SUPREME COURT OF THE UNITED STATES

No. 98–818

HAROLD F. RICE, PETITIONER *v.* BENJAMIN J. CAYETANO, GOVERNOR OF HAWAII

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[February 23, 2000]

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins as to Part II, dissenting.

The Court's holding today rests largely on the repetition of glittering generalities that have little, if any, application to the compelling history of the State of Hawaii. When that history is held up against the manifest purpose of the Fourteenth and Fifteenth Amendments, and against two centuries of this Court's federal Indian law, it is clear to me that Hawaii's election scheme should be upheld.

I

According to the terms of the federal Act by which Hawaii was admitted to the Union, and to the terms of that State's Constitution and laws, the Office of Hawaiian Affairs (OHA) is charged with managing vast acres of land held in trust for the descendants of the Polynesians who occupied the Hawaiian Islands before the 1778 arrival of Captain Cook. In addition to administering the proceeds from these assets, OHA is responsible for programs providing special benefits for native Hawaiians. Established in 1978 by an amendment to the State Constitution, OHA was intended to advance multiple goals: to carry out the duties of the trust relationship between the Islands' indigenous peoples and the Government of the United States; to compensate for past wrongs to the ancestors of

these peoples; and to help preserve the distinct, indigenous culture that existed for centuries before Cook's arrival. As explained by the senior Senator from Hawaii, Senator Inouye, who is not himself a native Hawaiian but rather (like petitioner) is a member of the majority of Hawaiian voters who supported the 1978 amendments, the amendments reflect "an honest and sincere attempt on the part of the people of Hawai'i to rectify the wrongs of the past, and to put into being the mandate of our Federal government– the betterment of the conditions of Native Hawaiians."[1]

Today the Court concludes that Hawaii's method of electing the trustees of OHA violates the Fifteenth Amendment. In reaching that conclusion, the Court has assumed that the programs administered by OHA are valid. That assumption is surely correct. In my judgment, however, the reasons supporting the legitimacy of OHA and its programs in general undermine the basis for the Court's decision holding its trustee election provision invalid. The OHA election provision violates neither the Fourteenth Amendment nor the Fifteenth.

That conclusion is in keeping with three overlapping principles. First, the Federal Government must be, and has been, afforded wide latitude in carrying out its obligations arising from the special relationship it has with the aboriginal peoples, a category that includes the native Hawaiians, whose lands are now a part of the territory of the United States. In addition, there exists in this case

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[1]App. E to Brief for Hawai'i Congressional Delegation as *Amicus Curiae* E–3. In a statement explaining the cultural motivation for the amendments, Senator Akaka pointed out that the "fact that the entire State of Hawai'i voted to amend the State Constitution in 1978 to establish the Office of Hawaiian Affairs is significant because it illustrates the recognition of the importance of Hawaiian culture and traditions as the foundation of the *Aloha* spirit." *Id.*, at E–5.

the State's own fiduciary responsibility– arising from its establishment of a public trust– for administering assets granted it by the Federal Government in part for the benefit of native Hawaiians. Finally, even if one were to ignore the more than two centuries of Indian law precedent and practice on which this case follows, there is simply no invidious discrimination present in this effort to see that indigenous peoples are compensated for past wrongs, and to preserve a distinct and vibrant culture that is as much a part of this Nation's heritage as any.

II

Throughout our Nation's history, this Court has recognized both the plenary power of Congress over the affairs of native Americans[2] and the fiduciary character of the special federal relationship with descendants of those once sovereign peoples.[3] The source of the Federal Government's responsibility toward the Nation's native inhabitants, who were subject to European and then American military conquest, has been explained by this Court in the crudest terms, but they remain instructive nonetheless.

> "These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. . . . From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised,

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[2] See, *e.g.*, *Alaska* v. *Native Village of Venetie Tribal Government*, 522 U. S. 520, 531, n. 6 (1998); *United States* v. *Wheeler*, 435 U. S. 313, 319 (1978); *United States* v. *Antelope*, 430 U. S. 641, 645 (1977); *Morton* v. *Mancari*, 417 U. S. 535, 551 (1974); *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 564–565 (1903); *United States* v. *Kagama*, 118 U. S. 375 (1886).

[3] See, *e.g.*, *United States* v. *Sandoval*, 231 U. S. 28 (1913); *Kagama*, 118 U. S., at 384–385; *Cherokee Nation* v. *Georgia*, 5 Pet. 1 (1831).

> there arises the duty of protection, and with it the power. This has always been recognized by the Executive, and by Congress, and by this court, whenever the question has arisen." *United States* v. *Kagama*, 118 U. S. 375, 383–384 (1886) (emphasis in original).

As our cases have consistently recognized, Congress' plenary power over these peoples has been exercised time and again to implement a federal duty to provide native peoples with special "care and protection."[4] With respect to the Pueblos in New Mexico, for example, "public moneys have been expended in presenting them with farming implements and utensils, and in their civilization and instruction." *United States* v. *Sandoval*, 231 U. S. 28, 40–41 (1913). Today, the Federal Bureau of Indian Affairs (BIA) administers countless modern programs responding to comparably pragmatic concerns, including health, education, housing, and impoverishment. See Office of the Federal Register, United States Government Manual 1999/2000, pp. 311–312. Federal regulation in this area is not limited to the strictly practical but has encompassed as well the protection of cultural values; for example, the desecration of Native American graves and other sacred sites led to the passage of the Native American Graves Protection and Repatriation Act, 25 U. S. C. §3001 *et seq.*

Critically, neither the extent of Congress' sweeping power nor the character of the trust relationship with indigenous peoples has depended on the ancient racial origins of the people, the allotment of tribal lands,[5] the coherence or existence of tribal self-government,[6] or the

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[4] *Sandoval*, 231 U. S., at 45; *Kagama*, 118 U. S., at 384–385.

[5] See, *e.g.*, *United States* v. *Celestine*, 215 U. S. 278, 286–287 (1909).

[6] See *United States* v. *John*, 437 U. S. 634, 652 (1978) ("Neither the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the

varying definitions of "Indian" Congress has chosen to adopt.[7] Rather, when it comes to the exercise of Congress' plenary power in Indian affairs, this Court has taken account of the "numerous occasions" on which "legislation that singles out Indians for particular and special treatment" has been upheld, and has concluded that as "long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation towards the Indians, such legislative judgments will not be disturbed." *Morton* v. *Mancari*, 417 U. S. 535, 554–555 (1974).

As the history recited by the majority reveals, the grounds for recognizing the existence of federal trust power here are overwhelming. Shortly before its annexation in 1898, the Republic of Hawaii (installed by United States merchants in a revolution facilitated by the United States Government) expropriated some 1.8 million acres of land that it then ceded to the United States. In the Organic Act establishing the Territory of Hawaii, Congress provided that those lands should remain under the control of the territorial government "until otherwise provided for

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federal power to deal with them"); *Delaware Tribal Business Comm.* v. *Weeks*, 430 U. S. 73, 82, n. 14, 84–85 (1977) (whether or not federal statute providing financial benefits to descendants of Delaware Tribe included nontribal Indian beneficiaries, Congress' choice need only be "'tied rationally to the fulfillment of Congress' unique obligation toward the Indians'" (quoting *Morton* v. *Mancari*, 417 U. S., at 555)).

[7] See generally, Cohen's Handbook of Federal Indian Law 19–20 (1982). Compare 25 U. S. C. §479 ("The term 'Indian' as used in [this Act] shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians"), with §1603(c)(3) (Indian is any person "considered by the Secretary of the Interior to be an Indian for any purpose").

by Congress," Act of Apr. 30, 1900, ch. 339, §91, 31 Stat. 159. By 1921, Congress recognized that the influx of foreign infectious diseases, mass immigration coupled with poor housing and sanitation, hunger, and malnutrition had taken their toll. See *ante*, at 9. Confronted with the reality that the Hawaiian people had been "frozen out of their lands and driven into the cities," H. R. Rep. No. 839, 66th Cong., 2d Sess., 4 (1920), Congress decided that 27 specific tracts of the lands ceded in 1898, comprising about 203,500 acres, should be used to provide farms and residences for native Hawaiians. Act of July 9, 1921, ch. 42, 42 Stat. 108. Relying on the precedent of previous federal laws granting Indians special rights in public lands, Congress created the Hawaiian Homes Commission to implement its goal of rehabilitating the native people and culture.[8] Hawaii was required to adopt this Act as a condition of statehood in the Hawaii Statehood Admissions Act (Admissions Act), §4, 73 Stat. 5. And in an effort to secure the Government's duty to the indigenous peoples, §5 of the Act conveyed 1.2 million acres of land to the State to be held in trust "for the betterment of the conditions of native Hawaiians" and certain other public purposes. §5(f), *id.*, at 6.

The nature of and motivation for the special relationship between the indigenous peoples and the United States Government was articulated in explicit detail in 1993, when Congress adopted a Joint Resolution containing a

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[8]See H. R. Rep. No. 839, 66th Cong., 2d Sess., 4, 11 (1920). Reflecting a compromise between the sponsor of the legislation, who supported special benefits for "all who have Hawaiian blood in their veins," and plantation owners who thought that only "Hawaiians of the pure blood" should qualify, Hawaiian Homes Commission Act: Hearings before the Senate Committee on the Territories, H. R. Rep. No. 13500, 66th Cong., 3d Sess., 14–17 (1920), the statute defined a "native Hawaiian" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778," 42 Stat. 108.

formal "apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii." 107 Stat. 1510. Among other acknowledgments, the resolution stated that the 1.8 million acres of ceded lands had been obtained "without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government." *Id.*, at 1512.

In the end, however, one need not even rely on this official apology to discern a well-established federal trust relationship with the native Hawaiians. Among the many and varied laws passed by Congress in carrying out its duty to indigenous peoples, more than 150 today expressly include native Hawaiians as part of the class of Native Americans benefited.[9] By classifying native Hawaiians as "Native Americans" for purposes of these statutes, Congress has made clear that native Hawaiians enjoy many of "the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities." 42 U. S. C. §11701(19). See also §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 . . . Hawaii").

While splendidly acknowledging this history– specifically including the series of agreements and enactments the history reveals– the majority fails to recognize its import. The descendants of the native Hawaiians share

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[9] See Brief for Hawai1 Congressional Delegation as *Amicus Curiae* 7, and App. A; see also, *e.g.*, American Indian Religious Freedom Act, 42 U. S. C. §1996 *et seq.*; Native American Programs Act of 1974, 42 U. S. C. §§2991–2992; Comprehensive Employment and Training Act, 29 U. S. C. §872; Drug Abuse Prevention, Treatment, and Rehabilitation Act, 21 U. S. C. §1177; Cranston-Gonzalez National Affordable Housing Act, §958, 104 Stat. 4422; Indian Health Care Amendments of 1988, 25 U. S. C. §1601 *et seq.*

with the descendants of the Native Americans on the mainland or in the Aleutian Islands not only a history of subjugation at the hands of colonial forces, but also a purposefully created and specialized "guardian-ward" relationship with the Government of the United States. It follows that legislation targeting the native Hawaiians must be evaluated according to the same understanding of equal protection that this Court has long applied to the Indians on the continental United States: that "special treatment . . . be tied rationally to the fulfillment of Congress' unique obligation" toward the native peoples.

Declining to confront the rather simple logic of the foregoing, the majority would seemingly reject the OHA voting scheme for a pair of different reasons. First, Congress' trust-based power is confined to dealings with tribes, not with individuals, and no tribe or indigenous sovereign entity is found among the native Hawaiians. *Ante*, at 23. Second, the elections are "the affair of the State," not of a tribe, and upholding this law would be "to permit a State, by racial classification, to fence out whole classes of citizens from decision making in critical state affairs." *Ante*, at 24–25. In my view, neither of these reasons overcomes the otherwise compelling similarity, fully supported by our precedent, between the once subjugated, indigenous peoples of the continental United States and the peoples of the Hawaiian Islands whose historical sufferings and status parallel those of the continental Native Americans.

Membership in a tribe, the majority suggests, rather than membership in a race or class of descendants, has been the *sine qua non* of governmental power in the realm of Indian law; *Mancari* itself, the majority contends, makes this proposition clear. *Ante*, at 23. But as scholars have often pointed out, tribal membership cannot be seen as the decisive factor in this Court's opinion upholding the BIA preferences in *Mancari;* the hiring preference at issue

in that case not only extended to non-tribal member Indians, it also required for eligibility that ethnic Native Americans possess a certain quantum of Indian blood.[10] 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. See nn.6, 7, *supra*. In light of this precedent, it is a painful irony indeed to conclude that native Hawaiians are not entitled to special benefits designed to restore a measure of native self-governance because they currently lack any vestigial native government– a possibility of which history and the actions of this Nation have deprived them.[11]

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[10] See, *e.g.*, Frickey, Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law, 110 Harv. L. Rev. 1754, 1761–1762 (1997). As is aptly explained, the BIA preference in that case was based on a statute that extended the preference to ethnic Indians– identified by blood quantum– who were not members of federally recognized tribes. 25 U. S. C. §479. Only the implementing regulation included a mention of tribal membership, but even that regulation required that the tribal member also "'be one-fourth or more degree Indian blood.'" *Mancari*, 417 U. S., at 553, n. 24.

[11] JUSTICE BREYER suggests that the OHA definition of native Hawaiians (*i.e.*, Hawaiians who may vote under the OHA scheme) is too broad to be "reasonable." *Ante*, at 4 (opinion concurring in result). This suggestion does not identify a constitutional defect. The issue in this case is *Congress'* power to define who counts as an indigenous person, and *Congress'* power to delegate to States its special duty to persons so defined. (JUSTICE BREYER's interest in *tribal* definitions of membership– and in this Court's holding that tribes' power to define membership is at the core of tribal sovereignty and thus "unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority," *Santa Clara Pueblo* v. *Martinez*, 436 U. S. 49, 56 (1978)– is thus inapposite.) Nothing in federal law or in our Indian law jurisprudence suggests that the OHA definition of native is anything but perfectly within that power as delegated. See *supra*, at 7, and nn. 6–7. Indeed, the OHA voters match precisely the set of people to whom the congressional apology was targeted.

Federal definitions of "Indian" often rely on the ability to trace one's ancestry to a particular group at a particular time. See, *e.g.*, 25

Of greater concern to the majority is the fact that we are confronted here with a state constitution and legislative enactment– passed by a majority of the entire population of Hawaii– rather than a law passed by Congress or a tribe itself. See, *e.g.*, *ante*, at 24–25. But as our own precedent makes clear, this reality does not alter our analysis. As I have explained, OHA and its trustee elections can hardly be characterized simply as an "affair of the State" alone; they are the instruments for implementing the Federal Government's trust relationship with a once sovereign indigenous people. This Court has held more than once that the federal power to pass laws fulfilling its trust relationship with the Indians may be delegated to the States. Most significant is our opinion in *Washington* v. *Confederated Bands and Tribes of Yakima Nation*, 439 U. S. 463, 500–501 (1979), in which we upheld against a Fourteenth Amendment challenge a state law

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C. F. R., ch. 1, §5.1 (1999) (extending BIA hiring preference to "persons of Indian descent who are . . . (b) [d]escendants of such [tribal] members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation"); see also n. 7, *supra*. It can hardly be correct that once 1934 is two centuries past, rather than merely 66 years past, this classification will cease to be "reasonable." The singular federal statute defining "native" to which JUSTICE BREYER points, 43 U. S. C. §1602(b) (including those defined by blood quantum without regard to membership in any group), serves to underscore the point that membership in a "tribal" structure *per se*, see *ante*, at 2, is not the acid test for the exercise of federal power in this arena. See R. Clinton, N. Newton, & M. Price, American Indian Law 1054–1058 (3d ed. 1991) (describing provisions of the Alaska Native Claims Settlement Act creating geographic regions of natives with common heritage and interest, 43 U. S. C. §1606, requiring those regions to organize a native corporation in order to qualify for settlement benefits, §1607, and establishing the Alaska Native Fund of federal monies to be distributed to "enrolled natives," §§1604–1605); see also *supra*, at 8–9, and n. 10. In the end, what matters is that the determination of indigenous status or "real group membership," *ante*, at 3, is one to be made by Congress– not by this Court.

assuming jurisdiction over Indian tribes within a State. While we recognized that States generally do not have the same special relationship with Indians that the Federal Government has, we concluded that because the state law was enacted "in response to a federal measure" intended to achieve the result accomplished by the challenged state law, the state law itself need only "'rationally further the purpose identified by the State.'" *Id.*, at 500 (quoting *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U. S. 307, 314 (1976) *(per curiam)*).

The state statutory and constitutional scheme here was without question intended to implement the express desires of the Federal Government. The Admissions Act in §4 mandated that the provisions of the Hawaiian Homes Commission Act "shall be adopted," with its multiple provisions expressly benefiting native Hawaiians and not others. 73 Stat. 5. More, the Act required that the proceeds from the lands granted to the State "shall be held by said State as a public trust for . . . the betterment of the conditions of native Hawaiians," and that those proceeds "shall be managed and disposed of . . . in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States." §5, *id.*, at 6. The terms of the trust were clear, as was the discretion granted to the State to administer the trust as the State's laws "may provide." And Congress continues to fund OHA on the understanding that it is thereby furthering the federal trust obligation.

The sole remaining question under *Mancari* and *Yakima* is thus whether the State's scheme "rationally further[s] the purpose identified by the State." Under this standard, as with the BIA preferences in *Mancari*, the OHA voting requirement is certainly reasonably designed to promote "self-government" by the descendants of the indigenous Hawaiians, and to make OHA "more respon-

sive to the needs of its constituent groups." *Mancari*, 417 U. S., at 554. The OHA statute provides that the agency is to be held "separate" and "independent of the [State] executive branch," Haw. Rev. Stat. §10–4 (1993); OHA executes a trust, which, by its very character, must be administered for the benefit of Hawaiians and native Hawaiians, §§10–2, 10–3(1), 10–13.5; and OHA is to be governed by a board of trustees that will reflect the interests of the trust's native Hawaiian beneficiaries, Haw. Const., Art. XII, §5 (1993); Haw. Rev. Stat. §13D–3(b) (1993). OHA is thus "directed to participation by the governed in the governing agency." *Mancari*, 417 U. S., at 554. In this respect among others, the requirement is "reasonably and directly related to a legitimate, nonracially based goal." *Ibid.*

The foregoing reasons are to me more than sufficient to justify the OHA trust system and trustee election provision under the Fourteenth Amendment.

III

Although the Fifteenth Amendment tests the OHA scheme by a different measure, it is equally clear to me that the trustee election provision violates neither the letter nor the spirit of that Amendment.[12]

Section 1 of the Fifteenth Amendment provides:

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[12] Just as one cannot divorce the Indian law context of this case from an analysis of the OHA scheme under the Fourteenth Amendment, neither can one pretend that this law fits simply within our non-Indian cases under the Fifteenth Amendment. As the preceding discussion of *Mancari* and our other Indian law cases reveals, this Court has never understood laws relating to indigenous peoples simply as legal classifications defined by race. Even where, unlike here, blood quantum requirements are express, this Court has repeatedly acknowledged that an overlapping political interest predominates. It is only by refusing to face this Court's entire body of Indian law, see *ante*, at 15, that the majority is able to hold that the OHA qualification denies non-"Hawaiians" the right to vote "on account of race."

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U. S. Const., Amdt. 15.

As the majority itself must tacitly admit, *ante*, at 17–18, the terms of the Amendment itself do not here apply. The OHA voter qualification speaks in terms of ancestry and current residence, not of race or color. OHA trustee voters must be "Hawaiian," meaning "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples have continued to reside in Hawaii." Haw. Rev. Stat. §10–2. The ability to vote is a function of the lineal *descent* of a modern-day resident of Hawaii, not the blood-based characteristics of that resident, or of the blood-based proximity of that resident to the "peoples" from whom that descendant arises.

The distinction between ancestry and race is more than simply one of plain language. The ability to trace one's ancestry to a particular progenitor at a single distant point in time may convey no information about one's own apparent or acknowledged race today. Neither does it of necessity imply one's own identification with a particular race, or the exclusion of any others *"on account of race."* The terms manifestly carry distinct meanings, and ancestry was not included by the framers in the Amendment's prohibitions.

Presumably recognizing this distinction, the majority relies on the fact that "[a]ncestry can be a proxy for race." *Ante*, at 18. That is, of course, true, but it by no means follows that ancestry is always a proxy for race. Cases in which ancestry served as such a proxy are dramatically different from this one. For example, the literacy requirement at issue in *Guinn* v. *United States*, 238 U. S. 347 (1915), relied on such a proxy. As part of a series of

blatant efforts to exclude blacks from voting, Oklahoma exempted from its literacy requirement people whose ancestors were entitled to vote prior to the enactment of the Fifteenth Amendment. The *Guinn* scheme patently "served only to perpetuate . . . old [racially discriminatory voting] laws and to effect a transparent racial exclusion." *Ante,* at 17. As in *Guinn*, the voting laws held invalid under the Fifteenth Amendment in all of the cases cited by the majority were fairly and properly viewed through a specialized lens– a lens honed in specific detail to reveal the realities of time, place, and history behind the voting restrictions being tested.

That lens not only fails to clarify, it fully obscures the realities of this case, virtually the polar opposite of the Fifteenth Amendment cases on which the Court relies. In *Terry* v. *Adams*, 345 U. S. 461 (1953), for example, the Court held that the Amendment proscribed the Texas "Jaybird primaries" that used neutral voting qualifications "with a single proviso– Negroes are excluded," *id.*, at 469. Similarly, in *Smith* v. *Allwright*, 321 U. S. 649, 664 (1944), it was the blatant "discrimination against Negroes" practiced by a political party that was held to be state action within the meaning of the Amendment. Cases such as these that "strike down these voting systems . . . designed to exclude one racial class (at least) from voting," *ante,* at 17, have no application to a system designed to empower politically the remaining members of a class of once sovereign, indigenous people.

Ancestry surely can be a proxy for race, or a pretext for invidious racial discrimination. But it is simply neither proxy nor pretext here. All of the persons who are eligible to vote for the trustees of OHA share two qualifications that no other person old enough to vote possesses: They are beneficiaries of the public trust created by the State and administered by OHA, and they have at least one ancestor who was a resident of Hawaii in 1778. A trust

whose terms provide that the trustees shall be elected by a class including beneficiaries is hardly a novel concept. See 2 A. Scott & W. Fratcher, Law of Trusts §108.3 (4th ed. 1987). The Committee that drafted the voting qualification explained that the trustees here should be elected by the beneficiaries because "people to whom assets belong should have control over them . . . . The election of the board will enhance representative governance and decision-making accountability and, as a result, strengthen the fiduciary relationship between the board member, as trustee, and the native Hawaiian, as beneficiary."[13] The described purpose of this aspect of the classification thus exists wholly apart from race. It is directly focused on promoting both the delegated federal mandate, and the terms of the State's own trustee responsibilities.

The majority makes much of the fact that the OHA trust– which it assumes is legitimate– should be read as principally intended to benefit the smaller class of "native Hawaiians," who are defined as at least one-half descended from a native islander circa 1778, Haw. Rev. Stat. §10–2 (1993), not the larger class of "Hawaiians," which includes "any descendant" of those aboriginal people who lived in Hawaii in 1778 and "which peoples thereafter have continued to reside in Hawaii," *ibid*. See *ante*, at 26–27. It is, after all, the majority notes, the larger class of Hawaiians that enjoys the suffrage right in OHA elections. There is therefore a mismatch in interest alignment between the trust beneficiaries and the trustee electors, the majority contends, and it thus cannot be said that the class of qualified voters here is defined solely by beneficiary status.

While that may or may not be true depending upon the

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[13] 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Standing Committee Rep. No. 59, p. 644.

construction of the terms of the trust, there is surely nothing racially invidious about a decision to enlarge the class of eligible voters to include "any descendant" of a 1778 resident of the Islands. The broader category of eligible voters serves quite practically to ensure that, regardless how "dilute" the *race* of native Hawaiians becomes– a phenomenon also described in the majority's lavish historical summary, *ante*, at 9– there will remain a voting interest whose ancestors were a part of a political, cultural community, and who have inherited through participation and memory the set of traditions the trust seeks to protect. The putative mismatch only underscores the reality that it cannot be purely a racial interest that either the trust or the election provision seeks to secure; the political and cultural interests served are– unlike *racial* survival– shared by both native Hawaiians and Hawaiians.[14]

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[14] Of course, the majority's concern about the absence of alignment becomes salient only if one assumes that something other than a *Mancari*-like political classification is at stake. As this Court has approached cases involving the relationship among the Federal Government, its delegates, and the indigenous peoples– including countless federal definitions of "classes" of Indians determined by blood quantum, see n. 7, *supra*– any 'racial' aspect of the voting qualification here is eclipsed by the political significance of membership in a once-sovereign indigenous class.

Beyond even this, the majority's own historical account makes clear that the inhabitants of the Hawaiian Islands whose descendants comprise the instant class are identified and remain significant as much because of culture as because of race. By the time of Cook's arrival, "the Hawaiian people had developed, over the preceding 1,000 years or so, a cultural and political structure, . . . well-established traditions and customs and . . . a polytheistic religion." *Ante*, at 3. Prior to 1778, although there "was no private ownership of land," *Hawaii Housing Authority* v. *Midkiff*, 467 U. S. 229, 232 (1984), the native Hawaiians "lived in a highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture and religion," 42 U. S. C. §11701(4). According to

Even if one refuses to recognize the beneficiary status of OHA trustee voters entirely,[15] it cannot be said that the

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Senator Akaka, their society "was steeped in science [and they] honored their *ʻāina* (land) and environment, and therefore developed methods of irrigation, agriculture, aquaculture, navigation, medicine, fishing and other forms of subsistence whereby the land and sea were efficiently used without waste or damage. Respect for the environment and for others formed the basis of their culture and tradition." App. E to Brief for Hawai'i Congressional Delegation as *Amicus Curiae* E–4. Legends and oral histories passed from one generation to another are reflected in artifacts such as carved images, colorful feathered capes, songs, and dances that survive today. For some, Pele, the God of Fire, still inhabits the crater of Kilauea, and the word of the Kahuna is still law. It is this culture, rather than the Polynesian race, that is uniquely Hawaiian and in need of protection.

[15] JUSTICE BREYER's even broader contention that "there is no 'trust' for native Hawaiians here," *ante*, at 1, appears to make the greater mistake of conflating the public trust established by Hawaii's Constitution and laws, see *supra*, at 11, with the "trust" relationship between the Federal Government and the indigenous peoples. According to JUSTICE BREYER, the "analogy on which Hawaii's justification must depend," *ante*, at 4, is "destroy[ed]" in part by the fact that OHA is not a trust (in the former sense of a trust) for native Hawaiians alone. Rather than looking to the terms of the public trust itself for this proposition, JUSTICE BREYER relies on the terms of the land conveyance to Hawaii in part of the Admissions Act. But the portion of the trust administered by OHA does not purport to contain in its corpus all 1.2 million acres of federal trust lands set aside for the benefit of all Hawaiians, including native Hawaiians. By its terms, only "[t]wenty per cent of all revenue derived from the public land trust shall be expended by the office for the betterment of the conditions of native Hawaiians." Haw. Rev. Stat. §10–13.5 (1993). This portion appears to coincide precisely with the one-fifth described purpose of the Admissions Act trust lands to better the conditions of native Hawaiians. Admissions Act §5(f), 73 Stat. 6. Neither the fact that native Hawaiians have a specific, beneficial interest in only 20% of trust revenues, nor the fact that the portion of the trust administered by OHA is supplemented to varying degrees by nontrust monies, negates the existence of the trust itself.

Moreover, neither the particular terms of the State's public trust nor the particular source of OHA funding "destroys" the centrally

ancestry-based voting qualification here simply stands in the shoes of a classification that would either privilege or penalize "on account of" race. The OHA voting qualification– part of a statutory scheme put in place by democratic vote of a multiracial majority of all state citizens, including those non-"Hawaiians" who are not entitled to vote in OHA trustee elections– appropriately includes every resident of Hawaii having at least one ancestor who lived in the Islands in 1778. That is, among other things, the audience to whom the congressional apology was addressed. Unlike a class including only full-blooded Polynesians– as one would imagine were the class strictly defined in terms of race– the OHA election provision *excludes* all full-blooded Polynesians currently residing in Hawaii who are not descended from a 1778 resident of Hawaii. Conversely, unlike many of the old southern voting schemes in which any potential voter with a 'taint' of non-Hawaiian blood would be excluded, the OHA scheme excludes no descendant of a 1778 resident because he or she is also part European, Asian, or African as a matter of race. The classification here is thus both too inclusive and not inclusive enough to fall strictly along racial lines.

At pains then to identify at work here a singularly "racial purpose," *ante*, at 18, 20– whatever that might mean, although one might assume the phrase a 'proxy' for "racial discrimination"– the majority next posits that

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relevant trust "analogy" on which Hawaii relies– that of the relationship between the Federal Government and indigenous Indians on this continent, as compared with the relationship between the Federal Government and indigenous Hawaiians in the now United States-owned Hawaiian Islands. That trust relationship– the only trust relevant to the Indian law analogy– includes the power to delegate authority to the States. As we have explained, *supra*, at pages 9–11, the OHA scheme surely satisfies the established standard for testing an exercise of that power.

"[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities." *Ante*, at 20. That is, of course, true when ancestry is the basis for denying or abridging one's right to vote or to share the blessings of freedom. But it is quite wrong to ignore the relevance of ancestry to claims of an interest in trust property, or to a shared interest in a proud heritage. There would be nothing demeaning in a law that established a trust to manage Monticello and provided that the descendants of Thomas Jefferson should elect the trustees. Such a law would be equally benign, regardless of whether those descendants happened to be members of the same race.[16]

In this light, it is easy to understand why the classification here is not "demeaning" at all, *ante*, at 27, for it is simply not based on the "premise that citizens of a particular race are somehow more qualified than others to vote on certain matters," *ibid.* It is based on the permissible assumption in this context that families with "any" ancestor who lived in Hawaii in 1778, and whose ancestors thereafter continued to live in Hawaii, have a claim to

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[16] Indeed, "[i]n one form or another, the right to pass on property— to one's family in particular — has been part of the Anglo-American legal system since feudal times." *Hodel* v. *Irving*, 481 U. S. 704, 716 (1987). Even the most minute fractional interests that can be identified after allotted lands are passed through several generations can receive legal recognition and protection. Thus, we held not long ago that inherited shares of parcels allotted to the Sioux in 1889 could not be taken without compensation even though their value was nominal and it was necessary to use a common denominator of 3,394,923,840,000 to identify the size of the smallest interest. *Id.*, at 713–717. Whether it is wise to provide recompense for all of the descendants of an injured class after several generations have come and gone is a matter of policy, but the fact that their interests were acquired by inheritance rather than by assignment surely has no constitutional significance.

compensation and self-determination that others do not. For the multiracial majority of the citizens of the State of Hawaii to recognize that deep reality is not to demean their own interests but to honor those of others.

It thus becomes clear why the majority is likewise wrong to conclude that the OHA voting scheme is likely to "become the instrument for generating the prejudice and hostility all too often directed against persons whose particular ancestry is disclosed by their ethnic characteristics and cultural traditions." *Ante*, at 20. The political and cultural concerns that motivated the nonnative majority of Hawaiian voters to establish OHA reflected an interest in preserving through the self-determination of a particular people ancient traditions that they value. The fact that the voting qualification was established by the entire electorate in the State– the vast majority of which is not native Hawaiian– testifies to their judgment concerning the Court's fear of "prejudice and hostility" against the majority of state residents who are not "Hawaiian," such as petitioner. Our traditional understanding of democracy and voting preferences makes it difficult to conceive that the majority of the State's voting population would have enacted a measure that discriminates against, or in any way represents prejudice and hostility toward, that self-same majority. Indeed, the best insurance against that danger is that the electorate here retains the power to revise its laws.

IV

The Court today ignores the overwhelming differences between the Fifteenth Amendment case law on which it relies and the unique history of the State of Hawaii. The former recalls an age of abject discrimination against an insular minority in the old South; the latter at long last yielded the "political consensus" the majority claims it seeks, *ante*, at 27– a consensus determined to recognize

the special claim to self-determination of the indigenous peoples of Hawaii. This was the considered and correct view of the District Judge for the United States District Court for the District of Hawaii, as well as the three Circuit Judges on the Court of Appeals for the Ninth Circuit.[17] As Judge Rymer explained:

> "The special election for trustees is not equivalent to a general election, and the vote is not for officials who will perform general governmental functions in either a representative or executive capacity. . . . Nor does the limitation in these circumstances suggest that voting eligibility was designed to exclude persons who would otherwise be interested in OHA's affairs. . . . Rather, it reflects the fact that the trustees' fiduciary responsibilities run only to native Hawaiians and Hawaiians and 'a board of trustees chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles.'[18] The challenged part of Hawaii law was not contrived to keep non-Hawaiians from voting in general, or in any respect pertinent to their legal interests. Therefore, we cannot say that [petitioner's] right to vote has been denied or abridged in violation of the Fifteenth Amendment.
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> "[18]1 Proceedings of the Constitutional Convention of Hawaii of 1978, Standing Comm. Rep. No. 59 at 644. The Committee reporting on Section 5, establishing OHA, further noted that trustees should be so elected because 'people to whom assets belong should have control over them. . . . The election of the board will enhance representative governance and decision-making accountability and, as a result, strengthen the fiduciary relationship be-

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[17]Indeed, the record indicates that none of the 20-plus judges on the Ninth Circuit to whom the petition for rehearing en banc was circulated even requested a vote on the petition. App. to Pet. for Cert. 442.

> tween the board member, as trustee, and the native Hawaiian, as beneficiary.' *Id.*"

146 F. 3d 1075, 1081–1082 (CA9 1998).

In my judgment, her reasoning is far more persuasive than the wooden approach adopted by the Court today.

Accordingly, I respectfully dissent.