have no such government-to-government relationship, is a relatively recent phenomenon. “[A] close scrutiny of the various executive orders, Congressional legislation, departmental policies, Solicitor’s opinions, and judicial decisions since 1783 \* \* \* discloses an astonishing oblivion of the need for an express declaration or statement regarding which Indian tribes were to be recognized, until the enactment of the Wheeler-Howard (Indian Reorganization) Act of 1934,”<sup>169</sup> thirteen years after the enactment of the Hawaiian Homes Commission Act. In fact, there was no systematic procedure by which a Native American group could petition the United States for recognition until 1978, when regulations were promulgated to implement the Federal Acknowledgment process.<sup>170</sup>

An administrative process for the acknowledgment of Native groups by the United States that was established almost twenty years after Hawai‘i’s admission to the Union could not have informed the provisions of the Hawaiian Homes Commission Act nor the Hawai‘i Admission Act and it is thus not surprising that the language of those Acts do not conform neatly with categorizations that had yet to be developed.

Although the authority of Congress to formally “recognize” tribes through legislation is unquestioned, the Department of the Interior’s regulations associated with the administrative process for the acknowledgment of tribes pursuant to 25 CFR Part 83 exclude Native Hawaiians from that process, and thus legislation is the only mechanism available to Native Hawaiians.<sup>171</sup> The present legislation thus establishes no precedent applicable to groups eligible to apply for recognition under the existing administrative framework.

<sup>167</sup> See, e.g., Public Law No. 129, §§1–4, 34 Stat. 137, 137–38 (April 26, 1906) (setting forth enrollment criteria for members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Oklahoma).

<sup>168</sup> See 25 C.F.R. Part 83.

<sup>169</sup> William W. Quinn, Jr., Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept, 34 Am. J. Leg. Hist. 331, 332 (1990) (citing 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§461 et seq.)); see generally, William W. Quinn, Jr., Federal Acknowledgment of American Indian Tribes: Authority, Judicial Interposition, and 25 C.F.R. 83, 17 Am. Indian L. Rev. 37 (1992); L.R. Weatherhead, What is an “Indian Tribe?”—The Question of Tribal Existence, 8 Am. Indian L. Rev. 1 (1980).

<sup>170</sup> 25 C.F.R., Part 83. Quinn 1992, at 40–41.

<sup>171</sup> See 25 CFR §§83.1, 83.3 (administrative process available only to groups within the “continental United States,” defined as the “contiguous 48 states and Alaska”). Native Hawaiians have twice sought unsuccessfully to challenge their exclusion from this process. *Price v. State of Hawai‘i*, 764 F.2d 623 (9th Cir. 1985); *Kahawaiolaa v. Norton*, 222 F. Supp. 2d 1213 (D. Haw. 2002).

The primary injury that S. 344 is intended to address is the loss of a sovereign governing entity resulting from the 1893 overthrow of the government of the Kingdom of Hawai'i, an event made possible by the actions of officials and citizens of the United States. Although Congress has consistently recognized Native Hawaiians as among the Native people of the United States on whose behalf it may exercise its powers under the Indian Commerce Clause, it has not as yet acted to provide a process for the reorganization of a Native Hawaiian sovereign governing entity. S. 344 provides authority for that process.

*Summary of Provisions of S. 344*

The findings of S. 344 focus on the history of Native Hawaiians and the United States policy as it relates to Native Hawaiians, including the enactment of over 160 public laws to address the conditions of Native Hawaiians.

S. 344 also provides a process for the recognition of a Native Hawaiian government by the United States for purposes of carrying on a government-to-government relationship.

S. 344 provides for the development of a roll of the adult members of the Native Hawaiian community who meet the definition of "Native Hawaiian" in section 3(7) of S. 344 and who wish to participate in the reorganization of the Native Hawaiian governing entity. This roll is to be submitted to the Secretary of Interior by the adult members of the Native Hawaiian community and the names on the roll are to be certified as meeting the definition of "Native Hawaiian" in section 3(7) of S. 344. The Secretary then publishes the roll and thereafter, the adult members of the Native Hawaiian community elect an Interim Governing Council that is authorized to conduct referenda on the proposed elements of the organic governing documents of the Native Hawaiian governing entity, the proposed criteria for citizenship of the Native Hawaiian governing entity, the proposed powers and authorities to be exercised by the Native Hawaiian governing entity, as well as the proposed privileges and immunities of the Native Hawaiian governing entity, the proposed civil rights and protection of civil rights of the citizens of the Native Hawaiian governing entity and all persons subject to the authority of the Native Hawaiian governing entity, and other issues determined appropriate by the Council.

Based on the referendum, the Council is authorized to develop proposed organic governing documents for the Native Hawaiian governing entity, to distribute them to all adult members of the Native Hawaiian community listed on the roll, and conduct an election for the purpose of ratifying the proposed organic governing documents. Upon the ratification of the organic governing documents, the governing documents are to be submitted to the Secretary of the Interior for certification that they are consistent with Federal law and the special relationship between the United States and native people. The Secretary is also authorized to certify that the governing documents provide for the protection of the civil rights of the citizens of the Native Hawaiian government and any others who would come within the jurisdiction of the government. Once the Secretary has made these certifications, and the officers of the Native Hawaiian governing entity are elected, the bill provides authority for the United States' recognition of the Native Ha-

waiian government. Upon recognition, the definition of “Native Hawaiian” for purposes of S. 344, would be as provided for in the organic governing documents of the Native Hawaiian government.

S. 344 also provides authority for the establishment of a United States Office of Native Hawaiian Relations within the Office of the Secretary of the U.S. Department of the Interior. The Office is to be the principal entity through which the United States will carry on relations with the Native Hawaiian people until a Native Hawaiian government is formed. The Office would also serve as the primary agent of ongoing efforts to effect the reconciliation that is authorized in the Apology Resolution. The Office would also serve as lead agency for the work of a Native Hawaiian Interagency Task Force that is authorized to be established in S. 344.

#### *Indian and Native Hawaiian Program Funding*

As referenced above, since 1910, the Congress has enacted over 160 statutes designed to address the conditions of Native Hawaiians. Appropriations for Native Hawaiian programs have always been separately secured and have had no impact on program funding for American Indians or Alaska Natives, based in part on the fact that generally, Native Hawaiian programs do not come within the jurisdiction of the appropriations subcommittees that provide funding for American Indian and Alaska Native programs. Consistent with this practice, S. 344 provides authority for a separate and distinct appropriation that does not impact in any way on existing authorizations for American Indian and Alaska Native programs.

It is also important to note that Federal programs addressing health care, education, housing, job training, Native graves protection, arts and culture, and language preservation for Native Hawaiians are already in place. Accordingly, new impacts on the Federal budget that might otherwise be anticipated with the Federal recognition of a native government will not be forthcoming as a result of the recognition of a Native Hawaiian government. S. 344 does authorize appropriations for the establishment of the U.S. Office of Native Hawaiian Relations within the Department of the Interior, but the costs associated with these activities are not expected to be significant.

#### *Gaming*

Some have questioned whether the reorganization of a Native Hawaiian government might have implications for gaming that is conducted under the authority of the Indian Gaming Regulatory Act (IGRA). The Act authorizes Indian tribal governments to conduct gaming on Indian reservations and lands held in trust by the United States for Indian tribes and over which a tribal government exercises jurisdiction. The scope of gaming that can be conducted under the Indian Gaming Regulatory Act is determined by the law of the state in which the Indian lands are located. There are no Indian reservations or Indian lands in the State of Hawai'i, nor are there any Indian reservations or Indian lands over which a tribal government exercises jurisdiction in the State of Hawai'i.

The U.S. Supreme Court has held that in Public Law 83-280 states, state laws that criminally prohibit certain forms of gaming apply on Indian lands. Hawai'i is one of only two states in the

Union (the other is Utah) that criminally prohibit all forms of gaming. Accordingly, a reorganized Native Hawaiian government could not conduct any form of gaming in the State of Hawai'i under the authority of the Indian Gaming Regulatory Act. In an effort to address concerns about the application of the IGRA, S. 344 provides that nothing in S. 344 is to be construed as an authorization for the Native Hawaiian governing entity to conduct gaming activities under the authority of the Indian Gaming Regulatory Act.

#### EXPLANATION OF AMENDMENTS

The amendment in the nature of a substitute to S. 344 as approved by the Committee includes the following substantive changes:

- Addition of a section setting forth the short title of the Act;
- Inclusion of a finding addressing actions undertaken by the legislature of the State of Hawai'i and the Governor of Hawai'i expressing support for the recognition of a Native Hawaiian governing entity by the United States;
- Addition of provisions addressing a process for the reorganization of the Native Hawaiian governing entity;
- Addition of a section providing a waiver of certain provisions that would otherwise bar Native Hawaiians from employment in the United States Office for Native Hawaiian Relations.

#### SECTION-BY-SECTION ANALYSIS

##### *Section 1. Short title*

This section states that this Act may be cited as the "Native Hawaiian Recognition Act of 2003".

##### *Section 2. Findings*

This section sets forth the Congress' findings. Findings (1) through (4) address Congress' recognition of Native Hawaiians as native people of the United States and the State of Hawai'i. Findings (5) through (7) reflect Congress' determination of the need to address conditions of Native Hawaiians through the Hawaiian Homes Commission Act of 1920. Findings (8) and (9) document Congress' establishment of the ceded lands trust as a condition of statehood for the State of Hawai'i. Findings (9) through (11) reflect the importance of the Hawaiian Home Lands and Ceded Lands to Native Hawaiians as a foundation for the Native Hawaiian community for the survival and economic self-sufficiency of the Native Hawaiian people. Findings (12) through (14) address the effect of the Apology Resolution. Findings (15) through (19) address the status of the Native Hawaiian community as a "distinct native community." Finding (20) reflects the legal position of the United States before the U.S. Supreme Court in the case of *Rice v. Cayetano*. Findings (21) and (22) reaffirm the special political and legal relationship between the Native Hawaiian people and the United States. Finding (23) documents that the Governor and Legislature of the State of Hawai'i have expressed their strong support for the recognition of the Native Hawaiian governing entity.

### *Section 3. Definitions*

This section sets forth definitions of terms used in the bill. Defined terms are Aboriginal, Indigenous, Native People; Adult Members; Apology Resolution; Council; Interagency Coordinating Group; Native Hawaiian; Native Hawaiian Governing Entity; Office; and Secretary.

With regard to the definition of the term “Native Hawaiian,” it is the intent of the Committee that the definition shall be applicable for the purpose of establishing the roll authorized under section 7(b)(1) and until such time as the Native Hawaiian governing entity is recognized by the United States. Thereafter, however, the definition of this term for the purposes of citizenship in the Native Hawaiian governing entity shall be as set forth in the organic governing documents of the Native Hawaiian governing entity, and upon certification of those documents by the Secretary of the Interior, the definition of Native Hawaiian in the organic governing documents of the Native Hawaiian governing entity shall be the definition of Native Hawaiian for purposes of this Federal law.

### *Section 4. United States policy and purpose*

This section reaffirms that Native Hawaiians are an aboriginal, indigenous, native people with whom the United States has a special political and legal relationship. It also affirms that Native Hawaiians have the right to self-determination and that it is the intent of the Congress to provide a process for the reorganization of the Native Hawaiian governing entity and for the Federal recognition of the Native Hawaiian governing entity for purposes of continuing a government-to-government relationship.

### *Section 5. United States Office for Native Hawaiian Relations*

This provision provides authority for the establishment of the United States Office for Native Hawaiian Relations within the Office of the Secretary of the Department of the Interior. This Office is charged with: (1) effectuating and coordinating the special political and legal relationship between the Native Hawaiian people and the United States; (2) continuing the process of reconciliation with the Native Hawaiian people, and upon recognition of the Native Hawaiian governing entity by the United States, continuing the process of reconciliation with the Native Hawaiian governing entity; (3) fully integrating the principle and practice of meaningful, regular, and appropriate consultation with the Native Hawaiian people and the Native Hawaiian governing entity prior to taking any actions that may have the potential to significantly affect Native Hawaiian resources, rights, or lands; (4) consulting with the Native Hawaiian Interagency Coordinating Group, other Federal agencies, and with relevant agencies of the State of Hawai'i on policies, practices, and proposed actions affecting Native Hawaiian resources, rights, or lands; and (5) preparing and submitting to the Senate Committee on Indian Affairs, Senate Committee on Energy and Natural Resources, and House Resources Committee an annual report detailing the activities of the Interagency Coordinating Group that are undertaken with respect to the continuing process of reconciliation and to effect meaningful consultation with the Native Hawaiian governing entity, and providing recommendations for

any necessary changes to existing Federal statutes or regulations promulgated under the authority of Federal law.

It is the intent of the Committee that the United States Office for Native Hawaiian Relations serve as a liaison between the Native Hawaiian people and the United States for the purposes of continuing the reconciliation process and ensuring proper consultation with the Native Hawaiian people for any Federal policy impacting Native Hawaiians. The Committee does not intend that the United States Office for Native Hawaiian Relations will assume the responsibility or authority for any of the Federal programs established to address the conditions of Native Hawaiians. All Federal programs established and administered by Federal agencies will remain with those agencies.

*Section 6. Native Hawaiian Interagency Coordinating Group*

This section authorizes the establishment of an Interagency Coordinating Group composed of officials from each Federal agency, to be designated by the President, and a representative from the U.S. Office of Native Hawaiian Relations. The Department of Interior is to serve as the lead agency of the Coordinating Group. The primary responsibility of the Interagency Coordinating Group is to coordinate Federal policies or acts that affect Native Hawaiians or impact Native Hawaiian resources, rights, or lands. The Coordinating Group is also charged with assuring that each Federal agency develops a Native Hawaiian consultation policy and participates in the development of the report to Congress authorized in section 4.

*Section 7. Process for the recognition of the Native Hawaiian governing entity*

Subsection (a) sets forth the recognition by the United States that the Native Hawaiian people have the right to organize for their common welfare and to adopt appropriate organic governing documents.

Subsection (b) addresses a process for the reorganization of the Native Hawaiian government.

Subsection (b)(1) provides that the United States Office for Native Hawaiian Relations (Office), in consultation with those adult members of the Native Hawaiian community who elect to participate in the reorganization of the Native Hawaiian governing entity (participating adult members), shall prepare and maintain a roll containing the names of those adult members of the Native Hawaiian community who meet the definition of "Native Hawaiian" as set forth in section 3(7) of S. 344. The Committee does not intend, nor does S. 344 provide authority for, the Office to conduct independent research into the genealogy of Native Hawaiians seeking to be listed on the roll beyond the documentation or other evidence submitted by those who wish to participate in the organization of the Native Hawaiian governing entity. The participating adult members, in consultation with the Office, shall certify to the Secretary that those individuals listed on the roll meet the definition of "Native Hawaiian" as set forth in section 3(7) of S. 344. Upon certification, the Secretary shall publish the roll, or if the Secretary fails to act within 90 days after the date that the roll is submitted to the Secretary, the Office shall publish the roll notwithstanding any

order or directive issued by the Secretary or any other official of the Department of the Interior to the contrary. The Secretary may establish an appeal mechanism available to any Native Hawaiian excluded from the roll, provided however that the pendency of such appeals shall not delay the Secretary's publication of the roll. The Secretary shall update the roll and shall publish the final roll upon the final disposition of all appeals. The effect of the publication of the roll is to assure that the roll will serve as the basis for the eligibility of adult members of the Native Hawaiian community whose names are listed on the roll to participate in all referenda and elections associated with the reorganization of the Native Hawaiian governing entity.

Subsection (b)(2) addresses the organization of the Native Hawaiian Interim Governing Council.

Subsection (b)(2)(A) provides that the adult members of the Native Hawaiian community whose names are listed on the roll published by the Secretary (published roll) may develop eligibility criteria for election to serve on the Native Hawaiian Interim Governing Council (Council), may determine the structure of the Council, and may elect the members of the Council from those listed on the final roll.

Subsection (b)(2)(B) provides that at the request of the adult members of the Native Hawaiian community listed on the published roll, the Office may assist individuals listed on the roll in holding an election by secret ballot, including, at the option of the Office, absentee and mail balloting, to elect the membership of the Council.

Subsection (b)(2)(C) provides that the Council may represent individuals on the published roll in the implementation of the Act and shall have no powers other than powers conferred upon the Council under the authority of S. 344. The subsection further provides that the Council may enter into a contract with, or obtain a grant from, any Federal or State agency for the purpose of carrying out its authorized activities. The Council may also conduct a referendum among the adult members of the Native Hawaiian community whose names are listed on the published roll for the purpose of determining the proposed elements of the organic governing documents of the Native Hawaiian governing entity, the proposed criteria for citizenship of the Native Hawaiian governing entity, the proposed powers, authorities, privileges, and immunities of the Native Hawaiian governing entity, the proposed civil rights and protection of the rights of the citizens of the Native Hawaiian governing entity and all persons subject to its authority, and other issues determined by the Council to be appropriate. Based on the referendum, the Council may develop proposed organic governing documents for the Native Hawaiian governing entity, may distribute to all adult members of the Native Hawaiian community listed on the published roll a copy of the proposed organic governing documents and a brief impartial description of their contents. The Council may also hold elections for the purpose of ratifying the proposed organic governing documents and, upon certification of those documents by the Secretary in accordance with section 7(b)(4), may hold elections of the officers of the Native Hawaiian governing entity. The Council may request the assistance of the Office in conducting the elections.

Subsection (b)(2)(D) provides that the Council shall have no powers other than those set forth in S. 344, and those powers, and the existence of the Council itself, shall terminate when the duly elected officers of the Native Hawaiian governing entity take office.

Subsection (b)(3) provides that following the organization of the Native Hawaiian governing entity and the adoption of organic governing documents, the Council shall submit the ratified organic governing documents to the Secretary.

Subsection (b)(4)(A) provides that not later than 90 days after the date on which the Council submits the organic governing documents to the Secretary, the Secretary shall certify that the organic governing documents:

- Establish criteria for citizenship in the Native Hawaiian governing entity;
- Were adopted by a majority vote of the adult members of the Native Hawaiian community whose names are listed on the roll published by the Secretary;
- Provide for the exercise of governmental authorities by the Native Hawaiian governing entity;
- Provide authority for the Native Hawaiian governing entity to negotiate with Federal, State, and local governments, and other entities;
- Prevent the sale, disposition, lease, or encumbrance of lands, interests in lands, or other assets of the Native Hawaiian governing entity without the consent of the Native Hawaiian governing entity;
- Provide for the protection of the civil rights of the citizens of the Native Hawaiian governing entity and all persons subject to the authority of the Native Hawaiian governing entity, and ensure that the Native Hawaiian governing entity exercises its authority in a manner consistent with the requirements of section 202 of the Act of April 11, 1968 (25 U.S.C. 1302); and
- Are consistent with applicable Federal law and the special political and legal relationship between the United States and the indigenous native people of the United States. It is the Committee's intent that for purposes of determining whether the criteria for citizenship in the Native Hawaiian governing entity are consistent with applicable Federal law, the definition of "Native Hawaiian" contained in S. 344 or any other Federal law shall not serve as a constraint on the right of the Native Hawaiian governing entity to determine its own citizenship or membership.

Subsection (b)(4)(B) provides that if the Secretary determines that any provision of the organic governing documents is not consistent with applicable Federal law, the Secretary shall resubmit the organic governing documents to the Council along with a justification for each of the Secretary's findings as to why the provisions are not consistent with such law. The Council is authorized to amend the organic governing documents in order to ensure their compliance with applicable Federal law and to resubmit the organic governing documents to the Secretary for certification. It is the Committee's intent that the resubmission to the Secretary of the organic governing documents does not foreclose the Native Ha-

waiian governing entity from seeking judicial review of the Secretary's rejection of the proposed organic governing documents.

Subsection (b)(4)(C) provides that the certification of the organic government documents shall be deemed to have been made if the Secretary has not acted within 90 days of the date that the Council has submitted, or resubmitted, the organic governing documents of the Native Hawaiian governing entity to the Secretary.

Subsection (b)(5) provides that on completion of the certifications made by the Secretary, the Council may hold elections of the officers of the Native Hawaiian governing entity.

Subsection (b)(6) provides that upon election of the Native Hawaiian governing entity's officers and the certification of the organic governing documents of the Native Hawaiian governing entity, the United States shall extend Federal recognition to the Native Hawaiian governing entity as the representative governing body of the Native Hawaiian people.

*Section 8. Reaffirmation of delegation of Federal authority; negotiations*

Section 8(a) reaffirms the United States' delegation of authority to the State of Hawai'i in the Hawai'i Admission Act to address the conditions of the indigenous, native people of Hawai'i.

Section 8(b) provides that upon Federal recognition of the Native Hawaiian governing entity, the United States and the State of Hawai'i are authorized to enter into negotiations with the Native Hawaiian governing entity that are designed to lead to an agreement addressing matters such as the transfer of lands, natural resources and other assets, and the exercise of governmental authorities over such lands, natural resources and other assets. It is the Committee's intent that the reference to "lands, natural resources and other assets" include, but not be limited to, lands set aside under the Hawaiian Homes Commission Act and lands ceded by the Republic of Hawai'i to the United States in 1898 and later ceded to the State pursuant to §5 of the Hawai'i Admission Act and Pub. L. 88-233, 77 Stat. 472 (December 23, 1963). It is the Committee's view that if an inventory of the ceded lands is required to facilitate negotiations addressing ceded lands, then such an inventory should be conducted. The section also provides that nothing in S. 344 shall be construed as a settlement of any claim against the United States.

*Section 9. Applicability of certain Federal laws*

This section provides that nothing in S. 344 is to be construed as an authorization for the Native Hawaiian governing entity to conduct gaming activities under the authority of the Indian Gaming Regulatory Act or as an authorization for eligibility to participate in any programs and services provided by the Bureau of Indian Affairs, for any persons who are not otherwise eligible for such programs and services.

*Section 10. Ethics*

This section provides a limited waiver of the provisions of 18 U.S.C. 208(a), prohibiting involvement by a Federal employee in matters in which an employee has a financial interest, to permit individuals who would otherwise be barred from such employment

by reason of the status of the individual, a spouse, or minor child as a Native Hawaiian, to accept employment within the United States Office for Native Hawaiian Relations.

*Section 11. Severability clause*

This section provides that should any section or provision of this Act be deemed invalid, the remaining sections, provisions, and amendments shall continue in full force and effect.

*Section 12. Authorization of appropriations*

This section authorizes the appropriation of such sums as are necessary to carry out the activities authorized by S. 344.

LEGISLATIVE HISTORY

S. 344 was introduced on February 11, 2003, by Senator Akaka, for himself and Senator Inouye, and was referred to the Committee on Indian Affairs. Senator Reid of Nevada became a cosponsor on February 27, 2003, and Senator Stevens of Alaska became a cosponsor on March 17, 2003. A hearing on S. 344 was held before the Committee on Indian Affairs on February 25, 2003. S. 344 was ordered favorably reported to the full Senate by the Committee on Indian Affairs on May 14, 2003.

A House companion measure, H.R. 665, was introduced on February 11, 2003, by Representative Abercrombie, for himself and Representative Case, and was referred to the Committee on Resources.

In the 107th Congress, S. 746, a bill similar in purpose to S. 344 was introduced on April 6, 2001, by Senator Akaka, for himself and Senator Inouye, and was referred to the Committee on Indian Affairs. On July 24, 2001, S. 746 was ordered favorably reported to the full Senate. The Committee report accompanying the bill was Senate Report 107-66.

A House companion measure, H.R. 617, was introduced in the House of Representatives by Representative Neil Abercrombie, for himself and Representatives Patsy Mink, Eni Faleomavaega, James Hansen, Dale Kildee, Nick Rahall, and Don Young, and was referred to the Committee on Resources. H.R. 617 was ordered favorably reported to the full House of Representatives on May 16, 2001. S. 746 and H.R. were not acted upon prior to the sine die adjournment of the 107th session of the Congress.

In the 106th Congress, a bill similar in purpose to S. 344, S. 2899, was introduced by Senator Akaka, for himself and Senator Inouye, and was referred to the Committee on Indian Affairs. A House companion measure to S. 2899, H.R. 4904, was introduced in the House of Representatives in the 106th session of the Congress. Five days of hearings were held on S. 2899 and H.R. 4904 in joint hearings of the House Resources Committee and the Senate Indian Affairs Committee in Hawai'i from Monday, August 28, 2000 through Friday, September 1, 2000. An additional hearing on S. 2899 was held in Washington, D.C. on September 13, 2000. S. 2899 was ordered favorably reported to the full Senate by the Senate Committee on Indian Affairs on September 13, 2000. The Committee report accompanying the bill was Senate Report 106-424. H.R. 4904 was ordered favorably reported by the House Resources Committee and passed the House on September 26, 2000. H.R.

4904 failed to pass the Senate before the sine die adjournment of the 106th session of the Congress.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

The Committee on Indian Affairs, on May 14, 2003, in an open business meeting, considered an amendment in the nature of a substitute to S. 344, and ordered the substitute amendment to S. 344 favorably reported to the Senate.

COST AND BUDGETARY CONSIDERATIONS

The cost estimate of the Congressional Budget Office on S. 344 is set forth below:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, May 30, 2003.*

Hon. BEN NIGHTHORSE CAMPBELL,  
*Chairman, Committee on Indian Affairs, U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 344, the Native Hawaiian Recognition Act of 2003.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Lanette J. Walker (for federal costs), and Marjorie Miller (for the impact on state, local, and tribal governments).

Sincerely,

BARRY B. ANDERSON  
(For Douglas Holtz-Eakin, Director).

Enclosure.

*S. 344—Native Hawaiian Recognition Act of 2003*

S. 344 would establish a process for a Native Hawaiian government to be constituted and recognized by the federal government. CBO estimates that implementing S. 344 would have no significant impact on the federal budget. The bill would not affect direct spending or revenues.

S. 344 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments. Enacting this legislation could lead to the creation of a new government to represent native Hawaiians. The transfer of any lands or other assets to this new government, including lands now controlled by the state of Hawai'i, would be the subject of future negotiations. Similarly, federal payments to native Hawaiians following recognition of a Native Hawaiian government would depend on future legislation.

The bill would establish the United States Office for Native Hawaiian Relations within the Department of the Interior (DOI) to coordinate services to native Hawaiians. In addition, S. 344 would establish the Native Hawaiian Interagency Coordinating Group to coordinate federal programs and policies that affect native Hawaiians. Based on information from DOI, CBO expects that the agency would require up to five additional employees to implement the

bill. Therefore, CBO estimates that implementing S. 344 would cost less than \$500,000 a year, subject to the availability of appropriated funds.

The CBO staff contacts for this estimate are Lanette J. Walker (for federal costs), and Marjorie Miller (for the impact on state, local, and tribal governments). This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

#### EXECUTIVE COMMUNICATIONS

The Committee has not received any communications from the Executive branch on S. 344.

#### REGULATORY AND PAPERWORK IMPACT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate require each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 344 will have a minimal impact on regulatory or paperwork requirements.

#### CHANGES IN EXISTING LAW

The provisions of S. 344 do not effect any change in existing law.

## A P P E N D I X A

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### DEMOGRAPHICS OF THE NATIVE HAWAIIAN POPULATION

#### *Housing*

Within the last several years, three studies have documented the poor housing conditions that confront Native Hawaiians who either reside on the Hawaiian home lands or who are eligible to reside on the home lands.

In 1992, the National Commission on American Indian, Alaska Native, and Native Hawaiian housing issued its final report to the Congress, "Building the Future: A Blueprint for Change." The Commission's study compared housing data for Native Hawaiians with housing information for other citizens in the State of Hawai'i. The Commission found that Native Hawaiians, like American Indians and Alaska Natives, lacked access to conventional mortgage lending and home financing because of the trust status of the Hawaiian home lands, and that Native Hawaiians had the worst housing conditions in the State of Hawai'i and the highest percentage of homelessness, representing over 30 percent of the State's homeless population.

The Commission concluded that the unique circumstances of Native Hawaiians require the enactment of new legislation to alleviate and address the severe housing needs of Native Hawaiians and recommended that the Congress extend to Native Hawaiians the same Federal housing assistance programs that are provided to American Indians and Alaska Natives under the Low-Income Rental, Mutual Help, Loan Guarantee Program and Community Development Block Grant programs. Subsequently, the Community Development Block Grant program authority was amended to address the housing needs of Native Hawaiians.

In 1995, the U.S. Department of Housing and Urban Development (HUD) issued a report entitled "Housing Problems and Needs of Native Hawaiians." The HUD report was particularly helpful because it compared the data on Native Hawaiian housing conditions with housing conditions nationally and with the housing conditions of American Indians and Alaska Natives.

The most alarming finding of the HUD report was that Native Hawaiians experience the highest percentage of housing problems in the nation—49 percent—higher than even that of American Indians and Alaska Natives residing on reservations (44 percent) and substantially higher than that of all U.S. households (27 percent). Additionally, the HUD study found that the percentage of overcrowding in the Native Hawaiian population is thirty-six percent as compared to three percent for all other households in the United States.

Applying the HUD guidelines, 70.8 percent of Native Hawaiians who either reside or who are eligible to reside on Hawaiian home lands have incomes which fall below the median family income in the United States, and 50 percent of those Native Hawaiians have incomes below thirty percent of the median family income in the United States.

Also in 1995, the Hawai'i State Department of Hawaiian Home Lands published a Beneficiary Needs Study as a result of research conducted by an independent research group. This study found that among the Native Hawaiian population, the needs of Native Hawaiians eligible to reside on the Hawaiian home lands are the most severe—with 95 percent of home lands applicants (16,000) in need of housing, and with one-half of those applicant households facing overcrowding and one-third paying more than 30 percent of their income for shelter.

#### *Health status*

Language contained in the 1984 Supplemental Appropriations Act, Public Law 98-396, directed the Department of Health and Human Services to conduct a comprehensive study of the health care needs of Native Hawaiians. The study was conducted under the aegis of Region IX of the Department by a consortium of health care providers and professionals from the State of Hawai'i in a predominantly volunteer effort, organized by Alu Like, Inc., a Native Hawaiian organization. An island-wide conference was held in November of 1985 in Honolulu to provide an opportunity for members of the Native Hawaiian community to review the study's findings. Recommended changes were incorporated in the final report of the Native Hawaiian Health Research Consortium, and the study was formally submitted to the Department of Health and Human Services in December of 1985. The Department submitted the report to the Congress on July 21, 1986, and the report was referred to the Select Committee on Indian Affairs.

Because the Consortium report's findings as to the health status of Native Hawaiians was compared only to other populations within the State of Hawai'i, the Select Committee requested that the Office of Technology Assessment (OTA), an independent agency of the Congress, undertake an analysis of Native Hawaiian health statistics as they compared to national data on other United States populations. Using the same population projection model that was employed in OTA's April 1986 report on "Indian Health Care to American Indian and Alaska Native Populations," and based on additional information provided by the Hawai'i State Department of Health and the Office of Hawaiian Affairs of the State of Hawai'i, the Office of Technology Assessment report contains the following findings:

The Native Hawaiian population living in Hawai'i consists of two groups, Hawaiians and part-Hawaiians, who are distinctly different in both age distributions and mortality rates. Hawaiians comprise less than 5 percent of the total Native Hawaiian population and are much older than the young and growing part-Hawaiian populations.

Overall, Native Hawaiians have a death rate that is 34 percent higher than the death rate for the United States

all races, but this composite masks the great differences that exist between Hawaiians and part-Hawaiians. Hawaiians have a death rate that is 146 percent higher than the U.S. all races rate. Part-Hawaiians also have a higher death rate, but only 17 percent greater. A comparison of age-adjusted death rates for Hawaiians and part-Hawaiians reveals that Hawaiians die at a rate 110 percent higher than part-Hawaiians, and this pattern persists for all except one of the 13 leading causes of death that are common to both groups.

As in the case of the U.S. all races population, Hawaiian and part-Hawaiian males have higher death rates than their female counterparts. However, when Hawaiian and part-Hawaiian males and females are compared to their U.S. all races counterparts, females are found to have more excess deaths than males. Most of these excess deaths are accounted for by diseases of the heart and cancers, with lesser contributions from cerebrovascular diseases and diabetes mellitus.

Diseases of the heart and cancers account for more than half of all deaths in the U.S. all races population, and their pattern is also found in both the Hawaiian and part-Hawaiian populations, whether grouped by both sexes or by male or female. However, Hawaiians and part-Hawaiians have significantly higher death rates than their U.S. all races counterparts, with the exception of part-Hawaiian males, for whom the death rate from all causes is approximately equal to that of U.S. all races males.

One disease that is particularly pervasive is diabetes mellitus, for which even part-Hawaiian males have a death rate 128 percent higher than the rate for U.S. all races males. Overall, Native Hawaiians die from diabetes at a rate that is 222 percent higher than for the U.S. all races. When compared to their U.S. all races counterparts, deaths from diabetes mellitus range from 630 percent higher for Hawaiian females and 538 percent higher for Hawaiian males, to 127 percent higher for part-Hawaiian females and 128 percent higher for part-Hawaiian males.

There is thus little doubt that the health status of Native Hawaiians is far below that of other U.S. population groups, and that in a number of areas, the evidence is compelling that Native Hawaiians constitute a population group for whom the mortality rate associated with certain diseases exceed that for other U.S. populations in alarming proportions.

Native Hawaiians premise the high mortality rates and the incidence of disease that far exceed that of other populations in the United States upon the breakdown of the Hawaiian culture and belief systems, including traditional healing practices, that was brought about by western settlement, and the influx of western diseases to which the native people of the Hawaiian Islands lacked immune systems. Further, Native Hawaiians predicate the high incidence of mental illness and emotional disorders in the Na-

tive Hawaiian population as evidence of the cultural isolation and alienation of the native peoples, in a statewide population in which they now constitute only 20 percent. Settlement from both the east and the west have not only brought new diseases which decimated the Native Hawaiian population, but which devalued the customs and traditions of Native Hawaiians, and which eventually resulted in Native Hawaiians being prohibited from speaking their native tongue in school, and in many instances, at all.

In 1998, Papa Ola Lokahi, a Native Hawaiian organization which oversees the administration of the Federally-authorized Native Hawaiian health care systems, updated the health care statistics from the original E Ola Mau report. In addition, on an annual basis, Papa Ola Lokahi extrapolates the data on Native Hawaiians gathered yearly by the Hawai'i State Department of Health from the Department's behavioral risk assessment and health surveillance survey. The findings from those assessments reveal that—

- With respect to cancer, Native Hawaiians have the highest cancer mortality rates in the State of Hawai'i (216 out of every 100,000 male residents and 191.6 out of every 100,000 female residents), rates that are 21 percent higher than that for the total State population (179.0 out of every 100,000 residents) and 64 percent higher than the rate for the total State female population (117.0 per 100,000).

- With respect to breast cancer, Native Hawaiians have the highest mortality rates in the State of Hawai'i, and nationally Native Hawaiians have the third highest mortality rates due to breast cancer.

- Native Hawaiians have the highest mortality rates from cancer of the cervix and lung cancer in the State of Hawai'i, and Native Hawaiian males have the third highest mortality rates due to prostate cancer in the State.

- For the year 2000, Native Hawaiians had the highest mortality rate due to diabetes mellitus in the State of Hawai'i, with full-blooded Hawaiians having a mortality rate that is 518 percent higher than the rate for the statewide population of all other races.

- In 1990, Native Hawaiians represented 44 percent of all asthma cases in the State of Hawai'i for those eighteen years of age and younger, and 35 percent of all asthma cases reported, and in 1999, the Native Hawaiian rate for asthma was 69 percent higher than the rate for the total statewide population.

- With respect to heart disease, the mortality rate for Native Hawaiians from heart disease is 68 percent higher than for the entire State of Hawai'i, and Native Hawaiian males have the greatest years of productive life lost in the State of Hawai'i. The death rate for Native Hawaiians from hypertension is 84 percent higher than that for the entire State, and the death rate from stroke for Native Hawaiians is 20 percent higher than for the entire State.

- Native Hawaiians have the lowest life expectancy of all population groups in the State of Hawai'i. Between 1910 and 1980, the life expectancy of Native Hawaiians from birth has ranged from five to ten years less than that of the overall State population average, and the most recent data for 1990 indicates that Native Ha-

waiians life expectancy at birth is approximately five years less than that of the total State population.

- With respect to prenatal care, as of 1998, Native Hawaiian women have the highest prevalence of having had no prenatal care during their first trimester of pregnancy, representing 44 percent of all such women statewide. Over 65 percent of the referrals to Healthy Start in fiscal year 1996 and 1997 were Native Hawaiian newborns, and in every region of the State of Hawai'i, many Native Hawaiian newborns begin life in a potentially hazardous circumstance.

- In 1996, 45 percent of the live births to Native Hawaiian mothers were infants born to single mothers. Statistics indicated that infants born to single mothers have a higher risk of low birth weight and infant mortality. Of all low birth weight babies born to single mothers in the State of Hawai'i, 44 percent were Native Hawaiians.

- In 2001, Native Hawaiian fetal mortality rates comprised 21 percent of all fetal deaths for the State of Hawai'i. Thirty-seven percent of all fetal deaths occurring in mothers under the age of eighteen years were Native Hawaiians.

### *Education*

In 1981, the Senate instructed the Office of Education to submit to Congress a comprehensive report on Native Hawaiian education. The report, entitled the "Native Hawaiian Educational Assessment Project," was released in 1983 and documented that Native Hawaiians scored below parity with regard to national norms on standardized achievements tests, were disproportionately represented in many negative social and physical statistics indicative of special educational needs, and had educational needs that were related to their unique cultural situation, such as different learning styles and low self-image.

In recognition of the educational needs of native Hawaiians, in 1988 the Congress enacted title IV of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988 (102 Stat. 130) to authorize and develop supplemental educational programs to benefit Native Hawaiians. In 1993, the Kamehameha Schools Bishop Estate released a ten-year update of findings for the Native Hawaiian Educational Assessment Project, finding that despite the successes of the programs established under title IV of the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, many of the same educational needs still existed for Native Hawaiians. Subsequent reports by the Kamehameha Schools Bishop Estate and other organizations have generally confirmed those findings. For example—

- (A) educational risk factors continue to start even before birth for many Native Hawaiian children, including—
  - (i) late or no prenatal care;
  - (ii) high rates of births by Native Hawaiian women who are unmarried; and
  - (iii) high rates of births to teenage parents;

(B) Native Hawaiian students continue to begin their school experience lagging behind other students in terms of readiness factors such as vocabulary test scores;

(C) Native Hawaiian students continue to score below national norms on standardized education achievement tests at all grade levels;

(D) both public and private schools continue to show a pattern of lower percentages of Native Hawaiian students in the uppermost achievement levels and in gifted and talented programs;

(E) Native Hawaiian students continue to be over represented among students qualifying for special education programs provided to students with learning disabilities, mild mental retardation, emotional impairment, and other such disabilities;

(F) Native Hawaiians continue to be under represented in institutions of higher education and among adults who have completed 4 or more years of college;

(G) Native Hawaiians continue to be disproportionately represented in many negative social and physical statistics, indicative of special educational needs, as demonstrated by the fact that—

(1) Native Hawaiian students are more likely to be retained in grade level and to be excessively absent in secondary school;

(ii) Native Hawaiian students are the highest users of drugs and alcohol in the State of Hawai'i; and

(iii) Native Hawaiian children continue to be disproportionately victimized by child abuse and neglect; and

(H) Native Hawaiians now comprise over 23 percent of the students served by the State of Hawai'i Department of Education, and there are and will continue to be geographically rural, isolated areas with a high Native Hawaiian population density.

In the 1998 National Assessment of Educational Progress, Native Hawaiian fourth-graders ranked thirty-ninth among groups of students from thirty-nine States and the District of Columbia in reading.