

Who Is Hawaiian, What Begets Federal Recognition, and How Much Blood Matters

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Abstract: *The Akaka bill proposes to federally recognize a Hawaiian governing entity similar to those of federally recognized Indian tribes. As the Akaka bill will institutionalize a political difference between Hawaiians and non-Hawaiians, who is Hawaiian is a timely, and controversial, issue. Also controversial is whether Congress possesses the authority to federally recognize a Hawaiian governing entity. This article addresses three questions that probe the heart of the controversy surrounding the Akaka bill: who is Hawaiian, what begets federal recognition, and how much blood matters. After analyzing relevant Indian jurisprudence, this article demonstrates that political history, not indogeneity, begets federal recognition. As such, it is the political-historical, not racial, definition of Hawaiian that is legally significant to the Akaka bill. Since, however, the Akaka bill utilizes an ethnic Hawaiian blood eligibility criterion, another important question – and one Justice Breyer raised in *Rice v. Cayetano* – is how much blood is necessary to distinguish ideological self-identification from legitimate racial identity. To the extent racial preferences may coexist with the equal protection components of the Constitution, this article contends that a preponderance of preferred blood is the logical quantum, but a fifty percent requirement is the most practicable.*

I. INTRODUCTION

Part III introduces the Akaka bill, explains its purpose, and notes the controversy surrounding it. Since an understanding of Hawai‘i’s unique history is a necessary primer to discussion of Hawaiian issues, part IV reviews the political history of Hawai‘i to the extent it is relevant to this article. Next, part V discusses the institution of federal recognition and the United States’ respective relationships with federally recognized and unrecognized Indians. After analyzing relevant Indian jurisprudence, part VI contends that political history is the predicate factor to obtaining federal recognition. Part VII discusses the United States-ethnic Hawaiian trust relationship. Part VIII analyzes whether the political history the Akaka bill articulates satisfies federal common law’s criteria for federal recognition, and ultimately concludes that it does not. Finally, part IX

discusses the prickly question of how much of particular preferred ethnicity should be required for eligibility in racial entitlement programs.

II. THE AKAKA BILL

The Akaka bill¹ proposes a process for organizing and federally recognizing a native Hawaiian government akin to federally recognized

¹ H.R. 862, 111th Cong., 1st Sess. [hereinafter, the “Akaka bill”]; S. 381. Several prior versions stalled or did not receive sufficient votes to reach cloture in the Senate. *See e.g.* H.R. 505, 110th Cong.; S. 310, 110th Cong.; S. 147, 109th Cong.; H.R. 309, 109th Cong.; H.R. 665 & 4282, 108th Cong.; S. 344, 108th Cong. H.R. 617, 107th Cong.; S. 746 & S. 1783, 107th Cong. H.R. 4904, 106th Cong.; S. 2899, 106th Cong.

Since I submitted this article for publication, Hawai‘i’s Congressional delegation introduced several different versions of the Akaka bill to the House of Representatives and Senate that differ in several significant aspects from the version, H.R. 862, discussed and cited to herein. *See* 111th Cong., 1st Sess. S. 1011; 111th Cong., 1st Sess. H.R. 2314. On Dec. 16, 2009, the House Natural Resources Committee voted to approve the Akaka Bill. *See* Dave Helfert, *Akaka Bill Wins House Committee Approval*, HAW. REPORTER, Dec. 16, 2009, available at <http://208.106.154.79/story.aspx?11c12ca2-ba37-451d-a8c9-798778b63e2c>. On Dec. 17, 2009, the Senate Committee on Indian Affairs passed an amended version of H.R. 2314. *See* Kenneth R. Conklin, *Summary of Congressional Action Concerning Akaka Bill in December 2009*, available at <http://www.angelfire.com/big09a/AkakaMidDecember2009.html>.

Introduction of this amended version, however, prompted Hawai‘i’s Governor and Attorney General to rescind their longstanding support for the bill because of significant changes in the new bill regarding State control over the proposed Hawaiian governing entity. *Id.* For a thorough explanation of the differences between prior versions and the Senate version of the Akaka bill (S. 1011), *see* Ka Huli Ao Center for Excellence in Native Hawaiian Law, *Summary of Important Provisions in Amended S. 1011*, Jan. 7, 2010, available at http://api.ning.com/files/rE0PU6CEIyGIK8vwwKAHjsb8WHnKxjMsOr23LAan3Q4_/S1011Summary.pdf. The most significant difference between S. 1011 and H.R. 862 (the version cited to and discussed herein) appurtenant to this article is that S. 1011’s eligibility criterion employs both an ethnic Hawaiian blood requirement as well as a cultural-nexus criterion. *See* H.R. 2314 § 3(12) (outlining the requirements of a “Qualified Native Hawaiian Constituent”). By contrast, every prior version of the Akaka bill utilized an eligibility criterion expressly requiring ethnic Hawaiian ancestry. *See post* note 172 (discussing two-pronged ancestry and cultural nexus eligibility criteria in the Indian context).

On February 22, 2010, Congressman Neil Abercrombie (D-HI) introduced another version of H.R. 2314 to the House floor. Gov. Lingle sharply criticized this bill as well, again due to issues surrounding the potential for jurisdictional conflicts between the ethnic Hawaiian governing entity and the State of Hawai‘i, as well as a lack of State control of the proposed governing entity. *See* Statement by Gov. Linda Lingle on the Native Hawaiian Government Reorganization Act, Feb. 22, 2010, available at <http://hawaii.gov/gov/news/releases/2010-news-releases/statement-by-governor-linda-lingle-on-the-native-hawaiian-government-reorganization-act>:

[U]nder the current version of the bill, the “governmental” (non-commercial) activities of the Native Hawaiian governing entity, its employees, and its officers, will be almost completely free from State and County regulation, including free from those laws and rules that protect the health and safety of Hawai‘i’s people, and protect the

Indian tribes.² The bill's declared purpose is the "reorganization of a Native Hawaiian government" and establishment of a government-to-government relationship between that Native Hawaiian government and the United States.³ The Akaka bill is not, however, an organic, governing document. Rather, the bill states that the policy of the United States is to provide for self-governance for native Hawaiians,⁴ identifies native Hawaiians as a "distinct native community,"⁵ asserts that Congress

environment . . . [the newest version of the bill creates a structure that] will, in my opinion, promote divisiveness and litigation, rather than negotiation and resolution . . . [and grant to the Hawaiian governing entity] almost complete sovereign immunity from lawsuits, including from ordinary tort and contract lawsuits . . . I do not believe this makes sense for the people of Hawai'i."

On February 23, 2010, the House of Representatives passed H.R. 2314 by a 245–164 vote. In contrast to S. 1011, however, (and consistent with the decade of prior versions of the Akaka bill) H.R. 2314 does not employ a cultural sovereignty eligibility criterion. Instead H.R. 2314 employs an ethnic Hawaiian ancestry eligibility criterion. See H.R. 2314 § 3(10). Prior to the House vote on H.R. 2314, Rep. Jeff Flake (R-AZ) introduced an amendment to the bill clarifying that "nothing in the Akaka bill could be interpreted to exempt the Native Hawaiian Governmental Authority from complying with the Fourteenth Amendment to the U.S. Constitution," and Rep. Doc Hastings (R-WA) introduced an amendment requiring an "all-Hawaii plebiscite to create the Akaka Tribe and approve its governing documents." See Peter Kirsanow, *Equal Protection is for Flakes*, NAT. REV., Feb. 24, 2010, available at <http://corner.nationalreview.com/post/?q=ODM3M2UyMTgyMTEjOWFiZjJkNTdlYWVkYjAwN2MzZDg=>. Both proposed amendments failed. *Id.*

² See *infra* Part.III. Professor Cohen's authoritative treatise on Indian law provides a useful introduction to the extraordinary political status of federally recognized Indian tribes. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, 2 (LexisNexis, 2005) [hereinafter FEDERAL INDIAN LAW].

An Indian nation possesses . . . all of the powers of a sovereign state. Those powers that are lawfully vested in an Indian nation are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty that has never been extinguished. This sovereignty preexisted the formation of the United States and persists unless diminished by treaty or statute, or in certain instances federal common law. Because of their retained sovereignty, the tribes have a "government-to-government relationship" with the United States.

³ H.R. 862 § 3(b) ("It is the intent of Congress that the purpose of this Act is to provide a process for the reorganization of a Native Hawaiian government and for the recognition by the United States of the Native Hawaiian Government for purposes of continuing a government-to-government relationship.").

⁴ H.R. 862 § 3(C)(4) (asserting that native Hawaiians possess an "inherent right to autonomy in their internal affairs" as well as self-determination, self-governance, and economic self-sufficiency; § 7(b) (asserting the "right of the Native Hawaiian people to organize for their common welfare").

⁵ H.R. 862 § (1)(15)-(16) (asserting that native Hawaiians "continue to maintain

possesses the power to federally recognize a native Hawaiian governing entity,⁶ and outlines a process to do so.⁷ If Congress enacts the Akaka bill, a commission will draft the organic documents⁸ for the proposed government and establish a roll of eligible members.⁹

The Akaka bill arouses much controversy for several reasons¹⁰ – most of all that it limits eligibility in its proposed government to

[a] separate identity as a distinct native community through the formation of cultural, social, and political institutions”).

⁶ See H.R. 862 § 3(a)(3)(A)-(C) (asserting that Congress’ Constitutional authority to federally recognize a native Hawaiian governing entity flows from the Hawaiian Homes Act of 1920 (42 Stat. 108, chapter 42), the act admitting the State of Hawai’i into the Union (P.L. 86-3; 73 Stat. 4), as well as the “more than 150 other Federal laws addressing the conditions of Native Hawaiians”). See also *Id.* at § 1(1) (asserting that the Constitution vests Congress with authority over indigenous, native people of United States); § 1(20)(b) (asserting that Congresses Indian authority extends to native Hawaiians because “dozens” of existing federal statutes include them with Indians); *Id.* at § 3(a)(3) (reasserting Congress possesses constitutional authority to regulate the welfare of native Hawaiians); *Id.* at § 1(3) (asserting a special trust relationship between native Hawaiians and the United States); *Id.* at § 1(20)(a) (asserting a special responsibility between Congress and indigenous peoples, of which native Hawaiians are one); *Id.* at § 1(20)(c) (asserting that Congress has delegated a portion of its trust responsibility to native Hawaiians to the State of Hawai’i); *Id.* at § 1(21) (asserting that the United States has recognized and affirmed this trust relationship); *Id.* at § 1(22)(C)-(D) (asserting that a special relationship exists between the United States and Indians, native Alaskans, and native Hawaiians because of their status as aboriginal, indigenous, native people of the United States); *Id.* at § 3(a)(2) (asserting that the trust relationship is purposed to promote the welfare of native Hawaiians).

⁷ See H.R. 862 § 4 (establishing the Office for Native Hawaiian Affairs within the Office of the Secretary the United States); *Id.* at § 5 (requiring the United States Attorney General to designate an official to assist the Office for Native Hawaiian Affairs “in the implementation and protection of the rights of native Hawaiians and their political, legal, and trust relationship”); *Id.* at § 6 (establishing a Native Hawaiian Interagency Task Force tasked to coordinate federal policies affecting native Hawaiians and assure that each federal agency consults with the Interagency Task Force to develop a policy affecting native Hawaiians consistent with that consultation); *Id.* at § 7 (outlining the process for federal recognition of the native Hawaiian government proposed by the Interim Council).

⁸ H.R. 862 at § 7(a)(c) (outlining the structure, rights, powers, and functions of the native Hawaiian government and listing the organic governing documents the Interim Council will draft).

⁹ H.R. 862 § 7(a)(1)-(3) (outlining a process to select nine native Hawaiians to sit on a commission to determine eligibility within the native Hawaiian government by establishing and certifying a “roll” of individuals eligible for membership within the native Hawaiian government, and limiting eligibility therein to individuals possessing any amount of ethnic Hawaiian blood). See also *supra* note 2 (observing that the most recent version of the Akaka bill does not employ a blood-based criterion to determine eligibility on the committee that would create the roll of eligible individuals).

¹⁰ See Kenneth R. Conklin, *Introductory Note to Chief Maui Loa’s “Open Letter to President Bush”*, Apr. 6, 2005, archived at

individuals possessing ethnic Hawaiian blood.¹¹ For instance, the United States Commission on Civil Rights opposes the Akaka bill on this ground, finding that it “discriminate[s] on the basis of race or national origin and further subdivide[s] the American people into discrete subgroups accorded varying degrees of privilege.”¹² Whether Congress possesses the authority to federally recognize a native Hawaiian governing entity is also contested,¹³ as is whether the Akaka bill promotes sound public policy.¹⁴

<http://www.angelfire.com/hi5/bigfiles/ChiefMauiLoa040605.html> (last visited Oct. 20, 2009) (identifying three primary, and at times conflicting, positions opposing the Akaka bill); Andrew Walden, *Akaka Bill Reading List*, HAW. FREE PRESS, Jan. 14, 2009, available at <http://www.hawaiiifreepress.com/main/ArticlesMain/tabid/56/articleType/ArticleView/articleId/316/Akaka-Bill-Reading-List.aspx> (last visited Oct. 15, 2009) (compilation of articles and commentary for and against the Akaka bill).

¹¹ See Akaka bill, *supra* note 2 at § 7 (a)(1)-(2). See also *supra* note 2 (noting that the version of the Akaka bill the House passed in February employs a dual ethnic and cultural criterion to determine eligibility in the Akaka bill’s proposed governing entity); *post* note 171 (discussing ‘cultural sovereignty’ eligibility criteria in the context of Indian tribes); *post* note 316.

¹² United States Commission on Civil Rights, *Letter re: Akaka Bill*, Aug. 28, 2009, available at <http://akakabill.org/wp-content/uploads/2009/08/Letter-on-Akaka-Bill-Aug-28-2009.pdf> (last visited Oct. 15, 2009) [hereinafter “USCCR Letter”] (letter from the United States Commission on Civil Rights to leading members of the Senate and House of Representatives reiterating its opposition to the Akaka bill on grounds that Congress possesses “no authority to “reorganize” racial or ethnic groups into dependent sovereign nations unless those groups have a long and continuous history of separate self-governance” and “[m]oreover, quite apart from the issue of constitutional authority, creating such an entity sets a harmful precedent” for other ethnic groups who will “demand” similar treatment”). See also Gail Heriot & Peter Kirsanow, *Congress Tries to Break Hawaii in Two*, WALL ST. J., Feb. 28, 2010, available at http://online.wsj.com/article/SB10001424052748703411304575093180795586118.html?mod=WSJ_Opinion_LEFTT opOpinion; Peter Kirsanow, *Akaka: Bad Bill, Bad Process*, NAT. REV., Feb. 22, 2010, available at <http://corner.nationalreview.com/post/?q=ZmFINmNjMTQwZjc0OTgyOTBjM2RkMjY3Njk1NTZmY2U=>. By contrast, the Department of Justice (“DOJ”) has endorsed federal recognition for Native Hawaiians. See United States Department of the Interior and 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*, (Aug. 23, 2000), available at http://www.iiirm.org/hawaiian_consultation/.../river_justice.pdf (last visited Oct. 21, 2009) [hereinafter “Mauka to Makai”]. The Department of Justice, however, would utilize a higher ethnic Hawaiian blood quantum to determine eligibility than the Akaka bill’s hypodescent eligibility criterion. See Le’a Malia Kanehe, *The Akaka Bill: The Native Hawaiian’s Race for Federal Recognition*, 23 U. HAW. L. REV. 857, 881 (2001) (noting the DOJ’s position that a significantly higher ethnic Hawaiian blood quantum may be necessary for the Akaka bill to pass Constitutional muster); *infra* Part VII.

¹³ Compare American Bar Ass’n, *Resolution and Report on the Akaka Bill*, 10 HAW. B.J. 80 (July 2006) (“urg[ing] Congress to pass legislation to establish a process to provide federal recognition for a native Hawaiian governing entity”) with Paul M.

Critics of the Akaka bill contest its findings of facts and law,¹⁵ and oppose its potential to transfer to the native Hawaiian governing entity the “ceded

Sullivan, *Seeking Better Balance: A Proposal for Reconsideration of the 2006 ABA Resolution on the Akaka Bill*, 10 HAW. B.J. 80 (July 2006) (criticizing the previously cited ABA resolution supporting the Akaka bill for failing to address the “serious historical and constitutional issues” associated with federally recognizing a native Hawaiian governing entity, and recommending the ABA undertake a “new, comprehensive and balanced” examination of the issue); compare Kanehe, *supra* note 12 with Paul M. Sullivan, “Recognizing” the Fifth Leg: the Akaka Bill Proposal to Create a Native Hawaiian Government in the Wake of *Rice v. Cayetano*, 3 ASIAN-PAC. L. & POL’Y J. 4 (2002). See generally Compilation of Editorials, *Akaka Bill Debate: Hawai‘i Att. Gen. Mark Bennett vs. Burgess, Conklin, and Fein Re: Constitutionality of Hawaiian Recognition Bill*, archived at <http://www.angelfire.com/hi2/hawaiiansovereignty/AkakaBennett2004.html>. See also Ilya Shapiro, *Trouble in Paradise: Akaka Bill’s Passage Would Threaten Many Hawaiian Institutions*, HAW. REP., Jan. 6, 2010, available <http://hawaiiireporter.com/story.aspx?6c503172-c01e-483b-b277-6aa3f3c9557e>.

¹⁴ See Sarah Glassman, et al., *The Economic Impact of the Akaka Bill: Unintended Consequences for Hawaii*, Beacon Hill Institute Policy Study (2009), available at http://www.grassrootinstitute.org/Publications/BHI_Akaka_0109.pdf (analyzing the economic effects of the Akaka bill and concluding that “[b]y almost any plausible interpretation of the bill, [its economic effects] are uniformly significant and negative” for the majority of citizens of the State of Hawai‘i); Tom McDonald, *What Comes After Akaka Bill Passage? A Preview from Senator Inouye*, GRASSROOT INSTITUTE HAW. (Sep. 2008), available at <http://www.grassrootinstitute.org/system/old/GrassrootPerspective/AfterAkaka090308.shtml> (asserting that, if Congress enacts the Akaka bill, significant legal and jurisdictional conflicts between the State of Hawai‘i and a native Hawaiian governing entity are inevitable); Kaleihanamau Johnson, *The Politics of Dependency*, HONOLULU STAR BULLETIN, June 11, 2006, available at <http://archives.starbulletin.com/2006/06/11/editorial/commentary.html> (last visited October 15, 2009) (asserting that the “Akaka Bill is written to create a dependent class of an unprecedented multitude, to politically and racially divide us, steal our freedom by not recognizing private property, and subject the people of Hawaii to socialized living in perpetuity” and, rather than being a “just settlement” it will be “the beginning of a great conflict”). See also Editorial, *A Hawaiian Punch to E Pluribus Unum*, NAT. REV., May 24, 2006, available at <http://article.nationalreview.com/280943/a-hawaiian-punch-to-ie-pluribus-unumi/the-editors> (“The most pernicious outcome is perhaps the only one that is assured: The governing entity would lead to a permanent hereditary caste in Hawaii, where natives—defined however the interim government chooses to define them—enjoy at least some rights that non-natives do not.”); *contra* Editorial, *Akaka Bill Deserves Support*, HONOLULU STAR BULLETIN, Apr. 24, 2009, available at http://www.starbulletin.com/editorials/20090424_Akaka_Bill_deserves_support.html (encouraging support for the Akaka bill as moral and historically justified and encouraging President Obama to support the bill, which he has since promised to do). See Nat. Public Radio, *Hawaii Is Diverse, But Far From A Racial Paradise*, NAT. PUBLIC RADIO, Nov. 15, 2009, available at <http://www.npr.org/templates/story/story.php?storyId=120431126&ft=1&f=120652135> (last visited Nov. 16, 2009).

¹⁵ See Paul M. Sullivan, *Killing Aloha: The “Akaka Bill” is Wrong for Native Hawaiians, Wrong for the State of Hawai‘i and Wrong for the United States. Here’s Why.*, [unpublished scholarly analysis of the Akaka bill], Aug. 2009, available at <http://bigfiles90.angelfire.com/AkakaSullivanKA111CongS1011HR2314Aug2009.pdf> (last visited Nov. 24, 2009) [hereinafter “Killing Aloha”] (refuting the Akaka bill

lands” of Hawai‘i, the revenue from which currently serves all of Hawai‘i’s citizens.¹⁶

Ethnic Hawaiian opinion on the Akaka bill, and more broadly on the issue of ethnic Hawaiian separatism, is mixed.¹⁷ Some ethnic

“section-by-section”); Kenneth R. Conklin, HAWAIIAN APARTHEID: RACIAL SEPARATISM AND ETHNIC NATIONALISM IN THE ALOHA STATE 215-221 (E-Book Time, 2007) [hereinafter HAWAIIAN APARTHEID]; Kenneth R. Conklin, Lies told on the U.S. Senate Floor by Senators Inouye and Dorgan Regarding the Akaka Bill, HAW. REP., June 23, 2008, archived at http://www.angelfire.com/planet/big60/Akaka_InouyeDorganLies.html (last visited Oct. 15, 2009) (analyzing statements by Senators Inouye and Dorgan during a 2006 Senate debate on a prior version of the Akaka bill, characterizing many of their statements as “flat-out [historical] lies”). See also H. William Burgess & Thomas Macdonald, Akaka Bill Clashes With Hawaii Ideals, HONOLULU ADVERTISER, Aug. 18, 2009, archived at http://www.amren.com/mtnews/archives/2009/08/akaka_bill_clas.php (discussing Duke law professor Stuart Minor Benjamin’s testimony concerning the Akaka bill before the Senate Indian Affairs Committee and noting that the Akaka bill’s definition of Native Hawaiian is “too broad, with members having too little connection to a historic tribe, or to each other, to be considered a tribe”).

¹⁶ See Editorial, *Aloha, Segregation*, WALL STREET J., Dec. 17, 2009 at A26, available

[at http://online.wsj.com/article/SB10001424052970203917304574412832314714444.html](http://online.wsj.com/article/SB10001424052970203917304574412832314714444.html). The “ceded lands” were the Crown and Government lands of the Kingdom of Hawai‘i. Following the overthrow of the Kingdom of Hawai‘i in 1893, the Republic of Hawai‘i controlled the ceded lands. In 1898, as part of annexation to the United States, the Republic “ceded” those lands to the United States. The United States held the ceded lands in trust until it transferred that trust responsibility to the State of Hawai‘i in 1959, when Hawai‘i became a State. See Office of Hawaiian Affairs Info Sheet on the Ceded Lands Case, available at <http://www.oha.org/pdf/090211supremeinfo.pdf> (last visited Oct. 22, 2009) (summarizing the background of the ceded lands dispute at the center of *Hawaii v. OHA*, a 2009 Supreme Court case holding in pertinent part that the State of Hawai‘i possesses clear title to the Ceded lands). See also Map of Ceded Lands, available at <http://aloha4all.org/wordpress/basic-issues/land-map/>.

Today the ceded lands generate a substantial amount of revenue that the State of Hawai‘i administers in fulfillment of the five trust obligations established by the Admission Act. See Hawai‘i Admission Act of 1959, Pub. L. No. 86-3 § 1(5)(b), 73 Stat. 4 (codified as amended at 48 U.S.C. § 491). While the Supreme Court in *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. ___ (2009), adjudicated any outstanding claims ethnic Hawaiians may have to the ceded lands, determining that the State of Hawai‘i possesses clear title to the ceded lands, scholars have vigorously debated the question of who owns the ceded lands. Compare John M. Van Dyke, WHO OWNS THE CROWN LANDS OF HAWAI‘I? (Univ. Haw. Press, 2008) (analyzing the ceded lands’ cultural and legal history, and contending that ethnic Hawaiians possess an exclusive claim to the ceded lands), with Paul M. Sullivan, *A Very Durable Myth: Critical Commentary on John Van Dyke’s WHO OWNS THE CROWN LANDS OF HAWAI‘I?* 31 U. HAW. L. REV. 341, 345 (2008) [hereinafter “Sullivan Review”] (critiquing Van Dyke’s book as failing to answer its legal thesis in favor of advocating a political position endorsing “a giveaway of state and federal public property in a race-conscious manner in order to radically change a 160 year old race-neutral land reform program with which the United States had nothing to do” and concluding, with regard to Van Dyke’s question of who owns the ceded lands, that “Native Hawaiians do not have and never had any valid claim to the Crown Lands or other ceded lands, before or after the termination of the monarchy in 1893”).

Hawaiian groups disfavor the Akaka bill because the federal government will retain too much control over the proposed Hawaiian government.¹⁸ Other groups, who prefer outright sovereignty from the United States, consider the Akaka bill an impediment to that end goal.¹⁹ By contrast, a number of ethnic Hawaiians are principally opposed to the idea of forming a separate Hawaiian governing entity of any sort.²⁰ Likewise, a majority

¹⁷ For an excellent primer to ethnic Hawaiian separatist issues in Hawai‘i, see James Podgers, *Greetings From Independent Hawai‘i*, 83 A.B.A. J. 74 (June, 2004).

¹⁸ See Gordon Y.K. Pang, *For Some, Akaka Bill Falls Far Short*, HONOLULU ADVERTISER, July 21, 2005, available at <http://the.honoluluadvertiser.com/article/2005/Jul/21/ln/507210349.html> (reporting that “an umbrella” of native Hawaiian groups opposed a prior version of the Akaka bill because federal recognition would give the Department of the Interior too much control over ethnic Hawaiians).

¹⁹ See Kekuni Blaisdell, Lynette Hi‘ilani Cruz, George Kahumoku Flores, et al, *Why the Native Hawaiian Reorganization Act Must be Rejected: An Urgent Open Letter to Barack Obama*, HAWAI‘I REPORTER, Apr. 21, 2009, archived at <http://www.angelfire.com/big09a/AkakaHist11Feb2009.html> (scroll nearly to bottom of page) [hereinafter “Kekuni et al.”] (rejecting the Akaka bill because it does not provide adequate redress for the “accumulated fundamental political and other claims against the United States under international law” possessed by both ethnic Hawaiians and “Hawaiian Kingdom heirs” [descendants of non-ethnic Hawaiian citizen-subjects of the Kingdom of Hawai‘i]). See also Gordon Y.K. Pang, *Hawaiian Independence Groups Send ‘No’ Message*, HONOLULU ADVERTISER, July 1, 2005, available at <http://the.honoluluadvertiser.com/article/2005/Jul/01/ln/ln15p.html> (last visited Sept. 22, 2009) (reporting that “a number of Native Hawaiian sovereignty groups, most of whom support a separate Hawaiian nation” oppose the Akaka bill on moral and historical grounds); Kekuni Blaisdell, *Statement on Statehood*, Mar. 13, 2009, [hereinafter “Kekuni Statement”] available at <http://www.fifdifdi.com/main/sharing/share?id=1611032%253ATopic%253A5742> (last visited Nov. 3, 2009) (“Independence for us Hawaiian nationals does not mean secession from the U.S. because we Kanaka and non-Kanaka Hawaiian nationals never voluntarily gave up our nation of Hawai‘i or our Hawaiian citizenship to join the U.S. as a territory/colony or state.”); Trisha Kehaulani Watson, *A Letter from Aunty Rita Kawehi Kanui on the Akaka Bill*, HONOLULU ADVERTISER, Dec. 21, 2009, available at <http://hehawaiiiau.honadvblogs.com/2009/12/21/a-letter-from-aunty-rita-kawehi-kanui-on-the-akaka-bill/>.

²⁰ See, e.g., Testimony of Prof. Rubellite Kawena Kinney Johnson before the 109th Congress, Committee on Indian Affairs, United States Senate, Mar. 1, 2005, archived at <http://www.angelfire.com/hi5/bigfiles/AkakaRubelliteKawenaKinneyJohnsonTest030105.html> (last visited Oct. 15, 2009) (disagreeing with the historical findings the Akaka bill is based upon, urging Congress not to enact a prior version of the Akaka bill substantially similar to H.R. 862, and principally opposing the idea of a separate government within Hawai‘i as contrary to liberal notions of individualism, equality, and liberty); Sandra Puanani Burgess, *Letter to the Editor: Hawaiians Should Oppose Akaka bill*, HONOLULU ADVERTISER, July 27, 2000, available at <http://the.honoluluadvertiser.com/2000/Jul/27/letters.html> (last visited Nov. 2, 2009) (urging ethnic Hawaiians to oppose the Akaka bill or any other legislation that “would seek to partition Hawai‘i or to secede from the Union or to otherwise assert special

of Hawai'i's residents oppose the bill and would prefer a state referendum on the matter.²¹ In light of the controversy surrounding the Akaka bill, a review of Hawai'i's relevant political history is necessary background for discussion of who is Hawaiian for purposes of federal recognition.

III. RELEVANT HAWAIIAN HISTORY²²

The purpose of this history is to identify who is Hawaiian as a matter of political history. Doing so requires review of the settlement of the Hawaiian Islands, the establishment of the Kingdom of Hawai'i as an internationally recognized sovereign, and the composition of that Kingdom's citizenry. As with all pre-history, nothing is certain as to the settlement of the Hawaiian Islands. Yet, the abundance of anthropological and archeological evidence discovered in the modern era coupled with Hawai'i's rich oral histories²³ sheds considerable light on the remarkable discovery and settlement of earth's most isolated archipelago. In discussing the settlement of Hawai'i, this article relies upon the narrative propounded by a number of historians,²⁴ including esteemed Hawai'i

political or economic status for Hawaiians”).

²¹ See Press Release, *Hawaii Voters Opposed to the Akaka Bill*, GRASSROOTS INSTITUTE OF HAWAII, Dec. 15, 2009, available at http://www.grassrootinstitute.org/system/attachments/33/Akaka_Bill_Poll_PR.pdf (reporting the findings of a Zogby International poll of registered Hawai'i voters finding that: (a) 34% registered Hawai'i voters support the Akaka Bill; (b) 51% oppose it; (c) 15% aren't sure; (d) of those with an opinion on the Akaka bill 60% are opposed; and (e) 58% desire a state referendum on the matter (28% oppose such a vote, 13% aren't sure). See also Valerie Richardson, *Only 34 Percent of Hawaiians Support the Akaka Bill*, HAW. REPORTER, Dec. 18, 2009, available at <http://hawaiireporter.com/story.aspx?08f5eda2-eb6d-4b78-9cab-5a92326d7976>. See Rep. Doc Hastings, *Hawaiians Deserve to Vote, Not Just Congress*, Daily Caller, Feb. 23, 2010, available at <http://dailycaller.com/2010/02/23/hawaiians-deserve-to-vote-not-congress/>.

²² This history endeavors to demonstrate what was, rather than to isolate causes demonstrating why, or pass judgment on what was. See Jacques Barzun, *FROM DAWN TO DECADENCE* 655 (HarperCollins, 2001) (noting that “[t]he historian does not isolate causes, which defy sorting out even in the natural world; he describes conditions that he judges relevant, adding occasionally an estimate of their relative strength”). Some are not as kind, however, to historical analysis. See Matthew M. Fletcher, *Politics, History, and Semantics: The Federal Recognition of Indian Tribes*, 82 N.D. L. REV. 487, 517 fn.159 (2006) (“[T]he historian's search for pure origins and beginnings [i]s folly.”) (internal citations omitted).

²³ For an exhaustive compilation of Hawaiian mythology, see Martha Beckwith, *HAWAIIAN MYTHOLOGY* (Univ. Haw. Press, 1977), available online at <http://www.sacred-texts.com/pac/hm/index.htm>.

²⁴ See, e.g., Ralph S. Kuykendall, *THE HAWAIIAN KINGDOM, VOL. I*, 1-11 (Univ. Haw. Press, 1967) [hereinafter KUYKENDALL I]; Herb Kawainui Kane, *ANCIENT HAWAII* (Kawainui Press, 1998), chapter titled *Tahitian Conquest* available online at <http://hawaiiantrading.com/herb-kane/ah-book/c3.html>; Edward Joesting, *KAUA'I: THE SEPARATE KINGDOM*, 15 (Univ. of Haw. Press, 1984) [hereinafter KAUA'I].

historian Ralph S. Kuykendall,²⁵ because, while it articulates only one of several settlement hypotheses,²⁶ much archeological evidence, including that of respected Pacific anthropologist Patrick Vinton Kirch, supports it,²⁷ and it is consistent with the oral histories that Hawai‘i’s ruling class relied upon to legitimize their claims to authority.²⁸ Finally, this history does not thoroughly review or debate the facts and circumstances contributing to the overthrow of the Kingdom of Hawai‘i in 1893 because doing so is unnecessary to identify who is Hawaiian as a matter of political history.

A. *Settlement of Hawai‘i*

The original inhabitants of the archipelago now known as Hawai‘i²⁹ (“Hawai‘i”) were Polynesians³⁰ from the Marquesas Islands who arrived in approximately 400-600 A.D.³¹ The Marquesans established settlements on at least ten separate islands.³² Approximately

²⁵ For a short biography and complete list of Prof. Kuykendall’s works, see Delman L. Kuykendall and Charles H. Hunter, *The Publications of Ralph S. Kuykendall*, <http://evols.library.manoa.hawaii.edu/bitstream/10524/352/2/JL02148.pdf>.

²⁶ For a discussion of several alternative settlement theories, see Michael W. Graves & David J. Addison, *The Polynesian Settlement of the Hawaiian Archipelago: Integrating Models and Methods of Archeological Interpretation*, 26 *WORLD ARCHAEOLOGY* 380 (1995), available at http://www.anthropology.hawaii.edu/alumni/addison/publications/1995_settlement_WA.pdf.

²⁷ Patrick Vinton Kirch, *FEATHERED GODS AND FISHHOOKS: AN INTRODUCTION TO HAWAIIAN ARCHEOLOGY AND PREHISTORY* (University of Hawaii Press, 1985) [hereinafter *GODS & FISHHOOKS*].

²⁸ See *post notes* 42-43.

²⁹ The Hawaiian archipelago is comprised of 132 islands, atolls, reefs, shallow banks, shoals, and seamounts. There are eight ‘main’ islands: Hawai‘i (also the archipelago’s namesake, a source of much confusion); Maui; Kaho‘olawe; Lana‘i; Moloka‘i; O‘ahu; Kaua‘i; and Ni‘ihau. See *GODS AND FISHHOOKS*, *supra* note 27 at 22-23.

³⁰ Polynesians are the culturally and ethnologically related inhabitants of nearly a dozen remote Pacific island groups located within a geographic ‘triangle’ formed by Hawai‘i to the north, New Zealand to the south, and Rapa Nui (Easter Island) to the east. See Robert D. Craig, *HANDBOOK OF POLYNESIAN MYTHOLOGY*, 1-19 (ABC-Clio Pub., 2004).

³¹ See *KUYKENDALL I*, *supra* note 24 at 1-2; *GODS & FISHHOOKS*, *supra* note 27 at 58, 65, 87 (asserting that “firm” evidence “supports the identification of the Marquesas Islands as the immediate homeland of the first Polynesian colonizers of Hawai‘i”); *Id.* at 69 (noting that initial settlement may have occurred by A.D. 300). See also *KAUA‘I*, *supra* note 24 at 15 (“most authorities agree that the first settlers [of the islands of Hawai‘i] came from the Marquesas Islands, some 2,400 miles to the south”).

³² *GODS & FISHHOOKS*, *supra* note 27 at 89-98; *Id.* at 98; S. Lee Seaton, *The Hawaiian "kapu" Abolition of 1819*, 1 *AM. ETHNOLOGIST* 193-206 (1974). See also Ralph S. Kuykendall & A. Grove Day, *HAWAII: A HISTORY*, 5-7 (Prentice Hall, 1948) [hereinafter *KUYKENDALL & DAY*] (“these first Hawaiians and their descendants lived

500-600 years after the Marquesan arrival, successive waves of Tahitians began arriving in Hawai'i.³³ The Tahitian arrival is significant because it forever altered the original Marquesan inhabitants' "ancient customs, creed, and polity."³⁴ These "newcomers possessed a culture more highly developed than the original Marquesans,"³⁵ and more strictly enforced the kapu system, Polynesia's ubiquitous socio-political-religious structure.³⁶

isolated in their little island world for several hundred years . . . [t]hey were the *Menehunes*, whom the makers of legends in following centuries transformed into dwarfs or brownies having magical powers that enabled them to perform with incredible speed marvelous feats of engineering in the construction of fish ponds, water courses, and temples for their gods"); KAUA'I, *supra* note 27 at 19-20 ("[l]ong considered a mythical people . . . in reality the Menehune were a distinct people of an ancient time"); *Id.* at 20 ("the Tahitians . . . labeled the original settlers Menehune").

³³ KUYKENDALL I, *supra* note 24 at 3 (asserting that successive arrivals of Tahitian settlers extended for hundreds of years). For a summary of the archeological, linguistic, and oral Hawaiian histories evidence supporting a latter Tahitian arrival, see GODS AND FISHHOOKS, *supra* note 27 at 65-66. See also David Lewis & Derek Oulton, WE THE NAVIGATORS, 350-51 (2d ed., 1994) ("there is ample evidence of later two-way contact with Tahiti"); E. Matisoo-Smith, et al., *Patterns of Prehistoric Human Mobility in Polynesia Indicated by mtDNA From the Pacific Rat*, 95 PROC. NATL. ACAD. SCI. 15145, 15149 (1998) ("[i]n addition to the Hawaiian-Marquesan link, a range of evidence suggests that there are also links between Hawaii and the region [of Tahiti]"); KUYKENDALL & DAY, *supra* note 32 at 6-7. Hawai'i's oral histories, too, support the theory of a later Tahitian arrival. *Id.* at 6. See also Abraham Fornander, AN ACCOUNT OF THE POLYNESIAN RACE VOL.II at 1 (1880) [hereinafter FORNANDER]; *post* note 40-42.

³⁴ KUYKENDALL I, *supra* note 24 at 8-9.

³⁵ KUYKENDALL & DAY, *supra* note 32 at 6-7. In addition, the Tahitians introduced "almost all the cultivated Polynesian food plants," domesticated animals (dogs, chickens, and pigs), and the paper-mulberry plant. *Id.*

³⁶ The word "kapu" means "sacred, prohibited, set apart." KUYKENDALL I, *supra* note 24 at 8-9; FORNANDER, *supra* note 33 at 113-14. The kapu system strictly divided the ali'i (ruling class) from the maka'ainana (commoners), and included a third class of "despised" persons, the kauwa (slaves). KUYKENDALL I, *supra* note 24, at 9. The kapu system "[i]n practice . . . consisted of a multitude of prohibitions" such as a rule barring women from eating with men. KUYKENDALL & DAY, *supra* note 32 at 11. It further determined production, redistribution, and consumption of resources. See Seaton, *supra* note 32 at 193-206 (1974) (providing a thorough discussion of the kapu system's origins, practices, and gradual abolition beginning in 1819). Although, according to Kuykendall, the kapu system was "most hampering, if not oppressive[,] and susceptible to abuse by the ruling class, it reflected Polynesians' "dualistic concept of nature" (common versus sacred; male versus female; light versus darkness). KUYKENDALL I, *supra* note 24 at 8-9.

Land tenure under the kapu system was feudalistic in nature. "[N]early all the lands in the kingdom were held jointly by the feudal lords, the kings and chiefs" while commoners possessed a revocable tenure, owed feudal dues, and could be taxed at the landlord's will." *Id.* at 269-70; e.g. KUYKENDALL & DAY, *supra* note 32 at 8 ("dispossession [of commoner's land] was not uncommon, though [the commoners] could change from one chief to the next"). In 1841 an American Naval officer observed that this system resulted in "the common laborers [not receiving] probably on average,

The kapu system “regulat[ed] the daily life of the different classes of society and insur[ed] the subordination of the lower to the higher, the maintenance of an aristocratic type of government and a caste system.”³⁷ It was a “system of religious law”³⁸ that governed daily life and resulted in a “highly stratified and rigid” system of social organization.³⁹

Ultimately, the Tahitian settlers displaced the original Marquesan settlers, whom the Tahitians referred to as Menehune, a “derisive” term for commoner,⁴⁰ and established Tahitian chiefs as the islands’ ali’i – Hawai’i’s ruling caste.⁴¹ The descendents of these Tahitian ali’i remained

more than a third of the avails of their labors, while the different orders of chiefs received the remaining two thirds.” KUYKENDALL I, *supra* note 24 at 269-70. By contrast, some legal commentators have described the Kapu land tenure system somewhat differently. See, e.g., Kathryn Nalani Setsuko Hong, *Understanding Native Hawaiian Rights: Mistakes and Consequences of Rice v. Cayetano*, 15 ASIAN AM. L. J. 9, 11 (2008) (describing the kapu land tenure system as chiefs “manag[ing] the land over the commoners”).

³⁷ KUYKENDALL I, *supra* note 24 at 8-9

³⁸ KUYKENDALL & DAY, *supra* note 32 at 11.

³⁹ KAUA’I, *supra* note 24 at 23.

⁴⁰ See *Id.* at 19-22 (noting that Tahitians gave the name “Menehune” [sic] to the original Marquesan settlers, and that Menehune became a derisive term for commoner); KUYKENDALL I, *supra* note 24 at 3 (noting that the Menehune were “driven out or conquered by the later invaders”); KUYKENDALL & DAY, *supra* note 32 at 6 (stating that “[the Tahitians] became the dominant element in the population”). Note, too, that “commoner” and “makainana” are used interchangeably throughout this article to denote the commoner-class of persons in Hawai’i.

Notably, at least one Menehune community persisted into the early 19th century. In a census of the island of Kaua’i in the “very early 1800s . . . sixty-five persons described their nationality as Menehune.” KAUA’I, *supra* note 24 at 22.

⁴¹ See KUYKENDALL I, *supra* note 24 at 3 (“[t]he leaders of these latter [Tahitian] immigrants were the ancestors of the historical ali’i (chiefly class)”; KUYKENDALL & DAY, *supra* note 32 at 6-7 (“[the Tahitian] chiefs [ali’i] became the ruling class and their priests took over the direction of the religious observances and introduced some new temple forms and practices and some new gods”); KAUA’I, *supra* note 24 at 20 (“the Tahitians seiz[ed] the positions of leadership”); e.g. Brian Lusignan, *One of These Things is Not Like the Others? A Comparative Analysis of Secessionist Movements in Vermont, Quebec, Hawai’i and Kosovo* at 29, Apr. 2009, available at <http://ssrn.com/abstract=1385764> (noting that the “islands were ruled by hereditary kings who claimed authority through divine ancestry”); KUYKENDALL & DAY, *supra* note 29 at 12. See also KAUA’I, *supra* note 27 at 24-45 (describing the hierarchy of chiefs).

The Tahitian warrior priest Pa’ao is traditionally credited with enforcing in Hawai’i strict adherence to the kapu system, which was already in place (albeit in a more relaxed fashion) when the later Tahitians arrived. See FORNANDER, *supra* note 33 at 33-38 (detailing the oral histories surrounding Pa’ao’s arrival, his works in Hawai’i, including the construction of at least two hei’au (temple), the 19th century priests who trace their lineage directly to Pa’ao, and the line of ali’i who trace their geneology to Pili, a chief Pa’ao brought to Hawai’i, perhaps from Samoa, to rule over the original inhabitants); e.g. Seaton, *supra* note 32 at 18; GODS & FISHHOOKS, *supra* note 27

largely genealogically distinct from the commoner-caste and exclusively controlled Hawai‘i’s socio-political systems until nearly the end of the 19th century.⁴² Possession of ali‘i blood, or lack thereof, determined the caste to which an individual belonged.⁴³

B. *Pre-Western Contact Political Organization*

The political organization of the residents of pre-Western contact Hawai‘i consisted of numerous kapu chiefdoms⁴⁴ that were never united, and persistently warred for territory and power.⁴⁵ At the time of Western

at 66 (according a historical basis to the oral histories of Pa‘ao and other Tahitian settlers in Hawai‘i, but noting a lack of scientific evidence to corroborate their existence); David Malo, *HAWAIIAN ANTIQUITIES: MO‘OLELO HAWAI‘I* 25 (Bishop Museum Press, 1951) (explaining Pa‘ao’s history as having journeyed from Tahiti to Hawai‘i and residing in Hawai‘i until “the kings of Hawaii became degraded and corrupted,” whereupon he returned to Tahiti to bring back to Hawai‘i a high chief, Pili, who restored appropriate lineage to the ali‘i class).

⁴² Pa‘ao and Pili’s respective genealogical dynasties continued unbroken well into the 19th century, and include the last high priest of the kapu faith (Hewahewanui), and the Kamehameha dynasty. FORNANDER, *supra* note 33 at 38. See KAUA‘I, *supra* note 24 at 24 (noting that ali‘i-commoner unions, although rare, did occur and that the children of those unions usually occupied “the ranks of commoners”).

⁴³ Put another way, Hawai‘i’s ali‘i-caste, through possession of a particular blood lineage, distinguished themselves from the islands’ other residents, ruled over them by virtue of that blood, and thereby maintained by exclusive socio-political control of the islands for over half a millennium. By contrast, several commentators describe Hawai‘i’s pre-Western contact residents as having a “shared Polynesian heritage.” Lusignan, *supra* note 41 at 29. *E.g.* KUYKENDALL & DAY, *supra* note 32 at 12 (“[t]his, then, was [collectively] the native race that first found the Hawaiian islands”). These commentators may not be incorrect, but their broad conclusion is purposed to distinguish pre-Western contact residents of Hawai‘i from those that arrived after Western contact, rather than to analyze the political organization of pre-Western contact Hawai‘i. Although their distinction is important, it glosses over the fundamental socio-political differences between the chief and commoner castes. Since the chief-commoner blood distinction was a key factor in Hawai‘i’s political organization until nearly the end of the nineteenth century, it should be noted as such.

⁴⁴ Kapu chiefdoms were controlled by a paramount chief and further subdivided into smaller, “radial territorial units” called ahupua‘a controlled by sub-chiefs and a land managers called konohiki. Patrick Vinton Kirch, *Monumental Architecture and Power in Polynesian Chiefdoms: A Comparison of Tonga and Hawaii*, 22 *WORLD ARCHAEOLOGY* 206, 211 (1990). See KUYKENDALL & DAY, *supra* note 32 at 7-8 (“the entire [island] group had a natural tendency to fall into four kingdoms dominated by great families of chiefs on the larger islands – Hawaii, Maui, Oahu, Kauai [while] [t]he smaller islands sometimes maintained a precarious independence, but more commonly belonged, as prizes of war, to one or another of their more powerful neighbors”).

⁴⁵ KUYKENDALL & DAY, *supra* note 32 at 8; KUYKENDALL I, *supra* note 24 at 9; GODS & FISHHOOKS, *supra* note 27 at 307-08 (these “little kingdoms size and boundaries were continually changing, varying with the power of the chiefs who governed them”).

contact in 1778,⁴⁶ four distinct kapu chiefdoms existed, centered on the four largest islands (Hawai‘i, Maui, O‘ahu, Kaua‘i).⁴⁷

C. *Unifying the Kapu Chiefdoms*

In 1782, Kahekili, the powerful chief of Maui, conquered populous O‘ahu, virtually eliminating O‘ahu’s ruling caste.⁴⁸ In 1786, Kahekili gained indirect control of Kaua‘i by installing his half-brother as that island’s chief.⁴⁹ Now in control of every kapu chiefdom but Hawai‘i island, Kahekili appeared poised to unify the entire island group under his rule.

Meanwhile, the kapu chiefdom of Hawai‘i Island broke apart into three distinct kapu chiefdoms, one of which was controlled by a rising chief named Kamehameha.⁵⁰ In 1791, Kamehameha conquered the whole of Hawai‘i Island, concluding a ten-year struggle that saw his intra-island rivals killed in battle or eliminated by fortuitous volcanic eruption.⁵¹

⁴⁶ British naval captain James Tiberius Cook was the first European to arrive in Hawai‘i when he landed on the north shore of Kaua‘i in 1778. See KUYKENDALL I, *supra* note 24 at 12-20. See also Tony Horowitz, *BLUE LATITUDES* (St. Martin’s Press, 2002) (travel narrative providing a biographical sketch of Cook and retracing his voyages). Captain Cook named the islands of Hawai‘i the “Sandwich Islands.” Ethnic Polynesians as well as foreign traders and residents used this name to refer to the island chain, and later Kamehameha’s unified kapu chiefdom, until the late 1830s. See KUYKENDALL I, *supra* note 24 at 125, fn. 30.

⁴⁷ See *Id.* at 30. Kalaniopu‘u ruled the island of Hawai‘i and a portion of Maui; Kahekili ruled over the remainder of Maui as well as Moloka‘i, Lana‘i, and Kaho‘olawe; Peleioholani ruled O‘ahu; several chiefs vied for rule of the Kaua‘i and Ni‘ihau kapu chiefdom.

⁴⁸ See FORNANDER, *supra* note 33 at 226 (“The native Oahu aristocracy was almost entirely extirpated.”); KUYKENDALL I, *supra* note 24 at 33; *Id.* at 22 (“Until the year 1796 war was the characteristic note in the islands” and the islands’ various rulers engaged in a Western arms race to procure foreign men, weapons (including cannons and muskets), and ships.”).

⁴⁹ *Id.* at 34.

⁵⁰ Western explorers, including British Captains Cook and Vancouver, held Kamehameha in high regard for his impressive physique and intelligence. KUYKENDALL I, *supra* note 24 at 39. In later years he was renowned for his statesmanship. *Id.* at 60. Although not an ali‘i of the highest lineage, Kamehameha could nevertheless trace his ancestry to Pa‘ao, see *supra* notes 41-42, and was born at Mo‘okini heiau, which was the last of several heiau that Hawai‘i’s oral histories declare Pa‘ao built. FORNANDER, *supra* note 33 at 34.

⁵¹ See KUYKENDALL I, *supra* note 24 at 37; KUYKENDALL & DAY, *supra* note 32 at 24-25.

In 1791, an important battle, called Kepuwahaulaula (“the red-mouthed gun”), occurred for control of Hawai‘i where Kahekili’s forces joined an east-Hawai‘i island kapu chiefdom in an attempt to defeat Kamehameha’s forces. That battle saw the use, by all parties, of Western cannons, muskets, and ships. Kamehameha’s forces decisively won the battle. Kamehameha’s forces included two British sailors, John

The period from 1791 to 1793 was a short era of peace in which the leaders of the two primary kapu chiefdoms solidified their territories. During this time, Kamehameha befriended several foreigners, and in 1793, offered his kapu chiefdom to Britain as either an official protectorate or to form a defensive alliance to defend his kapu chiefdom from Kahekili.⁵² In 1794, Kahekili died, and Maui's ali'i resumed war for control of the Maui and O'ahu kapu chiefdoms.⁵³ Sensing opportunity to expand his own

Young and Isaac Davis. Both would go on to play important roles in Kamehameha's kapu chiefdom. Kamehameha made them high chiefs, gave them wives of royal lineage, lands, and servants. Notably, Young is buried beside the Kamehameha dynasty at Mauna Ala, the Royal Mausoleum located in Nu'uau Valley on the island of O'ahu. See generally Emmett Cahill, *THE LIFE AND TIMES OF JOHN YOUNG: CONFIDANT AND ADVISOR TO KAMEHAMEHA THE GREAT* (Island Heritage, 1999).

⁵² See KUYKENDALL I, *supra* note 24 at 41-43. According to Western accounts, Kamehameha's "cession" of Hawai'i island to Great Britain hinged upon Captain Vancouver promising to leave a British naval ship in Hawai'i for its defense from potential attacks by Kahekili. Vancouver refused to do this, but promised to bring Kamehameha a warship in the future. Vancouver did, however, leave with Kamehameha a Union Jack flag and weapons for Kamehameha's personal defense. Vancouver also outfitted a war canoe with a Western sail, and commissioned his carpenters to assist Kamehameha build a British-styled vessel that Kamehameha later named Britannia. *Id.* See also Stephen B. Jones & Klaus Mehner, *Hawaii and the Pacific: A Survey of Political Geography*, 30 GEOGRAPHICAL REV. No. 3 358, 375 (1940) (noting that "[f]or a time the Hawaiians referred to themselves as "kanaka no Beritane" (men of Britain) and counted on British protection"). That Vancouver may have been receptive to Kamehameha's offer of cessation is unsurprising since Vancouver, who would eventually make five extended voyages to Hawai'i, "earnestly sought to attach" Hawai'i island (and possibly the entire island group) to Great Britain. KUYKENDALL I, *supra* note 24 at 21. See Lusignan, *supra* note 41 at 30 (stating that Kamehameha "signed away the legal rights to the Hawaiian Islands to Britain, perhaps voluntarily or perhaps through confusion or coercion"); but see KUYKENDALL I, *supra* note 24 at 21 (quoting Vancouver's interpretation of the affair as "their religion, government and domestic oeconomy [sic] was noticed; and it was clearly understood, that no interference was to take place in either; that Tamaahmaah, [sic] the chiefs and priests, were to continue as usual to officiate with the same authority as before .. a[nd] that no alteration in those particulars was in any degree thought of or intended."). By contrast, modern Hawaiian accounts assert that Kamehameha's offer was merely a request for aid, although those accounts do not make clear what Britain would receive in return for the aid Vancouver provided if not for some type of control in or over Kamehameha's chiefdom, which at that time was limited to Hawai'i island. KUYKENDALL I, *supra* note 24 at 43. While the author of this article would defer to Kamehameha's statement pronouncing a measure of loyalty to the English monarch as conclusive on the matter, the issue is not dispositive on this article. Rather, it magnifies how profound the establishment of the Kingdom of Hawai'i in 1840 was, given that no other indigenous (perhaps even non-Western European) people had successfully resisted British colonization and established an independent nation state, as Kamehameha III later succeeded in doing. See *infra* Part II.vi.

⁵³ KUYKENDALL I, *supra* note 24 at 44-45. After Kahekili's death, Kalanikupule claimed O'ahu while Ka'eo, already chief of Kaua'i and Ni'ihau, claimed Maui, Moloka'i, Lana'i, and Kaho'olawe. Ka'eo invaded O'ahu, but Kalanikupule killed him and decisively defeated his army. Kalanikupule gained an advantage over Ka'eo when he

kapu chiefdom, Kamehameha redoubled his efforts to unify under his rule all of the independent kapu chiefdoms.⁵⁴ Here, Kamehameha's strong relationships with foreigners, such as those in his advisory council, family, and military, paid dividends.⁵⁵

In 1795, Kamehameha attacked Maui, securing possession of Maui and Moloka'i.⁵⁶ Next, Kamehameha attacked O'ahu,⁵⁷ and routed Kalanikupule, a Maui chief, at the battle of Nu'uano. Thus by 1795, Kamehameha succeeded in conquering every kapu chiefdom except Kaua'i, which was by then ruled by Kaumuali'i – a highly regarded and fiercely independent ali'i.⁵⁸ Several setbacks, however, including a failed invasion attempt, prevented Kamehameha from forcibly conquering Kauai.⁵⁹

By 1810, Kamehameha changed tacks. He offered Kaumuali'i a diplomatic resolution via foreign intermediaries who sought peace in order to facilitate the lucrative sandalwood trade and “sympathized with [Kaumuali'i] in his desire to be independent.”⁶⁰ Kamehameha and Kaumuali'i eventually reached an agreement whereby the chiefdom of Kaua'i and Ni'ihau would be a tributary to Kamehameha's larger kapu chiefdom. Notwithstanding Kaumuali'i's “desire to be free from the

procured aid from a British captain, who furnished guns and ammunition, and eight British sailors, who volunteered to fight for him. Ka'eo was killed, and Kalanikupule gained all of his chiefdom except for Kaua'i and Ni'ihau, which were ruled by Kaua'i's hereditary chief Kaumuali'i. *Id.*

⁵⁴ *Id.* at 47. Kamehameha likely anticipated an attack from Kalanikupule, who also possessed significant Western artillery and ships. Kamehameha likewise possessed foreign-manned artillery that provided him a significant advantage because foreigners were experienced in operating and utilizing muskets and cannons in battle.

⁵⁵ *See supra* note 46; KUYKENDALL & DAY, *supra* note 32 at 25 (“Kamehameha's success in getting foreign arms and foreign recruits gave him the upper hand over chiefs visited less often by the traders”).

⁵⁶ KUYKENDALL & DAY, *supra* note 32 at 25.

⁵⁷ *Id.* During this pivotal battle a warrior and minor chief named Kaiana defected from Kamehameha's forces to Kalanikupule in the first public showing of disaffection for Kamehameha's rule. Such unrest amongst Kamehameha's subjects was not surprising, however. Prior to Kaiana's rebellion, Captain Vancouver observed that many of Kamehameha's subjects on his hereditary island of Hawai'i were “very ill disposed to [Kamehameha's] interest.” KUYKENDALL I, *supra* note 24 at 61.

⁵⁸ *Id.* at 48, n.51a.

⁵⁹ *See Id.* 48-49. These setbacks included a 1796 rebellion against Kamehameha on his home island of Hawai'i by Namakeha, brother of former defector Kaiana, a failed attempt to invade Kaua'i in 1795, and later a foreign disease that ravaged “the flower of [Kamehameha's] army.” Kaumuali'i used the delay to prepare contingency escape plans to China, or alternatively the South Pacific, if his defense of Kaua'i failed.

⁶⁰ *Id.* at 50.

overlordship of Kamehameha,”⁶¹ his official role was effectively reduced to that of island governor since he was forced to recognize Kamehameha as “suzerain.”⁶² In short, Kamehameha organized the residents and territories of Hawai‘i, at least in name, into a single, unified kapu chiefdom in the year 1810.⁶³

D. Kamehameha’s Unified Kapu Chiefdom

Kamehameha governed his kapu chiefdom in the traditional manner, as “essentially a feudal autocracy.”⁶⁴ A particularly significant development, however, was the presence, by 1818, of some 200 foreigners residing within Kamehameha’s kapu chiefdom.⁶⁵ Several of these foreigners were Kamehameha’s most trusted advisors.⁶⁶ Furthermore, although not perfectly clear, it appears Kamehameha considered his 1793 “cessation” pact⁶⁷ with Great Britain in effect for the duration of his life.⁶⁸

⁶¹ KUYKENDALL I, *supra* note 24 at 57-59.

⁶² *See Id.* *See also* BLACK’S LAW DICTIONARY (8th ed., 2004), *suzerain*.

⁶³ *Id.* at 51; e.g. Jones & Mehnert, *supra* note 52 at 375.

⁶⁴ KUYKENDALL I, *supra* note 24 at 54. *See also* KUYKENDALL & DAY, *supra* note 32 at 27 (“[a]s conqueror, everything belonged to [Kamehameha], land and people alike . . . [h]is rule was feudal”).

The most significant change to the kapu chiefdom governing structure was the implementation of a strong, island chief to govern each island. Traditionally, chiefs of multi-island kapu chiefdoms were loath to assign important districts to powerful sub-chiefs for fear of those chiefs instigating rebellions. Kamehameha broke from this practice, appointing ali‘i of high blood, as well as foreigners (including John Young, Isaac Davis, and Oliver Holmes) to govern the various islands in his absence. KUYKENDALL I, *supra* note 24 at 54.

⁶⁵ KUYKENDALL & DAY, *supra* note 32 at 37 (noting the foreign resident contingent included British, American, African-American, Spanish, Genoese, Portuguese, Irish, and Chinese persons).

⁶⁶ *Id.* Most foreign residents were “predominantly of a humble status, commonly sailors” and were essentially treated as commoners by the ali‘i. KUYKENDALL I, *supra* note 24 at 137-38 (noting the difficulties posed by foreigners’ presence because of the inherent cultural and political differences between Western countries and the kapu system). Foreigners’ political status would be later become an important issue affecting international and domestic relations of the Kingdom of Hawai‘i. *See infra* Part II.viii.

⁶⁷ *See supra* note 48.

⁶⁸ KUYKENDALL I, *supra* note 24 at 54-57. In an 1810 letter to British monarch King George III, Kamehameha referred to himself as a “subject” of the British King. *Id.* at 54. Foreign naval officers visiting Hawai‘i also recognized the Britain-Kamehameha chiefdom “special relationship.” *Id.* at 54. The practical effect of this special relationship, however, was limited, and Kamehameha treated all foreigners and nations cordially. The British government’s official actions, with respect to the Sandwich Islands, were limited to maintaining friendly relations with Kamehameha. Later, however, in 1822, Britain delivered the warship Vancouver promised to Kamehameha in 1793, and Kamehameha II, as Kamehameha had done previously, “beg[ged] leave to

In 1823, King George affirmed and clarified Hawai‘i’s special relationship with Britain when he committed Britain to defend the islands from foreign nations, but not from “forces within.”⁶⁹

Although in 1810 Kamehameha succeeded in unifying, at least in name, all the islands in Hawai‘i, the concept of a “Hawaiian” nationality appears to have not yet developed in practice or name,⁷⁰ nor was Kamehameha’s kapu chiefdom expected to endure beyond his death. One foreigner predicted: “after the death of the old hero, his kingdom, founded and kept together by force, will fall to pieces, the portion of it being already decided upon, and prepared.”⁷¹ Indeed, Kamehameha’s most trusted chiefs secretly partitioned his kingdom for themselves before he died.⁷² It is not surprising, then, that Kamehameha’s most disloyal subject, Kaua‘i’s hereditary king, Kaumuali‘i, attempted in 1816 to make his former kapu chiefdom a protectorate of Russia in exchange for Russian military assistance to restore Kaua‘i’s sovereignty from Kamehameha.⁷³ Rather than reflecting poorly upon Kamehameha’s rule, which by several accounts was admirable,⁷⁴ these disloyal intentions and actions simply demonstrate that a decade after Kamehameha unified the islands in name, the native residents therein still identified themselves along traditional,

place the whole of [Hawai‘i] under the protection of [Britain].” KUYKENDALL & DAY, *supra* note 32 at 47.

⁶⁹ KUYKENDALL I, *supra* note 24 at 79. Not long after, however, Hawai‘i’s chiefs demonstrated resentment at being subservient to Britain in any fashion, and by 1825, British influence in Hawai‘i had considerably waned. *Id.*

⁷⁰ It took nearly two decades for the name “Hawaiian” to appear in formal, governmental use to describe Hawai‘i islands and its residents. *See* KUYKENDALL I, *supra* note 24 at 125 fn. 30 (quoting an 1829 letter observing that “[t]he Government and Natives have dropped for do not admit to the designation of *Sandwich* Islands as applied to their possessions; but adopt and use that of *Hawaiin* [sic]; in allusion to the fact that of the whole group having been subjugated by the first Tamehameha, who was chief of the principal island of [Hawai‘i]”).

⁷¹ *Id.* at 61.

⁷² *Id.* at 54. Kamehameha’s trusted advisors Kalanimoku and Ke‘eaumoku planned to keep O‘ahu and Maui, respectively, while erstwhile rival Kaumuali‘i would regain his former kapu chiefdom. Kamehameha’s child-heir, Liholiho, would rule over only Kamehameha’s “hereditary island of Hawai‘i,” if he could keep it. *Id.*

⁷³ Kaumuali‘i went so far as to sign a “treasonable” pact with a Russian fur trader, attempting to make his former kapu chiefdom a protectorate of Russia in exchange for Russian military assistance to reestablish Kaua‘i and Ni‘ihau’s sovereignty from Kamehameha. Pursuant to their pact, the fur trader delivered, in 1818, a Western sailing ship to Kaumuali‘i and erected a “substantial and well designed fort” over which flew the Russian flag. Kamehameha, however, received assurances from the captain of a visiting Russian warship that the fur trader’s actions did not reflect the Russian government’s disposition towards Kamehameha. *Id.* at 56-59.

⁷⁴ *See* KUYKENDALL I, *supra* note 24 at 60.

familial-clan and island specific ties – not as members of a single group or nation.

E. *Preserving Kamehameha's Unified Kapu-Chiefdom*

Kamehameha died in 1819, leaving his kapu-chiefdom to his son Liholiho (“Kamehameha II”), and his (Kamehameha’s) wife Ka‘ahumanu, who became Regent (essentially a co-ruler).⁷⁵ It was not clear, however, whether Kaumuali‘i and the Kaua‘i kapu-chiefdom would submit to Kamehameha II, or if the chiefs would support Kamehameha II as they had his father.⁷⁶

Through a series of deft political maneuvers, and brute force, Kamehameha II and Ka‘ahumanu kept Kamehameha’s kapu chiefdom unified. Kamehameha II’s first significant act was to, in 1819, abolish the kapu system’s polytheistic religion and its associated social prohibitions.⁷⁷ This monumental break from tradition sparked a bloody, but unsuccessful rebellion on Hawai‘i Island against Kamehameha II’s rule.⁷⁸ Next, Kamehameha II allowed the chiefs to share in the profitable sandalwood trade, which “somewhat allayed” “disaffection among the nobles.”⁷⁹ Thirdly, in 1821, Kamehameha addressed the Kaua‘i issue by making a surprise visit to that island to inquire of Kaumuali‘i’s loyalty.⁸⁰ Although Kaumuali‘i professed the same loyalty to Kamehameha II as he had previously to Kamehameha, Kamehameha II nevertheless stole Kaumuali‘i away to O‘ahu and made him a prisoner of the state.⁸¹ Then, the regent Ka‘ahumanu forcibly married Kaumuali‘i⁸² (as well as his royal son Keali‘iahonui), and placed her brother as head of Kaua‘i.⁸³

⁷⁵ *Id.* at 63-65.

⁷⁶ *Id.* at 75-76.

⁷⁷ *Id.* at 65-69. Factors contributing to the decision to abolish the kapu religion included “the example of the foreign population and [] the news that idolatry and [kapu] had been abolished by the Polynesians of Tahiti.” KUYKENDALL & DAY, *supra* note 32 at 41. The kapu system’s land-tenure and ali‘i-commoner caste systems were not affected, and remained in place. Although several commentators ascribe the abolishment of the kapu religion to American missionary influence, missionaries did not arrive in Hawai‘i until 1820 – a year after the abolition of the kapu religion. *Id.*

⁷⁸ *Id.* Kamehameha II quelled the rebellion at the battle of Kuamo‘o. KUYKENDALL I, *supra* note 24 at 72.

⁷⁹ KUYKENDALL & DAY, *supra* note 32 at 40-41. In addition, the presence of a French warship whose captain supported Kamehameha II “strengthened” his claim to power. *Id.*

⁸⁰ KUYKENDALL I, *supra* note 27 at 75; KAUA‘I, *supra* note 24 at 94-97.

⁸¹ KAUA‘I, *supra* note 24 at 96; KUYKENDALL I, *supra* note 24 at 75.

⁸² The genealogical implications of this forced union were very significant. Kaumuali‘i was an ali‘i of the highest order. His blood lineage gave him claim to all of the islands except Hawai‘i, which was the Kamehameha dynasty’s hereditary island. Thus Ka‘ahumanu’s marriage to Kaumuali‘i gave the Kamehameha dynasty a legitimate

Kaumuali'i's death in 1824 left Kaua'i's residents divided as to whether to support Kamehameha II or pursue independence.⁸⁴ This divide sparked a bloody "civil war" between Kauaians and Hawaiians.⁸⁵ A sizeable faction of Kauaians, led by Kaumuali'i's son George, took up arms against Kamehameha II's army⁸⁶ seeking to expel the Hawaiians from Kaua'i.⁸⁷ The Kauaians were unsuccessful, however, and Hawaiian forces killed over 130 Kauaians in battle.⁸⁸ George's rebellion is politically significant because it demonstrates that, fourteen years after Kamehameha formally unified the islands, traditional clan and island ties remained strong for at least a significant portion of the chiefdom's residents.

Ka'ahumanu's political response to the Kaua'i civil war was savvy. She dispossessed Kaua'i's remaining ali'i of their rank and lands and removed them to Hawai'i Island and Maui where they couldn't easily conspire against the Kamehameha clan.⁸⁹ Thus the Kauaians, as the Mauians and O'ahuans before them, were finally subjugated by the hereditary ali'i of Hawai'i island.⁹⁰ Kamehameha II died in England in 1823 on a state visit that affirmed the fact that both Britain and the kapu-

blood-claim as rightful leaders of all of the islands. See KAUA'I, *supra* note 24 at 111. An interesting aside is that, prior to being kidnapped, Kaumuali'i attempted to further bolster his lineage by establishing a direct tie to Tahiti's rulers through marriage with a Tahitian ali'i of appropriate lineage. *Id.*

⁸³ *Id.* Kauaians were dismayed at their King's forced departure. See *Id.* at 97 (recording a Kauaian who "express[ed] the feeling of many" by saying "[f]arewell to our King – we shall see him no more").

⁸⁴ Or at least the relative form of independence they experienced from 1810-1821, under Kaumuali'i. *Id.* at 105.

⁸⁵ KUYKENDALL I, *supra* note 24 at 91.

⁸⁶ Kamehameha II died in 1823 in England. Kamehameha's general Kalanimoku, who also put down the 1819 rebellion, commanded Kamehameha II's forces during George's Rebellion. *Id.*

⁸⁷ KAUA'I, *supra* note 24 at 108-09. Initially it appeared the Kauaian forces would be victorious. See *Id.* at 106 (quoting a first-hand account of the battle who reported the Kauaian forces as calling out during battle: "come on – the Hawaiians are beaten – the Kauaians have the fort").

⁸⁸ *Id.*

⁸⁹ *Id.* at 110-11 ("The disaffected chiefs and their tenants were distributed among other islands where it would be impossible for them to combine in another conspiracy. Their lands were divided among the loyal favorites and chiefs, who filled the minor offices with their creatures. The poor serfs were looked upon in the contemptuous light of conquered rebels; and for many years groaned under the heavy exactions of their new lords.").

⁹⁰ Ka'ahumanu replaced the dispossessed Kaua'i ali'i with the "loafers and hangers-on of O'ahu and Maui." KAUA'I, *supra* note 24 at 112.

chiefdom of Hawai‘i stood in a protectorate relationship.⁹¹ His short reign established the hereditary chiefs of Hawai‘i Island as the now unified kapu chiefdom’s ruling clan.

F. *Establishing the Kingdom of Hawai‘i*

Kamehameha III acceded the throne in 1825,⁹² and immediately endeavored to establish complete independence and develop his chiefdom into a modern nation.⁹³ Although the Hawai‘i-Britain protectorate relationship may not have formally ended until 1840, when Britain’s Parliament “virtually denied” any such relationship, Hawai‘i “for practical purposes was manifestly independent” when Kamehameha III took the throne.⁹⁴ This independence, however, was “of the indefinite and

⁹¹ KUYKENDALL I, *supra* note 24 at 77-79.

⁹² KUYKENDALL & DAY, *supra* note 32 at 49.

⁹³ In 1826 Kamehameha III signed a treaty with the United States, an act consistent with an emerging, independent kingdom, not a protectorate of Great Britain. This treaty, the “Articles of Arrangement,” declared friendship as well as terms of commerce and navigation. Although the Senate never ratified it, modern authorities consider it Hawai‘i’s first, valid, international agreement. *Id.* at 98-99. This act was consistent with the sentiment of the lesser chiefs of Hawai‘i, who in 1827 “practically repudiated the idea of a British protectorate.” KUYKENDALL I, *supra* note 24 at 185. *See also Id.* at 125.

Moreover, by 1829 the Hawaiian “government and natives” replaced the British term “Sandwich Islands” with Hawaiian, signifying the development of a “Hawaiian” nationality surpassing traditional, clan and island ties that previously defined ethnic Hawaiians. *See* KUYKENDALL I, *supra* note 24 at 125, fn. 30 (quoting an American naval captain’s 1829 observation that:

[t]he government and natives have dropped or do not use the designation of *Sandwich* islands . . . but adopt and use that of Hawaiin [sic]; in allusion to the fact of the whole groupe [sic] having been subjugated by the first Tamehameha [sic], who was the Chief of the principal island of [Hawai‘i] . . . and also in contradiction of the assertion made by some persons that Tamehameha had ceded sovereignty to Capt. Vancouver, for and in behalf of the British government.

It appears that either or both the governing structure or native residents of the Sandwich islands organically extended the term “Hawaiian” to describe the island chain and its native residents because: (a) Kamehameha, who forcibly unified the islands, was from Hawai‘i island; and (b) Hawai‘i was considered the “principal” island (probably because it is significantly larger in size than the other islands and was the early governmental seat of the chiefdom). *Id.* In light of this it is interesting to consider that if Kahekili had conquered Hawai‘i island in 1791 the island group and kingdom might have been named “Maui” and the “Kingdom of Maui,” (and its residents, kingdom wide, “Mauians”). If Kaua‘i had regained (and maintained) its independence in the 1824 civil war, its residents would presumably self identify as “Kauaians,” being distinct from “Hawaiians.”

⁹⁴ KUYKENDALL I, *supra* note 24 at 185.

uncertain kind possessed by [] peoples not yet admitted into the family of nations.”⁹⁵ Accordingly, Kamehameha III endeavored to establish his kingdom as fully independent amongst the world’s nations, believing “the greatest safeguard for the liberties of this people, is the mutual jealousy of the greater nations.”⁹⁶

In 1838, Kamehameha III divided the government into three bodies: King, Kuhina-nui (Regent), and Chiefs.⁹⁷ Next, in 1839 he enacted a “Hawaiian Magna Carta,”⁹⁸ and in 1840 adopted a Constitution that enshrined the 1838 division of power.⁹⁹ The 1840 constitution also granted, for the first time in Hawai‘i’s long history, a modicum of political representation to commoners through an elected body of representatives.¹⁰⁰ In short, Kamehameha III established the Kingdom of Hawai‘i, a constitutional monarchy, in 1840.

G. *Securing International Recognition*

In 1841, Kamehameha III dispatched envoys, consisting of foreigner-residents and ethnic-Hawaiians, to “secure the acknowledgement by those governments [Great Britain, France, and the United States] of the independence of this [Hawaiian] nation.”¹⁰¹ Between 1839 and 1852 Hawai‘i received formal recognition as a sovereign, independent, co-equal nation from the United States and nearly every major European nation.¹⁰²

⁹⁵ *Id.* at 197.

⁹⁶ *Id.* at 186 (quoting an American editor of the newspaper *The Honolulu Polynesian*).

⁹⁷ *Id.* at 157.

⁹⁸ The official name of this document was the “Declaration of Rights.” *Id.* at 156, 159-61. See also Ralph S. Kuykendall, CONSTITUTIONS OF HAWAI‘I, 8-9 (Hawaiian Historical Society, 1940) [hereinafter CONSTITUTIONS].

⁹⁹ KUYKENDALL I, *supra* note 24 at 167-169; CONSTITUTIONS, *supra* note 98.

¹⁰⁰ KUYKENDALL I, *supra* note 24 at 167-169, 227; CONSTITUTIONS, *supra* note 98. In addition, the King possessed absolute veto power over the legislature and chiefs. *Id.*

The 1840 constitution declared “God hath made of one blood all nations of men to dwell on the earth, in unity and blessedness” while acknowledging and setting forth guidelines for the ali‘i-commoner relationship, which was still determined by blood. This paradox reflects the strong presence of both traditional and Western socio-political notions in the Kingdom of Hawai‘i. This paradox may be unsurprising, given that Europeans and Americans had by 1840 resided in Hawai‘i for sixty years and played important roles as advisors, educators, and foreign emissaries for the Kingdom. KUYKENDALL I, *supra* note 24 at 167-169.

¹⁰¹ *Id.* at 192.

¹⁰² The first country to formally recognize the independence of and establish government-to-government relations with the Kingdom of Hawai‘i was the United States, in 1842. KUYKENDALL I, *supra* note 24 at 194. The United States also established a permanent consulate in the islands. *Id.* at 251, fn. 102. In 1843 Belgium verbally

This independence, however, was somewhat precarious. For instance, Britain and France's navies individually abrogated, albeit it temporarily, the Kingdom's sovereignty in 1843 and 1849 respectively.¹⁰³ In addition, a significant number of Americans within Hawai'i, as well as in the United States, actively supported annexing Hawai'i to the United States, posing an internal threat to Hawai'i's sovereignty.¹⁰⁴

recognized Hawai'i's independence, and Britain did so in writing. *Id.* at 198. Later in 1843 Britain and France signed a joint declaration recognizing Hawai'i's sovereignty, and in 1846 signed a new declaration that was less restrictive on the Kingdom of Hawai'i. *Id.* at 202-03. Although France technically recognized Hawai'i's sovereignty, they did so subject to a previous treaty signed in 1839 that mandated the Kingdom of Hawai'i give preferential treatment to French citizens. This 1839 treaty, and the French in general, would be a perennial source of trouble for the Kingdom of Hawai'i. *See Id.* at 166-67; 371-73; 393-94. Denmark also recognized Hawai'i's independence in 1846. *Id.* at 374. In 1849 the then-free city of Hamberg recognized Hawai'i's independence, *Id.* at 374, and the United States reaffirmed its earlier recognition as well as entering into a formal treaty with the Kingdom of Hawai'i. *Id.* at 380. In 1852 Sweden and Norway also recognized Hawai'i's independence. *Id.* at 381.

Hawai'i's struggle to establish political independence and transition into a modern state appears to have galvanized the concept of a Hawaiian nation amongst Hawai'i's residents, ethnic-Polynesians and foreigners alike. *See* KUYKENDALL I, *supra* note 24 at 146, 262 (noting the development of a "patriotic disposition" amongst the legislative council, which at the time was comprised primarily of ethnic Hawaiians); *Id.* at 384 (statement of British-born Robert C. Wyllie, advisor to Kamehameha III referring to himself, and presumably other non-ethnic Polynesian residents of Hawai'i who considered themselves "Hawaiian," notwithstanding that they were originally from other countries).

¹⁰³ In 1843 British naval captain Paulet overthrew Kamehameha III for five months due to alleged mistreatment of British citizens and property. This turbulent episode is known as the "Paulet Affair," and while Britain immediately repudiated Captain Paulet's actions upon discovering them, the Paulet Affair demonstrated that Hawai'i's independence was insecure, and utterly dependent upon the goodwill of foreign nations.

A similar episode, this time involving a French warship, occurred in 1849 when French troops landed on O'ahu, forcibly disarmed the Hawaiian guards, demanded some \$30,000, and stole a Hawaiian naval frigate. *See Id.* at 393-94. In response to the French threat to Hawai'i's sovereignty the United States, in 1850, promised to go to war, if necessary, against France to defend Hawai'i's behalf if France's belligerent actions persisted. *Id.* at 398; 402. By 1851 Kamehameha III and the chiefs were essentially resigned to the fact that a French invasion (military or politically) was inevitable, and took contingency steps to make Hawai'i either a protectorate of the United States or Britain, or alternatively be annexed to the United States. *Id.* at 400-02; *see Id.* at 401 (reporting that Britain believed that Americans supporting annexation of Hawai'i to the United States were instigating or inflaming the French situation to force Hawai'i into a protectorate state of the United States).

¹⁰⁴ *Id.*

H. *Subject-Citizenship in the Kingdom of Hawai‘i*

Although foreigners had long resided in Hawai‘i, and played pivotal roles in the Islands’ affairs,¹⁰⁵ foreigners were not officially subjects of the Kingdom of Hawai‘i.¹⁰⁶ The issue of whether to formally naturalize non-ethnic Polynesians as subjects of the Kingdom of Hawai‘i was hotly contested.¹⁰⁷ Significant factions of foreigners, including some protestant missionaries,¹⁰⁸ were against foreign naturalization because of naturalized foreigners’ potential to “break the nation to bits.”¹⁰⁹ In addition, at least eight percent of the ethnic Hawaiian population formally opposed foreign naturalization.¹¹⁰

Yet, foreigners performed much of the “important affairs of government”¹¹¹ because ethnic Hawaiian chiefs were not yet sufficiently versed in international diplomacy and Western forms of government to “manage these complicated affairs.”¹¹² The fact that foreigners performed such important national service “required that those of foreign birth who entered into the union should become Hawaiians by taking the oath of allegiance to the king.”¹¹³ Most of all, as Kuykendall notes:

“[T]he policy being followed looked to the creation of an Hawaiian state by the fusion of native and foreign ideas and the union of native and foreign personnel, bringing into being an Hawaiian body politic in which all elements, both Polynesian and haole [non-ethnic Polynesian], should work together for the common good under the mild and enlightened rule of an Hawaiian king.”¹¹⁴

In 1840, the Kingdom took a tentative step towards offering naturalization to foreigners, enacting a law of “marriage and divorce” that prohibited foreign men from marrying an ethnic Hawaiian wife unless he would remain in the islands and swear allegiance to the Kingdom of

¹⁰⁵ See *supra* notes 51, 54, 64.

¹⁰⁶ Until 1846 only ethnic Hawaiians were officially subjects of the Kingdom of Hawai‘i. See Jon M. Van Dyke, *Population, Voting, and Citizenship in the Kingdom of Hawai‘i*, 28 U. HAW. L. REV. 81, 89 (2005) [hereinafter “Kingdom Citizenship”].

¹⁰⁷ See KUYKENDALL I, *supra* note 24 at 230, fn.17, 238-240.

¹⁰⁸ *Id.* at 239, fn. 59.

¹⁰⁹ *Id.* at 238, fn. 54.

¹¹⁰ See Kingdom Citizenship, *supra* note 106 at 90 (citations omitted).

¹¹¹ KUYKENDALL I, *supra* note 24 at 238.

¹¹² *Id.* According to another scholar, “[w]ithout western influence, it is unlikely that there would have been a unified Hawaiian Kingdom.” Lusigman, *supra* note 41 at 30.

¹¹³ KUYKENDALL I, *supra* note 24 at 238- 39.

¹¹⁴ *Id.*

Hawai‘i.¹¹⁵ By 1844, the Kingdom required all foreigners in the Kingdom to take an oath of allegiance to the King.¹¹⁶ In 1846, the Kingdom permitted full naturalization to foreigners who had resided in the Kingdom for at least one year.¹¹⁷ Within two years, the number of naturalized citizen-subjects of the Kingdom of Hawai‘i was 481.¹¹⁸ In 1856, the Supreme Court of the Kingdom of Hawai‘i confirmed that Hawaiian born children of foreign residents were subjects of the Kingdom.¹¹⁹ By 1893, when a group consisting largely of Hawaiian citizen-subjects overthrew the monarch, naturalized citizen-subjects comprised approximately 15-20% of the population of the Kingdom of Hawai‘i.¹²⁰

I. *The Political-Historical Definition of Hawaiian*

With regard to who is Hawaiian, Hawaiian is a nationality birthed in the nineteenth century through the coerced unification of multiple, independent kapu chiefdoms and the subsequent development of that unified chiefdom into an internationally recognized state – the Kingdom of Hawai‘i. The subject-citizens of that Kingdom were Hawaiians. As a matter of political history today, a Hawaiian is a descendant of a citizen-subject of the former Kingdom of Hawai‘i. While there existed significant differences between ethnic Polynesian-Hawaiians (“ethnic Hawaiians”) and non-ethnic Hawaiians (“non-ethnic Hawaiians”), those differences were cultural and legal – not political.¹²¹

¹¹⁵ *Id.* at 230, fn.17.

¹¹⁶ *Id.* In 1874 the Kingdom codified this customary practice. See Kingdom Citizenship, *supra* note 106 at 92.

¹¹⁷ KUYKENDALL I, *supra* note 24 at 239.

¹¹⁸ *Id.* at 240. Prior to offering naturalization to eligible and willing foreign residents, the Hawaiian government addressed the political status of foreign residents via treaties with their respective home countries delineating the rights and status of those countries’ citizens (or subjects) in Hawai‘i. The resulting treaties, however, differed in their terms, resulting in disparate treatment of French, British, and Americans, as well as their goods and property. They further, for years to come, adversely affected Kamehameha III’s foreign and domestic relations. For example, the French and British navies justified their pernicious military and political activity in Hawaiian affairs upon defense of their citizens’ rights and property. See *Id.*

¹¹⁹ See *Naone v. Thurston*, 1 Haw. 220 (1856). See also Patrick W. Hanafin, *To Dwell on the Earth in Unity: Rice, Arakaki, and the Growth of Citizenship and Voting Rights in Hawaii*, 5 HAW. B. J. 15, 18-21 (noting that the Kingdom of Hawai‘i adhered to *jus soli*, the international legal principle granting citizenship to children born in a particular state territory).

¹²⁰ Kingdom Citizenship, *supra* note 106 at 93.

¹²¹ Indeed, there were significant, discriminatory, legal differences between foreigners, naturalized foreigners, and ethnic Polynesian-Hawaiians. In Kingdom

J. *Later History of the Kingdom of Hawai‘i*

After the Kingdom formally established itself, in 1840, it persisted for over half a century as a constitutional monarchy independent amongst the world’s nations. In 1893, Kingdom dissidents – most of whom were naturalized foreigners, native-born subjects of non-ethnic Hawaiian ancestry, or simply foreign residents – led a coup over Hawai‘i’s last monarch, Queen Lili‘uokalani.¹²² The motivations of the coup’s participants ranged from seeking annexation to the United States, for business and national interests,¹²³ to fear of the Queen abrogating the 1887 constitution that limited the monarch’s role in government.¹²⁴

On the eve of the coup, the United States minister to Hawai‘i, John L. Stevens,¹²⁵ ordered United States troops on the U.S.S. Boston to Honolulu’s shore.¹²⁶ He did so for one of two reasons:¹²⁷ (a) as part of a

Citizenship, *supra* note 106, Prof. Van Dyke notes many of these differences. For instance, while all foreigners could become naturalized citizen-subjects of the Kingdom, the 1887 constitution stripped naturalized Asians of the right to vote. *Id.* at 102. Females of all races and classes were prohibited from voting. *Id.* at 96-97. Property requirements further limited which male citizen-subjects could vote. *Id.* Commoner-class ethnic Polynesians could neither become monarchs, nor be elected to the house of nobles. And in *Naone v. Thurston*, 1 Haw. 220 (1856), the Supreme Court of the Kingdom of Hawai‘i ruled that a law requiring foreigners to pay five-dollars extra per year for the privilege of sending their children to English language schools did not violate the Kingdom’s constitution. Yet, such unequal treatment at law does not in of itself make respective classes citizen-subjects politically unequal. While the citizen-subjects of the Kingdom of Hawai‘i were treated unequally at law, they were politically equal in that they were citizen-subjects nonetheless (albeit under nineteenth century standards that tolerated levels of discrimination that should be unthinkable today). See Hanafin, *supra* note 119 at 19-20 (noting that the lack of modern notions of equal protection in the Kingdom of Hawai‘i did not principally affect Hawaiians’ subject-citizenship status).

¹²² Ralph S. Kuykendall, *THE HAWAIIAN KINGDOM: VOL. III 1874-1893* at 566-73 (Univ. Haw. Press, 1967) [hereinafter KUYKENDALL III].

¹²³ *Id.* at 560-66.

¹²⁴ *Id.* at 582 (“The proximate cause of the [1893 revolution] was the attempt by Queen Lili‘uokalani . . . to promulgate a new constitution which she had prepared.”).

¹²⁵ *Id.* at 566-73.

¹²⁶ *Id.* at 594. This was not the first instance that United States troops landed on the Kingdom’s shore to quell a potentially violent internal rebellion. In 1874, following the death of Kamehameha V, the last of the Kamehameha clan, Queen Emma lost a hotly contested election to David Kalakaua. Supporters of Queen Emma considered the election a sham, due to allegations of bribery, and intended to place Queen Emma upon the throne by force, if necessary. In 1874, a combined force of 220 American and British marines spent eight days guarding Kingdom buildings and officials, effectively suppressing the coup d’etat Queen Emma supporters hoped to achieve. See generally KUYKENDALL III, *supra* note 122 at 1-16.

¹²⁷ Whether and to what extent Minister Stevens was complicit in the overthrow of the monarchy is perhaps the most hotly contested issue in all of Hawai‘i’s rich and fascinating history. This paper does not enter that debate because doing so is unnecessary

“prearranged agreement to assist in overthrowing the queen”; or (b) “to protect American citizens and property in the event of the impending and inevitable conflict between the Queen and the citizens, and not to cooperate with the [coup leaders] in carrying out [their] plans.”¹²⁸

Ultimately, the 1893 coup succeeded. Having overthrown the monarch, the coup’s leaders created the provisional government of Hawai‘i.¹²⁹ The provisional government failed to secure annexation to the United States, however, and transitioned into the Republic of Hawai‘i.¹³⁰ By January 1895, twenty countries recognized the Republic of Hawai‘i as the lawful government of Hawai‘i.¹³¹ In 1898, the United States annexed the Republic of Hawai‘i with the Newlands Resolution,¹³² making Hawai‘i a territory of the United States.¹³³ Hawai‘i became the fiftieth State in 1959.¹³⁴

IV. FEDERAL RECOGNITION

A. Congress’ Plenary Power over Indian Affairs

Congress is generally, but not uniformly, regarded as possessing plenary power to regulate Indian affairs derived from its Constitutionally enumerated treaty power¹³⁵ as well as the Indian Commerce clause.¹³⁶

for the topics discussed herein.

¹²⁸ *Id.* It should be noted that, according to Kuykendall: “[i]n fact, the troops did not cooperate with the [coup leaders], and the [coup leaders] had no more knowledge than did the Queen’s government where the troops were going or what they were going to do.” *Id.*

¹²⁹ See generally William Adam Russ, *THE HAWAIIAN REPUBLIC (1894-98) AND ITS STRUGGLE TO WIN ANNEXATION*, (Ass. Univ. Presses, 1992).

¹³⁰ *Id.*

¹³¹ See Recognition of the Republic of Hawaii, available at <http://historymystery.grassrootinstitute.org/recognition-of-the-republic-of-hawaii/> (last visited Oct. 23, 2009) (archiving and describing letters of formal diplomatic recognition delivered to the Republic of Hawai‘i by twenty countries between August 1894 and January 1895).

¹³² Newlands Resolution, Act of July 7, 1898, 30 Stat. 750 (Congressional acceptance of the cession by the Republic of Hawai‘i to the United States of “the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining.”)

¹³³ See *Id.* at § 3 (“A Territorial Government is hereby established over [Hawai‘i] Territory, with its capital at Honolulu, on the Island of Oahu.”).

¹³⁴ Admission Act, Pub. L. No. 86-3, §§ 5(b), (f), 73 Stat. 4, 6-7 (1959).

¹³⁵ U.S. Const. art. II, § 2, cl. 2.

¹³⁶ U.S. Const. art. I, § 8, cl. 3. See *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (asserting that “the central function of the Indian Commerce Clause

While federal common law is generally in accord that Congress' authority over Indians is "broad," "plenary and exclusive,"¹³⁷ (the "plenary power doctrine") several scholars, as well as Justice Thomas, observe that the plenary power doctrine is unenumerated within the text of the Constitution and may therefore be suspect.¹³⁸ Moreover, federal common law has not always recognized Congress' plenary power over Indian tribes.¹³⁹

Scholars do not, however, acknowledge the uncertain nature of the

is to provide Congress with plenary power to legislate in the field of Indian affairs").

¹³⁷ *United States v. Lara*, 541 U.S. 193, 200-02 (2004) (explaining the Constitutional base, as well as the common law framework, of Congress' plenary power over Indians); e.g. *Rice v. Cayetano*, 528 U.S. 495, 529-30 (2000) ("[t]hroughout our Nation's history, this Court has recognized both the plenary power of Congress over the affairs of Native Americans and the fiduciary character of the special federal relationship with descendants of those once sovereign peoples"); *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 531, n. 6 (1998) (noting that "Congress has plenary power over Indian affairs"); *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974) (explaining that "[t]he plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself").

¹³⁸ *Lara*, 541 U.S. at 214-25 (2004) (J. Thomas dissenting) ("I cannot agree with the Court, for instance, that the Constitution grants to Congress plenary power to calibrate the "metes and bounds of tribal sovereignty"); Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201 (2007) (asserting that "as originally understood, congressional power over the tribes was to be neither plenary nor exclusive" and concluding that "[t]he Indian Commerce Clause was adopted to grant Congress power to regulate Indian trade . . . [but] did not otherwise abolish or alter the pre-existing state commercial and police power over Indians within state borders . . . [nor] grant to Congress a police power over the Indians, nor a general power to otherwise intervene in tribal affairs."); L. Scott Gould, *Tough Love for Tribes: Rethinking Sovereignty After Atkinson and Hicks*, 37 NEW ENG. L. REV. 669, 675-76 (2003) (arguing that Congress' plenary authority to federally recognize and thereby "reconstruct" tribal sovereignty has no textual support within the Constitution, which explains why the doctrine has been unable to adequately defend tribal sovereignty); Steven Paul McSloy, *Back to the Future: Native American Sovereignty in the 21st Century*, 20 N.Y.U. REV. L. & SOC. CHANGE 217, 226 (1993) ("[t]he claimed constitutional bases for this power, the Commerce and Treaty Clauses, are found wanting, in that neither the original intent of the Framers nor any more modern constitutional jurisprudence can offer support to plenary power"). See also Ann E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy, and United States v. Lara: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J. L. REFORM 651, 656 (2009) (noting that the Indian Commerce Clause as well as Congress' Treaty power "envision tribes to be largely outside of the political system of the United States" and "that tribal sovereignty is both pre-constitutional and extra-constitutional").

¹³⁹ Compare *Ex parte Crow Dog*, 109 U.S. 556 (1883) (denying that the United States had jurisdiction over the internal affairs of the Sioux nation) with *United States v. Kagama*, 118 U.S. 375, 382 (1886) (acknowledging federal authority over members of Indian tribes under a theory of necessity, but not under the Indian commerce clause, because "these Indian tribes are the wards of the nation . . . [t]hey are communities dependent on the United States").

plenary power doctrine to assert that the institution of tribal sovereignty is unwarranted. Rather, they do so to defend tribal sovereignty, which in their view exists independently of the United States,¹⁴⁰ by demonstrating that Congress, lacking true plenary power, possesses no constitutional authority to limit Indian tribes' sovereignty.¹⁴¹ Under this view, the federal government should treat Indian tribes as it does foreign sovereigns, such as Canada or Mexico.¹⁴²

Yet, some tribes fear the possibility that the Supreme Court might invalidate the plenary power doctrine.¹⁴³ Doing so would necessarily call into question, and potentially invalidate, the institution of federal recognition insofar as it exists because of Congressional action.¹⁴⁴ It is

¹⁴⁰ See, e.g., Roberto Iraola, *The Administrative Tribal Recognition Process and the Courts*, 38 AKRON L. REV. 867, fn.2 (2005):

“Indian tribes pre-existed the federal Union and draw their powers from their original status as sovereigns before European arrival. Indian tribal sovereignty is a retained sovereignty, and includes all the powers of a sovereign that have not been divested by Congress or by tribes' incorporation into the Federal Union. As a result, tribal sovereignty is not ‘conferred’ upon tribes through federal recognition. Rather, recognition is a process by which the Federal Government acknowledges that particular Indian entities retain their sovereign status.”

¹⁴¹ See Tweedy, *supra* note 138 at 659 (“noting the Constitution’s “oblique provisions” relating to Indians have “enabl[ed] the adoption of radical, seemingly baseless principles such as Congress' unbounded (or, at the very least, nearly unbounded) plenary power over tribes”); Gould, *supra* note 138 at 677 (“[a]t worst, [plenary power] is a judicial grant of unbridled power to the Congress to act without constitutional basis or constraint”; “[a]t best, it is a fiduciary responsibility that can be extrapolated from [Congress'] treaty power” and the Indian Commerce Clause”). C.f. Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L. J. 579, 597-98 (2008) (“[t]he [Supreme] Court also appears very uncomfortable with federal plenary and exclusive power over Indian affairs where the single provision in the Constitution that authorizes federal control only relates to commerce with Indian tribes”).

¹⁴² See generally Tweedy, *supra* note 138 at 659 (2009); Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 1018-20 (1981) (responding to critics of Indian sovereignty “by marshalling the justifications for continued protection of a tribal right to self-determination and governmental autonomy”). See also Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1069 (2004) (proposing that a third dimension exists within the debate as to whether Congress possesses plenary power over Indian tribes, and asserting that Congress’ “misguided tendency to regard the tribes as fungible has obscured the possibility of relevant differences that might yield variable federal power”).

¹⁴³ See Prakash, *supra* note 142 at 1119-20.

¹⁴⁴ *Id.* (noting that “[t]his possibility warrants serious consideration”). Conceivably, the only tribes that remain as legally viable, sovereign entities in the absence of the plenary power doctrine would be tribes that received federal recognition in the pre-1871, treaty era. See John W. Ragsdale Jr., *The United Tribe of Shawnee Indians*:

unlikely, however, that the Supreme Court will invalidate the plenary power doctrine, if for no other reason than the Court, in *United States v. Lara*, recently reaffirmed it.¹⁴⁵ In light of the plenary power doctrine, Courts have traditionally deferred to Congressional judgment in matters

the Battle for Recognition, 69 UNIV. MO. KS. CITY. L. REV. 311, fn. 180 (2000) (“[t]he significance of the date is that in 1871, a rider was added to the Indian Appropriations Act which said: [h]ereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty”).

It is important to note, however, that invalidating the plenary power doctrine would not necessarily impugn the inherent sovereignty vested in Indian tribes that existed before European ‘discovery,’ conquest, and the judicial fiction of plenary power appeared on the continent. Yet the tribes that received federal recognition and acquired land bases and federal benefits via Congress’ plenary power in the determination era might, in the absence of plenary power, longer possess a modern legal right to self-governance, a land base, or federal benefits. As a result, those tribes would no longer be able to exercise their inherent tribal sovereignty in the tangible fashion they currently do. By contrast, Tribes that received federal recognition, land bases, and benefits via treaty or “through interactions with, or official statements by, the federal government,” *see post* note 172, in the treaty era would retain their actual right to self-governance, land base, and benefits, even if the Supreme Court invalidated the plenary power doctrine. Thus, while invalidating the plenary power doctrine might have ill effects on many tribes, doing so might be a significant benefit to the tribal stability of treaty-era tribes, potentially making their territorial boundaries and tribal structures as sovereign as that of Canada’s.

In addition, some Indian tribes fear that if the Akaka bill is struck down by a court that it will be precedent to limit the institution of Indian tribal sovereignty. *See* Alan Parker, *Overcoming Neocon Campaign Against Akaka Bill Key for Tribal Right*, INDIAN COUNTRY TODAY, Feb. 16, 2007, available at <http://www.angelfire.com/big09a/DialogOpposeAkakaMeansOpposeTribes.html>; *contra* Kenneth R. Conklin, *The Akaka Bill Can be Rejected for Reasons that Do Not Attack the Legitimacy of the Genuine Indian Tribes*, HAW. REP., July 8, 2009, available at <http://www.angelfire.com/big09a/AkakaVsTribes.html> (last visited Nov. 3, 2009).

¹⁴⁵ *See Lara*, 541 U.S. at 200-02. *See also* Prakash, *supra* note 142 at 1120 (concluding in pertinent part that: “The plenary power doctrine has proven remarkably resilient. Though its supporting rationales have come and gone, the doctrine has endured for over a century. One might conclude that plenary power over Indians is here to stay--a permanent fixture of American constitutional law.”). Moreover, invalidating the plenary power doctrine may necessarily invalidate an entire chapter of United States Code – section twenty five.

affecting Indians,¹⁴⁶ including when Congress reconstructs tribal sovereignty by federally recognizing an Indian group.¹⁴⁷

B. *Institution of Tribal Sovereignty*

Federal recognition¹⁴⁸ transforms an Indian group into a “domestic dependent nation”¹⁴⁹ possessing “nearly all the powers of a sovereign state.”¹⁵⁰ These powers include limited sovereign immunity, self-governance, and control over lands the federal government designates for

¹⁴⁶ *E.g. United States v. Sandoval*, 231 U.S. 28, 46 (1912) (“questions whether, to what extent, and for what time [Indians] shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts”); *Perrin v. United States*, 232 U.S. 478, 486 (1914) (“Congress is invested with a wide discretion [as to federal recognition], and its action, unless purely arbitrary, must be accepted and given full effect by the courts”). *C.f. Miami Nation of Indians of Indiana, Inc. v. United States Dept. of the Interior*, 255 F.3d 342 (7th Cir. 2001) (upholding a Department of Interior decision refusing to grant federal recognition to the Miami Nation of Indians of Indiana).

¹⁴⁷ Originally, the Executive branch possessed authority to federally recognize Indian tribes. *See* Mark D. Myers, *Federal Recognition of Indian Tribes in the United States*, 12 STAN. L. & POL’Y REV. 271, 272 (2001). At least one commentator argues that the President still possesses this authority because of the “Constitution’s clear assignment to the President of the power not only to make treaties, but to ‘appoint Ambassadors’ to other sovereign powers with the Senate’s consent and to ‘receive Ambassadors and other public Ministers’ therefrom entirely at his own discretion.” Christopher A. Ford, *Executive Prerogatives in Federal Indian Jurisprudence: the Constitutional Law of Tribal Recognition*, 73 DENV. U. L. REV. 141, fn. 168-69 (arguing that the Constitution vests in the Executive the power to federally recognize Indian tribes) (quoting U.S. Const. art. II, S 2, cl. 2; *Id.* art. II, S 3); *but see* Fletcher, *supra* note 22 at fn.30 (noting that “Congress discontinued the practice of allowing the President to negotiate treaties with Indian tribes in 1871” in the Act of Mar. 3, 1871, 16 Stat. 544, 566, which is now codified at 25 U.S.C. § 71”); Myers, *supra* at 273 (“the possibility of recognition by the executive must be regarded today as quite limited”).

¹⁴⁸ *See* Alva C. Mather, *Old Promises: the Judiciary and the Future of Native American Federal Acknowledgement Litigation*, 151 U. PA. L. REV. 1827, 1828 (2003) (summarizing federal recognition as “the legal term of art used to identify those Native American tribes with which the United States government acknowledges a formal government-to-government relationship”); Myers, *supra* note 147 at 272 (explaining the purpose and scope of federal recognition).

¹⁴⁹ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *but see United States v. Lara*, 541 U.S. 193, 213-215 (2004) (J. Thomas dissenting) (“the tribes either are or are not separate sovereigns, and our federal Indian law cases untenably hold both positions simultaneously”).

¹⁵⁰ FEDERAL INDIAN LAW, *supra* note 2 at 2. By contrast, one commentator characterizes federally recognized tribes’ sovereignty as no sovereignty at all, since they possess authority over only “those who consent to be governed.” Gould, *supra* note 138 at 669. Even with regard to sovereignty over their consenting members, however, federally recognized tribes only possess the power that Congress permits them to retain. *Id.* at 770.

them.¹⁵¹ In addition, federal recognition establishes between the United States and the recognized group a government-to-government, political trust relationship (the “Political Trust”).¹⁵² As such, courts consider members of federally recognized tribes (“federally recognized Indians”) a political class of persons. Federally recognized Indians are eligible for a large number of federal services unavailable to others, including ethnic Indians who are not members of a federally recognized tribe (“unrecognized Indians”).¹⁵³

¹⁵¹ See Fletcher, *supra* note 141 at 490 (listing as benefits of federal recognition “(1) a favorable tax position in relation to federal, state, and local governments; (2) from federal services provided by the Bureau of Indian Affairs, the Indian Health Service, the Department of Housing and Urban Development, and other federal agencies; (3) from the exercise of treaty rights; and (4) from numerous other advantages”).

¹⁵² Mather, *supra* note 148 at 1828. Scholars and Courts refer to the United States’ relationship with federally recognized Indian tribes as, variously, a trust, trust obligation, or special relationship. Herein I use the terms “Political Trust” and “Blood Trust” to differentiate the United States’ relationship with federally recognized tribes from the United States’ relationship with unrecognized Indians. While Congress’ authority to enact special legislation for both recognized and unrecognized Indians flows from the same Constitutional bases, the two respective trust relationships are not equivalent and thus require separate terminology.

¹⁵³ See Eric Beckenhauer, *Can Genetic Testing Provide Biological Proof of Indian Ethnicity?*, 56 STAN. L. REV. 161, 167 (2003) (explaining the “bipartite” test (membership in an Indian tribe and acknowledgment of that tribe as federally recognized) that determines who is a federally recognized Indian consequentially excludes “nearly a half-million Indian people whose benefits are limited because they are un-enrolled members of a federally recognized tribe, or because they are enrolled in a tribe that has been terminated or remains unrecognized”).

As used herein the term “unrecognized Indian” is not intended to imply that unrecognized Indians are not culturally or ethnically Indian, a sentiment often associated with the term. See Margo S. Brownell, *Searching for an Answer to the Question at the Core of Federal Indian Law*, U. MICH. J. L. REF. 275 (beginning her article by quoting an unrecognized Indian: “I feel as if I’m not a real Indian until I’ve got that BIA stamp of approval”); Myers, *supra* note 147 at 277 (quoting an unrecognized Indian: “[t]o be told you are unrecognized stabs you right in the heart”). Rather, the term is used here merely to distinguish between Indians who are members of federally recognized tribes (“federally recognized Indians”) and Indians who are not members of federally recognized tribes (“unrecognized Indians”). See Mather, *supra* note 148 at 1828 (utilizing the term “nonrecognized” for the same purpose of differentiating between recognized and unrecognized Indians). This distinction is necessary since considerable confusion exists as to who is an Indian. See FEDERAL INDIAN LAW, *supra* note 2 at 26:

“Some people . . . can be an Indian for one purpose but not for another. A Caucasian or person of little Indian ancestry might become a tribal member by adoption for some purposes, such as voting and participation in tribal government, but not be an Indian for purposes of federal criminal jurisdiction. An Indian whose tribe has been terminated will not be considered an Indian for most federal purposes. Nevertheless, such a person remains an Indian ethnologically and continues to be a tribal member for internal tribal purposes.”

Membership in a federally recognized tribe is a political, not racial, classification and is judicially significant. As the Supreme Court explained in *Morton v. Mancari*,¹⁵⁴ the political nature of the relationship between the United States and federally recognized tribes requires courts to apply rational basis judicial scrutiny to, and thus uphold, laws rationally related to fulfilling that political relationship.¹⁵⁵ By drawing a distinction between political entities and racial groups, *Mancari* shields laws enacted solely for federally recognized Indians from the typically fatal strict scrutiny that *Adarand Constructors v. Pena* requires to be applied to all racial or suspect classifications.¹⁵⁶

C. Federally Recognized Indians' Political Trust

It is important to note that *Mancari's* distinction between political entities and racial groups is not a mere legal fiction. Rather, the United States' policy of recognizing, protecting, and enhancing tribal existence is the product of hundreds of years of government-to-government relations with Indian tribes, evidenced by more than 370 Indian tribe-United States treaties remaining in force today.¹⁵⁷ Indian nations "bargained long, hard, and often unwillingly" and "ceded vast tracts of land" as valuable consideration for the federal services available only to them,¹⁵⁸ as well as the right to remain a distinct political entity.¹⁵⁹

¹⁵⁴ *Morton v. Mancari*, 417 U.S. 535, 554, fn.24 (1974) ("The preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature.").

¹⁵⁵ L. Scott Gould, *Mixing Bodies and Beliefs: the Predicament of Tribes*, 101 Colum. L. Rev. 702, 711-13 (2001).

¹⁵⁶ *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) ("all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny"). See Kirsty Gover, *Genealogy as Continuity: Explaining the Growing Tribal Preference for Descent Rules in Membership Governance in the United States*, 33 AM. INDIAN L. REV. 243, 265 (2007) ("it is the political relationship between tribes and their members that saves special measures for Indians from the category of constitutionally impermissible racial classifications. If the political relationship is lost, so too is the protection of the federal-Indian trust relationship.").

¹⁵⁷ See generally Sharon O'Brien, AMERICAN INDIAN TRIBAL GOVERNMENTS 257-67 (Univ. of Oklahoma Press, 1989) [hereinafter TRIBAL GOVERNMENTS].

¹⁵⁸ See TRIBAL GOVERNMENTS, *supra* note 157 at 261-62 ("[T]he United States is responsible for protecting Indian lands and resources, providing social services such as health and educational benefits, and preserving tribal autonomy. These rights and benefits are owed to tribes as a result of promises made by the federal government in return for the cession of more than [97%] of Indian land to non-Indians."). See also Mather, *supra* note 148 at 1833 ("Although the federal government acknowledges the sovereignty of Indian tribes, it also acknowledges its own fiduciary responsibility to assure that native tribes have the necessary resources to provide for and protect their

Moreover, both routes to federal recognition¹⁶⁰ are fundamentally predicated upon a particular Indian group's political history satisfying federal political-historical criteria.¹⁶¹ These criteria, at least in theory, limit federal recognition to Indian groups able to demonstrate they were a viable, distinct, sovereign political entity at some historical point, and retained that sovereignty in a meaningful fashion continuously up until the present time.¹⁶² But not all Indian groups' political history satisfies the criteria for federal recognition.¹⁶³ As a result there are "dozens, perhaps hundreds" of unrecognized Indian groups, as well as a hundred thousand,¹⁶⁴ or perhaps a half million,¹⁶⁵ unrecognized Indians.

distinct cultural heritage. It is this reason that underlies the breadth of federal services provided to federally recognized tribes.").

¹⁵⁹ TRIBAL GOVERNMENTS, *supra* note 157 at 265. *See also* Brownell, *supra* note 153 at 300 (citing President Nixon: "we must make it clear that Indians can become independent of Federal control without being cut off from Federal concern and Federal support").

¹⁶⁰ *See infra* Part.III.v.-vi.

¹⁶¹ *See* Mather, *supra* note 148 at 1840-42 (acknowledging the cogent logic driving the implementation of the Bureau of Indian Affairs' ("BIA") regulatory process for federal recognition, but noting the process imposes "large financial, emotional, and cultural costs"); *Native Village of Venetie I.R.A. Council v. State of Alaska*, 944 F.2d 548 (9th Cir. 1991) *superseding* 918 F.2d 797 (1990) ("Indian sovereignty flows from the historical roots of the Indian tribe"). *See also infra* III.v.

¹⁶² *See Infra* Part III.v. (discussing the BIA's regulatory process for federal recognition); Gover, *supra* note 156 at 298 (noting that the current "era places a very strong emphasis on historic continuity as a characteristic of tribalism").

¹⁶³ This may be unsurprising since "[t]he concept of tribes as legal entities is purely European" and "[a]lthough ethnological groupings of Indians occurred for centuries before Columbus, political divisions were often informal, consisting of only groups and bands"). Gould, *supra* note 155 at 718. *See also* *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 664 & n.5 (1979) ("[S]ome bands of Indians . . . had little or no tribal organization . . . the record shows that the territorial officials who negotiated the treaties on behalf of the United States took the initiative in aggregating certain loose bands into designated tribes and even appointed many of the chiefs who signed the treaties.").

¹⁶⁴ Fletcher, *supra* note 141 at 491. For instance, the Lumbee Indians "never possessed tribal rolls . . . have no historical relationship with the Federal government . . . no treaties, no Federal trust land base, no historical tribal organization." Brownell, *supra* note 153 at 303-04. While "the fact that they cannot document their lineage to one particular tribe does not negate their claim to Indian descent" their lack of political history vis a vis well established Indian nations such as the Cherokee precludes them from obtaining federal recognition via the BIA's regulatory process. *Id.*

¹⁶⁵ Beckenhauer, *supra* note 153 at 167.

D. *Unrecognized Indians' Blood Trust*

Unrecognized Indians are a class of persons possessing ethnic Indian blood but are not members of federally recognized tribes.¹⁶⁶ Since unrecognized Indians are not members of federally recognized tribes, they do not stand in the Political Trust with the United States and are thus ineligible for programs specifically benefiting federally recognized tribes and their members.¹⁶⁷ Taking into account *Mancari's* distinction between racial and political entities, and *Adarand's* requirement that courts strictly scrutinize all racial classifications, it appears at first glance that Congress cannot enact special legislation for unrecognized Indians (or, rather, courts must strictly scrutinize such legislation), since unrecognized Indian is a racial classification.¹⁶⁸

Yet, special legislation for unrecognized Indians “has long been considered a constitutionally and judicially approved activity.”¹⁶⁹ Indeed,

¹⁶⁶ Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437, 451 (2002) (“[b]eginning with the Non-Intercourse Acts of the late 1700s and through enactment of the 1934 Indian Reorganization Act, federal law has treated “Indians” as a class without regard to proof of tribal enrollment”). See *Simmons v. Eagle Seelatsee*, 244 F.Supp. 808, 814 (E.D. Wash., 1965), *aff'd*, 384 U.S. 209 (1966) (“Congress, on numerous occasions, has deemed it expedient, and within its powers, to classify Indians according to their percentages of Indian blood. Indeed, if legislation is to deal with Indians at all, the very reference to them implies the use of ‘a criterion of race’. Indians can only be defined by their race.”). By contrast the norm today, at least for purposes of establishing tribal jurisdiction, is to treat individuals as Indians if they (a) possess ethnic Indian blood from a federally recognized tribe and (b) are regarded as an Indian by his or her community, or the federal government. *United States v. Bruce*, 394 F.3d 1215, 1223-24 (9th Cir., 2005).

¹⁶⁷ The Congressional trend since the 1970s has been to limit eligibility for Indian programs to federally recognized Indians, a political classification. See *Gover*, *supra* note 154 at 244. This is a primary reason unrecognized Indian groups strive to obtain federal recognition. As one scholar noted, “[f]ederal recognition is that magical status that most Indian tribes try to achieve.” Fletcher, *supra* note 143 at 489.

¹⁶⁸ See Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537, 612 (1996) (describing the “stark dichotomy that exists in the post-Adarand world: [a]ll programs containing racial classifications are presumptively invalid, except for the programs that apply to [federally recognized] “Indian Tribes” under the Indian Commerce Clause; the latter programs are consistently upheld, regardless of whether they benefit or harm tribal members”).

¹⁶⁹ Frank Shockey, *Invidious American Indian Tribal Sovereignty: Morton v. Mancari Contra Adarand Constructors, Inc., v. Pena, Rice v. Cayetano, and Other Recent Cases*, 25 AM. INDIAN L. REV. 275, 290 (2001). In so asserting, Shockey contends that Indian legislation that includes unrecognized Indians is constitutional, since (a) *Mancari* hasn’t been interpreted as expressly invalidating all Indian legislation that includes within its reach unrecognized Indians, (b) prior to 1934 Congress defined Indians not by express tribal affiliation but by possession of ethnic Indian blood, and (c) neither *Mancari* nor *Eagle Seelatsee* expressly invalidate Indian legislation with expressly racial elements, such as the Indian Reorganization Act. *Id.* at 290-91. Indeed, were this not so, most of Title 25 of the United States Code would be invalidated. *Id.* at 290. See also *Rice v.*

from the late 18th Century until 1934, federal law identified Indians not by tribal affiliation but by blood.¹⁷⁰ One scholar suggests this paradox is resolved by the “reality that the framers of the Constitution did recognize that individual Indians should be treated differently from other persons without regard to whether they were in ‘tribes.’”¹⁷¹ That Congress has enacted special legislation for unrecognized Indians¹⁷² demonstrates that unrecognized Indians stand in a trust relationship with the United States

Cayetano, 528 U.S. 495, 535 (2000) (J. Stevens, dissenting) (“Indeed, the Federal Government simply has not been limited in its special dealings with the native peoples to laws affecting tribes or tribal Indians alone.”).

¹⁷⁰ Goldberg, *supra* note 166 at 451.

¹⁷¹ Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL’Y REV. 95, 112-13 (1998) [hereinafter “Van Dyke I”] (arguing in pertinent part that unrecognized Indians, and more broadly all indigenous groups, are included within the scope of the plenary power doctrine and Congress may therefore enact special legislation for them, as much as Congress may enact special legislation for federally recognized tribes).

¹⁷² While Congress has not expressly permitted unrecognized Indians to be eligible for federal Indian programs in the determination (post 1970s) era, prior to the determination era a number of Indian programs included unrecognized Indians, including the Indian Reorganization Act. See Karl A. Funke, *Educational Assistance and Employment Preference: Who is an Indian?*, 4 Am. Indian L. Rev. 1, 4 (1976) (noting that the Indian Reorganization Act specifically included unrecognized Indians possessing at least fifty-percent ethnic Indian blood); *Id.* at 8 (noting that from 1834 to 1934 Indian employment preferences were determined solely by possession of ethnic Indian blood, not tribal or political affiliation); *Id.* at 5-6 (asserting that the modern trend requiring both membership in a federally recognized tribe as well as an ethnic Indian blood quantum for eligibility in Indian hiring preference programs is contrary to the intent of the Indian Reorganization Act, which was to make eligible all persons possessing ethnic Indian blood regardless of tribal affiliation). From 1957 to 1986 unrecognized Indians in California possessing at least twenty-five percent ethnic Indian blood were eligible for the B.I.A.’s Higher Education Grant Program. See Am. Indian Studies Center, *Status and Needs of Unrecognized and Terminated California Indian Tribes*, Univ. Calif. L.A., available at http://www.aisc.ucla.edu/ca/Tribes14.htm#_ftnref6. While the post 1970s Congressional trend has been to exclude unrecognized Indians from Indian programs, unrecognized Indians may be eligible for Indian Health Service programs if they can show a cultural nexus to their Indian community “as evidenced by such factors as tribal membership, enrollment, residence on tax-exempt land, ownership of restricted property, active participation, or other relevant factors.” Ralph Forquera, *Urban Indian Health* at 8, Nov. 2001, Report Prepared for Seattle Indian Health Board, available at [http://www.kff.org/minorityhealth/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=13909](http://www.kff.org/minorityhealth/loader.cfm?url=/commonsspot/security/getfile.cfm&PageID=13909). In addition, Congress has specifically included Terminated Indians, a subset of unrecognized Indians that formerly stood in a political relationship with the United States, in several Indian programs. See Sharon O’Brien, *Tribes and Indians: With Whom Does the United States Maintain a Trust Relationship?*, 66 NOTRE DAME L. REV. 1461, 1471-72 (1991) (“Among the programs for which terminated tribes are eligible, are the Indian Child Welfare Act, the Health Care Improvement Act, and the Indian Education Act, all programs of vital interest to continued Indian existence.”).

based upon possession of ethnic Indian blood (what I refer to herein as the “Blood Trust”).¹⁷³

The Blood Trust is quite different, however, from the Political Trust. The Blood Trust is predicated upon possession of ethnic Indian blood, not political history, and makes available to its beneficiaries a more limited set of entitlement programs that does not include self-governance.¹⁷⁴ In this sense, the Blood Trust may be characterized as a fiduciary responsibility, rather than a political relationship.¹⁷⁵ Due to the Blood Trust’s apolitical nature, programs for unrecognized Indians are perpetually “in limbo,” since *Adarand* and the equal protection components of the Fifth and Fourteenth Amendments make blood an unstable basis of Constitutional authority.¹⁷⁶

¹⁷³ See O’Brien, *supra* note 172 at 1469 (“In truth, the federal government maintains a variety of relationships with Indian tribes and individual Indians, not all of whom are federally recognized, nor members of federally recognized tribes.”). Ethnic Hawaiians are another group of unrecognized persons with whom the United States maintains a presumptively constitutional trust relationship. See *infra* Part.V. As such, to the extent ethnic Hawaiians may be treated as Indians, the numerous federal entitlements extended to ethnic Hawaiians may also be considered laws benefiting unrecognized Indians. If this is not the case, however, then Prof. Benjamin is correct that “[a]ll programs containing racial classifications are presumptively invalid, except for the programs that apply to [federally recognized] ‘Indian Tribes,’” and special legislation for ethnic Hawaiians is presumptively unconstitutional. Benjamin, *supra* note 168 at 612. Under this view ‘unrecognized Indian’ may be, in effect, a permissible racial classification remaining in jurisprudential existence today, post-*Adarand* and *Mancari*, because of the United States’ long history of defining Indians by blood, rather than political affiliation.

¹⁷⁴ By contrast, the Political Trust makes available to its beneficiaries nearly every piece of Indian legislation as well as the self-governance afforded only to federally recognized Indians. See Fletcher, *supra* note 143 at 489.

¹⁷⁵ The legal or fiduciary nature of the Blood Trust is such that an unrecognized Indian may or may not be eligible for a particular piece of special Indian legislation. For instance, an unrecognized Indian may be eligible for educational grants, but not health benefits. See Brownell, *supra* note 153 at 277 (describing this as “untenable”).

¹⁷⁶ See, e.g., Beckenhauer, *supra* note 153 at 166 (noting that unrecognized Indians relationship with the United States is in a “constant state of limbo”); Brownell, *supra* note 149 at 296-97 (citing a Department of Justice opinion interpreting, under *Mancari*, that the “racial classifications contained in 25 C.F.R. § 5.1 [BIA Indian hiring preference] are unconstitutional, even assuming a history of discrimination against Indians”). Given the tenuous nature of the Blood Trust several commentators have proposed a myriad of alternative definitions of Indian that would minimize the importance of obtaining federal recognition. See, e.g., Brownell, *supra* note 153 at 319 (suggesting a federal definition of Indian based alternatively upon (i) membership in a federally recognized tribe or (ii) membership in a State recognized Indian tribe and possession of no less than twenty five percent Indian blood quantum). Alternatively, some commentators propose that demonstrating “cultural sovereignty” may be a valid method of identifying membership. See Goldberg, *supra* note 166 at 462-65 (describing “cultural sovereignty” as a “tribal citizenry committed to engagement with a living tradition,” and listing as “possible bases for establishing a more culturally assertive

E. *Obtaining Federal Recognition: Bureau of Indian Affairs' Regulatory Process*

The Bureau of Indian Affairs (“BIA”) administers a regulatory process for tribal recognition that affords all Indian groups the opportunity to obtain federal recognition.¹⁷⁷ This process requires Indian groups to demonstrate that their respective political history satisfies the BIA’s seven Mandatory Criteria (the “Mandatory Criteria”), which are the political, historical, and anthropological requirements that determine eligibility for federal recognition.¹⁷⁸ The Mandatory Criteria essentially require that the

citizenry” “[l]anguage revitalization, aesthetic immersion, storytelling, reliance on elders' knowledge, and repatriation,” as well as “[reservation] residency, language fluency, community service, elders' certification and [participation in tribal ceremonies]”).

Yet, a cultural criterion, rather than political-historical or blood quantum, raises significant legal issues and practical difficulties, such as determining what cultural activities are required, at what intervals, and who will be the arbiter of cultural sufficiency. *Id.* And unless a tribe opened eligibility to all interested individuals who express sufficient levels of ‘cultural sovereignty,’ which is unlikely, tribal eligibility will remain circularly tied to blood, and therefore Constitutionally suspect.

¹⁷⁷ See Myers, *supra* note 147 at 272-73 (“[t]he current BIA recognition process is probably best understood as action taken by the executive branch pursuant to authority delegated to it by Congress, as well as under [Congress’] own inherent power”). *Id.* at 272 (noting that “historically” Indian tribes could obtain federal recognition “through interactions with, or official statements by, the federal government”); Mather, *supra* note 148 at 1837-38 (section explaining the federal acknowledgment process”).

¹⁷⁸ See 25 C.F.R. § 83.7 (Mandatory Criteria for Federal Acknowledgment). The seven criteria are, in pertinent part:

(1) “[t]he petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900”;

(2) “[a] predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present”;

(3) the petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present”;

(4) “[a] copy of the group's present governing document including its membership criteria . . . [i]n the absence of a written document, the petitioner must provide a statement describing in full its membership criteria and current governing procedures”;

(5) “[t]he petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity”;

(6) “[t]he membership of the petitioning group is composed principally of persons who are not members of any [other federally] acknowledged North American Indian tribe”;

(7) “[n]either the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.”

petitioning Indian group is a distinct, identifiable, political entity that has existed continuously since at least 1900, descends from an Indian tribe that historically was a political entity with an identifiable, exclusive membership, and has not previously relinquished or diminished its political sovereignty by treaty or otherwise with the United States.¹⁷⁹ While the merits of the BIA's regulatory process for federal regulation are hotly contested,¹⁸⁰ the broad difference between federally recognized Indian tribes and unrecognized Indian groups is their respective political histories.¹⁸¹

This strong emphasis on political history lends a practical credence to *Mancari's* distinction between the Political Trust and impermissible racial classifications.¹⁸² Emphasis on Political history further extends to

¹⁷⁹ *Id.*

¹⁸⁰ See Fletcher, *supra* note 141 at 498 (quoting Mark Edwin Miller, FORGOTTEN TRIBES: UNRECOGNIZED INDIANS AND THE FEDERAL ACKNOWLEDGMENT PROCESS 17, 20 (Univ. Neb. Press: Lincoln and London, 2004)):

“[i]t is my contention that the concepts rolled up into the process are so ambiguous and contested that the success of the groups is often reliant upon their ability to hire experts and secure political allies, or their ability to find scraps of paper or documents pointing to continuous historical existence-- records that are often the result of good fortune or the accidents of history . . . [there] is no historical or rational reason why some indigenous groups have federal status and others do not.”;

See Fletcher, *supra* note 141 at 491 (quoting a Bureau of Acknowledgment and Research (“BAR”) staffer as saying “[f]airness is not our 8th criterion”). But see Iraola, *supra* note 137 at 877 (noting that “[c]onclusive proof is not required to establish any of the seven criteria . . . [r]ather, a criterion will be met ‘if the available evidence establishes a reasonable likelihood of the validity of the facts relating to that criterion’”).

While scholars debate the merits of the BIA's regulatory process, see e.g. Rachael Paschal, *The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgement Process*, 66 WASH. L. REV. 209 (1991), courts give “great deference” to federal recognition obtained (and denied) through it, courts may only overturn federal acknowledgment “if the determination was a heedless extension and a manifestly unauthorized exercise of power.” *Masayeva v. Zah*, 792 F.Supp. 1178, 1185 (D. Ariz., 1992). See also *Miami Nation of Indians of Indiana, Inc. v. United States Dept. of the Interior*, 255 F.3d 342 (7th Cir. 2001) (upholding a DOI decision refusing to grant federal recognition to the Miami Nation of Indians of Indiana).

¹⁸¹ See Myers, *supra* note 147 at 276 (“[a]n examination of BIA findings regarding the qualifications of unsuccessful petitioners demonstrates that most have been denied federal acknowledgement, not because their members are not Indians as required by § 83.7(e), but on other grounds, such as failure to show that “[t]he petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900” or because the group has been “the subject of congressional legislation that has expressly terminated or forbidden the federal relationship”).

¹⁸² Since by federally recognizing an entity the United States is recognizing an Indian group's inherent sovereignty, it is rational for the DOI to rely on a political historical criteria that ensures the entity seeking federal recognition was in fact at some

determining eligibility within recognized polities. While the preamble to the Mandatory Criteria requires petitioners be American Indians, “groups of descendents will not be recognized solely on a racial basis.”¹⁸³ Rather, “maintenance of tribal relations – a political relationship – is indispensable.”¹⁸⁴ That some Indian tribes historically included non-ethnic Indian individuals as “‘naturalized citizens’ of Indian tribes reflects the political nature of Indian tribes.”¹⁸⁵ For example, African-American slaves and Freedmen, who as early as 1763 settled amongst the Seminole Indians, “formally became members of the Seminole Nation in 1866” by treaty with the United States.¹⁸⁶ Two bands of Freedmen exist today within the Seminole tribe.¹⁸⁷ As one scholar notes, “[t]he [Black] Freedmen of the Seminole Nation of Oklahoma have been members of an American Indian tribe for about 250 years, not on account of possessing American Indian blood, but on the basis of a history of camaraderie.”¹⁸⁸ Today, the descendents of the Seminole tribe’s historical political body, non-ethnic Indian as well as ethnic Indian alike, are eligible for tribal membership.¹⁸⁹ Likewise, the Cherokee nation does not utilize a racial

historical point a sovereign political entity. Strict reliance on political history, however, can produce inconsistent results. See Fletcher, *supra* note 141 at 109-11 (providing an example of just such an inconsistent result).

¹⁸³ Brownell, *supra* note 153 at 302.

¹⁸⁴ *Id.*

¹⁸⁵ Gover, *supra* note 156 at 263 (quoting a Memorandum from Raymond C. Coulter, Deputy Solicitor, Dep’t for the Interior, to the Sec’y for the Interior (Dec. 10, 1969) and noting that, by contrast, the United States has traditionally recognized Indians by race).

¹⁸⁶ The Seminole Nation itself is a conglomerate of indigenous Floridian Indians, various Creek Indian bands, as well as freed and escaped African-American slaves. See Daniel E. Dawes, *Unveiling the Mask of Interracial Injustice: How the Seminole Nation Implicitly Endorses Dred Scott and Plessy*, 50 HOW. L.J. 319, 326 (2007). See also Joyce A. McCray-Perterson, *Red and Balck – A Divided Seminole Nation: Davis v. U.S.*, 14 KAN. J. L. & PUB. POL’Y 607, 609-622 (2005).

¹⁸⁷ Dawes, *supra* note 185 at 236.

¹⁸⁸ *Id.* See also Terrion L. Williamson, *The Plight of “Nappy-Headed” Indians: The Role of Tribal Sovereignty in the Systematic Discrimination Against Black Freedmen by the Federal Government and Native American Tribes*, 10 MICH. J. RACE & L. 233, 237-38 (2004). There is considerable disagreement, however, between several factions of Seminole Indians and scholars as to whether the descendents of Black Slaves and Freedmen should be entitled to tribal membership and the benefits it confers. Several prominent Seminole members would prefer to limit membership to descendents of those “ancestors [who] fought with the Seminole Indians to explain and validate their membership in the Seminole Nation.” *Id.* Other scholars, however, consider the systematic denial of equal benefits for Freedmen tantamount to yet another form of explicit racial discrimination against Blacks, especially since Seminoles previously enslaved some of the African-Americans who later became tribal members. *Id.*

¹⁸⁹ See Goldberg, *supra* note 166 at 449:

criterion, choosing instead to include any individual who can demonstrate a “legal-historical relationship” to the tribe¹⁹⁰ – a critical, albeit controversial, distinction that federal courts have upheld.¹⁹¹

F. *Obtaining Federal Recognition: Express Congressional Grants*

The alternative route to federal recognition is an express Congressional grant (“Express Grant”).¹⁹² An Express Grant is a legislative action that confers or restores federal recognition to an Indian

A case in point is the controversy between several Oklahoma tribes and the United States over the legitimacy of membership and voting rights for descendants of freedmen-freed black slaves who lived with the tribe. The position of the United States is that federal law, namely post-Civil War treaties made with these tribes, affords the freedmen and their descendants rights that the tribes may not deny.

¹⁹⁰ Judy Rohrer, “Got Race?” *The Production of Haole and the Distortion of Indigeneity in the Rice Decision*, 18 CONTEMPORARY PAC. 1, 13 (Univ. Haw. Press, 2006).

¹⁹¹ See *Seminole Nation of Okalahoma v. Norton*, 223 F. Supp. 2d 122, 146-47 (D.D.C. 2002):

The Court acknowledges and appreciates the importance of the [Cherokee] Nation's right, as a sovereign body, to self-determination and self-government. However, as a sovereign, the Nation has the duty and the responsibility to respect the rights of all of its members, including the rights of its minority members as guaranteed by the Nation's Constitution. . . [W]here the Nation evidences that it does not intend to respect those rights, the government, as part of “the distinctive obligation of trust incumbent upon [it] in its dealings with these dependent and sometimes exploited people” [citations omitted] has a duty to ensure that its minority members are protected against the will of the majority that is being imposed in violation of its own Constitution. The United States has itself dealt with many of these same issues, where, if the will of the majority had prevailed, many minority members of this society would not have been able to enjoy the same privileges and benefits as other citizens. Where the Nation will not protect the Constitutional rights of its minority members, the BIA has the responsibility and indeed, the duty, to intervene and attempt to protect those rights through appropriate remedies.

For more information on the history of Cherokee Freedmen and the debate surrounding their status within the Cherokee Nation see Circe Sturm, *BLOOD POLITICS: RACIAL CLASSIFICATIONS, AND CHEROKEE NATIONAL IDENTITY: THE TRIALS AND TRIBULATIONS OF THE CHEROKEE FREEDMEN* (Univ. Calif. Press, 2002).

¹⁹² Currently there are two routes available to obtain federal recognition: the BIA's regulatory process and by Express Grant. In the past, however: “[f]ederal recognition may arise from treaty, statute, executive or administrative order, or from a course of dealing with the tribe as a political entity. Any of these events, or a combination of them, then signifies the existence of a special relationship between the federal government and the concerned tribe” Myers, *supra* note 147 at 272 (citing *The Kansas Indians*, 72 U.S. 737 (1866)).

group.¹⁹³ While expedient for Indian groups fortunate enough to obtain them, Express Grants are rare.¹⁹⁴ They are also incongruous with the BIA's regulatory process because they bypass it altogether, making "little or no mention" of the Mandatory Criteria, or any other political-historical criteria.¹⁹⁵

For example, the Express Grant federally recognizing the Texas Band of Kickapoo Indians¹⁹⁶ (the "Texas Kickapoo Grant") "finds" that the Texas Band of Kickapoo Indians was a subgroup of the Oklahoma Kickapoo forced "many years ago" to migrate to Texas and Mexico and today possess a unique culture with distinct educational needs.¹⁹⁷ Therefore, the Texas Kickapoo Grant reasons that the Texas Kickapoo should be federally recognized in order to gain access to federal programs available only to federally recognized Indians.¹⁹⁸ Compared to the Mandatory Criteria, the Texas Kickapoo Grant scarcely articulates a political-historical basis for federal recognition.¹⁹⁹ Rather, the Texas

¹⁹³ *Id.* at 273.

¹⁹⁴ Only "[f]ive other tribes have been legislatively recognized since 1978, and one has been legislatively restored." *Id.* at 273. In addition to expressly granting federal recognition to an Indian group, Congress may, and has several times, restored a tribe's status as federally recognized. *See* Iraola, *supra* note 140 at fn. 19.

¹⁹⁵ Jackie J. Kim, *The Indian Federal Recognition Administrative Procedures Act of 195: a Congressional Solution to an Administrative Morass*, 9 ADMIN. L.J. AM. U. 899, fn. 96 (1995) (noting Sen. John McCain's testimony that "many tribes complain of" Express Grants).

Many members of Congress disfavor Express Grants, preferring instead an improved regulatory process. *See* Brian Stockes, *Virginia Tribes Renew Fight for Federal Recognition*, INDIAN COUNTRY TODAY, July 16, 2001 (Rapid City, S.D.) (unavailable at original source but archived by Westlaw, 2001 WLNR 7670777) (stating that "[m]any in Congress" such as Sen. Ben Nighthorse Campbell, R-Colo. "have taken issue with tribes gaining federal recognition through legislation . . . [and] said they believe that following an improved administrative process should be the preferred path for federal acknowledgment"); *e.g.* Myers, *supra* note 147 at 273 (quoting Rep. James Clark: "The established process . . . is the BIA process; to grant Congressional recognition . . . is to "circumvent" the "proper" recognition process . . . [t]here are some ten other Indian groups in North Carolina alone that have petitions for recognition pending before the Bureau. It is not fair to these and the other groups that have petitioned for Federal recognition to short-circuit the established process for one group."); *Id.* (noting that "[t]hose who oppose congressional recognition of specific tribes can be understood either as objecting to the recognition of those tribes in particular or as concerned that groups will be recognized based on their lobbying power rather than the legitimacy of their claims").

¹⁹⁶ PL 97-429; 1983 HR 4496.

¹⁹⁷ PL 97-429 at § 2(a)-(b).

¹⁹⁸ *Id.*

¹⁹⁹ Criticism of the Texas Kickapoo Grant does not mean, however, that the Kickapoo Tribe itself lacks a political history befitting federal recognition. To the

Kickapoo Grant's articulated basis for federal recognition appears to be the Texas Kickapoo's need for federal services.

Express Grants that fail to articulate a political historical basis for federal recognition on par with the Mandatory Criteria wrongly treat federal recognition as if it were a remedial program, rather than an exclusive political action. The fact that the BIA promulgated the Mandatory Criteria in the first place, in order to distinguish between eligible and ineligible Indian groups, demonstrates that federal recognition is not a program to which all unrecognized Indians are entitled by virtue of possessing Indian blood. Were all Indian groups so entitled, there would be no rational purpose for the Mandatory Criteria.

G. *The Express Grants Parameter*

Federal common law places some limitations on Congress' authority to expressly grant federal recognition to an Indian group.²⁰⁰ Most plainly, *United States v. Sandoval* forbids Congress from federally recognizing any group or community other than "distinctly Indian communities."²⁰¹ Nor may Congress "arbitrarily"²⁰² or "heedlessly"²⁰³

contrary, Phillip M. White, *THE KICKAPOO INDIANS, THEIR HISTORY AND CULTURE: AN ANNOTATED BIBLIOGRAPHY*, preface at xv (Greenwood Press, 1999) notes:

"Kickapoo history is in many respects the most remarkable of all the Indian histories in the United States. Some of the Kickapoo have maintained the major characteristics of their traditional way of life for over 350 years. They have endured some of the most varied changes in social and physical conditions by any Indian tribe, moving from the woodlands near the Great Lakes in northern Wisconsin into the prairie regions south and on to the arid regions of northern Mexico. They have survived removals, warfare and government interference, and yet many have kept their traditional ways."

Nevertheless, Express Grants, such as the Texas Kickapoo Grant, that fail to articulate an adequate political-historical basis for federally recognizing an Indian group fuels criticism that legislative grants of federal recognition may be arbitrary and unfounded in historical fact.

²⁰⁰ Myers, *supra* note 147 at fn.24 (2001). Nevertheless, courts give great deference to Congress in matters relating to Indians. See *United States v. Sandoval*, 231 U.S. 28, 46 (1912) ("questions whether, to what extent, and for what time [Indians] shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts"); *Perrin v. United States*, 232 U.S. 478, 486 (1914) ("Congress is invested with a wide discretion, and its action, unless purely arbitrary, must be accepted and given full effect by the courts"). But, while plenary, Congress' Indian authority is not absolute; it "must be rationally related to the protection of Indians." *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 1219 (9th Cir. 2001); FEDERAL INDIAN LAW, *supra* note 2 at 2 ("[a]lthough Congress has broad authority to regulate Indian affairs, its authority is subject to constitutional restraints").

²⁰¹ *United States v. Sandoval*, 231 U.S. 28, 46 (1913). In *Sandoval* the Supreme

grant federal recognition.²⁰⁴ While this may be only a rational basis standard requiring Congress to merely enunciate legitimate reasons for federally recognizing an entity, courts may nevertheless scrutinize Express Grants “to determine whether [they] violate[] the equal-protection component of the Fifth Amendment.”²⁰⁵

With respect to establishing the parameters of a “distinctly Indian community,” *United States v. Montoya* (“*Montoya*”) is instructive.²⁰⁶ While acknowledging that Indian tribes have never been “nations” in the international sense, *Montoya* lists the characteristics of an Indian “tribe” as “[a] a body of Indians of the same or a similar race, [b] united in a community under one leadership or government, and [c] inhabiting a particular though sometimes ill-defined territory.”²⁰⁷ Moreover, the Ninth Circuit has added a fourth political-historical component to the *Montoya*

Court reviewed the federal status of the Pueblo Indians and their lands, and determined the New Mexico Pueblo were subject to federal control, including federal laws prohibiting Indians from selling alcohol in Indian country. Sandoval’s pertinent holding is that, Congress, not courts, determines “whether, to what extent, and for what time [Indian groups] shall be recognized and dealt with.” Yet, Sandoval prohibits Congress from federally recognizing groups that are not “distinctly Indian communities.” *Id.*

²⁰² *United States v. Sandoval*, 231 U.S. 28, 46 (1913).

²⁰³ *Masayesva v. Zah*, 792 F.Supp. 1178, 1185 (D. Ariz., 1992).

²⁰⁴ *Sandoval*, 231 U.S. at 46; *Masayesva*, 792 F.Supp. at 1185.

²⁰⁵ *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 83-84 (1977) (“the plenary power of Congress in matters of Indian affairs does not mean that all federal legislation concerning Indians is . . . immune from judicial scrutiny or that claims . . . are not justiciable”) (internal quotations omitted). See Robert T. Anderson, et al., AMERICAN INDIAN LAW: CASES AND COMMENTARY at 165 (ThompsonWest, 2008) (asserting that judicial review of Congressional acts arising from Congress’ plenary power over Indians “should be more stringent than the garden-variety rational basis test” applied to non-plenary power derived Congressional acts).

²⁰⁶ *Montoya v. United States*, 180 U.S. 261 (1901). At issue in *Montoya* was but the meaning of the terms ‘band (or) tribe . . . in amity with the United States,’ as those terms were used in a federal claims act that indemnified persons whose property was destroyed by Indians. *Id.* at 264. The Indian band in question in *Montoya* consisted of 200 Southern (Gila, Mimres, Mogallen), Chiracahua, and Mescalero Apache under the leadership of a Chiracahua war chief named Victoria. *Id.* at Findings of Fact. The Victoria band waged war against the United States for a two-year period. *Id.* The Supreme Court regarded Victoria and his warriors as a distinct band of Indians because the consequences of not doing so would be to make the parent bands of Victoria’s Indians “pecuniarily liable for all damages inflicted by a band over whom they could have no control,” a result contrary to Congressional intent. *Id.* at 270.

With regard to what makes a community “distinctly Indian,” it is possession of ethnic Indian blood that distinguishes Indians from non-Indians. See *Simmons v. Eagle Seelatsee*, 244 F.Supp. 808, 814 (E.D. Wash., 1965), *aff’d*, 384 U.S. 209 (1966).

²⁰⁷ *Montoya v. United States*, 280 U.S. 261, 266 (1901).

'tribe' test. In *Native Village of Tyonek v. Puckett* ("Tyonek"), the Ninth Circuit required that, in addition to satisfying the *Montoya* test, "the group claiming tribal status show that they are 'the modern-day successors' to a historical sovereign entity that exercised at least the minimal functions of a governing body."²⁰⁸ In short, *Sandoval* sets forth the baseline requirement for federal recognition, that the Indian group is a "distinctly Indian community," while *Montoya* and *Tyonek* articulate the political-historical and ethnological requirements thereof.²⁰⁹ In addition to this common law framework, Cohen's treatise on Indian law indicates an additional political-historical component: that an Indian tribe has "retained its sovereignty in some meaningful fashion continuously up until the

²⁰⁸ *Native Village of Tyonek v. Puckett*, 957 F.2d 631, 635 (9th Cir. 1992). At pertinent issue in *Tyonek* was determining when an Indian community is legally a tribe. The *Tyonek* court, citing *Sandoval* and *Montoya*, noted that "[a]n Indian community constitutes a tribe if it can show that (1) it is recognized as such by the federal government, or (2) it is "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." *Id.* (internal citations omitted). The Court further required that "the group claiming tribal status show that they are "the modern-day successors" to a historical sovereign entity that exercised at least the minimal functions of a governing body." *Id.* (internal citations omitted). Additional factors to weigh when considering whether an Indian group is a tribe include (a) organization under the Indian Reorganization Act, 25 U.S.C. §§ 461-79 (1988), (b) evidence of the Indian community's political cohesiveness, and (c) consideration of the Mandatory Criteria, which "may guide a judicial inquiry into this question." *Id.* (internal citations omitted). See also *United States v. Bruce*, 394 F.3d 1215, 1224 (9th Cir., 2005) (listing as factors indicating a tribal nexus "declining order of importance, evidence of the following: "1) tribal enrollment; 2) government recognition formally and informally through receipt of assistance reserved only to Indians; 3) enjoyment of the benefits of tribal affiliation; and 4) social recognition as an Indian through residence on a reservation and participation in Indian social life.") (internal citations omitted).

²⁰⁹ Therein lies a remarkable paradox: if an Indian group's political history does not satisfy the BIA's Mandatory Requirements for federal recognition, it may nevertheless obtain federal recognition through an Express Grant with an entirely different, and lower, political-historical standard. Such a paradox may not be surprising, however, as "[f]ederal Indian law is rooted in conflicting principles that leave the field in a morass of doctrinal and normative incoherence." Prakash, *supra* note 142 at 1074 (citing Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1754 (1997)).

The ethnological prong of the *Montoya* test, as well as *Sandoval*'s "distinctly Indian" requirement, is somewhat at odds with current judicial emphasis on political-history, as well as the fact that some tribes, such as the Seminole, include non-ethnic Indians as historic and current members. The Seminoles represent the exception, however, not the rule, as most Indian tribes were solely comprised of that tribe's ethnic Indians. What may resolve this tension between political history and blood is understanding that, while it is possession of ethnic Indian blood that brings an Indian group under Congress' plenary power over Indians, it is political history that determines whether a particular Indian group is eligible for federal recognition, as well as determining, where applicable, eligibility for membership within the tribe.

present time.”²¹⁰ Combined, *Sandoval*, *Montoya*, and *Tyonek* establish the following common law parameter for express grants of federal recognition (the “Express Grants Parameter”):

Congress may only federally recognize groups of individuals who: (a) stand in its plenary power over Indians; (b) are united in a community under one leadership or government; (c) inhabit a particular, if ill-defined, territory; and (d) can show that they are the modern-day successors to a historical sovereign entity that exercised at least the minimal functions of a governing body.

While no court has applied this proposed framework to an Express Grant, a glance at the political-historical basis for federal recognition that two relatively recent Express Grants set forth indicate that this framework would be useful for judicial analysis of Express Grants. The Ponca Restoration Act federally recognizes the Ponca Tribe without any mention of its political history, save for noting the Tribe will use as part of its eligibility criterion the BIA’s 1965 tribal list.²¹¹ Similarly, the Express Grant restoring the Ysleta del Sur Pueblo as well as the Alabama and Coushatta Indian Tribes of Texas fails to establish those tribes’ modern political historical basis for restoration, and indeed omits those tribes’ political historical basis for having possessed federal recognition in the first place.²¹²

A court could invalidate these Express Grants because they fail to articulate a political-historical basis satisfying the Express Grants Parameter. Although federal common law concerning the political historical requirements for Express Grants appears less stringent than the Mandatory Criteria, it nevertheless precludes Congress from federally recognizing an Indian group whose political history fails to establish that it was a viable political entity whose sovereignty the United States may now

²¹⁰ See FEDERAL INDIAN LAW, *supra* note 2 at 6. See also Gover, *supra* note 156 at 298 (noting that the current “era places a very strong emphasis on historic continuity as a characteristic of tribalism”).

²¹¹ See PL 101-484, 1990 S 1747 § 2(4); § 3.

²¹² See PL 100-89; 1987 HR 318. The Express Grant restoring federal recognition to the Potawatomi states that the Potawami descend from Indians who made no less than eleven treaties with the United States in the early nineteenth century. PL 103-323; 1994 S. 1066 § 1(1). While this political-historical fact clearly satisfies two of the four elements of the Express Grants Parameter ((a) group within Congress’ plenary power; and (d) modern day successors to sovereign entity), it does not show that the Potawatomi are either now united under one government or inhabit a particular territory. Nor does it satisfy Professor Cohen’s requirement that a tribe seeking federal recognition has maintained its sovereignty up until the present day. See *supra* note 204.

recognize.²¹³ As such, an insufficient political-historical base may prove to be a federally cognizable issue because “[h]owever broad Congress’ power with respect to Indian tribes might be, it falls short of entitling Congress to create a tribe where non[e] previously existed.”²¹⁴

V. WHAT BEGETS FEDERAL RECOGNITION

A. *Summary of Federal Recognition*

At the risk of oversimplification, a summary of federal recognition and the two respective Indian trust relationships is helpful here. Federal recognition transforms Indian groups into domestic dependent nations by acknowledging the sovereignty that Indian tribes originally possessed. The authority for Congress to federally recognize Indian tribes is the plenary power doctrine. Since the source of the plenary power doctrine is the Indian Commerce Clause, the threshold requirement to obtain federal recognition is being an unrecognized Indian.²¹⁵

There are two classes of Indians: federally recognized Indians and unrecognized Indians. They respectively stand in two different trust relationships with the United States. Federally recognized Indians stand in the Political Trust, while unrecognized Indians stand in the Blood Trust. These two trust relationships are not equivalent to each other. The Political Trust confers self-governance, as well as eligibility for the gamut of federal Indian entitlement programs. By contrast, the Blood Trust is apolitical, and entitles unrecognized Indians to a sharply limited set of entitlement programs – and tenuously at that.²¹⁶

²¹³ In addition to the Express Grants Parameter federal common law sets forth, FEDERAL INDIAN LAW, *supra* note 2, indicates that two, essential, political-historical components are necessary for Congress to federally recognize an Indian group: (i) the Indian group in question must have been a sovereign political entity at the time the United States was formed; and (2) retained its sovereignty in some meaningful fashion continuously up until the present time. *See* FEDERAL INDIAN LAW, *supra* note 2 at 6.

²¹⁴ Sullivan Review, *supra* note 16 at 367. *See also* Sullivan, *supra* note 13.

²¹⁵ It is for this reason that non-Indian groups in the United States with a history of a government-to-government relationship with the United States, such as Texans and Cajuns, cannot today petition neither the Bureau of Indian Affairs nor Congress for federal recognition.

²¹⁶ The differences between federally recognized and unrecognized Indians’ respective relationships with the United States are quite significant, and require separate terminology. Lumping both categories of Indians into a single tribal-federal trust relationship both obfuscates the significant political-historical and practical differences between the two categories of Indians, and is a hindrance to critical analysis of which category of Indian (and corresponding relationship with the United States) ethnic Hawaiians’ political history is most analogous. *See infra* Part III.iii-iv (discussing the Political and Blood Trusts); *infra* Part V.-VI (discussing the ethnic Hawaiian-United States trust relationship, and whether ethnic Hawaiians’ political history may validly beget federal recognition).

B. *Political History Begets Federal Recognition*

There are two routes to federal recognition,²¹⁷ both predicated upon political history, albeit with differing standards. If an Indian group seeks federal recognition through the BIA's regulatory process for federal recognition, it must demonstrate that its political history satisfies the Mandatory Criteria – a high political-historical bar. The second, and far less common, route to federal recognition is an Express Grant, which requires a tribe to persuade Congress to grant federal recognition through legislation. Three federal cases, *Sandoval*, *Montoya*, and *Tyonek*, articulate a political-historical framework useful for analyzing the validity of an Express Grant. While possession of ethnic Indian blood is the threshold requirement to stand in Congress' plenary power over Indians, political history is the predicate factor determining eligibility for federal recognition under both routes available to obtain it.²¹⁸ In short, political history begets federal recognition.

Such reliance on political history is rational since federal recognition places the recognized group and its members into the Political Trust – an exclusive political classification. Reliance on political history is also consistent with *Mancari's* conception of federally recognized Indian tribes as inherently political, not racial, entities. Implicit to relying on political history, however, as the basis for federal recognition is the inevitable result that a number of Indian groups will not be eligible for it.²¹⁹ Yet, while scores of Indian groups have failed to obtain federal recognition through the BIA's regulatory process for this very reason,²²⁰ much confusion surrounds the important distinction between indigeneity

²¹⁷ See *infra* Part.III.iii-vii (discussing the routes available to obtain federal recognition).

²¹⁸ While only Congress and the BIA's regulatory process are today original sources of federal recognition, federal courts may play an important role in determining whether a particular Indian group obtains federal recognition. For instance, if an Indian group successfully challenges a BIA decision not to award federal recognition a court may reverse the BIA's determination and award federal recognition. Alternatively, a court may invalidate a BIA award of federal recognition. The standard, however, to overturn a BIA determination of federal recognition is quite high, as courts give "great deference" to federal recognition obtained, and denied, through the BIA regulatory process. *Masayeva v. Zah*, 792 F.Supp. 1178, 1185 (D. Ariz., 1992); *Richmond v. Wampanoag Tribal Court Cases*, 431 F.Supp.2d 1159, 1162-65 (D. Utah, 2006). Courts may only overturn a BIA award or denial of federal recognition "if the determination was a heedless extension and a manifestly unauthorized exercise of power." *Masayeva*, 792 F.Supp. at 1185.

²¹⁹ See Myer, *supra* note 147 at 274-276 (noting the existence of over a hundred unrecognized tribes and citing as the most common reason for failing to obtain federal recognition "failure to prove that it meets the more technical requirements of [the Mandatory Criteria]").

²²⁰ *Id.*

and political history as the basis for federal recognition. For instance, consider this statement by Linda Lingle, Governor of the State of Hawai‘i, given before the United States Congress in support of a prior version of the Akaka bill: “The United States is inhabited by three indigenous peoples – American Indians, Native Alaskans and Native Hawaiians. . . . Congress has given two of these three populations full self-governance rights.”²²¹ Governor Lingle’s statement is incorrect. It wrongly asserts that all American Indians and Native Alaskans possess federal recognition, and implies that they do so by virtue of their indigeneity. Rather, only Indian groups whose political history satisfies the Mandatory Criteria or the Express Grants Parameter may be federally recognized.²²² This is the reason hundreds of Indian groups are not federally recognized, contrary to what Gov. Lingle, as well as Hawai‘i State Attorney General Mark J. Bennett, appears to believe.²²³

VI. THE “HAWAIIAN BLOOD TRUST”

A. *Source and Scope*

In 1920, Congress enacted the Hawaiian Homes Commission Act (“HHCA”), a remedial homestead program that defined native Hawaiians²²⁴ as individuals possessing at least fifty percent ethnic-

²²¹ Testimony of Linda Lingle, Governor of the State of Hawaii, Senate Indian Affairs Committee Hearing on S. 147, at 2 (Mar. 1, 2005) (prepared text).

²²² In addition, Indian tribes who obtained federal recognition in the treaty era possess federal recognition because of their recognized, government-to-government relationship with the United States. *See supra* note 144.

²²³ *See* Mark J. Bennett, Att. General of the State of Hawai‘i, *The Akaka Bill is Fair, Just, Long Overdue and Constitutional*, HAW. REPORTER, Aug. 16, 2005, available at <http://www.hawaii-reporter.com/story.aspx?2680f428-5289-489e-a3b9-368b1f4e4f2f> (last visited Oct. 23, 2009) (characterizing the Akaka bill as ethnic Hawaiians “simply asking to be treated *the same way all other native indigenous Americans are treated in this country*”) (emphasis added).

²²⁴ As utilized herein, the term “*native Hawaiian*” is an individual possessing at least fifty percent ethnic Hawaiian blood. The term “*ethnic Hawaiian*” is an individual possessing ethnic Hawaiian blood of any amount. The term “*Hawaiian*” is an individual who descends from a citizen-subject of the former Kingdom of Hawai‘i, regardless of whether that ancestor possessed ethnic Hawaiian blood. *Hawaiian* is essentially the political-historical definition of who is a Hawaiian. While *native Hawaiians* are also *ethnic Hawaiians*, for the purposes of this paper *ethnic Hawaiian* generally refers to individuals possessing less than fifty percent ethnic Hawaiian blood. This terminology is somewhat different from the terminology utilized by the majority of commentators, courts, and statutory definitions. For instance, in *Rice v. Cayetano*, “*native Hawaiian*” meant an individual possessing fifty percent ethnic Hawaiian blood, while “*Hawaiian*” was an individual possessing ethnic Hawaiian blood, but less than the fifty percent quantum. While the *Rice* terminology seems to be the most widely understood, it does not take into account the political-historical definition of Hawaiian. For that reason this article modifies *Rice*’s terminology.

Hawaiian blood and made native Hawaiians eligible for the Hawaiian homesteads program.²²⁵ In so doing, the HHCA established a trust relationship (what I term the “Hawaiian Blood Trust”) between the United States and native Hawaiians.²²⁶ Although special legislation for native Hawaiians may appear constitutionally suspect, because native Hawaiian is an explicit racial classification,²²⁷ Congress’ authority to enact special legislation for native Hawaiians has not been successfully challenged.²²⁸ Subsequently, Congress has expanded the scope of the Hawaiian Blood Trust to include ethnic Hawaiians (individuals possessing less than 50% ethnic Hawaiian blood)²²⁹ by enacting special legislation, albeit not

²²⁵ Hawaiian Homes Commission Act of 1920, Pub. L. No. 67-34, 42 Stat. 108 (1921), later enshrined in the Hawaii Statehood Admissions Act § 5(f), 73 Stat. at 6.

²²⁶ O’Brien, *supra* note 172 at 1478 (“The courts have concluded, however, that Congress has assumed a legislative trust relationship with Native Hawaiians through passage of the Hawaiian Homes Commission Act and other legislation.”); *see also* Mark A. Incion, *The Lost Trust: Native Hawaiian Beneficiaries Under the Hawaiian Homes Act*, 8 ARIZ. J. INT’L & COMP. L. 171 (1991) (introducing the HHCA as the United States’ first declaration of its intent to rehabilitate ethnic Hawaiians); *Id.* at 175 (describing the HHCA as Congress’ “remedy” to improve the condition of ethnic Hawaiians). *See Rice v. Cayetano*, 963 F.Supp. 1547, 1553 (D. Haw., 1997) *overruled by* 528 U.S. 495 (2000) (discussing the ethnic Hawaiian-United States trust relationship, and noting that by the 1970s ethnic Hawaiians stood in “trust relationship with the Federal Government as demonstrated by the passage of the HHCA and because Native Hawaiians were not being excluded from beneficial legislation in the same manner as [unrecognized Indians]”).

While the HHCA is the first federal action articulating the existence of an ethnic Hawaiian-United States trust relationship, an alternative view is that Congress enacted the HHCA pursuant to a pre-existing trust relationship between the federal government and ethnic Hawaiians analogous to Indian tribes. *See Kanehe, supra* note 12 at 870. Although unclear, this view appears to contend that that ethnic Hawaiians stood in a trust relationship with the United States analogous to Indians prior to enactment of the HHCA, notwithstanding that Congress had not yet articulated such a relationship. *See infra* Part V.iv (distinguishing ethnic Hawaiians’ indigeneity from that of Indians on the basis of political history).

²²⁷ *See Rice v. Cayetano*, 528 U.S. 495, 514 (2000). *See also* Jonathan Kamakawiwo’ole Osorio, “*What Kine Hawaiian Are You?*” *A Mo’olelo About Nationhood, Race, History, and the Contemporary Sovereignty Movement in Hawai’i*, CONTEMPORARY PAC. Vol. 13, No. 2, 359, 361 (2001) [hereinafter “Mo’olelo”] (“It is generally agreed that Hawaiians are an ethnic group, today comprising the descendants of the people who settled the Hawaiian Islands before the first Europeans arrived. Hawaiians are thus defined by ancestry[.]”)

²²⁸ *E.g. Arakaki v. Lingle*, 477 F.3d 1048 (9th Cir. 2007), *cert denied*, 547 U.S. 1200 (2006) (dismissing for lack of standing non-ethnic Hawaiian plaintiffs’ claim); *Kuroiwa v. Lingle* 2008 WL 2622816 (D.Hawai’i, 2008) (unreported in F.Supp.2d) (dismissing non-ethnic Hawaiian plaintiffs claim that the Office of Hawaiian Affairs unconstitutionally distributes State funds by race).

²²⁹ That the federal government, as well as the State of Hawai’i, has expanded the scope of the Hawaiian Blood Trust to include ethnic Hawaiians has raised the ire of certain factions of native Hawaiians. *See Price v. Akaka*, 3 F.3d 1220 (9th Cir. 1993)

homesteads, benefiting both ethnic Hawaiians as well as native Hawaiians.²³⁰

In addition, several courts and scholars consider Congress' plenary power over Indians coterminous to ethnic Hawaiians.²³¹ By conflating "indigenous" with "Indian,"²³² Congress has included ethnic Hawaiians as beneficiaries of at least 150 Indian entitlement programs.²³³ If Congress'

(group of native Hawaiians challenging an Office of Hawaiian Affairs decision to commission a referendum to, in effect, extend Native Hawaiian resources to native Hawaiians); *Day v. Apoliona*, 2008 WL 2511198 (D. Haw. 2008) (unreported in F.Supp.2d) (group of native Hawaiian plaintiffs challenging the Office of Hawaiian Affairs use of trust funds for the benefit of ethnic Hawaiians "without regard to blood quantum"). See also Chief Maui Loa, *Open Letter to President Bush: Corruption, Fraud, Deceit: Exposing the Akaka Bill*, Originally published at INDIAN COUNTRY TODAY, Apr. 6, 2005, archived at <http://www.angelfire.com/hi5/bigfiles/ChiefMauiLoa040605.html> (last visited Oct. 25, 2009) [hereinafter "Maui Loa"] (opposing the Akaka bill because it extends eligibility and services to individuals possessing less than 50% ethnic Hawaiian blood, which is the quantum Chief Maui Loa considers necessary to be an "authentic native Hawaiian").

²³⁰ Likewise, the State of Hawai'i, by constitutional amendment, has elected to extend special services to ethnic Hawaiians in addition to native Hawaiians. See Kanehe, *supra* note 13 at 871. See also Haw. Rev. Stat. § 10-2 (defining Hawaiian as "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii" and defining native Hawaiian as "any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, as amended, provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii").

²³¹ *E.g. Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 470 F.3d 827, 850-57 (Fletcher, J., concurring) ("[Ethnic Hawaiians] constitute a unique population that has a "special trust relationship" with the United States); *Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 339 (1982) ("Essentially, we are dealing with relationships between the government and aboriginal people. Reason thus dictates that we draw the analogy between native Hawaiian homesteaders and other native Americans."); *Nalielua v. Hawaii*, 795 F.Supp. 1009, 1012-13 (D.Haw. 1990) ("[Ethnic Hawaiians] are people indigenous to the State of Hawaii, just as American Indians are indigenous to the mainland United States"); Van Dyke I, *supra* note 171 at 113 ("[Ethnic Hawaiians] are clearly the sort of historical and social grouping of indigenous people governed by the Indian Commerce Clause").

²³² *E.g. The Native Hawaiian Health Care Act*, 42 U.S.C.A. § 11701(17) ("The authority of the Congress under the United States Constitution to legislate in matters affecting the aboriginal or indigenous peoples of the United States includes the authority to legislate in matters affecting the native peoples of Alaska and Hawaii.").

²³³ *E.g. Native American Programs Act of 1974*, 42 U.S.C. § 2991 et seq.; the American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996; the National Museum of the American Indian Act, 20 U.S.C. § 80q et seq.; the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 et seq.; the National Historic Preservation Act, 16 U.S.C. § 470 et seq.; the Native American Languages Act, 25 U.S.C. § 2901 et seq.

plenary power extends to ethnic Hawaiians (and there is a plethora of unchallenged legislation so asserting) the Hawaiian Blood Trust is premised upon the same Constitutional ground as unrecognized Indians' Blood Trust – the plenary power doctrine.

B. *The Political Inference*

The 1993 Apology Resolution²³⁴ may be precedent for the idea that the Hawaiian Blood Trust is, or should be, political in nature, like federally recognized Indians' Political Trust. The Apology Resolution acknowledges that the United States played an illegal role in the overthrow of the Kingdom of Hawai'i in 1893, apologizes for this, and calls for political reconciliation between ethnic Hawaiians and the United States.²³⁵ In essence, the Apology Resolution finds that the United States' proximately caused the overthrow of the monarch in 1893 and therefore possesses a yet unfulfilled duty to reconcile with ethnic Hawaiians.²³⁶ Several commentators and courts appear to regard the Apology Resolution as placing ethnic Hawaiians in a quasi-political trust relationship more akin to federally recognized Indians' Political Trust than unrecognized Indians' Blood Trust.²³⁷ Moreover, subsequent to the Apology Resolution, the DOI, as well as the Department of Justice ("DOJ") recommended that the "[ethnic] Hawaiian people should have self-determination over their own affairs within the framework of Federal law, as do Native American tribes."²³⁸

That Congress validly includes Alaska Natives, who, like ethnic Hawaiians, are historically and anthropologically different from Indians, in the scope of its Indian authority may be further precedent for courts to consider native Hawaiians within the scope of the plenary power doctrine. *See Pence v. Kleppe*, 529 F.2d 135, 138 n.5 (9th Cir. 1976) (noting that the "word 'Indian,' as applied in Alaska, includes Aleuts and Eskimos").

²³⁴ Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993).

²³⁵ *Id.* §§ 1, 3, 107 Stat. 1513. Some commentators consider federal recognition to be the reconciliation the Apology Resolution calls for. *E.g.* Kanehe, *supra* note 13 at 860. *See also* Francis Anthony Boyle, *Restoration of the Independent Nation State of Hawaii Under International Law*, 7 ST. THOMAS L. REV. 723 (1995).

²³⁶ The Apology Resolution does not account for the fact that the Kingdom of Hawai'i had, in addition to its ethnic Hawaiian subjects, thousands of non-ethnic Hawaiian citizen-subjects. As such, the text of the Apology Resolution only calls for reconciliation to the descendants of ethnic Hawaiian citizen-subjects.

²³⁷ *See, Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 470 F.3d 827, 850 (Fletcher, J., concurring); David A. Ezra, *Doe v. Kamehameha Schools: A "Discreet and Insular Minority" in Hawai'i Seventy Years After Carolene Products?* 30 U. HAW. L. REV. 295 (2008).

²³⁸ *Mauka to Makai*, *supra* note 12 at 17. A later Department of Justice report, however, acknowledged that the scope of the Trust Relationship may be limited to ethnic Hawaiians possessing at least fifty percent Hawaiian blood. *See Kanehe*, *supra* note 13 at 881.

Combined, these precedents arguably establish that ethnic Hawaiians stand in a blood trust with the United States analogous to that of unrecognized Indians, and furthermore that, based upon the Apology Resolution, ethnic Hawaiian may in fact be a political classification. Yet, as Justice Kennedy wryly noted in *Rice v. Cayetano* (“*Rice*”), “it remains a disputed issue whether Congress may treat the [ethnic] Hawaiians as it does the Indian tribes.”²³⁹ What is disputed is whether ethnic Hawaiian is a racial or political classification, and whether Congress may validly include ethnic Hawaiians within the scope of the plenary power doctrine.²⁴⁰

C. *Factors Limiting the Scope of the “Hawaiian Blood Trust”*

In *Rice*, the Supreme Court invalidated, as an unconstitutional “proxy” for race, an ethnic Hawaiian only voting preference promulgated by the State of Hawai‘i.²⁴¹ Yet, the Court elected to “stay far off [the] difficult terrain” of declaring the political, or racial, status of ethnic Hawaiians in the contexts of the due process components of the Fifth and Fourteenth Amendments.²⁴² Nevertheless, and in spite of the potential for *Rice’s* holding to be limited to the context of the Fifteenth Amendment, several scholars read *Rice* as revealing that a majority of the Supreme Court, unlike several lower courts,²⁴³ does not consider ethnic Hawaiian a political classification in any context, but rather an expressly racial criterion.²⁴⁴ *Rice* may further indicate that the Court will reject “the

²³⁹ *Rice v. Cayetano*, 528 U.S. 495, 529-30 (2000).

²⁴⁰ With regard to the debate over the political status of native Hawaiians, Justice Kennedy invited readers to *compare* Benjamin, *supra* note 168 with Van Dyke, *supra* note 171.

²⁴¹ In *Rice*, 528 U.S. 495 (2000), the Supreme Court struck down, by 7-2 majority, an ethnic Hawaiian voting preference essentially identical to the Akaka bill’s eligibility criterion. The court considered, at least in the context of the fifteenth amendment, an ethnic Hawaiian only criterion to be an unconstitutional “proxy” for race. *Id.* at 514. The court did not, however, address the issue of whether ethnic Hawaiians are Indians for the purposes of special legislation or federal recognition, choosing rather to “stay far off that difficult terrain.” *Id.* at 519.

²⁴² *Id.* at 519.

²⁴³ See *supra* note 214.

²⁴⁴ See Sullivan Review *supra* note 16 at 359 (“No serious argument can be made that the classification “Native Hawaiian” is not racial. The Supreme Court made the racial character of that classification unmistakably clear in *Rice v. Cayetano*.”); William E. Spruill, *The Fate of the Native Hawaiians: The Special Relationship Doctrine, the Problem of Strict Scrutiny, and Other Issues Raised by Rice v. Cayetano*, 35 U. RICH. L. REV. 149, 153-54 (2001) (interpreting *Rice* as suggesting that “[ethnic] Hawaiians are not Native Americans, do not enjoy the same “special relationship” with the federal government as the Indian tribes, and are not subject to the same rights and privileges of tribal Indian sovereigns”). See George Will, *Island of Equal Protection*, WASH. POST, A19 Mar. 2, 2000 (suggesting that, in *Rice*, the Supreme Court was simply not willing to

possibility that groups with memberships based on common ancestry can be anything but racial,”²⁴⁵ potentially calling into question special legislation for ethnic Hawaiians and unrecognized Indians.²⁴⁶

D. *Factors Against Considering “Indigenous” Hawaiians as Indians*

With regard to the idea that Congress’ plenary power over Indian affairs extends to ethnic Hawaiians, there is precedent for a court to find that it does not so extend because of fundamental differences between ethnic Hawaiians and Indians. First, the DOI specifically excludes ethnic Hawaiians from its definition of Indian,²⁴⁷ as well as the BIA’s regulatory process for federal recognition. Second, the Ninth Circuit determined that Indians and ethnic Hawaiians are “fundamentally different” due to their respective political histories.²⁴⁸ Unlike Indian tribes, who were never “nations” in the Western sense – and truly never possessed the opportunity to so become – Kamehameha III transformed his kapu chiefdom into an

potentially invalidate an entire chapter of United States Code – that pertaining to Indians – by calling into question the constitutionality of special legislation for ethnic Hawaiians).

²⁴⁵ *Gould, supra* note 155 at 771; Patrick W. Hanafin, *Rice is Right*, 3 ASIAN-PAC. L. & POL’Y J. 3 (2002).

²⁴⁶ Benjamin, *supra* note 167 at 612; Spruill, *supra* note 244 at 153-54.

²⁴⁷ *See Kahawaiolaa v. Norton*, 386 F.3d 1271, 1279-81 (9th Cir. 2004) (dismissing an equal protection claim brought by ethnic Hawaiians who were precluded from the DOI’s regulatory tribal acknowledgment process because Hawaiians are not included in the definition of “Indians” for the purposes of obtaining federal recognition through the DOI’s regulatory process); *Price v. Hawai‘i*, 764 F.2d 623 (9th Cir. 1985).

²⁴⁸ *Kahawaiolaa*, 386 F.3d at 1282-83 (noting that “Congress has specifically included both ethnic Hawaiians and members of American Indian tribes in certain privilege-granting statutes while specifically excluding either ethnic Hawaiians or tribal members from a number of others . . . many statutes distinguish between native Hawaiians and members of Indian tribes . . . [thus] [i]t is rational for Congress to provide different sets of entitlements-one governing native Hawaiians and another governing members of American Indian tribes”). Even if ethnic Hawaiians were eligible for the BIA’s regulatory process for federal recognition Hawai‘i’s unique political history would not satisfy the Mandatory Criteria’s stringent requirements. *See Id.* at 1282:

In short, the history of the indigenous Hawaiians, who were once subject to a government that was treated as a co-equal sovereign alongside the United States until the governance over internal affairs was entirely assumed by the United States, is fundamentally different from that of indigenous groups and federally recognized Indian tribes in the continental United States.

Kahawaiolaa demonstrates that there is a considerable political-historical and legal base to distinguish Hawaiians from federally recognized tribes as well as unrecognized Indian groups, at least for purposes of federal recognition. While *Kahawaiolaa* doesn’t necessarily preclude a court from upholding an Express Grant of federal recognition for ethnic Hawaiians, it establishes that there are significant political-historical and legal differences between ethnic Hawaiians and Indians that may limit the scope of the ethnic Hawaiian-United States trust relationship.

internationally recognized, multi-ethnic nation.²⁴⁹ A court could consider that upon the establishment of the Kingdom of Hawai‘i ethnic Hawaiians became their nation’s citizenry, and were no longer simply the indigenous inhabitants of the islands of Hawai‘i.²⁵⁰

If political history does not at some point transmute indigenous rights into political or legal claims, then the word “indigenous” rings hollow since every individual is by ancestry “indigenous” to one or many places. For its part, the United Nations Declaration on the Rights of Indigenous Peoples (the “U.N. Declaration”)²⁵¹ recognizes as inherent to “indigenous peoples” the right to self-determination²⁵² and redress for “dispossess[ion] [] of their lands, territories or resources.”²⁵³ Although the UN Declaration does not clearly define who is indigenous, it indicates that claims to inherent indigenous rights are strongest when, as with Indians and native Alaskans, indigenous peoples are denied self-determination.²⁵⁴ But this is not the case with ethnic Hawaiians.²⁵⁵ Kamehameha III transformed his kapu chiefdom into an internationally recognized nation and joined the international order of States.²⁵⁶ To the extent that the United States violated the sovereignty of the Kingdom of

²⁴⁹ See *Rex v. Booth*, 2 Haw. 616, 630 (1863):

The Hawaiian Government was not established by the people; the Constitution did not emanate from them; they were not consulted in their aggregate capacity or in convention, and they had no direct voice in founding either the Government or the Constitution. King Kamehameha III. originally possessed, in his own person, all the attributes of absolute sovereignty. Of his own free will he granted the Constitution of 1840, as a boon to his country and people . . .

²⁵⁰ See *infra* Part.VII.vi.-vii.

²⁵¹ The United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter “U.N. Declaration”]. The United States, Australia, Canada, and New Zealand voted against this declaration. See *Id.*

²⁵² *Id.* at art. 3)

²⁵³ *Id.* at art. 8 S 2(b).

²⁵⁴ See *Id.* at annex:

“Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests[.]”

²⁵⁵ *Contra* Ashley Obrey, *Yalangu: the “True Spirit of Reconciliation” for Australia’s Indigenous Peoples*, KA HE‘E, available at <http://www2.hawaii.edu/~nhlawctr/article5-8.htm> (likening ethnic Hawaiians to Australia’s Aboriginal population).

²⁵⁶ See *Rex v. Booth*, 2 Haw. 616, 630 (1863).

Hawai'i in 1893, modern claims to restoring self-determination are legal or political, not simply "indigenous," in nature. As the Kingdom of Hawai'i was of its own volition multi-ethnic, the descendants of all of the Kingdom's citizen-subjects possess legal claim to self-determination, not ethnic Hawaiians exclusively.²⁵⁷

By contrast, disregard of the political history of the Kingdom of Hawai'i might open far more speculative claims for redress. For instance, the 1824 rebellion²⁵⁸ on Kaua'i against the rule of the Kamehameha clan demonstrates that not all ethnic Hawaiians supported the formation of a single nation. Under this view, the descendants of ethnic Hawaiians who were opposed to the Kamehameha clan's rule could assert that the Kingdom of Hawai'i violated their self-determination and claim redress against a reinstated ethnic Hawaiian government.²⁵⁹ This would be a rather large group of ethnic Hawaiians, however, as Kamehameha forcibly conquered the majority of the residents of his native island, as well as those of every island but Kaua'i (which his son and successor, Kamehameha II, forcibly subjugated).²⁶⁰ The descendants of ethnic Hawaiians whom the Kamehameha clan conquered could plausibly argue that the Kamehameha clan "coloniz[ed] and dispossess[ed] [them of] their lands, territories and resources, thus, preventing them from exercising, in particular, their right to development in accordance with their own needs and interests."²⁶¹ Of course, some readers may regard this scenario as unserious. The reason it may be unserious, however, is that political history matters. At some point, an ethnic group transmutes into political body and extinguishes ethnic-group claims.²⁶²

²⁵⁷ See Kekuni et al. *supra* note 19 (characterizing the descendants of non-ethnic citizens of the Kingdom of Hawai'i as "Kingdom heirs" and including them as entitled to the same restoration of self-governance and sovereignty as ethnic Hawaiians).

²⁵⁸ See *infra* Part II.iii.

²⁵⁹ While there may be no international legal grounds to base such a claim, there may be compelling moral and philosophical grounds to support the idea that the descendants of those opposed to the Kamehameha clan's rule possess a legitimate grievance to restoration of the rule of their traditional chiefs.

²⁶⁰ See *infra* Part II.ii-v, discussing the Kamehameha clan's conquest and subsequent unification of the islands of Hawai'i.

²⁶¹ UN Declaration, *supra* note 251 at art. 8 S 2(b).

²⁶² If this is not true then far less plausible scenarios than described previously may ensue. For instance, approximately 230,000 years ago Neanderthals were the dominant hominid specie in the continent of Europe. Approximately 40,000 years ago Homo Sapiens began settling in Europe, and within 10,000 years completely displaced Neanderthals. See *Neanderthals in Our Midst*, SEED MAGAZINE, Nov. 7, 2006, available at http://seedmagazine.com/content/article/neanderthals_in_our_midst/ (last visited Nov. 5, 2009) ("many experts have maintained that humans completely replaced the Neanderthals, consistently out-doing them and slaughtering them when they got in the way. Other anthropologists, however, believe that rather than dying out, the Neanderthals

Ethnic Hawaiians' profound political history – the evolution of separately ruled kapu chiefdoms comprised of two distinct castes into a multi-ethnic, internationally recognized nation state – is the reason they are not indigenous in the same sense that Indians and native Alaskans are indigenous. If a court characterized ethnic Hawaiians as not an “indigenous” people, but rather the descendants of one portion of a political class of persons – the citizenry of the Kingdom of Hawai‘i – then Congress' plenary authority over Indians would not be coterminous to ethnic Hawaiians.²⁶³

E. *Factors Limiting the Political Inference*

Several factors weigh against relying on the Apology Resolution as a source of authority to consider ethnic Hawaiian a political, not racial, classification. First, the factual history that the Apology Resolution articulates, and upon which proponents of the Akaka bill rely to establish a political component within the Hawaiian Blood Trust, is contested.²⁶⁴

assimilated into early human populations through interbreeding, also known as admixture.”); Ronald Bailey, *The Neanderthal in Us – Neanderthal Genome Sequenced*, REASON, May 6, 2010, available at <http://reason.com/blog/2010/05/06/the-neanderthal-in-us-neanderth>. Carbon-dated, anthropological evidence makes clear that Neanderthals are the indigenous hominid of Europe, at least with respect to Homo Sapiens. If an individual today could demonstrate that he/she possesses Neanderthal blood, which may actually be possible through mitochondrial DNA studies, he/she would theoretically possess inherent indigenous rights against Homo-Sapiens.

²⁶³ Under this view, a court would characterize ethnic Hawaiians as the descendents of the citizen-subjects of the Kingdom of Hawai‘i – a political classification, albeit one quite different than that accorded to federally recognized Indians. In addition to ethnic Hawaiians, the descendants of non-ethnic Hawaiian citizen-subjects of the Kingdom of Hawai‘i are coequal members of this political class. Yet, the Akaka bill's eligibility criterion excludes non-ethnic Hawaiians from eligibility. It is this contradiction or disregard of Hawai‘i's political history that sustains criticism of special legislation for ethnic Hawaiians as being racial in nature. If the Akaka bill's eligibility criterion included all Hawaiians, the debate and controversy surrounding the Akaka bill would essentially be limited to whether Congress may federally recognize a non-Indian entity (or whether the plenary power doctrine extends to include the non-Indian, political citizenry of a former nation), and if so, whether doing so is sound public policy. *See infra* Part.VI.

²⁶⁴ *See generally* Thurston Twigg-Smith, *HAWAIIAN SOVEREIGNTY: DO THE FACTS MATTER? AN ATTEMPT TO UNTANGLE REVISIONISM* (Goodale Publishing, 1998) [hereinafter *HAWAIIAN SOVEREIGNTY: DO THE FACTS MATTER?*]; *HAWAIIAN APARTHEID*, *supra* note 15. *See also* Killing Aloha, *supra* note 15; Jere Krischel, *Apology Resolution Apology*, Apr. 1, 2009, available at <http://historymystery.grassrootinstitute.org/2009/04/01/apology-resolution-apology/> (last visited Oct. 15, 2009) (disagreeing with the Apology Resolution's findings of fact, and characterizing the Apology Resolution as “stealth legislation of the lowest order” because its findings of fact were not vetted for historical accuracy, and the bill received limited debate in the Senate, and none in the House). *Cf.* Benjamin, *supra* note 168 at 591 (“the mere fact that Congress may proclaim a group to be a tribe, or a benefit to be nonracial, does not make it so”).

Indeed, there are dueling accounts of the extent and legality of the United States role in the coup that overthrew the Kingdom of Hawai'i in 1893. Whereas the 1993 Apology Resolution²⁶⁵ and 1893 Blount Report²⁶⁶ find that the United States played an illegal role in the overthrow of the Kingdom of Hawai'i, warranting a measure of political reconciliation, the 1894 Morgan Report²⁶⁷ and the Native Hawaiians Study Commission of 1980²⁶⁸ find the opposite.²⁶⁹

²⁶⁵ See *supra* note 234.

²⁶⁶ James Blount, Report of Commissioner to the Hawaiian Islands, Exec. Doc. No. 47, 53d Cong., 2d Sess. (1893) (hereinafter, the "Blount Report"). Proponents of the Akaka bill, as well as Hawaiian sovereignty in general, regard the Blount report as conclusive evidence that the United States' participation in the overthrow of the monarchy in 1893 was illegal. For a review of the Blount Report as well as a subsequent agreement between the United States and the deposed monarch of the Kingdom of Hawai'i, Lili'uokalani, to restore Hawai'i's monarchy, see David Keanu Sai, *1893 Cleveland-Lili'uokalani Executive Agreements*, available at http://www2.hawaii.edu/~anu/pdf/Exec_Agmt.pdf.

²⁶⁷ S. Rept. No. 77, 53d Cong., Sess. 21 (1894) (hereinafter, the "Morgan Report"). The Morgan report consists of 808 pages of historical documents and testimony given under oath, in open hearings and subject to cross-examination, regarding the events surrounding the 1893 coup. See How the Morgan Report repudiates the Blount Report, available at http://morganreport.org/mediawiki/index.php?title=How_the_Morgan_Report_repudiates_the_Blount_Report.

²⁶⁸ Native Hawaiians Study Commission, *Report on the Culture, Needs and Concerns of Native Hawaiians* 333-70 (1983), available at http://wiki.grassrootinstitute.org/mediawiki/index.php?title=Native_Hawaiians_Study_Commission_Report (report mandated by the Native Hawaiians Study Commission Act, Pub. L. NO. 96-565, 94 Stat. 3321 (1980) (codified at 42 U.S.C. § 2991a) (finding that "native Hawaiians have no present legal entitlement to compensation from the United States for any loss of sovereignty" and determining, with regard to whether "there is any trust relationship arising from statutes or other laws, between the natives of Hawaii and the United States" that "if there is any such relationship, it is at most a very limited special trust that would not entitle native Hawaiians to any compensation" akin to the compensation the United States gave to native Alaskans in the Alaska Native Claims Settlement Act); but see *Id.* at 7-11, 80-99 (dissenting view advocating a moral basis for reparations for ethnic Hawaiians). See also Patrick W. Hanifin, *Hawaiian Reparations: Nothing Lost, Nothing Owed*, XVII HAW. B. J. No. 2 (1982), archived at <http://www.angelfire.com/hi5/bigfiles/HanifinReparations1982.pdf> (last visited Oct. 20, 2009).

²⁶⁹ Historians hotly contest whether role the United States played in the overthrow of the monarchy was the proximate cause of the end of the Kingdom of Hawai'i. Compare HAWAIIAN SOVEREIGNTY: DO THE FACTS MATTER?, *supra* note 255 (contending that the proximate cause of the overthrow of the monarchy was the actions of the Hawaiian citizen-subjects who organized and participated in the coup, and that historians and scholars who assert otherwise wrongly portray the role of United States troops played) with Michael Kioni Dudley & Keoni Kealoha Agard, A CALL FOR HAWAIIAN SOVEREIGNTY (Na Kane O Ka Malo Press, 1993 Ed.) (analyzing the dispossession of ethnic Hawaiian society and the emergence of the Hawaiian sovereignty movement).

Second, the Supreme Court has not treated the Apology Resolution favorably. In *Hawai'i v. Office of Hawaiian Affairs*, the Supreme Court unanimously characterized the Apology Resolution's "whereas" clauses as being of no legal effect.²⁷⁰ And in *Rice*, the Supreme Court, while acknowledging the Apology Resolution's existence, "pointedly ignored" it as a source of authority in "the very case where it might have had the greatest impact."²⁷¹ For these reasons, the Apology Resolution may be a tenuous source of authority to extend the scope of the Hawaiian Blood Trust beyond its remedial origins and infer that ethnic Hawaiian is a political, not racial, classification.²⁷²

Furthermore, the remedial scope of the Hawaiian Blood Trust may be more limited than existing legislation for ethnic Hawaiians suggests. The Department of Justice ("DOJ") has acknowledged that the scope of the Hawaiian Blood Trust, at least for purposes of federal recognition, may be limited to native Hawaiians – individuals possessing at least fifty percent ethnic Hawaiian blood.²⁷³ The reason for this is that the original source of the Hawaiian Blood Trust, the HHCA, while establishing a remedial trust between the United States and native Hawaiians, specifically excluded ethnic Hawaiians possessing less than fifty percent ethnic Hawaiian blood.²⁷⁴ Although existing federal legislation includes ethnic Hawaiians within the scope of the Hawaiian Blood Trust, the authority to do so is unenumerated in the text of the document establishing the Hawaiian Blood Trust, and may therefore be unwarranted.

F. Summary of the "Hawaiian Blood Trust"

The Constitutionality of special legislation for ethnic Hawaiians, including the Akaka bill, depends on several assumptions. First, courts

²⁷⁰ *Hawaii v. Office of Hawaiian Affairs*, 129 S.Ct. 1436, 1444-45 (2009). See also H. William Burgess, *Hawaiian Apology Resolution Blown Out of the Water by US Supreme Court*, HAW. REP., Apr. 3, 2009, available at <http://hawaiiireporter.com/story.aspx?573930df-4e76-4eca-a7bb-9d871ed35235> (last visited Oct. 15, 2009). That the Supreme Court considers the Apology Resolution's "whereas" clauses of no legal effect contrasts one scholar's view that the Apology Resolution's "whereas" clauses are official findings of fact and law by the United States Congress . . . bind[ing] all state and federal courts here in Hawaii . . . the court and judges are bound by these findings of fact. They can no longer be contested or denied. The United States is stuck with them." Boyle, *supra* note 235 at 727-28.

²⁷¹ Sullivan Review, *supra* note 16 at 372.

²⁷² See *Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 336, 640 P.2d 1161, 1167 (Haw. 1982) ("It is generally acknowledged that the primary purpose of the HHCA was the rehabilitation of native Hawaiians").

²⁷³ See Kanehe, *supra* note 13 at 881.

²⁷⁴ Nor is this fact lost on native Hawaiians, several groups of whom have petitioned federal courts to enjoin native Hawaiian benefits from being distributed to ethnic Hawaiians. See *supra* note 229.

regard ethnic Hawaiians as an indigenous people in the same sense that Indians and native Alaskans are indigenous, Hawai'i's extraordinary political history notwithstanding. Second, a court must interpret "Indian," as it appears in the Constitution, as "indigenous." Assuming both of these views, Congress' plenary power over Indian affairs extends to ethnic Hawaiians.²⁷⁵ The nature of the ethnic Hawaiian-United States trust relationship is akin to the Blood Trust of unrecognized Indians. Possession of ethnic Hawaiian blood places an individual in the Hawaiian Blood Trust, and Congress may enact special legislation for ethnic Hawaiians in spite of ethnic Hawaiians' lack of federal recognition. The original source of the Hawaiian Blood Trust is the Hawaiian Homes Commission Act, which limits eligibility to individuals possessing at least fifty percent ethnic Hawaiian blood. Congress and the State of Hawai'i, however, consider ethnic Hawaiians within the scope of the Hawaiian Blood Trust, and have enacted much special legislation for ethnic Hawaiians possessing any amount of ethnic Hawaiian blood.

Under a constrained view of the plenary power doctrine, one that either does not consider ethnic Hawaiians indigenous in the same sense as Indians or conflates indigenous with Indian, Congress' plenary power over Indians does not extend to ethnic Hawaiians. Several factors cut against the idea that ethnic Hawaiian is a political classification. There is no federally recognized ethnic Hawaiian governing entity; *Rice* characterized an ethnic Hawaiian only criterion as a constitutionally impermissible racial classification; and the Supreme Court considers the Apology Resolution of no legal effect.²⁷⁶ Under this view, ethnic Hawaiian is an impermissible racial classification, and special legislation for ethnic Hawaiians is presumptively unconstitutional.²⁷⁷

VII. AKAKA BILL V. EXPRESS GRANTS PARAMETER

To the extent that Congress' plenary power over Indian affairs extends to ethnic Hawaiians, Congress may treat ethnic Hawaiians as it does unrecognized Indian groups, including, as the Akaka bill proposes, extending federal recognition to ethnic Hawaiians. The Akaka bill, then, would be subject to the Express Grants Parameter,²⁷⁸ as well as additional common law prohibitions against arbitrary or heedless extensions of federal recognition.²⁷⁹ Whether a reviewing court determines that the

²⁷⁵ As noted previously, special federal legislation for ethnic Hawaiians has not been successfully challenged. *See supra* note 228.

²⁷⁶ *See infra* Part.V.iii-iv.

²⁷⁷ *Contra* Van Dyke, *supra* note 171 at 237 (arguing that special legislation for ethnic Hawaiians would satisfy both prongs (compelling governmental interest and narrowly tailored requirement) of the strict scrutiny test).

²⁷⁸ *See infra* Part.III.viii.

²⁷⁹ *See supra* notes 180, 218 (discussing judicial restraints on "heedless" and

Akaka bill satisfies the Express Grants Parameter will depend on how the court construes the Akaka bill's political-historical findings.

A. *Reconstruction of the Kingdom of Hawai'i*

A court would most likely construe the Akaka bill as recognizing or reconstructing the sovereignty of the former Kingdom of Hawai'i. In its findings, the Akaka bill rightly notes that the United States engaged in government-to-government relations with the Kingdom of Hawai'i²⁸⁰ and cites the Apology Resolution as a basis for, presumably, restoring that Kingdom's sovereignty.²⁸¹ As previously discussed, the Apology Resolution essentially finds that the United States' actions during the 1893 coup proximately caused the overthrow of the monarchy, and as a result the United States' possesses a duty to reconcile with that former Kingdom.²⁸²

Assuming that the reviewing court adopts a broad view of the plenary power doctrine, the first prong of the Express Grants Parameter is satisfied; ethnic Hawaiians are a group within Congress' plenary power over Indians. The second prong, however, is problematic because ethnic Hawaiians are not united in a community under one leadership or government. Rather, there are at least ten self-proclaimed ethnic Hawaiian governing entities, each claiming a different base of authority and pursuing somewhat different aims.²⁸³ The third prong is similarly problematic. Ethnic Hawaiians do not inhabit a particular, if ill-defined, territory. The only geographically distinct ethnic Hawaiian communities

“arbitrary” grants of federal recognition).

²⁸⁰ H.R. 862 at § 1(4).

²⁸¹ *Id.* at § (1)(3).

²⁸² Under this view, the Republic of Hawai'i, which succeeded the Kingdom of Hawai'i, was illegitimate, notwithstanding that twenty members of the international community, including the United States, recognized the Republic of Hawai'i as the lawfully established government of the islands of Hawai'i up until the Republic signed a treaty of Annexation with the United States. *See infra* Part.II. Many Hawaiian sovereignty groups believe the Kingdom of Hawai'i remains in existence today, considering annexation to the United States a “non-event,” and reasoning “therefore Hawaii is still a kingdom.” *See* Dan Boylan, *Battle Royal*, MIDWEEK MAGAZINE, Aug. 7-13 (1998), available at <http://www.hawaii-nation.org/midweek-owana.html> (last visited Nov. 6, 2009) (noting that several individuals of various ali'i lineages are locked in a “battle” for claim to the presumptive throne of the Kingdom of Hawai'i).

²⁸³ *See* Michael Keany, *Contenders to the Throne*, HONOLULU MAGAZINE, Nov. 2009, available at <http://www.honolulumagazine.com/Honolulu-Magazine/November-2009/Contenders-to-the-Throne/> (last visited Nov. 4, 2009). In addition to these numerous Hawaiian governing entities, the entity representing the largest number of ethnic Hawaiians is the Office of Hawaiian Affairs (“OHA”). The Supreme Court does not, however, consider OHA a governing entity *per se*. In *Rice*, the Court noted that OHA is not a separate government akin to Indian tribal governments but rather a State agency.

are those located on Hawaiian Homestead lands, and only a small fraction of ethnic Hawaiians are eligible to reside there.²⁸⁴ With regard to the fourth prong, ethnic Hawaiians can assuredly demonstrate they are “the modern-day successors to a historical sovereign entity that exercised at least the minimal functions of a governing body” – but so can the descendants of non-ethnic Hawaiians, whom the Akaka bill excludes from eligibility within its proposed governing entity for lack of ethnic Hawaiian blood.

This is what is potentially most problematic for the Akaka bill, even under a broad view of the plenary power doctrine. The Akaka bill excludes a class of persons – the descendants of non-ethnic Hawaiian citizens of the Kingdom of Hawai‘i²⁸⁵ – who possess a political claim to self-governance equal to that of the eligible class. The sole, tangible difference between the two descendant classes is the possession, or lack, of ethnic Hawaiian blood. A court could conceivably invalidate the Akaka bill’s eligibility criterion because it discriminates, by blood, against a class of persons possessing a political claim to self-governance equal to that of the eligible class.²⁸⁶

Precluding non-ethnic Hawaiians from eligibility in the Akaka bill’s proposed government cuts against *Mancari’s* conception of federally recognized entities as political, not racial, in nature because limiting eligibility to ethnic Hawaiians is directly at odds with the political history of the Kingdom of Hawai‘i.²⁸⁷ By contrast, utilizing the political-

²⁸⁴ Approximately five percent of ethnic Hawaiians satisfy the fifty percent quantum required for the Hawaiian homestead program. *See post* note 311 (discussing the ethnic Hawaiian and native Hawaiian populations, respectively). Of eligible native Hawaiians, less than a quarter reside on homesteads due to a lack of available homesteads. *See* Gordon Y.K. Pang, *Hawaii Took Too Long to Award Leases to Native Hawaiians, Court Rules*, HONOLULU ADVERTISER, Nov. 5, 2009, available at <http://www.honoluluadvertiser.com/article/20091105/NEWS01/911050340/Hawaii+took+too+long+to+award+leases+to+Native+Hawaiians++court+rul+es> (last visited Nov. 5, 2009) (summarizing a recent Hawai‘i circuit court ruling that the Department of Hawaiian Homelands failed its fiduciary duty to Native Hawaiians, and noting that approximately 18,000 Native Hawaiians eligible for homesteads have not received them).

²⁸⁵ *See* Kekuni et al. *supra* note 19; Kekuni Statement, *supra* note 19. Kekuni’s commentary demonstrates that some supporters of outright Hawaiian sovereignty recognize the importance of political history to their claims.

²⁸⁶ *See United States v. Weeks*, 430 U.S. 73, 84 (1977) (stating that “the power of Congress ‘has always been deemed a political one,’... [but this] has not deterred this Court, particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment”) (quoting *Lone Wolf*, 187 U.S. at 565).

²⁸⁷ While it is undisputed that non-ethnic Hawaiians were officially subjects of the Kingdom, one strain of thought contends that this political equality should not extend to the modern day.

historical definition of Hawaiian, and thus, including the descendants of non-ethnic Hawaiian citizens of the Kingdom of Hawai'i, could potentially insulate the Akaka bill's eligibility criterion from judicial scrutiny.²⁸⁸

Under this view, the fact that non-ethnic Hawaiians were political equals did not derive out of ethnic Hawaiians' desire to so include them. This view contends that non-ethnic Hawaiian residents exerted undue economic and political pressure on the Kingdom to include them as citizen-subjects, and therefore Congress today is justified to exclude the descendants of non-ethnic Hawaiians within the Akaka bill or any other legislation for ethnic Hawaiians. Put another way, this view essentially contends that non-ethnic Hawaiians were officially, but not rightfully, citizen-subjects of the Kingdom of Hawai'i. Compare Jonathon Kamakawiwo'ole Osorio, *DISMEMBERING LAHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887* (Univ. Haw. Press, 2002) (contending in pertinent part that non-ethnic Hawaiians are not Hawaiians at all) with *HAWAII APARTHEID*, *supra* note 15 (arguing that the view excluding non-ethnic Hawaiians does a disservice to the intelligence of the native monarchs who were empowered as sovereigns to exercise self-determination on behalf of their people and who knowingly and rationally chose Westernization and a multiracial polity).

Some commentators take the view that non-ethnic Hawaiians were only officially, and not rightfully, citizen-subjects of the Kingdom of Hawai'i so far as to tacitly suggest that non-ethnic Hawaiians were not even officially citizen-subjects. *E.g.* H. Christopher Bartolomucci, et al., *The Authority of Congress to Establish a Process for Recognizing a Reconstituted Native Hawaiian Governing Entity*, Prepared for the Office of Hawaiian Affairs of the State of Hawaii (2007), available at <http://www.nativehawaiians.com/archives/pdf/NHGRA070226.pdf> (hereinafter "Bartolomucci") (last visited Oct. 18, 2009) (describing non-ethnic Hawaiian citizen-subjects as merely within ethnic Hawaiians' "midst" and dismissing their "presence" as "irrelevant to [ethnic Hawaiians'] "inherent sovereignty *vel non*"); *contra* Kekuni et al. *supra* note 19 (including the descendants of non-ethnic Hawaiian citizens of the Kingdom of Hawai'i as "kingdom heirs" to the Hawaiian sovereignty many groups claim is rightful under international law).

²⁸⁸ See Kanehe, *supra* note 13 at 880-82 (noting that if utilizing an eligibility criterion consistent devoid of race, or utilizing the fifty percent criterion originally enunciated in the Hawaiian Homes Commission Act, could potentially insulate the Akaka bill from judicial scrutiny, at least with respect to its eligibility criterion).

A court may find additionally problematic, as a matter of public policy, that by federally recognizing the descendants of the indigenous portion of a former government's citizenry, the Akaka bill sets precedent to federally recognize a Chicano governing entity. Many Chicanos can trace ancestry to the indigenous persons of the parts of North America that Mexico exercised sovereignty over prior to the United States-Mexico war in 1848. If the United States possesses a political duty to restore ethnic Hawaiian sovereignty (due either to "inherent" indigenous rights or having participated unlawfully in the overthrow of the Kingdom of Hawai'i) then the United States may owe a similar duty to the descendants of the indigenous citizens of Mexico. There is a motivated, if fringe, movement known as Aztlán irredentism purposed to establish Chicano sovereignty in some form within the southwestern United States. See Carlos Villareal, *Culture in Lawmaking: A Chicano Perspective*, 24 U.C. DAVIS L. REV. 1193, 1214-18 (1991). See also Maria Hsia Chang, *Ulticulturalism, Immigration, and Aztlán*, available at http://www.asustainableusa.org/reports_studies/chang_aztlan.html (last visited on Nov. 2, 2009); Movimiento Estudiantil Chicano de Aztlán (MEChA), *The Philosophy of MEChA*, 1999 available at <http://www.nationalmecha.org/>

B. *Pre-Western Contact Construction*

Alternatively, a court could construe the Akaka bill as relying less on the political credibility of the former Hawaiian Kingdom to establish a basis for federal recognition, and more on ethnic Hawaiians' presumed indigeneity. Indeed, the Akaka bill is clear that claims to self-governance are limited to the ethnic Hawaiians only: "[t]his Act provides for . . . the [ethnic] Hawaiian people to exercise their inherent rights as a distinct, aboriginal, indigenous, native community to reorganize a native Hawaiian government."²⁸⁹

This construction is also problematic because it is unclear what ethnic Hawaiian government the Akaka bill is providing a process to "reorganize" and subsequently federally recognize. No single political entity represented the majority of ethnic Hawaiians in the pre-Western contact era. Nor were pre-Western contact residents of Hawai'i organized as a single, kinship-based tribe. Rather, the post-Western contact, unified, kapu chiefdom that Kamehameha, Kamehameha II, and Ka'ahumanu, forcibly created after Western contact became the Kingdom of Hawai'i in 1840.²⁹⁰ That sovereign Kingdom purposefully and rationally ceased, in 1846, to be exclusively ethnic Hawaiian, and persisted as a multi-ethnic Kingdom until 1893.²⁹¹ Organizing and federally recognizing an ethnic Hawaiian only government would be contrary to the political history of the Kingdom of Hawai'i, and fail the most basic political-historical requirement of all – that the former political entity the Akaka bill is ostensibly recognizing actually existed.²⁹² The exclusion of the descendants of non-ethnic Hawaiian citizen-subjects from the Akaka bill's proposed government sustains the contention that the Akaka bill is an unconstitutional attempt to organize a racial group into an ad hoc confederacy, rather than a constitutional recognition of an Indian group with a "a long and continuous history of separate self-governance."²⁹³

C. *Summary*

Even if Congress possesses the authority to federally recognize an ethnic Hawaiian governing entity, in order for a court to uphold the Akaka bill, it must accept several postulates that contradict the political history of

documents/philosophy.pdf.

²⁸⁹ H.R. 862 § 1(19).

²⁹⁰ See *infra* Part II.xxx.

²⁹¹ See *infra* Part II.xxx.

²⁹² This is essentially the first prong of the Cohen test, which requires that the Indian group in question must have been a sovereign political entity at the time the United States was formed. See FEDERAL INDIAN LAW, *supra* note 2 at 2. See also Sullivan Review, *supra* note 16 at 367.

²⁹³ USCCR Letter, *supra* note 12.

Hawai‘i and stretch to breaking the bounds federal common law places on Express Grants. If a court does so, it must grapple with one more inquiry – the uncomfortable question of how much blood matters in equal protection analysis of special legislation for ethnic Hawaiians.

VIII. HOW MUCH BLOOD MATTERS

A. *Blood’s Longstanding Significance in Hawai‘i*

How much blood matters is a question quite apart from the blood barrier that divided ethnic Hawaiians in the pre-history and Kingdom eras. Historically, the issue was not how much ethnic Hawaiian blood an individual possessed but what type – chief or commoner. This chief-commoner blood division determined who ruled and who followed, who labored and who was served. Near the middle of the nineteenth century this same blood-type division determined who was entitled to receive large, fee simple tracts of land, and who was eligible to obtain far smaller pieces.²⁹⁴ Possession of ali‘i blood further determined Hawai‘i’s monarchs until the end of the Kingdom of Hawai‘i in 1893.

In 1920, the Hawaiian Homes Commission Act broke from the chief-commoner blood division by defining native Hawaiians as individuals possessing at least 50% ethnic Hawaiian blood. The practical result of the HHCA are three blood-based strata that exist in Hawai‘i today: (i) *native Hawaiian* (universally eligible for Hawaiian Homesteads as well as ethnic Hawaiian entitlement programs); (ii) *ethnic Hawaiian* (ineligible for Hawaiian Homesteads, but possessing some ethnic-Hawaiian blood and thus eligible for certain private, state, and federal entitlement programs requiring proof of ethnic Hawaiian ancestry); and (iii) *non-Hawaiian* (everyone else, including the descendants of non-ethnic Hawaiian citizens of the former Kingdom of Hawai‘i).²⁹⁵ In effect, while an individual may be ethnic Hawaiian, he/she is not *as* ethnic Hawaiian as a native Hawaiian, but nevertheless *is* ethnic Hawaiian as compared to a non-Hawaiian. Of course, a non-Hawaiian cannot become an ethnic Hawaiian. Nor can ethnic Hawaiians become native Hawaiians. Blood matters. Whether and how much blood matters must be “plumb[ed]”²⁹⁶ because blood is a barrier preventing individuals from

²⁹⁴ Whereas approximately 240 ali‘i obtained fee simple land tracts totaling 1.5 million acres via individual mahele (division) with Kamehameha III, approximately 9,000 maka‘ainana obtained a combined 30,000 acres via the Kuleana system. See KUYKENDALL I, *supra* note 24 at 287-94.

²⁹⁵ As noted previously, the descendants of non-ethnic Hawaiian citizens do not occupy a place in the common vernacular of Hawai‘i. See *supra* note 2245 (discussing how and why the terminology utilized herein differs from most commentators).

²⁹⁶ Natalie Coates, *Who are the Indigenous Peoples of Canada and New Zealand?*, 12 J. SOUTH PACIFIC L. 49, 55 (2008) (“who is to plumb the depths of the human heart when people

choosing whom they want to be and determining what governmental treatment they will receive.²⁹⁷

B. *How Much Blood Matters*

Justice Breyer's concurrence (the "concurrence") in *Rice* broached the question of how much blood matters in the context of ethnic Hawaiians,²⁹⁸ bluntly cautioning that a quantum inclusive of individuals possessing as little as one five-hundredth²⁹⁹ ethnic Hawaiian blood is "beyond all reasonable limits"³⁰⁰ because it includes individuals who possess scant amounts of preferred ethnic Hawaiian blood.³⁰¹ What the

choose what they want to be") (internal citation omitted).

²⁹⁷ See *Fullilove v. Klutznick*, 448 U.S. 448, 547 (1980) (J. Stevens, dissenting), overruled by *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) ("The ultimate goal must be to eliminate entirely from governmental decisionmaking such irrelevant factors as a human being's race. The removal of barriers to access to political and economic processes serves that goal. But the creation of new barriers can only frustrate true progress . . . such protective barriers reinforce habitual ways of thinking in terms of classes instead of individuals. Preferences based on characteristics acquired at birth foster intolerance and antagonism against the entire membership of the favored classes.").

²⁹⁸ *Rice v. Cayetano*, 528 U.S. 495, 526-27 (2000) (J. Breyer, concurring).

²⁹⁹ The blood quantum at issue in *Rice*, and employed by the Akaka bill (as well as nearly every piece of special legislation for ethnic Hawaiians) is a hypodescent eligibility criterion. A hypodescent-rule means that possession of a "single drop" of a particular type of blood defines an individual entirely of that ethnicity or race. See Floyd James Davis, *WHO IS BLACK?* 4-5, 15 (Penn. State. Univ, 1991) [hereinafter *WHO IS BLACK*] (explaining the concept and origins of the rule, and noting that a particularly nefarious aspect of hypodescent rules in the context of African-Americans was that possession of a traceable amount of black ancestry automatically made that individual black – "[b]lacks had no other choice" – an idea that "helped to justify slavery and was later used to buttress the castelike [sic] Jim Crow system of segregation").

³⁰⁰ See *Rice*, 528 U.S. at 526-27 (2000) (J. Breyer, concurring):

There must, however, be some limit on what is reasonable, at the least when a State (which is not itself a tribe) creates the definition. And to define that membership in terms of 1 possible ancestor out of 500, thereby creating a vast and unknowable body of potential members-leaving some combination of luck and interest to determine which potential members become actual voters-goes well beyond any reasonable limit.

³⁰¹ For his part, Justice Stevens contended in dissent that Justice Breyer's concurrence "does not identify a constitutional defect." *Rice*, 528 U.S. at 535, fn. 11 (J. Stevens, dissenting). By characterizing a hypodescent eligibility criterion as creating a "class of descendants," *id.* at 535, rather than an explicit racial grouping, Justice Stevens determined that a hypodescent eligibility criterion is "thus both too inclusive and not inclusive enough to fall strictly along racial lines." See *Rice* at 528 U.S. at 527- 47 (J. Stevens, dissenting). But see *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995):

[U]nder our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's

concurrence³⁰² broadly suggests is that when blood is the predicate factor in according or denying governmental benefits a reasonable blood quantum is necessary.³⁰³ Put another way, in Justice Breyer's view, eligibility for ethnic Hawaiian entitlement programs should be based upon a reasonable, not scant, amount of ethnic Hawaiian blood.

Of course, that blood quantum matters is not a novel legal³⁰⁴ or practical³⁰⁵ observation. However unsavory,³⁰⁶ blood quantum analysis is

focus upon the individual . . . To pursue the concept of racial entitlement – even for the most admirable and benign of purposes – is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.

³⁰² Under the view that Congress possesses more latitude than States to enact special legislation, Justice Breyer's concurrence may only apply to a State's, not Congress', ability to enact race based laws. *See Rice*, 528 U.S. at 526-27 (J. Breyer, concurring) (“There must, however, be some limit on what is reasonable, at the least when a State (which is not itself a tribe) creates the definition.”). *See also* Bartolomucci et al. *supra* note 264 at 27-28.

³⁰³ *Rice*, 528 U.S. at 526 (J. Breyer, concurring). The concurrence also suggested that if the racial eligibility criterion at issue in *Rice* utilized a blood quantum on par to those utilized in Indian legislation (or by individual Tribes) then it may satisfy equal protection. The concurrence cited as examples: (a) the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1629h, which defines Native Alaskan as a United States citizen possessing one quarter or more native Alaskan Indian blood (*Id.* at 1601(a)); (b) the Revised Constitution of the Jicarilla Apache Tribe, Art. III (requiring three-eighths Jicarilla Apache Indian blood unless name on 1968 roll); (c) the Revised Constitution Mescalero Apache Tribe, Art. IV (requiring one-fourth degree Mescalero Apache blood unless member's name is on the 1936 roll); and (d) the Constitution of the Choctaw Nation of Oklahoma, Art. II (political historical criterion requiring than tribal members lineally descend from listed on the tribe's 1906 roll).

Similarly, the majority of federally recognized Indian tribes self impose a blood quantum requirement higher than the Akaka bill's to determine tribal eligibility, Gover, *supra* note 156 at 251 (noting that seventy percent of tribes utilize a blood quantum requirement). Self-imposed tribal blood quantum range from as little as one sixty fourth ethnic Indian blood to fifty percent. Beckenhauer, *supra* note 153 at 167.

Yet, the Concurrence stopped short of labeling a hypodescent eligibility criterion as necessarily violating equal protection, holding: “[t]his is not to say that Hawaii's definitions themselves independently violate the Constitution[,] * * * it is only to say that the analogies they here offer are too distant to save a race-based voting definition that in their absence would clearly violate the Fifteenth Amendment.” *Rice*, 528 U.S. at 527.

³⁰⁴ *E.g.* Kanehe, *supra* note 13 at 881-82 (2001). *See* Xuanning Fu & Tim B. Heaton, *Source Implications of Status Exchange in Intermarriage for Hawaiians and Their Sovereignty Movement*, 42 SOCIOLOGICAL PERSPECTIVES 97, 112 (1999) (noting that since the majority of ethnic Hawaiians possess a minority proportion of ethnic Hawaiian blood “[i]t is already difficult to identify who is an ethnic Hawaiian [as a matter of blood], and it will be even more difficult among future generations.”).

³⁰⁵ *See* HAWAIIAN SOVEREIGNTY: DO THE FACTS MATTER? *supra* note 264 at 4 (“The failure to define “Hawaiian” in terms of a reasonable level of blood quantum already creates a statistical nightmare in analyzing matters related to race. It's a failure

an issue many courts have grappled with in the context of both Indians and ethnic Hawaiians.³⁰⁷ One ethnic Hawaiian scholar put it bluntly: “Koko [blood] counts.”³⁰⁸ But commentators have not fully explored how much blood matters in the context of ethnic Hawaiians. This paper interprets Justice Breyer’s assertion as essentially this: if ethnic blood is significant enough to legally discriminate between ethnic and non-ethnic individuals – and it is, according to prominent ethnic Hawaiian scholars³⁰⁹ – then

that renders suspect many generalizations involving groups of Hawai‘i residents, such as measures of social welfare, crime and prison records, susceptibility to illnesses, and so forth.”). See Mo‘olelo, *supra* note 227 at 375 (“‘Ae. ‘Oia ka nīnau maoli (That is the real question). Who the hell are we?”); Jere Krischel, *Hawaiian Misrecognition*, HAW. REP., Feb. 27, 2007, available at <http://www.hawaii-reporter.com/story.aspx?1632aa4e-06ff-462b-b2e0-56cb47f1cd5b>.

³⁰⁶ Greg Guedel, *Wondering if You’re an Indian? Ask the Ninth Circuit*, Feb. 13, 2009, Native Am. Legal Update, available at <http://www.nativelegalupdate.com/2009/02/articles/wondering-if-youre-an-indian-ask-the-ninth-circuit/> (“Conducting mathematical calculations on a human being’s racial ancestry for the purpose of deciding which laws apply to that person harkens back to the darkest days of American jurisprudence.”).

³⁰⁷ See, e.g., *Vešina v. United States*, 245 F. 411 (8th Cir.1917) (women 1/4 to 3/8 Chippewa Indian held to be Indian); *Sully v. United States*, 195 F. 113 (8th Cir.1912) (1/8 Indian blood held sufficient to be Indian); *St. Cloud v. United States*, 702 F.Supp. 1456, 1460 (D.S.D.1988) (15/32 of Yankton Sioux blood sufficient to satisfy the first requirement of having a degree of Indian blood); *Goforth v. State*, 644 P.2d 114, 116 (Okla.Crim.App.1982) (requirement of Indian blood satisfied by testimony that person was slightly less than one-quarter Cherokee Indian); *Makah Indian Tribe v. Clallam County*, 73 Wash.2d 677, 440 P.2d 442 (1968) (1/4 Makah blood sufficient to satisfy Indian blood requirement); *Day v. Apoliona*, 2008 WL 2511198 (D. Haw. 2008) (unreported in F.Supp.2d) (group of native Hawaiian plaintiffs challenging the Office of Hawaiian Affairs use of trust funds for the benefit of ethnic Hawaiians “without regard to blood quantum”). See also *United States v. Maggi*, 598 F.3d 1073, 1080-81 (9th Cir., 2010) (analyzing defendant’s Indian ancestry, but not resolving the sufficiency thereof, as “Maggi has just one full-blooded Blackfeet ancestor in seven generations or, put another way, 1/64 Blackfeet blood corresponds to one great-great-great-great-great grand-parent who was full-blooded Blackfeet, and sixty three great-great-great-great-great grandparents who had no Blackfeet blood,” and noting that “Maggi argues that this amount is so small as to render him not an Indian under the statute.”).

³⁰⁸ Trisha Kehaulani Watson, *The Hawaiian “N” Word: On Being “Native”*, HONOLULU ADVERTISER, May 27, 2009, available at <http://hehawaiiiau.honadvblogs.com/2009/05/27/the-hawaiian-“n”-word-on-being-“native”/> (last visited Nov. 3, 2009) (observing that blood quantum is positively correlated with the number of indigenous Hawaiian ancestors an individual descends from, which should positively correlate with “priority on opportunities because [higher quantum individuals] were born with greater kuleana [responsibility] and carry greater responsibility.”).

³⁰⁹ See Mo‘olelo *supra* note 227 at 362 (stating that “ancestry – that is, some kind of [ethnic] Hawaiian blood, however minute – is [] a necessary precondition to being [an authentic] Hawaiian”); *Id.* at 365 (“[R]ace definitely matters to us. It is important to us that we are, in the first place, [ethnic] Hawaiian). See also Watson, *supra* note 308 (“So anyone with even one single ancestor who resided here prior to western

ethnic blood is sufficiently significant to distinguish between individuals possessing disparate proportions of ethnic blood.

The question is how much ethnic Hawaiian blood should special legislation for ethnic Hawaiians require.³¹⁰ That the vast majority – ninety percent – of ethnic Hawaiians are comprised of less than fifty percent ethnic Hawaiian blood makes this question particularly pertinent.³¹¹ By

contact is “Hawaiian” as far as I’m concerned.”).

³¹⁰ This issue of how much blood matters has been litigated several times in the context of who is African-American. Most infamous is *Plessy v. Ferguson*, 163 U.S. 537 (1896), in which the Supreme Court took judicial notice of the fact that African-Americans were commonly defined as individuals possessing any amount of African ancestry, notwithstanding the plaintiff’s claim that since he possessed only one-eighth African blood he was not in fact black. *But see Plessy v. Ferguson*, 163 U.S. 537 (1896) (J. Harlan, dissenting) (“[I]n view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.”). *See also* WHO IS BLACK, *supra* note 299 at 9 (discussing *Plessy* as well as other cases and statutes from Mississippi and Louisiana, affecting the legal definition of an African-American).

³¹¹ The last (2000) census counted 239,655 ethnic Hawaiians. Office of Hawaiian Affairs, *Statistical Profile of the Hawaiian Population in Hawai‘i*, available at www.oha.org/pdf/databook_6_02.pdf (last visited Nov. 3, 2009). One credible estimate of the number of ethnic Hawaiians in 2010 is 484,000. Kamehameha Schools / Bishop Estate, *Contemporary Native Hawaiian Population Baseline Counts and Estimates*, available at www.ksbe.edu/SPI/PDFS/Reports/...Well.../BaselineForecasts.pdf (last visited Nov. 3, 2009).

In 2009 the Office of Hawaiian Affairs counted 46,850 native Hawaiians. *See* Office of Hawaiian Affairs, Summary of Proposed Amendments to S. 1011 Substitute Amendment, available at http://www.oha.org/pdf/100128_Akaka_OHA_S1011_Summary.pdf. *But see* Chief Maui Loa, *supra* note 221 (estimating the amount of native Hawaiians as only 3,500, and the number of full-blooded ethnic Hawaiians at 400). Assuming there are 46,850 native Hawaiians out of an estimated 484,000 ethnic Hawaiians, native Hawaiians comprise less than ten percent of the total ethnic Hawaiian population.

Others doubt the existence of a scientific basis to precisely determine blood quantum. *See* Pacific Law Foundation / Cato Institute, Amicus Brief Submitted in *Hawai‘i v. OHA*, available at www.cato.org/pubs/legalbriefs/Hawaii_v_OHA.pdf (“There is no taxonomic basis in biology or physiology to support racial distinctions used by the U.S. Census.”) (citing Barry Edmonston & Jeffrey S. Passel, HOW IMMIGRATION AND INTERMARRIAGE AFFECT THE RACIAL AND ETHNIC COMPOSITION OF THE U.S. POPULATION, IN IMMIGRATION AND OPPORTUNITY: RACE, ETHNICITY, AND EMPLOYMENT IN THE UNITED STATES at 383 (Frank D. Bean & Stephanie Bell-Rose eds., 1999)). *See also* Adam Gustafson & Katherine Gustafson, *Hawaii Department of Health Lifts Race-Requirement for Birth Certificates to Avoid Defending the Out-Dated Policy in Federal Court*, HAW. REPORTER, Dec. 9, 2009, website unavailable, article archived at <http://www.angelfire.com/big09a/BirthCertificatesRaceRequired.html> (“State-imposed race-labeling has caused enough division and suffering in this country. * * * Hawaii’s people come from all over the globe; that’s what makes Hawaii great. But when the State registers the births of her residents’ children, it should see them all equally, as human beings and American citizens.”).

contrast African-Americans possess, on average, eighty-seven percent African ancestry.³¹²

To be sure, there are compelling philosophical arguments asserting that an individual cannot possess a negligible amount of ethnic blood,³¹³ as Justice Breyer suggests.³¹⁴ And that blood quantum paradigms are post-colonial constructs inapplicable to ethnic Hawaiians because possessing ethnic blood in any amount, however minute, irrevocably and exclusively links an individual to that ethnicity's history and genealogy.³¹⁵ Arguments supporting a hypodescent eligibility criterion³¹⁶ for ethnic Hawaiians simultaneously contend that ethnic Hawaiian blood is a necessary precondition to authentically identify as Hawaiian, but blood quantum cannot determine relative levels of ethnic or ancestral connection.³¹⁷ Put

³¹² See Sarah A. Tishkoff, et al., *The Genetic Structure and History of Africans and African Americans*, 324 *SCIENCE EXPRESS* 1035 (Apr. 30, 2009), *PDF available at* <http://www.science-mag.org/cgi/data/1172257/DC1/1>, *abstract available at* <http://www.sciencemag.org/cgi/content/abstract/1172257>.

³¹³ E.g. J. Kehaulani Kauanui, *HAWAIIAN BLOOD: COLONIALISM AND THE POLITICS OF SOVEREIGNTY AND INDIGENEITY (NARRATING NATIVE HISTORIES)* 171, 10 (Duke Univ. Press, 2008) [hereinafter *HAWAIIAN BLOOD*] (arguing that blood quantum “neglects Hawaiian genealogical and kinship practices which are typically inclusive” and “embedded in indigenous epistemologies whereby peoplehood is rooted in the land”).

³¹⁴ See *Id.* at 181-82 (asserting that Justice Breyer's concurrence wrongly assumes “that such matters of ancestry are both arbitrary and irrelevant” and arguing that it is blood quantum, not ancestry, that is arbitrary).

³¹⁵ Mo'olelo, *supra* note 227 at 362; Lisa Kahaleole Hall, *Hawaiian at Heart and Other Fictions*, 17 *CONTEMPORARY PACIFIC* 402, 405 (2005) (“Concepts such as “part” and “full,” 50 percent, or more and less than 50 percent, are colonial constructions that threaten to divide Hawaiians from each other”); Rohrer, *supra* note 190 at 12 (“The blood quantum policy is racist because it works to redefine Hawaiian identity from a genealogical link to the land to a mathematical fraction. It also works towards the end of lowering the numbers of ‘authentic’ Hawaiians, and thus dispossessing other Hawaiians from the land bases entitled.”) (citations omitted); See Jonathon Kamakawiwo'ole Osorio, *On Race, Blood Quantum, and Ancestry*, *HONOLULU ADVERTISER*, Nov. 20, 2009, *available at* <http://hehawaiiiau.honadvblogs.com/2009/11/20/jon-osorio-on-race-blood-quantum-and-ancestry/> (last visited Nov. 26, 2009) (“I am calling on all the Hawaiian organizations, even the Homestead Associations to denounce blood quantum as a racist law.”). See also *HAWAIIAN BLOOD*, *supra* note 313 at 182 (proposing that non-ethnic Hawaiians' fixation with blood quantum, rather than ancestry, stems from feeling “uneasy about indigeneity since this [ancestral] rootedness [sic] throws into question the place of the neocolonial settlers”). A number of Pacific island cultures, including the Maori of New Zealand, share these sentiments. See, e.g., Coates, *supra* note 296 (“The concept of dividing our blood into parts, how Māori are you, flies in the face of one of our strongest values, the concept of whakapapa, our genealogy.”) (internal citations omitted).

³¹⁶ See *supra* note 299 (discussing hypodescent rules).

³¹⁷ Compare Mo'olelo, *supra* note 227 at 361 (“For if being a descendant of a Native makes one Native, what if anything does blood quantum have to do with who we are? Does the dilution of Hawaiian ancestry in any significant way change the ethnicity of the individual?”) with *HAWAIIAN BLOOD*, *supra* note 313 at 171-74 (noting that a

another way, ethnic blood is a threshold requirement for an authentic Hawaiian identity, but blood does not positively correlate with ‘Hawaiian-ness.’³¹⁸

A court, however, may find these arguments unavailing. To the extent that an ethnic group self-defines by possession of ethnic blood, blood quantum will be an issue, and a practical one at that. While proponents of a hypodescent rule for ethnic Hawaiians frame the issue of blood as one of ancestry³¹⁹ (and the Supreme Court framed it in *Rice* as one of race, finding ancestry to be a “proxy” for race),³²⁰ the basic fact remains that possession of a relatively greater proportion of ethnic blood more closely ties an individual to a particular ethnic history or genealogy as compared to an individual possessing a lesser proportion of ethnic blood – blood amount counts.³²¹ Reliance on blood – and ethnic Hawaiians self define by blood – necessarily prompts the question of how much blood.

This fact is not lost on many of the most passionate supporters of ethnic Hawaiian rights. For instance, “the oldest and [] still largest Native initiative for sovereignty,” *Ka Lahui Hawai‘i*,³²² extends full citizenship to [ethnic] Hawaiians possessing less than fifty percent ethnic Hawaiian blood, but mandates that half of its legislative body be composed of individuals possessing at least fifty percent ethnic Hawaiian blood.³²³ Another sovereignty group, the Sovereign Nation of Hawai‘i, limits eligibility to native Hawaiians (fifty percent quantum) without exception.³²⁴ It is a remarkable paradox that prominent Hawaiian

former trustee of the Office of Hawaiian Affairs considers possession of fifty percent Hawaiian blood determinative of who is an authentic, indigenous Hawaiian, and who is not). *See also* Watson *supra* note 308.

³¹⁸ One scholar appears to contend that individuals opposing hypodescent blood quantum “cannot understand the complexity of ancestry. It’s about political heritage, culture, history, ancestry – [ethnic Hawaiians] are a Nation, a people, a family.” *See* Trisha Kehaulani Watson, [Comment 4] *A Stand on the Akaka Bill*, HONOLULU ADVERTISER, Dec. 16, 2009, available at <http://hehawaiiu.honadvblogs.com/2009/12/16/a-stand-on-the-akaka-bill/#comments>.

³¹⁹ *E.g.* Hall, *supra* note 315 at 405 (“The indigenous conception of Hawaiian identity is very different. Hawaiian identity lies in a genealogical relationship to ‘aumakua (ancestral spirit), ‘aina (the land), and kanaka (other Hawaiians). Hawaiians are linked through ‘aumakua, ancestral spirits, and through makua, our parents.); Watson, *supra* note 308 (“being Hawaiian isn’t about race, it’s about ancestry”).

³²⁰ *See Rice v. Cayetano*, 528 U.S. 495, 514 (2000) (“Ancestry can be a proxy for race. It is that proxy here.”).

³²¹ *See* Watson, *supra* note 308.

³²² *See* Mililani B. Trask, *Ka Lahui Hawaii: a Native Initiative for Sovereignty*, available at <http://www.hawaii-nation.org/turningthetide-6-4.html>.

³²³ Mo‘olelo, *supra* note 227 at 364.

³²⁴ *See* Maui Loa, *supra* note 229 (limiting eligibility in the Sovereign Nation of

sovereignty groups utilize a high blood quantum to distinguish between ethnic Hawaiians while prominent ethnic Hawaiian scholars decry the existence of blood quantum in American jurisprudence.³²⁵

If it is true, however, that any amount of ethnic Hawaiian blood is important because it links an individual to ethnic Hawaiian ancestral history then it is equally true that an individual's non-ethnic Hawaiian ancestry ties him/her to that particular race or races ancestral history. If a person possesses a greater proportion of non-ethnic Hawaiian blood it follows that that person possesses a stronger link – as a matter of blood – to his/her non-ethnic Hawaiian ancestry because he/she possesses a greater proportion of it.³²⁶ This is not to wrongly presume, however, that an individual's “‘blood amount’ correlates to one's cultural orientation and identity.”³²⁷ In and of itself blood does not – cannot – establish an individual's cultural orientation and identity.³²⁸ The mere assertion that

Hawai'i to individuals possessing fifty percent ethnic Hawaiian blood).

³²⁵ Attempting to explain this paradox, one scholar suggests “that blood quantum discrimination [may be] acceptable to [ethnic] Hawaiians so long as the government means well by it.” Mo'olelo, *supra* note 227 at 364.

³²⁶ By contrast, a hypodescent rule for ethnic Hawaiians essentially holds that an individual's minority proportion of ethnic Hawaiian blood preempts his/her majority proportion of non-ethnic Hawaiian ancestry. This is effectively a reverse-hypodescent rule. While a single drop of African ancestry once subjugated an individual to unequal treatment at law (under the repugnant idea that black blood was so inferior as to make the entire individual a lesser human being), possession of a single drop of ethnic Hawaiian blood qualifies an individual for unequal, though preferential, treatment at law. Put differently, the lack of a single drop of ethnic Hawaiian blood denies an individual access to equal treatment at law. There is no logical basis to justify this position short of ascribing greater intrinsic value to ethnic Hawaiian ancestry *vis a vis* non-ethnic Hawaiian ancestry. And unlike African-Americans, there is no history of institutionalized discrimination against ‘one-drop’ ethnic Hawaiians that would provide a moral justification for preferential legal treatment today. See *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980) (J. Stevens, dissenting), *overruled by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (“Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification. Quite obviously, the history of discrimination against black citizens in America cannot justify a grant of privileges to Eskimos or Indians.”).

³²⁷ HAWAIIAN BLOOD, *supra* note 313 at 2 (identifying as the fundamental failure of blood quantum logic that it wrongly presumes blood quantum is positively correlated with cultural identity); *but see* Watson, *supra* note 308 (“those with more blood quantum have also (generally) maintained stronger ancestral ties to Hawai'i”).

³²⁸ New Zealand again provides a useful parallel. See Coates, *supra* note 296 at 53:

[New Zealand's hypodescent definition of Maori] allows people to claim that they are “Māori” solely for the [legal] advantages that entail without regard to any of the other factors that make Māori a distinct ethnic group. Thus, the New Zealand law currently permits a person who has never been involved in the Māori community, never intends to be involved in the Māori community, has absolutely no

blood, as opposed to reason and choice, determines an individual's cultural orientation or identity may be a particularly virulent form of racism.

Racism is the lowest, most crudely primitive form of collectivism. It is the notion of ascribing moral, social or political significance to a man's genetic lineage—the notion that a man's intellectual and characterological traits are produced and transmitted by his internal body chemistry. Which means, in practice, that a man is to be judged, not by his own character and actions, but by the characters and actions of a collective of ancestors. * * * Like every form of determinism, racism invalidates the specific attribute[,] which distinguishes man from all other living species: his rational faculty. Racism negates two aspects of man's life: reason and choice, or mind and morality, replacing them with chemical predestination.³²⁹

Nor is cultural orientation or identification what special legislation for ethnic Hawaiians requires. Blood is at issue here because blood determines and denies eligibility for ethnic entitlement programs.³³⁰ If an individual asserts his/her primary identity as Hawaiian, while possessing a minority proportion of ethnic Hawaiian blood, that individual does not do so as a matter of blood.³³¹ Rather, that individual does so upon cultural affinity, orientation, identity, or cultural association.³³² In the legal context,

affinity with anything to do with the Māori culture, its values, its principles, or its beliefs, to legally classify as being "Māori". On the other hand there are also people such as Professor John Moorfield (a former professor of Māori language at the University of Otago). He is a Pākehā (a European person) but an expert in the Māori language and has contributed greatly to Māori society. His books are used in most universities to teach people how to speak Māori. He has a great affinity to the Māori culture, but no blood. Under the NZ law he does not qualify as a "Māori".

³²⁹ Ayn Rand, *Racism*, available at <http://aynrandlexicon.com/lexicon/racism.html> (last visited Nov. 3, 2006).

³³⁰ By contrast, blood quantum might not be as critical an issue if special legislation for ethnic Hawaiians took the "cultural sovereignty" approach endorsed by several scholars and Indian tribes. *See supra* notes 2, 171.

³³¹ *See WHO IS BLACK*, *supra* note 299 at 7 (observing that a former president of the National Association for the Advancement of Colored People ("NAACP") possessed "no more than one sixty-fourth African Black" blood, and therefore, while he identified with African-Americans, African-American "was not his correct genetic classification").

³³² *See Mo'olelo*, *supra* note 227 at 362 (ethnic Hawaiian scholar relating that "the simple truth" of why he self-identifies as Hawaiian, rather than with his apparently majority proportions of Portuguese, Chinese, and German, is that "every institution that had anything to do with my rearing: family, church, school (especially teachers), and

these may be pretexts, or to borrow Justice Kennedy's language in *Rice* "prox[ies]"³³³ for ideology – a basis that cannot sustain unequal treatment.

This does not demean any individual who chooses to identify with his/her minority ethnicity. Nor should this preclude an individual who possesses a minority proportion, or none at all, of a particular ethnicity from identifying with that ethnicity. But it is meant to plainly observe that where an individual possesses a minority percentage of the particular ethnicity he/she identifies with, he/she does not do so upon blood, but upon ideology, for in his/her case blood would dictate a different ethnic identification.

An ethnic blood quantum of 50.01% – a preponderance of preferred blood – is logically necessary to establish legitimate racial identity as a matter of blood³³⁴ where possession of that blood is the predicate factor for eligibility.³³⁵ A criterion requiring less than a preponderance of race is in effect relying upon an inversely proportional quantity of ideology.³³⁶ Although 50.01% may not have been the figure Justice Breyer had in mind when he penned his concurrence in *Rice*, it is the logical conclusion of his suggestion that blood matters.

other children in the all-Hawaiian community" identified him as Hawaiian).

³³³ See *Rice v. Cayetano*, 528 U.S. 495, 514 (2000).

³³⁴ For many, this is an uncomfortable position because it renders legally "inauthentic" the vast majority of ethnic Hawaiians, including this article's ethnic Hawaiian author. See HAWAIIAN BLOOD, *supra* note 313 at 25. Yet, it is a view shared in principal by many half, majority, and full blooded Indians and native Hawaiians. See Brownell, *supra* note 153 at 312 (quoting a full-blooded Chippewa who takes a "hard line" against diluting tribal blood quantum, preferring instead that the BIA would impose a fifty percent Chippewa blood quantum, notwithstanding that such a high blood quantum would preclude her granddaughter from tribal membership); *supra* note 284; Watson, *supra* note 308. *C.f.* Judith A. Bennet, NATIVES AND EXOTICS: WORLD WAR II AND ENVIRONMENT IN THE SOUTHERN PACIFIC 36-37 (Univ. Haw. Press, 2009) (noting that after the second world war, some in Western Samoa favored reducing the blood quantum from seventy-five percent to fifty percent in order to account for the fact that, since Allied servicemen fathered "so many" children, their communities could never be "pure Samoan").

³³⁵ See Sullivan Review, *supra* note 16 at fn. 8 (citing a litany of state and federal statutes defining Hawaiian, native Hawaiian, and Native Hawaiian, and observing that "the operative test is purely one of race, or as the Court put it in *Rice v. Cayetano*, ancestry used as a proxy for race. There are no other nonracial or race-neutral criteria such as membership in a tribe, residence within a geographic region or adherence to a particular religion or lifestyle which makes one a 'Native Hawaiian').

³³⁶ See Gould, *supra* note 155 at 739 ("A person whose blood quantum is as little as one-sixty-fourth that of a full-blooded Polynesian (a figure suggested by Hawaii), and who might ascribe fully to aboriginal Hawaiian culture, is not, in any meaningful sense, a biological Polynesian.").

C. *Quantum Options*

Yet, a 50.01% requirement would, for lack of a majority proportion of blood, exclude individuals who are 50% “X” and 50% “Y.” It would be senseless to preclude an individual possessing equal racial components from asserting either of them as his/her legal identity. While that individual does not possess a majority proportion of any one particular ethnicity, he/she does not possess a minority proportion either. Under this view, a fifty percent quantum makes sense.

Somewhat problematic, however, with a fifty percent quantum is that it precludes an individual possessing equal parts of more than two ethnicities from establishing a legal, racial identity.³³⁷ Consider, for instance, an individual possessing equal parts, twenty-five percent, of four different ethnicities. He/she could not legally assert any of them as his/her racial identity for lack of either a majority or minority proportion of preferred blood. A fifty percent quantum, then, in effect asserts that fifty percent is the amount of blood necessary to legally establish a racial identity.³³⁸

³³⁷ Whether it is sound policy to permit an individual to legally establish multiple, racial identities for the sake of obtaining access to federal entitlement programs is beyond the scope of this paper.

³³⁸ A useful parallel is the debate surrounding what percentage of Kona grown coffee should be necessary to label coffee blends as “Kona.” Kona Coffee is acclaimed as “one of the [world’s] most unique, gourmet coffees.” Chuck Furuya, *World-class Kona Coffee Worth Savoring*, HONOLULU STAR BULLETIN, Feb. 25, 2009, available at http://www.starbulletin.com/columnists/bytheglass/20090225_World-class_Kona_coffee_worth_savoring.html (last visited Nov. 5, 2009). Currently, however, Hawai‘i State law permits the use of the name “Kona Coffee” if a blend possesses only ten percent Kona-grown beans. While some farmers and coffee retailers benefit from the ten-percent criterion (as it allows for larger retail volumes, albeit at a lower price), the result of the low criterion is that “Kona coffees can be second rate.” Stewart Yerton, *One out of Ten*, HONOLULU STAR BULLETIN, Feb. 12, 2006, available at <http://archives.starbulletin.com/2006/02/12/business/story01.html> (last visited Nov. 4, 2009). Another commentator characterizes a ten percent Kona-grown criterion as “so ridiculously low as to be insulting to coffee drinkers everywhere.” *What Exactly is Kona Coffee*, Coffeopolis, July 24, 2007, available at <http://coffeopolis.com/2007/07/24/what-exactly-is-kona-coffee/> (last visited Nov. 3, 2009).

As a result, significant factions of Kona Coffee farmers are adamant that the State raise the minimum Kona-grown bean requirement in order to preserve Kona Coffee’s prestigious reputation. Mixing low percentages of Kona beans with inferior beans grown elsewhere compromises Kona coffee’s reputation. Various farmers and farmers’ associations have proposed a 50%, 51%, 75%, and 100% requirement, respectively. Yerton, *supra*. According to the president of the Kona Coffee Farmers Association, “[b]lends with only 10 percent Kona coffee are not worthy of the name.” Pat Gee, *Pushing 50*, HONOLULU STAR BULLETIN, Nov. 9, 2009, available at http://www.starbulletin.com/news/20091109_pushing_50.html (last visited Nov. 10, 2009). Proponents of a high Kona bean quantum look to Napa Valley, which requires that wines labeled “Napa” possess seventy-five percent Napa-grown grapes. Yerton, *supra*.

A second option is a hundred percent blood quantum. This is equally as nonsensical, however, as a hypodescent rule. If it is unreasonable to legally categorize as ethnic Hawaiian an individual possessing a scant amount of ethnic Hawaiian blood then it is equally unreasonable not to classify as ethnic Hawaiian an individual possessing ninety-nine percent ethnic blood.

A third option is to require a majority proportion of a particular preferred blood, without imposing a blood quantum. This rule too, however, will lead to results as unreasonable as those Justice Breyer cautioned against. For instance, a multi-ethnic individual possessing one-eighth ethnic Hawaiian blood (12.5%) and one-sixteenth (6.25%) of fourteen other ethnicities could legally assert himself as, by blood, an ethnic Hawaiian. Yet, an individual possessing three times that amount of ethnic Hawaiian Blood (37.5%), but also possessing a proportion of any another ethnicity greater than 37.5%, could not legally assert himself as an ethnic Hawaiian. Such a result would render baseless the premise that blood matters. And blood matters where an ethnic group self defines by blood, and eligibility for special legislation favoring that ethnic group is predicated upon blood.

D. *Favored Option*

A fifty percent blood quantum is the most practicable requirement. A fifty percent quantum ensures that an individual's legal identity is based upon, at minimum, equal parts of blood and ideology. Fifty percent is a hard line, but arguably the best – if “sordid”³³⁹ – answer to the question of how much blood matters. Less sordid would be eliminating racial criterions, utilizing instead need-based eligibility criteria for remedial programs, cultural criteria for cultural programs, and political history for federal recognition.³⁴⁰

See Bruce Corcker, *Why Aren't Hawaii Coffee Businesses Protected from Truth in Labeling Issues?*, HAW. REPORTER, Feb. 9, 2010, available at <http://hawaiiireporter.com/story.aspx?f3ce821a-2420-4a75-af60-fbaa05966404> (demanding that the Hawaii State government “end [] the use of the "Kona" name on packages of 90% foreign-grown coffee, and [] put in place the types of protection for us that other state legislatures have provided to their farmers”).

³³⁹ *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 511 (C.J. Roberts, dissenting) (“It is a sordid business, this divvying us up by race.”). *See also Fullilove v. Klutznick*, 448 U.S. 448, 547 (1980) (J. Stevens, dissenting), *overruled by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (“The ultimate goal must be to eliminate entirely from governmental decisionmaking such irrelevant factors as a human being's race.”).

³⁴⁰ *See* Guedel, *supra* note 306:

“A far better way for Tribal/federal jurisdiction questions to be analyzed is based on treaty status, with Tribal members being subject to either Tribal or federal jurisdiction based on agreements between their Tribe and the US government . . . Such a policy would properly

IX. CONCLUSION

The Akaka bill is novel in that it is the first Congressional attempt to federally recognize a non-Indian entity, and to do so in a fashion inconsistent with the political history of the former governing entity it is ostensibly recognizing. Under a different view, the Akaka bill is novel in that it endeavors to federally recognize a government to collectively represent an entire ethnic group based upon shared indigeneity, rather than political history. But political history, not indigeneity, begets federal recognition. As a result the Akaka bill faces invalidation because its political-historical inconsistencies – most of all with regard to who is Hawaiian – raise a number of cognizable legal issues potentially fatal to the bill. Its blood-based eligibility criterion further raises the question of how much ethnic blood is necessary to distinguish legitimate racial identification from ideological association. To the extent that racial preferences may coexist with the equal protection components of the Constitution,³⁴¹ a preponderance of blood is the logical quantum, but a fifty percent requirement is the most practicable.

acknowledge the sovereign status of Tribes, and eliminate the embarrassing and intellectually-unsupportable notion that a person's race should determine their legal status in America.”

³⁴¹ *Contra* PLF/Cato Amicus Brief, *supra* note 311 at 23 (“It is anathema for courts interpreting the Equal Protection Clause to be weighing racial taxonomies and categorizations made thereunder.”).