The Fifteenth Amendment's Prohibition against State Suffrage Restrictions Based upon Race Encompasses Ancestral Restrictions That Are Used as Substitutes for Race: *Rice v. Cayetano*

Tina L. Corcoran

Follow this and additional works at: https://dsc.duq.edu/dlr

Part of the Law Commons

Recommended Citation


Available at: https://dsc.duq.edu/dlr/vol39/iss1/7

This Recent Decision is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.
Recent Decisions

The Fifteenth Amendment's Prohibition Against State Suffrage Restrictions Based upon Race Encompasses Ancestral Restrictions That Are Used as Substitutes for Race: Rice v. Cayetano

CONSTITUTIONAL LAW — RIGHT OF CITIZENS TO VOTE — FIFTEENTH AMENDMENT — The Supreme Court of the United States held that State voter eligibility statutes that limit suffrage to only those persons meeting a statutorily defined ancestry are prohibited by the Fifteenth Amendment when the legislative purpose behind the ancestral definition is to treat those defined persons as a distinct people so that ancestry becomes a proxy for race.


In 1996, petitioner Harold F. Rice, a citizen of the State of Hawaii, filed suit in the United States District Court for the District of Hawaii, alleging that the State of Hawaii's basis for denying his application to vote for trustees for the Office of Hawaiian Affairs ("OHA") was a violation of the Fourteenth and Fifteenth Amendments of the United States Constitution.1 The OHA was established by state constitutional amendment in 1978 and was vested with a mission to provide for "the betterment of conditions of native Hawaiians [and] Hawaiians."2 Eligible voters for the OHA's nine-member board of trustees are limited to those persons who

---

2. Rice, 120 S. Ct. at 1052.
are "Hawaiian" as defined by state statute. Petitioner Rice did not meet this statutory requirement. Therefore, the State of Hawaii refused to approve Rice's voter registration, and Rice brought the instant case.

In 1997, both petitioner Rice and respondent State motioned the district court for partial summary judgment on the issue. The district court held that the United States government and the State of Hawaii had a guardian-ward relationship similar to the relationship between Congress and the various Indian tribes, and thus concluded that Hawaii's voting restriction was based on the special status of native Hawaiians and not upon race. In so finding, the court relied primarily upon the United States Supreme Court's decision in Morton v. Mancari. The court then applied the rational basis test, which is the same level of scrutiny adopted by the Supreme Court in controversies involving Indian legislation that

3. The applicable Hawaiian statute states:
   "Hawaiian" means 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.
   "Native Hawaiian" means 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, 1920, 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.

4. Rice, 120 S. Ct. at 1047. Rice, a Caucasian, was born in and is a current resident of Hawaii. Rice, 963 F.Supp. at 1548. He was able to trace his lineage back to a time prior to the 1893 United States assisted overthrow of the Hawaiian monarchy. Id. He was not, however, a descendant of a person residing in Hawaii in 1778 or anytime before 1778. Rice, 120 S. Ct. at 1053. The year 1778 is used as a line of demarcation because it marks the year when the first Westerner, England's Captain Cook, landed on the island. Id. at 1048-53. Consequently, it also marked the beginning of Western influences upon the Hawaiian culture and the end of the isolation of the island. Id.

5. Rice, 120 S. Ct. at 1047.

6. Rice, 963 F.Supp. at 1549. In Rice v. Cayetano, 941 F.Supp. 1529 (D. Haw. 1996), a related case, the district court denied Rice's request for a preliminary injunction barring the State of Hawaii from announcing the results of the Native Hawaiian Sovereignty Election. Rice, 941 F.Supp. at 1536. The district court declined to issue the injunction on the basis that Rice was unlikely to prevail on either his Fourteenth or Fifteenth Amendment claims. Id. at 1545.


8. 417 U.S. 535 (1974). The Supreme Court found that special employment preferences for Indian tribe members were not based upon racial classifications, but were instead grounded in the special relationship that existed between the government and Indian tribes and the tribe's special quasi-sovereign status. Id. at 554.

singles out Indians for special treatment, to determine if Hawaii's voting restriction was rationally related to its fiduciary duty to native Hawaiians. The court held that because the OHA was created to benefit native Hawaiians and Hawaiians, the State's action in limiting eligible OHA voters to the beneficiaries of OHA programs was rationally related to the State's trust obligations. Consequently, the petitioner's summary judgement motion was denied and the State of Hawaii's motion was granted by the district court.

The United States Court of Appeals for the Ninth Circuit affirmed despite finding that the State's eligibility requirement contained racial classifications. The court presumed that the establishment and structure of the trusts and the OHA were constitutionally valid because neither the constitutionality of the OHA, itself, nor the programs it administers were challenged by Rice. Therefore, the court concluded that because the trusts and the OHA were lawfully created for the benefit of Hawaiians, limiting trustee voters to those who are beneficiaries of the trust was in reality a qualification based on beneficiary status as opposed to race. However, unlike the district court, the court of appeals did not consider Mancari to be controlling because it considered Hawaiians to be distinguishable from Indians. Even so, the court

---

10. Id. "[L]egislation based upon racial classifications is Constitutionally suspect under the Equal Protection Clause and should be viewed under strict scrutiny. The Supreme Court has held, however, in the context of Native American Indians, that . . . race-conscious legislation is valid utilizing the . . . rational basis test." Id. (citations omitted). See also Mancari, 94 S. Ct. at 2485 (holding that an Indian employment preference does not constitute racial discrimination or even a racial preference, but is instead a rational design to promote Indian self-government).

11. Rice, 963 F.Supp. at 1555-58. The district court relied on the United States Supreme Court decision in Salyer Land Co. v. Tulare Lake Basin Water Storage District and its progeny. 410 U.S. 719 (1973). In Salyer, the Court held that the Fourteenth Amendment's "one person, one vote" rule did not pertain to certain "special purpose districts," notwithstanding the fact that the district at issue had some governmental authority. Id. at 726.


13. Rice v. Cayetano, 146 F.3d 1075 (9th Cir. 1998). "Rice is, of course, quite right that the Hawaii Constitution and Haw.Rev.Stat. § 13D-3 contain a racial classification on their face." Id. at 1079.

14. Id. "[T]he Constitutionality of the racial classification that underlies the trusts and OHA is not challenged in this case. This means that we must accept the trusts and their administrative structure as we find them, and assume that both are lawful." Id.

15. Id. "[T]he voting restriction is not primarily racial, but legal or political." Id.

16. Id. at 1081. "[W]e recognize that Mancari is distinguishable because Hawaiians are not exactly like Indians (for example, they aren't organized in tribes and there isn't an Hawaiian Commerce Clause in the Constitution), and we do not regard . . . Mancari . . . as
believed that *Mancari* did stand for the principal that a racially restrictive voting scheme may be appropriate when there is a unique fiduciary relationship that led to the restrictive design,\(^{17}\) and in this sense *Mancari* was indeed similar to the instant case.\(^{18}\) The court of appeals found that *Salyer Land Co. v. Tulare Lake Basin Water Storage District* and its progeny controlled the instant case because the OHA trustee vote is a special purpose election similar to the election scheme in the *Salyer* line of cases.\(^{19}\) The court, therefore, concluded that although Hawaii's voter restriction was suspect because it was based upon a racial classification, it, nevertheless, should survive strict scrutiny because the racial classification, itself, was based on beneficiary status which is permissible in special purpose elections such as the OHA election.\(^{20}\)

Rice appealed and the United States Supreme Court granted certiorari\(^{21}\) to decide whether Hawaii's voting requirement which limits the right to vote for the trustees of the OHA to the "descendant[s] 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" discriminates on the basis of race in violation of the Fourteenth or Fifteenth Amendments to the Constitution.\(^{22}\)

Justice Kennedy, writing for the majority, held that the State's voting qualification makes distinctions among people based on their ancestry, and in that manner, ancestry was being used as a
substitute for race in violation of the Fifteenth Amendment's mandate that people not be denied the right to vote because of their race. The majority reached this conclusion by first exploring the island of Hawaii's vast history, but limited this chronicle to the lawmakers' perspective so that proper deference could be given to the lawmakers' purposes in enacting the laws that were challenged in the current case.

The Court next examined the purpose and scope of the Fifteenth Amendment's mandate. While noting that the Fifteenth Amendment was enacted just after the end of the Civil War, Justice Kennedy cautioned that the Fifteenth Amendment was not and is not merely a suffrage edict for the then newly emancipated slaves. Rather, it is made applicable to all persons regardless of race because, like the Constitution itself, the Fifteenth Amendment's mandates go beyond the political climate and controversies that prompted its ratification. For this same reason, the Court believed that precedents established through its adjudication of Fifteenth Amendment cases in which it invalidated various State attempts to deny African American suffrage were relevant to the current controversy.

The Court established through its examination of Guinn v. United States and other Fifteenth Amendment cases that

24. Id. at 1049-51. The term "Native Hawaiian" and its corresponding 1778 date were first used by Congress when it became concerned with the condition of the Hawaiian territory's aboriginal peoples and enacted the Hawaiian Homes Commission Act of 1921 to address this concern. Id. at 1052-53. The year 1778 was used to identify "Native Hawaiians" because it marks the year when the first Westerner, England's Captain Cook, landed on the island. Id. at 1048. At the time of Cook's landing, the inhabitants of the islands had developed their own distinct culture. Id. It is this culture that the legislators were attempting to preserve because after Cook's arrival, the Hawaiian culture began to erode due to Western influences and the end of the island's migratory isolation. Id. at 1048-53.
25. Id. at 1054. "The purpose and command of the Fifteenth Amendment are set forth in language both explicit and comprehensive. The National Government and the States may not violate a fundamental principle: They may not deny or abridge the right to vote on account of race." Id.
26. Id.
27. Id.
29. In Guinn v. United States, the Supreme Court invalidated an amendment to the Oklahoma Constitution that required voters to pass a literacy test before they were permitted to vote; but it included an exemption for persons meeting specific ancestral qualifications. 238 U.S. 347 (1915). The State of Oklahoma's literacy test for determining voter eligibility did not require persons with "lineal descendant[s]" who on or before January 1, 1866, were either entitled to vote or resided in a foreign country to take the test. Id. at 357. The Court
lawmakers have sometimes used ancestry as an unconstitutional substitute for race.\textsuperscript{30} Next, the Court examined Hawaii's contention that its statute classified persons based merely on whether or not they had an ancestor, regardless of that ancestor's race, residing in the State at a specific time in the past.\textsuperscript{31} The majority found this argument to be incompatible with both the conclusions drawn in scholarly accounts of Hawaiian history as well as the views held by drafters of the statutory definition at issue.\textsuperscript{32} These writings led the Court to conclude that the ancestral inhabitants of Hawaii at issue are an "identifiable class of persons."\textsuperscript{33} Justice Kennedy then noted that in an earlier civil rights case, the Court had defined "racial discrimination" as "that which singles out identifiable classes of persons . . . solely because of their ancestry or ethnic characteristics."\textsuperscript{34}

By examining the history of the State's statutory definition of "Hawaiian," Justice Kennedy demonstrated that the term was actually a "racial definition" used for a "racial purpose."\textsuperscript{35} Justice Kennedy also stipulated that the mere fact that the ancestral definition at issue would put people of the same race within different classifications does not serve to make the classifications any less racial.\textsuperscript{36} The majority, therefore, concluded that "ancestral tracing of this sort achieves its purpose by creating a legal category...\textsuperscript{37}

\begin{itemize}
\item[30.] \textit{Rice}, 120 S. Ct. at 1056.
\item[31.] \textit{Id.}
\item[32.] \textit{Id.} at 1055-56. These works illustrate that because the islands had been isolated prior to 1778, the Hawaiians had established their own customs, religion, and political structure, and shared common physical characteristics, all of which were distinct from other Polynesian societies. \textit{Id.} It was this distinct class of people that Hawaii's legislature was seeking to protect. \textit{Id.}
\item[33.] \textit{Id.} at 1056.
\item[34.] \textit{Id.} (quoting Saint Francis College v. Al Khazraji, 481 U.S. 604, 613 (1987)).
\item[35.] \textit{Rice}, 120 S. Ct. at 1056. These reports show that in the State's current revised definition of "Hawaiian" the word "peoples" had been substituted for "races" and in the revised definition of "Native Hawaiian" the phrase "descendants of the races" was changed to "descendants of the aboriginal peoples." \textit{Id.} However, the drafters of the revised definitions stressed that neither change was material. \textit{Id.}
\item[36.] \textit{Id.} "Simply because a class defined by ancestry does not include all members of the race does not suffice to make the classification race neutral. Here, the State's argument is undermined by its express racial purpose and by its actual effects." \textit{Id.}
\end{itemize}
which employs the same mechanisms, and causes the same injuries, as laws or statutes that use race by name. The State’s electoral restriction enacts a race-based voting qualification."\(^37\)

The majority then addressed three principal defenses that the State raised to show that its statute should be found constitutional despite its racial classification.\(^38\) Hawaii’s first defense was that the political status of Hawaiians is analogous to the status of Native American Indians, and that, as such, the racial classification should be found constitutional under Supreme Court cases permitting differential treatment of Indian tribes.\(^39\) However, the Court rejected this argument without deciding if Hawaiians should be afforded the same political status as Indian tribes.\(^40\) Instead, the majority determined that even if Hawaiians shared the same status as Indian tribes, the State’s argument would still fail \(^41\) because the OHA is a State agency,\(^42\) making it subject to the Fifteenth Amendment, whereas a tribal election is “the internal affair of a quasi-sovereign.”\(^43\) The Court arrived at this conclusion by distinguishing Mancari’s tribal Indian hiring preference for positions at the federal Bureau of Indian Affairs from Hawaii’s restrictive voting scheme for some of its public officials.\(^44\) The State’s second contention was that its voting requirement should be valid under the Supreme Court’s \textit{Sayler} line of decisions that held that the Fourteenth Amendment’s “one person, one vote” rule should not be applied to special purpose districts.\(^45\) Without

\(^{37}\) \textit{Id.} at 1057.

\(^{38}\) \textit{Id.}

\(^{39}\) \textit{Id.}

\(^{40}\) \textit{Rice}, 120 S. Ct. at 1057-58. “It is a matter of some dispute, for instance, whether Congress may treat the native Hawaiians as it does the Indian tribes. We can stay far off that difficult terrain, however. The State’s argument fails for a more basic reason.” \textit{Id.} (citations omitted).

\(^{41}\) \textit{Id.} at 1058. “Even were we to take the substantial step of finding authority, in Congress, delegated to the State, to treat Hawaiians or native Hawaiians as tribes, Congress may not authorize a State to create a voting scheme of this sort.” \textit{Id.}

\(^{42}\) \textit{Id.} at 1058-59. “OHA is a state agency, established by the State Constitution, responsible for the administration of state laws and obligations.” \textit{Id.} “[OHA] [is] independent from the executive branch and all other branches of government although it [has] the status of a state agency.” \textit{Id.} at 1059.

\(^{43}\) \textit{Id.} at 1058-59. “If a non-Indian lacks a right to vote in tribal elections, it is for the reason that such elections are the internal affair of a quasi-sovereign. The OHA elections, by contrast, are the affair of the State of Hawaii.” \textit{Id.}

\(^{44}\) \textit{Id.} at 1058. “It does not follow from Mancari . . . that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens.” \textit{Id.}

\(^{45}\) \textit{Rice}, 120 S. Ct. at 1059-60.
deciding whether the "one person, one vote" rule could ever be extended to statewide elections for a State agency such as the OHA, the Court dismissed the State's argument by holding that compliance with the Fourteenth Amendment in no way absolves a statute's noncompliance with the Fifteenth Amendment.46

The State's final argument was that its voting franchise is limited to the beneficiaries of the trust that the OHA administers, not upon the voter's race.47 The Court noted that while it is not clear that there is a proportional balance between qualified OHA voters and OHA beneficiaries,48 limiting the voting franchise in this way is offensive to the Fifteenth Amendment's mandate that race should not be determinative in establishing voting qualifications.49 Moreover, according to the majority, the fundamental failure of the State's final contention was that the State's attempt to limit qualified voters to trust beneficiaries was essentially a race-based qualification.50 According to the Court, the State, by following this approach, was making an invalid assumption that those persons who did not share the same race as the trust beneficiaries were either less qualified or could not be trusted to vote ethically because of their race.51

Justice Breyer, joined by Justice Souter, agreed with the majority in its holding that Hawaii's voter limitation was unconstitutional, but wrote separately to expressly reject the State's attempt to analogize the OHA to a government trust for Indian tribes.52 Justice Breyer would have found that the OHA did not administer a trust for native Hawaiians in the same sense as a trust of an Indian tribe because the trust at issue was established to benefit all citizens of Hawaii, with only a portion devoted to native Hawaiians.53

46. Id. at 1060. "The Fifteenth Amendment has independent meaning and force. A State may not deny or abridge the right to vote on account of race, and this law does so." Id.
47. Id.
48. Id. The Court stated that:
   Although the bulk of the funds for which OHA is responsible appears to be earmarked for the benefit of "native Hawaiians," the State permits both "native Hawaiians" and "Hawaiians" to vote for the office of trustee. The classification thus appears to create, not eliminate, a differential alignment between the identity of OHA trustees and what the State calls beneficiaries.
Id.
49. Id. "The State's position rests, in the end, on the demeaning premise that citizens of a particular race are somehow more qualified than others to vote on certain matters." Id.
50. Rice, 120 S. Ct. at 1060.
51. Id.
52. Id. at 1060-61 (Breyer, J., concurring).
53. Id. (Breyer, J., concurring). Admissions Act §5 (f) provides that:
   The lands granted to the State of Hawaii by subsection (b) of this section and
Additionally, the Justices agreed with the majority that the OHA was a state agency, but based this conclusion on the source of the OHA's funding and the fact that the funding sources as well as the amount that the OHA received could be changed at any time through the normal state legislative process. Justice Breyer thought that it was equally important that the State of Hawaii created the "native Hawaiian" and "Hawaiian" definitions while Indian tribes defined their own membership, and that the State's definition was much broader than any Indian tribe definition. Accordingly, the concurring Justices would have held that the analogy drawn by the State was improper because it was too remote to insulate the State's facially racial classification from Fifteenth Amendment mandates.

Justice Stevens and Justice Ginsburg disagreed with the Court's decision because, in their view, the majority ignored the history of Hawaii and the efforts made by the federal government to compensate for the past wrongs it had committed against all indigenous peoples of the United States. The dissent believed the Court should have followed the long history of cases which have recognized, first, that Congress is afforded plenary power over the indigenous peoples of the United States, native Hawaiians being among those indigenous peoples; and, second, that a special guardian-ward relationship exists between the government and indigenous peoples. Therefore, in keeping with this line of cases, the Justices would have applied the rational basis test to uphold public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use.


54. Id. at 1061 (Breyer, J., concurring).
55. Rice, 120 S. Ct. at 1061-62 (Breyer, J., concurring).
56. Id. at 1062 (Breyer, J., concurring).
57. Id. at 1062-63 (Stevens, J., dissenting).
59. Rice, 120 S. Ct. at 1064 (Stevens, J., dissenting) (citing United States v. Sandoval, 231 U.S. 28 (1913); Kagama, 118 U.S. at 384-85; Cherokee Nation v. Georgia, 30 U.S. 1, 18 (1831)).
Hawaii’s voting requirement because the special treatment afforded Hawaiians under that scheme was rationally related to the government’s fiduciary duty to preserve Hawaiian culture. 60

The dissenters also noted that the existence of a special fiduciary relationship between the United States government and native Hawaiians could not be seriously doubted due to the existence of many federal laws that afford special treatment to native Hawaiians by including them within indigenous peoples classifications that have withstood constitutional challenge. 61 The majority’s quasi-sovereign principal was rejected by the dissenters because they believed it was unreasonable for the Court to require some remnant of native self-government when the federal government, itself, played a large part in the destruction of native Hawaiian Sovereignty. 62

Justices Stevens and Ginsburg, unlike the majority, would not have found the fact that the OHA was entirely within the State’s province to be determinative because, as they previously established, the federal government has a trust responsibility to native Hawaiians and, as previous case law has established, Congress may delegate this responsibility to the states provided that state laws be enacted to fulfill the objective of federal law. 63 According to the dissent, the Hawaii statute at issue was enacted in furtherance of the Admissions Act, and through it, the Hawaiian Homes Commission Act. 64

Justice Stevens also would have rejected the majority’s contention that ancestry was being used as a racial classification because the ancestry requirement used in Hawaii’s voting scheme is distinguishable from those cases in which the Court has found that such an unconstitutional proxy has occurred. 65 According to Justice Stevens, the majority should have examined Hawaii’s ancestral

60. Id. at 1064-65 (Stevens, J., dissenting).
61. Id. at 1066 (Stevens, J., dissenting). Statutes recognizing native Hawaiians as a class of persons subject to the same rights and privileges extended to other indigenous peoples totaled more than 150 at the time of the Court’s opinion according to the Brief for the Hawaiian Congressional Delegation that was cited by the dissent. See Brief for Hawaiian Congressional Delegation as Amicus Curiae at 4, A.A., Rice v. Cayetano, 120 S. Ct. 1044 (2000) (No. 98-818).
62. Rice, 120 S. Ct. at 1066 (Stevens, J., dissenting).
63. Id. at 1068 (Stevens, J., dissenting).
64. Id. at 1067 (Stevens, J., dissenting). “The state statutory and Constitutional scheme here was without question intended to implement the express desires of the Federal Government.” Id. at 1067-68 (citations omitted).
65. Id. at 1068-69 (Stevens, J., dissenting). Justice Ginsburg did not join in this part or in the remainder of Justice Stevens’s opinion. Id. at 1062.
classification in the same manner and to the same extent that the Court analyzed earlier Fifteenth Amendment cases; his suggestion was that the Court should have looked to "the realities of time, place, and history behind the voting restrictions being tested."\(^6\)

This type of inquiry, in Justice Stevens's view, shows that the purposes behind each of the State's statutory classifications were completely the opposite.\(^6\) In each of the earlier Fifteenth Amendment cases, the statutory classifications were designed maliciously to deny the right to vote to at least one group of persons based on their race; whereas, Hawaii's classification was intended to provide some measure of autonomy to native Hawaiians.\(^6\)

Justice Stevens noted that limiting qualified trustee voters to those persons who are the beneficiaries of the trust is neither unique nor unconstitutional under the Fifteenth Amendment.\(^6\) Unlike the majority, Justice Stevens believed the fact that Hawaii had extended the voter qualification to include "Hawaiians" did not serve to make the classification any less a beneficiary classification.\(^6\) Instead, he concluded that the purpose of the expansion was not to deny suffrage, but rather was to ensure the survival of Hawaiian culture, which itself demonstrated that Hawaii's voting scheme was not based upon racial differences.\(^7\)

In further support of his contention that Hawaii's voting restriction was not racially motivated, Justice Stevens pointed out that the ancestral classification is both too broad and too narrow in its definition to be solely race-based because it includes "[any] descendant of a 1778 resident [regardless of whether] he or she is also part European, Asian, or African" and it "excludes all full-blooded Polynesians currently residing in Hawaii who are not descended from a 1778 resident of Hawaii."\(^7\) Finally, Justice Stevens rejected the majority's view that Hawaii's voting limitation is "demeaning" or would likely become an "instrument for generating prejudice and hostility" because the statutory scheme at

---

\(^{66}\) Id. at 1069 (Stevens, J., dissenting).

\(^{67}\) *Rice*, 120 S. Ct. at 1069 (Stevens, J., dissenting).

\(^{68}\) Id. (Stevens, J., dissenting).

\(^{69}\) Id. at 1070 (Stevens, J., dissenting) (citing A. *Scott & W. Fratcher, Law of Trusts* § 108.3 (4th ed. 1987)).

\(^{70}\) *Rice*, 120 S. Ct. at 1070 (Stevens, J., dissenting).

\(^{71}\) Id. (Stevens, J., dissenting). "[T]here 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." *Id.*

\(^{72}\) Id. at 1071 (Stevens, J., dissenting).
issue was enacted by the vote of all of the citizens of Hawaii, the majority of whom are non-Hawaiian and would, therefore, not be entitled to vote for the OHA trustees.73

Justice Ginsburg wrote a separate dissenting opinion in order to emphasize that Congress, in keeping with its authority prescribed by the Court in Mancari, has singled out native Hawaiians for special treatment, just as it has Native Americans.74 Thus, according to Justice Ginsburg, Hawaii, through the authority delegated to it by Congress, could constitutionally have established the challenged voting scheme because it was “rationally related” to the furtherance of the State’s fiduciary responsibility to its indigenous peoples.75

In 1869, following intense debate,76 the Fifteenth Amendment was passed by the Fortieth Congress; it was subsequently presented to the legislatures of the states.77 The states ratified the amendment in 1870.78 The Supreme Court’s earliest cases interpreting the Fifteenth Amendment held that the amendment does not confer the right to vote upon any person, but rather prevents a state from denying equally qualified voters the right to vote merely because of their race, color, or previous condition of servitude.79

73. Id. at 1071-72 (Stevens, J., dissenting). “One 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.” Id. at 1057. “The law itself may . . . 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.” Id.

74. Id. at 1073 (Ginsburg, J., dissenting). See also Brief for the United States as Amicus Curiae at 6, Rice v. Cayetano, 120 S. Ct. 1044 (2000) (No. 98-818). (contending that Hawaii’s voting law derives from federal policies on behalf of “indigenous people of a once-sovereign nation with a unique trust relationship to the United States”).

75. Rice, 120 S. Ct. at 1073 (Ginsburg, J., dissenting).

76. WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT 46-78 (1965). Congress was divided by three opposing views. One group was completely opposed to any Constitutional guarantee of African American suffrage. The second group supported universal male suffrage that would eliminate all property ownership requirements and literacy tests. The final group included those who endorsed an amendment that prohibited the use of racial qualifications in determining voter eligibility, while leaving the states free to continue or establish any other voting requirements. The latter faction prevailed. Id. See also B. SHWARTZ, STATUTORY HISTORY OF THE UNITED STATES — CIVIL RIGHTS (1971).

77. GILLETTE, supra note 76, at 73.

78. Id. at 153.

79. For example, in United States v. Reese, 92 U.S. 214, 217-18 (1875), two inspectors of a Kentucky municipal election were indicted, under a federal penal statute, for refusing to accept and count the vote of William Garner, an African American citizen. The Court found that the statute was beyond congressional authority under the Fifteenth Amendment because it did not limit those persons subject to punishment to those who wrongfully refused to allow a person to vote in an election solely because of that potential voter’s race, color, or
However, within ten years, in the Klu Klux Klan cases, the Court revisited this issue in *Neal v. Delaware* and conceded that in some circumstances the Fifteenth Amendment might, in fact and effect, grant an affirmative right to vote. The origin of *Neal* was Delaware's failure to alter its constitution after the passage of the Fifteenth Amendment so that "white man" remained a qualification for the right to vote in the State. The Court held that the word "white" was automatically struck from Delaware's Constitution by operation of the Fifteenth Amendment, thereby conferring the right to vote upon previously disqualified persons.

Another salient aspect of the early cases was the Court's apparent espousal of the view that the Fifteenth Amendment not only reaches discriminatory state action, but also private action that deprives individuals of their right to vote. However, in *James v. \[.\]
v. Bowman, Justice Brewer, writing for the majority, held that remedial legislation under the Fifteenth Amendment that purported to prohibit private discriminatory conduct interfering with the suffrage right of another was beyond the enumerated power granted to Congress under the Fifteenth Amendment and was, therefore, unconstitutional. Thus, like the Fourteenth Amendment, the Fifteenth Amendment was subjected to the "state action doctrine." For the next forty years, the state action doctrine was not considered by the Court in connection with a Fifteenth Amendment case.

In Giles v. Harris, a case decided the same term as Bowman, the petitioner, on behalf of himself and over 5000 African American citizens of the State of Alabama, sought an order requiring the state to add their names to its voting list. The African Americans alleged that a conspiracy by Alabama officials had prevented qualified African Americans from being registered to vote. Justice Holmes's majority opinion refused to grant the equitable relief sought. The majority's view was that the relief sought (a judicial order simply adding their names to the voting roster) would have been an "empty form" that would not have defeated the alleged conspiracy by the "mass of the white population [who] intend[ed] to keep the blacks from voting." Instead, the majority suggested that the petitioner apply to the federal legislative or executive

Congress undertakes to protect the citizen in the exercise of rights conferred by the Constitution." Yarbrough, 110 U.S. at 666.

87. 190 U.S. 127 (1903).
88. Id. at 136. Bowman, a private individual, not connected with the state in any manner, was indicted under section 5 of the Enforcement Act of 1870, for bribing and intimidating African Americans to prevent them from exercising their right to vote. Id. at 127. The majority held that the Fifteenth "Amendment relates solely to action 'by the United States or by any state,' and does not contemplate wrongful individual acts. It is in this respect similar to the . . . 14th Amendment." Id. at 136. "A statute which purports to punish purely individual action cannot be sustained as an appropriate exercise of the power conferred by the 15th Amendment . . . ." Id. at 139.
89. State action is identified by "determining whether an action [has] . . . a sufficiently close nexus [to the state such] . . . that the action may fairly be treated as that of the state itself." BLACK'S LAW DICTIONARY 1407 (6th ed. 1991).
90. See United States v. Raines, 362 U.S. 17 (1960) (holding that because the defendants' action was state action, the defendants can not challenge the Constitutionality of the 1967 Civil Rights Act's application to private discriminatory action).
91. 189 U.S. 475 (1903).
92. Id. at 482.
93. Id. at 482-83.
94. Id. at 486.
95. Id. at 488.
branch in order to obtain a remedy.\textsuperscript{96}

It was not until 1915 in \textit{Guinn v. United States}\textsuperscript{97} that the Court finally delivered a judgement that provided a major Fifteenth Amendment victory. In \textit{Guinn}, the State of Oklahoma openly excluded African Americans from voting through an amendment to its constitution that established a voter literacy test and included a "grandfather clause" to allow previously registered white voters to vote without passing the tests.\textsuperscript{98} The Court recognized the validity of voter literacy tests in general because the Fifteenth Amendment does not take away States' authority to set voting requirements.\textsuperscript{99} However, the Court also recognized that States' power over suffrage is limited by the self-executing effect of the Fifteenth Amendment, so that States may not impose voter eligibility requirements which "abridge or deny the right of a citizen of the United States to vote on account of race, color, or previous condition of servitude."\textsuperscript{100} Therefore, having found that the grandfather clause established by Oklahoma was merely a means of perpetuating a discriminatory voter standard that existed before the passage of the Fifteenth Amendment, the Court held the State's amendment to be unconstitutional.\textsuperscript{101}

Similar to the decision in \textit{Guinn}, the Court invalidated a grandfather clause in \textit{Lane v. Wilson}.\textsuperscript{102} Early in 1916, the Oklahoma legislature enacted a new registration law that granted permanent voting privileges to all persons who were registered to vote during the 1914 election, registered voters being limited to those persons under the pre-\textit{Guinn} grandfather clause suffrage scheme, and gave all others otherwise eligible in 1916 only twelve days to register to vote or be disenfranchised in the state for life.\textsuperscript{103} The Court easily found this "grandfathering" of the invalidated grandfather clause violative of the Fifteenth Amendment.\textsuperscript{104} The Supreme Court continued to follow the

\begin{itemize}
  \item 96. \textit{Giles}, 189 U.S. at 488.
  \item 97. 238 U.S. 347 (1915).
  \item 98. \textit{Id.} at 357.
  \item 99. \textit{Id.} at 362.
  \item 100. \textit{Id.}
  \item 101. \textit{Id.} at 364-68.
  \item 102. 307 U.S. 268 (1939).
  \item 103. \textit{Id.} at 269-71. A limited exception was made for ill or absent persons. \textit{Id.}
  \item 104. \textit{Id.} at 275. Justice Frankfurter held that "[t]he [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." \textit{Id.}
\end{itemize}
important precedent established in *Guinn* to invalidate both subtle and blatant state methods designed to disenfranchise African Americans through state voting laws.\(^{105}\)

However, the Court exhibited indecision when African Americans were barred from voting in primary elections.\(^{105}\) This indecision stemmed from its struggle over the issue of whether state action was present when party organizations having various types of connections with the state excluded African Americans from voting.\(^{107}\) In early cases dealing with the so-called "white primaries,"\(^{108}\) the Court opined that such primaries were not elections to which the Fifteenth and Fourteenth Amendments applied.\(^{109}\) However, in a Texas White Primary Case, *Nixon v. Herndon*, the actions of the State of Texas in denying African Americans the right to vote, by statute, in its primary elections were analyzed.\(^{110}\) The unanimous Court, without considering whether the statute also violated the Fifteenth Amendment, found the Texas law to be an obvious violation of the Equal Protection Clause of the Fourteenth Amendment.\(^{111}\) In the events giving rise to

---

105. See, e.g., Davis v. Schnell, 336 U.S. 933 (1949) (requiring prospective voters to show that they could "understand and explain" Constitutional articles in order to register violates the Fifteenth Amendment); Myers v. Anderson, 238 U.S. 368 (1915) (stating that a Maryland grandfather clause violates the Fifteenth Amendment).


107. *Id.* at 898.


109. See, e.g., United States v. Classic, 313 U.S. 299 (1941) (holding that the rights conferred by Article I, § 2 of the Constitution are secured against individual actions as well as against state action, unlike those guaranteed by the Fourteenth and Fifteenth Amendments).


111. *Id.* at 540-41. "We find it unnecessary to consider the Fifteenth Amendment, because it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth. That Amendment, while it applies to all, was passed . . . with a special intent to protect the blacks from discrimination against them." *Id.* "The statute of Texas in the teeth of . . . [its] prohibitions . . . assumes to forbid negroes to take part in a primary election . . . discriminating against them by the distinction of color alone." *Id.* at 541. "[I]t is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case." *Id.*
Nixon v. Condon, 112 another Texas White Primary Case, the State of Texas attempted to circumvent the holding in Herndon by enacting a statute that granted the state's political parties the authority to establish voter eligibility requirements in an effort to place African American disenfranchisement outside the reach of the Amendments by operation of the state action doctrine. 113 The Court, in a five-to-four decision, 114 again reversed the dismissal of the suit because the committee's action was deemed to be State action and, thus, invalid under the Fourteenth Amendment. 115 Moreover, the Court reserved for itself the question of whether actions by political parties, without any state statutory authority, nevertheless constitute state action and are, thus, subject to the commands of the Fourteenth and Fifteenth Amendments. 116

Three years later, in the case of Grovey v. Townsend, 117 the Court was faced with the state action issue it reserved in Condon. A unanimous Court concluded that because the discriminatory resolution was passed by the party members during a Democratic convention rather than by the party executive committee acting under the authority of the state, as in Condon, the discriminatory action was "voluntary" and did not constitute state action. 118 The Court further held that party managers' refusal to permit African Americans to vote in primary elections merely amounted to a refusal of the privilege of party membership. 119 Consequently, the Court held that the denial of party membership did not deprive the petitioner of any right guaranteed by the Fourteenth or Fifteenth Amendments. 120

112. 286 U.S. 73 (1932).
113. Id. at 81-82.
114. Id. Justice Cardozo delivered the majority opinion. Id. at 81. Justice McReynolds's dissent was joined by Justice Van Devanter, Justice Sutherland, and Justice Butler. Id. at 106.
115. Id. at 89. "The test is whether ... [political party committee members] are to be classified as representatives of the state to such an extent and in such a sense that the great restraints of the Constitution set limits to their action." Id.
116. Id. at 88-89. "Whether in given circumstances parties or their committees are agencies of government within the Fourteenth or the Fifteenth Amendment is a question which this court will determine for itself." Id.
117. 295 U.S. 45 (1935). Managers of a Texas Democratic primary election refused to furnish the petitioner an absentee ballot solely because he was African American. Id. at 46. After the Condon holding, the Texas legislature repealed the statute in which it had delegated franchise authority to the political parties in order to "disinvolve" the state in the discriminatory actions of the political parties in a further effort to eliminate any state action claims. Johnson, supra note 108, at 67.
119. Id. at 55.
120. Id.
However, in 1944, the Supreme Court, in *Smith v. Allwright*, overruled *Grovey* and declared that when a state delegates by statute the selection of candidates for public office to political parties, the political party is, in effect, a state agency. Therefore, according to the *Smith* court, a political party's refusal to permit qualified African Americans to vote in its primary elections solely because of their race is unconstitutional under the Fifteenth Amendment.

The Court had greater difficulty with *Terry v. Adams*, wherein North Carolina attempted to evade the holding of *Smith* by repealing all of its statutes regulating primary elections. Consequently, when the Jaybird Democratic Association, a political organization that controlled primary elections, refused to allow African Americans to participate in primaries, the organization claimed that because it was not regulated by the state, its actions were not governed by the Fifteenth Amendment. Although the Court found that the Fifteenth Amendment had been violated, the majority was unable to agree upon a rationale for the holding.

In 1960, in *Gomillion v. Lightfoot*, the Supreme Court, in a unanimous decision led by Justice Frankfurter, applied the

---

121. 321 U.S. 649 (1944). Justice Reed delivered the majority opinion. *Id.* Justice Frankfurter concurred in the result. *Id.* at 666. Justice Roberts dissented. *Id.*

122. *Id.* at 666.

123. *Id.* at 663-65.

124. *Id.* at 664-66.

125. 345 U.S. 461 (1953).

126. *Id.* at 465-66.

127. *Id.* at 462-63.

128. *Id.* at 469.

129. *Id.* Chief Justice Vinson, along with Justices Clark, Reed and Jackson believed that *Smith* controlled the instant case because the two cases were indistinguishable. *Id.* 481-82. Justice Frankfurter was of the opinion that elected officials, because of their participation in organizing the Jaybird Association in a manner that would defeat the law, could not by that subversion, divest it of state authority. *Id.* at 475-76. Justices Black, Douglas, and Burton shared the view that whenever the state permits a private entity to assume functions normally performed by the state, that private entity's actions are state actions subject to the commands of the Fifteenth Amendment. *Id.* at 468-70. Justice Minton dissented. *Id.* at 484.


131. *Id.* at 349. Justice Whittaker concurred in the result, but would have rested the decision on the Equal Protection Clause of the Fourteenth Amendment not the Fifteenth Amendment. *Id.* In his view, transferring voters from one voting district to another does not abridge those voters' Fifteenth Amendment rights because they remain entitled to vote in the new district, a right also shared by others in the same district. *Id.* However, when, as in the present case, the moving of voters was for the purpose of racial segregation such action violates equal protection. *Id.* In subsequent racial gerrymandering cases, the Court adopted Justice Whittaker's reasoning and abandoned Fifteenth Amendment adjudication in this area.
Fifteenth Amendment and held unconstitutional the sophisticated disenfranchising technique known as racial gerrymandering. The State of Alabama had redrawn the boundaries of Tuskegee, changing the shape of the city from a square into an "uncouth twenty-eight sided figure." The effect of this change was to remove all but four or five of Tuskegee's African American resident voters from the city limits, while retaining every white resident voter. The Court reasoned that the discriminatory treatment of black voters violated the Fifteenth Amendment by depriving them of the benefits of residence in the city, including the right to vote in the city.

In 1964, in Wright v. Rockefeller, Latino and African American voters alleged that a New York statute that reapportioned congressional districts resulted in racially segregated districts in violation of the Fourteenth and Fifteenth Amendments. The Wright Court rejected the constitutional challenge, finding that despite evidence "that the New York Legislature was either motivated by racial considerations or in fact drew the districts on racial lines," plaintiffs had still not proven that the legislature's districting was done on the basis of race, because the evidence presented could support other inferences. Shortly after this decision, Congress passed the Voting Rights Act of 1965 to enforce the Fifteenth Amendment by addressing direct and indirect


132. Gomillion, 364 U.S. at 342. "It is difficult to appreciate what stands in the way of adjudging a statute having this inevitable effect invalid in light of the principles by which this Court must judge, and uniformly has judged, statutes that, howsoever speciously defined, obviously discriminate against colored citizens." Id. "The [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination." Id. (quoting Lane v. Wilson, 307 U.S. 268, 275 (1939)).

133. Gerrymandering is defined as "the process of dividing a state or other territory, into the authorized civil or political divisions, but with such a geographical arrangement as to accomplish an ulterior or unlawful purpose." BLACK'S LAW DICTIONARY 687 (6th ed. 1990).


135. Id. at 341.

136. Id. at 346. The Court also held that the issue presented was not a nonjusticiable political question. Id. at 346-47. "While in form this is merely an act redefining metes and bounds . . . the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights." Id. at 347.

137. 376 U.S. 52 (1964).

138. Id. at 56-58.

139. 42 U.S.C. §§ 1971 to 1973gg-10 (1994). Congressional power to establish the Voting Rights Act derives from United States Constitution Amendment Fifteen, section two, which provides: "Congress shall have power to enforce this article by appropriate legislation."
interference with African American voting rights such as literacy and voter eligibility tests. The Supreme Court has upheld and broadly applied various provisions of the Act since its passage. In 1966, the act was directly challenged in *South Carolina v. Katzenbach*. Katzenbach arose from South Carolina's desire to change its election laws without following Voting Rights Act procedures by seeking an injunction against enforcement of the Act's provisions. The Court denied South Carolina's request, reasoning that Congress had faithfully exercised its enforcement power under section 2 of the Fifteenth Amendment. Specifically, the Court held that section 2 authorized Congress to transcend mere bans on discriminatory state action by enforcing the Fifteenth Amendment requirement that measures be rationally related to the Amendment's legitimate enforcement purpose. The nearly unanimous decision that established a rational basis standard of review, provided Congress with broad discretion to enact affirmative remedial Fifteenth Amendment enforcement laws.

In 1980, in *City of Rome v. United States*, the Court, applying the rational basis test, held that Congress had the authority, under section 1 of the Fifteenth Amendment, to prohibit electoral devices that have a discriminatory effect even if the prohibited practice,

141. See, e.g., United States v. Mississippi, 380 U.S. 128 (1965) (stating that the Attorney General is authorized to sue for injunctive relief to protect citizens' right to vote, the states may be subjected to suit, and suits can not be defeated by the resignation of election official defendants); Louisiana v. United States, 380 U.S. 145 (1965) (finding that reasonable interpretation tests violate the Fifteenth Amendment and the Voting Rights Act).
142. 383 U.S. 301 (1966).
143. Id. at 308.
144. Id. at 337. Section 2 of the Fifteenth Amendment states, "Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XV, § 2. See also *City of Boerne v. Flores*, 521 U.S. 507 (1997) (approving the scope of the Civil Rights Act as a valid enforcement of the Fifteenth Amendment).
146. Id. at 355. Justice Black dissented from the portion of the opinion upholding the Attorney General's prior approval requirement for states to amend their voting statutes. Id.
148. 446 U.S. 156 (1980). The City of Rome attempted to show that it had not utilized any discriminatory voting practices within the period prescribed in the Voting Rights Act in an effort to avoid the preclearance edicts of the Act. Id. at 170-72.
alone, would not violate the Fifteenth Amendment. The Court reasoned that Congress could do so "because electoral changes by jurisdictions with a demonstrable history of purposeful discrimination in voting create a risk of purposeful discrimination . . . . [Therefore, Congress can] prohibit changes that have a discriminatory impact."150

In City of Mobile v. Bolden, a case decided the same day as Rome, the Court held that the use of at-large elections for members of a city commission did not violate the Voting Rights Act or the Fifteenth Amendment absent a demonstration of racially discriminatory intent even though no minority member had ever been elected to the commission.153 In a fractured plurality opinion, Justice Stewart contradicted past interpretations of the Fifteenth Amendment by asserting that it concerned only acts of purposeful discrimination.155 In addition, Justice Stewart's plurality opinion

---

149. Id. at 177. "It is clear, then, that under § 2 of the Fifteenth Amendment Congress may prohibit practices that in and of themselves do not violate § 1 of the Amendment, so long as the prohibitions attacking racial discrimination in voting are 'appropriate.' " Id. "We hold that the Act's ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment, even if it is assumed that § 1 of the Amendment prohibits only intentional discrimination in voting." Id. at 177.

150. Id.


152. In an at-large electoral system, each candidate runs citywide instead of running for individual wards. See generally ALEXANDER J. BOTT, HANDBOOK OF UNITED STATES ELECTION LAWS AND PRACTICES 204-07 (1990). Each voter casts ballots for each of the council seats, rather than for just his or her own ward. Id. Because the citywide majority chooses all the candidates, such a system tends to decrease the influence of minority groups. Id.

153. Bolden, 466 U.S. at 62 (plurality opinion). The plaintiffs also charged that the scheme violated the Equal Protection Clause of the Fourteenth Amendment. Id. at 58. The Court required that the plaintiffs show evidence of purposeful discrimination to prevail in this claim. Id. at 66.

154. Id. at 57. Justice Stewart announced the judgment of the Court in an opinion joined by Chief Justice Burger and Justices Powell and Rehnquist. Id. at 55. Justice Blackmun concurred only in the result because he thought that the district court's remedy was improper even though he agreed that there might be a basis for finding purposeful discrimination. Id. at 80. Justice Stevens concurred in the judgment of the Court; however, his analysis focused on the objective effects of the change in the voting laws or voting practices rather than the "subjective motivation of the decisionmaker." Id. at 90. Justice White dissented because he believed that the plaintiffs had made a sufficient showing of a racially discriminatory purpose. Id. at 103. Justices Brennan and Marshall, in separate dissenting opinions, argued that proof of discriminatory impact on minority race voters was sufficient to show a violation of the Voting Rights Act as well as the Fourteenth and Fifteenth Amendments. Id. at 94, 103.

155. Id. at 62. Justice Stewart based his opinion, with which only three other Justices joined, on interpretations of Guinn, Gomillion, and Wright. Id. at 62-63. Compare Bolden, 446 U.S. at 62 (plurality opinion) (characterizing Guinn as requiring a discriminatory purpose
opinion limited the protection provided by the Fifteenth Amendment by interpreting it as guaranteeing no more than the right to cast a vote.156

In 1982, in response to the Borden decision, Congress amended the Voting Rights Act157 to make clear that a violation of section 2 could be proven by showing a discriminatory result alone, rather than having to show a discriminatory purpose as Justice Stewart demanded in Borden.158 In the vote dilution case Thornburg v. Gingles, the Court upheld the amended provision of the Act, thereby discarding the purposeful discrimination standard for
to find a Fifteenth Amendment violation), with Guinn, 238 U.S. at 365 (holding that a law with no rational purpose other than to deny or abridge a person’s right to vote violates the Fifteenth Amendment); compare Bolden, 446 U.S. at 63 (plurality opinion) (characterizing Gomillion as holding that “in the absence of such an invidious purpose, a State is Constitutionally free to redraw boundaries in any manner it chooses”), with Gomillion, 364 U.S. at 347 (explaining that “[w]hile in form this is merely an act redefining metes and bounds, . . . the inescapable human effect of this essay in geometry and geography is to despoil colored citizens . . . of their theretofore enjoyed voting rights.”); compare Bolden, 446 U.S. at 63 (plurality opinion) (characterizing Wright as supporting the principle that an invidious purpose must be presented), with Wright, 376 U.S. at 56 (holding that the plaintiffs failed to prove that the legislature “was either motivated by racial considerations or in fact drew the districts on racial lines”).

156. Bolden, 466 U.S. at 64-65. “The Fifteenth Amendment does not entail the right to have a Negro candidate elected . . . . The Amendment prohibits only purposefully discriminatory denial or abridgement by government of the freedom to vote on account of race, color, or previous condition of servitude.” Id. at 65. See also Justice Marshall’s dissenting opinion criticizing the plurality’s view of the Fifteenth Amendment’s right to vote as “providing the politically powerless with nothing more than the right to cast meaningless ballots.” Id. at 104.


(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race, color, or previous condition of servitude, as provided in subsection (b) of this title.

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered. Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.


purposes of establishing a violation of the Voting Rights Act.\textsuperscript{159} The Court did not, however, discuss the \textit{Borden} plurality's purposeful discrimination requirement in relation to Fifteenth Amendment claims, the applicability of which, to date, the Court has not decided.\textsuperscript{160}

\textit{Rice} differs from the Fifteenth Amendment cases that have preceded it because it arose from a State's attempt to disenfranchise all nonmembers of a specific racial minority group as opposed to an attempt to disenfranchise the minority group itself. However, this distinction should not and does not have any effect upon the outcome of the case because the Fifteenth Amendment prohibits disenfranchisement on the basis of race regardless of whether the race being disenfranchised is within or without a specific racial minority group.\textsuperscript{161} The State of Hawaii initially argued that its voter eligibility statute did not abridge the rights of voters because the scheme did not limit franchise privileges to only "Hawaiians" as a race but, rather, as a political or beneficiary group.\textsuperscript{162} The Court appropriately rejected Hawaii's contention because the State's own definition of the term "Hawaiian," as set forth in its statutory history, clearly contradicted that argument.\textsuperscript{163} Additionally, the voting scheme at issue was established by state statute for a state agency election.\textsuperscript{164} While the status of native Hawaiians and their relationship with the United States government are complex issues,\textsuperscript{165} the resolution of this case regarding the Fifteen Amendment is decidedly uncomplicated. No more than the following two facts are necessary to find a violation of the Fifteenth Amendment, i.e., state abridgement of the right to vote on the basis of race.\textsuperscript{166} Therefore, Hawaii's voter eligibility

\begin{itemize}
\item \textsuperscript{159} Id. at 71. \"[T]he suggestion that the discriminatory intent of individual white voters must be proved in order to make out a § 2 claim must fail for the very reasons Congress rejected the intent test with respect to governmental bodies.\" \textit{Id.}
\item \textsuperscript{160} \textit{Id.}
\item \textsuperscript{161} \textit{See, e.g., Reese,} 92 U.S. at 217. By its plain language, the Fifteenth Amendment provides the right to be free from discrimination in voting. \textit{Id.} at 218.
\item \textsuperscript{162} \textit{Rice,} 120 S. Ct. at 1055.
\item \textsuperscript{163} \textit{Id.} at 1056.
\item \textsuperscript{164} \textit{Id.} at 1059. \"OHA elections, by contrast, are the affair of the State of Hawaii. OHA is a state agency, established by the State Constitution, responsible for the administration of state laws and obligations.\" \textit{Id.}
\item \textsuperscript{165} For opposing viewpoints, compare Jon M. Van Dyke, \textit{The Political Status of the Native Hawaiian People,} 17 YALE L. \\& POL'y REV. 95 (1998), with Stuart Minor Benjamin, \textit{Equal Protection and the Special Relationship: The Case of Native Hawaiians,} 106 YALE L.J 537 (1996).
\item \textsuperscript{166} \textit{See Roger Clegg, Can Racial Bias Ever Be Legal?; DOJ Strains to Legitimize Hawaii Law That Violates 15th Amendment,} \textit{FULTON COUNTY DAILY REPORT,} August 17, 1999,
\end{itemize}
scheme clearly violates the Fifteenth Amendment.

The majority opinion in *Rice* made no determination as to the constitutionality of the OHA structure or the underlying public trust benefiting native Hawaiians.\(^{167}\) Nevertheless, the Court's analysis reveals that racial entitlement programs, such as the OHA, might be found unconstitutional because the arguments presented to the Court concerning Indian tribes, special trust relationships, and Hawaiian history were carefully reviewed by the majority and rejected.\(^{168}\) As a result, challenges are already underway.\(^{169}\) An additional issue is whether non-Hawaiians can run for the office of OHA trustee. Legal experts are divided as to whether the *Rice* decision invalidates the native Hawaiian qualification for trusteeship.\(^{170}\) As a result, several non-Hawaiians are said to be considering running for OHA trustee.\(^{171}\)

The State of Hawaii and the OHA's reaction to the decision is a case of history repeating itself. Initially, the OHA considered "privatizing" its trustee elections by paying for the election through OHA funds,\(^{172}\) an action that is highly reminiscent of the White Primary cases. After receiving legal advice that such action would not make the voting requirement any less unconstitutional, the OHA board approved two draft bills to create a private entity to which they can transfer the trust assets.\(^{173}\) However, the greatest response has been renewed momentum in the direction of Hawaiian sovereignty.\(^{174}\)

Currently, there appears to be three distinct approaches to

\(^{167}\) *Rice*, 120 S. Ct. at 1059.

\(^{168}\) *Id.* at 1057-60. A great deal of money is at stake. In recent years the OHA has been awarded more than $440 million through legislation and grants. Pat Omandam, *Hawaiian Funding Tops $440 Million*, HONOLULU STAR-BULLETIN, March 20, 2000.

\(^{169}\) See, e.g., Pat Omandam, *Group Challenges Paying Ceded-land Funds to OHA*, HONOLULU STAR-BULLETIN, March 29, 2000 (reporting that a group of Hawaii residents claim that the state should not make ceded-land revenue payments to the OHA because the laws that created the OHA were based on racial classifications that are forbidden under the United States Constitution).


\(^{171}\) *Id.*


\(^{173}\) *Id.*

achieving Hawaiian sovereignty. A second sovereignty approach has been termed “nation within a nation” and is similar to the treatment of Native American governments in the continental United States and in Alaska. Under this approach, a native Hawaiian nation would have direct government-to-government relations with the United States and would enjoy a level of autonomy that would include the authority to define its own membership and to restrict elections solely to its own members. The third and most radical sovereignty approach calls for the decolonization or secession of Hawaii.

Regardless of the paths taken concerning native Hawaiian issues, it appears that the people of the State of Hawaii are in for a time of political, racial, and legal uncertainty for the foreseeable future. When considering any action, all of Hawaii’s citizens would be best served by taking to heart Justice Kennedy’s gentle reminder, “The Constitution of the United States, too, has become the heritage of all the citizens of Hawaii.”

Tina L. Corcoran