

Kavanaugh, Brett M

Wall Street Journal (1923 - Current file); Sep 27, 1999;

ProQuest Historical Newspapers: The Wall Street Journal
pg. A35

Are Hawaiians Indians? The Justice Department Thinks So.

The Aloha state has two classes of citizens: there are Hawaiians and then there are *real* Hawaiians.

At least that's the message of the state Office of Hawaiian Affairs, which doles out money to certain citizens solely because of their race—in this case, only to Hawaiians of Polynesian origin ("native Hawaiians," for short). By law, OHA officers must be native Hawaiians and only native Hawaiians can vote in the statewide elections for officers. Hawaiians of all other ethnic backgrounds (whether Latino or African-American or Caucasian, for example) are barred because of their race from receiving OHA funds, voting in OHA elections, or serving as OHA officers.

Rule of Law

By Brett M. Kavanaugh

Sound blatantly unconstitutional? It did to Harold Rice, who was born and bred in Hawaii, but is not of the preferred race (he is white). Rice brought a case against the state contesting this racial scheme. In particular, the state's racial voting qualification.

Mr. Rice's case has now reached the Supreme Court, which is scheduled to hear arguments on Oct. 6. *Rice v. Cayetano* has implications far beyond the 50th state. Hawaii's naked racial-spoils system, after all, makes remedial set-asides and hiring and admissions preferences look almost trivial by comparison. And if Hawaii is permitted to offer these extraordinary privileges to residents on the basis of race or ethnic heritage, so will every other state.

The Clinton Justice Department nonetheless has filed a brief contending that one's race (at least, if you're a native Hawaiian) can be the sole basis for voting in a state election, serving in a state office,

and receiving awards of state money. As a matter of sheer political calculation, of course, the explanation for Justice's position seems evident. Hawaii is a strongly Democratic state, and the politically correct position there is to support the state's system of racial separatism. But the Justice Department and its Solicitor General are supposed to put law and principle above politics and expediency. And the simple constitutional question posed by *Rice* is whether Hawaii, by denying citizens the right to vote in a state election on account of race, has violated the 14th and 15th Amendments, which prohibit states from denying individuals the right to vote on account of race.

No doubt recognizing that Hawaii's racial spoils system, including its racial voting qualification, is constitutionally indefensible, the Justice Department has charted a novel legal course. Justice contends that native Hawaiians are the equivalent of an American Indian tribe because Hawaiians are descendants of an "indigenous people" just like American Indians. Therefore, Justice argues, Hawaii's racial scheme is equivalent to constitutionally permissible legislation that singles out Indian tribes and tribal members for special benefits.

But the Justice Department's argument is seriously flawed both as a legal and historical matter. The Constitution expressly established special rules for Indian tribes because the Founders considered Indian tribes to be separate sovereigns. To convert this express recognition of Indian tribal sovereignty into a sweeping license for favorable race-based treatment of the descendants of indigenous people is to allow political correctness to trump the Constitution. A group of people must, in fact, constitute an Indian tribe in order to qualify for the special treatment afforded tribes under the Constitution. The Department of Interior has established strict criteria govern-

ing recognition of Indian tribes. Those regulations specify that federal recognition as a tribe is a "prerequisite to the protection, services and benefits of the Federal government available to Indian tribes."

But neither the Congress nor the Department of Interior has recognized native Hawaiians as an Indian tribe. What's more, Hawaiians have never even applied for recognition as an Indian tribe. The reason is obvious. Native Hawaiians couldn't possibly qualify. They don't have their own government. They don't have their own system of laws. They don't have their own elected leaders. They don't live on reservations or

forced in the last decade.

And that's not all. By claiming that native Hawaiians deserve special privileges because their ancestors lived in Hawaii, the Justice Department's position is also fiercely anti-Immigrant, flouting the principle that all American citizens have equal rights regardless of when they became citizens.

At his 1858 Fourth of July address, President Lincoln emphasized that all citizens, whether descended from signers of the Declaration of Independence or new arrivals, were the same in the eyes of the law. As to the new arrivals, he said, "when they look through that old Declaration they find, 'We hold these truths to be self-evident, that all men are created equal,' and then they feel that that moral sentiment evidences their relation to those men, and that they have a right to claim it as though they were blood of the blood, and flesh of the flesh, of the men who wrote that Declaration, and so they are." But now the Justice Department has turned its back on that bedrock American ideal by arguing that some Hawaiians can't vote in certain state elections solely because their ancestors didn't live in Hawaii.

Rice v. Cayetano, then, is of great moment. The Supreme Court ought not be fooled by the Justice Department's simplistic and far-reaching effort to convert an ethnic group into an Indian tribe. Rather, the Court should rule for Harold Rice and adhere to the fundamental constitutional principle most clearly articulated by Justice Antonin Scalia: "Under our Constitution there can be no such thing as either a creditor or a debtor race . . . In the eyes of government, we are just one race here. It is American."

Mr. Kavanaugh is an attorney in Washington and together with Robert H. Bork filed an amicus brief in *Rice v. Cayetano* supporting Harold Rice.

Hawaii's naked racial-spoils system makes remedial set-asides and hiring and admissions preferences look almost trivial by comparison.

in territorial enclaves. They don't even live together in Hawaii. Native Hawaiians are dispersed throughout the state of Hawaii and the United States. In short, native Hawaiians bear none of the indicia necessary to qualify as an Indian tribe.

If Hawaii can enact special legislation for native Hawaiians by analogizing them to Indian tribes, why can't a state do the same for African-Americans? Or for Creole-Americans? Or for Irish-Americans? After all, Hawaiians originally came from Polynesia, yet the department calls them "indigenous," so why not the same for groups from Africa or Europe? It essentially means that any racial group with creative reasoning can qualify as an Indian tribe. The Justice Department's theory of tribal status thus threatens to end-race the constitutional restrictions on racial classifications that the Supreme Court has rein-